



EMPLOYMENT TRIBUNALS

Claimant: S Thompson

Respondent: The Mayor and Burgesses of the London Borough of Merton

RECORD OF A PRELIMINARY HEARING

Heard at: London South Employment Tribunal by video
On: 29 September 2023

Before: Employment Judge Burge

Appearances

For the Claimant: In person
For the Respondent: Mr J Davies, Counsel

RESERVED JUDGMENT ON DISABILITY

The judgment of the Tribunal is as follows:

1. At the relevant times the claimant was a disabled person as defined by section 6 Equality Act 2010 because of diabetes.

REASONS

Introduction

1. A Preliminary Hearing took place on 29 September 2023. One of the issues for the Tribunal to decide was:

- (i) Was the claimant “disabled” under s.6 Equality Act 2010 at the relevant time by virtue of her diabetes?

The hearing and the issues

2. The respondent accepts that the claimant had dyslexia and chronic fatigue syndrome and that the associated impairments amounted to a disability. The respondent accepts the claimant was diagnosed with diabetes in about 2017 but does not admit that it met the definition of disability at the relevant time. It was agreed that the issues for the Tribunal are:
- 2.1 Did the diabetes have a substantial adverse effect on the claimant’s ability to carry out day-to-day activities at the relevant time?
- 2.2 If not, at the relevant time, did the claimant have medical treatment, including medication, or take other measures to treat or correct the diabetes?
- 2.2.1 Would the diabetes have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
- 2.3 Were the effects of the diabetes at the relevant time long-term? The Tribunal will decide:
- 2.3.1 Did they last at least 12 months, or were they likely to last at least 12 months?
- 2.3.2 if not, were they likely to recur?
3. The claimant had submitted 6 pages of medical evidence and a 7 page disability impact statement. She gave oral evidence to the Tribunal. Both the claimant and Mr Davies gave closing submissions.

Findings of Fact

4. An Occupation Health Report dated 4 December 2018 confirms that the Claimant had suffered from type 2 diabetes since 2017 when she was prescribed with medication and that “this condition seems to be under control at present despite the fact that [the Claimant] report[s] that she gets side effects that occasionally she cannot tolerate such as nausea and vomiting”.
5. A letter dated 14 February 2019 from the department of neurology to the claimant’s GP includes that the claimant is “on metformin for diabetes HbA1c said to be high at 55”.
6. A letter from Dr Murphy dated 28 December 2022 states:

"I can confirm that this lady has Type 2 diabetes since 2016. Her recent bloods show that her sugars are at the target range for treatment (they have improved over the past year). Which she has informs is due to being at home. She is on twice daily metformin tablets for sugar control and once daily atorvastatin to control cholesterol.

Miss Thompson's symptoms from diabetes, has made it difficult for her to cope with day-to-day living due to severe tiredness and neuropathy (loss of sensation in both her legs and hands. As well as suffering from insomnia making her, lack concentration in the day and urgent need to nod off in the days.

The long-term effect of living with diabetes for Miss Thompson with stage 3 kidney failure is she is prone to frequent urine infections and recurring athlete feet.

On diagnosis, Miss Thompson did not cope well living with her diabetes due to side effects of her medication causing her extreme dizziness, constipation/diarrhoea, nausea, and vomiting."

7. The claimant wrote an impact statement on 20 January 2023, the relevant extract for these purposes is as follows:

"To date, I live daily with feeling of nausea that will just suddenly come upon me with dizziness vertigo as if I am going to pass out at times. This feeling is further exacerbated by the constant tingling and numb sensation in both my hands and feet, that do not go away even under medication.

What aggravates it is using mobile phone or the keyboard of a laptop, which triggers shooting pain to the tips of my fingers. I struggle with concentration and have to do work with short and frequent breaks to shake numbness and tingling out of my hand.

At its worse, I can't even feel I am tapping the keys or spacebar on the computer.

I equally have an adverse reaction to coldness and need to be in a warm environment.

Emotional Symptoms

Living and working with long-term medical conditions and diabetes takes it toll on my energy, physical strength and my mental health.

- I suffer from clinical depression of which I am being treated, but undue work related stress has caused me to relapse.*

I use to be very confident and self-sufficient and resourceful, but currently my life consist of pain and stress.

The hardest part for me with living with diabetes is coping with constant neuropathy in my hands and feet. This makes simple task as holding a cup of tea, using a pen, testing on the phone and using my laptop unbearable due to intense tingling leading to numbness where I cant feeling the keyboard. Its like living with frost bite.

The fatigue causes me to lack concentration, due to brain fog and tension in my neck leading all the way up to my head. I often feel demotivated due to my current situation both at work and home.

I suffer daily with frustration around challenges to focus or maintain reading without an inordinate amount of energy and effort..."

8. In oral evidence to the Tribunal, the claimant's evidence was consistent with her impact statement and it was therefore accepted. Her view was the neuropathy and tiredness was a part of her diabetes. She described how in 2017 she was having pins and needles in her hands and feet and this prompted her to visit the GP. She also had an urge to urinate and was thirsty. She was prescribed Metformin and she continues to take that, although at first the Claimant suffered from an adverse reaction to it.
9. The claimant described how metformin does not make a difference to the tingling and neuropathy. The metformin helps keep her blood sugar levels under control, when it is too high she reviews what she has been eating and drinking and tries to change her diet. She is worried about getting worse so that she will have to inject insulin, something she does not want to do. In addition, the claimant has access to a coach who helps her with understanding her medication and her condition better and how her activities and diet can help her manage her diabetes. The Dr describes this coaching as in order to "assist her with pain management, be clear about her medicines and complications when failing to regulate her sugar levels. "
10. The claimant uses a blood pin prick test to test her blood sugar levels and make sure she is not too low or too high.
11. Unfortunately, the claimant also developed carpal tunnel and had an operation to relieve that in 2021.

Law

12. Section 6 of the Equality Act 2010 ("EqA") provides:

(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 subsection (1).

13. The questions for the Tribunal to answer therefore are:

- a) Did the claimant have a mental or physical impairment?
- b) Did the impairment affect the claimant's ability to carry out normal day-to-day activities?
- c) Was the adverse condition substantial (defined in S.212(1) EqA as meaning 'more than minor or trivial')? And
- d) Was the adverse condition long term?

14. Paragraph 5 of Schedule 1 EqA provides:

“(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:

- (a) measures are being taken to correct it, and*
- (b) but for that, it would be likely to have that effect.*

(2) ‘Measures’ includes, in particular, medical treatment and the use of a prosthesis or other aid.”

15. Paragraph 12 of Schedule 1 EqA provides that when determining whether a person is disabled, the Tribunal “must take account of such guidance as it thinks is relevant.” The “Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability” (May 2011) (the “Guidance”) was issued by the Secretary of State pursuant to s. 6(5) of the EqA 2010.

16. The Guidance sets out a number of factors to consider including: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3]; the cumulative effects of an impairment [B4]; the cumulative effects of a number of impairments [B5/6]; the effect of behaviour [B7]. B7 provides:

“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. 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.

For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities. (See also paragraph B12.)

When considering modification of behaviour, it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such as shopping, or using public transport.”

17. The effect of environment is set out in [B11] and the effect of treatment is in [B12]. B12 provides “*In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs*”. B14 states:

“... 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.”

18. The Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) (“the Code”). Both the Guidance and the Code do not impose legal obligations but tribunals and courts must take into account any part of the Guidance and/or Code that appears to them relevant to any questions arising in proceedings.
19. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means “could well happen”: *Boyle v SCA Packaging Ltd* [2009] ICR 1056 HL. In assessing whether there is a substantial adverse effect on the person’s ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored.
20. In circumstances where a person (P) (a) has a progressive condition, (b) as a result of that condition P has an impairment which has (or had) an effect on P’s ability to carry out normal day-to-day activities, but (c) the effect is not (or was not) a substantial adverse effect, then P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment (Schedule 1, paragraph 8(1) and (2)).
21. The time at which to assess whether there is an impairment which has a substantial adverse effect on normal day-to-day activities is the date of the alleged

discriminatory act. This is also the material time when determining whether the impairment has a long-term effect. It may be necessary for the Tribunal to draw inferences, based upon the evidence before it, as to the relevant time at which an impairment existed and/or produced substantial adverse effects. However, the key question is whether, at the time of the alleged discrimination, the adverse effects of an impairment have been established as both substantial and long-term. That is to be assessed by reference to the facts and circumstances existing at that date. The Tribunal is not entitled to have regard to events occurring subsequently (*All Answers Ltd v W* [2021] IRLR 612 CA. 76).

22. Mr Davies refers the Tribunal to *Metroline Travel Ltd v Stoute* [2015] IRLR 465 EAT and *Taylor v Ladbrokes Betting & Gaming Ltd* [2017] IRR 312 EAT.
23. In *Metroline* the claimant was a bus driver who suffered from type 2 diabetes which he controlled largely by avoiding sugary drinks during the two periods where he was not taking Metformin. It was the side effects of the metformin that caused the claimant to be unable timeously to perform work by reason of the side effect of diarrhoea. HHJ Serota QC allowed the appeal as he did not accept that abstention from sugary drinks constitutes a substantial adverse effect on day-to-day activities caused by type 2 diabetes as:

“It would mean that any person suffering from Type 2 diabetes controlled by diet is to be regarded as disabled under the Act. It would also mean that people with other conditions such as nut allergies, intolerance to lactose or what have you would also be regarded as disabled. I agree with Mr Solomon’s submission that Type 2 diabetes per se does not amount to a disability.”

24. In *Taylor v Ladbrokes Betting & Gaming Ltd* [2017] IRR 312 EAT HHJ Hand QC allowed the appeal of the claimant as the findings made by the Employment Judge were not supported by the medical evidence and the issue of whether the Appellant’s diabetes was a progressive condition, and therefore should be deemed under paragraph 8(2) of Schedule 1 to the Equality Act 2010 to be likely to result in a substantial adverse impairment on his ability to carry out day-to-day activities, should be re-considered in the light of further medical evidence.

Conclusions

25. Unfortunately the claimant suffers from a number of conditions, and unsurprisingly it is not always easy to work out what symptom is as a result of what impairment. However, in respect of diabetes, her evidence is clear that she originally went to the doctors in 2016 because of the tingling and numb sensations in her hands and feet, as well as the thirst and urge to urinate. She also says *“the constant tingling and numb sensation in both my hands and feet, that do not go away even under medication.”*
26. The claimant has not provided medical records confirming that she has visited medical professionals about this neuropathy. The claimant says that she was told

that she did not have to disclose documents containing her private information and so she restricted what she disclosed. However, the letter from Dr Murphy confirms that:

“Miss Thompson’s symptoms from diabetes, has made it difficult for her to cope with day-to-day living due to severe tiredness and neuropathy (loss of sensation in both her legs and hands. As well as suffering from insomnia making her, lack concentration in the day and urgent need to nod off in the days.”

27. Dr Murphy is saying that the claimant’s symptoms of diabetes are severe tiredness and neuropathy (loss of sensation in both her legs and hands), and these make it difficult for her to cope with her day to day living. It is not clear to me, however, whether the claimant has a separate diagnosis of insomnia.
28. Dr Murphy also says *“The long-term effect of living with diabetes for Miss Thompson with stage 3 kidney failure is she is prone to frequent urine infections and recurring athlete feet.”* However, it is not clear how likely it is that the claimant will suffer from frequent urine infections and recurring athlete foot. In her disability impact statement the claimant says that at the time she was first diagnosed with diabetes, “I was also suffering from with severe athletes’ feet which still causes ongoing and recurring issues to date.” However, it is not clear what the effects are on her ability to carry out day to day activities. Further, there does not seem to be evidence of what the effects of the urine infections are. I therefore conclude that, with the information available to me, recurrent athletes foot and urine infections do not meet the test under s.6 EqA.
29. There is evidence that on diagnosis the claimant suffered from side effects of her medication causing her extreme dizziness, constipation/diarrhoea, nausea, and vomiting. However, this appears to have cleared up as she now regularly takes metformin.
30. Returning to the neuropathy and severe tiredness. The claimant gives the following examples of the difficulties she has on a daily basis from her neuropathy:

“What aggravates it is using mobile phone or the keyboard of a laptop, which triggers shooting pain to the tips of my fingers. I struggle with concentration and have to do work with short and frequent breaks to shake numbness and tingling out of my hand.

At its worse, I can’t even feel I am tapping the keys or spacebar on the computer.”

31. The claimant also says:

The hardest part for me with living with diabetes is coping with constant neuropathy in my hands and feet. This makes simple task as holding a cup of tea, using a pen, texting on the phone and using my laptop unbearable

due to intense tingling leading to numbness where I cant feeling the keyboard. Its like living with frost bite.

The fatigue causes me to lack concentration, due to brain fog and tension in my neck leading all the way up to my head. I often feel demotivated due to my current situation both at work and home.

I suffer daily with frustration around challenges to focus or maintain reading without an inordinate amount of energy and effort.

32. Using a telephone or a computer, holding a cup of tea, using a pen are day to day activities. Shooting pain, struggling with concentration and having to perform short periods of work with frequent breaks to shake the numbness and tingling out of her hand show that the impairment is having an adverse effect on her ability to carry out day to day activities. Substantial means more than minor or trivial, it was substantial in this case. By the time of the start of the discriminatory period the diabetes had already lasted over 12 months, it was long term.
33. I conclude that the symptoms of the claimant's diabetes, namely neuropathy and severe tiredness, had a substantial adverse effect on the claimant's ability to carry out day-to-day activities at the relevant time.
34. In *Metroline*, the EAT held that type 2 diabetes is not necessarily a disability for the purposes of the EqA 2010. The EAT noted that paragraph B12 of the Guidance must be read in conjunction with paragraph B7. This requires account to be taken of how far a person can reasonably be expected to modify his or her behaviour to prevent or reduce the effects of an impairment. A coping or avoidance strategy might alter the effects of the impairment such that they are no longer substantial, and the person would no longer meet the definition of disability. A particular diet may be a "treatment or correction" that must be ignored when assessing the effect of an impairment. However, the impact on day-to-day activities of a "diabetic diet" might be sufficiently small that it could not constitute a treatment or correction. It would be a reasonable behavioural modification of the type contemplated in paragraph B7. The EAT in *Metroline* were concerned not to open the floodgates to a condition that might be easily controlled by lifestyle modifications alone. Whether diabetes gives rise to a disability must be assessed on a case-by-case basis. If it is genuinely the case that a particular individual can manage their condition without medication and simply by adopting reasonable dietary modifications, then it may well be that the question whether the condition has a substantial adverse effect should be determined after taking those modifications into account. However, the provisions relating to medication and control by diet are not particularly relevant to the current case, as the metformin and dietary control do not affect the neuropathy and severe tiredness that the claimant suffers as part of her diabetes.
35. *Taylor v Ladbrokes Betting and Gaming Ltd* [2017] IRLR 312 concerned the assessment of diabetes as a progressive condition and proper medical evidence that ought to be taken into account. Again, this is not the position for the current

**Case Number: 2300217/2020
2302818/2020
2307642/2020
2301372/2021**

case. The claimant is not saying that her diabetes should be a deemed disability as it is progressive, she is saying that since diagnosis in 2016/2017, her symptoms of diabetes have had a substantial adverse effect on her ability to carry out day-to-day activities.

36. For all the above reasons I conclude that the claimant is “disabled” pursuant to s.6 EqA by virtue of the neuropathy and severe tiredness caused by diabetes.

EJ Burge

4 October 2023