EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr I Knowles	**v**	The Chancellor Masters and Scholars of the University of Oxford

PRELIMINARY HEARING

Heard at: Reading Employment Tribunal (by CVP)
On: 11 March 2024
Before: Employment Judge George

Appearances
For the Claimant: Self-representing
For the Respondent: Ms C Musgrave-Cohen, counsel

JUDGMENT

1. The claimant was not disabled within the meaning of s.6 Equality Act 2010 at the period of time relevant for the claim, which is April to September 2022.

2. The complaint of disability discrimination is therefore dismissed.

REASONS

1. Following a period of conciliation which lasted between 28 October 2022 and 31 October 2022, Mr Knowles presented a claim on 30 November of that year. It was defended by a response that was entered in time on 4 January 2023.

2. The dispute arises out of Mr Knowles' employment by the respondent university as a Full Stack Web Designer and that lasted from either 1 March 2018 (as the claimant claims) or 25 February 2019 (as the respondent alleges) to 31 July 2022 on a series of fixed term contracts.

3. As initially presented, the claim included complaints of disability discrimination and unfair dismissal. A complaint of disability discrimination by association that was raised on the face of claim form was dismissed on withdrawal on 13 September 2022.

4. The case has been previously case managed, including by myself, as set out in the records of the respective hearings. Today's hearing was first scheduled to take place on 30 November 2023 by Employment Judge King who directed that a judge would determine at a preliminary hearing in public whether the claimant was disabled within the meaning of s.6 Equality Act 2010 (hereafter the EQA) at the relevant time by virtue of his asthma, aggravated by hay fever.

5. The claimant apparently had some difficulty in obtaining all of the relevant medical evidence he wanted to rely on (see page 58 of the hearing file). The November hearing was first postponed to 24 January 2024 and I set out in my order from that hearing the explanation for my decision to convert that hearing to a preliminary hearing in private at which the claim was listed for final hearing. I explained at that hearing that if the claimant continued to have difficulty obtaining records from his GP, he could write to apply for an order for them to disclose them.

6. Subsequently, the claimant disclosed a complete set of his medical records, with passages that do not relate to the impairment under consideration redacted, and also a letter from his GP dated 18 January 2024 (page 71 & 72).

7. On 31 January 2024 the claimant wrote to the tribunal to say that the summary of his medical records was missing relevant consultations from 2017 when he was treated by a different GP surgery and also that the report did not include a medical opinion on his symptoms and impact statement which he had understood his GP to have originally agreed to. He explained that the surgery was now unwilling to amend the report to provide it. He applied for an order that the report (the letter at page 71) be amended.

8. This was referred to me but my directed response was, regrettably, not sent by the tribunal to the parties. I explained at the start of the hearing that I had intended that it should be explained that while the tribunal could direct a third party to attend to be a witness or to produce documents, we did not have the power to order them to amend the contents of a particular document and also that the most relevant evidence would be the claimant's personal account of the impact on his ability to carry out day to day activities which was found in the impact statement and his oral evidence. My intention was that the claimant should be asked whether he wanted an order that his doctor attend the hearing.

9. The claimant stated at the hearing on 11 March 2024 that, given that explanation, he was content to proceed with the hearing on the basis of the evidence available.

10. The relevant time for the claim is the period April 2022 to September 2022. The facts set out in box 8 of the claim form complain about the claimant's unsuccessful applications for two roles: the first interview took place in April 2022 and the second interview was in September 2022 after his final contract had come to an end.

11. I have had the benefit of a hearing file that runs to 94 pages and Ms Musgrave-Cohen has prepared some written submissions that Mr Knowles took the opportunity to read at the start of the hearing while I was doing some prereading.

Law Applicable to the Issue

12. Relevant sections of the EQA are the statutory definition in s.6, and the additional factors set out in paras:1, 2 and 5 of Schedule 1 EQA. They provide, so far as material, as follows:

"6 Disability

(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."

and Sch.1 paras.1, 2 and 5 provides as follows:

"1 Impairment

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

2 Long-term effects

(1) 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.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

5 Effect of medical treatment

(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 treat or 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.

(3) Sub-paragraph (1) does not apply—

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed."

13. A person has a disability, for the purposes of the EQA, if they have a mental or physical impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Substantial in this context means more than trivial: s.212(1) EqA and Goodwin v The Patent Office [1991] I.R.L.R. 540. There is no sliding scale, the effect is either classified as "trivial" or "insubstantial" or not and if it is not trivial then it is substantial: Hutchinson 3G UK Ltd v Edwards UKEAT/0467/13. As it says in paragraph B1 of the Guidance on the definition of disability (2011) (hereafter referred to as the 2011 Guidance), this requirement reflects the general understanding that disability is a limitation going beyond the normal differences which exist among people.

14. When considering whether the adverse effects on the claimant's ability to carry out day-to-day activities are substantial the following factors are taken into account (see the 2011 Guidance Section B),

    a. The time taken to carry out an activity,

    b. The way in which an activity is carried out,

    c. The cumulative effects of an impairment (see paragraphs B6 and C2 of the Guidance),

    d. How far a person can reasonably be expected to modify his or her behaviour by the use of a coping or avoidance strategy to prevent or reduce the effects of the impairment,

    e. The effects of treatment

    f. There may be indirect effects, such as that carrying out certain day-to-day activities causes pain or fatigue (See 2011 Guidance paragraph D22).

15. In the present case, the Equality Act 2010 Disability Regulations 2010 (hereafter the 2010 Disability Regulations) are also relevant. Regulation 4 sets out particular conditions that are deemed not to be impairments; this

gave effect to the Sch.1 para.1 EQA power given to the Secretary of State to designate particular conditions as not to be covered by the EQA. So far as material, reg.4 provides:

"4.— Other conditions not to be treated as impairments

(1) For the purposes of the Act the following conditions are to be treated as not amounting to impairments:—

(a) a tendency to set fires,

(b) a tendency to steal,

(c) a tendency to physical or sexual abuse of other persons,

(d) exhibitionism, and

(e) voyeurism.

(2) Subject to paragraph (3) below, for the purposes of the Act the condition known as seasonal allergic rhinitis shall be treated as not amounting to an impairment.

(3) Paragraph (2) above shall not prevent that condition from being taken into account for the purposes of the Act where it aggravates the effect of any other condition."

16. Thus, under reg.4(2), it is specified that the condition known as Seasonal Allergic Rhinitis should be treated as not amounting to an impairment for the purposes of the definition. However, the effect of reg.4(3) is that a claimant may rely on Seasonal Allergic Rhinitis for the purposes of the EQA where it aggravates the effect of any other condition, hence the way that Mr Knowles' asthma has been described in the issue that I have to decide.

17. The way that the claimant has set out his evidence in his witness statement makes his argument that the treatment that he has received for hay fever has significantly reduced the symptoms that he experiences of hay fever. That is particularly the case in paragraphs 29 & 30 of his statement (page 92) where he states that his hay fever was largely uncontrolled until 2021 and treatment prescribed in May of that year has led to a significant reduction of symptoms. The question arises as to whether reg.4(3) permits the aggravating effect that an individual's hay fever would have on any other condition, were that hay fever untreated to be considered. Alternatively, does reg.4(3) provide only that the actual aggravating effects of an individual's hay fever on any other condition (and not the deduced aggravating effects) should be taken into account

18. In the present case, Mr Knowles argues that all medical treatment should be ignored and that when deciding what the adverse effects of asthma are on his ability to carry out day to day activities and whether or not those were substantial, I should take account under reg.4(3) of the aggravating effects that untreated hay fever would have on his asthma.

19. The respondents argue that to do so would be contrary to the reading of Sch.1, paragraphs 1 and 5. I have not been referred to any decision of

the EAT or a higher court on this point and the research I was able to do in the time available did not reveal any relevant authority.

20. In my view, the use of the term "condition" in reg.4(1) and (2) of the 2010 Disability Regulations contrasts with the word "impairment" (both in reg.4(2) and in Sch.1 para.5 EQA in the sense that it is stated that the condition of hay fever cannot be an impairment for the purposes of the Act but it can be taken into account if it aggravates the effects of any other condition. Sch. 1 EQA deals with additional matters for determination of disability. I repeat para.5 which deals with the effect of medical treatment and says that:

> "5 (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 treat or correct it, and
>
> (b) but for that, it would be likely to have that effect."

Measures include medical treatment, such as medication.

21. Sch.1 para.5 refers to disregarding measures which "are being taken to treat or correct *it*" (my emphasis) and "it" refers back to "An impairment". By reg.4(2) 2010 Disability Regulations, hay fever cannot be an impairment but is referred to as a condition. There is a certain logic in this: hay fever has been decided by parliament to be a condition which is not itself capable of being a disability so it is not unfair if it is only the *actual* aggravating effects of the condition (which may be well controlled for much of the season) which should be taken into account.

22. Taking the facts of the present case up against the wording of paragraph 5, the question I need to ask myself is whether the measures to treat hay fever are being taken additionally to treat or correct asthma. If there is evidence of that then the measures would fall within Sch.1, para.5(1)(a) EQA. If it is not, then I can still consider the hay fever if its actual effects (when subject to treatment) aggravates asthma. The question is what evidence is there of the effect of asthma on Mr Knowles' ability to carry out day to day activities, taken in conjunction with hay fever, as that actually affects him without disregarding measures only taken to treat hay fever.

23. In this case I have also had to consider the question of coping strategies. As I mention above, the 2011 Guidance is helpful in a number of respects. In the present case I particularly note its guidance on the effects of behaviour in B7 to B10 and the effects of environment in B11.

    23.1 Para. B7 counsels that account should be taken of how far a person can reasonably be expected to modify his or her behaviour by use of a coping or avoidance strategy. In some cases the coping or avoidance strategy might mean there was no substantial adverse effect; in others there might still be.

23.2 However, it would not be reasonable to expect a person to give up or modify normal activities that might exacerbate the symptoms: the example being given in para.B7 of shopping or using public transport.

24. In the present case, the claimant argues that he does not go out and that that is something which should be taken into account when. I need to consider whether this is a coping strategy taken to prevent or reduce the effects of asthma on his ability to carry out day to day activities. I have to engage with the question of why the claimant avoided going out to the extent that I am satisfied that he did in the relevant period.

Findings of Fact and Conclusion on the Issue

25. It is accepted that the claimant has the impairment of asthma. What, if any, adverse impact is there on his ability to carry out day-to-day activities? Is that more than trivial? I remind myself that that is a bifurcated test in the sense that if it is more than trivial then it is substantial.

26. The day-to-day activities that the claimant argues are affected are:

26.1 sleeping difficulties (see in particular his disability statement at paragraph 32);

26.2 the asthma attacks themselves;

26.3 he states that he has avoided physical exertion, and

26.4 he states that he avoids going outside during the grass pollen season.

27. What then is the evidence of the sleep difficulties that the claimant says that he has experienced? I had a disability impact statement (page 91) from the claimant. There is also a response given by the claimant to earlier questions asked by the tribunal in a four-page document. Unfortunately, that is split up in several places in the hearing file. The claimant confirmed that all of the pages of it are present at pages 83, 82, 89 and 90.

28. In paragraphs 14 to 18 of the impact statement the claimant describes the impact on him of hay fever and he says in paragraph 17 that forgetting to use his hay fever medication can disturb his sleep two to three times each summer. That is an effect that is connected with hay fever which is only relevant to the extent that it contributes to the impact of asthma.

29. The claimant does give evidence about the knock-on effect of asthma-related sleep deprivation on other abilities such as concentration. He states that he experiences reduced capacity to breathe and therefore oxygen deprivation. However, the medical evidence on this point is extremely limited.

30. There is a GP letter (page 71) which summarises the relevant extracts from the medical records which are also themselves in the hearing file. It states that Mr Knowles was noted to have nocturnal asthma and the report of difficulty sleeping from 15 June 2023 states this had been the case for “a

few years" but better over the five months before the consultation. Given the difficulties that the clamant experienced in obtaining medical evidence I was careful to ensure that the claimant had himself redacted the documents that are in the hearing file and had included those which were relevant to sleep deprivation, hay fever and asthma. He confirmed that to be the case. The references to sleep deprivation are scant. Furthermore, they date from before the relevant period of time and there is nothing in them to suggest that sleep deprivation was concluded to be asthma-related, certainly not during the period that I am concerned with. Medical evidence that asthma-related sleep interference happens sufficiently frequently to say that it was a significant interference with the claimant's ability to carry out day to day life is simply not there. There is the claimant's statement alone.

31. I next analyse the medical and other evidence about the asthma attacks themselves. The claimant was diagnosed with asthma in 2001; he gave oral evidence (which I accept) that he was prescribed a Soprobec preventer inhaler in about 2005 but he candidly accepted that he had not been prescribed another such until August 2023. The next inhaler that was prescribed was in January 2020 and he described nocturnal shortness of breath symptoms in his GP consultation at that point. That does provide some supporting evidence that this was a complaint he made. However, the Salbutamol inhaler that he was prescribed on that occasion lasted until another was prescribed in June 2023, a period of some three and a half years. The claimant accepted that this was infrequently used and that is illustrated by the calculations performed by Ms Musgrave-Cohen, which he also accepted. Had that single pump been used to dispense the maximum dose prescribed, it would have been used within 25 days. Conversely, averaging the dose out over the period January 2020 to June 2023 works out as about once a week.

32. The medical evidence certainly does not show a history of regular consultations setting out ongoing unresolved problems caused by asthma with the claimant pressing for a change in treatment over the period between Janaury 2020 and June 2023. There are isolated visits, a reference to chest infection, and no direct mention of consultations about asthma during the relevant period in the GP's letter (page 71). The medical evidence does not reveal regular use of measures to treat asthma which need to be disregarded.

33. The primary evidence of the frequency of the asthma related episodes comes from the claimant's witness statement. He describes (his paragraph 19) having one or two minor episodes per year which he links to hay fever. In his closing argument he amplified that to refer to that meaning low level breathing problems which risk leading to inflammation which had to be managed.

34. In paragraph 26 he says that he had typically experienced three to five asthma attacks each year which he described in closing as meaning that he felt faint, he had to sit down, carry out breathing exercises and kept his inhaler to hand for those occasions.

35. Although the claimant in oral evidence highlighted the potential for long-term damage in relation to asthma, this is something that might happen in some cases. He does not argue that his is a progressive condition or that it was a progressive condition at the relevant period. He does argue that the cumulative effect of shortness of breath and lack of sleep had an impact on his ability to carry out day-to-day activities on those days when he was affected. But I need to focus realistically on how often that happened in the relevant period and whether that level of impact that can be said to be a significant adverse effect in the sense of more than trivial.

36. I also note the final paragraph in answer to question 2.2 on page 83 where Mr Knowles discusses the effect on his hay fever of the environment and the acute symptoms of hay fever. He says that acute hay fever symptoms occurred on five to ten days throughout the summer of 2022 and then states that he may "experience acute inflammation leading to breathing difficulties which leaves me unable to perform any task" . This is said to have occurred on two to three days in the summer of 2022 and required the use of his inhaler. That is a slightly lower figure than the figure given for the asthma attacks in his paragraph 26. Much of the rest of the recent statement was, in fact, when analysed, discussing the period post 2023.

37. Taking that all as a whole, what I find is that on a few days in each year prior to 2023, the claimant experienced some adverse effects on his ability to carry out day-to-day activities allied to either asthma attacks themselves or breathing difficulties caused by the combination of hay fever and asthma attacks.

38. I turn next to the impact on the claimant's life of the coping strategies that he adopts. He states that he now avoids going outside from May to September. The respondent's submissions in response to this are set out in paragraph 24 of Ms Musgrave-Cohen's skeleton argument where it is emphasised that the claimant was receiving treatment for hay fever rather than for asthma, and argued that he attended the interview in September 2022 in person.

39. I accept that the regular treatment that the claimant was undergoing was directed towards hay fever and there is no evidence that it was prescribed to reduce the impact on him of asthma. Therefore, it is not something that should be ignored in accordance with Sch.1 para.5 EQA. But, in any event, the claimant's explanation for his avoidance strategies focussed overwhelmingly on the misery he experiences as someone living with hay fever if he did not follow those avoidance strategies.

40. There is an element in his evidence of protective steps taken to reduce the risk of shortness of breath and other aspects of asthma in that period. It does appear to be the case that Mr Knowles has unfortunately experienced much more severe symptoms of asthma since the middle of 2023. However, in the relevant period the protective steps were not taken to anything other than a minor extent to avoid the effect of asthma. As an effect of the impairment relied upon, it is fair to describe the impact on Mr

Knowles day-to-day life of steps taken to avoid the effect of asthma as trivial.

41. The final day-to-day activity that Mr Knowles refers to is the effect of physical exertion. He accepted that the evidence that he relied on in fact post-dated the exacerbation of his condition in 2023. That is the point at which there was a greater effect on his ability to walk briskly to the train station for example. The evidence is not relevant to the question I have to decide.

42. My finding is that it is not until June 2023 that asthma had a significant adverse effect on Mr Knowles' ability to carry out day-to-day activities even when taking into account what is known about the impact of hay fever at that time on that impairment. For that reason I have concluded that he did not meet the definition of disability during the relevant period.

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Employment Judge George

Date Signed: 14 April 2024

Sent to the parties on: 17/04/2024

For the Tribunal Office

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