



# EMPLOYMENT TRIBUNALS

**Claimant:** T Kent

**Respondent:** Oxfordshire County Council

**HELD AT:** Reading ET (by CVP)

**ON:** 11 March 2024

**BEFORE:** Employment Judge McCluskey

## REPRESENTATION

**Claimant:** Mr H Lewis- Nunn, counsel

**Respondent:** Ms C Herries-Smith, solicitor

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

The claimant was a disabled person between 13 October 2022 - 19 February 2023 in terms of section 6 of the Equality Act 2010.

# REASONS

## Introduction

1. This public preliminary hearing was listed to determine i) Whether the claimant is “disabled” as defined in section 6 of the Equality Act 2010 (EqA); and (ii) the claimant’s application to amend her claim following the case management preliminary hearing on 12 December 2023.
2. I reserved my decision on the question of whether the claimant is disabled. The claimant’s application to amend was not heard today. I have listed a case management preliminary hearing by CVP for 23 May 2024 at 10am for 3 hours to consider the claimant’s amendment application.

3. The claimant gave oral evidence on her own account. She referred to a file of documents that included two occupational health reports and a record from her optician of her attendance at an optician's appointment on 12 November 2022. She also referred to a disability impact statement which had been filed prior to the case management hearing on 12 December 2023.
4. Ms Herries-Smith represented the respondent. She cross examined the claimant. No witnesses were called for the respondent.
5. In the claim form the claimant alleges acts of disability discrimination. In the summary of the case management preliminary hearing on 12 December 2023 the list of issues identifies complaints of discrimination arising from disability (section 15 EqA) and failure to comply with the duty to make reasonable adjustments (sections 20 and 21 EqA).
6. The section 15 EqA complaints are listed as a lack of support, negative feedback and providing a negative reference about the claimant to a prospective employer. The PCP in the section 20/21 EqA complaint is listed as requiring the claimant to work in the office after dark during the winter months. The claimant also brings a complaint of victimisation about the provision of a reference about the claimant to her prospective employer.
7. The claimant was employed by the respondent in the period from 9 September 2022 until 19 February 2023.
8. In her claim form the claimant says she first raised her eye condition and that it was worsening with the respondent in early October 2022. In evidence today she said it was on 13 October 2022. She asserts that from that date she received a lack of support. The claimant asserts that the first discriminatory act occurred on 13 October 2022 and that further acts took place thereafter until 15 February 2023 which was the date of the written reference to the prospective employer.
9. The claimant asserts that at all material times she is and was a disabled person within the meaning of the EqA. She has an eye condition called keratoconus.
10. In relation to disability status the issues that I had to determine were set out in the list of issues in the summary of the case management preliminary hearing on 12 December 2023. The issues are as follows:
11. Did the claimant have a mental or physical impairment? The respondent did not dispute that the claimant has an eye condition called Keratoconus or that this is a physical impairment.
12. Did the impairment affect the claimant's ability to carry out normal day to day activities? Was the adverse condition substantial? The respondent says the impairment of Keratoconus does not meet the statutory test.
13. Was the adverse condition long term in that it has lasted 12 months; it is likely to last for at least 12 months; or is likely to last the rest of the life of the person affected? The respondent says the impairment of Keratoconus does not meet the statutory test.

## Facts

14. The claimant was employed by the respondent from around 9 September 2022 until 19 February 2023. The claimant resigned from the respondent's employment on 19 January 2023 giving one month's notice. She was a Team Manager.
15. The claimant has the medical condition keratoconus. She was diagnosed with the condition when she was age 14. The condition causes a gradual thinning of the corneas of her eyes which leads to the lens in each eye developing into a cone shape. This distorts her vision. The condition is progressive. The condition does not improve or go away. When there is a worsening, those effects remain.
16. When applying for the role as Team Manager and completing recruitment checks prior to starting her employment on 9 September 2022, the claimant did not tell the respondent about her condition.
17. By early October 2022 the claimant's condition deteriorated which affected her ability to drive in the dark. She experienced double vision, saw "halos", had blurring of vision and could not make out shapes clearly, when driving in the dark. This was the case when wearing glasses or wearing contact lenses. Neither corrected her vision. This made her scared to drive in the dark. She stopped driving in the dark.
18. On 13 October 2022 the claimant told her then line manager Sabina Baz (SB) that she had an eye condition called keratoconus which was impacting on her ability to commute to work in the dark. SB referred the claimant to Occupational Health. OH produced a report dated 8 November 2022 after speaking with the claimant on the phone. The report included the following "She reports a history of Keratoconus since her teens, which she tells me is becoming progressively worse and, although she says it is manageable during daylight hours, it is impacting on her ability to drive at night and to leave her home in the dark". The OH report suggested a further OH referral, preferably face to face to allow a more thorough physical assessment.
19. On 12 November 2022 the claimant went to the optician. In the record of that appointment the optician recorded that "*in the last year her prescription has really fluctuated and altered, and she is becoming more myopic and there is no obvious cause for this as topography is still relatively stable*". The optician also recorded that the claimant was "*struggling with night driving to the point where she has limited the amount that she is driving at night*". The optician recommended a referral to an ophthalmologist at the hospital.
20. The optician prescribed new glasses for the claimant in around November 2022. With the new glasses she continued to experience double vision, saw "halos" and had blurring of vision in the dark. She could not make out shapes in the dark. This continued to make her scared to drive in the dark. She did not drive in the dark.
21. The claimant attended a second OH appointment, again by telephone. A second OH report was prepared dated 4 January 2023. The report included the

following: “The claimant “reports her work duties are not impacted by her condition, however driving in the dark can result in an increase in symptoms of anxiousness”. The opinion section of the OH report included the following: “Based on the information provided it appears that [the claimant’s] symptoms are related to perceived work-related stress triggers as mentioned above which are continuing to have a detrimental effect on her health rather than any underlying illness”.

22. The referral to the hospital ophthalmologist is for contact lenses. She had her first appointment at the hospital in February 2024. She had been waiting for the appointment since the referral in November 2022.
23. The claimant has another appointment in May 2024 with the hospital ophthalmologist for specialist contact lenses. The claimant does not know whether these contact lenses will correct the effects of her keratoconus.
24. Since October 2022 the claimant has continued to experience double vision, see “halos” and have blurring of vision in the dark. She has been unable to make out shapes clearly in the dark. This has continued to make her scared to drive in the dark. This is the case with her existing glasses and contact lenses.
25. At the hospital appointment in February 2024 her vision was assessed as within the legal limit for driving.

## **Law**

26. Section 6(1) EqA provides that a person has a disability if they have ‘a physical or mental impairment; and the impairment has a substantial and long term adverse effect on the person’s ability to carry out normal day to day activities.’ The burden of proof is on the claimant to show that she satisfies the definition.
27. The statutory definition of ‘substantial’ in section 212(1) EqA is, ‘more than minor or trivial’.
28. Supplementary provisions for determining whether a person has a disability are found in part 1 of schedule 1 to the EqA. For example, schedule 1, paragraph 2 provides that the effect of an impairment is long-term if it has lasted at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person. Further if the impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day to day activities, it is treated as continuing to have that effect if it is likely to recur.
29. Schedule 1, paragraph 5(1) EqA provides that an impairment is treated as having a substantial adverse effect on the ability of the person concerned if measures are taken to correct it and, but for that, it would be likely to have that effect.
30. Schedule 1, paragraph 5(3)(a) EqA provides that paragraph 5(1) EqA 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.

31. The issue of whether a sight impairment is 'correctable' by means of spectacles or contact lenses is a practical issue to be decided on a case-by-case basis (**Mart v Assessment Services Inc 2019 ICR 1414, EAT**).
32. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the Guidance) under section 6(5) EqA. The Guidance states that the only effects on a person's ability to carry out normal daily activities to be considered are those which remain, or would remain, if spectacles or contact lenses are used (see para B15). Thus, a person is only disabled under the Act if that person's vision with the best spectacles or contact lenses is still impaired to a degree that substantially affects normal daily activities.
33. Day to day activities are things people do on a regular or daily basis and include travelling by various forms of transport and driving (Guidance, D2-D7).
34. The leading case on the examination of whether a person is disabled is the EAT decision of **Goodwin v Patent Office [1999] ICR 302**. While that case concerned the predecessor legislation to the Act, the four questions identified in Goodwin remain appropriate: (1) The impairment condition: Does the claimant have an impairment which is either mental or physical? (2) The adverse effect condition: Does the impairment affect the claimant's ability to carry out normal day-to-day activities, and does it have an adverse effect? (3) The substantial condition: Is the adverse effect (upon the claimant's ability) substantial? (4) The long-term condition: Is the adverse effect (upon the claimant's ability) long-term?
35. The time at which to assess the disability (i.e. whether there is an impairment that had a substantial adverse effect on normal day to day activities) is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd [2002] ICR 729, EAT**). This is also the material time when determining whether the impairment has a long-term effect.
36. The long-term requirement relates to the effect of the impairment (which must be a substantial adverse effect on the ability to carry out normal day to day activities), rather than merely the impairment itself (**Seccombe v Reed in Partnership Ltd EA-2019-000478-00**).

### Discussion / decision

37. I have considered each of the questions set out in **Goodwin** in turn.

*Does the claimant have an impairment which is either mental or physical?*

38. The respondent accepts that the claimant has the physical impairment keratoconus. It is documented in the medical records provided.

*Does the impairment affect the claimant's ability to carry out normal day-to-day activities, and does it have an adverse effect?*

39. The assessment of adverse effect is personal to the claimant. As the EAT in Goodwin observed: "The focus of attention ... is on the things that the applicant

either cannot do or can only do with difficulty, rather than on the things that the person can do.” The Guidance includes examples of day-to-day activities, such driving.

40. Appendix 1 to the Code states that ‘normal day-to-day activities’ are activities that are carried out by most people on a fairly regular and frequent basis and gives the example of driving.
41. The claimant’s evidence which I accepted was that from October 2022 her impairment of keratoconus had got worse. It had got worse such that she was scared to drive in the dark because she experienced double vision, saw “halos”, had blurring of vision and could not make out shapes clearly. This impacted her ability be in the office during working hours in the winter months as she could not drive in the dark.
42. The respondent challenged whether the claimant’s impairment of keratoconus affected her ability to carry out normal day to day activities and whether it had an adverse effect. It relied on the second OH report dated 4 January 2023., in particular that the claimant reported that her work duties were not impacted by her condition, “however driving in the dark can result in an increase in symptoms of anxiousness” and “Based on the information provided it appears that [the claimant’s] symptoms are related to perceived work-related stress triggers as mentioned above which are continuing to have a detrimental effect on her health rather than any underlying illness”.
43. The respondent asserted that it was not her keratoconus which affected her ability to carry out normal day to day activities but rather anxiousness. Anxiousness was not pled as an impairment / disability.
44. I have no reason to doubt the claimant’s evidence, given in her disability impact statement and in oral evidence. She said that she experienced double vision, saw “halos”, had blurring of vision and could not make out shapes clearly, when driving in the dark. I accepted that this was happening. This is consistent with what was recorded in the OH report in November 2022 where she told the doctor about a history of keratoconus which was becoming progressively worse and the optician’s report in November 2022 which referred to fluctuations in her prescription and that she was struggling with night driving.
45. I also accepted her evidence that she continued to experience double vision, saw “halos”, had blurring of vision and could not make out shapes clearly, when driving in the dark., once she got her new glasses from the optician. I accepted her evidence that she had stopped driving in the dark and that is still the case.
46. I considered it entirely understandable that as she was experiencing double vision, saw “halos”, had blurring of vision and could not make out shapes clearly this would also make her anxious. I did not agree that the second OH report in January 2024 discredited the claimant’s evidence about the adverse effects of her keratoconus impairment.
47. I was satisfied that the impairment did affect the claimant’s ability to carry out normal day to day activities and it had an adverse effect.

*Is the adverse effect upon the claimant's ability substantial?*

48. This is a question of fact. The effect must be "more than minor or trivial" (section 212(1) of the EqA).
49. The respondent challenged whether the adverse effect upon the claimant's ability the claimant's ability was substantial. The respondent asserted that as the claimant's vision was assessed as within the legal limit for driving in February 2024 it could not be substantial.
50. In determining whether an adverse effect is substantial, a tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability the claimant would have if not impaired – not what the claimant can do with what the average person can do (*Paterson v Commissioner of Police of the Metropolis* [2007] ICR 1522, EAT).
51. As already stated, I have no reason to doubt the claimant's evidence that she experienced double vision, saw "halos", had blurring of vision and could not make out shapes clearly, when driving in the dark. I concluded that these effects are "more than minor or trivial". They resulted in the claimant not being able to drive in the dark, even although her vision was within the legal limit for doing so.
52. For completeness, the claimant's evidence, which I accepted, was that keratoconus is not a condition which can improve or go away. There was no suggestion that her condition had improved in February 2024, such that she was within the legal limit for driving with glasses or contact lenses but had not been so previously.
53. Paragraph 8 of Appendix 1 to the Code states: "The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people".
54. Absent her keratoconus, the claimant's ability to drive at night would be considerably different – she could drive at night. Considering paragraph 8 of Appendix 1 of the Code, this difficulty is greater than those experienced by other people.

*Is the adverse effect long term?*

55. The claimant's keratoconus had worsened in early October 2022. It was then that she began to experience double vision, saw "halos", had blurring of vision and could not make out shapes clearly, when driving in the dark. Before early October 2022 she did not experience these effects.
56. The time at which to assess whether the impairment has a long-term effect is the dates of the alleged discriminatory acts. The first of these was on 13 October 2022.
57. Paragraph 2(1) of Part 1 of Schedule 1 EqA provides that the effect of an impairment is long-term if (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.

58. As already stated, the claimant's evidence, which I accepted, was that keratoconus is not a condition which can improve or go away. I have concluded that by early October 2022 the effects of her keratoconus impairment had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. This was before the first alleged discriminatory act on 13 October 2022.

59. The effects of her keratoconus impairment had not lasted for at least 12 months on 13 October 2022. However, keratoconus is not a condition which can improve or go away. When there is a worsening, those effects remain. I therefore concluded that on 13 October 2022 the effects of her keratoconus impairment were likely to last for the rest of the life of the claimant, so as to satisfy the description in paragraph 2(1) of Part 1 of Schedule 1 EqA.

### *Conclusion*

60. For the above reasons, the claimant was disabled by reason of her keratoconus at the time she asserts that the first discriminatory act occurred on 13 October 2022 and at all material times thereafter.

Employment Judge McCluskey

Date: 21 March 2024

JUDGMENT SENT TO THE PARTIES ON  
27 March 2024

For the Tribunal

### **Notes**

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