



# EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mrs S Rowe

(1) Omni Serve Ltd  
(2) Gatwick Airport Ltd

Heard at: London South Employment Tribunal

On: 29 July 2019

Before: Employment Judge Hyams-Parish

**Representation:**

For the Claimant:

Mrs S Rowe

For the First Respondent:

Mr A O'Neill (Solicitor)

For the Second Respondent:

Mr D Isenberg (Counsel)

## RESERVED JUDGMENT ON PRELIMINARY ISSUE

1. At all material times the Claimant was a disabled person within the meaning of s.6(1) Equality Act 2010. She is therefore entitled to proceed with her substantive claim.

## REASONS

### Claim

2. By a claim form received by the tribunal on 5 June 2018 ("the Claim") the Claimant complains of disability discrimination arising from a refusal to vary her hours and the non-renewal of her fixed term contract with the First Respondent.

### Issues

3. The Respondent denies that the Claimant was disabled within the meaning

of s.6(1) Equality Act 2010 (“EqA”). The purpose of the preliminary hearing was therefore to determine this issue.

4. At the outset of the hearing, it was accepted by the Respondents that, at all material times, the Claimant was suffering from a physical impairment. However, it was not accepted that the impairment had a substantial and long-term adverse effect on the Claimant’s ability to carry out day to day activities.
5. The focus of the Respondents’ challenge to the Claimant’s evidence was on the lack of substantial adverse effect during any period other than between 27 November 2017 and 25 May 2018, meaning that at no point could the substantial adverse effect be considered to be long term. The Claimant was taken to documents in the bundle which the Respondents argued contradicted her evidence that she was suffering adverse effects and/or that any effect was substantial.

### **Hearing**

6. The tribunal heard evidence from the Claimant and from Ms L Harkins, Recruitment and ID Lead for the First Respondent.
7. The tribunal was referred to documents in a hearing bundle extending to 121 pages. References in square brackets in this judgment are to page numbers in the hearing bundle. Included in the hearing bundle was an impact statement from the Claimant [40] which she adopted as her evidence in chief.

### **Relevant law**

8. The law on the definition of “disability” is provided by s.6 EqA, with further assistance provided in Schedule 1 of the same Act.
9. S.6(1) of the EqA defines disability as follows:  
  
*“A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities”*
10. The above definition poses four essential questions:
  - a. Does the person have a physical or mental impairment?
  - b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
  - c. Is that effect substantial?
  - d. Is that effect long-term?
11. Under para 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:

- a. has lasted for at least 12 months
  - b. is likely to last for at least 12 months, or
  - c. is likely to last for the rest of the life of the person affected.
12. The term “substantial” is defined in S.212(1) EqA as meaning ‘more than minor or trivial’.
  13. Guidance on the definition of “disability” is also contained in a document produced by the Office for Disability Issues in May 2011 called “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (“the Guidance”). Reference was made to the Guidance during the hearing.
  14. As is clear from paragraph 5 above, the focus during this preliminary hearing was on answering questions at paragraph 10(b)(c) and (d) above.
  15. The tribunal reminds itself that the case of **Goodwin v Patent Office [1999] IRLR 4 (EAT)** emphasised that tribunals and courts should give a purposive construction to the legislation, which is designed to confer protection rather than restrict it.
  16. The tribunal was clear that the Claimant bore the burden of proving that she was disabled.

### **Findings of fact**

17. The following findings of fact were reached by the tribunal, on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the tribunal’s assessment of the witness evidence.
18. Only findings of fact relevant to the issues, and those necessary for the tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute.
19. The Claimant was employed by the First Respondent as an Airline Performance Controller between 28 February 2017 and 1 May 2018. She was employed on a one-year fixed term contract with an option to extend.
20. Her role required her to support the turnaround teams primarily to ensure the prompt turnaround of aircraft, including supporting flights depart promptly in the morning, as well those arriving in the evening. Ms Harkins described it as a physical role requiring considerable movement around the airport. The Claimant accepted that the role did involve a considerable amount of walking but suggested that the pace of the work meant that she wasn’t constantly moving from one place to the next. There were shortcuts that were taken by the Claimant and it was clear that Ms Harkins did not

have oversight of all the Claimant's movements on a daily basis. The tribunal accepted the Claimant's evidence on this point.

21. The tribunal accepts the Claimant's account that in August 2016, the Claimant was sitting at her dining room table and suddenly from nowhere her heart began racing extremely fast. She could not breathe, and her lips turned blue. She found it very scary and had to cough repeatedly to attempt to convert her heart back to sinus rhythm. The tribunal accepts the Claimant's evidence that it was an awful feeling, as though she were going to die.
22. The Claimant was referred to, and saw, a Cardiologist in January 2017. In the meantime, the Claimant had further trips to the GP and the A&E department at hospital suffering with Arrhythmia and had a heart monitor fitted in November 2016.
23. By January, the Claimant was suffering more regular episodes and had adopted techniques to bring her sinus rhythm back to normal by bearing down, coughing or using Vagal Maneuvers. The tribunal accepts that the Claimant found it necessary to change her lifestyle and dietary patterns and constantly had to be aware of situations. Episodes were brought on by being overtired, being too hot or cold, consuming too much food or eating too little.
24. The Claimant was informed by the Cardiologist that she had an Arrhythmia but to establish which kind, she needed to have a monitor fitted. The tribunal finds that by February 2017 the episodes had increased in intensity and frequency. At times she felt so unwell that she could not reach for the monitor device to activate it.
25. At a subsequent visit to the Cardiologist in August 2017, it was clear that the condition had deteriorated further. The tribunal accepts that by this point the effect of her condition meant that she was having difficulty walking up the stairs and she was suffering with poor concentration from the worry of another attack. Simply bending over and any form of exercise could bring about an attack. The Claimant was taking extra time to do normal activities such as shopping bathing cooking etc. Her energy levels decreased, and she felt constantly tired as she was not sleeping well as she was in fear of an attack.
26. Matters took a turn for the worse on 28 November 2017 when the Claimant suffered an attack at work. She was accompanied by two colleagues who described her as having gone grey in pallor and her lips having turned blue. The tribunal accepts the Claimant's account of what happened on that day, including what she said about her vision disappearing completely, and not being able to breathe. An ambulance was called, and she was taken to hospital.
27. The following day the Claimant was informed that the type of arrhythmia she had was a supraventricular tachycardia in the upper left chamber of her

heart.

28. On 7 December 2017 the Claimant was told that she needed an urgent cardiac ablation because the symptoms were so severe. She was put on medication whilst waiting for an appointment. She saw the cardiac electrophysiologist at the beginning of January 2018. She was originally given a date in February but that was postponed to 2 March 2018. She felt extremely unwell after the procedure and for the subsequent twelve weeks at which point, she felt much better.
29. The tribunal accepts that in January/February 2019 the Claimant experienced mild problems with her heart again, namely that it was skipping beats. She was again given a monitor. The effect of this made the Claimant feel tired.
30. Considering all of the evidence, the Tribunal finds that the Claimant was suffering the above adverse effects on her ability to carry out day to day activities, albeit to varying degrees and at varying levels of frequency and severity, between August 2016 and May 2018, with the effects becoming progressively more serious and being particularly acute and more frequent from January/February 2017. Whilst the Respondents referred to, and cross examined the Claimant on, letters from medical experts treating the Claimant, which the Respondent argued contradicted what the Claimant said in her evidence, the Claimant clearly disagreed with some parts of what was written. The tribunal finds that the medical correspondence is largely consistent with, and supportive of, what the Claimant said in her evidence. In any event, the authors of the medical correspondence were not at the hearing to be cross examined and the tribunal preferred the direct evidence of the Claimant as being the better person to give an accurate picture of the adverse impact brought on by her impairment.

### **Analysis and conclusions**

31. The tribunal is mindful of the legal principle that the point in time to assess whether someone is disabled (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act: **Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT**. This is also the material time when determining whether the impairment has lasted for at least twelve months or is likely to last for at least twelve months.
32. The tribunal considered the Guidance carefully in reaching its decision, particularly parts B and C and including the following paragraphs:

*[C3].....'likely', should be interpreted as meaning that it could well happen. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood.*

*[C4] In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood.*

*[C7] It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop, and the initial effect may disappear altogether.*

*[B4] An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.*

*[B5] For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.*

33. The claim form alleges two discriminatory acts: a failure to allow the Claimant to vary her hours following a request, made some time after 7 December 2017; and a failure to renew her fixed term contract on 15 March 2018. The material times for determining whether the Claimant was disabled are these two dates.
34. Taking into account its findings of fact, the Tribunal had little difficulty in concluding that, during the twelve months leading up to the second discriminatory act on 15 March 2018, the Claimant was suffering adverse effects on her ability to carry out normal day to day activities and that such effects were substantial. The tribunal rejects the Respondents' assertion that the Claimant was not suffering any substantial adverse effect prior to 27 November 2017. It concludes that the fact that the Claimant was not diagnosed until after her hospital admission in November 2017 does not mean that she was not suffering a substantial adverse effect before the point of diagnosis.
35. With regards the first discriminatory act, the tribunal concludes that in the twelve months leading up to December 2017, the Claimant was also suffering from adverse effects on her ability to carry out normal day to day

activities and that such effects were substantial. The Claimant's condition had become much worse by January/February 2017 and, on the evidence, the tribunal concluded that the condition did not suddenly deteriorate but rather the deterioration occurred over time. On that basis the tribunal also concluded that it is more probable than not that, as at 7 December 2016, the Claimant was suffering substantial adverse effects of her impairment.

36. The tribunal also considered whether the second limb of the "long term" test under paragraph 2(1)(b) of Schedule 1 to the EqA was also satisfied with regards the first discriminatory act, namely was it likely, as at 7 December 2017, that the impairment was likely to last for twelve months?
37. The tribunal notes that, as at 7 December 2017, the Claimant did not have a firm date for the ablation procedure, and neither could she be certain that the procedure would completely repair the problem or whether she would continue to feel any continued substantial adverse effect. Indeed, the cardiologist treating the Claimant could only state that he was "*hopeful that it will eliminate the symptoms*" [60]. As the assessment of whether the substantial adverse effect was likely to last for 12 months must be taken as at 7 December 2017, tribunal is not permitted to consider the *actual* effect of the procedure for the Claimant.
38. Accordingly, the Tribunal considers that even considering this alternative basis for assessing "long term", it is satisfied that the substantial adverse effects were likely to last for twelve months from the first discriminatory act and therefore also satisfied the requirement at paragraph 2(1)(b) of Schedule 1 of the EqA.
39. Taking all the above into account it is the Tribunal's judgment that the Claimant was disabled within the meaning of the EqA at all material times and she is therefore entitled to proceed with her substantive claim which is listed for hearing on November 2019.

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**Employment Judge Hyams-Parish**  
**29 July 2019**