



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Daley

Respondent: Optiva

Heard at: Birmingham (by CVP) **On:** 11 December 2020

Before: Employment Judge Miller

Appearances

For the claimant: In person

For the respondent: Mr G Baker (counsel)

RESERVED JUDGMENT

The claimant is, from 1 November 2017, disabled by reason of underactive thyroid and symptoms of the menopause.

REASONS

Introduction

1. These are the reasons for my decision that the claimant is, and has since 1 November 2017 been, a disabled person by reason of the impairments of underactive thyroid and symptoms of menopause.
2. By a claim form dated 10 October 2019, the claimant brought a number of claims against her employer. At a case management hearing on 23 March 2020, EJ Perry identified the claims as claims of indirect discrimination on the grounds of sex and age. At that point there was a question as to whether the claimant had also brought claims under sections 20 and 21 of the Equality Act 2010 for failure to make reasonable adjustments.
3. Although the question of whether the claimant's claims included claims of disability discrimination was not settled at the previous case management hearing, orders were made and this case was listed to determine whether the claimant's claims did include a failure to make reasonable adjustments

claim, if not whether the claim should be amended to include such claims and whether the claimant was disabled by reason of the impairments of underactive thyroid and symptoms of menopause.

4. At the hearing on 11 December 2020, I considered and allowed the claimant's application to amend her claim to include claims that the respondent had failed to make reasonable adjustments. Consequently, it was necessary to consider whether the claimant was at the material time disabled and these are my reasons for that decision.

The hearing

5. the hearing was conducted remotely by CVP. The respondent was represented by Mr Baker of counsel and the claimant represented herself.
6. I had a bundle of documents prepared by the respondent which included a disability impact statement provided by the claimant. The claimant had a bundle of those documents but it was an earlier iteration. Documents had been provided on the morning of the hearing or the day before and the claimant had not had an opportunity to access the correct bundle. I identified documents that were missing which most relevantly was a letter about this hearing from the respondent to the tribunal. The claimant agreed to continue with the hearing using the bundle to which she had access. Mr Baker sent the claimant a separate copy of the missing document and it was agreed that the claimant would access that and her attention been drawn to it should it become necessary in the course of the hearing.
7. In the event, it was not relevant to the matters considered in this judgment.
8. I read the claimant's disability impact statement and the pleadings and I heard evidence from claimant. I am grateful to the parties for the way in which the hearing was conducted and additionally to Mr Baker for the considerate way he questioned the claimant and his wholly appropriate assistance to the claimant and the Tribunal.

Findings

9. The claimant is, at the date of this hearing, a 51 year old woman. In her disability impact statement, the claimant says that she has been suffering with symptoms of menopause for over two years. She describes the following symptoms:
 - a. hot flushes - the claimant says that the hot flushes that she suffers with normally appear as a rising redness on her chest, neck and face which makes her very overheated and sweaty. She describes this as very embarrassing, leaving her needing to wash and change her clothing.
 - b. Night sweats - these are hot flushes that occur at night and disrupt the claimant's sleep. She says that they leave her feeling unwell when she wakes up, and having extreme fatigue during the work day due to lack of sleep. This, the claimant says, impacts on her ability to concentrate and digest information.

- c. Headaches - the claimant says that these typically occur after spending a lot of time on the computer and she has to turn the office lights off to avoid developing a migraine.
 - d. Joint pain - the claimant says the menopause has caused her musculoskeletal problems which result in tiredness, aching muscles and painful arms, legs and back.
 - e. Muscle tension - the claimant says she understands this to be linked to stress and anxiety and it presents itself as a feeling of tightness in her muscles. She says this has a major impact on her ability to do physical tasks.
 - f. Tingling extremities - the claimant describes tingling sensation in her feet and hands which then go to sleep. She then has to just stop what she is doing to massage the affected area until sensation goes away.
 - g. Itchy skin - this arises, the claimant says, from low oestrogen levels which have caused the skin to become dry and itchy. She uses cream to soothe the itching.
 - h. Fatigue - the claimant has feelings of extreme tiredness.
 - i. Anxiety and panic disorder – the claimant describes the symptoms of anxiety as leaving her feeling nervous, restless and hyperventilating. She starts to sweat and gets feeling of panic. The claimant experiences, she says, panic attacks.
 - j. Disrupted sleep – the claimant says that because of the other symptoms of menopause she experiences frequent disrupted sleep and insomnia.
 - k. Memory lapses - the claimant says that she now struggles to remember how to do things that caused her no problems previously.
 - l. Concentration difficulties - the claimant says she has a lack of focus and concentration as a result of lower levels of oestrogen.
10. In respect of hyperthyroidism, the claimant lists without further explanation the following symptoms:
- a. Tiredness
 - b. Being sensitive to cold
 - c. Weight gain
 - d. Constipation
 - e. Depression
 - f. Slow movements and thoughts
 - g. Muscle aches and weakness

- h. Muscle cramps
 - i. Dry and scaly skin
 - j. Brittle hair and nails
 - k. Loss of libido (sex drive)
 - l. Pain, numbness and a tingling sensation in the hand and fingers (carpal tunnel syndrome)
11. The claimant was not challenged on whether she actually experienced any of the symptoms. The respondent's issues were focused predominantly on when the claimant's problems started and how long they would, were likely to or had lasted.
 12. The claimant said that the symptoms of underactive thyroid were similar to and overlap with some of the symptoms of menopause. This, the claimant said, was one of the reasons why it had taken a while for the underactive thyroid to be diagnosed.
 13. In respect of the symptoms of menopause, I have no difficulty in accepting that the claimant suffered from the symptoms that she said she did. Firstly, that was not challenged by the respondent and secondly the potential symptoms of menopause are well known.
 14. The problems, to which I will come shortly, that the claimant described herself as experiencing appeared to relate predominantly to the problems she described as arising from symptoms of menopause. Those related specifically to difficulties concentrating, memory problems, anxiety and panic attacks. To the extent, therefore, that the symptoms of an underactive thyroid overlap with the symptoms of menopause it is not necessary or, in this hearing, possible to distinguish which impairment is responsible for the difficulties. The claimant did not mention any difficulties arising in relation to her claim from any of the other symptoms of underactive thyroid.
 15. The claimant found it difficult to identify precisely when her problems had started. This she attributed to the problems with her memory.
 16. Mr Baker referred to and I have had regard to the claimant's medical records included in the bundle. The claimant said in evidence that the first time she started to feel really bad was around 2016. She remembered this because it was around the time when she lost her mother, and she at first attributed some of the symptoms to grief.
 17. Looking at the claimant's medical records, the claimant went to see her doctor in February 2017, at which time the possibility that the claimant might be experiencing the onset of menopause was first raised. The next significant attendance at the doctor was in October 2017 when the following issues are recorded: "hot sweats, panics, headaches, muscles ache intermittently". It also includes a reference to sleeplessness, flushing and being anxious. The doctor records that menopausal symptoms are present.

18. Around the same time, in November 2017, the claimant attended the respondent's occupational health advisor. In the report, the occupational health advisor refers to hormonal changes and says:

[The claimant] "reports excessive night sweats at with sleep deprivation resulting in energy and concentration problems. She currently benefits from using a desk fan during the day and she advises me she is struggling to keep up with the current new role demands at present as a result of depleted concentration and energy levels linked to her condition. She has attended her GP and she is prescribed appropriate medical management though she has only recently started her treatment".
19. It is further recorded that "It is likely that initially Mrs Daley will still be experiencing some level of symptoms such as tiredness and fatigue issues while her medications take effect. While she works some flexible hours of later and or early finish, there may be some temporary impact on her performance".
20. Medication refers to hormone replacement therapy.
21. Having regard to the doctor's notes, the evidence the claimant gave and the occupational health report, I find that the claimant was by the beginning of November 2017 when she saw the occupational health advisor, experiencing the symptoms of menopause described above.
22. The claimant did say that the condition had been getting worse - she described it as progressive - but in light of the information recorded in the occupational health report and the complaints the claimant brings about her working environment and how that was affecting her at the time, I conclude that the symptoms were substantial for the claimant at that time.
23. The claimant did not in her disability impact statement explicitly set out the difficulties she had with day-to-day activities. In cross-examination she said that she has difficulties with the following things.
24. She can shop, but 99% of the time she is accompanied by her daughter or husband. This is because she experiences muscle weakness and cramps which causes her difficulties in lifting full bags of shopping.
25. She said that she also now has difficulty driving although the claimant said that she could no longer drive to see her relatives who live in Skegness, 300 miles away. It was unclear whether the claimant would be able to undertake regular shorter journeys.
26. The claimant said that she struggles to stay awake to watch films and falls asleep half way through.
27. The claimant said that she is no longer able to go out and socialise. The main reason for this, the claimant said, was because of the anxiety that she describes as "really bad". She said she used to go out very regularly and enjoy it but she is no longer able to do that. The reason for this was a combination, as I understand it, of anxiety and panic attacks arising being in a group environment, combined with the physical symptoms of hot flushes. It appears that the two things work together to cause the claimant to

become anxious and panicky so that she no longer feels comfortable going out in social situations.

28. I note also, that it is part of the claimant's claim that one of the reasons she struggled with working across more than one site is that, she says, she needed to rest during the day and driving through lunchtime prevented her from doing that. Although I did not hear evidence directly about that issue, it is clear from the claimant's witness statement that she had difficulties in sleeping at night and was fatigued generally and I conclude that this would, on balance of probabilities, be likely to have an impact on the claimant's ability to stay alert and active throughout the whole of the day.
29. The claimant also said that she struggled to concentrate on work documents and would struggle with processes that she was previously familiar with and had to remind herself of them.
30. Again, I have no difficulty in accepting the claimant's description of the difficulties that she experiences. I note that the symptoms of menopause and an underactive thyroid overlap in respect of these particular issues.
31. The claimant said that when she initially presented at the doctors throughout 2016 neither the menopause nor her underactive thyroid were identified by the doctor. She said that the doctor and consequently she believed that she was experiencing a number of viruses.
32. I find, therefore, that the symptoms in all probability started from 2016 or before but started to become very serious and have a substantial impact on the claimant from the middle to the end of 2017 as mentioned above.
33. I also accept the claimant's unchallenged evidence that her problems have been getting steadily worse since they first started in 2016.

Law

34. Section 6 of the equality act 2010 says, as far as is relevant for today's purposes,
 - (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.
35. This question comprises of four separate tests as set out by the employment appeal Tribunal in the case of *Goodwin v the Patent Office* [1999] IRLR 4, EAT
 - (1)The impairment condition
Does the applicant have an impairment which is either mental or physical?
 - (2) The adverse effect condition
Does the impairment affect the applicant's ability to carry out normal day to day activities...., and does it have an adverse effect?
 - (3) The substantial condition

Is the adverse effect (upon the applicant's ability) substantial?

(4) The long-term condition

Is the adverse effect (upon the applicant's ability) long-term?

36. I have also had regard to the relevant provisions of Appendix 1 of The Equality and Human Rights Commission Code of Practice on Employment - The Meaning of Disability.
37. This says that a substantial adverse effect is something which is more than minor or trivial. In determining whether something has a substantial adverse effect, account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of the loss of energy and motivation.
38. The code says that normal day-to-day activities are those activities which are carried out by most men or women on a fairly regular and frequent basis. Day-to-day activities include activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing, going to the toilet, talking, listening to conversations of music, reading, taking part in normal social interaction or forming social relationships, nourishing and care for oneself. This is not an exhaustive list.
39. Where someone receives treatment, that should be ignored and the impairment should be taken to have the effect it would have had without such treatment.
40. I was also referred to paragraph 8 of part 1 of schedule 1 of the Equality Act 2010. This provides:
- (1) This paragraph applies to a person (P) if—
 - (a) P has a progressive condition,
 - (b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but
 - (c) the effect is not (or was not) a substantial adverse effect.
 - (2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.
41. I have considered the case of *Taylor v Ladbrokes Betting and Gaming Ltd* [2017] IRLR 312. Although I have been unable to identify any cases in which “progressive” in the context of schedule 1 of the Equality Act 2010 is identified, it appears to me that progressive must be read in the context of the whole of that paragraph and *Taylor* so that progressive must mean a condition that, while at one point in time does not give rise to a substantial adverse effect on the claimant’s ability to undertake day-to-day activities, at some point in the future the condition will develop to such an extent that it does then have a substantial adverse effect.
42. I conclude, therefore, that progressive does not have a particular technical or medical meaning in this context but is to be determined on the available evidence as to the progress, or likely progress, of the particular condition.

Conclusions

43. In my judgement, the claimant does have substantial difficulties in undertaking day-to-day activities as a result of the undisputed impairments of the effects of menopause and/or an underactive thyroid.
44. The evidence of the claimant that I accepted was that she has difficulties with concentration, memory and fatigue which will inevitably impact on the claimant's ability to do many tasks throughout the day. The claimant described difficulties in remembering work processes and reading documents. She also described not being able to watch a film to the end. In my view all of these things are normal day-to-day activities and having regard to the tiredness and difficulty that the claimant experiences which cannot reasonably undertake them.
45. The claimant also described a very significant difficulty in continuing her social life. I accept the claimant's evidence that this was a big part of the life and consequently is a normal day-to-day activity. The claimant's social life, she said, has all but disappeared. Even disregarding the effects of the Covid 19 pandemic the anxiety and panic that the claimant experiences, whether as a result of hot flushes or otherwise, are sufficiently serious that she is unable to undertake the normal day-to-day activity of socialising with friends.
46. The claimant also described difficulties in shopping and driving which I have accepted.
47. It should be clear from my findings that this started to become significant for the claimant in November 2017. In my judgement it was obviously likely from the serious onset of those symptoms that the impairment would last for at least a year, thereby satisfying the long-term condition. Consequently, I do not consider that it is necessary to determine whether this was a progressive condition at that time.
48. For these reasons, my decision is that the claimant was disabled by reason of underactive thyroid and/or symptoms of the menopause with effect from 1 November 2017 and continue to be so is at the date of this hearing.

13027637/2017

Employment Judge Miller
17 December 2020