



EMPLOYMENT TRIBUNALS

Claimant: Mr. J. Durbin

Respondent: Marks and Spencer PLC

HELD BY: CVP

ON: 29th June 2021

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr. G. Pollitt, Counsel

Respondent: Ms. A. Greenley, Counsel

PRELIMINARY HEARING JUDGMENT

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

REASONS

1. **The Issue:** Whether the claimant's diagnosed condition of asthma, which the respondent conceded amounted to a physical impairment, was such as to satisfy the definition of disability in s.6 Equality Act 2010 (EqA).
2. **The Facts:**
 - 2.1. The claimant was diagnosed as living with asthma at the age of 5; he is now aged 29.
 - 2.2. The claimant has a repeat prescription for inhalers and he uses two each morning and two each night; that is an established and consistent medication regime. He has followed this regime for several years. He uses Ventolin and Fostair inhalers, bronchodilator medication including salbutamol sulphate and corticosteroids. He carries what he refers to as an emergency inhaler which he uses as and when required, that is when, notwithstanding his regular use

of inhalers, he is struggling to breath. On occasions he requires use of that emergency inhaler.

2.3. In describing the claimant's symptoms I have used the words used by him in his Impact Statement of 4th November 2020 and during his oral evidence at today's hearing; the fact that I have used inverted commas to indicate quotation does not imply that I am just repeating what he said merely to quote his evidence. The claimant, while somewhat diffident and nervous, gave credible and plausible evidence and I believed him; he did not appear to exaggerate and he did not seem well prepared or coached but to be speaking honestly. The symptoms described are as I find as fact and expressed here as he will better understand this judgment. I am just using his words as appropriate.

2.4. The claimant would struggle with day to day duties without his inhalers and this is because he would otherwise feel very tight chested, wheezy and he would struggle to breath. His symptoms include these matters and what he described as a heavy chest causing him to "strain" leaving him "not in a good place". He is dependent on his inhalers to function without those symptoms of asthma and, when having an asthma episode, to ameliorate the symptoms. These effects are not speculative but are examples of what he has experienced without regular or effective use of his inhalers. He has had those symptoms; they are what happens when the regime is not followed or proves ineffective.

2.5. The claimant's last recalled asthmatic episode was in January 2021 when he was so concerned that during it he dialled the NHS 111 number. He was "out of control", "straining", "not coping", and in "a bad place". He was advised to attend hospital, so concerned was the call-handler at hearing him on the telephone. The claimant chose not to attend the hospital. On other occasions he has felt it necessary to visit his GP to restore, what he referred to as, his "levels".

2.6. The claimant considers that without his asthma medication and the medication that he takes for a mental ill-health condition he "would not be here". He describes asthma as being "always there" and his inhalers are "always with me"; they are two factual statements. As long as he takes this medication he can carry on with his day to day activities. In the mornings he coughs and needs his inhalers.

3. The Law:

3.1. Section 6 EqA defines disability as a physical or mental impairment having a substantial and long-term adverse effect on a person's normal day-to-day activities.

3.2. The Secretary of State has published Guidance on the definition of disability (2011).

3.3. Long-term is for 12 months or likely to be so.

- 3.4. Substantial is more than minor or trivial. The substantial adverse effect must be long-term.
- 3.5. Normal day-to-day activities means those activities that one would usually perform any day in ordinary living but not requiring special skills or a high degree of technical knowledge and expertise. Examples of such activities are given in the Guidance, which is illustrative and not definitive.
- 3.6. To succeed in a claim of disability discrimination one must be disabled at the time of the alleged discrimination, where the fact of disability does not depend on a respondent's knowledge (albeit knowledge plays a part in respect of various claims of discrimination).
- 3.7. In all other respects and without repeating them, the principal legal requirements are set out in the claimant's written submissions which were approved by the respondent. I endorse the agreed legal submissions and have taken the cited authorities into account.

4. Application of law to facts:

- 4.1. The claimant was ordered to disclose medical evidence and an "impact statement".
- 4.2. His impact statement is in the preliminary hearing bundle at pages 52 and 53. It is brief. The statement gives little detail of what life would be like for the claimant if he did not take the medication that he describes in the statement as being taken on a regular daily basis. The statement confirms that the claimant takes "several inhalers each day for my asthma and without them, I would struggle to do my day-to-day activities". He states that without that medication and antidepressant medication "I do not feel I would be here".
- 4.3. His medical evidence is at pages 57 to 59 of the hearing bundle. It sets out the repeat drug prescriptions and contents of his inhalers. The records confirm a diagnosis of asthma in January 1997, that was when the claimant was five years of age.
- 4.4. In cross-examination, in answering questions that I asked to clarify his evidence, and under re-examination the claimant explained what he meant as to how he would struggle with his activities if he did not take his inhalers and how he does struggle with them when the inhalers are ineffective. He also explained what he meant by the expression "I do not feel I would be here".
- 4.5. I accept the respondent's submission that the claimant has not provided in his records or impact statement great detail of the effect of his asthmatic condition without medication and that there is no record of any attendance at either a hospital or GP surgery in connection with an asthmatic episode. My initial inclination was to consider that perhaps the claimant had not proved substantial adverse effect on day-to-day activities. Having carefully considered the claimant's evidence however I concluded otherwise. That said, counsel for the respondent must be correct in saying that a mere

diagnosis of asthma and the fact of use of inhalers alone cannot substantiate disability; there are degrees of severity of asthma and some is induced in particular circumstances such as by strenuous exercise. Many people living with asthma would not consider themselves to be disabled people and I take judicial notice of the fact that many people living with asthma would not satisfy the definition of disability in EqA, taking into account the Guidance and relevant case law.

- 4.6. The particular difficulty here is that the claimant is regulating his condition largely to good effect by the use of medication on a regular daily basis. In these circumstances one would not expect there to be many examples of asthmatic episodes and/or symptoms actually adversely affecting day-to-day activities, let alone to a substantial degree.
- 4.7. I am required to consider the deduced effect. I have to ask myself whether the claimant's asthma, which is clearly long-term (being from at least age 5 where the claimant is now 29 years of age, 28 at the material time, and still so diagnosed), would have a substantial adverse effect on his day-to-day activities if it were not for his daily treatment regime. I have to consider whether any substantial adverse effect without that regime would be long-term.
- 4.8. I believe the claimant that he follows the treatment regime he described. I believed the claimant's description of his symptoms when the treatment was ineffective or on the rare occasion that he failed to take it. In his daily activities without treatment the claimant would struggle to breathe. His struggle would include him feeling a tight, heavy, wheezy chest causing him to cough and struggle with breathing. Those effects are not minor or trivial. As Mr Pollitt put it "there is nothing more day-to-day than breathing".
- 4.9. Having considered the submissions from both parties on the evidence that I heard, that evidence, and taking into account the legal definition of disability I find that the claimant satisfies the definition of disability in section 6 EqA with regard to asthma.

Employment Judge T.V. Ryan

Date: 30th June 2021

JUDGMENT SENT TO THE PARTIES ON 1 July 2021

FOR THE TRIBUNAL OFFICE Mr N Roche