THE EMPLOYMENT TRIBUNALS

VIDEO PUBLIC PRELIMINARY HEARING

Claimant: **Mrs A Styles**

Respondent: **B&Q Limited**

Heard: **Remotely (by video link)** **On:** **2 August 2021**

Before: **Employment Judge Shore**

Claimant: **In Person**
Respondent: **Mr D Piddington, Counsel**

RESERVED JUDGMENT AND REASONS

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant did not meet the definition of 'disabled person' contained in section 6 of the Equality Act 2010 ("EqA") between the period 30 April 2020 and 6 October 2020. Her sole claim, of failure to make reasonable adjustments contrary to sections 20 and 21 EqA, is therefore dismissed.

2. The final hearing listed for 12, 13 and 14 January 2022 is vacated.

REASONS

BACKGROUND

1. The claimant has been employed by the respondent, a company that retails home repair and decoration items, as a cashier since 26 Aug 2015 and her employment continues. Early conciliation started on 19 October 2020 and ended on 19 November 2020. The claim form was presented on 24 November 2020.

2. The claim is one of failure to make reasonable adjustments concerning the claimant's back condition being allegedly aggravated by measures put in place by the respondent as a response to COVID. The respondent's defence is that the claimant does not have a disability, it did not know of any disability and the claimant did not suffer a substantial disadvantage.

3. The case came before Employment Judge Kelly in a private preliminary hearing by telephone on 29 March 2021 when case management orders were made. One of those orders set up this private preliminary hearing by video link to determine the following matter:

    3.1. To determine whether the claimant met the definition of 'disabled person' in section 6 of the EqA.

4. It was clear from the case management order and agreed by the parties that this hearing was only to deal with the issue of whether the claimant was a disabled person at the relevant time and would not make any determination of the issue of whether the respondent had or ought to have had knowledge of the claimant's asserted disability.

5. It is relevant to note that whilst the claimant was not legally represented at the telephone preliminary hearing, the case management order produced contained a lot of information to assist her to prepare for this hearing that included:

    5.1. A very clear explanation of what "day-to-day activities" are and what information the claimant should provide (paragraph 20.2);

    5.2. A link to the gov.uk guidance on disability definition (paragraph 18)

    5.3. Links to ELIPS legal advice clinic (paragraph 56);

    5.4. A link to the www.judiciary.uk site for advice on case management and preparation (paragraph 60); and

    5.5. A full list of issues to be determined (paragraph 7 of the List of Issues).

6. I also note that after the claimant had provided her Impact Statement [pages 26 and 27 of the bundle], the respondent's representative wrote to her on 17 June 2021 [28] setting out comprehensive reasons why it continued to dispute that the claimant met the definition of 'disabled person'.

HOUSEKEEPING

7. The parties produced a bundle of 83 pages for this hearing. Both confirmed at the outset of the hearing that there were no other documents to add. The bundle did not contain a copy of EJ Kelly's case management order dated 29 March 2021, but I had obtained a copy from the Tribunal office and both parties indicated that they had a copy to hand. If I refer to a document from the bundle, I have noted the relevant page numbers in square brackets [ ].

8. The claimant produced a witness statement, which was an email dated 26 May 2021 [26-27].

9. The claimant is unrepresented, so is a Litigant in Person. I advised her that the Tribunal operates on a set of Rules. Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —*
>
> *(a) ensuring that the parties are on an equal footing;*
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

10. I started the hearing by confirming the single issue that I was dealing with at the hearing: the question of disability. It was important to determine the period of time that was covered by the claimant's claim because the respondent had accepted that the claimant had a physical impairment that had had an adverse effect on her ability to carry out normal day-to-day activities in the past, but did not accept that the effect was continuing and was a substantial adverse effect in the period that the claimant alleges that the acts of discrimination were done by the respondent.

11. I sought to pin down the dates of the relevant period and was assisted by Mr Piddington referring me to paragraph 9.1 of the List of Issues in EJ Kelly's case management order that stated that it had been agreed that the PCP on which the claimant based her claim was implemented on 30 April 2020 until 29 June 2020 and was then re-introduced on 28 September 2020. The claimant left work on 6 October 2020 and has not returned, so that is the end date of the relevant period. These dates were agreed by the parties at this hearing.

12. We discussed the effect of paragraph 2(2) of Schedule 1 of the EqA, which I have set out in full at paragraph 18 of these reasons below. The issue of whether the adverse effect of the impairment is likely to recur is an important element of this hearing because of the interpretation of the legislation by the higher courts. I explained to Mrs Styles that appeals on points of law from the Employment Tribunal are made to the Employment Appeal Tribunal (EAT); appeals from the EAT are made to the Court of Appeal (CA); and appeals from the CA are made to the Supreme Court. If a higher court makes a decision on how the law is to be interpreted, then all the courts beneath it are bound by that decision. The principle

is called “precedent”. It is relevant in this case because of a couple of precedent cases that I have to take into account when making my decision.

13. Mrs Styles confirmed that she wished to give evidence and was happy to answer questions on her statement. Given that the statement was very brief, this was a wise choice, as it allowed her to expand on her evidence. We then discussed the timetable for the hearing, which was listed for a half day.

14. The claimant gave evidence in person and adopted her email dated 26 May 2021 [26-27] as her evidence in chief. She was then cross-examined by Mr Piddington in some detail. At the end of cross-examination, I gave the claimant the opportunity to clarify or amplify any answers she had given to the questions she had been asked, but she declined.

15. I then heard closing arguments from both parties. I indicated I would make a reserved judgment as there were a number of legal points that I wished to cover in my judgment and reasons; I did not want to have to rush them.

ISSUES

16. The issues that I had to determine (questions I needed to find the answers to) at this preliminary hearing were set out in paragraph 7 of the List of Issues in EJ Kelly’s case management order and are as follows:

    16.1. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

        16.1.1. Did she have a physical or mental impairment of wear and tear to back disc? The respondent does not accept that this is a disability on the basis of the evidence currently available to it.

        16.1.2. Did it have a substantial adverse effect on her ability to carry out day-to- day activities?

        16.1.3. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

        16.1.4. Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

        16.1.5. Were the effects of the impairment long-term? The Tribunal will decide:

            16.1.5.1. did they last at least 12 months, or were they likely to last at least 12 months?

            16.1.5.2. if not, were they likely to recur?

LAW

17. Section 4 of the EqA identifies certain characteristics as protected characteristics. These include disability. Section 6 of the EqA provides, so far as material, that:

> *"(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.*
>
> *(3) In relation to the protected characteristic of disability—*
>
> *(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
> *(b) a reference to persons who share a protected characteristic is a reference to persons who have the same 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 provisions) has effect".*

18. The circumstances in which an effect is "long-term" are defined in paragraph 2 of Schedule 1 to the EqA in the following terms:

> *"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.*
>
> *(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.*
>
> *(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term."*

19. Paragraph 2(2) of Schedule 1 to the EqA states that if an impairment has had a substantial adverse effect but that effect ceases, the substantial adverse effect is treated as continuing if it is likely that the effect will recur. The word 'likely' means that it 'could well happen' (this was decided by the House of Lords (now called the Supreme Court) in a case called **SCA Packaging Ltd v Boyle** [2009] ICR 1056.

20. Following the case of **Richmond Adult Community College v McDougall** [2008] EWCA Civ 4, it was made clear that the likelihood of recurrence was to be judged on the basis of just what was known at the time when the discrimination took place

and anything that happens between then and the date of the hearing must be disregarded as irrelevant. That decision means that relapses occurring after the date of the alleged discrimination must be disregarded in assessing whether it was likely that the effect would recur. Although the decision was made under the previous legislation that covered disability discrimination, the EqA contains the same provisions, so the **McDougall** case is still good law.

21. Mr Piddington referred me to a recent Court of Appeal decision in the case of **All Answers Ltd v Mr W and Ms R** [2021] EWCA Civ 606 in which, at paragraph 26, Lord Justice Lewis stated:

> *"The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that 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".*

FINDINGS OF FACT

22. In order to reach a decision, I firstly have to make findings of fact that are based on the written evidence (witness statement), oral evidence (answers to cross-examination questions) and the documents produced.

23. All findings of fact were made on the balance of probabilities (which account is the most likely). If a matter was in dispute, I have set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I have either recorded that with the finding or made no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine that relate to this preliminary hearing. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so I have dealt with the case on the basis of the evidence and documents produced to me. I make the following findings.

24. There were some facts that related to this application which were not disputed. I therefore find that it was undisputed (or indisputable) that:

    24.1. The claimant has been employed by the respondent since 26 August 2015 and remains employed as a Customer Advisor.

    24.2. The claimant injured her back in March 2019. The injury was not work-related. The injury has been diagnosed as wear and tear of her lumbar discs of the level L4/5 [79].

    24.3. The claimant's Individual Absence Log [38] shows that she had three periods of absence because of the back injury:

        24.3.1. 1 April to 8 April 2019;

        24.3.2. 1 May to 15 May 2019; and

        24.3.3. 14 August to 19 August 2019.

    24.4. The claimant had no further absences because of her back between 19 August 2019 and 6 October 2020.

    24.5. The claimant's GP records show no consultations relating to back pain from 11 December 2019 and 6 October 2020 [62-63]. The consultation on 6 October 2020 was because the claimant had felt her back/hip give way when she was in her kitchen.

25. I considered the claimant's written evidence [26-27] and found it to be very brief, lacking in detail and vague. I appreciate that the claimant is not a lawyer and is not represented by a lawyer or trade union, but I find that the guidance that was provided in EJ Kelly's case management order was comprehensive and should have enabled Mrs Styles to produce a much more thorough statement. She accepted that, with hindsight, she ought to have given much more detail in her witness statement.

26. I find that the entirety of the claimant's evidence on the effect of her back condition on her ability to carry out normal day to day activities was one sentence: "After standing for periods of time and then moving to a sitting position or bending position or walking this brings on severe pain." There was no explanation of how long "a period of time" was or when the symptoms were experienced. I find that the guidance in EJ Kelly's case management order included the statement that "If possible, the examples [of adverse effects] should be from the time of the events that the claim is about."

27. I find that on 11 December 2019, the claimant was examined by Dr Hannaford-Youngs, a Consultant in Orthopaedic Medicine, who wrote a report on the same date [80]. That report noted that:

    27.1. The claimant had presented in September 2019 with "quite an intrusive pattern of low back pain";

    27.2. Since then, her symptoms had improved, her mobility was better, she was doing various exercise and going in the right direction;

    27.3. She was looking more comfortable in clinic;

    27.4. "In short, an excellent lumbar spine examination at 56; and

27.5. "She is pleased with the progress to date. There is nothing further I could recommend."

28. The medical report did not indicate anything that would lead the average bystander to conclude that the claimant met the definition of 'disabled person' at that date.

29. It was agreed that the claimant had no further absences from work after 11 December 2019 until the relapse on 6 October 2020. It was agreed that the claimant's GP records show no consultations relating to back pain from 11 December 2019 and 6 October 2020 [62-63]. It cannot be disputed that at 11 December 2019, it had been approximately 9 months since the claimant had injured her back.

48. I therefore find that between 11 December 2019 and 6 October 2020, the claimant has not shown that she experienced substantial adverse effects on her ability to carry out normal day-to-day activities. She can therefore only meet the definition if the adverse effect of her back injury was likely to recur. I find that her evidence and the documents do not support that proposition, on the balance of probabilities. I make that finding for the following reasons:

48.1. The absence of any evidence of recurrence or the likelihood of recurrence in the claimant's witness statement;

48.2. Her perfect attendance record at work in 2020 until 6 October;

48.3. The cessation of strong painkillers on prescription;

48.4. The claimant did not consult her GP after 11 December 2019 until 6 October 2020;

48.5. The claimant's answers to cross-examination questions, which consistently referenced the whole period from the initial injury to the present day, rather than focussing on the period in question;

48.6. The contents of the Consultant's report of 11 December 2019 [80];

48.7. The fact that there was a further four months between the report and the date of the first allegation of discrimination on 30 April 2020.

APPLYING FINDINGS TO LAW AND ISSUES

49. I find that the law is set out in the case of **All Answers Ltd** that is referenced above. I find that as at the time of the alleged discriminatory acts (30 April 2020 to 6 October 2020), the effect of the claimant's back condition was not likely to last at least twelve months by reference to the facts and the circumstances existing at the date of the alleged discriminatory acts.

50. I cannot have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months.

51. I have considerable empathy with the claimant's position, as she has obviously worked hard to overcome the effect of the initial back injury and the recurrence on

6 October 2020, but the test of disability is legal, not medical and the facts of the case do not support her contention that she met the definition at the relevant time.

52. I therefore have to dismiss all the claimant's claims, as they cannot proceed if she does not meet the definition in section 6 of the EqA.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

EMPLOYMENT JUDGE SHORE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE SHORE ON 3 August 2021

JUDGMENT SENT TO THE PARTIES ON 20 August 2021

AND ENTERED IN THE REGISTER

.....

FOR THE TRIBUNAL Mr N Roche