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THE EMPLOYMENT TRIBUNALS

Claimant: Mr D Theventhiran
Respondent: Datrrix Limited
Heard at: East London Hearing Centre
On: Thursday 18 July 2019
Before: Employment Judge Tobin

Representation

Claimant: In Person
Respondent: Mr J Bryan (counsel)

PRELIMINARY HEARING (OPEN)

1 This case was listed as a Preliminary Hearing (Open) to determine whether at the relevant times in this case, the Claimant was a disabled person in accordance with the Equality Act 2010 (“EqA”) because of the following condition:

A visual impairment caused by a scar on the cornea giving blurred vision to his left eye.

2 The Claimant gave evidence. He had prepared a disability impact statement, which he confirmed. The Claimant was cross-examined by the Respondent’s representative (Mr Bryan). I asked some questions to clarify matters and we had the benefit of a joint bundle of documents.

The Law

3 Section 4 EqA sets out certain “protected characteristics”. These are the grounds upon which discrimination is deemed unlawful. Disability is listed as one of the protected characteristics in s4 EqA.

4 S6 EqA provides 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 A number of sources provide assistance in interpreting the s6 EqA test, which

includes schedule 1 to the EqA; the Equality Act 2010 (Disability) Regulations 2010 and the “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (“the Guidance”) which came into force on 1 May 2011. In this instance, the Respondent accepted that, at the material times, the Claimant had a physical impairment which affected normal day-to-day activities. The Respondent disputed that this impairment was substantial and that it had a long-term adverse effect.

6 S212(1) EqA defines “substantial” to mean “more minor or trivial”. In *Aderemi v London and South-Eastern Railway Limited* UK EAT/0316/12 the Employment Appeal Tribunal held that any matter that cannot be classified as “trivial” or “insubstantial” must be treated as substantial.

7 Under schedule 1, paragraph 2 EqA the effects of an impairment is long term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or, in this instance, it is likely to last for at least 12 months. The long-term question should be answered as at the date of the alleged discriminatory acts, not with the benefit of hindsight at the date of the hearing: *Richmond Adult Community College v McDougall* [2008] ICR431. In *SCA Packaging Limited v Boyle* [2009] UKHL37 the House of Lords held that the word “likely” should be interpreted as meaning “could well happen” rather than “more likely than not”.

8 Sch 1, para 1 EqA states that if an impairment has had a substantial adverse effect of a person’s ability to carry out normal day-to-day activities at that effect ceases, the substantial effect is treated as continuing if it is likely to reoccur. Conditions with effects which reoccur only sporadically or for short periods could still qualify as impairments for the purposes of the EqA in respect of the meaning of “long-term”: sch 1, para 2(2) EqA.

9 In *Cruickshank v VAW Motorcast Limited* [2002] IRLR 24, the Employment Appeal Tribunal held that an Employment Tribunal must assess on the basis of the evidence available at that time, whether the Claimant had a disability at the time of the alleged discriminatory act, rather than at the time of the hearing. This approach was confirmed by the Court of Appeal in *Richmond Adult Community College v McDougall*.

The Tribunals Findings of Facts

10 Following hearing the Claimant’s evidence and reading the documents in the hearing bundle, I (i.e. the Tribunal) make the following findings of fact.

11 The Claimant went to see his General Practitioner on 14 December 2018. On this day, the Claimant went to the urgent eye clinic at Watford General Hospital where he was diagnosed with a herpes simplex infection to his left eye and he was prescribed antibiotics. There are no treatment records after this consultation, so I conclude that the eye infection cleared with the medication proscribed.

12 The Claimant returned to his GP on 21 December 2017 for a different matter and although there is a reference, in the GP records, to his eye infection and a healing scab on his left eyebrow, the GP consultation was in respect of an unrelated matter. The Claimant did not consult with his GP about the eye condition that forms the basis of these proceedings.

13 The Claimant next visited his GP on 26 March 2018, i.e. 3 months later. This was again in connection with his left eye and the GP took a scrape and referred him to the Moorfields Eye Hospital. The Claimant did not consult with his General Practitioner about his eye complaint thereafter.

14 On 26 March 2018, the Claimant attended Moorfield Eye Hospital with Keratitis (which is an inflammation of his cornea to his left eye). Corneal scrapes were taken on that day and a review was arranged later in the week. The Claimant was seen by Mr Indy Sian who was a corneal fellow at the A&E department.

15 On 4 April 2018, Mr Sian reviewed the Claimant's condition and reported his left eye was "subjectively better" and that there remained a small epithelial defect (in effect a small blemish or scar). Mr Sian reported that the Claimant continued to receive medication and that he would be reviewed in one-week. Mr Sian said that should the Claimant notice any worsening in his symptoms, he was to report directly to the eye casualty department.

16 On 12 April 2018, the Claimant saw Mr Martin Watson who was the Consultant Ophthalmologist. Mr Watson reviewed the Claimant's eye condition and reported that he was "symptomatically better". Mr Watson set a review for two weeks and on 26 April 2018, he reported that the Claimant's left eye was "healing nicely".

17 The Claimant attended his GP a month later, on 11 May 2018, for a long consultation which dealt with his complaints in respect of anxiety and stress. There is a full note from his GP Registrar Dr Priya Karia dealing with anxiety on 11 May 2018 and again on 16 May 2018. There are no further GP medical notes.

18 On 7 June 2018, Mr Watson reviewed the Claimant for the final time and stated:

I am pleased to report his left eye has healed and he is now off treatment. There is a paracentral scar which is not visually significant. He has been discharged.

Determination

19 The burden is on the Claimant to establish that he has a disability. There are three sources of evidence: the Claimant's disability impact statement, the Claimant's oral evidence to the Tribunal and the contemporaneous documentary evidence available.

20 The Respondent accepted that the Claimant had the physical condition contended although it did not accept that the Claimant suffered from blurred vision, either at the time of his eye infection or thereafter. Mr Bryan did not contest the Claimant had an impairment in mid-December 2018 and between mid-March 2018 to early-June 2018. Mr Bryan did not dispute that the Claimant's condition had an adverse effect on his day-to-day activities as set out in his disability impact statement. However, the Respondent disputed that the Claimant's eye condition was substantial and long term.

21 In respect of whether or not the Claimant's eye condition was substantial, there was no dispute that the Claimant suffered from a viral (or possibly bacterial) infection and that this became serious (see page 126 of the hearing bundle, 4 April 2018). The

hospital Consultant's records that the Claimant eye was "subjectively better" although a small defect remained. The Claimant accepted that was a scar or the thing that became a scar or a blemish on his cornea. I do not accept that this has any ongoing significant effect as that would contradict the contemporaneous evidence.

22 The Claimant accepted that he was told to go to A&E during his second treatment if his infection did not respond to the proscribed treatment, as anticipated. He did not re-attend A&E and he attended A&E in the past. His condition was healing. On 12 April 2018, it was reported that he was symptomatically better and on 26 April 2018, a couple of weeks later, that he was "healing nicely". There was an onward improvement of the Claimant's condition.

23 There were no hospital records that refer to visual blurring or other impact that the Claimant refers to in his disability impact statement. The Claimant's disability impact statement refers to effects that are quite serious, which I would expect to see recorded in the contemporaneous hospital (or GP) records. The absence of such corroboration leads me to deduce that the Claimant has over-egged his symptoms.

24 Finally, the contemporary crucial evidence was at page 132, which was 7 June 2018. This concludes that the culmination of the Claimant's improvement in his eye condition was that his eye had totally healed with treatment.

25 The letter of the Claimant's expert reports that the Claimant's eye condition was not significant, which the Respondent contended was the same as not-substantial under s6 EqA.

26 The Claimant's statement was written within the last few weeks. This does not assist as much as the contemporaneous records. The witness statement is not consistent with the Claimant's GP records. He had two consultations with Dr Karia, which he said did not record his consultation accurately. There are no notes referring to the Claimant's problems with vision and the Employment Tribunal expects that such notes will be included. The Claimant's submission that the GP Registrar (Dr Karia) made an error in recording the Claimant's condition in full or that she was not appropriately diligent in recording the consultation is not accepted. There is no evidence that the Claimant took this up with Dr Karia and her notes are thorough for two consultations in respect of other matters.

27 I conclude, that the Claimant's eye condition was of no ongoing substantial impact on the Claimant (i.e. beyond the two episodes of Mid-December 2018 and between mid-March 2018 to early-June 2018).

28 Dr Watson's medical report of 16 May 2019 confirms that on his last review in June 2018 the Claimant had healed leaving a small corneal scar, which was of the visual axis. Dr Watson said that this could affect the Claimant's eye prescription (i.e. the potential need for glasses) and he said that it would be worth the Claimant seeing an optician to assess this. The Claimant accepted that he had not been to an optician in the year or so following his discharge from Dr Watson's care.

29 The Claimant also confirmed in evidence that there had be no further or reoccurring infection. Treatment was completed prior to his discharge. The Claimant's cornea scar or blemish will fade over time. This is nothing in the treatment or wider

medical records, or in any other contemporaneous record, to corroborate any ongoing vision or other related difficulty. This is in circumstances where I expect some indication given the extensive investigation and treatment provided. Consequently, I do not accept the Claimant's contention that he has an ongoing significant medical condition. He certainly does not require any surgery such as corneal transplant as suggested.

30 So far as whether this reaches a threshold of an episodic condition, Mr Watson stated, "there is no way of predicting which patients are likely to get future flare ups". So, the Claimant suffered an eye infection which was treated with antibiotics. The Claimant either suffered another eye infection or his original eye infection reoccurred around three months later. This was treated effectively and there has been no further reoccurrence. If this was an episodic condition then the condition was successfully treated in June 2018, with was at most seven months from the original occurrence. Consequently, this is not a long-term condition as recognised by the EqA.

31 There is no dispute that the Claimant suffered a virus infection that became serious. There is a record of him beginning the healing process on 4 April 2018 (bundle 126). The Claimant was left with a very small scar which Mr Watson contended would heal. So far as any possible future need for glasses or spectacles, schedule 1 of the Equality Act deals with this type of visual impairment. If a visual impairment is correctable by glasses, then it does not amount to a disability and the best evidence of this was Mr Watson's report. He says that the scar or blemish could affect a prescription so he concedes that there might be some impairment but even if there was then an optician's assessment and glasses should resolve it. This cannot amount to a disability.

32 So far as longevity is concerned, this is judged at the date of the Claimant's dismissal. The Claimant had a significant injury/illness/infection which lasted, at most, from December 2017 until May 2018. This is not near the 12-month threshold. On 7 June 2018, the Claimant's eye had healed. Mr Watson expected the scar or blemish to fade over time. It was not reasonable to conclude that it would last past the cut off time.

33 The Claimant is not disabled within the meaning of the Act.

Employment Judge Tobin

7 August 2019