



EMPLOYMENT TRIBUNALS

Claimant: Miss M Cunniff

Respondent: Borough Council of Bolton

Heard at: Manchester

On: 11 March 2020

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr D Campion, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was a disabled person under section 6 of the Equality Act 2010 at the material time (that is between October 2018 and early September 2019) in respect of the following physical impairments:

- (1) Headaches;
- (2) Irritable bowel syndrome;
- (3) Refractory vomiting, causing the claimant to be constantly sick or feeling as though she is going to be sick;
- (4) Stage two kidney disease which caused periodic chronic kidney infections and which required nightly antibiotics;
- (5) Fibromyalgia, causing fatigue, weak muscles, sleeping problems and pain; and
- (6) Complex regional pain syndrome due to gall bladder surgery in 2008 causing pain down the right side in internal organs.

2. The claimant has not proved that she had a disability at the relevant time in relation to the following conditions:

- (1) Blood clots in her left calf causing her to take warfarin indefinitely; and/or
- (2) Vitamin D/iron deficiency.

REASONS

Introduction

1. The claimant is employed as an Administration Officer by the respondent and has been since July 2017. She alleges that the respondent has breached its duty to make reasonable adjustments and that she has suffered harassment related to disability. At a preliminary hearing (case management) conducted on 8 November 2019, this further preliminary hearing was arranged primarily to determine whether the claimant was a disabled person under section 6 of the Equality Act 2010 at the relevant time, and also to go on to make other Case Management Orders.

Issues

2. The claim form said that the claimant suffers from numerous complex medical conditions. During the preliminary hearing (case management) conducted on 8 November 2019 the claimant identified 17 different medical conditions which she said either individually or cumulatively rendered her a disabled person. These were recorded as follows:

- (a) Idiopathic intercranial hypertension (fluid on the brain/spinal cord) which causes headaches, blurred vision, dizziness and other symptoms;
- (b) Migraines, causing pins and needles in her feet and hands and visual symptoms, but not any headaches;
- (c) Chronic gastritis which causes the claimant to gag on acid coming up from her stomach and gives her a constant stabbing pain in her stomach;
- (d) Gastroesophagitis reflux disease which causes acid reflux;
- (e) Irritable bowel syndrome;
- (f) Refractory vomiting, causing the claimant to be constantly sick or feeling as though she is going to be sick, symptoms alleviated by sucking a mint or sweets during the day;
- (g) Blood clots in her left calf causing her to take Warfarin indefinitely;
- (h) Non-alcoholic fatty liver disease which causes constant pain and prevents the claimant eating or digesting certain foods;
- (i) Stage 2 kidney disease which causes periodic chronic kidney infections and which requires nightly antibiotics;

- (j) Polycystic ovaries which cause painful symptoms in the abdomen;
- (k) Asthma, especially in winter;
- (l) Fibromyalgia, causing fatigue, weak muscles, sleep problems and pain;
- (m) Complex regional pain syndrome due to gall bladder surgery in 2008 causing pain down the right side in internal organs;
- (n) Vitamin D/iron deficiency;
- (o) Bile salt malabsorption which causes constant diarrhoea and when in a flare up causes the claimant to need to use the toilet more than 20 times a day and periodically causes her to be hospitalised;
- (p) Loin pain haematuria syndrome where kidneys leak protein and blood into urine causing constant pain and requiring opiate medication, and
- (q) High blood pressure.

3. Prior to this preliminary hearing, the respondent accepted that the claimant had a disability at the relevant time in the ways described for conditions (e), (l) and (m). The respondent accepted that the claimant had a disability in relation to (l) only from September 2018, which the claimant agreed.

4. Prior to the issues being determined in this preliminary hearing, it was explored with the claimant whether the claims she was pursuing required determination for all the other conditions of whether they were disabilities at the relevant time. In relation to the conditions listed at (j), (k) (p) and (q), the claimant confirmed that the Tribunal did not need to decide whether these conditions separately amounted to a disability.

5. As a result of the respondent accepting that the claimant had irritable bowel syndrome, and that being a disability, it was agreed by the claimant that conditions (c), (d) and (o) referred to conditions which are related to irritable bowel syndrome and for which it was now not necessary for the Tribunal to decide whether they were separate disabilities.

6. As a result of the respondent accepting that the claimant had complex regional pain syndrome (as described at (m) above), and that being a disability, it was agreed by the claimant that condition (h) referred to a condition which was related to (m) and for which it was now not necessary for the Tribunal to decide whether that was a separate disability.

7. In the course of the hearing, the respondent accepted that condition (i) was a disability at the relevant time.

8. In the course of the hearing, the respondent accepted that the claimant's headaches amounted to a disability at the relevant time. On that basis, the claimant agreed that the Tribunal did not need to determine whether conditions (a) and/or (b) were separate disabilities.

9. As a result of these clarifications and acceptances, the Tribunal only needed to determine whether the following impairments amounted to a disability at the relevant time: f - refractory vomiting, causing the claimant to be constantly sick or feeling as though she is going to be sick, symptoms alleviated by sucking a mint or sweets during the day; g - blood clots in her left calf causing her to take Warfarin indefinitely; and/or n - vitamin D/iron deficiency.

10. It was agreed in the hearing that the relevant time, for the purposes of the proceedings, was October 2018 until early September 2019.

Procedure

11. At the hearing the claimant represented herself. The respondent was represented by Mr Campion, counsel.

12. In accordance with the directions made at the previous preliminary hearing, the claimant had prepared a witness statement detailing the impact which her disabilities had upon her and her ability to undertake normal day-to-day activities. The claimant gave evidence relying upon that statement. The claimant was cross examined by the respondent's representative and asked questions by the Tribunal. The cross examination and questions focussed upon the elements which specifically related to the three impairments left to be determined, together with the end of the statement which had some more generic content which related to a variety of conditions.

13. The Tribunal was provided with a bundle of documents which comprised three lever arch files and 1,375 pages. However, the Tribunal was only referred to a limited number of pages and only read those pages to which the Tribunal was referred. The claimant also provided an additional Occupational Health report which had not been included in the bundle, which was also read and considered by the Tribunal.

14. Following the evidence, the respondent's representative made verbal submissions. The claimant was also given the opportunity to make submissions.

15. Judgment in relation to disability was reserved at the end of the hearing.

Facts

Alleged impairment (f)

16. In relation to refractory vomiting, the claimant's evidence was that she was diagnosed with this in 2007 and that when it flared up she would either constantly vomit, or would constantly just feel sick and would have to suck mints or boiled sweets in order to be able to speak to people over the phone or face to face. Her evidence was that she had periods of remission, but that other conditions could trigger another episode.

17. In answer to questions from the Employment Tribunal, the claimant identified three different types of medication which she was currently taking in relation to the vomiting, all of which were being taken two or three times a day. The claimant's evidence was that her doctor had recently tried to take her off one medication, but after 1½ days had had to put her back on it because she had started vomiting.

18. In answers to questions from the respondent's representative, the claimant confirmed that she had not actually vomited during the relevant period but that she had felt sick day in/day out during that time. The impact of feeling sick in that way was that she did not want to speak to people, she did not want to answer the phone, and she did not want to eat or drink (in case she was sick).

19. The Tribunal was provided with a medical report from a dentist dated 27 August 2019 which confirmed that the claimant had refractory vomiting, albeit that the report was focussed upon the impact that the claimant's intake of fizzy drinks (which she drank to settle her stomach) had upon her teeth.

Alleged impairment (g)

20. The claimant's evidence was that she had been diagnosed with deep vein thrombosis (DVT) in her calf in August 2018. This had had a significant impact on the claimant for a short period of time. The claimant had initially been placed on medication which had had an adverse impact on the claimant and resulted in her being in hospital for a short period. She had then been placed on warfarin which had addressed the issue.

21. The claimant's statement said that the DVT resulted in cramps and calf pain. In answer to questions, she explained that she could identify the pain linked to that condition as opposed to the many other conditions from which the claimant suffers. In answer to questions from the respondent's representative, the claimant confirmed that this pain had only come on later, confirmed as meaning after Christmas 2019 (that is outside the relevant period).

22. The Tribunal was provided with a report of 7 November 2018 by a Dr Kallat which confirmed the claimant's DVT. That report states that the claimant should continue with Warfarin for a minimum period of three months. The report confirmed that there was a 5-10% recurrent risk of a further DVT on the claimant discontinuing anticoagulation. The Tribunal was also provided with a report of 20 March 2019 prepared by Dr Hashim. The claimant's evidence was that she had in fact continued to take Warfarin.

Alleged impairment (n)

23. In relation to vitamin D and iron deficiency, the claimant's evidence was that she had first been diagnosed with vitamin D deficiency in May 2013 and this had last been logged in March 2019. Her evidence was that this affected her muscle weakness, made it hard to walk, and gave her pain in her joints. In answer to questions from the Tribunal the claimant referred to parts of her statement which detailed the difficulties she had in moving and the need for a stairlift to be fitted in her home. However, in answers to subsequent questions, the claimant stated that it was difficult to identify what impacts on her mobility arose from vitamin D or iron deficiency and what arose from her various other conditions, which had similar symptoms.

24. The only medical evidence to which the Tribunal was referred was a GP note from 1 June 2018 which recorded the claimant's vitamin D status as "*maybe sub optimal*".

Law

25. Section 6 of the Equality Act 2010 provides the following:

“A person (P) has a disability if –

(a) He has a physical or mental impairment; and

(b) The impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”

26. Section 212 of the Equality Act 2010 records that “substantial” means more than minor or trivial.

27. Paragraph 2 of Part 1 of Schedule 1 of the Equality Act 2010 records that an impairment is long-term if:

“(a) It has lasted for at least 12 months;

(b) It is likely to last for at least 12 months; or

(c) It is likely to last for the rest of the life of the person affected.”

28. Under paragraph 2(2):

“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.”

29. Paragraph 5 of Part 1 of Schedule 1 addresses the issue of medical treatment and measures:

“An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it, and but for that it would be likely to have that effect. Measures include medical treatment.”

30. In the Equality Act, “likely to” needs to be read as meaning “*could well happen*” (**SCA Packaging Limited v Boyle [2009] IRLR 746**).

31. It is for the claimant to prove that she has a disability on the balance of probabilities.

32. The Employment Tribunal was referred to and took notice of the guidance on definition of disability. The respondent’s representative in particular placed reliance on sections B1, B7-B10, C9-C11, D3 and the list of illustrative factors in the Appendix. The Tribunal has considered these elements and the guidance as a whole.

33. In his submissions, the respondent’s representative also referred to **Swift v Chief Constable of Wiltshire Constabulary [2004] IRLR 540** and **McDougall v Richmond Adult Community College [2008] IRLR 227**.

Conclusions

Alleged impairment (f)

34. In relation to the refractory vomiting, this is a physical impairment.

35. In terms of whether it was long term, the claimant's evidence was that she has had this impairment since 2007 (or at least that was when it was first diagnosed). The impairment was therefore long term as, at the relevant time, it had lasted for 11-12 years.

36. During the flare-ups, when the claimant is constantly vomiting, it is self-evident that this impairment has a substantial adverse effect on her ability to carry out normal day-to-day activities. However, even when the claimant is just feeling sick constantly but not actually vomiting, the Tribunal finds that the condition still has/had a substantial adverse effect on the claimant's ability to undertake normal day-to-day activities such as eating, drinking and speaking to other people. As substantial means more than minor or trivial, the Tribunal accepts the claimant's evidence about the impact on her of feeling sick and finds this impact to be substantial.

37. In its submissions, the respondent placed emphasis upon the claimant's evidence that she did not in fact vomit during the period which was the relevant time. However, the Tribunal does not find that this means that the impairment was not a disability at the relevant time. This is for two reasons. In respect of the constant vomiting, a recurring condition which has lasted for 11 or 12 years but which has periods of remission is still likely to recur if may well happen that there is a future flare up. In respect of the impact of feeling sick constantly, the evidence was that this was the position during the relevant period and (as confirmed above) the Tribunal has found that for the claimant this satisfied the requirement that it had a substantial adverse effect on the claimant's ability to undertake normal day-to-day activities (even if the claimant was not actually vomiting).

38. Even had it not been the case that the Tribunal had found that the claimant's refractory vomiting had been a disability on the basis explained, it is in any event clear that the refractory vomiting is a disability once the effect of measures/medical treatment is taken into account. The claimant's evidence was very clear: she was taking three types of medication to limit/stop vomiting; and on the one occasion when she had ceased to take one of those types of medication, the impact had been that she had returned to vomiting. As a result, the Tribunal finds that but for the medication upon which the claimant had been placed to address the vomiting, her condition would clearly have had a substantial adverse effect on her ability to carry out normal day-to-day activities (even if that was not the case in any event).

39. The Tribunal accordingly finds that, in respect of the impairment described by the claimant as refractory vomiting, causing the claimant to be constantly sick or feeling as though she is going to be sick, symptoms alleviated by sucking a mint or sweets during the day, the claimant had a disability at the relevant time.

Alleged impairment (g)

40. In relation to the DVT, this is a physical impairment.

41. The DVT clearly did have a substantial adverse effect on the claimant's ability to undertake normal day-to-day activities for a period starting in August 2018. However, that initial significant impact appears to have been something which, at most, appears to have continued for no more than three months.

42. Thereafter, the ongoing impact of the DVT on the Claimant's ability to undertake normal day-to-day activities (on the evidence heard by the Tribunal) was not substantial (prior to December 2019).

43. On the claimant's evidence, the DVT does now result in a substantial ongoing adverse effect upon her, because she is suffering from cramps and calf pain. However, the claimant's evidence was that these ongoing effects did not commence until December 2019, that is after the relevant period. It is entirely possible that the claimant has a disability in respect of this impairment as at the date of the hearing. However, in the relevant period there was no evidence before the Tribunal that the DVT did have such an adverse impact or that any such impact was likely to occur or recur in the future. There was no evidence available that the claimant was likely to suffer cramps or calf pain in the future, after the relevant period ended.

44. Accordingly, the substantial impact that the DVT had upon the claimant's ability to undertake normal day-to-day activities was not long term, because: it did not last for twelve months; at the relevant time was not likely to last for twelve months or for the life of the claimant; and there is no evidence that at the relevant time it was likely to recur.

45. The application of Paragraph 5 of Part 1 of Schedule 1 of the Equality Act 2010 and the question of measures in relation to the DVT and Warfarin is somewhat more complicated. It is clear from the evidence that should the claimant cease to take Warfarin the risk of a DVT would increase. However, the only evidence available to the Tribunal about this increased risk was that of Dr Kallat who assesses the risk (at its highest) as a recurrent risk of 10% in the future if she should discontinue taking the Warfarin or other anticoagulation. That level of risk of recurrence may well mean that the claimant should advisably continue to take Warfarin for the rest of her life, if that is what the Doctors treating her continue to advise. However in the view of the Tribunal, a 10% risk is not a risk which can accurately be described as something which "could well happen", or that is likely. Accordingly, whilst measures are being taken to treat the claimant's condition, the Tribunal does not find that but for that medication the impairment would be likely to have a substantial adverse effect on the claimant's ability to undertake normal day-to-day activities, where the only medical evidence available places the likelihood of that occurring as being at 10%.

46. Accordingly the Tribunal finds that the DVT does not amount to a disability because: at the relevant time it did not have a long-term substantial adverse effect upon the claimant's ability to undertake normal day-to-day activities; and if the claimant ceased to take the medication given to her for this condition it is not likely (that is, it is not the case that it could well happen) that the condition would have a

substantial adverse effect on the claimant's ability to undertake normal day-to-day activities.

Alleged impairment (n)

47. In relation to vitamin D or iron deficiency, the Tribunal was provided with almost no evidence about this condition and/or about any impacts which it had upon the claimant's ability to carry out day-to-day activities that was distinguishable from the many other serious conditions from which the claimant suffers.

48. The medical evidence, as summarised in the facts section above, provided to the Tribunal to evidence the impact which this condition has, was almost non-existent.

49. It is for the claimant to prove that she has a disability, and for the vitamin D/iron deficiency the claimant has not provided evidence to the Tribunal which demonstrates that this is a distinct impairment which has a substantial and long-term adverse effect upon her ability to undertake day-to-day activities.

50. The claimant's evidence was very clear that she has a number of conditions which do have a significant impact upon her day-to-day activities in relation to pain, movement and tiredness. The Tribunal finds that the claimant simply did not evidence that vitamin D and iron deficiency did have such an adverse impact on her, as opposed to the impact on those day-to-day activities which results from the other conditions from which she suffers.

The further conduct of the claims

51. At the end of the hearing, after Judgment had been reserved, the Tribunal spent some time identifying the issues in the claim and made case management Orders for the preparation of the claim for hearing. Those Orders are recorded in a separate case management order.

Employment Judge Phil Allen

25 March 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

1 April 2020

FOR THE TRIBUNAL OFFICE

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