



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Phillips
Respondent: Aneurin Bevan University Local Health Board
Heard at: Cardiff (by video) **On:** 20 September 2023
Before: Employment Judge R Vernon

Representation:

Claimant: In person
Respondent: Mr G Graham (Counsel)

JUDGMENT having been sent to the parties on 21 September 2023 and reasons having been requested by the claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. This is the Judgment of the Tribunal in respect of the issue of disability. I am dealing today with a Preliminary Hearing that has been listed to consider a number of issues in this case but primarily to resolve the issue of disability, in other words whether the Claimant was a disabled person within the meaning of the Equality Act 2010 at the relevant times.
2. To provide some context I will set out briefly what the claim is about and how it has got to the stage it has got to.
3. The Claimant presented her ET1 claim form on 9 November 2022. The claim form indicated that predominantly the complaints being raised by the Claimant were of a discrimination nature and reliant upon disability as being the protected characteristic.

4. The claim form also indicated that complaints were being made about holiday pay and also about deductions from wages. Those aspects of the claim are not the focus of today's hearing.
5. The Respondent thereafter filed an ET3 Response indicating that all of the Claimant's complaints were denied.
6. A Preliminary Hearing took place before Employment Judge Povey on 21 February 2023. He set out in his record of that hearing (in the case summary) some information about what the claim was about in general terms and then sought to distill the various complaints into identifiable legal causes of action that the Employment Tribunal could deal with. He identified the following causes of action:
 - 6.1 direct disability discrimination;
 - 6.2 discrimination arising from disability;
 - 6.3 a failure to make reasonable adjustments;
 - 6.4 victimisation under the Equality Act 2010;
 - 6.5 the Holiday Pay complaint; and
 - 6.6 the Wages Act complaint.
7. Some of the specific allegations that he referred to within the List of Issues he created were undated and others were said to be ongoing acts. Other issues were identified including the issue of time limits and the Tribunal's jurisdiction to deal with the complaints in light of any such relevant time limits.
8. A further Preliminary Hearing then took place before Employment Judge Sharp on 3 May 2023. During that Preliminary Hearing a number of new aspects were identified of the legal causes of action being pursued. New Particulars were listed within the List of Issues of the existing legal complaints.
9. An Order was made by Employment Judge Sharp requiring an application to Amend to be made by the Claimant and for that Amendment Application to be considered, if time allowed, at this Preliminary Hearing. Although that was said to be a secondary issue for today, with the agreement of the parties I in fact dealt with the Application to Amend at the outset of today's hearing. The Application was not opposed by the Respondent and therefore was granted subject to the Respondent having reserved the right to continue to argue that some (or all) of the Claimant's allegations are out of time and should therefore not be considered by the Tribunal. That is a matter to be left to be determined at any Final Hearing.
10. The conclusion, as a result of that Application to Amend being granted, is that the period of time during which the Claimant's allegations of

discrimination are said to have occurred covers a period between February 2021 and the date on which she submitted the ET1 Claim Form to the Tribunal being, I think, 9 November 2022. It is important to bear those dates in mind because the question of whether the Claimant was a disabled person for the purposes of the Act is something to be looked at as at the date of any alleged discriminatory act or omission and therefore the focus of the Tribunal today must be on that period of time.

11. It is next necessary to set out some legal principles to be applied. The first legal principle is that the Claimant brings a complaint of disability discrimination in one or more forms. In order for those claims to be successful it is necessary for the Claimant to establish that she is a disabled person within the meaning of the Act. In other words, the burden of proof on this issue rests upon the Claimant and it is for her to establish (on the balance of probabilities) that she satisfies the definition within the Act.

12. Moving on then to the definition in the Act, the relevant starting point is Section 6 of the Equality Act 2010. That section says this:

“a person has a disability if that person has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on that person’s ability to carry out normal day to day activities”

13. It is clear from that Section that what the Tribunal has to be satisfied of is that there is a) either a physical or a mental impairment, b) that that impairment has an effect on the Claimant’s ability to carry out day to day activities and c) that that effect is both substantial and long term.

14. Schedule 1 to the 2010 Act then provides further assistance, at paragraph 2 of Schedule 1 which is headed long term effects. It says this,

“the effect of an impairment is long term if it has lasted for at least 12 months, it is likely to last for at least 12 months or it is likely to last for the rest of the life of the person affected.”

15. For the purpose of determining whether an effect is substantial or not it must be noted that substantial is defined within the Act in Section 212(1) and substantial for the purposes of the Act means “more than minor or trivial”.

16. Those provisions really set out the basic statutory framework which I have to apply in dealing with the issue I am dealing with today.

17. Two further matters then are relied upon by the Respondent as set out by Mr Graham during submissions. The first is some relevant paragraphs from the Guidance on Disability issued by the Secretary of State in 2011. I note

from reading the Guidance that any relevant part of that Guidance must be taken into account by the Tribunal when determining the question of disability. I will return to that issue at the relevant point later in this Judgment. Secondly, the Respondent also has referred me to the Authority of **J -v- DLA Piper [2010] ICR 1052, EAT**. Again, when relevant I will return to that later.

18. The conditions or impairments that are relied on as disabilities in this case by the Claimant are these:

- 18.1 Dermatitis;
- 18.2 stress at work.

19. It seems to me that those conditions are relied upon by the Claimant as separate conditions. One is a physical condition; the other a mental condition. They give rise to distinct issues and therefore, in my judgment, must be looked at separately.

Dermatitis

20. I will deal firstly with the issue of dermatitis and whether or not the Claimant has established that that is a disability that she suffered with at the relevant time for the purposes of this claim.

21. The evidence before me on this issue comprises the Claimant's medical records, various photographs and the Claimant's impact statements. I should also say that there are two documents that have been provided by the Claimant which purport to be impact statements; one is within the document bundle for today and one is not but they essentially say more or less the same things in respect of both this condition and also the stress at work condition. I have also had oral evidence from the Claimant today and she has been the subject of cross-examination from Mr Graham.

22. By way of summary and to provide again some context to the issue of the dermatitis, on the evidence before me the dermatitis complained of is an allergic reaction that the Claimant has sustained which has affected her hands following (initially) her use of latex gloves at work in 2016. Her evidence to me was clear that that is the first time at which she experienced any difficulty and that was the cause of it.

23. Between 2016 and 2021 she then used vinyl gloves at work and again on the basis of her evidence no real issues arose at all during that 5-year period. It would appear that there was no similar issue with the use of vinyl gloves and no ongoing dermatitis or other irritation of the skin.

24. In 2021, advice was then given to the effect that the Claimant could not continue to use vinyl gloves at work and she was therefore required to trial various other types of gloves in order that she could continue to work. In doing so, she again suffered a reaction to one or more of the gloves that she was required to try.
25. In general terms, the nature of the reaction is shown in a number of ways on the evidence before me as being redness, scaliness, itchiness and broken skin to the hands. There is also some evidence of inflammation of the skin on the hands.
26. There are a number of mentions made of issues with the Claimant's hands, for example, in her medical records in April 2021, May 2021, June 2021 and also in November 2021. The effect or the extent of the issue with the hands on those occasions varies from time to time.
27. The photographs that I have been provided with also assist with the extent of the issue and again show that the irritation suffered to the Claimant's hands is variable but, at its worst, involves redness, inflammation and broken skin to the Claimant's hands.
28. I am satisfied that those issues with the Claimant's hands amount to a physical impairment. They are a reaction or dermatitis (as described) to the skin on her hands resulting in redness, scaliness, itchiness, broken skin and inflammation.
29. The real issue in regard to the dermatitis condition in this case, and as to whether or not it is a disability within the meaning of the Act, rests upon the effects of that physical impairment and whether or not those effects cause a substantial adverse effect on the Claimant's ability to carry out day to day activities.
30. The Claimant's evidence on these issues is really encompassed in the two impact statements she has provided. In those documents she describes her hands becoming red, itchy and sore if she comes into contact for example with washing up liquid. She indicates that she can only use certain handwashes, must avoid certain shampoos and body washes and cleaning products and also has difficulties caused when she comes into contact with certain food types including raw chicken, potatoes and tomatoes.
31. It must also be noted from her evidence, and from the other documentary evidence, that those issues appear to be capable of being either ameliorated or removed entirely by taking certain measures. Those measures basically comprise wearing some type of covering on the hands of a non-allergenic type. There are two types of hand covering that have been referred to on the evidence before me. The first is vinyl gloves; on the

Claimant's evidence she used those between 2015 and 2021 and suffered no adverse reaction to her hands whatsoever. Secondly, within her medical records, in July 2022 there is reference to the Claimant having used cotton gloves underneath rubber gloves at home and again suffering no adverse reaction as a result.

32. On the basis of all of that evidence I am satisfied that the Claimant has shown that there is some effect upon her ability to do day to day activities that is caused by the reaction to her skin, but the question here, and the question which I must ask myself under the Act is, is that a substantial adverse effect on her ability.

33. The Respondents argument is that it is not and primarily Mr Graham has referred me to the relevant Guidance and, in particular, to paragraph (b)(vii) of that Guidance. That paragraph comes under a heading "Effects of Behaviour" and says this,

*"account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example, by using 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".*

34. The question therefore that I think I need to ask myself is this: can the Claimant reasonably be expected to make an adjustment to reduce or remove the effect that otherwise would be caused to her day-to-day activities by the irritation to her skin.

35. In my judgment, the answer to that question is that yes, she can reasonably be expected to make those adjustments by using hand coverings.

36. The reasons I come to that conclusion are these:

36.1 the use of those gloves is a relatively simple and non-onerous requirement;

36.2 the use of gloves is a step which she has already taken on the basis of her own evidence and the evidence set out in the medical records;

36.3 the wearing of vinyl gloves in particular was something that she was able to do for a period of 5 years between 2016 and 2021.

37. As I say, in my judgment, they are relatively simple steps that in fact result in a complete removal of the impact of irritation on the Claimant's hands.
38. Although there is evidence before me that the Claimant has had to use or avoid using certain products as a result of the irritation to her hands, that is either not an effect on her ability to do day to day activities, or if it is, there are again mechanisms in place to allow her to reduce or remove the issue.
39. In those circumstances the decision I have come to on this aspect of the case is that the Claimant has not established that the dermatitis has a substantial adverse effect on her ability to do day to day activities and therefore the definition of disability within the Act is not made out in respect of the dermatitis condition.
40. Therefore, dermatitis is not a disability that the Claimant suffered with for the purposes of her claim.

Stress at work

41. Moving on then to deal with the other condition relied upon which is described as being work related stress.
42. I remind myself again that the relevant time period in question is the period February 2021 to November 2022; that is the widest possible timeframe given the basis on which the Claimant puts her case.
43. The first question I have asked myself is this: does the Claimant suffer from work related stress (given that that is the condition that she points to)?
44. There is clear reference to that condition throughout the Claimant's medical records from February 2021 through until late 2022. There are also entries within her medical records revealing that on several occasions throughout that period Fit Notes have been issued by the doctor indicating that the Claimant is unfit for work as a result of work-related stress.
45. The Respondent says that, notwithstanding that, work-related stress is not a disability for the purposes of the 2010 Act. Mr Graham has referred me to the Authority of **J -v- DLA Piper**.
46. I have considered the judgment in that case and considered it carefully in the paragraphs that underpin the argument that Mr Graham has made to me. It is right to say that in that case the Court drew a distinction between mental illness on the one hand, for example clinical depression which is an impairment under the Act, and on the other hand a reaction to adverse life events such as problems at work which it is said can on occasion not amount to a mental condition.

47. It was also observed that that distinction between mental illness and a reaction to adverse life events is a distinction routinely made by clinicians.
48. On that basis the Respondent argues that the Claimant here does not have a mental impairment within the meaning of the Equality Act and therefore is not a disabled person by reason of any such mental impairment.
49. In paragraph 40 of the Judgment of the Tribunal in **J -v- DLA Piper** the Court said this (in paragraph 40(ii)):

“in reaching those conclusions the Tribunal should not proceed by rigid consecutive stages, specifically in cases where there may be a dispute about the existence of an impairment it will make sense for the reasons given in paragraph 38 above to start by making findings about whether the Claimant’s ability to carry out normal day to day activities is adversely affected on a long term basis and to consider the question of impairment in the light of those findings”.

50. In this case the Claimant has given evidence to me both in terms of her written evidence and in her oral evidence as to effects on her ability to do day to day activities which, in my judgment, is significant. She has described being unable at times to leave the house, she has described being unable to socialise with others, she has indicated that on numerous occasions her sleep has been affected as has her ability to concentrate. They are all effects on her ability to carry out day to day activities which are adverse and which are substantial.
51. The Respondent also then points to an entry within the Claimant’s medical records specifically in July 2022 which appears at page 245 of the bundle. That is an entry from 20 July 2022 and the relevant part of the entry relied upon says this:

“spoke to patient, ongoing grievance process with work, states intimidation from Line Manager but Head of Nursing more supportive, wants resolution of process, feels Occ Health haven’t done anything to find hypoallergenic gloves, insists can wear vinyl gloves but boss couldn’t/wouldn’t supply them through COVID, doesn’t feel would want to return to this role given stress and breakdown of relationship, largely ok in self rest of time, gets upset more easily and dislikes answering phone in case it is Line Manager calling.”

52. Whilst I accept that there appears to be some conflict between that entry and the Claimant’s evidence both in written and oral form, in my judgment the entry is indicative of a period where the symptoms may well have been

- less troublesome to the Claimant. However, I also note that both before and after that entry, and in fact at the same time, the symptoms were obviously sufficiently significant for the Claimant to be signed as being unfit for work as a result of stress at work.
53. I also place significant weight upon the evidence which Mrs Phillips has given me, which I found to be compelling evidence, as to the impact that this condition has had upon her.
54. Therefore, I have concluded that the effects of work-related stress upon the Claimant's ability to carry out day to day activities are substantial adverse effects.
55. I also accept and find that those have been issues for her since the early part of 2021 and have continued thereafter, including throughout the duration of the period that she relies upon for the purposes of her claim.
56. Turning again back to the Judgment in the case of **J -v- DLA Piper** I should also note that in paragraph 42 of that Judgment the EAT said this, after setting out the distinction to be drawn between mental illness on the one hand and other non-mental illnesses on the other:
- “fortunately however we would not expect those difficulties often to cause a real problem in the context of the claim under the Act. This is because of the long-term effect requirement. If as we recommend at paragraph 42 above a Tribunal starts by considering the adverse effect issue and finds that the Claimant’s ability to carry out normal day to day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more it would in most cases be likely to conclude that he or she was indeed suffering clinical depression rather than simply a reaction to adverse circumstances. It is a common sense observation that such reactions are not normally long lived.”*
57. It seems to me that there is no requirement for there to be a formal diagnosis of a mental illness in order for the Tribunal to be satisfied that there is a mental impairment causing a substantial adverse effect on a Claimant's ability to do day to day activities.
58. On the basis of my findings this Claimant has suffered those effects on her abilities (which are substantial) for a prolonged period of time and for more than 12 months.
59. In my judgment, the issue of impairment must be seen in that context and even though there is no formal diagnosis here of any medical condition I am

satisfied that, given the other findings I have made, I can also make a finding that that is as a result of a mental impairment.

60. For those reasons the conclusion I have reached is that on the issue of work-related stress I am persuaded that the Claimant has established that that is a disability for the purposes of the Equality Act 2010 and for the purposes of this claim.

61. Those are my findings, conclusions and my reasons.

Employment Judge R Vernon

Dated: 27 October 2023

REASONS SENT TO THE PARTIES ON 30 October 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS