



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr C Pickering

v

The Secretary of State for Justice

PRELIMINARY HEARING

Heard at: Leeds

On: 10 June 2019

Before:

Employment Judge Rogerson

Appearance:

For the Claimant: Mr B Henry (Counsel)

For the Respondent: Mr A Serr (Counsel)

JUDGMENT

The claimant was a disabled person within the meaning given by section 6 of the Equality Act 2010 at the material time which was from 2 May 2018 for alleged discrimination from that date as identified in the claim form presented on 11 January 2019.

REASONS

1. I heard evidence from the claimant and saw a bundle of documents containing documents relied upon by both parties on the issue of disability.
2. From the evidence I saw and heard I made the following findings of fact

Findings of Fact

- 2.1. The claimant was diagnosed with Asthma in September 2015, by a Respiratory Nurse Specialist (page 105). He was at the time prescribed medication of Clenil and Salbutamol. This is 'preventative' medication which the claimant is required to take daily to prevent the symptoms of his asthma.

- 2.2. Since his diagnosis, he controls his asthma with medication and inhalers. He takes medication first thing in the morning and before he goes to sleep. He finds that if he does not take medication he quickly becomes short of breath and experiences tightness across his chest. He describes, substantial adverse effects on day to day activities of going up/down stairs when he is walking his dog, and showering. He describes the effects of shortness of breath and tightness which requires him to use his inhaler to control those effects.
- 2.3. The respondent sought advice on the question of 'disability' and the claimant had an 'in person', Occupational Health assessment on 11 April 2019. A report was prepared by Ms Rhona Hammal (page 149 – 151), an Occupational Health Advisor. The relevant parts of that report are at page 149:

'Current Health Issues'

"He is in receipt of medication for his asthma which was diagnosed in 2015/2016. He is required to take medication daily and in 2018 this was changed. He attends regular asthma review clinics at his GP Surgery and has increased his fitness regime with positive results"

'Current Outlook'

"Mr. Pickering has an underlying health condition that is likely to be long term. He is being assessed, regularly at his GP practice with appropriate support and advice regarding the management of his condition and the taking of his medication".

- 2.4. Ms. Hammal concludes that in her view ***"Mr. Pickering is likely to be considered disabled because his asthma has lasted longer than 12 months, is likely to recur and would have a significant impact on normal daily activities without the benefit of treatment."***
- 2.5. Ms. Hammal also refers to documentary evidence the claimant provided and a list of medication he is required to take on a daily basis to treat/control his asthma.
- 2.6. I had the benefit of seeing the claimant's GP records. At page 79 there is a list of the medication prescribed which includes repeat prescriptions for asthma medication. Mr Serr points to a gap in the prescription records from January 2016 to 11 April 2018.
- 2.7. Mr Pickering could not explain the gap in the records, although he has moved house and has moved his GP practice. He confirmed that he has always taken the prescribed medication, two puffs twice daily regularly because of his asthma.
- 2.8. There is no evidence t.

- 2.9. -+o suggest the claimant's 'asthma' disappeared in this period of time when there appears to be a gap in the records. It is clear from the records provided that not all prescriptions are recorded on the GP's notes, for example the medication prescribed in 2015, when the claimant was diagnosed with asthma, is not in the records. I accepted the claimant's oral evidence that since his diagnosis in 2015 he has always taken preventative medication for his asthma. Without that medication he suffers with breathing difficulties and tightness in the chest and wheezing. Mr. Serr asked the claimant the question "leaving aside your medication, no symptoms of asthma?". The claimant replied the symptoms of his asthma were under control with the medication, but he had to have medication. It was not a condition where the claimant could 'leave aside' the medication. He took medication to treat his asthma out of necessity not choice.
- 2.10. Mr. Henry has helpfully referred to the "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)". Specifically:
- 2.10.1. Paragraph A5: which refers to disabilities that can arise from a wide range of impairments and gives an example of organ specific including respiratory conditions such as asthma
- 2.10.2. Paragraph B12: that where an impairment is subject to treatment the impairment is to be treated as having a substantial adverse effect if, but for the treatment the impairment is likely to have that effect. In this context 'likely' should be interpreted as meaning could well happen. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (schedule 1 paragraph 5(1)).
- 2.10.3. Paragraph C5: deals with 'likely to recur' – if the substantial adverse effects are likely to recur they are to be treated as if they are continuing.
- 2.10.4. The appendix lists examples of daily activities it would be reasonable to have regard to in considering substantial adverse effect on normal day to day activity and include:
- Difficulty going up or down steps, stairs or gradients: for example, because movements are painful; fatiguing or restricted in any way
 - Inability to walk without difficulty
- 2.11. Section 6 of the Equality Act 2010 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 that person's ability to carry out normal day to day activities.
- 2.12. Applying the law and the guidance, to the findings made at this hearing and the helpful occupational health assessment conducted by the respondent in

April 2019, I was satisfied the claimant has proved he meets all 3 requirements of section 6 of the Equality Act 2010. He has a physical impairment of asthma, which he has had since 2015, which is likely to last for the rest of his life/ is likely to recur and is long term. Without medication, the asthma, substantially adversely effects the claimant's ability to carry out normal day to day activities (it causes breathing difficulties, and tightness in his chest, when walking up or down steps, making movement painful and restricted).

- 2.13. The respondent's occupational health adviser has carried out a face to face examination and concludes the claimant is likely to meet the requirements of section 6, because the effects of medication taken, to control the asthma must be ignored in assessing disability. I agree with that assessment.
3. For those reasons the claimant was a disabled person at the material time from 2 May 2018, for the purposes of alleged disability discrimination identified in his claim form presented on 11 January 2019.
4. The hearing will proceed as listed on 20 – 27 September 2019. Case management orders have already been made. No further orders appear to be required. If either party thinks an order is required an application should be made to the Tribunal promptly.

Employment Judge Rogerson

20 June 2019

Sent to the parties on:

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For the Tribunal:

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