

Appeal No. UKEATS/0032/18/SS

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 16th May 2019
At 10.30am

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

Mrs Ellen Mart

APPELLANT

Assessment Services Inc.

RESPONDENT

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant

In person

For the Respondent

Mr Brian Napier QC
Instructed by:
Harper Macleod LLP
The Ca'd'oro
45 Gordon Street
Glasgow
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THE HONOURABLE LORD SUMMERS

1. I heard parties in this appeal on 16 May 2019. The case was based on the proposition that the Respondents had discriminated against the Appellant on the ground of her disability. The disability in question was diplopia. In the Preliminary Hearings there was some discussion as to whether other disabilities were part of her case. These included facial disfigurement and anxiety and depression. The Appellant however chose to base her case on diplopia. The clearest expression of this is found in her email of 10 April 2018 enclosing a letter from Dr Boyle where she stated, “my indirect discrimination claim is for diplopia” and “I am not claiming for facial disfigurement. I have suffered from anxiety and depression throughout my life owing to this disfigurement...”. The Respondents prepared for the hearing on this basis and did not seek to address the possibility that diplopia had interacted with or exacerbated her disfigurement or anxiety and depression.
2. The appellant argued that the Employment Judge had taken an excessively narrow view of her case. While she accepted that diplopia was her key disability she pointed out that the contact lens that she had been prescribed to correct the effects of diplopia or double vision had other side effects. It was disfiguring in the sense that it was cosmetically unattractive. I am advised that in occluding the vision of that eye it corrected her double vision but it visibly blacked out that eye. She submitted that the contact lens which corrected her diplopia had disfiguring side effects. She also argued that a consequence of wearing the lens was that her peripheral vision was restricted and that the lens had not therefore corrected her diplopia.
3. In my view the Employment Judge was only required to deal with the question of whether the diplopia was a disability (para. 62-63 of Judgment). He was not required to consider

whether the cosmetic issue referred to above and the anxiety also referred to above were disabilities (see para. 67). I agree that this would have required an amendment. This was not therefore a case based on disfigurement. The suggestion by the sift Judge that it was arguable that her condition was a disfigurement within paragraph 3 of Schedule 1 of the Equality Act 2010 is not in my view sound. The Appellant's claim is based on a specific disability viz. diplopia and other grounds such as disfigurement were excluded in the pre-Hearing discussions.

4. The key issue is whether the Employment Judge's interpretation of schedule 1 of the Equality Act 2010, paragraph 5(1) and 5(3) is correct. It excludes from the ambit of "impairment" cases where the impairment is an impairment of vision and the impairment is "in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed". Here the consultant Dr Boyle (tab 6; letter 5 March 2018) expressed the view that the lens in her left eye "would resolve her symptoms". It was confirmed that the lens did indeed resolve her symptoms of double vision. As I have indicated I do not consider that the Appellant is permitted to rely on consequential cosmetic consequences or anxiety and depression. Had she wished to do so evidence would have been required and the claim would have to been placed on a broader footing. This was not done.
5. There is a further question however as to the meaning of the word "correctable". If the lens corrected the diplopia in the sense that it removed the double vision but did so "at a cost", is it legitimate to take into account any adverse consequences of the correction? In this case it might be argued that the disfiguring effect of the lens and the anxiety and depression to which it was said this gave rise meant that the lens was not in practical terms capable of correcting the impairment. Mr Napier QC pointed out that the sub-paragraph did not state that the word "correctable" was subject to any proviso such as, "provided it is reasonable in

all the circumstances for the person to wear the... contact lenses...”. This is true. The consequence of this interpretation however would be that no account should be taken of practical impediments to the use of lenses e.g. dryness of the eye, susceptibility to infection.

6. In my opinion whether or not an impairment is “correctable” is a practical issue. I consider that regard could properly be had to whether the impairment (such as diplopia) was resolved by use of the lens but also whether the resolution brought with it unacceptable adverse consequences e.g. eye discomfort or infections. In my opinion whether the impairment is “correctible” is a matter to be judged on a case by case basis having due regard to the factual context and not just whether the sight impairment is resolved by the use of spectacles or lenses.

7. In this case there was no dispute that the lens corrected the problem with double vision and there was no indication in the evidence that the side effects were such as to make the use of a lens unacceptable or unworkable. It is plain to me that while loss of peripheral vision may have occurred to some extent there was no evidence before the tribunal that this was such a significant side effect that the lens could not be said to provide a practical solution to her diplopia. If the Appellant had wished to base her claim on the ground of facial disfigurement then no doubt the role of the lens could have been considered in the context of such a claim. I do not consider however that it intrudes into the question of whether her diplopia is truly “correctable”. There was equally nothing to suggest that her anxiety and depression was connected to the use of the lens or that she had sought to present such a claim to the Tribunal. This is not a case where the use of a lens was a theoretical solution rather than a real solution.

8. In these circumstances I will uphold the decision of the Employment Judge and refuse the appeal.