EMPLOYMENT TRIBUNALS

Claimant: **Ms C Jones**

Respondent: **Sims Engineering Systems Limited**

Heard at: **East London Hearing Centre**

On: **30 June 2020**

Before: **Employment Judge Gardiner (sitting alone)**

Representation

Claimant: Mr A Hollis (friend)

Respondent: Mr T Hussain

JUDGMENT

The judgment of the Tribunal is that:-

1. During the material period, the Claimant was a disabled person, as defined in Section 6 and Schedule 1 Equality Act 2010.

REASONS

1. This Preliminary Hearing was listed by Employment Judge McLaren to decide whether the Claimant had a disability as defined by Section 6 Equality Act 2010 by reason of her asthma.

2. The Claimant brings complaints of disability discrimination, constructive unfair dismissal and unauthorised deduction from wages against Sims Engineering Systems Limited ("the Respondent"). She was employed by the Respondent as a Receptionist from 3 November 2014 until her resignation on 23 October 2019.

3. The Preliminary Hearing was conducted remotely over the Microsoft Teams Video Platform. As a result of technical difficulties, it was not possible for the Claimant to

participate in the Hearing with a video connection. However, she was able to see me and see Mr Hutchings, her former line manager, who was called as a witness for the Respondent. Mr Hussain, the Respondent's representative, was also able to see me, although was unable to be seen. Both parties were content for the Preliminary Hearing to proceed on this basis. As a result, when the Claimant gave her evidence, I was able to hear her answers but unable to see her as she did so. For parity of treatment, when Mr Hutchings gave his evidence, he switched off his video camera.

4. The evidence given by the Claimant and by Mr Hutchings was contained in witness statements which each confirmed on affirmation. In addition, I was provided with a bundle of documents, 170 pages in length, including the Claimant's medical records. This was an agreed bundle. References in these Reasons in square brackets are references to the corresponding page number in the agreed bundle.

5. In addition, both the Claimant and the Respondent had prepared Skeleton Arguments in support of their respective positions.

6. The Claimant's disability discrimination complaint spans the period from May 2019 to October 2019. As a result, the issue to be determined on this Preliminary Hearing concerns the extent of the Claimant's impairment during this period of time. I am not concerned with whether the Claimant was disabled at an earlier point in time; or whether the Claimant is disabled now. Evidence and medical records outside the material period is only relevant insofar as it can shed light on the extent of her symptoms during the material period.

7. The Claimant's case is that she had a disability by reason of the extent of her asthma symptoms and their effect on her normal day to day activities. The Respondent agrees that the Claimant had asthma during the relevant period and had had this condition for a lengthy period of time. Its case is that the impairment did not have a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities.

Legal principles

8. Section 6 Equality Act 2010 is worded as follows:

   (1) A person (P) has a disability if-

      a. P 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.

   (5) A Minister for the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

   (6) Schedule 1 (disability: supplementary provision) has effect.

9. Schedule 1 contains the following definition of long-term effects, in paragraph 2:

    (1) The effect of 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.

    (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.

10. As to effect of medical treatment, paragraph 5 of Schedule 1 provides as follows:

    (1) An impairment is to be treated as having a substantial adverse effect on the ability of a person to carry out normal day-to-day activities if-

        a. Measures are being taken to treat or correct it, and
        b. But for that, it would be likely to have that effect

    (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

11. "Substantial" is defined in Section 212(1) as "more than minor or trivial".

12. Further guidance is given on the meaning of the word "substantial" in guidance issued by the Secretary of State under Section 6(5) Equality Act 2010. Of particular relevance to the issue to be decided are the following sections of that guidance:

    B.1 A limitation going beyond the normal differences in ability which may exist among people.

    B2. The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial.

    B3. … the way in which a person with that impairment carries out a normal day-to-day activity. The comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment.

    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.

B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would **not** be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty.

B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.

B11. Environmental conditions may exacerbate or lessen the effect of an impairment. Factors such as temperature, humidity, lighting, the time of day or night, how tired the person is, or how much stress he or she is under, may have an impact on the effects. When assessing whether adverse effects of an impairment are substantial, the extent to which such environmental factors, individually or cumulatively, are likely to have an impact on the effects should, therefore, also be considered. The fact that an impairment may have a less substantial effect in certain environments does not necessarily prevent it having an overall substantial adverse effect on day-to-day activities.

B12. The Act provides that, where an 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. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (See also paragraphs B7 and B16.)

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability

so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

B14. For example, if a person with a hearing impairment wears a hearing aid the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid. Similarly, in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet.

C5. The Act states that, if an impairment has had a substantial adverse effect on a person’s ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of ‘long-term’ (Sch1, Para 2(2))

C6. For example, a person with rheumatoid arthritis may experience substantial adverse effects for a few weeks after the first occurrence and then have a period of remission. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. Other impairments with effects which can recur beyond 12 months, or where effects can be sporadic, include Menières Disease and epilepsy as well as mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant.

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

D15. Some of the examples in this section show how an adverse effect may arise from either a physical or a mental impairment. Where illustrations of both

types of impairment have not been given, this does not mean that only one type of impairment could result in that particular effect. Physical impairments can result in mental effects and mental impairments can have physical manifestations.

Appendix

The illustrative list of impairments whose effects are likely to be substantial includes:

- Difficulty in going up or down steps, stairs or gradients; for example, because movements are painful, fatiguing or restricted in some way;
- A total inability to walk, or an ability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue;
- Difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage, with one hand.

13. It is important for the disability issue to be clearly and specifically identified in advance of the hearing at which it is to be determined, and good practice for this to be done at a directions hearing (see *Goodwin v Patent Office* [1999] ICR 302 at 306F). Here that issue was specified by Employment Judge McLaren as concerning the Claimant's asthma.

14. Tribunals should look at the evidence by reference to four different conditions – (1) The impairment condition; (2) The adverse effect condition; (3) The substantial condition; (4) The long-term condition (*Goodwin* at 308). The focus of attention required by the legislation is on the things that the claimant either cannot do or can only do with difficulty, rather than on the things that the person can do (*Goodwin* at 309).

15. Whether an impairment is substantial and whether it is likely to recur is to be judged at the time of the alleged discrimination. This is because whether an employer has committed a wrong must be judged in the light of the evidence available at the time of the decision complained of (*McDougall v Richmond Adult Community College* [2008] ICR 431 at paragraph 24).

16. In *Paterson v Commissioner of Police of the Metropolis* [2007] ICR 1522 Elias J said (at para 27) that the correct approach for deciding on the severity of a disabling condition is to enquire "how the individual carries out the activity compared with how he would do it if not suffering the impairment". If that difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial. Because the Equality Act is concerned not with any adverse effect but rather with a substantial adverse effect, the fact that a claimant can only carry out normal day-to-day activities with difficulty or with pain does not necessarily establish that disability is made out (*Condappa v Newham Healthcare Trust* [2001] All ER (D) 38).

17. However, where a claimant is on medication, "the Tribunal should examine how the claimant's abilities have actually been affected at the material time, whilst on medication, and then address their minds to the difficult question as to the effects which they think there would have been but for the medication: the deduced effects. The question is then whether the actual and deduced effects on the applicant's abilities to carry out normal day to day activities in clearly more than trivial" (*Goodwin* at 310). The issue is whether, but for the medication, the Claimant's asthma is likely to have a substantial adverse effect on the ability to carry out normal day to day activities (Schedule 1, para 5(1)). 'Likely' means 'could well happen' : *Boyle v SCA Packaging Limited* [2009] ICR 1056.

18. When asking whether a substantial adverse effect is "likely" to recur, the Tribunal must consider whether it 'could well' recur.

19. The burden of proof is on the Claimant to show that she falls within the definition of disability. If a Claimant fails to provide information about particular activities, work related or otherwise that she was unable to undertake or that were adversely affected by the impairment, she may be unable to establish that she was within the statutory definition (*Mutombo-Mpania v Angard Staffing Solutions Ltd* UKEATS/0002/18 (17 July 2018).

Findings of fact

20. The Claimant has had asthma for many years. That is her evidence and is supported by the medical records. On occasions, she had needed to take time off work as a result. However, on each occasion she self-certified her absence which lasted one or at most two days. Her asthma related absences were not long enough to require a fit note from her GP. There are recorded to be two days absence in September 2015, a week's absence in April 2016, no asthma related absences in 2017, one day in February 2018 [85], one day in November 2018 [83], two days in December 2018 [82], and four days over two periods in February and May 2019. In 2017 she consulted her GP on four occasions for help with increased symptoms of asthma; in 2018 this occurred on three occasions; and in 2019, there was one instance of her consulting her GP before the material time period starts in May 2019.

21. The best evidence as to the impact of her asthma before and during the relevant period, from May 2019 to October 2019, is provided by the asthma annual review carried out on 4 June 2019, as recorded in detail in her medical notes. By this point, she had been absent from work on sick leave for about a week, having been signed off work with stress.

22. At the time, she used two types of inhaler. The first, known as Fostair, was taken first thing in the morning and last thing at night. The other, Ventolin, which had been started in mid-May 2019, was used during the day, as and when required. The Claimant's evidence was that this was meant to last 3 months but she often needed to replace it every 3-4 weeks.

23. The extensive entry on 4 June 2019 as part of her annual review records that she was over-using her inhaler, using it 3-4 times per day. The immediate trigger for needing to use her inhaler more was changes in the weather, which caused an increase in her symptoms. Her working environment was also causing increased symptoms, which she though was due to dust and dust mites.

24. She had had three asthma exacerbations during the past year. I infer that 'the past year' refers to the period since the last annual review which is recorded as having taken place on 30 August 2018. One of these had been due to a very dusty environment during a holiday in Marrakesh in December 2018. She had taken two days off on sick leave. Another incident had been whilst in Canada in February 2019 where her chest had flared in temperatures noted to be minus 20 degrees Celsius. She told Mr Hutchings she had an emergency doctor's appointment [103] and took two days off work on sick leave [75].

25. The third incident may have been the one day's absence on 26 November 2018, or the incident on 14 and 15 May 2019, when she took a further two days off work with "asthma flare up and cold". I infer that this is the incident referred to in the GP records on 4 June 2019 prompted by the dusty working environment.

26. However, the extent of the general impact of the working environment on her symptoms needs to be seen in the context of what was reported at the 4 June 2019 annual assessment. In answer to the question "Did your asthma prevent you from getting as much done at work/school/home?", the answer is "none of the time". In answer to the question "Have you had shortness of breath?" the answer is "None at all". Did your asthma symptoms wake you up at night or early in the morning" the answer is "Not at all". It is recorded that "Asthma is not limiting her activities". The asthma is recorded as causing day symptoms most days but causing night symptoms 1 to 2 times per month. Read consistently with other attendances at her GP where symptoms of asthma are recorded, these answers would appear to relate to her ability to cope on a day when she was not experiencing a particular flare up of her asthma.

27. To the question "Have you used your reliever inhaler?" the answer given is "3 or more times a day". At that annual assessment a decision was taken to add a further medication, namely Montelukast, to enable the asthma to be better controlled. Whilst the impact of this drug was scheduled to be reviewed in 2-3 weeks, there is no record that this was specifically done.

28. It is instructive to compare the June 2019 annual assessment with the earlier assessment on 30 August 2018. Then it was recorded that the asthma was under control with current inhalers and there were no flare ups. It was never causing daytime symptoms and was never restricting exercise. Comparing the two annual assessments, it appears that the asthma was worse at the time of the second assessment, but was still at a level where it was not interfering with her sleep or limiting her activities. A note in her GP records made on 4 June 2019 [136] explains

what is meant by the asthma ‘not being well controlled’. This label would be used if someone was using her blue inhaler more than 3-4 times a week. In the Claimant’s case, the record is she was using her blue inhaler 3-4 times a day, which is significantly more than would be expected if the morning and evening inhaler was fully effective.

29. In the same month, June 2019, the Claimant was referred to occupational health. The reason for the referral to occupational health was her absence on sick leave for several weeks as a result of stress, which appears to have been caused by events at work. There is no reference either in the referral or in the subsequent occupational health report [107] to the Claimant’s asthma. This is unsurprising, given that the focus of that assessment was the Claimant’s stress and anxiety.

30. It is also not surprising that the Claimant’s line manager, Mr James Hutchings, did not see the Claimant using her inhaler. Although he would speak to her on a regular basis during the working day, given that he and the Claimant both had responsibility for health and safety issues, amongst other matters, I find that she had not starting using her blue inhaler as frequently as 3-4 times a day until shortly before going on sick leave. Had this been her normal usage at an earlier point in time, it would probably have been recorded in the annual assessment in August 2018, or in subsequent GP entries pre-dating 4 June 2018. I infer from the fact that this was first recorded on 4 June 2019, that this GP visit took place shortly after her symptoms had escalated to a point where this increased use occurred.

31. Mr Hutchings’ evidence, which I accept, is that the Claimant did not complain to him about experiencing any symptoms at work from her asthma. In her role as Receptionist, she worked in a seated position throughout the working day. She did not need to use any stairs to access her work location. If she had needed to use her inhaler on rare occasions during the working day before May 2018, this would probably not have been when Mr Hutchings was present to see this being done.

32. On 1 July 2019, the Claimant presented with a history of “restless leg”. This was thought to have been a side effect of using her Ventolin inhaler when she had been experiencing anxiety attacks. I infer from this GP entry, which starts ‘History of Asthma’, that the Claimant had been experiencing increased symptoms of asthma at the same time as panic attacks. As a side effect of the overuse of her inhaler, she was potentially experiencing nervousness and tremors (ie shaking). There is no evidence that her anxiety symptoms diminished from July onwards. She continued to be signed off work with stress throughout the period until her resignation in October 2019.

33. Her evidence to the Tribunal was that she was needing to replace her Ventolin inhaler every 3-4 weeks, which was far more frequently than would normally be the case. During the period from July onwards, there are entries in the GP records every 3-4 weeks making reference to the Ventolin inhaler again, corroborating her evidence. However, there is no reference in her GP records to any further particular

symptoms of asthma during the remainder of the material period, nor any further references to restless leg syndrome.

34. The Claimant did not need further medical attention for her asthma until she attended A&E on 15 December 2019, which was almost two months after the end of her employment. On that date, she attended A&E with shortness of breath, wheezing and a cough. The final entry on 13 February 2020 records that her asthma was flaring more recently at night, but there was no chest pain or phlegm.

35. Somewhat unhelpfully, the major focus of the Claimant's witness statement is on her current symptoms at the time when the witness statement was prepared, although at points (eg paragraph 8), she also ventures into her past medical history. When describing the impact on her day to day activities, she speaks in the present tense when mentioning "bouts of shortness of breath" doing "a simple and normal activity like walking at a normal pace" or "doing the laundry, carrying the clothes, bending to put them in the washing machine or unloading and hanging out to dry" (paragraph 13). She also mentions limitations on her ability to take part in sports (paragraph 14).

36. These statements are at odds with the contemporaneous records at the time of the annual asthma reviews on 30 August 2018 and 4 June 2019 – specifically the comment that her asthma was never restricting exercise (30 August 2018) and was not making it more difficult for her to get as much done at work or at home (4 June 2019).

37. The Claimant also relies on a letter she received from her GP dated 1 June 2020. This letter asks her to stay at home at all times because she is at risk of severe illness if she catches Covid-19. It lists those conditions considered to be very high risk as those with severe respiratory conditions such as all cystic fibrosis, severe asthma and severe COPD issues. Based on this, the Claimant argues that she has severe asthma. I do not consider this evidence to be probative of the extent of the Claimant's symptoms over six months earlier. This is particularly the case in circumstances where the last entry in the medical records is dated 9 March 2020, and those records were printed on 12 March 2020. Therefore, there is a missing period of three months where the extent of the Claimant's symptoms is unclear. Given the evidential gap of some three months, the position in June 2020 as described by the Claimant or in the letter from her GP is not a reliable guide to the extent of the Claimant's symptoms during the material period.

38. What is clear is that by 13 February 2020, almost three months after her employment had ended, her asthma appeared to be flaring recently "more at night". I infer from the wording that this worsening post-dated the Claimant's employment. The Claimant did not find that the asthma was particularly interfering with her sleep during the material period, despite what she asserts in her witness statement.

39. In her witness statement, the Claimant refers to her asthma as a progressive condition. I take it that she intended to refer to her asthma as a 'chronic condition',

namely a condition that is well established and not expected to resolve for the foreseeable future. There is no medical evidence that her asthma is a 'progressive condition' as that term is generally understood, namely a condition that has effects which increase in severity over time.

40. In her witness statement, the Claimant also refers to high blood pressure, triggered by stress and anxiety (witness statement, paragraph 23); and says that mental impairments are also present in terms of her anxiety as well as reduced cognitive impairment from lack of concentration due to asthma (witness statement, paragraph 42). There is no specific medical evidence that her asthma has caused lack of concentration or reduced cognitive impairment. It is not part of the preliminary issue to be considered at this hearing to determine whether the Claimant was a disabled person by reason of her stress and anxiety or her hypertension. The specific focus of the Preliminary Issue listed by Employment Judge McLaren was whether the asthma amounted to a disability. If the Claimant had wanted the Tribunal to assess whether the combined effect of the asthma and other conditions amounted to a disability then she should have identified this in her ET1 and/or at the first Preliminary Hearing heard by Employment Judge McLaren. The case of *London Luton Airport Operations Limited v Levick* [2019] UKEAT/0270/18 is authority for the proposition that the scope of enquiry at a Preliminary Hearing to determine the issue of disability is limited by the way that the claimant has identified their disability in the ET1 and during an early case management preliminary hearing.

Analysis

41. The question of whether the Claimant was a disabled person turns on an application of established legal principles to the facts as found. Contrary to the Respondent's submissions, the Tribunal does not take into account the views expressed by "specialist and leading charities".

42. It is appropriate to analyse whether the Claimant was a disabled person by reference to the four different conditions identified in *Goodwin v Patent Office* [1999] ICR 302.

The impairment condition

43. Both parties agree that the Claimant had asthma during the material period, and this was a physical impairment.

The adverse effect condition/substantial adverse effect condition

44. The Claimant's asthma had a substantial adverse effect on normal day-to-day activities, when she needed to take sick leave as a result of asthma symptoms, or when she consulted her GP given a particular flare up. There were at least three occasions in the period of six months before the start of the material period, when

she needed to take time off work on sick leave for asthma related reasons, albeit two of them appear to have been prompted by choosing to holiday in extreme climates, namely the dusty climate of Marrakesh and the freezing climate of Canada.

45. Apart from those particular episodes, I am not persuaded that the Claimant's asthma had a substantial adverse effect on normal day to day activities in the period up until May 2019. The Claimant has not identified any specific day to day activities that she was unable to perform before May 2019, even whilst using her medication. Evidence as to those activities she could only perform with difficulty is focused on the time when the statement was drafted, rather than on the material period. The contemporaneous medical evidence on 4 June 2019 is that the Claimant told her GP she was able to perform all her day to day activities without restriction.

46. As to the "difficult question" of the deduced effect, the Claimant has not advanced any medical evidence as to the level of symptoms she would have experienced had she not used her inhalers and taken other medication for asthma. Nor has her factual evidence identified the symptoms she experienced on any days when for whatever reason she failed to take her medication. In her witness statement she speculates as to the effect of not taking medication as follows (paragraphs 35 and 36):

> "The impact on my life with asthma without my medication is only what I can imagine as impossible. Without medication I would be at an increased risk of lung scarring, which is a permanent damage to the lungs and airways making it impossible to breath without mechanical assistance. It is likely that without medication that I could develop chronic obstructive pulmonary disease (COPD), which is still a possibility even though I take prescription medication.
>
> My perception of life without medication for my asthma is that, more probably than not, I would die. I do not say that lightly, nor for impact. I state it due to the medical facts"

47. The Claimant's difficulty is that she is not medically qualified and the witness evidence she provides is evidence that only an expert can give. I have no medical evidence on the issue of the strength of the particular dose that the Claimant was prescribed, nor as to the Claimant's health without that treatment. As a result, I cannot place any weight on the Claimant's assertions. Whilst I can deduce that the Claimant's symptoms would be worse to some degree, I cannot make any findings as to the extent of that worsening, and its impact on normal day to day activities.

48. However, from mid May 2019 onwards, the picture changes. She took two days off work on sick leave on 14 and 15 May with asthma symptoms. Thereafter her asthma symptoms increased as did the frequency of her use of her Ventolin inhaler. She experienced asthma attacks when she had panic attacks. As a result

of the overuse of her inhaler prompted by her increased asthma she experienced side effects, including restless leg syndrome. These combined physical symptoms did cause a substantial adverse effect on normal day to day activities, even though the activities were also curtailed by her mental symptoms of stress and anxiety. This continued throughout the period until her resignation towards the end of October 2019.

The long term condition

49. The Claimant's asthma had a substantial adverse effect on normal day to day activities for short episodes throughout the period from 2015 onwards – either when she needed time off work on sick leave or when she needed to visit her GP. It only had a continuous substantial adverse effect on her normal day to day activities from mid- May 2019 until the end of her employment.

50. I do not accept that at any point from May 2019 to October 2019 her heightened asthma symptoms were likely to last for at least 12 months, in the sense that they could well last 12 months. For this purpose, I am to disregard what has in fact happened since the end of her employment. Judged during the period from May 2019 to October 2019, the increase in her asthma symptoms appears to have been associated with the particular pressure she was under at work, as a result of the proposed restructuring, and the stress it was causing her to experience. There is no evidence that workplace stress was likely to continue for at least 12 months (in the sense that it 'could well' continue for at least 12 months), or that the increased level of asthma symptoms would continue even without stress at work.

51. However, I also need to consider whether the substantial adverse effect that the Claimant experienced from her asthma from mid-May onwards had already lasted for at least 12 months (Schedule 1, paragraph 2(1)(a)). If it had, then it would satisfy the definition of 'long-term'. The Claimant's asthma had caused a substantial adverse effect on her normal day to day activities on several occasions over a period lasting much longer than 12 months – namely when it had required sick leave, or required an attendance at the GP's surgery. On each occasion, it was likely to recur, in the sense that it could well recur. Over the entire period since 2015, it had recurred albeit, at times, these were several months apart. This previous pattern suggested that, assessed as at 2018 and during the first half of 2019, asthmatic episodes 'could well' recur. As a result, under paragraph 2 of Schedule 1, the asthma is "to be treated as continuing to have the substantial adverse effect" that it had during each episode which required time off work on sick leave or a visit to the GP. The consequence is that by the time the material period starts in May 2019, the Claimant's asthma had had a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities (Section 6(1)(b) Equality Act 2010).

Conclusion

52. For these reasons, I conclude that the Claimant was a disabled person during the material period. The Tribunal will need to consider at the Final Hearing whether the Respondent knew or ought to have known of the Claimant's disability, and whether the Claimant has suffered discrimination in any of the respects alleged because of her symptoms of asthma or their effects.

53. The Tribunal will also decide whether the Claimant was constructively unfairly dismissed and whether there has been an unauthorised deduction of wages.

54. The Tribunal has varied the case management orders previously given. Those varied case management orders are contained in a separate document sent to the parties.

Employment Judge Gardiner

Date: 6 July 2020