



EMPLOYMENT TRIBUNALS

Claimant

Mr L D Kalman

Respondent

AstraZeneca UK Limited

v

Heard at: Bury St Edmunds

On: 2 & 3 September 2024

Before: Employment Judge S Moore

Appearances

For the Claimant: Mr J Jenkins, counsel

For the Respondent: Mr T Welch, counsel

JUDGMENT ON PRELIMINARY ISSUES

- (1) The Claimant was disabled person at the material time within the meaning of s.6 Equality Act 2010, by reason of eczema together with DAO Enzyme Deficiency (Histamine Intolerance) and allergies to quinoline mix and chromium salts, cat and dog dander and dust mite.
- (2) The Claimant's application to amend to bring complaints of whistleblowing detriment and automatic unfair dismissal (ss. 47B & 103A Employment Rights Act 1996) and of victimisation (s.27 Equality Act 2010) is dismissed.

REASONS

Introduction

1. At a Preliminary Hearing on 3 June 2024 the following issues were listed for determination at a Public Preliminary Hearing today:

- i) Was the Claimant a disabled person within the meaning of s.6 Equality Act 2010 (EqA) at the relevant time?
- ii) The Claimant's application to amend his claim to include complaints of detriment for making public interest disclosures, and for automatic unfair dismissal, and for victimisation.
- iii) The Respondent's application for a strike out and/or deposit order, if pursued.

Background

- 2. The Claimant was employed by the Respondent as an IT Apprentice between 2 September 2019 until 1 September 2023 pursuant to a four-year fixed term contract. The Respondent did not offer the Claimant a permanent role on expiry of this contract.
- 3. Early Conciliation took place between 15 July and 26 August 2023.
- 4. On 1 October 2023 the Claimant presented a claim in the Tribunal making complaints of unfair dismissal, indirect age discrimination (s. 19 EqA), discrimination arising from disability and failure to make reasonable adjustments (ss 15 & 20 EqA), harassment on grounds of disability and age and for breach of contract. He also brought a claim for failure to provide a written statement of reasons for dismissal.
- 5. By email dated 31 May 2024 the Claimant made an application to amend his claim to include claims of automatic unfair dismissal, detriment for making public interest disclosures and victimisation.
- 6. At the Preliminary Hearing on 3 June 2024 the Claimant withdrew his complaint of indirect age discrimination.
- 7. The primary source of the Claimant's issues at work appears to be that in the autumn of 2022 the Respondent introduced a policy that employees should work for 3 days a week in the office for the purpose of getting employees back in the office after lengthy periods working from home during the Covid pandemic. The Claimant wished to remain/considered his conditions required him to remain working from home.

Issues for Determination

- (i) Disability
- 8. It was agreed that the relevant period of the alleged discriminatory treatment by reason of disability was from March to September 2023.
- 9. The Claimant relies on the disabilities of eczema, DAO Enzyme Deficiency (Histamine Intolerance) and/or allergies to quinoline mix and chromium salts, cat and dog dander and dust mite.

10. The Respondent accepts that the Claimant suffers from these conditions and that they amount to physical impairments. It also accepts the impairments are long-term within the meaning of s.6 EqA, however it does not accept that they have a substantial adverse impact on the Claimant's ability to carry out normal day to day activities.

The Claimant's evidence

11. In his impact statement the Claimant says he has suffered from eczema since early childhood and over the years has also developed various types of allergies, with some disappearing and some appearing.
12. Histamine intolerance means he cannot properly metabolise ingested histamine which means he needs to make sure everything he eats is fresh, which restricts his diet and makes eating out or visiting family and friends difficult because he cannot be sure how the food was prepared. Eating the wrong things causes him nausea, bloating, dizziness, rashes and shortness of breath. When he went on holiday with his girlfriend he had to ensure their room had a kitchen so they could cook their own meals.
13. As regards his allergies, including dust mite allergies, he has been advised to take precautions to ensure his room is damp dusted and hoovered at least once weekly. He can also have sensitivities to strong perfumes.
14. As regards eczema and his allergies, his sleep can be interrupted by itching, particularly when he stays at his girlfriend's house where there are gerbils and he cannot ensure the sheets are always freshly washed.
15. Further, when he wakes up his skin is dry, red and itchy, and can be bleeding. The Claimant says he has to shower and then apply a moisturizing balm over the affected areas, which he has to allow to soak in for 20 minutes before getting dressed. His choice of clothes is also influenced by his condition because he wears long-sleeved shirts and jumpers to avoid revealing his arms.
16. As regards measure to alleviate his conditions, the Claimant says since early childhood he has intermittently used topical corticosteroids, however he does not believe the long-term use of steroid creams would have a positive prognosis so has preferred to use normal moisturizing creams such as Shea butter and coconut butter on a regular basis as well as alternative treatments. He says he has also been prescribed antihistamines during more severe flare-ups, but these have only had a minor impact on his condition.
17. As regards his diagnosis of histamine intolerance in November 2021, the Claimant says he now follows a strict low-histamine diet, and that dietitians and nutritionists have advised dietary supplements.

18. Overall, the Claimant said that mainstream medicine had not had a profound impact on his conditions and that he had learned how to manage his symptoms mainly with the use of natural skincare products and homeopathic remedies and resorting to steroid creams only during flare ups. After his conditions were negatively impacted by the Covid vaccine in February and May 2021, and by contracting the virus in May 2022, from mid-November 2022 to early February 2023 and from October to December 2023 he underwent a series of alternative treatments in his home country, Hungary, including acupuncture and therapy from supplements and nutrition.
19. In a supplementary witness statement the Claimant listed the effects on his normal day-to-day activities as follows: bathing and showering taking longer, having to apply a moisturizing balm after his shower which “takes at least 30 minutes”, house chores exacerbating his symptoms, his sleep being affected, taking more time shopping and preparing food, only eating out rarely, finding sporting activities painful because sweat causes inflammation of his skin; and his symptoms flaring up during period of exam stress.

Medical Evidence

20. Although there was about 300 pages of medical evidence in the bundle, a significant amount was in Hungarian and had not been translated, and a significant amount related to the Claimant being referred for various tests to establish the nature of his allergies, which was not relevant given the only issue before me was substantial effect.
21. I had regard, however, to the following evidence:
22. A letter from Dr Macnair from the Allergy Department of Addenbrooke’s Hospital dated 19 October 2011, when the Claimant was then aged 10 years old, which refers to the Claimant suffering from patchy eczema on his face and neck, “which did not appear to be particularly severe”.
23. GP notes of 10 July 2018 refer to the Claimant attending his surgery to discuss a blood test, to the Claimant using homeopathic treatments for his skin complaint and not being keen for topical steroids, though he had used them in the past when his skin was particularly bad.
24. A letter dated 17 September 2018 from DMC Community Services refers to a diagnosis of atopic dermatitis (eczema) and to a clinical management plan and emphasizes the importance of using emollients several times a day and maintenance therapy with steroids of calcineurin-inhibitors.
25. GP notes of 2 November 2021 refer to ‘flare up every 3-4 months of dry skin on arms, neck and skin around eyes...Not keen on steroid creams, not using ordinary emollients, taking some homeopathic remedies’.

26. A letter of Dr Shauib Nasser, Consultant in Allergy and Asthma dated 9 December 2021, refers to the Claimant developing atopic dermatitis as young child, to his symptoms peaking at the age of 10, then improving a little before worsening again after his second Covid vaccine in May 2021. The letter refers to the Claimant going to Hungary, taking supplements and placing himself on a low histamine diet and using a cream prepared by a pharmacist in Hungary and his eczema clearing substantially. The consultant states 'Therefore he has atopic dermatitis which has recently flared but subsequently improved...I have suggested that he continue with moisturizing creams twice daily but try to introduce some foods cautiously back into his diet.'
27. A further letter from Dr Shauib Nasser of 6 January 2022 refers to the Claimant's eczema flaring on his face, neck and arms after he stopped using his Hungarian cream and that the Claimant had stopped using antihistamines three days earlier which had led to a further worsening of his eczema. There was evidence of infected eczema on the Claimant's neck and elbow flexures. The letter stated the Claimant's skin prick tests were strongly positive to house dust mite and cat allergen only and stated he therefore had house dust mite allergic eczema.
28. Appointment notes with Doctor Care Anywhere of 5 July 2022 refer to the Claimant having redness with weeping skin around the beard area and dry and irritated eyes. That the Claimant said his skin had flared up a week ago and that he had had four flare ups since he had a Covid infection. The Claimant was diagnosed with infected eczema and prescribed antibiotics and hydrocortisone cream.
29. An Occupational Health Report dated 3 April 2023 (OHR) records that "[the Claimant] suffers with chronic eczematous skin disorder and has also now been diagnosed to be allergic to cats, dust and chromium salts" that, "at present, the disorders are not...having an adverse effect on his ability to carry out day-to-day activities". The report also records "[The Claimant] has a steroid cream that he uses, and which controls his eczema to a degree. It does not stop the skin disorder occurring. He is continuing to explore further possible allergies that he may also be suffering with including possible allergies to certain processed foodstuffs and their additives." The report states that "remote working will not mitigate against [the Claimant's] medical condition" that his conditions are "not likely on a day-to-day basis to have a significant impact on his work performance" and are not likely to be covered by the Equality Act 2010.
30. Appointment notes with Doctor Care Anywhere of 19 June 2023 (apparently for a referral to a gastroenterologist) refer to the Claimant having "no current skin issues".
31. A BPP Learning Support Agreement dated July 2023 records the Claimant as suffering from severe eczema which flares up unpredictably, which had been exacerbated by the Covid vaccine and two Covid infections, as well as multiple allergies.

32. Finally, a letter from a Consultant Gastroenterologist dated 9 August 2023 states the Claimant's "skin rash is thankfully quite minimal currently".

Relevant law

33. As regards whether the Claimant's conditions have, cumulatively, a substantial adverse effect on his ability to carry out normal day to day activities (for the purpose of s.(1)(b) EqA) paragraph 5 of schedule 1 to the 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 treat or correct it, and
 - (b) but for that it would be likely to have that effect.
- (2) "Measures" includes, in particular, medical treatment...

34. Further the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability ("the Guidance") provides at paragraphs B1 and B7:

B1 The requirement that an adverse effect on normal day to day activities should be substantial reflects the 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.

B7 Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of coping or avoidance strategy, to prevent or reduce the effects of an impairment on 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.

Conclusions

35. Mr Welch submitted the Claimant's conditions did not have a significant adverse effect on his ability to carry out normal day to day activities during the period March to September 2023.
36. The notes from Doctor Care Anywhere of 19 June 2023 refer to the Claimant having "no current skin issues" and the letter from the Consultant Gastroenterologist dated 9 August 2023 refer to the Claimant's "skin rash being "quite minimal currently". Further the OHR of April 2023 states "at

present, the disorders are not...having an adverse effect on his ability to carry out day-to-day activities”.

37. Mr Welch relied on **Primaz v Carl Room Restaurants [2022] IRLR 194** at [68] which states that where “a claimant asserts that engaging in a certain activity will risk triggering or exacerbating some adverse effect of the impairment itself, such as bringing on a seizure or an adverse skin reaction, or something of that sort, and that is disputed, the tribunal must consider whether it has some evidence that objectively makes good that contention.”
38. Mr Welch submitted the Claimant did not have any evidence that made good his contention for the purpose of the relevant period, and he had not shown, as a matter of causation that his impairment had the effect which he contended. To the contrary, the OHR suggested the opposite.
39. Further and in any event the Claimant’s evidence was not credible. His claims had expanded – initially in his impact statement he said he had to wait 20 minutes after putting on his balm (post shower) before getting dressed, but in his witness statement that had become “at least 30 minutes”. Also, in cross examination the Claimant had said the period between March and September 2023 had been particularly bad for his eczema, however that wasn’t borne out by the medical evidence.
40. As regards the Claimant’s allergies, it was reasonable for the Claimant simply to avoid the foods he found problematic pursuant to paragraph B7 of the Guidance, and thus reduce the effects of that impairment.
41. I do not consider the authority of **Primaz v Carl Room Restaurants** relevant to the circumstances of the present case. In **Primaz** the Claimant believed that engaging in a certain activity risked triggering the adverse effect he relied upon, and it was held the matter was not one of belief but objective causation – did the impairment have the effect contended for?
42. In the present case there is no dispute that the Claimant has eczema, and that eczema has the effect of causing skin dryness, discomfort and itching.
43. Further I am satisfied on the evidence – both that of the Claimant and the medical evidence – that the Claimant has a skin care routine using daily emollients to maintain and protect his skin against flare ups but that his eczema does flare up from time to time and that since his exposure to Covid (by way of vaccination and then contracting Covid) those flare ups have become more regular. The fact that when the Claimant saw doctors in June and August 2023, he wasn’t experiencing a flare up doesn’t undermine the credibility of that state of affairs. The evidence also shows that whereas the Claimant prefers not to use steroid creams as part of his maintenance regime – using other emollients instead – he does (or sometimes does) resort to using steroids and antihistamines when experiencing a flare up, particularly if his eczema becomes infected.

44. I consider that the Claimant's regular use of non-steroid emollients, steroid emollients and antihistamines constitute "measures" for the purposes of paragraph 5 of Schedule 1 to the EqA, and accordingly I must consider whether, in the absence of those measures, the Claimant's condition would be likely to have a substantial adverse effect on his ability to carry out normal day to day activities.
45. I am satisfied that without the Claimant's maintenance strategy of using daily emollients (as he has been medically advised) he would be likely to experience more frequent flare ups, and where affected, his skin would suffer itching and pain. Further the skin infections he has experienced during a flare up would become more frequent and severe. Indeed, that conclusion is expressly supported by the letter from Dr Shauib Nasser of 6 January 2022, describing the Claimant's condition shortly after he had stopped using his Hungarian cream and antihistamines.
46. As regards the impact that would have on the Claimant's ability to carry out normal day to day activities, the Claimant gave evidence that his eczema affects his sleep, and further that if left untreated his eczema would significantly impair his ability to fall and stay asleep and would make basic activities like showering and wearing clothes painful. He also stated that it would be likely to have an adverse impact on his desire to socialize and generally be seen in public, particularly since he suffers from eczema on exposed areas such as his face and neck. I am satisfied this would be the case.
47. Overall, I am satisfied that, but for the measures used by the Claimant to treat his eczema, it would have a substantial adverse effect on his ability to carry out normal day to day activities.
48. For that reason I am therefore satisfied that the Claimant satisfies the definition of being a disabled person within the meaning of s.6 EqA.
49. I would add, however, that as regards the Claimant's histamine intolerance and other allergies, I do not consider that, of themselves, these conditions have a substantial adverse effect on his ability to conduct normal day to day activities as, pursuant to paragraph B7 of the Guidance, I consider the Claimant can reasonably be expected to modify his diet and generally behave in such a way as to prevent those impairments having a substantial adverse effect. This is particularly the case given that while uncomfortable and debilitating, the Claimant's intolerances and allergies are not life threatening (as might be the case, for example, with a nut allergy).
50. I would further add that while I have found the Claimant to be a disabled person within the meaning of s.6 of the EqA by reason of the application of paragraph 5 of schedule 1, and in that respect have reached a different conclusion from the author of the OHR, I obviously make no findings about the author's other conclusions that "remote working will not mitigate against [the Claimant's] medical condition" and that his conditions are "not

likely on a day to day basis to have a significant impact on the Claimant's work performance", which will be matters for the Tribunal at the Final Hearing.

(ii) Application to Amend

51. The Claimant now wishes to bring complaints of:
- (i) Whistleblowing detriment pursuant to s.47B Employment Rights Act 1996 (ERA);
 - (ii) Automatic unfair dismissal pursuant to s.103A ERA; and
 - (iii) Victimization pursuant to s.27 EqA
52. Although there was some discussion as regards whether the Claimant's application was merely a relabeling exercise, Mr Jenkins finally accepted that it wasn't but said the context of the claims had been floated in the Particulars of Claim.
53. I accept that the broad context of the proposed new claims, namely the escalating dispute about the Claimant's non-attendance at the workplace, is the same as his existing claims, but nowhere in the claim form does he suggest he disclosed facts to the Respondent of the kind listed in section 43B ERA for which reason he was subjected to detriments and dismissed.
54. Further nowhere does the Claimant make a factual assertion that during his employment he alleged someone had contravened the EqA and he was subjected to a detriment as a result.
55. I am satisfied these are substantial alterations pleading new causes of action.
56. This is therefore the context in which I must have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it.
57. The protected disclosures the Claimant sets out in his proposed amendment are:
- (i) On 5 April 2023 he "made a disclosure" to an HR Business Partner and "his concerns were dismissed";
 - (ii) On 19 April 2023 he sent an email to his line manager Lauren Eardly "about discrepancies between promised educational support of apprenticeships and the actual provisions being instigated by Lauren Eardly".
 - (iii) On 2 May 2023 he made a disclosure to Emma Nawoor "by highlighting concerns about mismanagement of the end-point assessment and the Claimant's failed request to get the time they are entitled to which was impeding academic and professional progress, and the detrimental effect this can have on current and

- future apprentices in terms of their future prospects and mental health”.
- (iv) On 26 May 2023 he made a disclosure to Kim Hardman in a meeting that there was a “lack of adherence to the structured learning and development components that were contractually promised and the detrimental effect this can have on current and future apprentices in terms of their future prospects and mental health”
 - (v) On 31 July 2023 “he reached out to Sam Penrice to seek her expert opinion”.
 - (vi) On 7 August 2023 he lodged a grievance in which he complained about lack of adherence to the structured learning and development components that were contractually promised and discrepancies between promised educational support of apprenticeships and the actual provisions that were the result of Lauren Eardley’s failures”.
 - (vii) On 15 September 2023 he reiterated the protected disclosures in a grievance appeal, focusing on the initial grievances not being adequately addressed or resolved, highlighting ongoing detrimental treatment and mismanagement.
 - (viii) On 27 October 2023 in his grievance appeal hearing he “articulated concerns about the apprenticeship scheme management, the lack of fair treatment in handling the grievance, and the ongoing impact on professional and personal well-being.”
58. The Claimant alleges these disclosures tended to show a breach of the Respondent’s obligations under the ESFA (Education and Apprenticeship Funding Agency) Funding Rules (s.43(1)(b)) and/or that information falling within s.43(1)-43(e) had been or was likely to be concealed.
59. As regards the victimization claim, the alleged protected acts relied on are the alleged disclosures referred to above (i) (iv) and (vi) save that the Claimant says for these purposes that he also raised concerns about harassment and discrimination and cross refers to paragraphs 25.4, 25.12 and 34 of the Particulars of Claim. (As paragraph 25.12 doesn’t exist consideration was given to the whole of paragraph 25.)
60. As regards the prejudice that the Respondent would suffer if the amendments were allowed, I accept Mr Jenkins point that the general narrative of events will be addressed in evidence in any event, so that allowing the amendment is unlikely to require the Respondent to call more witnesses. However I also accept Mr Welch’s submission that having to address that narrative from the additional perspective of a whistleblowing and victimisation claim will add time and complexity to the evidence. It will also add to the complexity of submissions and deliberations of the Tribunal and may well require a longer hearing allocation.
61. As regards the prejudice caused to the Claimant if the amendments were refused, I consider this to be minimal.

62. First, on the face of it the Claimant hasn't set out any disclosures capable of amounting to protected disclosures and forming the basis for a detriment claim or an automatic unfair dismissal claim. As Mr Welch submitted, in **Kilrane v London [2018] ICR 1850**, Sales LJ (as he then was) held that in order for a disclosure to be a qualifying disclosure "it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection 43B(1)". However, none of the disclosures relied upon by the Claimant have sufficient factual content or specificity. Further the Claimant hasn't identified which legal obligation in the Funding Rules he is relying upon (or even which set of Funding Rules, given that there appear to be new Funding Rules each year) or what information he says has been deliberately concealed.
63. Secondly, as regards the victimisation claim, the paragraphs of the Particulars of Claim to which the Claimant cross refers in his amendment application don't contain any assertion that he alleged, while employed by the Respondent, that he had been harassed or discriminated against within the meaning of the EqA.
64. Accordingly, if the amendment were allowed, it is highly likely that the Respondent would make an application for strike out or for a deposit order. The Respondent would also point out that the claims have been brought out of time.
65. Turning to the question of time limits, a detriment claim under s.47B and a claim for automatic unfair dismissal under s.103A must both be brought within 3 months of the date of the relevant event or within such other period as the tribunal considers reasonable where it is not satisfied that it was reasonably practicable for the complaint to have been presented within 3 months.
66. A victimisation claim must also be brought within 3 months but in this case the time limit is subject to extension on just and equitable grounds.
67. However the Claimant didn't make his application to amend until 31 May 2024, which was 7 months after he had lodged his Claim Form. If permission is granted the new cause of action would take effect today (3 September 2024) which would mean the claims are just under a year out of time (at best).
68. When giving evidence, the Claimant said that although he had had the help of lawyers when bringing his claim they had all overlooked the fact he had a whistleblowing claim until compiling the list of issues for the Preliminary Hearing on 3 June 2024. This was because they had been focused on the Claimant's discrimination case.
69. I was not invited to make a definitive finding on whether the proposed new claims are out of time but to take account of the fact that if the amendment were allowed the Claimant would then need to extend time which would mean demonstrating that it was not reasonably practicable to bring his

claims in time (for the purpose of the whistleblowing claims) and that it is just and equitable to extend time (for the purposes of the victimisation claim).

70. In my judgment it is unlikely the explanation advanced by the Claimant as to why his complaints had not been brought in time would be sufficient to satisfy the reasonably practicable test for the purposes of the whistleblowing claims.
71. As regards the victimization claim, I make no assessment as to whether or not the Claimant would be able to satisfy a tribunal that it would be just and equitable for the time limit to be extended, however I do take into account that the claim is on the face of it out of time and persuading the Tribunal that it would be just and equitable to extend time is a hurdle the Claimant would have to overcome.
72. Finally, as regards the timing and manner of the application, I accept that the application has been made before the case has been listed for hearing and before preparation for the hearing has begun.
73. However, I also take account of the fact that if the amendment is allowed, further delay in the process will occur because the inadequacies of the amendments as they are currently drafted mean the Claimant will have to further articulate and particularize his case in order for the Respondent to have a coherent claim to which to respond. Furthermore, preparation for trial may well be delayed by an application to strike out (on time or on the basis of the merits of the claim) or for a deposit order.
74. Taking all the above matters into consideration I am satisfied the balance of prejudice and hardship is against allowing any of the amendments to be made.
75. The application to amend is therefore refused in its entirety.

(iii) Application for strike out/deposit order
76. In view of my decision to refuse the application to amend, the Respondent did not pursue an application to strike out or for a deposit order.

Employment Judge S Moore

Date: 4 September 2024.....

Sent to the parties on: 22/11/2024....

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For the Tribunal Office