



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss E Packwood

**v CP Woburn (Operating Company)
Limited**

PUBLIC PRELIMINARY HEARING

Heard at: Watford (by CVP)

On: 4 October 2024

Before: Employment Judge Wyeth

Appearances

For the Claimant: Mrs H Packwood (the claimant's mother)

For the Respondent: Mr M McBride (Solicitor)

JUDGMENT

1. The claimant's impairment of Rolandic epilepsy was a disability until 2012 so as to fall within section 6(4) of the Equality Act 2010 ("the Act"). Accordingly the claimant meets the definition of disability by reason of this past disability so as to be covered by relevant provisions of the Act.

REASONS

Introduction

1. This matter came before me today (4 October 2024) listed for a public preliminary hearing ("PPH") for one day. Amongst other things, the purpose of this PPH was to determine whether the claimant was a disabled person as defined by s6 of the Equality Act 2010 ("EqA") by reason of impairments of autism and/or Rolandic epilepsy.
2. On 6 September 2024, the respondent wrote to the tribunal conceding that the claimant's autism was a disability but disputing that the claimant suffered with Rolandic epilepsy during her employment (October 2022 to March 2024) and whether it amounted to a disability when she did suffer

with it as a younger child. Accordingly the purpose of the hearing today was to determine the claimant's disability status in respect of her epilepsy.

3. Having given clear instructions at an earlier case management hearing about what should be included in the bundle for today's preliminary hearing and its size limit (at paragraph 20 of my previous order) it was unfortunate that the bundle of documents for this hearing extended to 559 pages. I have made observations about this in a separate case management order that do not need to be repeated in this decision. Aside from a number of medical documents being duplicated, most of the excess was made up material that was not relevant to the issues to be determined. Accordingly I explained to the parties that I would only be reading documents that I was directed to by the parties or that I deemed to be relevant to the question of the claimant's disability.
4. A large section of the bundle before me (section 2) was devoted to medical and other evidence regarding the claimant's disabilities. The claimant had produced a document that had been prepared on her behalf at pp327 to 431 described as her impact statement. Cut and pasted into that impact statement throughout was medical evidence and correspondence upon which she relied (some of which was already included by the respondent in the earlier part of section 2) that was not in chronological order.

Today's hearing

5. The claimant was cross examined by Mr McBride who was sensitive to the claimant's difficulties when giving evidence. I also made allowances for the claimant and permitted Mrs Packwood to provide the claimant with some assistance when giving her evidence but not to the extent that resulted in the claimant's evidence becoming something other than her own. Furthermore, Mrs Packwood directed me to particular pages within the claimant's evidence that she wanted to emphasise as important to this issue.
6. After hearing oral evidence and submissions from both sides, the parties agreed that I should also read and consider the various occupational health reports that were included in section 2 of the bundle. I indicated that I would reserve Judgment to enable me to reflect on the evidence and consider that additional material.

The issues

7. Given the concessions and position taken by the respondent since the previous case management preliminary hearing, the issues to be determined today had moved on slightly from when they were identified in my previous case management order. I set them out below.
 - 7.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 ("EqA") at the time of the events the claim is about? It is not disputed that the claimant previously had the

condition of Rolandic epilepsy. The respondent disputes that she continued to have the impairment at the time she was employed and maintains that the effects of it when she did have the condition were not such that it met the definition of being a past disability for the purposes of s6 EqA

- 7.2 The Tribunal will decide:
- 7.2.1 Did the claimant still suffer the impairment of Rolandic epilepsy during and up to the termination of her employment?
- 7.2.2 During the existence of the impairment, did it have a substantial adverse effect on her ability to carry out day-to-day activities?
- 7.2.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
- 7.2.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
- 7.2.5 Were the effects of the impairment long-term? In particular when did they start and:
- 7.2.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
- 7.2.5.2 if not, were they likely to recur?

The evidence

8. The claimant was diagnosed with Rolandic epilepsy when she was two and has been seizure free since 2012 (from the age of seven). Page 346 of the claimant's impact statement deals with the question of when she says the impairment started and stopped. Indeed, she has recited the questions in the issues at paragraphs 15.3 and 15.4 of my previous Case Management Summary at the top of that page. The claimant relies upon extracts from a website explaining the nature and effects of Benign Rolandic Epilepsy. From the claimant's own evidence it is clear that Rolandic epilepsy is a childhood condition and is the most common epilepsy syndrome in children. It can start anywhere between the ages of 1 to 14 years. Adults are not affected.
9. It is difficult to follow the claimant's impact statement because, as noted above, she has cut and pasted extracts of medical evidence into this document and these entries are not in chronological order. The claimant

has also included material about conditions that she has not identified as relying on for the purposes of disability.

10. On page 330 the claimant refers to experiencing febrile convulsions on 7 March 2006, at 13 months old. In August 2007 the claimant was diagnosed with epilepsy at the age of two. Consistent with the medical records, the claimant states on page 369 that she was first prescribed sodium valproate on 12 November 2008 until 7 February 2012. According to her statement, the last grand mal seizure she experienced was on 12 April 2012.
11. Tonic-clonic seizures are synonymous with grand mal seizures (to which the claimant refers in her evidence). Grand mal seizures result in a loss of consciousness. On page 418 (a report prepared by various medical practitioners at Great Ormond Street Hospital following assessment of the claimant on 29 April 2013), there is a reference to the claimant's mother describing one example of the claimant suffering "a generalised tonic-clonic seizure with jerking all over". In contrast, symptoms of partial complex seizures are more akin to day-dreaming and tend to last relatively short periods of time, usually for a matter of minutes although they can impact on an individual's ability to communicate for however long they last.
12. There is a letter from Dr Alison Salt, consultant paediatric neurologist at the Great Ormond Street Hospital dated 24 September 2013 on p374 to the claimant's mother. By the date of this letter the claimant was 8 years old. The purpose of the letter is to address the claimant's epilepsy. It contains the following extract:

"I have read through the information that you kindly sent us about Elise' epilepsy investigation and management. As Elise has now been seizure free for almost 2 years and off medication, I think she should be managed like any other child, although of course taking consideration of her autism. I do not think she needs a care plan in relation to her previous epilepsy. Her Brownies group might find it useful to have some general guidance in the unlikely event she has another seizure and I attach these. I'm sure they would normally have a contact number for you as well in case they need to contact you in an emergency.

I think some of the more complex behaviours that you describe in your email are much more likely to be due to Elise' autism (i.e. jumping up and down) rather than epilepsy.

Also it is true that brief episodes like these are not harmful (even if they did represent brief seizure activity although [sic]) and no particular action needs to be taken. It is only generalised seizures that require immediate management (as in guidance attached) and these are the only events that the Brownies group need to be concerned about.

Although as I say being seizure free off medication for so long makes a recurrence of seizures much less likely" [my emphasis added].

13. On page 319 there is a letter dated 22 February 2021 from Dr Krishnakumar, consultant paediatric neurologist, recording that the claimant had a previous history of epilepsy from 2002 to 2012. Clearly that time span referenced towards the start of the letter is wrong because the claimant was not born until 2005.
14. The neurologist records that the claimant has had "...no bad headaches for two years but mild headaches 2 to 3 times a week lasting 30 minutes; mild nausea, no vomiting. Some episodes of headaches associated with mild numbness but no definitive weakness. Headaches associated with visual phenomenon – shapes and colours in her eyes-one to 2 times a week."
15. Following that appointment, the claimant attended accident and emergency on the 8 March 2022 with a migraine that had caused numbness of her face. The notes on page 324 record that the claimant had previously refused oral tablets at that time but was keen to reconsider.
16. On p295 there are notes of a meeting on 15 June 2023 with an (unidentified) occupational health doctor, presumably Dr Roddah. Mrs Packwood is asked if the claimant's epilepsy affects her day-to-day life and she replies "no". The claimant's father confirmed that the claimant had not had a seizure since 2012. Indeed there are repeated references throughout the evidence to the fact that the claimant has been seizure free since 2012 and accordingly, I accept this to be the position. Notably Mrs Parkwood tells Dr Roddah that, in respect of her epilepsy, the claimant was discharged in 2019. Mrs Packwood also states that the claimant's specialist said "years ago" that if the claimant is not having seizures for a year "she can go on to lead a normal life, but it would always be on medical record [sic]".
17. When asked about the claimant's migraines, Mrs Packwood replied that the claimant has only had two in the last four years and that she gets advanced warning. In her oral evidence today, the claimant indicated that she had not had a migraine since December 2023. Accordingly, migraines are a very infrequent occurrence for the claimant.
18. Consistent with the above, in his report of the same date (15 June 2023) on page 298, presumably to the respondent, Dr Roddah writes:

"Hemiplegic migraines, as referenced in the care needs assessment – which causes her stroke like symptoms, but Elise's parents say this occurs rarely – twice in the past four years and it is preceded by an aura beforehand".
19. Dr Roddah goes on to record:

"There is a mention of complex partial seizures occurring when Elise is stressed; her parents say she has not had a full grand mal seizure since 2012 and sometimes gets twitching/lip smacking which is barely noticeable."

20. In a medical questionnaire completed by her GP, Dr Patel, on 19 July 2023 on p300, Dr Patel refers in box 2 to the claimant's epilepsy. Notably he states:

"EEG in 2012 suggestive of benign Rolandic epilepsy, seizures controlled on sodium valproate and Lamotrigine but weaned off medications in 2012, no seizure since. Normal brain MRI 2011."

21. In the same box, Dr Patel makes reference to "hemiplegic migraines". Dr Patel says: "major episodes involved weakness on left side and facial weakness. Reports no significant episodes for three years, but now occasional mild headache without other symptoms that resolves quickly with paracetamol". I interpose here to note that reference to an apparent diagnosis of "hemiplegic migraines" by the GP appears to be responding to something taken from the care needs assessment and is not something that is supported by the specialist medical evidence of Dr Krishnakumar, the claimant's consultant pediatric neurologist (see above). For the most part, that care needs assessment appears to have been based upon information provided to the assessor by the claimant's mother. More specifically it is part of a list of asserted "diagnoses" listed on p264.
22. On page 302, when asked about the claimant's most recent tonic-clonic seizures, the claimant's GP indicates that she has had no seizures since 2012. It is apparent that Dr Patel is not satisfied that he is the appropriate person to advise on the suitability of the outdoor activity/high ropes role for the claimant. Because of that, he indicates that he has written to a neurological specialist to obtain a prognosis regarding the potential impact of the claimant's epilepsy and hemiplegic migraines (p301).
23. This is followed by a letter from Dr Patel dated 1 November 2023 to the respondent's HR advisor, Nick Clifford (page 376) informing Mr Clifford that the claimant had been seizure free for 11 years and had not had a migraine for three years. Dr Patel also notes in that letter that the neurologist he had been in touch with, Dr Danute Kucinskienne, had advised: "Thank you for referral [sic]. If the patient is seizure free for 11 years, she is able to undertake a new role" [again, my emphasis]. Notably I have seen no disclosure of any letter from Dr Patel to the neurologist or indeed Dr Danute Kucinskienne's reply. I assume that the respondent has not been provided with this correspondence either, which is surprising.
24. Not only do I find that this single sentence remark of Dr Kucinskienne (recited by Dr Patel in his letter) provides no assistance to me in determining the disability issue, I observe that on any objective basis it also appears to be of very little value in terms of assessing the claimant's suitability for the outdoor activity/high ropes instructor role. It is impossible to know the context in which Dr Kucinskienne apparently offered that one line response to Dr Patel or the extent to which he took in to account all relevant factors including the demands and risks of *the* (rather than "a") new role, before responding in that way. Indeed, whilst this is not strictly relevant to

the matter in hand today, it is not at all clear whether Dr Kucinskienne knew of, or had taken in to account, the significance of the manifestation of the claimant's autism and how that might impact on her ability to perform the outdoor activity/high ropes instructor role when giving this bare statement unsupported by any reasoning.

25. All other medical evidence produced relates to autism (which the respondent has conceded amounts to a disability for the purposes of the EqA) and other conditions that are not relied on for the purposes of disability and is therefore not relevant to my decision.

The relevant law

26. Under section 6(1) EqA, a person has a disability if she has a physical or mental impairment which has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.
27. In essence, there are four separate questions to be determined:
 - 27.1 Did the claimant have a mental and/or physical impairment? (the 'impairment condition');
 - 27.2 Did the impairment affect the claimant's ability to carry out normal day to day activities? (the 'adverse effect condition');
 - 27.3 Was the adverse condition substantial? (the 'substantial condition');
 - and
 - 27.4 Was the adverse condition long term? (the 'long term' condition).

The above questions should be posed sequentially and not together (Goodwin v Patent Office [1999] ICR 302 EAT; J v DLA Piper UK LLP [2010] ICR 1052 EAT). Nevertheless in doing so it is important not to lose perspective of the 'whole picture' (Goodwin).

28. Part 1 of Schedule 1 EqA provides supplementary provisions for determining whether a person has a disability. In particular, under paragraph 2(1), an impairment will be long-term if it has lasted or is likely to last for at least 12 months. In this context "likely" should be interpreted as meaning "could well happen" (Boyle v SCA Packaging Ltd [2009] UKHL 37).
29. Paragraph 2(2) of Schedule 1 adds: "if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur"
30. Furthermore, under paragraph 5(1), an impairment is to be treated as having a substantial adverse effect described in s6(1) if measures (which includes medical treatment – para 5(2)) are being taken to treat or correct it, and but for that, it would be likely to have that effect.
31. At s212 EqA "Substantial" is defined as more than minor or trivial.

32. When assessing whether an impairment has a substantial adverse effect on day to day activities, it is necessary to consider whether the claimant is affected to a more than minor or trivial extent in carrying out day-to-day activities (which, in the case of an adult, may include work activities) as a result of the impairment in comparison to what the situation would be if the claimant did not have the impairment (Elliott v Dorset County Council [2021] IRLR 880 and Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522).
33. In addition, this tribunal is obliged under paragraph 12 of Part 2 of Schedule 1 to take account of the content of “Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011” (here after referred to as “the Guidance”) which came in to force on 1 May 2011, having been issued in accordance with s6(5) of the Act.
34. The Guidance emphasises at paragraph B9 that it is important to focus upon what a claimant cannot do or can only do with difficulty rather than what a claimant can do.
35. B12 of the Guidance states that the Act provides that where the impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. The practical effect of this provision is that the impairment should be treated as having the effect that it would have had without the further measures in question.
36. Paragraph C2 of the Guidance also explains that the cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person. The substantial adverse effect of an impairment which has developed from, or is likely to develop from another impairment should be taken into account when determining whether the effect has lasted or is likely to last at least 12 months or for the rest of the life of the person affected.
37. The time at which to assess the disability question and whether any impairment has a long-term effect (the material time) is the date of the alleged discriminatory act (Cruickshank v VAW Motorcast Ltd [2002] ICR 792).
38. Section 6(4) and paragraph 9 of Schedule 1 EqA extend the protection afforded to those with current disabilities to those who have had a disability in the past. Paragraph 9(2), Sch 1 makes it clear that it does not matter that the disability was experienced at a time prior to the provision of EqA were in force.

Discussion - applying the relevant law to the facts

39. When addressing the issues relevant to determining disability status (identified at the outset above) the real focus of this matter is on the question of whether the claimant's Rolandic epilepsy had a substantial adverse effect on her ability to carry out day to day activities. By way of reminder, 'substantial' is defined in the statute (s212 EqA) and the Guidance has a limited role to play in determining that issue (see the EAT in Elliott). Anything more than minor or trivial will be substantial in terms of adverse effect.
40. On the basis of the evidence before me I have no hesitation in concluding that the claimant is no longer disabled by reason of Rolandic epilepsy. It is apparent from the various contemporaneous representations made by the claimant's parents and numerous references by the claimant's various treating clinicians that the claimant has been seizure free since 2012. Furthermore, it is abundantly clear from Dr Salt's prognosis in September 2013 that any impact the claimant's epilepsy had on her day to day activities had ceased by that point and the chance of those effects recurring was not likely then and is not likely now. Need it be said, when determining what is likely, I have in mind the test of 'could well happen'.
41. I also note that the claimant ceased to take sodium valproate and Lamotrigine, used to control her epilepsy, in 2012 and in the absence of that medication has remained free of seizures involving loss of consciousness thereafter.
42. I have given careful thought to the relevance of the claimant's hemiplegic migraines and whether these had or have any bearing on the issue of whether the claimant's epilepsy continues to be a disability for the purposes of the EqA. There is nothing in the medical evidence to suggest that the migraines the claimant has suffered are in some way a symptom or linked to the claimant's epilepsy or connected in any way. Accordingly I am satisfied that they have no bearing on the question of whether the claimant's Rolandic epilepsy is an existing disability for the purposes of EqA. On the contrary, the evidence demonstrates that they are independent of any condition of epilepsy. It has already been established that the claimant does not rely on migraines as a stand-alone disability. As such I am doubtful that I need to address the position relating to them. Nevertheless, for completeness and in case I am mistaken as to their relevance I have reached the following conclusions from the evidence.
43. The claimant says in her impact statement that she was diagnosed with hemiplegic migraines on 16 July 2019 (p334). The medical evidence does not support this assertion. The letter from Dr Krishnakumar, the claimant's neurologist, of the same date refers to one episode of an acute headache in April during football training. At the outset of her letter, Dr Krishnakumar lists a total of six "Problems" the first of which is recorded as "1. Headaches ?Migraine". There is clearly a query about whether the claimant was suffering migraines and no reference at all to there being a problem of hemiplegic migraines. Furthermore, having had a follow up in 2021, Dr

Krishnakumar, records that the claimant had had no bad headaches for two years (i.e. since 2019 when she first saw the claimant about this problem) but mild headaches two to three times a week lasting about 30 minutes.

44. On the basis of this evidence I find that although the claimant had a problem of an acute headache in April 2019, thereafter she was suffering mild headaches only. There is no evidence before me demonstrating that these milder headaches had a substantial adverse effect on the claimant's day to day activities. Even if it could be said that the earlier problem of an acute headache referred to in April 2019 did have a substantial adverse effect on her day to day activities, in accordance with Dr Krishnakumar's assessment in 2021 it is evident that this was not long term as it did not last more than twelve months and amounted to nothing more than a short term condition. Furthermore, the claimant's GP recorded in July 2023 that the claimant had suffered "no significant episodes for three years but now occasional mild headache without other symptoms that resolves quickly with paracetamol." It is not for this tribunal to look behind that evidence.
45. All of this is consistent with the claimant's mother's insistence in June 2023 that the claimant had only had two migraines over a period of four years. Presumably the second incident of a migraine to which the claimant's mother is referring is the one the claimant suffered on or around 8 March 2022. As identified above, there is, of course, the report sent to her GP's surgery of the claimant attending Bedford Accident and Emergency on 8 March 2022 with a migraine. The claimant's GP has disregarded this in his assessment of her migraines and therefore I conclude from the evidence that this was not considered to be relevant.
46. The claimant said in evidence that she had a migraine in December 2023 but she gave no indication of this impacting on her day to day activities. In any event, there is no record of this in her medical evidence nor is there any medical evidence to suggest that this was anything other than a one off ailment unconnected to anything previously encountered. As I have already stated, there is no evidence to suggest that the acute headache (or migraine) in 2019 was linked to a further migraine in 2022 and a subsequent one said to have occurred in 2023.
47. On the evidence before me I find that these sporadic migraines (three in the space of five years) were exactly that – sporadic and infrequent and nothing other than one off short term episodes of illness that were not part of any continuing underlying condition. There is no evidence to support any conclusion to the contrary. Accordingly these are of no relevance either on their own or in relation to the claimant's Rolandic epilepsy.

Past disability (s6(4) and para 9, Sch 1 EqA)

48. Despite the fact that the claimant was not disabled by reason of Rolandic epilepsy from 2013 onwards, that is not the end of the matter. It is still necessary to determine whether this impairment did amount to a disability

previously so as to be a past disability for the purposes of s6(4) and para 9 of Schedule 1 EqA .

49. I see the force of the submissions on behalf of the respondent that there is not on the face of it a great deal in the way of evidence that addresses the question of how the claimant's Rolandic epilepsy impacted upon her ability to carry out day to day activities when she was suffering the symptoms. To that extent it is not entirely surprising that the respondent seeks a ruling on this issue from the tribunal and resists any suggestion that the claimant met the definition. Nevertheless, whilst there may be little evidence, that is not to say there is no evidence at all as to the impact on the claimant's ability to carry out day to day activities, and what does exist is significant.
50. The claimant has produced medical evidence that she was diagnosed with epilepsy in August 2007 (at the age of two) and that she suffered grand mal seizures until 2012. That is important evidence that cannot be ignored. Indeed, from this there is no doubt that the claimant suffered seizures that caused her to lose consciousness until the age of seven years old during her formative childhood years. It stands to reason that she was also at risk of losing consciousness at any unforeseen time.
51. When considering the question of whether the effects of an impairment have a substantial and long term adverse effect on her ability to carry out day to day activities in accordance with Elliott and Paterson it is necessary to look at how it impacts upon *her* abilities taking account of how things might be if she did not have the impairment. It is not a direct comparison with the population at large.
52. I am also mindful of the fact that day-to-day activities for a child of primary school age are very different to the day to day activities of an adult. Whilst it could be said that the risk of, and actually, losing consciousness at unforeseen times is likely to have a more serious impact on an adult who has greater demands and responsibilities than a child (e.g being unable to drive or operate dangerous machinery) that is not the comparison I am required to make.
53. It only requires the application of common sense to appreciate that she was in the formative years of her childhood when suffering the effects of this impairment and would have been learning the basics of life and play at this time. Her day to day activities would undoubtedly involve being able to engage in activities with other children in groups such as Brownies as evidenced in the correspondence of Dr Alison Salt on p374. As that letter of 24 September 2013 refers, it is only when she is free of seizures that she is able to be "managed like any other child". Need it be said, for as long as she was at risk of seizures she was at risk of serious harm or potential death if she participated in usual childhood activities such as swimming, cycling, climbing, and performing. This is reflected in the fact that even after being seizure free, Dr Salt talks about the possibility of needing to be contacted Mrs Packwood in the event of an emergency.

54. There can be no doubt that the risk of losing consciousness would have created difficulty going outdoors unaccompanied. Her ability to engage with other children would have been significantly impeded when she was experiencing a seizure. There can be no doubt that she would have been excluded from numerous activities or at the very least restricted in terms of her ability to participate simply by reason of the fact that she was at risk of harm to herself and possibly others because of this condition.
55. Evidently the claimant was having these seizures despite being on sodium valproate to control her epilepsy. Whilst I am cautious about drawing any conclusions of the deduced effect in the absence of direct medical evidence dealing with the issue, it must be right that the claimant's condition and the impact of her epilepsy was only likely to be exacerbated in the absence of that medication until such time as it became apparent that the seizures had ceased.

Conclusion

56. For all the above reasons I am satisfied that the adverse impact the claimant's impairment of epilepsy had on her day to day activities arising from the loss of consciousness and the risk of this happening (that could only have been worse in the absence of medication) was more than minor or trivial and thus substantial in accordance with section 6 EqA. Accordingly I find that the claimant was disabled for the purposes of the EqA by reason of her past disability of Rolandic epilepsy.

Employment Judge Wyeth

Date: 10 November 2024

Sent to the parties on: 20/11/2024

N Gotecha

For the Tribunal Office