



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Convery

Respondent: Bristol Street Fourth Investments Limited

HELD by Hybrid (Leeds) **ON:** 2 June 2021

BEFORE: Employment Judge Brain

REPRESENTATION:

Claimant: In person

Respondent: Miss L Gould of Counsel

JUDGMENT having been sent to the parties on 23 June 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are provided at the request of the respondent.
2. On 22 December 2020, the claimant presented her claim form to the Employment Tribunal. She brought complaints of unfair dismissal (under the Employment Rights Act 1996) and disability discrimination (under the Equality Act 2010).
3. The claimant was employed by the respondent between 11 July 2019 and 15 October 2020. The respondent is engaged in the retail sale, maintenance and repair of motor vehicles operating as a VW motor dealership. The claimant worked for the respondent as a service advisor at the respondent's showroom in Harrogate.
4. The case benefited from a preliminary hearing which came before Employment Judge Lancaster on 15 March 2021.

5. At the preliminary hearing, the claimant withdrew her complaint of unfair dismissal. This is because she did not have sufficient continuity of service to enable her to pursue a complaint. A Judgment upon withdrawal of the unfair dismissal claim was promulgated on 17 March 2021.
6. Employment Judge Lancaster, at the preliminary hearing, clarified the nature of the claimant's complaint brought under the 2010 Act. The claim is for discrimination arising from disability under section 15 when read in conjunction with section 39(2)(c). In other words, the claimant complains that she was unfavourably treated for something arising in consequence of disability.
7. The unfavourable treatment is the summary dismissal of the claimant by the respondent on 15 October 2020. The claimant was summarily dismissed because she refused to wear a face mask and failed to sanitise her hands regularly as required by the respondent.
8. The claimant's case is that, at the material time, she was a disabled person for the purposes of section 6 of the 2010 Act as she had a mental impairment by reason of anxiety and panic attacks. She says that the mental impairment results in an inability to wear a face mask or a face covering: (I shall use the terms '*face mask*' and '*face covering*' interchangeably). Therefore, the inability to wear a face mask is, on her case, something that arises in consequence of disability and for which she was dismissed.
9. A preliminary issue arose as to whether the claimant was at the material time a disabled person for the purposes of section 6 of the 2010 Act. Employment Judge Lancaster therefore listed the case for a preliminary hearing to take place today in order to determine that issue.
10. A person has a disability for the purposes of the 2010 Act if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. This means that, in general:
 - The person must have an impairment that is either physical or mental;
 - The impairment must have adverse effects which are substantial;
 - The substantial adverse effects must be long term; and
 - The long term substantial adverse effects must be effects on normal day-to-day activities.
11. On 24 July 2020 the UK Government made face coverings mandatory in shops and supermarkets. This measure was one of those taken by the UK Government in response to the Covid-19 pandemic.
12. On 22 September 2020 face coverings became mandatory for retail staff in England. Again, this was a measure taken by the UK Government in response to the pandemic.
13. Today, the claimant gave evidence in the form of the witness statement at pages 36 and 37 of the hearing bundle. (This is labelled "*statement of further particulars*" but is in reality a witness statement (or, as it is sometimes known, an impact statement) setting out the claimant's factual contentions in support of her case that she is a disabled person for the purposes of section 6 of the 2010 Act).

14. In paragraph 5 of her witness statement the claimant says:

“On 24 July 2020 – panic attack at Asda, unable to proceed with shop.

25 July 2020 – near panic attack in Asda, did not attempt to go in after extreme nausea experienced within seconds of covering face.

30 or 31 July – panic attack when attempting to enter Sainsbury’s. Had been self-medicating with magnesium in days prior in an attempt to calm anxiety, but, unsuccessful. The impairment is life long and expected to last. I have had wonderful support from establishments who understand and adhere to the government guidelines and allow me to go about my day to day activities unhindered by being forced to wear a face covering.”

15. There was no cross-examination of the claimant from Miss Gould upon the contents of paragraph 5 of the claimant’s witness statement. There was simply no sensible basis upon which Miss Gould could have sought to impugn this aspect of the claimant’s evidence.

16. The measure taken by the UK Government on 22 September 2020 applied to the respondent given its business as a retail car dealership. Quite properly, no factual evidence was presented by the respondent at today’s hearing. The respondent’s case of the impact of the 22 September 2020 measures upon its business is set out in their grounds of resistance. This says as follows:

(13) Consequently, on 23 September 2020, the respondent wrote to its employees to confirm that, from 24 September 2020, all customer facing colleagues (such as the claimant) would be required to wear face masks in the dealership in all customer facing or public areas or when moving around their dealership.

(14) The respondent encouraged those employees who are exempt from wearing a face mask to discuss the issue with their line manager, who could liaise with the respondent’s HR team. The respondent’s HR team could then write to exempt employees with written confirmation of authority to work without a face mask.

(15) On 24 September, the claimant approached her line manager to discuss the respondent’s face mask policy with him. The claimant was asked to wear a face mask during the conversation with her line manager, in accordance with the respondent’s policy and in order to protect him from potential Covid-19 transmission. The claimant refused to do so. The meeting with her line manager was therefore rescheduled to take place on 28 September 2020.

(16) The claimant met with her line manager on 28 September 2020. On arrival at the respondent’s Volkswagen Harrogate dealership, the claimant was asked to sanitise her hands. She refused to do so on the basis that she had “washed them earlier”. The claimant also refused to wear a face mask during the meeting with her line manager. Nevertheless, the claimant’s line manager allowed the meeting to proceed at a safe distance. During this meeting, the claimant stated that she didn’t like having her face covered and that wearing a face mask causes her distress. However, the claimant did not provide details of any illness or disability causing her to be exempt from the requirement to wear a face mask. The claimant’s line manager explored the possibility of the claimant wearing a plastic visor rather than a face mask, if that option was approved by the respondent. The claimant refused this option.

(17) At this stage, it appeared to the respondent that the claimant was refusing to adhere to the government Covid-19 guidance and the associated policy put in place by her employer, without good reason. The claimant's line manager therefore decided to place the claimant on precautionary suspension from duty on full pay to enable the matter to be investigated.

(18) Following investigation, the respondent concluded that there was a disciplinary case to answer. The claimant was invited to attend a disciplinary hearing on 6 October 2020 to answer allegations that she had:

(18.1) Breached the respondent's health and safety policies in a way which may put colleagues or customers at risk. Specifically, it was alleged that the claimant had failed to follow government guidelines with no good reason, refused to wear a face mask, and failed to sanitise her hands regularly as required.

(18.2) Failed to follow a reasonable management request.

(18.3) Seriously breached the respondent's values.

17. A disciplinary hearing took place on 15 October 2020. The claimant in fact did not attend on account of ongoing sickness absence. The respondent decided to summarily dismiss her.
18. Within today's hearing bundle (at pages 59 to 63) was the report prepared by the claimant's line manager referred to in the grounds of resistance.
19. The claimant's line manager was Matt Brogden. In particular, Mr Brogden refers to the meeting of 28 September 2020. He reports having asked the claimant if she was still refusing to wear a face mask and the claimant replying to the effect that her reasons for refusing so to do were set out in a text which she had sent to him earlier. Mr Brogden enclosed a copy of the text exchanges in his report.
20. The salient text dated 24 September 2020 is at pages 53 and 54. The claimant said in the text that she *"physically cannot wear [a mask]. I've tried on more than one occasion since 24 July and I just can't do it. It creates severe distress for a number of reasons; the main one being that I have a complete aversion to anything covering my face, which stems back to my teenage years I believe. I wasn't aware that this was even a problem until I have tried to wear a face covering in recent months, but it transpires it is a huge problem for me. I'm also wary of the health implications which we have already discussed. I spoke with my GP who is unable to issue what I suppose one would refer to as an "exemption certificate". There is no such thing. So where can we go from here?"* She then expresses the wish to continue to work as efficiently as possible in the circumstances. She concludes by saying that she has *"been really very worried since the guidelines were changed on Tuesday [22 September 2020] and I want to be able to work to my fullest potential, without having to cause myself any unnecessary suffering."*
21. Page 61 of his report, Mr Brogden noted a number of exemptions from the requirement to wear face masks. These include, *"people who cannot put on, wear or remove a face covering because of a physical or mental illness or impairment, or disability"* and *"where putting on, wearing or removing a face covering will cause the user severe distress"*.

22. In the light of the claimant's witness statement and the contents of Mr Brogden's report (which included the copy of the claimant's text message of 24 September 2020) I find that the claimant did provide reasons because of an illness or disability upon which basis she claimed to be exempt from the requirement to wear a face mask. I reject the contention in the respondent's grounds of resistance (at paragraph 16) that the claimant failed to provide details of any illness or disability causing her to be exempt. Plainly, she did so in the text of 24 September 2020.

23. In her impact statement, the claimant gives the following evidence:

“(2) The mental impairment experienced is the utter stress caused by wearing a face covering and the reaction it evokes when attempted. I am unable to wear a face mask as it creates severe distress which leads to nausea, dizziness and the feeling that I am unable to breathe (panic attack).

(3) I have had the impairment for approximately 19 years (to date). I suffered an unfortunate incident when I was 15 years old whereby I was sexually assaulted (raped) and at which point I was smothered for a prolonged period. There are references in my medical notes which I have highlighted which notes my prolonged exposure and suffering to depression. It notes that my anger and depressive state were caused by a traumatic event from the past. Please note that I have attempted to bear the aftermath of the sexual assault alone and without much medical intervention, thus it is not documented specifically with my GP. I did and still do find it impossible to disclose fully. The impairment was fully brought to light in July 2020 when I made numerous attempts to follow the government guidelines and utilise a face covering; until that point, I'd never been required to cover my mouth and nose. I also feel that my concern with my hearing issues (also highlighted in my medical notes) and my anxiety over the long term detriment to my health further exacerbated the impairment. This was brought to my employer's attention in July 2020.”

24. I pause here to observe that the claimant has a right to anonymity in connection with the matter to which she refers in paragraph 3 of her witness statement pursuant to section 5(2) of the Sexual Offences (Amendment) Act 1992. The claimant was informed of her right to anonymity during the course of the hearing. That right has particular importance where such matters arise in Employment Tribunal proceedings and where written reasons are given because those reasons will feature upon the Register of Judgments and written reasons issued by a Tribunal. That register is readily available to the public through a user-friendly government website.

25. The claimant chose to waive her right to anonymity. On 15 June 2021, the respondent's solicitor made a request for written reasons. On the same day, the claimant emailed the Employment Tribunal to confirm that she does not require anonymity. That being the case, the names of the parties and other identifying matters are set out in these reasons.

26. The reference in paragraph 3 of her witness statement to having brought matters to her employer's attention in July 2020 was, upon further exploration, a reference to an email to the respondent which the claimant says she sent on 7 July 2020. The claimant gave evidence that within the email she mentioned the World Health Organisation recommendation that those with a hearing impairment should refrain from mask wearing. Employment Judge Lancaster

in fact referred to this WHO guidance in his minute of the preliminary hearing (in particular, in paragraph 10). He observed that it was not clear that the claimant was alleging that her hearing loss led to any specific disadvantage as a result of wearing a covering.

27. The issue of the claimant's hearing loss clouded matters to a degree. However, the claimant clarified that the relevant disability was the mental impairment of anxiety/panic attacks and that her hearing issue is in fact a trigger for anxiety and panic attacks. The physical impairment of hearing loss was not relied upon by the claimant as a disability for the purposes of the claim but was advanced by the claimant as an explanation for the mental impairment of anxiety/panic attacks. (I observe that the Tribunal is not of course concerned with the causation of the relevant disability albeit that I found the claimant's explanation and clarification helpful). In summary, therefore, the claimant's hearing issue effectively feeds into and is causative of the relevant mental impairment.
28. I accept that the claimant sent an email to the respondent in July 2020 to the effect that she claims. Firstly, the respondent did not disclose it even though it is relevant to the issue in the case before me today. I accept that no specific directions were given for disclosure. That said, the respondent was directed to send copies of the file of relevant documents to the claimant 14 days before the hearing. The respondent did not dispute that the claimant had sent an email on 7 July 2020 but was unable to retrieve it. Secondly, the claimant's medical notes (which are within the bundle) record that she contacted her GP on 7 July 2020 seeking an exemption certificate. She was informed by the GP that they were unable to provide a letter supporting exemptions to the wearing of face coverings. That the claimant contacted her GP on 7 July 2020 (the same day as she sent the email to her employer) is corroborative of the claimant's case that she was endeavouring to deal with the issue at that time. The timelines fit. The claimant was clearly anxious about her position and was seeking to obtain some medical evidence in support of her position that she was unable to wear a face covering.
29. I now turn to a consideration of the four component parts of the definition of disability as set out in paragraph 10 above. I shall start with the question of whether the claimant suffered from a mental impairment at the material time (that is to say, at around the time of her dismissal). The term "*mental or physical impairment*" is to be given its ordinary meaning. It is not necessary for the cause of the impairment to be established nor does the impairment have to be the result of an illness. The claimant was diagnosed with depressive disorder on 25 September 2020. On 24 September 2020 her GP recorded a history of mental health problems for the last five years. I refer to page 48 of the bundle. The claimant had diagnosed with depression on 6 September 2011 (page 43).
30. The relevant entry of 6 September 2011 says that the claimant's "*mood remains an issue [the claimant] recognises the link between use of alcohol and low mood but struggling with stopping. Advised to reduce rather than to stop as then feels failed if it doesn't target. Recognises that low mood is symptom of past experiences and working through these. Planned further individual appointments to consider completing life map at next session*". On 27 September 2011 the claimant saw her GP again. There was a further reference to a recognition upon her part of the impact of past events and a diagnosis of depression.

31. There were in fact references early in 2011 (in particular, in March and April) to referrals to mental health counselling and anger management issues.
32. The GP notes corroborate the claimant's account in paragraph 3 of her witness statement cited above. The somewhat oblique references to events from the past relates to the sexual assault recounted by the claimant in paragraph 3 of her witness statement.
33. The GP entry of 25 September 2020 corroborates the claimant's case of experiencing a sensation of panic attack when she puts on a face mask. On any view, this is an impairment.
34. I reminded myself that the time at which to assess the disability (that is to say, whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act. Authority for this proposition may be found in **Cruickshank v VAW Motorcast Limited** [2002] ICR 729 EAT. The material time in this case is, of course, the period from July 2020 until the date of the claimant's dismissal on 15 October 2020 (with a greater emphasis upon the latter part of this period). It was over this time that the claimant was informing the respondent of the difficulty which she experienced wearing face coverings and which resulted ultimately in her suspension and then dismissal. The claimant's account of experiencing panic attacks in the supermarket at the end of July 2020 as corroborated by her GP records persuade me that the claimant has established that she suffered from a mental impairment at the material time with which the Tribunal is concerned.
35. I do not accept that the claimant's dependency upon alcohol excludes her from protection as a disabled person. Paragraph A14 of the *'Guidance on the definition of disability (2011)'* says that "A person with an excluded condition may nevertheless be protected as a disabled person if he or she has an accompanying impairment which meets the requirements of the definition. For example, a person who is addicted to a substance such as alcohol may also have depression, or a physical impairment such as liver damage, arising from alcohol addiction. While this person would not meet the definition simply on the basis of having an addiction, he or she may still meet the definition as a result of the effects of the depression or the liver damage". Therefore, even if the claimant's panic attacks were caused or contributed by dependency upon alcohol, the mental impairment (in the form of anxiety/panic attacks) from which she suffers means that she still meets the definition in any case.
36. The next issue that I will consider is whether face mask wearing is a normal day-to-day activity. I find that it is.
37. Face mask or face covering wearing has become the norm for the vast majority of the population with effect from 24 July 2020. I do not agree with Miss Gould's submission that the requirement placed upon the claimant to wear a face mask or face covering in the workplace takes matters outside normal day-to-day activities. I derive some assistance from paragraph D10 of the *Guidance*. This says that, "many types of specialised work related, or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment. For example they may involve normal activities such as: sitting down, standing up, walking, running, verbal interaction, writing, driving, using every day objects such as a computer keyboard or mobile phone, and lifting, or carrying every day objects, such as a vacuum cleaner." Paragraph D3 of the

Guidance says that, “*In general, normal day to day activities are things most people do on a regular or daily basis.*” In some instances, work related activities are so highly specialised that they would not be regarded as normal day-to-day activities. The Guidance makes it clear that the term ‘*normal day-to-day activities*’ does not include work of a particular form because no particular form of work is normal for people in general.

38. In my judgment, the requirement placed upon the claimant by the respondent to wear a face mask is an example of a work-related activity which was imposed upon the claimant by the respondent but which is also a normal day-to-day activity. Following the UK Government guidance, many people wear a face mask when going about their day-to-day activities and their work-related activities. I see no difference between the requirement to wear a mask within the workplace on the one hand and the requirement to operate an everyday object such as a computer within the workplace on the other. Pursuant to paragraph 10D of the guidance, the latter is a kind of normal day-to-day activity in that it is something done within the workplace but which is regarded as a normal activity falling within the general definition of day-to-day activities. So too, in my judgment, is the wearing of a face covering.
39. In any case, the mental impairment plainly has an effect upon other day-to-day activities such as shopping as described by the claimant in her witness statement. This impact is consequent upon mask wearing. Hence, what I find to be the day-to-day activity of mask wearing impacts upon other day-to-day activities such as shopping. Even if I am wrong to find that mask wearing is a day-to-day activity, the mental impairment suffered by the claimant consequent upon the legal requirement to wear a face covering impacts upon other day-to-day activities in any case.
40. The next issue that I will consider is whether the impairment has a substantial adverse effect upon the claimant. This is a low bar as the word “*substantial*” means “*more than minor or trivial*”.
41. On any view, the claimant’s mental impairment has effects which result in her being unable to wear a face covering. This is more than a minor or trivial consequence or effect upon her. She has an extreme adverse reaction to wearing a face covering which is caused by the mental impairment. The requirement to carry out the normal day- to-day activity of wearing a face covering prevented her from shopping in supermarkets towards the end of July 2020. Plainly, shopping is a day-to-day activity.
42. Pursuant to paragraph B7 of the Guidance, account needs to be taken of how far a person can reasonably be expected to modify his or her behaviour for example by use of a coping or avoidance strategy to prevent or reduce the effects of an impairment on normal day-to-day activities. An example is given that, “*When considering modification of behaviour, it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such as shopping, or using public transport.*”
43. This is a useful example in this case. The wearing of face coverings is generally mandatory when in retail premises and upon public transport. In my judgment, it is difficult to see how the claimant may be expected to modify her behaviour

by the use of a coping or avoidance strategy in circumstances where she simply cannot wear a face covering. This effectively places a significant obstacle upon her ability to go shopping and undertake day-to-day activities. (My conclusion would have been different were face coverings mandated only for certain specialised types of activity which the claimant could easily avoid).

44. On any view, the requirement to wear face masks is such a commonplace requirement that the claimant's inability to wear such has a substantial adverse effect upon her ability to carry out normal day-to-day activities extending to being unable to wear a mask in and of itself and because of that inability undertake other day-to-day activities.
45. The next issue is whether the substantial adverse effect of the claimant's impairment upon the carrying out of normal day-to-day activities is long term. In **All Answers Ltd v W and another** [2021] EWCA Civ 606 it was held that in determining whether an impairment is long term, events after the date of the discriminatory act should be disregarded. The question must be answered by reference to the facts and circumstances at the date of the act.
46. The claimant's new employer does not require her to wear a covering. It appears from her evidence that she has (post-dismissal) been able to go shopping and undertake other day-to-day activities without the need to wear a face covering.
47. However, the question that arises is whether at the material time of the discriminatory act the impairment had a long-term effect.
48. Under paragraph 2(1) of schedule 1 to the 2010 Act, the effect of an impairment is long term if it:
 - Has lasted for at least 12 months.
 - Is likely to last for at least 12 months or
 - Is likely to last for the rest of the life of the person affected.
49. For impairments that have not lasted 12 months, the Tribunal will have to decide whether the substantial adverse effects of the condition are likely to last for at least 12 months. The word "*likely*" is to be interpreted as meaning that it "*could well happen*" upon the authority of the decision of the House of Lords in **Boyle v SCA Packaging Limited** [2009] ICR 1056, HL.
50. The issue of how long an impairment is likely to last should be determined at the date of the discriminatory act and not the date of the Tribunal hearing. Authority for this proposition may be found in the case of **McDougall v Richmond Adult Community College** [2008] ICR 431, CA. I have already noted from the claimant's GP records a reference to her mental health history. As far as I can see, the first reference to anxiety (as opposed to depression) is in the entry of 3 January 2018. That said, I am satisfied upon the basis of the evidence given by the claimant in paragraph 3 of her witness statement above that the anger and depressive state brought about by the sexual assault resulted in anxiety and a propensity to panic attacks. That situation has pertained for a period around 20 years now and is corroborated by entries in the GP records dating from 2011. On any view therefore the claimant's mental impairment is long term.

51. Even if I am wrong upon that, I find that the mental impairment of which the claimant complained to her GP in July 2020 was one likely to last for a period of not less than 12 months (in the sense that it “*could well happen*”). As at the date of the claimant’s dismissal, the pandemic had not let up. The country was in tiers. Indeed, the second lockdown was imposed at the end of October 2020.
52. Given the state of the pandemic in early October 2020 and that it was unlikely that Covid was going to disappear in the short term the position then was that it could well happen that the pandemic was going to last for a further period of time. Therefore, the restrictions upon the claimant’s life were likely to continue and it could well happen therefore that the substantial adverse effect upon the claimant’s normal day-to-day activities could well last longer than 12 months. (We know of course that this is the case with hindsight but again I remind myself that I have to assess the position as it stood between July and 15 October 2020).
53. That the claimant happened to get a job with a sympathetic employer in November 2020 who did not require her to wear a face covering was of course the claimant’s good fortune. However, at the date of the discriminatory act of which the claimant complains it could well happen that wearing a mask in the workplace – an ordinary day-to-day activity – would be mandated by a future employer thus having a substantial adverse effect upon the claimant going forwards and that the impact upon other day-to-day activities such as shopping could also be substantially affected (in the sense of a more than minor or trivial impact).
54. For these reasons, it is my judgment that the claimant is a disabled person within the meaning of section 6 of the 2010 Act by reason of the mental impairment of anxiety/panic attacks.

Employment Judge Brain

Date: 30 July 2021

REASONS SENT TO THE PARTIES ON
02 August 2021

Olivia Vaughan
FOR THE TRIBUNAL OFFICE

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