EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000038/2023

Held at Aberdeen on 13 November 2023

Employment Judge N M Hosie

X	**Claimant** **In Person**
Y	**Respondent** **Represented by** **Mr D James, Counsel** **Instructed by** **Mr R Jespersen,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

1. the claimant was not a disabled person, in terms of s.6 of the Equality Act 2010; and

2. his disability discrimination claim is dismissed for want of jurisdiction.

REASONS

Introduction

1. This case called before me by way of a Preliminary Hearing to consider two issues: disability status and the claimant's application to amend.

Disability status

2. The two "impairments" relied upon by the claimant, in support of his assertion that he was a disabled person, at the relevant time, in terms of s.6 of the Equality Act 2010 ("the 2010 Act"), were his Type 2 Diabetes and Glaucoma. The respondent accepted that the claimant had these impairments but denied that they amounted to a disability, in terms of the 2010 Act.

3. I heard evidence from the claimant and he spoke to a 5-page witness statement which is referred to for its terms. Both parties also submitted a bundle of documentary productions, which included the claimant's medical records ("C" and "R"). Also included, was the claimant's response to a Disability Question & Answer Order which I issued (R130-137).and "Impact Statements" (R132A – 133).

4. The claimant was employed by the respondent as a Security Guard at the respondent's Sella Ness Accommodation Facility in the Shetland Islands. His employment commenced on 10 April 2022. He was summarily dismissed by the respondent on 19 December 2022, allegedly due to gross misconduct.

Diabetes

5. The claimant alleged in his Impact Statements that:- "*Diabetes is a long-term impairment with no cure and adverse effects on the patients ability to carry*

out normal day-to-day activities such as exercises, family life, work-life balance, and mental balance."

6. In his witness statement the claimant made reference to taking "Metformin Hydrochloride" medication for his diabetes. He also said this: "*If I do not take my diabetic medication on time, I can become physically impaired or suffer a heart attack.*" He also made this averment in the details of his claim which were annexed to his claim form (R17).

7. The clear impression given was that he had been prescribed this medication. However, this was misleading. In cross-examination it was put to him that there was no entry in his medical records of him being prescribed medication, at the relevant time when employed by the respondent. This was accepted and it emerged that at the relevant time he was using a "meal plan" and only taking medication which had been prescribed to his wife for diabetes "as a back-up". Apparently his G.P. was unaware of this.

8. The claimant had also averred in his Agenda for a Case Management Preliminary Hearing that: "*If I do not take my diabetic medication on time. I can become physically impaired or suffer a diabetes attack* (R80).

9. I found favour with the submission by the respondent's Counsel that the claimant's evidence in this regard was unreliable.

Relevant law

10. It was for the claimant to establish that he had a disability. Not just disabled generally, but disabled within the meaning of s.6 of the 2010 Act which is in the following terms:-

"***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."

11. When considering the circumstances relating to the claimant, I had regard not only to the foregoing definition and also Schedule 1 to the 2010 Act, which amplifies the definition, but also to the "Guidance On Matters To Be Taken Into Account In Determining Questions Relating to The Definition Of Disability (2011)" ("the Guidance").

12. I was also assisted by the observations of the EAT and the principles laid down in ***Goodwin v. Patent Office*** [1999] IRLR 4, which remains good law.

13. I was also mindful that in ***Aderemi v. London & South Eastern Railway Ltd*** [2013] ICR 591 EAT, Langstaff J, President, laid down a three-stage process of assessment, as follows:-

"*It is clear first from the definition in section 6 (1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 213(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.*" (paragraph 14, p.591).

14. So, first, the Tribunal has to consider adverse effects; second, whether that effect is upon the claimant's ability to carry out normal day-to-day activities; and third, whether that effect is substantial.

15. In determining whether a person's impairment has a substantial effect on that person's ability to carry out normal day-to-day activities, the effect of measures taken to treat or correct the impairment should be ignored – para. 5(1), Schedule 1, in the 2010 Act.

16. The effect of para. 5(1) is to require a Tribunal to examine how the claimant's abilities had actually been affected at the material time, while benefitting from the relevant measure in question, and then address its mind to the effects it thinks would have prevailed but for the measure. The latter are often referred to as the "deduced effects". The question is then whether the actual deduced effects on the claimant's abilities to carry out normal day-to-day activities are more than trivial.

17. I was satisfied that at the relevant time the claimant was using a "meal plan" to treat his diabetes and that medical treatment includes the need to follow a particular diet (paras. B7, 12 and 16 in the Guidance).

18. However, in support of his submission that the claimant's diabetes did not amount to a disability, the respondent's Counsel referred me to:-

Metroline Travel Ltd v. Stoute UKEAT/0302/14/JOJ;
Woodrup v. London Borough of Southwark [2002] EWCA Civ 1716.

19. In ***Metroline***, HHJ Serota QC said this at para. 11:

"*….. while a particular diet may be regarded as something which is to be ignored when considering the adverse effects of a disability, I do not consider that abstaining from sugary drinks is sufficient to amount to a particular diet which therefore does not amount to treatment or correction.*"

20. Each case of course has to be considered on the basis of its own particular circumstances. However, there was scant evidence from the claimant of the likely deduced effects and the case law is clear that a claimant's assertion alone as to what might happen if medication were to be stopped is unlikely to be sufficient.

21. In ***Woodrup*** at para. 13, the EAT said this:-

> "*In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under paragraph 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary.*"

22. There was no such "clear medical evidence" presented to me.

23. As I recorded above, I did not consider the claimant's evidence in this regard to be reliable. The only evidence about the adverse effect emanated from him and while he had a "meal plan" it does not follow that this means he was a disabled person.

24. There was insufficient evidence to make a finding in fact as to what might have happened had he not had a meal plan.

25. While I was mindful that the claimant was not represented and that allowances had to be made, during case management he had been referred to not just the terms of s.6 but also the Guidance and he was made aware of the requirement to provide medical evidence. On the evidence, I was not persuaded that the claimant was a disabled person, in terms of s.6, in respect of his diabetes. He failed to discharge the onus on him of establishing that he was a disabled person at the relevant time.

Glaucoma

26. It was accepted that the claimant has Glaucoma in his left eye. He takes medication for this condition in the form of Monopost drops in both eyes which he takes daily, at the same time. He claimed that if he did not take this medication his vision in his left eye would be gone within three months.

27. He has regular appointments at Aberdeen Royal Infirmary every three months (C156), for example. On 27 February 2020, shortly before he commenced his employment with the respondent, his glaucoma was recorded as being "stable" although from time to time, "his eyes are red and uncomfortable" (C157).

28. The issue with this impairment was also the deduced effects. The claimant alleged that if he did not take his medication he would *"go blind".* However, he accepted in cross-examination that any deterioration in his eyesight would not be immediate but rather that it would be "progressive".

29. There was no evidence of any adverse effects at the relevant time when he was employed by the respondent.

30. Further, the claimant wears spectacles and, as Counsel submitted, in terms of Schedule 1, para. 5 in the 2010 Act, the, deduced effects do not apply if the impairment is "correctable by spectacles". Once again, there was no medical evidence of the deduced effects and, as I recorded above, a claimant's assertion alone as to what might happen if medication were to be stopped is unlikely to be sufficient. Further, with reference to ***Woodrup*** there was an absence of the necessary "clear medical evidence of the likely deduced effects".

31. While I was mindful that the claimant was unrepresented and has no experience of Employment Tribunal proceedings, the onus was on him to establish that he was a disabled person and, on the evidence, I was unable to find that the adverse effect of his glaucoma on his ability to carry out day-to-day activities was substantial. In arriving at that view I was mindful that substantial only means more than "minor or trivial".

32. The claimant failed to discharge the onus. Accordingly, his glaucoma did not constitute a disability in terms of the definition in s.6 of the 2010 Act.

33. As he failed to establish that he was a disabled person, his disability discrimination claim falls to be dismissed.

Application to amend

34. As this is a case management issue, I shall issue a separate Note with my decision.

Employment Judge: N M Hosie
Date of Judgment: 20 November 2023
Date Sent to Parties: 20 November 2023