



EMPLOYMENT TRIBUNALS

Claimant: Ms S Brennan

Respondent: Lewis's Home Retail Limited

HELD AT: Liverpool

ON: 12 January 2018

BEFORE: Employment Judge Morris

REPRESENTATION:

Claimant: Mr R Lassey, Counsel

Respondent: Ms L Gould, Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that at the time of the alleged discrimination against her, the claimant was a “disabled person” as that term is defined in section 6 of the Equality Act 2010.

REASONS

1. The purpose of this preliminary hearing is to determine the discrete issue of whether or not the claimant is a “disabled person” as that term is defined by section 6 of the Equality Act 2010 (“the Act”).
2. Helpfully and rightly, the respondent has accepted that the claimant suffers from asthma and therefore has an impairment, and does not dispute that any effect of that impairment is long-term. On the evidence before me I so find not least because the statutory guidance that I am required to take into account specifically refers to asthma as an impairment.
3. The issue, however, is whether that impairment has a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. In this respect the parties are agreed, first, that the effect of treatment (in this case inhalers used by the claimant) must, in effect, be disregarded (see Schedule 1 paragraph 5 of the Act) and, secondly, with reference to section 212(1) of the Act, that “substantial” is defined as being more than minor or trivial; that reflecting earlier case law.

4. The claimant's evidence is clearly set out in her witness statement and relates to her sleepless nights and difficulty in undertaking what she refers to as "meaningful exercise", even after having taken her reliever inhaler beforehand. She cites jogging, walking outdoors and climbing stairs at home, the latter of which she says can take her some 5-10 minutes. She also states that she is unable to carry even moderately heavy objects such as the washing basket all over around the house and cannot change in bedding without needing to lie down to relieve the symptoms.

5. As submitted on behalf of the claimant, I have had regard to the Statutory Guidance, as I am obliged to do, such as comparing the claimant with people without the impairment and the cumulative effect of the impairment.

6. For the respondent it is submitted that the claimant has overstated or exaggerated the impact of her impairment. Counsel points particularly to the claimant having been able to undertake, for the respondent, her quite physical work on the shop floor for four hour shifts without a formal break and not having said that she needed an inhaler at work. Given this inconsistency in the claimant's account Counsel suggests that the Tribunal cannot be satisfied about the veracity of the claimant's account.

7. If, however, there is a conflict between what the claimant says she cannot do and the respondent says she can do, it is right, as has been accepted on behalf of the respondent, that my focus must be on what the claimant cannot do rather than what she can do; and I accept her explanation that while at work she does not, for example, lift heavy weights as there are other employees to do that, and even without a formal break in her four hour shift she takes informal what I might term (not her word) 'breathers' by sitting down, going to the toilet or having a drink.

8. I have not been helped in making my decision in this regard by the absence of any form of medical report, if not from an expert (which might have been disproportionate) at least a letter from the claimant's GP, and it might be that I should draw an adverse inference from that. I have had that in mind. What I do have, however, are fairly detailed medical records. On one point of detail, pages 13 to 16 out of 27 of those records are missing. I am satisfied that that does not reflect badly on the claimant personally. In any event I note that they would have covered the period from February 2010 to September 2014, which is not directly relevant to the issues before me given the acceptance that any effect is long-term. More particularly, the records I do have are relevant to the time in question. They are not, however, conclusive. For example, working backwards:

- a. On 5 January 2017 (page 53) it is recorded that the claimant was "generally unwell/?infection". Not surprisingly that is also the narrative in the fit note of the same date at page 64.
- b. At page 55 there is an entry for 22 December 2016 as follows: "Wheezy, Some chest pain – mainly after coughing, not pleuritic – improving. Recent hx [*which I take to mean history*] of pleurisy".
- c. Then at page 72 it can be seen that the claimant visited an emergency doctor on 9 December 2016. The record there is fairly non-specific although it does record, "on inhalers for asthma".

d. Page 74 is a record from a walk-in centre the claimant attended, which refers to “pleuritic pain” and “try steam inhalations” etc.

9. On a different point, on appointment the claimant completed an Equal Opportunity Monitoring form (page 36) and in answer to the question, “Do you consider yourself to have a disability under the Disability Discrimination Act?”, the claimant ticked, “No”. I accept the claimant's explanation of that, however, that she did not know what disability was in those terms, and was used to her asthma and did not think it would affect her job. More troublesome are the claimant's answers that are recorded on the Standard Interview Questions – Sales Assistant form, which she completed on 27 April 2016 (page 37) that she had had “no health issues” in the previous couple of years, and that she has an outside activity of “keep fit.

10. I accept the submission on behalf of the respondent that that form, or at least those entries on that form, are inconsistent with the evidence that the claimant now gives. That said, I am required to step back and consider all the evidence before me in the round and apply it to the statutory definition of a “disabled person” in the light of the Statutory Guidance.

11. Having done that I am satisfied that the claimant has discharged the burden of proof upon her to satisfy me, on the balance of probabilities, that at the time of the alleged discrimination against her, she was a disabled person: she had an impairment which had a long-term adverse effect and, but for the treatment she was prescribed and took, was likely to have a substantial adverse effect on her day-to-day activities in the sense that “likely” means “could well happen”, the focus being, I repeat, on what the claimant could not do rather than what she could do.

Employment Judge Morris

Date 15 January 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 February 2018

FOR THE TRIBUNAL OFFICE