



EMPLOYMENT TRIBUNALS

Claimant Ope Ajanaku

Respondent Monsas Ltd

Heard at: London Central (by CVP)

On: 9 May 2023

Before: Tribunal Judge McGrade acting as an Employment Judge (sitting alone)

Appearances

Claimant: In person

Respondent: Ms I Baylis, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant was a disabled person during the relevant period for the purposes of the Equality Act 2010 as a result of his anaphylaxis.

REASONS

1. The purpose of the Preliminary Hearing was to determine the issue of whether the claimant was a disabled person in terms of section 6 of the Equality Act 2010 as a result of his anaphylaxis. It has been conceded by the respondent that the claimant is disabled as a result of this asthma. However, it is disputed whether he is a disabled person as a result of his anaphylaxis.

Preliminary issues

2. There was an issue as to whether the witness statement produced by the claimant for the hearing today should be allowed and whether it was appropriate to adjourn today's proceedings, to enable the respondent's counsel to consider additional issues raised in the statement. I allowed the witness statement and refused counsel's request for an adjournment on the basis that I was not satisfied it was in accordance with the overriding objective, and in particular, to avoid delay. I did however allow a short adjournment of the hearing after the claimant had completed his evidence, to give the respondent's counsel time to consider the new statement and to prepare cross examination.
3. I heard oral evidence from the claimant who two adopted statements produced on his behalf. I am considering whether the claimant was disabled as a result of his anaphylaxis at the relevant date, namely between April and May 2022.

Relevant Law

4. Section 6 of the Equality Act provides a definition of “disability” 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.
5. Section 212(1) of the Equality Act provides that “substantial” means more than minor or trivial.
6. Schedule 1 of the Equality Act gives further details on the determination of a disability. Schedule 1 para 2(1) provides that the effect of an impairment is long term is (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.
7. Para 2(2) of Schedule 1 provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In **SCA Packaging Ltd v Boyle 2009 UKHL 37**, the House of Lords ruled that “likely to” in this context means “could well happen” rather than “more likely than not.”
8. Para (5) of Schedule 1 sets out provisions with regard to the effect of medical treatment. It 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 measures are being taken to correct it and, but for that, it would be likely to have that effect.
9. The Tribunal must take into account Statutory Guidance on the definition of Disability (2011). Section B7 provides as follows:

Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.

For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities. (See also paragraph B12.)

10. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities (Guidance D2 – D7). The test is a functional and not a medical test
11. The Tribunal must consider the status of the claimant at the date of the discriminatory act; **Cruickshank v VAW Motorcast [2002] IRLR 24**

Findings in fact

12. The claimant was diagnosed with anaphylaxis while still a child. The medical records produced include an entry dated 8 October 2009 which records that the claimant had been tested for peanut allergy at St Mary Sidcup in 2005 and obtain an RAST score of 6. The entry also records he had last been admitted to hospital in March 2009 and had had three previous admissions. The claimant accepted that the March 2009 admission was a result of this asthma, and not his anaphylaxis. However, I am satisfied on the balance of probabilities that the claimant had three hospital admissions prior to March 2009 because of his anaphylaxis.
13. I have before me a copy of the care plan produced for the claimant, which appears to have been prepared around January 2010, setting out the nature of the claimant's condition and the requirements that arise from that. This records that he may have a localised reaction of swollen face, itchy eyes and rash. There is also reference to an anaphylactic reaction including swelling of mouth and throat, breathing problems, collapse and loss of consciousness. The daily care requirements are stated to include him avoiding contact with peanuts and hazelnuts, for all staff to be aware of his condition, and to have read his care plan, for his EpiPen to be easily accessible and to accompany him wherever he goes, including off-site activities and for staff to be vigilant during snack and mealtimes, special occasions and science/cookery lessons. The document goes on to narrate what steps staff should take, should he suffer a localised reaction and or an anaphylactic reaction.
14. The medical records also contain a reference to the claimant being admitted to Barnet Hospital following an anaphylactic reaction to peanuts. It indicates that he developed swelling, chest tightness and difficulty breathing.
15. The claimant has to take a number of steps to cope with his condition. He cannot eat nuts or food containing nuts. He also has to go to considerable lengths to avoid exposure to nuts, as these trigger a very strong adverse reaction. His allergy is sufficiently severe that it can be triggered by very limited contact, such as smelling nuts. He therefore cannot be in the same room as someone who is consuming nuts, even if those nuts are only one ingredient. He is unable to eat in restaurants where nuts are regularly used in the food. When he is eating in a restaurant, he has to advise the waiting staff of his allergy and request that separate cooking utensils be used. When purchasing or preparing food, he has to check whether the foodstuff contains nuts or has been prepared in a factory where nuts are used. If he is travelling by plane,

he has to inform the airline of his condition, to ensure he is not exposed to nuts during the flight.

16. The claimant was best man at his older brother's wedding in London on 23 April 2022. Among the food served at the wedding was suya, which is a Nigerian food seasoned with peanut spice. The claimant consumed this at around 10pm. Shortly thereafter he went into anaphylactic shock. He did not have immediate access to his EpiPen, as he had left it in his car and did not know who had his car keys.
17. He reported this condition to his mother, who dialled 999. While the claimant was awaiting the arrival of the ambulance, he sat down and was hunched over, trying to get air into his lungs. He was completely immobile.
18. The ambulance arrived around 20 minutes later. The ambulance staff administered a first dose of epinephrine. He was also given oxygen. During the journey to hospital, the ambulance staff switched from oxygen to a nebuliser.
19. Following his arrival at hospital, he was treated in the resuscitation ward and given a second dose of epinephrine, along with cortisone. He was discharged the following day and given a five-day course of chlorphenamine, nizatidine, and prednisolone under 14 day course of paracetamol. He was also told to rest.

Decision

Did the claimant have a mental or physical impairment?

20. I am satisfied that as at April/May 2022, the claimant had a physical impairment, namely anaphylaxis. As a result of this condition, he suffers a very strong adverse reaction to peanuts, which involve his lips and eyes swelling, a tingling sensation with his body, tight chest witness, wheezing and the closure of his airways.

Did that impairment have an adverse effect on his ability to carry out normal day-to-day activities?

21. I am satisfied the claimant's anaphylaxis has an adverse effect on his ability to carry out the normal day-to-day activities of eating, preparing food and socialising, as he must avoid all foodstuffs containing any traces of nuts. I have outlined in paragraph 15 the nature of the steps which he must take and which impact on those normal day-to-day activities.

Was that effect substantial?

22. Provided the claimant takes the steps outlined in paragraph 15, he can lead an otherwise normal life. However, the steps themselves are without question very intrusive.
23. Counsel for the respondent referred me to **Metroline Travel Ltd v Stoute UKEAT0302**, in which it was held that someone suffering from Type 2 diabetes was not a disabled person. There is specific reference to section B7 of the guidance and remarks which suggest someone with a nut allergy is unlikely to be automatically be regarded as disabled. While I recognise that **Metroline** emphasises the importance of

taking account of avoidance or coping strategies, I consider the claimant's condition is clearly distinguishable from someone with Type 2 diabetes or a mild nut allergy. He suffers from anaphylaxis, which involves a very extreme reaction to exposure to nuts. The steps that he has to take extend significantly beyond avoiding a particular type of drink.

24. I have considered section B7 of the guidance, under the heading Effects of behaviour. I recognise that account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities. The difficulty for the claimant is that it is his coping strategy which has a substantial adverse effect on his ability to carry out day-to-day activities. Therefore, taking those steps cannot reduce the adverse effect. I consider the effects are substantial, or more than minor or trivial, as there are a number of steps that the claimant has to take, and those steps relate to important aspects of his daily life, including eating, preparing food and socialising.

Was the substantial adverse effect long term?

25. It is clear that the condition from which the claimant suffers was first diagnosed when he was very young and that it is a lifelong condition. Therefore, the substantial adverse effects are long term. I am therefore satisfied the claimant was a disabled person at the relevant date because of his anaphylaxis. The claim will now proceed to the final hearing which has been fixed.

Tribunal Judge McGrade

Date 26 May 2023

**JUDGMENT SENT TO THE PARTIES
ON: 26/05/2023**

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