



## EMPLOYMENT TRIBUNALS

**Claimant**

**Miss L Warburton**

**v**

**Respondent**

**Direct Mail Service Limited**

## PRELIMINARY HEARING

**Heard at: Cambridge**

**On: 7 December 2017**

**Before: Employment Judge Ord**

**Appearances:**

**For the Claimant: Mr Sims, Counsel.**

**For the Respondent: Mr Canning, Counsel.**

## JUDGMENT

1. At the material time the claimant was a disabled person within the meaning of s.6 of the Equality Act 2010.

## REASONS

1. This matter came before me today following a preliminary hearing on 3 August 2017, to determine the single question of whether or not the claimant is a disabled person within the meaning of s.6 of the Equality Act 2010 for the purpose of these proceedings.
2. Under s.6 of the Equality Act a person is a disabled person if they have a physical or mental impairment which has a substantial and long term adverse affect on their ability to carry out normal day to day activities.

3. Schedule 1 of the Act (paragraph 8) deals with progressive conditions and states that if a person has a progressive condition as a result of which they have an impairment which has or had an affect on their ability to carry out normal day to day activities but that affect is not or was not a substantial adverse affect then that person is to be taken to have an impairment which has a substantial adverse affect if the condition is likely to result in the claimant having such an impairment.
4. The leading authority on the question of the meaning of the word “likely” in those circumstances is SCA Packaging v Boyle [2009] IRLR 746. In that case the House of Lords determined that the word “likely” means “may well happen” and that the word should be taken to mean simply something which is a real possibility in the sense that it could well happen rather than something that is probable or more likely than not.
5. At today’s hearing I heard evidence from the claimant who was cross examined. The respondent has submitted to the tribunal two witness statements, one from Miss Carly Carr and one from Mr Philip Hutchinson. On behalf of the claimant Mr Sims confirmed that he did not seek to cross examine either of those witnesses, but that that was not to be taken to mean that he accepted what they said in those statements either in relation to the matter which was before me (in respect of which Mr Sims’ submission was that the witnesses added little or nothing) or in relation to other matters contained in those witness statements. I did need to pass comment that it was clear that the statement of Miss Carr in particular contained irrelevant comment which did not touch or concern the issue of whether or not the claimant was a disabled person, and which could only have been designed to cast aspersions on the claimant as they were disparaging in their nature.
6. The respondent accepted that the claimant suffers from Chronic Obstructive Pulmonary Disease (COPD) and that that is a progressive condition. The respondent denied that the claimant was at the material time (which was itself agreed to be between the period December 2015 and January 2017) a disabled person because at that time the respondent said that the condition had no effect on the claimant’s ability to carry out normal day to day activities and/or because the claimant had not established that any such impact was caused by the condition.
7. The claimant’s evidence was that she was diagnosed as asthmatic in July 1991 and was then diagnosed with COPD in April 2010. It has been described to her as a condition that makes it difficult to empty air out of the lungs because of a narrowed airway. In August 2017 the diagnosis was described as “severe” as the claimant had only fifty percent lung function on a test carried out at that time.
8. The claimant further referred to medication which is prescribed for her as a result of her condition. She takes a number of prescribed medications to reduce the build up of phlegm and to minimise asthmatic and COPD triggers, as well as using an inhaler for her asthma and steroid inhalers to reduce symptoms of COPD as well as the use of a steroid nasal spray. The claimant says that her condition is worse in the morning but improves “a bit” after taking medication. Both her asthma and her COPD affect her breathing which is worse in cold, damp or dusty environments or when she is in the presence of

allergens or triggers for COPD (such as some perfumes). That part of the claimant's evidence was not challenged.

9. The claimant says that she has learnt to live with her asthma and COPD but that even with medication which helps reduce the affects of those conditions she suffers impairments. She referred to an inability to go swimming or running (she referred to having previously swum three times per week but did not indicate that she had ever engaged in running as a pastime or activity), do her own gardening, lift heavy items, being slower going up and down stairs and sometimes having to stop part way for a rest. In relation to the lifting of heavy items she specifically referred to mail bags at work which should could not lift and which weighed approximately 11 kilograms. She says that she would struggle to walk the length of a football pitch without a rest, has difficulty using the vacuum cleaner at home and has to have two vacuum cleaners (one for upstairs and one for downstairs because she cannot carry the vacuum cleaner between the two). She is unable to vacuum the stairs and has to brush those stairs with a hand brush and a bowl of water to keep them clean. She suffers from broken sleep often waking in the course of the night short of breath and needing her inhaler. The claimant says that she stopped smoking in April 2017 and attends a stop smoking clinic fortnightly.
10. Her stopping smoking is corroborated by both the entry in her general practitioner notes and records indicating that she was attending a stop smoking clinic in April 2017 and further the respondent's witnesses' evidence which was that the claimant began using E cigarettes.
11. The claimant also says that because of her asthma and/or COPD she suffers chest infections which exacerbate the difficulties which she says she suffers. She refers to an inability to lift her arms, difficulties bending down, an inability to pick up a kettle full of water or lift a full pan from the cooker hob, struggling to get in and out of the bath and pain on movement that involves lifting or stretching. She says that when her condition is at its worse talking can be difficult because of breathlessness and that she sleeps downstairs because in those circumstances she cannot climb stairs at all. In early 2017 she had a visit from the COPD specialist team at Kettering General Hospital (The Rocket Team) because she was not fit to travel to see her own doctor at his surgery. She referred to a time in Christmas 2016 when she said that she could not be left on her own, and her son stayed with her for approximately four months but under cross examination it was not clear that her son had been with her at Christmas 2016 (having left in acrimonious circumstances in November 2016 following staying with his mother to assist his recovery from alcohol abuse brought about by depression).
12. The respondent challenged these matters in cross examination particularly by reference to the claimant walking up and down stairs when at work to have a lunch break or to make coffee which she might have done four or five times a day. The claimant said that she would not have been observed by others pausing on the stairs or being breathless as a result of that activity.

13. Some elements of Miss Carr's statement were put to the claimant in particular by reference to her smoking, but the claimant was adamant that she had been visiting the stop smoking clinic since April 2017 and that she has to attend that clinic every two weeks and undertake tests to confirm that she had not smoked in the interim. I accept that evidence in so far as it is relevant.
14. The evidence of in particular Miss Carr but also Mr Hutchinson acknowledged an awareness of the claimant's asthmatic condition because of the use of an inhaler. Both witnesses referred to the claimant having either a chesty or phlegmy cough, which both witnesses attributed to the claimant's smoking and/or subsequent use of E cigarettes.
15. Although the bundle of documents prepared for this case was substantial few of the documents were actually brought to my attention but two that were were a letter dated 1 September 2017 from Kettering General Hospital to the claimant's General Practitioner and a letter from the nurse at that practice to the claimant's solicitors dated 10 November 2017.
16. The first of those documents referred to the claimant having had five or six recurrent chest infections in the previous year which had required treatment through antibiotics and steroids. It referred to lung function tests carried out for the purpose of the letter which described the claimant as having a ratio of 0.40 and a classification of the claimant's condition as severe COPD. The registrar who was the author of the letter said that he had explained "the above" to the claimant. I read "the above" as meaning the results of his examination including the lung function tests. He said that he explained that "this may be why she has been having recurrent infections over the past year" and I read from that letter the word "this" as meaning the classification of severe COPD consequent upon the examination.
17. The letter from the nurse at the General Practice confirmed that the claimant's asthma was diagnosed on 1 July 1991 and was a life long condition. She described the condition as having "now progressed to COPD" due to the patients past history of smoking. COPD is a chronic non reversible condition which left untreated would deteriorate and would impact on her breathing which would in the nurse's words "have causative affect on ability to carry out activities of daily living". The nurse describes COPD treatment as being an effort to halt the decline and reduce the impact of COPD on a person's ability to carry out activities of daily living so that they could be allowed to lead as normal a life as possible in accordance with the severity of their disease. She confirmed that having COPD or asthma can make a person more susceptible to suffering with chest infections.
18. Based on the evidence that has been presented before me I have come to the following conclusions.
19. First, the claimant is asthmatic. She has previously been a smoker and that has led to the development of her condition into COPD. That is a chronic non reversible condition.

20. Second, that condition would, if untreated, deteriorate and the treatment which she receives is designed to try and halt the decline. Deterioration would follow without medication.
21. I am satisfied that the claimant suffers impairment as a result of her condition. She has an increased risk of chest infection and in 2016 suffered five or six such infections. I accept that she has disturbed sleep patterns on occasion and I also accept that from time to time she suffers from breathlessness and has a regular cough. That cough is so substantial that it was described by Miss Carr as one that would cause her concern that whilst she (ie Miss Carr) was on the telephone at work the claimant's cough would carry down the line to the person she was speaking to. Although Miss Carr attributed the claimant's cough to her smoking and/or the use of E cigarettes, given the evidence of the claimant and the medical evidence which she has produced I am satisfied that on the balance of probabilities the cough is a by product of the condition from which the claimant suffers.
22. In any event sleep interruption and recurrent infection are impacts on the claimant's day to day life and her ability to carry out normal day to day activities. I accept that the claimant has an increased risk of chest infection because of her condition and that she has suffered those infections as a consequence of her condition. During her period of chest infection her ability to carry out day to day activities is increasingly affected.
23. Further I accept that the claimant has the difficulties which she described in relation to lifting and carrying objects which include day to day objects such as her vacuum cleaner. Her inability to vacuum stairs and her requirement to have two vacuum cleaners because she cannot carry the vacuum cleaner up or down stairs amount to an impact on a normal day to day activity.
24. I am satisfied on the medical evidence that the claimant's impairments are a consequence of her COPD (which has developed through a combination of her previously diagnosed asthmatic condition and her previous smoking history), and that her condition had at the relevant time an impact on her ability to carry out normal day to day activities.
25. Further I am satisfied that the condition is progressive and that in the absence of medication it would deteriorate. For the purposes of the Equality Act 2010 and an assessment of disability I am to disregard the impact of medication. In any event the treatment in question is designed as the nurse says to "try and halt" decline caused by the condition and I am satisfied that the claimant has a progressive condition which is likely to result (if it has not already done so, a matter which I am not required to determine) in the claimant suffering a substantial adverse affect on her ability to carry out day to day activities.
26. Accordingly:-
  - 26.1 The claimant suffers from a progressive condition (COPD);
  - 26.2 As a result of that condition she did, at the material time, suffer adverse affect on her ability to carry out normal day to day activities; and

- 26.3 It is likely that the will result in her suffering a substantial adverse affect on her day to day activities.
27. For those reasons the claimant is a disabled person within the meaning of s.6 of the Equality Act 2010 and was for the purposes of these proceedings such a person throughout the relevant period between December 2015 and January 2017.
28. Directions have already been given for the final hearing of this case which is listed for five days commencing on 26 February 2018. The parties are to co-operate with each other in relation to the length of the hearing and determine whether or not in the circumstances that listing period is now considered to be either excessive or inadequate, and if any adjustment to the listing period is required to advise the tribunal accordingly at the first opportunity.

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**Employment Judge Ord**

Date: 5 January 2018

Sent to the parties on:

5 January 2018

For the Tribunal:

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