



EMPLOYMENT TRIBUNALS

Claimant: Ms S Morris

**Respondent: Lauren
Richards Ltd**

v

Heard at: Via CVP

On: 9 February 2021

Before: Employment Judge Milner-Moore

Appearances

For the Claimant: In Person

For the Respondent: Mr Ohringer (Counsel)

JUDGMENT

1. The claimant was not a disabled person within the meaning of section 6 of the Equality Act 2010.
2. The claim of disability discrimination is dismissed.
3. The claimant's application for leave to amend is refused.

REASONS

1. Following a case management hearing on 1 December 2020, this case was listed for a preliminary hearing to consider the following issues:
 - a. To determine the claimant's application to amend her claim to add an allegation that she was discriminated against on grounds of menopause;
 - b. To determine whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2020 by reason of depression, anxiety and (subject to a above) menopause; and
 - c. To determine the respondent's applications for orders for strike out or for a deposit.

The hearing

2. The hearing took place remotely by video using the CVP platform. A face-to-face hearing was not held because it was not practicable given the COVID 19 pandemic, and all issues could be fairly and effectively determined in a remote hearing. The parties were able to use the technology effectively. In determining the issues identified I had access to an agreed bundle of documents, a written application to amend by the claimant, an

expert's report produced by the claimant, a skeleton argument produced by the respondent's counsel and a bundle of authorities. The respondent did not wish to dispute the accuracy of any of the evidence produced by the claimant in relation to disability and so the claimant was not required to give oral evidence in support of her claim.

Background and Procedural history

3. The claimant was employed by the respondent as a Senior Technologist between 9 October 2017 and 19 September 2019, when she was dismissed by the respondent. On 13 January 2020, the claimant filed an ET claim alleging that she had been unfairly dismissed by the respondent and subject to disability discrimination. The narrative attached to her claim was lengthy and detailed (7 or so pages of single-spaced text with accompanying footnotes linking to relevant supporting evidence). Her claim of unfair dismissal was dismissed on the grounds that she did not have the requisite continuity of service. Her claim of disability discrimination proceeded. The claim was that the respondent had been harassed directly discriminated against on grounds of disability and that the respondent had failed to make reasonable adjustments. The claim form stated *"To summarise, the reason I am making this claim is that the respondent (Lauren Richards) placed unreasonable workload and responsibilities upon me from January 2019, to the detriment of my mental health. This caused me to suffer from stress and anxiety, both of which I had never suffered from before leading to me needing to take a leave of absence as instructed by a health professional. Upon my return to work, the respondent did not make any reasonable adjustments in order to improve these health issues. Instead they opted to dismiss me....."* The claim made no reference to menopause as a disability nor was menopause identified as a matter which had given rise to any adverse treatment by the respondent. The respondent denied that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010, asserted that the claimant was dismissed for reasons of capability and denied all the allegations of disability discrimination.
4. The case was listed for a case management hearing to take place on 1 December 2020. On 27 June 2020 the claimant was ordered to produce "a report from a qualified medical practitioner" to address whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010. The Order attached an instruction request addressing the elements of the test for disability set out in section 6. The claimant was also asked to provide an impact statement. It was ordered that both the report and impact statement be produced by 30 September 2020. In August 2020, the claimant produced some letters from the gynaecology clinics where she had been seen which confirmed a diagnosis of premature menopause and asked whether these letters, with an impact statements, would suffice. On 16 September 2020, the claimant produced an impact statement identifying four impairments premature menopause, anxiety, depression and post-traumatic stress disorder. The claimant did not, however, make an application to amend her claim form to include complaints that she had been discriminated against by reason of or in connection with menopause or PTSD. The respondent replied to indicate that it did not accept that the claimant

was disabled and noting that menopause was not the disability identified in the claim form. It indicated that it wished the case to be listed for a hearing to consider a strike out.

5. On 22 November 2020 the claimant submitted written representations for consideration ahead of the case management hearing. She suggested that the respondent had failed to make reasonable adjustments in relation to menopause but did not explain what disadvantage she considered she experienced as a result of that condition. She also made an allegation of harassment related to menopause (concerning comments made regarding body odour during a meeting) and complained of a comment made to the effect that she was too young to go through menopause (which she also considered to be age discrimination) and she applied to have this included by way of amendment. She provided excerpts from her GP records. On 1 December 2020 the case was listed for a one-hour case management hearing and I did not consider that there was sufficient time to deal with the applications being made for leave to amend (by the claimant) to determine whether the claimant was disabled and for strike out/deposit (by the respondent). For that reason, I undertook some case management, and I fixed a further open preliminary hearing to take place on 9 February 2020. I directed that by 8 January 2021 the claimant must make a written application to amend setting out the specifics of her complaint of disability discrimination referable to menopause. In particular, the claimant was asked to identify the type of disability discrimination (whether direct discrimination, indirect, failure to make reasonable adjustments etc), the facts relied on to support the claim and an explanation of why these matters had not been included when the claim was originally brought.

Evidence relating to disability

6. The claimant produced excerpts from her GP records and the medical history relevant to anxiety/depression in those notes is as follows:
 - a. During May and June 2011, after being diagnosed with premature ovarian failure the claimant underwent counselling. She responded well to counselling and reported feeling much improved.
 - b. On 17 July 2019, the claimant attended the GP reporting work related anxiety. She was prescribed beta blockers and Propranolol. She was seen again on the 22 July and at that point was signed off sick for a period. The claimant returned to work on 5 August 2019. She was dismissed on 19 September 2019.
 - c. The next entry in the medical records appears on 21 February 2020. The claimant was reporting “anxiety and fear” and explained that she “was in a job where her employer used to shout a lot and she was very anxious there.Now she is in another job and feels happy there. But occasionally she crosses roads with her previous employer’s cars etc and then she starts to panic and get anxious and she does not know how to deal with that” She was advised on self-help measures such as breathing exercises and the possibility of a self-referral for CBT.
 - d. On 9 July 2020 the claimant contacted her GP again and was reporting anxiety and panic attacks that counselling and breathing

exercises had not helped. She was prescribed beta blockers and propranolol. She completed depression and anxiety questionnaires a few days later. The results indicated moderately severe anxiety and severe depression. On 28 July there was a further telephone consultation during which it was suggested that the claimant might be depressed. The claimant volunteered that she had completed a PTSD questionnaire and that she thought that she might be suffering from PTSD.

7. There is evidence in the bundle in the documents created by the respondent relating to the claimant's employment which is relevant to the claimant's condition in the run up to her dismissal.
 - a. The claimant is recorded as having "broken down" in a meeting at the beginning of June, with the result that her workload was reduced and managed
 - b. The claimant reported feeling overworked in mid-July shortly before she was signed off.
8. The claimant's impact statement was produced on 16 September 2020.
 - a. She set out her medical history related to anxiety, she said that she had begun counselling in May 2020 and that before this she had difficulty undertaking activities such as leaving the house, speaking up in meetings or in social settings and that she experienced difficulty talking about her career history. She reported anxiety at the prospect of encountering the respondent's staff in meetings or seeing them driving in her neighbourhood. She reported difficulty concentrating when reading and difficulty sleeping. She considered that her anxiety had begun in late 2018/early 2019.
 - b. She also set out her medical history referable to depression, she said that she had begun counselling in May and that before this she had difficulty undertaking activities. These included matters such as being happy, sleeping normally, socialising, and eating healthily, completing housework, engaging in self-care due to low motivation and in engaging in hobbies due to lack of interest /concentration. She considered it likely that she had suffered from depressions since July 2019.
9. On 4 January 2021, the claimant was seen by a Psychiatrist who produced. A report dated 14 January 2021. The Psychiatrist wrote the report based on the claimant's self-reporting and without having had sight of her GP records (although the claimant had these, so it is not clear why they were not made available). The Psychiatrist's assessment was that the claimant met the diagnostic criteria for "mixed Anxiety and Depressive disorder". He indicated that the trigger for the condition was the claimant's work situation with the respondent. He recorded that the claimant had no pre-existing problems with her mental health. He considered that the claimant was disabled and that the condition was likely to have begun in May/June 2019. He considered that the condition has a substantial effect on the claimant's ability to carry out day to day activities in a number of respects. Including reduced frequency of going out and increased vigilance when doing so,

reduced concentration, decreased creativity, sleeping less well, less housework due to reduced energy levels and motivation and decreased assertiveness in conversations at work. His report did not address the question of whether, at the relevant time, the claimant's condition was likely to be long term.

Relevant law

10. The Presidential guidance on Case management provides guidance to Tribunals when considering applications to amend

"4. In deciding whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all of the relevant factors, having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment.

5. Relevant factors would include:

5.1 The amendment to be made. Applications can vary from the correction of clerical and typing errors to the addition of facts, the addition or substitution of labels for facts already described, and the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal must decide whether the amendment applied for is a minor matter or a substantial alteration, describing a new complaint.

5.2 Time limits. If a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended. Once the amendment has been allowed, and time taken into account, then that matter has been decided and can only be challenged on appeal. An application for leave to amend when there is a time issue should be dealt with at a preliminary hearing to address a preliminary issue. This allows all parties to attend, to make representations and possibly even to give evidence.

5.3 The timing and manner of the application. An application can be made at any time, as can an amendment even after Judgment has been promulgated. Allowing an application is an exercise of a judicial discretion. A party will need to show why the application was not made earlier and why it is being made at that time. An example which may justify a late application is the discovery of new facts or information from disclosure of documents.'

11. These factors are also set out in the **Selkent** case. However, they do not represent an exhaustive list of factors that will be of relevance in considering an application to amend.

12. The burden of proving disability is on the claimant. The definition of disability appears at section 6 and Schedule 1 of the Equality Act 2010

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.

Schedule 1

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.

- (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.

13. In the context of the statutory definition of disability, a substantial adverse effect is one that is “more than minor or trivial” and “likely” means that something “could well happen”. The Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability provides helpful guidance on the approach to be adopted when applying the statutory definition. In particular, the appendices to the Guidance provide a list of examples of the types of factors which might indicate a substantial adverse effect on normal day to day activities. Section C of the guidance deals with the assessment of whether an impairment is long term.

C4 In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).

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'

Application to amend

14. On 19 December 2020, the claimant submitted a written application to amend. That application did not provide any further detail of how the claimant considered the respondent to have discriminated against her in relation to menopause. The claimant stated that she had not included reference to menopause when filing the ET1 because she had not been sure what to write and had thought that what was required was that she “*explain the discrimination I thought was related to my dismissal rather than the discrimination that occurred whilst working for the respondent in total*”.

15. I refused the application to amend on the basis that, having conducted a balancing exercise I did not consider that it would be in the interest of justice to allow the application. I reached that decision for the following reasons:

- a. When one reads the claim form, the thrust of the complaint is that the respondent should have dealt differently with its concerns regarding the claimant's performance given the claimant's anxiety. The nature of the amendment proposed would involve the addition of substantial new issues which would require time and involve costs to address, namely whether the claimant was disabled by reason of menopause and whether she had been subjected to discrimination by reference to that disability. That would involve the addition of new facts, as it did not appear that any of the factual matters set out in the claim form disclosed discrimination referable to menopause.
- b. I considered the timing and manner of the application. Although the application was made during the preliminary stages of the ET process the claimant had left it 8 months after filing her ET 1 to make any mention of these matters. Despite being given ample opportunity to do so, the claimant had not been able to provide adequate written particulars specifying the nature of the disability discrimination complaint referable to menopause. The only specifics provided by the claimant related to two comments which were alleged to amount to harassment and even in relation to those comments the claimant had failed to set out sufficient detail (for example she had not identified when the incidents took place).
- c. Any new complaint would be substantially out of time, the claimant having been dismissed in September 2019. Whilst time limits are not determinative, the fact that the additional claims are substantially out of time is a relevant factor. I did not consider that it would be just and equitable to extend time limits.
- d. The claimant has not shown any good reason why, if she really believed herself to have been subjected to discrimination on grounds of menopause, she failed to include this in her claim. Although the claimant said that she thought that the claim form should focus on the discrimination related to dismissal rather than setting out all the issues she had encountered whilst working for the respondent in total, the claim form was a very lengthy and detailed account of events that had taken place during her employment. It is implausible that, had the claimant really considered that she had been discriminated against on grounds of menopause, that she would not have made mention of this.

16. For the avoidance of doubt, the documents submitted by the claimant also referenced claims relating to PTSD and age discrimination although it was not clear that the claimant was actively advancing an application to amend to add these. For the reasons given above, I did not consider it in the interests of justice to allow an application to amend to add a complaint of disability discrimination referable to PTSD or age discrimination.

Was the claimant a disabled person by reason of anxiety or depression?

Did the claimant have an impairment?

17. I considered that the claimant did have an impairment, namely anxiety. That impairment was first diagnosed in July 2019 but the evidence indicates that it is likely that the impairment began in late May /early June 2019 when the claimant began to suffer from a loss of confidence and reported feeling overwhelmed at work. I do not consider that the claimant had the impairment of depression at the relevant time, depression was not diagnosed by her GP until much later and she did not complain of depression at the relevant time.

Did the Claimant's impairment have a substantial effect on her ability to carry out normal day to day activities.

18. I had regard to the list of "day to day" activities in the appendix to the Guidance. I considered that in the period from late May to mid-September the claimant's anxiety did have an impact on her ability to carry out the normal day to day activities. In particular, I consider that she experienced persistent general low motivation/loss of interest, difficulty being in environments that she found frightening, difficulty concentrating and difficulty with normal social interactions. The claimant was upset during a meeting in June, by July, she felt unable to come to work at all because she felt nauseous at the thought of going in and was signed off for two weeks. Her symptoms were sufficient that she was prescribed beta blockers and Propranolol. Although she returned to work in August she became upset again on 10 September 2019 before being dismissed with notice on 11 September 2019. I consider that, at this time, the impacts of her impairment (although they may have fluctuated somewhat) were more than trivial and so were substantial.

19. However, after the dismissal, the claimant rapidly obtained new employment (starting in October 2019) and she did not require further support from her GP until February 2020, at which time she reported herself to be happy but to be suffering from discomfort at the thought of bumping into anyone from the respondent. The claimant still reports some difficulty with normal day to day activities (leaving the house, participating in meetings and social conversation). She has other anxieties which are specifically focussed on encountering the respondent or having to explain her career history with the respondent.

Was the impairment long term, did it last 12 months or was it likely to last more than 12 months?

20. It is necessary to consider this question by reference to the state of the evidence at the material time, i.e. the date of the allegedly discriminatory acts, and to consider whether, if the impairment had not lasted 12 months, the evidence indicated that it was "likely" that any impairment would last for 12 months or more. The earliest discrimination allegation relates to April 2019, from which time the claimant says the respondent should have made reasonable adjustments, and the last discriminatory act was dismissal on

11 September 2019. I therefore need to consider the evidence during this period. What actually happened subsequently is not relevant.

21. I did not consider that the evidence established that the claimant's impairment had lasted 12 months or was likely to do so.

- a. The claimant's anxiety had not lasted more than 12 months at the relevant time. The claimant suggested that her impairment had begun in late 2018/early 2019. However, this was not consistent with the medical evidence in GP records and her Psychiatrist report, which suggest that she began suffering from anxiety in late May/early June 2019. As at the date of dismissal her anxiety had lasted around 3 and a half months.
- b. The evidence did not suggest that the condition was likely to last 12 months applying the test of whether this was something that "could well happen". There was nothing to suggest that the claimant's condition at this time was severe, or was for some other reason likely to persist and become long term. The cause of the claimant's anxiety was centred on her issues with her workplace and the demands of her job and her anxiety had, at the relevant time, lasted for a few months. There was nothing to suggest that her anxiety was likely to persist once she left the respondent and its work environment. The claimant was not someone with a pre-existing history of mental health issues that indicated a particular vulnerability. On the contrary, the only relevant medical history indicated that when the claimant had previously experienced a stressful life event (her premature menopause diagnosis) she had recovered well with a short period of counselling. For that reason I consider that there was nothing to indicate that her condition in 2019 was likely to take a different course or that her anxiety was likely to persist or to become a long term or recurrent condition.
- c.

Employment Judge Milner-Moore
Dated 5 March 2021

22 March 2021

Sent to the parties on:

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For the Tribunals Office

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Note:

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.