



EMPLOYMENT TRIBUNALS

Claimant: S COBLEY

Respondent: KETTERING GENERAL HOSPITAL NHS FOUNDATION TRUST

Heard at: Watford Employment Tribunal (by video)

On: 11 October 2024

Before: Employment Judge Din (sitting alone)

Representation

Claimant: D Fletcher, Workers of England Union

Respondent: G Deane, counsel, instructed by Capsticks LLP

JUDGMENT having been sent to the parties on 31 October 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Introduction

1. The Claimant was employed by the Respondent, an NHS foundation trust, as a Healthcare assistant, from 6 March 2023 until 24 November 2023.
2. Early conciliation started on 13 December 2023 and ended on 15 December 2023.

3. The claim form was received by the Tribunal on 22 January 2024. In that claim form, the Claimant claims disability discrimination, and states that she is owed notice pay, holiday pay, arrears of pay and other payments.
4. The Claimant further makes points regarding her being forced to wear a face mask, even though she was exempt from doing so.

Response

5. The Respondent lodged a response and Grounds of Resistance dated 6 March 2024.
6. The Respondent states that the claim for disability discrimination is unparticularised and out of time. It denies this claim and further states that no admissions are made as to whether the Claimant was disabled at the relevant time within the meaning of the Equality Act 2010.
7. The Respondent denies that the Claimant is owed any pay for accrued untaken leave or notice pay.

26 April 2024

8. On 26 April 2024, the parties were notified of a preliminary hearing to take place on 13 June 2024. On the same date, the parties were notified that a final hearing has been set for 28, 29, 30 and 31 October 2024 in Cambridge. In addition, case management orders were made with respect to remedy and the Claimant's disability claims.
9. Further to these orders, and correspondence between the parties, the Claimant provided further and better particulars of her claim (headed "Particulars of Claim") on 24 May 2024. The Claimant also provided a disability impact statement and medical records on 31 May 2024. Her disability impact statement stated that the Claimant suffers from a severe dermatological condition characterised by extreme skin sensitivity. Further, the Claimant provided a schedule of loss dated 10 June 2024.
10. On 11 June 2024, the Respondent wrote to the Tribunal (copied to the Claimant) stating that the Respondent does not accept that the Claimant was disabled by a severe dermatological condition at the relevant time or at all.

Case management hearing – 13 June 2024

11. A case management hearing took place on 13 June 2024 before Employment Judge Tynan.
12. Employment Judge Tynan ordered that a public preliminary hearing take place to determine whether the Claimant was disabled at the relevant time by reason of a severe dermatological condition characterised by extreme sensitivity. Employment Judge Tynan stated that if the Tribunal concludes that the Claimant was not disabled during the relevant period, it will consider striking out her disability discrimination complaints if they have no reasonable prospect of success.

13. Employment Judge Tynan made various case management orders for the purpose of the public preliminary hearing and other matters.

Evidence and other materials

Bundle of documents

14. There is a 167 page bundle setting out relevant materials (**Hearing Bundle**). In addition, the Respondent provided a skeleton argument, for which the Tribunal is grateful.

Witness

15. The Claimant appeared as a witness.

The question

16. The question is whether the Claimant was disabled at the relevant time by reason of a severe dermatological condition characterised by extreme skin sensitivity.

Law

17. In order to bring a disability discrimination claim, the Claimant must satisfy the definition of “disability” as set out in section 6 of the Equality Act 2010.

18. The definition in section 6 of the Equality Act 2010 is as follows:

“(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”.

19. Para. 12 of Schedule 1 of the Equality Act 2010 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) (**Guidance**) was issued by the Secretary of State pursuant to section 6(5) of the Equality Act 2010.

20. A four-stage approach to determining whether a person is disabled was approved by the Court of Appeal in *Sullivan v Bury Street Capital Limited* [2021] EWCA Civ 1694, where Singh LJ listed the questions as:

20.1 Was there an impairment? (the ‘impairment condition’);

20.2 What were its adverse effects [on normal day-to-day activities]? (the ‘adverse effect condition’);

- 20.3 Were they more than minor or trivial? (the ‘substantial condition’);
- 20.4 Was there a real possibility that they would continue for more than 12 months? (the ‘long-term condition’).
21. Singh LJ emphasised that these are questions for the Tribunal; although it may be assisted by medical evidence, it is not bound by any opinion expressed.
22. There is no statutory definition of a physical impairment. In the case of *College of Ripon and York St John v Hobbs* [2002] IRLR 185, it was held that a person has a physical impairment if they have “something wrong with them physically”.
23. Under section 212(1) of the Equality Act, “substantial” means more than minor or trivial. As set out in *Rayner v Turning Point* [2010] 11 WLUK 156, the question of where there is a “substantial” adverse effect is a matter of fact for the Tribunal to determine.
24. There needs to be an adverse effect on normal day to day activities. It is settled that “day to day activities” encompass activities which are relevant to participation in professional life as well as participation in personal life, and that the Tribunal should focus on what the claimant cannot do, not what they can do.
25. There needs to be evidence that the relevant impairment caused the adverse impact on the claimant’s ability to carry out normal day to day activities – see *Primaz v Carl Room Restaurants Ltd* 2021 WL 05510289.
26. Schedule 1, part 1, paragraph 2 of the Equality Act 2010 defines “long-term”.
27. As set out in *Secretary of State for Work and Pensions v Alam* [2010] ICR 665, the Claimant must generally prove that the Respondent had knowledge of the Claimant’s impairment at the relevant time.

Relevant findings of fact

28. The Claimant’s new starter form with the Respondent dated 2 February 2023 confirmed that the Claimant was not registered as disabled.
29. The Claimant provided medical evidence. This is contained in the Hearing Bundle.
30. The following entries are of note with respect to the Claimant’s alleged disability of a severe dermatological condition characterised by extreme skin sensitivity. :
- 30.1 19 February 2007 – dermatitis / eczema. There is reference to a long history of dry itchy skin on both arms. This is described as “bad”. It is said to be spreading to the Claimant’s arms.
- 30.2 10 June 2008 – impetigo (which the Tribunal understands from the NHS website to be a “*common and contagious skin infection that causes sores, blisters and crusty patches*”). It is said that the Claimant is experiencing redness and swelling on her face.

- 30.3 29 September 2017 – Dry skin on face and chest. This is said to have been there for the previous three weeks. The examination entry says “*Dry eczematous looking skin to face (cheeks and forehead) and chest, some also to arms*”. Some areas are stated to be “*a little*” inflamed. Medicines were prescribed.
- 30.4 27 September 2021 – Red and peeling skin behind the ears. The relevant entry states with respect to the Claimant’s history that a face-to-face appointment was booked to “*look at skin behind her ears, it was red and peeling*”. The entry refers to the Claimant having treatment following which “*cleared now but been on annual leave so not [using her] face mask, also itchy scalp*”. The entry refers to a prescribed medicine and says “*better*”. The examination part of the entry says “*skin behind left ear- normal skin, scalp- very dry and scaly*”. Further medicine is prescribed.
31. There do not appear to be any subsequent references to dermatological conditions. The Tribunal notes that the medical records indicate that the Claimant has had issues with abscesses. However, these are not in the face / ear area, and do not, in the Tribunal’s view, fall within the alleged disability as described by the Claimant for the purposes of her claim.
32. The Claimant and Ms Delgado, her line manager, discussed the Claimant’s refusal to wear a face mask on 10 August 2023. The Claimant stated that her GP had told her that she was exempt from wearing a face mask. On 4 October 2023, the Claimant also stated that she was exempt from wearing a face mask. There is no reference to an exemption in the medical records as put before the Tribunal.
33. The Claimant provided a disability impact statement (**DIS**) on 24 May 2024. The DIS says that the Claimant “*...has a very sensitive skin condition that significantly impacts her ability to wear the necessary face necessary face masks required to perform her job duties. Over the past 15 years, she had been treated for several skin abscesses which required general anaesthesia surgery, skin issues, and the inability to wear any sort of face masks. She is compelled to prescribed medication from time to time if any skin irrigations occur*”.
34. The DIS sets out a number of the symptoms that the Claimant suffers from when she wears a face mask, including pain, itchy skin, skin irritation, skin blisters and peeling of the skin.
35. The DIS goes on to say that the Claimant’s role as a health care assistant involves close interaction with patients, requiring her to adhere to strict safety protocols, including wearing a face mask. The impact of her skin condition on her ability to wear a face mask leads to reduced efficiency, possible increased absenteeism, safety concerns and emotional strain.

Discussions and conclusions

36. As is not disputed, in order to bring her disability discrimination claims, the Claimant must satisfy the definition of disability under section 6 of the Equality Act 2010.
37. Following the relevant case law, and as set out above, there are four parts to this that a Tribunal should consider.
38. The burden of proof for satisfying the test as set out in section 6 of the Equality Act 2010 is on the Claimant.
39. As Mr Fletcher correctly pointed out, medical evidence is not necessary to prove the elements of section 6 of the Equality Act 2010. However, it will of course be of considerable evidential importance.

Impairment

40. In terms of the first part of the test, the Tribunal finds that the Claimant's skin condition was an impairment. The case law says a physical impairment is where there is something wrong with someone physically. Although the medical evidence in this regard is limited, the Tribunal is satisfied on the basis of what has been put before it, including the Claimant's oral evidence, that there was impairment at the relevant time using this standard.

Adverse and substantial effect

41. The Tribunal takes the next two parts of the test together – namely, what were the impairment's adverse effects on normal day-to-day activities and were they more than minor or trivial?.
42. Here, the Tribunal finds that there is insufficient evidence to support these parts of the test. The Tribunal emphasises that it takes the impairment and what the Claimant has said about it seriously. However, there is not enough evidence before the Tribunal to demonstrate that the standard set out in section 6 of the Equality Act 2010 is met in this regard.
43. The medical evidence that has been provided is not detailed, particularly for the period relevant to the Claimant's claim. There are long gaps between relevant entries and none for the period from when she started her employment with the Respondent.
44. The Claimant did not see a dermatologist or other skin specialist, and no specific medical report has been provided with respect to the alleged disability.
45. It is not clear from that what the impact of the impairment was on the Claimant. The Claimant has stated that she could not wear a mask due to her skin condition. However, there is no medical record of this, other than a passing reference to her not wearing a face mask. There is no evidence of a medical exemption being granted.
46. The DIS does go into more detail. However, this – without further evidence – does not meet the test for section 6 of the Equality Act 2010. The points regarding the impact on job performance are unsupported. It refers to reduced

efficiency without specifying what this is. It refers to possible increased absenteeism. However, the Claimant herself says that she was not absent during the relevant period as a result of her skin condition. The other parts of the DIS are similarly unsupported, whether by medical evidence or otherwise.

47. This leads the Tribunal to conclude that the Claimant does not satisfy the requirements set out in section 6 of the Equality Act 2010.
48. The Tribunal, therefore, does not need to consider the other parts of the four part test, or the Respondent's knowledge (or otherwise) of the Claimant's skin condition.
49. As there is no disability for the purposes of section 6 of the Equality Act 2010, the Claimant's claims for disability discrimination by reason of a failure to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010; disability related harassment under section 26 of the Equality Act 2010; and discrimination arising from disability under section 15 of the Equality Act 2010 are dismissed as having no reasonable prospect of success.
50. The above is reflected in the judgment the Tribunal issued on 11 October 2024. Also as set out in that judgment, the Claimant's remaining claims will proceed to a final hearing on the dates set.

Employment Judge Din

11 November 2024

Reasons sent to the parties on:

14/11/2024

For the Employment Tribunals: