



EMPLOYMENT TRIBUNALS

Claimant: Miss C Faux

Respondent: Hounslow Borough Council

Heard at: In Chambers **On:** Wednesday 11
November 2020

Before: Employment Judge Matthews

Representation:

Claimant: In Person

Respondent: Ms C Eccles - Solicitor

RESERVED JUDGMENT

1. Miss Faux's claims of age discrimination are dismissed on withdrawal.
2. Miss Faux was not, at any relevant time, a disabled person within the meaning of section 6(2) of the Equality Act 2010.
3. Miss Faux's claims of disability discrimination are dismissed.

REASONS

INTRODUCTION

1. Miss Claire Faux brought claims of age discrimination, race discrimination, disability discrimination and for wages/breach of contract.
2. The Respondent Council denied all the claims.

3. This is a Preliminary Hearing listed by Order of Employment Judge Mason sent to the parties on 12 August 2020 following a Telephone Case Management Preliminary Hearing on that date (the “Order”). The Order can be seen in the bundle at 36-43.
4. The Order sets out the matters for determination at this hearing as being:
 - “(i) If the Respondent does not concede that the Claimant was disabled, was the Claimant at all relevant times a disabled person? (s6 EqA).*
 - “(ii) Identification of the issues to be determined at the FMH.*
 - “(iii) Consideration of any further case management orders to ensure the parties are ready for the FMH.”*
5. The Council does not concede that Miss faux was disabled. That issue is dealt with in this Judgment. The Tribunal has also made contemporaneous case management orders on the subject of the issues and preparation for the full hearing. During the course of that case management exercise, Miss Faux withdrew her claims of age discrimination. They are, therefore, dismissed as part of this Judgment.
6. The Tribunal heard from Miss Faux by reference to further information supplied by her to the Council on 9 October 2020 (bundle 46-50). There was an “electronic” bundle of documentation. References in this Judgment are to pages in the bundle unless otherwise specified.
7. The hearing was a remote hearing using the Common Video Platform consented to by the parties. A face to face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. Unfortunately, it was not possible to establish visual contact with Miss Faux. Miss Faux was, however, happy to proceed on the basis that she had telephone contact whilst the Tribunal had visual contact with Ms Eccles. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.
8. It was not possible to both consider and give judgment on the issue of disability whilst leaving time for much needed case management. Judgment on the issue of disability was, therefore, reserved.

FACTS

9. Miss Faux started work with the Council on 8 May 2004 and remains in the Council’s employment. At all relevant times Miss Faux’s job

was as Housing Officer based at the Council's Langdale Centre in Isleworth.

10. Miss Faux worked 36 hours a week. In an occupational health referral, The Council describes the job thus (53):

"The role generally is managing a patch of properties across different tenures. The housing officer role is generic management of cases related to tenancy, some anti-social behaviour, rent arrears recovery, conducting estate inspections and providing a frontline service face to face in the office on duty and by telephone enquiries. Officers are expected to work on their own initiative and will require to conduct home visits to clients."

The Council added the following (53):

"The medical cert states "assistance with heavy lifting" but the role does not contain any heavy lifting (a Job Description is attached). It does involve carrying a surface Pro, with its charger, a headset and two USB connectors. But these are lighter than laptops that staff carry. (back packs and shoulder bags have also been provided)."

11. Miss Faux describes her alleged disability in this way (48-49):

"The natural curve of my back arches quite considerably. This is like Lordosis and can have the effect of causing pressure and pain in my lower back."...[The Tribunal understands Lordosis to be an excessive inward curvature of the spine in the lower back.]

"I try not to carry heavy loads or sit for long periods. I find that carrying heavy loads causes lower back pain almost like a burning, dull pain across the length of the lower back. under such circumstances I find I am then stuck in my tracks. When this happens, I try to push onto a wall or something solid to stretch the back and relieve the pain. I find it difficult to move without adopting that procedure. if i have a work rucksack at the time, I put it down to get some additional relief.

I can, on occasions, experience a dull pain on the lower back when i am walking up a flight of stairs. it feels like all the weight of my upper body has dropped and landed on the lower back area in one painful lump.

Sitting for long periods also influences my back pain, but the pain comes without warning. there is a feeling of heaviness travelling to the lower back and when i try to get up, it is painful/difficult to arrive at the stand-up position, immediately.

Although i have adopted coping mechanisms for the pain, I find that lumbar support, of various forms, reduces the frequency of pain or discomfort. Avoiding heavy lifting or carrying heavy items for a long time, engaging in back strengthening exercises also helps with my back pain. However, I do not experience pain every day.”

12. The bundle includes a number of “Fitness for Work” notes (56-59 and 63-64). On 3 May 2019 Miss Faux was noted as having “Back pain” and certified as “you may be fit for work taking account of the following advice.” The advice was “workplace adaptations”, “If adequate seating provided at work and assistance with heavy lifting.” On 28 June 2019 a note was issued in more or less identical terms. On 26 July 2019 an otherwise similar note included the different advice “amended duties” and “No heavy lifting”. Notes on 11 and 25 September 2019 certified Miss Faux as not fit for work. The last note in the bundle is dated 16 October 2019 and records that Miss Faux may be fit for work with the advice “- Lumbar supportive chair (as per work assessment medical officer) – Adequate regular breaks – avoid heavy lifting”. All of the notes recorded “I will not need to assess your fitness for work again at the end of this period.”
13. On 25 September 2019 Dr Paul Obi had written to the Council making his occupational health report (60-64). The report should be referred to for its full content but included this:

“Her role could be confrontational, including lone working sometimes and manual handling duties such as carrying equipment and paperwork which Ms Faux detailed could weigh as much as 10kg. She says carrying heavy equipment hurts her back and that she has raised this directly with her line manager and was given a trolley bag. However, as this still remains a problem, she changed to using a rucksack and there has been no improvement. Since her sickness absence, she report improvement with her back pain, obviously following a period of rest.” [From her oral evidence the Tribunal understands that Miss Faux went to an exercise/physiotherapy class twice a week during her sickness absence. Miss Faux described the class as “absolutely marvellous” in terms of alleviating her back pain.]

“She confirms she also works two days a week from home. Her estimated commute to work is about 75 minutes by bus which includes carrying relatively heavy equipment.”....

“...she does not currently take pain-killer medication since her pain improved in recent times with rest. Her current back pain score is about 2/10 lately and she has experienced this pain for the last one year.”....

“Functionally, lifting shopping bags is limited to light shopping lately. She is able to drive and sit up for 45 minutes at a time with a lumbar support or a cushion in her car seat. She has no difficulty standing or walking for long periods and neither has she reported any difficulties with the use of stairs.

“...there was evidence of some limited range of movement of her spine on forward flexion and limited range of movement in the joints of her lower limb, although this is likely due to guarding to avoid pain or discomfort. In my view, I suspect she has mechanical back pain which could normally respond to physiotherapy with back strengthening exercises and perhaps pain-killers as needed.”

14. Dr Obi’s report goes on to express the view that Mis Faux is medically fit to return to work on a phased basis and recommends adjustments. Those were as follows. First, a workstation assessment with a view to lumbar support and regular standing and/or stretch breaks. Second, flexibility to attend physiotherapy appointments. Third, a manual handling risk assessment of any required heavy lifting.

15. Finally, Dr Obi gives the following opinion:

“In my opinion, the disability threshold under the Equality Act is unlikely to be met given her condition. However, disability is ultimately a legal decision and not medical.”

APPLICABLE LAW

16. Section 6 of the Equality Act 2010 (the “EA”), so far as it is relevant, provides:

“6 Disability

(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.

(2) A reference to a disabled person is a reference to a person who has a disability.”....

“(5) A Minister of 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.”

17. The Government has issued “Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)” (the “Guidance”) under section 6(5) EA.

18. Section 212(1) of the EA, so far as relevant, provides:

“(1) In this Act-”....

““substantial” means more than minor or trivial”

19. Paragraph 2(1) of Part 1 of Schedule 1 to the EA provides:

“2. Long-term effects

(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.”

20. I was not referred to any case law.

CONCLUSIONS

21. Miss Faux's case is that, at all relevant times, she had a physical impairment as a result of the natural curve of her back and that it had a substantial and long-term adverse effect on her ability to carry out normal day to day activities. It is for Miss Faux to show that she satisfies the statutory definition.

22. The dates for determination of this issue are not settled although it seems that Miss Faux's claims of disability discrimination relate to the

Summer of 2018 onwards. In any event, Miss Faux describes her alleged disability as lifelong.

23. A physical impairment need not result from an injury or illness. It can be a physical difference from the norm. Thus, in the Tribunal's view, the exaggerated curve of Miss Faux's back is a physical impairment.

24. Having identified that Mrs May had a physical impairment, the Tribunal must now consider whether or not it affected her ability to carry out normal day-to-day activities. Here the focus is on what Miss Faux could not do, rather than what she could do.

25. Carrying loads

26. The evidence is that carrying loads of 10 kg or more causes Ms Faux back pain. Dr Obi noted that *"lifting shopping bags is limited to light shopping lately"*.

27. Sitting

28. Miss Faux avoids sitting for long periods (more than 45 minutes per Dr Obi) and uses lumbar support or a cushion when sitting. If Miss Faux sits for long periods she can experience pain resulting in difficulty standing up.

29. Walking up stairs

30. Miss Faux says that, on occasion, she experiences a dull pain in her lower back when walking up stairs. Dr Obi, however, noted that Miss Faux had not reported any difficulties with the use of stairs. Given the evidential difference, the Tribunal concludes that Miss Faux was not much, if at all, inconvenienced in this respect.

31. Driving

32. Dr Obi noted that Miss Faux could drive for up to 45 minutes, but presumably no longer without a break.

33. Sitting, walking up stairs and driving are all normal day-to-day activities. Carrying loads is also a normal day-to-day activity although an inability to move heavy objects without assistance is not. In the Tribunal's view the inability to carry a load of 10kg without assistance is borderline and it will proceed on the basis that that is a normal day-to-day activity.

34. Next, the Tribunal must consider whether or not the effect on Miss Faux's ability to carry out day-to-day activities was substantial.

35. The Guidance, amongst other things, has this to say on the meaning of “*substantial adverse effect*”:

“B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.”....

36. Looked at individually and cumulatively, the Tribunal’s conclusion is that the effect on Miss Faux’s ability to carry out day-to-day activities was not substantial. Carrying a load of 10 kg or a little more might, arguably, be a normal day to day activity. The inability to do so, however, is not a substantial effect. Carrying a load of that sort is unusual. Having to stand up after a period of 45 minutes is not a substantial effect. Generally, people will not sit for that period of time without standing up for a short period. The evidence on whether or not Miss Faux occasionally experienced a dull pain when walking up stairs is mixed but the effect seems not to have been substantial. The Guidance puts the threshold for driving at two hours. That is not to say that having to take a break after 45 minutes is a substantial adverse effect and the Tribunal’s conclusion is that having a break from driving every 45 minutes or so is not a substantial effect. As far as sitting, walking up stairs and driving were concerned, these were all things Miss Faux could do, provided it was not for prolonged periods. The effects of Miss Faux’s impairment do not cross the threshold into the statutory definition of disability.

37. In the Tribunal’s judgment, for these reasons, Miss Faux is not a disabled person within the meaning of that term in the EA by reference to the impairments associated with the natural curve of her back. That being the case, Miss Faux’s claims of disability discrimination must be dismissed.

Employment Judge Matthews

14 November 2020

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