



EMPLOYMENT TRIBUNALS

Claimant: Ms. J. Barnes

Respondent: Richard Newton Consulting Ltd.

Heard at: Mold Justice Centre (hybrid) **On:** 14 October 2022

Before: Employment Judge **S Evans**

Appearances

For the Claimant: Mr. N. Smith (Counsel)

For the Respondent: Mr. R. Newton, Director.

PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is that at the time material to the claimant's claims of disability discrimination she was a disabled person by reason of wet macular degeneration.

REASONS

The Hearing

1. A hybrid hearing was held with the claimant and her representative present in person at Mold Justice Centre and Mr. Newton, for the respondent, participating by Cloud Video Platform (CVP) from Cardiff. The technology worked satisfactorily throughout the hearing and both parties confirmed they had been able to take a full part in the hearing.
2. A bundle of 367 pages was before the Tribunal, The parties were directed to refer specifically to any pages to which the Tribunal should have regard in reaching its decision. All page references below are to pages in the bundle.

3. Oral evidence was taken from the claimant which included supplementary questions to explain the detail of her impact statement (pages 89 – 95) as at the material time of 1 February – 17 May 2021. Paragraph 18 of the impact statement was withdrawn as it did not relate to the material time. Written and oral submissions were made by both representatives.
4. The Tribunal took account of all the evidence to which it was directed in reaching its decision. The Tribunal also carefully considered the written and oral submissions made by the parties' representatives.
5. Mr. Newton expressed concern that not all the claimant's medical records have been disclosed. I have noted those concerns and the explanation given by the claimant. On the evidence that was before me, including the expert report produced by the respondent at pages 95 – 102, I am satisfied that the non-availability of further records does not prejudice my ability to determine the preliminary issue before me in accordance with the overriding objective.

The Issue

6. The issue for determination was set out in paragraph 4 of the record of a Preliminary Hearing held on 25 February 2022 before Employment Judge Ryan, namely:
“ whether at the material time, 1st February - 17th May 2021 the claimant was a disabled person.”
7. The claimant's case is that she was disabled at the material time by reason of an eye condition or conditions, namely central serous retinopathy and/or wet macular degeneration.
8. The respondent does not concede the issue of disability. Its case is that the claimant's eye condition postdates her employment, that any eye issues at the date of employment did not have a substantial adverse effect on her ability to carry out normal day-to-day activities and that the condition could not be said to be long-term.

Findings of Fact

9. The claimant experienced various issues with her eyes from 2019 onwards as recorded in the “Relevant chronology” section of the respondent's expert report at pages 97-98.
10. On 4 May 2021 the claimant attended an emergency eye appointment at Specsavers opticians. She had experienced a “stuck floater” in her left eye since March 2021. It did not cause her significant issues initially but in or about the beginning of May 2021 she experienced a marked change in her eye condition. Her vision was impaired. Full details of the impact are set out below at paragraphs 25 - 29. The issues included the claimant's inability to see the side of her face, difficulty in operating household items such as the cooker and the microwave and distortion of data when working on screen during her employment.

11. On 5 May 2021 a request was sent by Specsavers opticians to "Ophthalmology" requesting an emergency referral to the eye department (page 119). The principal referral reason was stated to be "Suspect Central Serious Retinopathy LE". Further detail was provided in the referral request as follows:
"Ms Barnes has noticed a central static grey patch in her left eye for the last few weeks...
Her vision in her left eye is reduced to 6/18. On examination the left macula appears raised. Please could she be reviewed urgently in your clinic to determine the cause of the visual disturbance and if any treatment is indicated."
12. A data collection sheet (page 186) dated 5 May 2021 refers to the claimant's referral as Risk Category 1 and is marked in hand with "AMD URGENT 2 WEEK PATHWAY."
13. The claimant attended an eye clinic on 18 May 2021 but due to the unavailability of Fluorescein dye, the claimant was not seen for her referral at the eye unit of Abergele Hospital until 1 June 2021.
14. A letter was sent to Specsavers opticians on 1 June 2021 from the Consultant Ophthalmologist at Abergele Hospital (page 115 and duplicated at page 184). It reported that:
"Fluorescein angiography carried out today indicates the presence of a choroidal neovascular membrane associated with central serous retinopathy. I have made arrangements for her to have treatment with an anti VEGF agent."
15. The claimant began to receive Lucentis injections to her left eye on 6 July 2021. They are ongoing every 4 - 6 weeks and the latest injection received by the claimant was on 11 October 2022.
16. The medical records (pages 170 – 249) refer to a diagnosis of left eye wet macular degeneration. They show that the claimant's condition has fluctuated so that, for example in August 2021 (page 179) "left vision much better than last visit, left scan improved since last visit" in October 2021 (page 177) the left eye was described as "better than last visit". In November 2021, the claimant described her vision to her GP as "more blurry double vision and less clarity" (page 99) In December 2021 (page 252) the "left eye scan was mostly stable except for a few pockets flowing" and in August 2022 (page 162) "left eye slightly worse than last visit".
17. The respondent secured an expert report ("the Report") from Professor Susan Lightman PhD, FRCP, FRCOphth, a consultant ophthalmologist. The Report is dated 4 October 2022 (pages 95 – 102). A series of questions were put to Professor Lightman in her instructions. The answers to all the questions have been read by the Tribunal and taken into account in reaching its decision.
18. The opinion of Professor Lightman is that "on a balance of probabilities this was not CSR but wet AMD from the start." The Report refers (page 100) to the finding that the claimant had a choroidal neovascular membrane (CNVM) and states that "This is wet AMD as the CNVM leaks and causes fluid to leak into

the tissues. Given her age and positive family history, on balance of probabilities this was always age-related macular degeneration... and she did not have CSR or both.”

19. It is clear from the Report that Professor Lightman found that the latest date of onset of the condition was 4 May 2021.
20. The Report goes on to say that the aim of treatment of CNVM is to “try and prevent further visual loss as it may not be possible to restore vision due to the structural damage and injections may be required for several years to control this.” (page 100).
21. Page 100 describes the claimant as being “on a treat and extend programme of injections for wet AMD, so the aim is to keep the CNVM quiescent by regular injections every 2-3 months likely over several years. So it is likely that this is still being continued.”
22. At page 101 the Report states that patients are given a course of three injections at monthly intervals and then if there is a positive response, injections will be continued” less frequently”. if there is not a positive response, monthly injections are likely to be given for “about two years”.
23. Professor Lightman described the impact of the level of vision in the claimant’s left eye as meaning she would not see well into the distance and would not read well with that eye. She states that “difficulties might occur initially in judging depth for example pouring fluids into a cup or judging kerb steps but patients usually learn to cope with these problems.” (page 101). The Report states that the claimant’s vision has worsened and has not improved. It confirms that the likelihood is that the vision in the claimant’s left eye would remain distorted.
24. On or around 4th May 2022, the claimant experienced a number of difficulties as a result of distorted vision in her left eye. Her vision was blurry, she experienced black spots in her vision, pulsating lights and grey patches.
25. This impacted on the claimant’s ability to do a number of routine activities and these issues continue. Full details of the claimant’s situation are set out in the Impact Statement at pages 89 – 95 of the Bundle. To the extent that the points below refer to the present tense, the Tribunal was satisfied by the claimant’s evidence that the effects have existed since, at the latest, 4 May 2021.
26. The claimant has double vision most days and this causes difficulty with judging distances and so on accurately. She has difficulty trying to pour things. Judging steps is difficult and she has fallen over several times whilst carrying shopping. The claimant’s ability to walk can be affected as her visual disturbance can make walking “feel odd”. She experiences difficulty seeing the dials on her cooker and in reading ingredients on items in the supermarket.
27. The claimant loves to read but finds this difficult as she cannot see the text with her left eye. Reading data on screen is difficult as the text and images are

distorted. This causes issues, for instance, with imputing data to tables on screen as the tabular lines appear curvy and distorted.

28. The claimant is an artist and discovered that colours greyed out and she could not achieve the accuracy she required.
29. When her vision worsened in May 2021 the claimant could not see the left side of her face which made it difficult to apply make-up. This continues to be a problem as she can only see a general shape of her face in the mirror. Although the claimant still drives, she avoids doing so at night as her vision is not clear.
30. These difficulties are alleviated by the regular injections of Lucentis, adjustments made to her glasses with the fitting of prisms and adaptations that the claimant has made, including the use of a magnifier on her mobile phone to help her read labels and switching from creating art work in colour to monochrome.
31. Without the Lucentis injections, the claimant's evidence was that she would be blind in her left eye. That evidence was not contested and I accept this to be the case. The injections do not "cure" the visual disturbances experienced by the claimant but they do improve her vision after the initial impact of the injection has settled. The quality of the claimant's vision still fluctuates and worsens as the next injection becomes due.

The Law

32. Under s.6 Equality Act 2010 ("EqA"), a person has a disability if they have a physical or mental impairment and that impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
33. Pursuant to s.6(5) EqA, the Secretary of State has published Guidance on the definition of disability (2011) ("Guidance"). As the Guidance states, it does not impose any legal obligations in itself, nor is it an authoritative statement of the law. However, Schedule 1, Paragraph 12 EqA requires the Tribunal to take into account any aspect of this guidance which appears to it to be relevant and the Tribunal confirms that it has done so.
34. Section 212 (1) EqA defines "substantial" as meaning "more than minor or trivial".
35. Schedule 1, paragraph 2 EqA states that the effect of an impairment is long term if it falls into one of the following provisions :
 - (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.
36. Schedule 1, Paragraph 5 (1) EqA provides that 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.

37. Under Schedule 1, paragraph 5(2) EqA, “measures” include “in particular, medical treatment and the use of a prosthesis or other aid.”

38. Under Schedule 1, paragraph 5(3) EqA, paragraph 5(1) does not apply, 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.

39. Normal day-to-day activities are not defined in EqA. Examples of such activities are given in the Guidance, which is illustrative and not definitive. Paragraph D3 states:

In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

40. A summary of relevant case law was produced in the skeleton argument produced by Mr. Smith. The written submissions made by Mr. Newton, at paragraph 7 confirm that “We do not dispute the caselaw that the Claimant proposes.” I endorse the cited authorities and have taken them into account in reaching my decision.

Conclusions

41. The claimant met the legal definition of disability at the material time. From some point prior to 4 May 2021 to 17 May 2021, (“the Material Time”) she had a physical impairment. This impairment was a serious eye condition which necessitated an emergency referral to a specialist eye unit. The principal referral reason was stated to be Central Serious Retinopathy. Records of 5 May 2021 also refer to an “AMD pathway” and subsequent medical records produced in the bundle, along with the expert report produced by the respondent, refer to a diagnosis of the claimant’s eye condition as wet macular degeneration.

42. The fact that the diagnosis post-dates the Material Time does not alter the finding of the Tribunal that, at the Material Time, the claimant had a physical impairment in the form of a choroidal neovascular membrane (“CNVM”). This was caused by wet macular degeneration.

43. At the Material Time, the claimant's physical impairment had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.
44. From the beginning of May 2021, the claimant experienced difficulty with judging distances which impacted her walking. She fell over several times whilst carrying shopping because her vision was distorted.
45. She could not see the left side of her face in a mirror, making it difficult to apply make-up.
46. She was unable to see the dials on the cooker and microwave nor to read the ingredients on products in the supermarket. This impacted her ability to shop and to prepare food.
47. The claimant's love of reading, and her ability to read data on screen in her work, is adversely affected by her vision as she cannot see text, either at all or with sufficient clarity to read accurately.
48. The claimant has had to adapt her art work as she cannot work in colour as the colours greyed out. She now works in monochrome instead.
49. The Tribunal finds that the activities listed in paragraphs 45 – 48 above are clearly normal day-to-day activities.
50. The Tribunal also finds that the activity described in paragraph 49 is a normal day to day activity. No evidence was given that it was artwork at a specialised level that was affected. Judicial notice is taken of the fact that painting in colour is a hobby enjoyed by many and a normal day-to-day activity.
51. The claimant's impairment, at the Material Time, had an adverse effect on her ability to carry out each of the day- to- day activities listed in paragraphs 43 – 47. These adverse effects were not trivial or minor. They had a significant negative impact on her ability to carry on a normal day-to-day routine. She could not see to put on make-up, she could not judge distances to navigate steps safely nor read for work or pleasure. She could not use a cooker or microwave to ensure her food was properly cooked not read the ingredients on packaging.
52. Some of these adverse effects have improved over time. The claimant receives regular injections which help alleviate the effects of her condition. The alleviation is temporary and the claimant's vision worsens as time passes from the date of the last injection. The claimant has also made changes to her lifestyle to reduce some of the adverse effects. These changes range from using a magnifier on her phone to read ingredients on packaging to not reading for pleasure and ceasing to create art work in colour.
53. The Tribunal is required to treat the impairment as having a substantial adverse effect on the ability of the claimant to carry out normal day-to-day activities if measures are being taken to treat or correct the impairment and, but for those measures, it would be likely to have that effect. That is the case here.

54. The measure taken here is the administration of medical treatment in the form of regular Lucentis injections. Without these injections, the claimant's sight would continue to deteriorate. The respondent's expert report stated that the aim of treatment of CNVM is to "try and prevent further visual loss as it may not be possible to restore vision due to the structural damage and injections may be required for several years to control this."
55. This is not a case to which Schedule 1, paragraph 5(3) EqA applies as there is no evidence to suggest that the impairment is correctable by spectacles or contact lenses.
56. A key issue in this case was whether any adverse effect on the claimant's ability to carry out normal day-to-day activities was "long-term" at the Material Time.
57. On the facts, the effects of the impairment had not lasted at least 12 months at the Material Time. The issue then is whether the effects of the impairment were likely to last for at least 12 months.
58. The Tribunal has reminded itself that the correct approach is to determine the effects of the impairment at the Material Time. This has to be assessed by reference to the facts and circumstances existing at that time. The Tribunal is not entitled to have regard to events occurring after the Material Time to determine whether the effect did [or did not] last for 12 months. The Tribunal has to determine whether, at the Material Time, it could well happen that the effects last for at least 12 months.
59. The respondent's medical evidence, produced at pages 96 – 102 of the bundle, identifies the claimant's impairment as being CNVM caused by wet macular degeneration. It states that treatment of CNVM is to "try and prevent further visual loss as it may not be possible to restore vision due to the structural damage and injections may be required for several years to control this." (page 100). It describes the claimant as being "on a treat and extend programme of injections for wet AMD, so the aim is to keep the CNVM quiescent by regular injections every 2-3 months likely over several years. So it is likely that this is still being continued." (page 100).
60. Relying on this evidence, the Tribunal is satisfied that, at the Material Time, it was likely that the effects of the impairment would last at least 12 months. It is described in terms that suggest treatment is needed to prevent further deterioration and that the treatment could well be needed for a period of years.
61. Having considered the submissions from both parties and reviewed the evidence to which it was referred, the Tribunal finds that the claimant met the definition of a disabled person within s.6 Equality Act 2010, at the material time, for the reasons stated above.

Case Number: 1601108/2021

Employment Judge S Evans
31 October 2022

Sent to the parties on 2 November 2022

For the Tribunal Office Mr N Roche