Neutral Citation Number: [2024] EAT 145

Case No: EA-2024-000343-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 August 2024

Before:

HIS HONOUR JUDGE BARKLEM

- -

Between:

MR IAN ESCUDIER

Appellant

- and -

COCA-COLA EUROPACIFIC PARTNERS GREAT BRITAIN LIMITED

Respondent

- -
- -

Mr Ian Escudier the **Appellant** in-person
No appearance or representation for the **Respondent**

HEARING DATE: 20 August 2024

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JUDGMENT

SUMMARY

Disability Discrimination

On the evidence, the finding of an employment tribunal that cough syncope, which results in the claimant experiencing a loss of consciousness for a short period of time on multiple occasions in the course of a year as not having a substantial adverse impact on his ability to carry out normal day to day activities was perverse. The finding that the condition was not likely to last more than 12 months was also perverse.

HIS HONOUR JUDGE BARKLEM:

1. This is an appeal against the decision of an Employment Tribunal sitting at Ashford, Employment Judge Martin, sitting alone. The judge was dealing with an issue which had been ordered to be determined prior to a full hearing, namely, whether the claimant was disabled due to Cough Syncope and/or anxiety and depression.

2. She answered both questions in the negative. The claimant sought reconsideration, which was refused, and he then appealed to the EAT. On the sift, Mrs Justice Eady, President, permitted the appeal to proceed to a full hearing in relation to paragraphs 4-6 of the notice of appeal, namely as to whether the employment tribunal erred in holding that the claimant's impairment due to suffering Cough Syncope did not amount to a disability for the purposes of the Equality Act.

3. In her reasons, Mrs Justice Eady noted in particular the tribunal's findings that the claimant's condition could result in a short-term loss of consciousness. Given what that would seem necessarily to imply in terms of the ability to carry out normal day-to-day activities, she considered it arguable that the tribunal erred in failing to hold that this gave rise to the required substantial adverse effect. She also found it arguable that the tribunal failed to engage with the implications of the medical evidence before it as to whether, at the relevant time, the effect was likely to last for more than twelve months.

4. The respondent, which I shall refer to as "Coca-Cola", has elected not to be represented at this hearing, although a lengthy skeleton argument had been lodged by Mr Goodwin of counsel on its behalf. Mr Goodwin had not appeared below.

5. By way of background, the claimant was dismissed on 26 July 2022 for misconduct. At the time he had a live final written warning in relation to earlier matters. His form ET1 ticked the boxes for unfair dismissal and disability discrimination. The narrative at box 8.2 referred to a serious injury at work in 2021 which had caused him ongoing neurological and other health issues. There was no

reference to either of the conditions which the employment Judge had to determine in this case, in the ET1 or accompanying documentation.

6. At a preliminary hearing on 21 July 2023, it was ordered that a further preliminary hearing be held to decide the issue of disability in relation to cough syncope, anxiety and depression. Mr Escudier represented himself at the hearing before me. He has no legal experience and the only issues he raised in relation to the respondent's skeleton argument were essentially procedural. Mr Escudier told me that he had felt at a disadvantage at the hearing below, as the bundle had been changed or renumbered, which had rather thrown him off-balance. He gave me some detail about his condition and its effects, although I pointed out to him that the EAT can deal only with matters of law and cannot determine or redetermine factual matters.

7. There were no documents in my bundle relating to medical evidence. Fortunately, the claimant had brought with him a bundle of documents which had been prepared for the tribunal hearing, and that included a letter from a consultant neurologist dated 28 June 2023 and which confirmed, this being a follow-up appointment, a diagnosis of cough syncope, noting that the blackouts tended to occur about twice a week. There is a reference to Home Video Telemetry suggesting that the investigations had taken some time and there is a reference to a follow-up appointment in twelve months' time.

8. After setting out the history of the matter, the respondent's skeleton argument makes a number of preliminary points relevant to the appeal; first the production of supplemental documents, and procedural points arising from those, second, matters relating to the legal issues which are engaged in the grounds of appeal, including a submission that one ground set out by Eady J was not in the grounds of appeal and there has been no application to advance it by way of amendment. It then goes through the legal issues arising from each ground of appeal.

9. Mr Escudier was a driver with Coca-Cola for over 30 years. I mean no disrespect at all to him when I say he would struggle to understand the legal arguments which were advanced, let alone respond to them. He has had some help from a solicitor on an *ad hoc* basis but is primarily dealing with this case himself.

10. With respect to Mr Goodwin and conscious of the industry which has gone into his submissions, I am prepared to allow a good deal of leeway in dealing with this appeal and will approach it in what I hope is a common-sense way, dealing with the substance of the issues which arise in the case and not the form. To the extent that permission is required to allow this, I grant it. Had the case been rejected at the sift but allowed following a rule 3(10) hearing, I have no doubt that an ELAAS representative would have applied successfully to re-cast the grounds and it would be wrong to deny the claimant the same opportunity by dint of his having bypassed that stage.

11. The relevant finding of the Tribunal in relation to Cough Syncope is at paragraphs 12-20 of the judgment:

> "12. **Cough Syncope** – this impairment has different symptoms. Dizziness and issues with an arm, which last about 30 seconds and loss of consciousness which is short term but means the Claimant must rest afterwards.
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> 13. I am looking at the evidence I have at the time of these issues. Not how the Claimant is currently. The only medical evidence is from a neurologist who examined the Claimant in June 2022. This raised the possibility of the Claimant having Cough Syncope. It was formally diagnosed in May 2023 after the termination of his employment.
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> 14. The Respondent accepts the Claimant has this impairment and that when there is an episode it is very unpleasant for the Claimant. The Claimant's evidence was that he had dizzy spells everyday. It was unclear from his evidence whether he was referring to how he is now, or how he was at the relevant time.
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> 15. I accept the Respondent's submission that the episodes of dizziness are very short lasting only about 30 seconds and that this does not have a substantial adverse impact on the Claimant's ability to carry out normal day to day activities. Once the dizzy spell is over it appears he can resume his normal day to day activities.
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> 16. The medical evidence is that the Claimant lost consciousness on about 5 occasions over the course of a year. Whilst I accept that the aftermath of this incident

> is that the Claimant must rest for a short while, he is then able to continue his normal day to day activities.
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> 17. I do not find that there is a substantial adverse impact on his ability to carry out normal day to day activities at the relevant time.
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> 18. I also do not find that at the relevant time that the condition was long term. I do not accept that the Claimant would have lost consciousness and not gone to see his GP or seek other medical help. This is something so out of the ordinary that medical assistance would inevitably have been sought if it had happened earlier.
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> 19. There is no medical evidence to suggest that it was likely to last more than twelve months. It is not a medical condition I am familiar with, and I would expect there to be evidence about this but there is none.
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> 20. I do not find cough Syncope to be a disability as defined in the Equality Act 2010."

12. There are, therefore, findings that there is a loss of consciousness, which is short term, that the neurologist examined the claimant in June 2022, and that there was a formal diagnosis in May 2023. There is reference to medical evidence that the claimant lost consciousness on about five occasions during the year, although I am not able to discern the source of that information. The consultant's letter refers to episodes occurring about twice a week in the sentence immediately after one reading: "He had another blackout a couple of days ago."

13. Much emphasis is placed in the respondent's submissions as to the claimant's reference, in new documentation, to HGV driving. I need not deal with that and I accept that the newly-produced evidence, which actually says that following a diagnosis of Cough Syncope a sufferer cannot drive any motor vehicle, is something which I may not have regard to on this appeal.

14. In my judgment, the failure to regard a condition which causes a person to lose consciousness for a short period of time on multiple occasions in the course of a year as not having a substantive adverse impact on a person's ability to carry out normal day-to-day activities, is perverse. It was also perverse to say that there was no evidence that the condition was likely to last more than twelve months. There was a finding on examination by a neurologist in June 2022 with a diagnosis just a year later, in a letter referring to ongoing treatment and a follow-up twelve months later.

15. The Employment Judge appears to have relied on her own view as to how a person losing consciousness would have behaved, but seems to have ignored the fact that, even if not in the GP notes, there had clearly been a referral to a neurologist about this condition. In these circumstances, I consider that the judge's finding as to Cough Syncope cannot stand and must be remitted. The finding in relation to the anxiety and depression stands.

16. There is no reason why the matter should be referred to the same judge. Mr Goodwin sensibly suggests that the issue could be determined at the outset of the liability hearing which is due to take place in October of this year. It will be a matter for the employment tribunal which deals with the matter to decide whether this can indeed be done. It seems to me that the matter would take very little time, assuming a pragmatic approach by both parties.

17. The claimant told me that he had had the benefit of BUPA cover in the past but that even with a subject data access request made to BUPA, he has not been able to obtain details of the medical professionals whom he saw in relation to his neurological conditions, including the Cough Syncope. Despite his best efforts, he simply cannot remember who the doctors were.

18. The claimant certainly went ill-equipped to the last hearing and if the employment tribunal is to be held in October to determine this issue, it would be wise for him to document in writing his recollection of the timetable of his condition, well in advance of that hearing. He was able to give me considerable detail at this hearing, although I, of course, ignored that in reaching my decision. Ultimately, if there is no more formal medical evidence, then the tribunal can only consider what he himself says his symptoms were, from when and how they affect him.

19. The employment Judge who dealt with this matter previously did not have the benefit of any information about this medical condition. As there is a formal diagnosis, it may be that the tribunal would be assisted by something as trite as documentation downloaded from the NHS website.

However, in saying that, I cannot and do not mandate how any future hearings should be conducted or what heed a tribunal should take of any material presented.