



EMPLOYMENT TRIBUNALS

Claimant: Camilla Male

Respondent: Chief Constable of Devon and Cornwall Police

Heard at: Bristol Employment Tribunal via CVP **On:** Monday, 4th October 2021

Before: Employment Judge Mr. M. Salter

Representation:
Claimant: Mr. P. Wilson, counsel
Respondent: Mr. J. Cainer, counsel along with Ms. Casey (Instructing Solicitor) and Ms Founders (HR Representative)

JUDGMENT

It is the judgment of the tribunal that the Claimant was not disabled within the meaning of the Equality Act 2010 at the relevant time

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons to the judgment above. Oral reasons were given orally at the final hearing on Monday, 4th October 2021
2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal->

decisions. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

3. The Judgment in this matter was sent to the parties on 21st October 2021 and written reasons were requested by the Claimant on 24th October 2021 with regards to my decision concerning her Coccydynia.

BACKGROUND

The Claimant's case as formulated in her ET1

4. The Claimant's complaint, as formulated in her Form ET1, presented to the tribunal on 7th June 2020, is in short, she was subjected to various forms of discrimination by the Respondent, where the protected characteristics were age, disability and sex [B17]. The Claimant's form did not identify a representative, but was accompanied by Particulars of Claim [24 identifying specific sections of the Equality Act, and running to some 50 pages and 183 paragraphs. The Particulars highlight in bold specific factual allegations and the legal basis of those claims.
5. Employment Judge Bax requested the claimant provide further particulars of her claim [B77] noting that there were specific allegations in bold, and requiring the Claimant to identify in writing what other claims she has presented. This document was not provided to the Respondent, despite it containing (even on the Claimant's own case) an application to amend the claim
6. On 25th June the Claimant provided further particulars of claim which, she said, were already mentioned in the claim form [B77]. These further particulars add an extra 8 pages and 35 paragraphs.

The Respondent's Response

7. In its Form ET3 [B87], the Respondent denied acts of discrimination.
8. Employment Judge Roper then required further material from the Claimant [B105] and as a result the Claimant provided impact statements [B107 and 111.

Relevant Procedural History

9. The matter came before me on 27th May 2021 for a Preliminary Hearing during which a list of issues was agreed and case management orders given for Preliminary Hearing as well as a Final Hearing.

THE PRELIMINARY HEARING

General

10. The matter came back before me for the Preliminary Hearing. The Claimant was represented by Mr. Wilson, and the Respondent by Mr Cainer, both of counsel
11. This was a remote hearing which was not objected to by the parties, being conducted entirely by CVP video platform. A face-to-face hearing was not held because it was not practicable and no-one requested the same it was conducted using the cloud video platform (CVP) under rule 46.
12. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.
13. The participants were told that it was an offence to record the proceedings.
14. Evidence was heard from the Claimant via video link. I was satisfied that she was not being coached or assisted by any unseen third party while giving her evidence.

Particular Points that were Discussed

Adjustments

15. The Claimant confirmed he/she did not require any other specific adjustments to be made in view of her disability; but it was agreed that should any other matter of concern arise as the hearing went along, she should raise this, and appropriate ad hoc adjustments could be made.

DOCUMENTS AND EVIDENCE

Witness Evidence

16. I heard evidence from the Claimant. no witness evidence was called by the Respondent.

Bundle

17. As is the normal practise in this region the bundle as limited by page count. The count was 300 pages (excluding m tribunal documentation) with a 10% margin of error [134]. Despite this generous page count I was provided with:

- (a) Bundle of 255 numbered pages;
- (b) Claimant's supplementary bundle of a further 190 pages. None of which appeared to be referred to in the claimant's witness statement.

My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number. My attention as not taken to ay document within the Claimant's supplemental bundle.

18. I also received an Authorities bundle from the Respondent totalling a further 274 pages.

SUBMISSIONS

19. I had written skeleton arguments from the parties. Both parties supplemented their arguments orally. Since the skeletons are in writing it is unnecessary to repeat them here and they are referred to as appropriate in the conclusions.

THE LAW

20. So far as is relevant the Equality Act 2010 ("the 2010 Act") states:

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".

21. This definition divides into four concepts, for a claimant to satisfy on the balance of probabilities (Goodwin v Patent Office [1999] ICR 302; Elliot v Dorset County Council UKEAT/0197/20/LA):

- (a) she had an “impairment”;
- (b) that had an “adverse effect”
- (c) that adverse effect was “substantial”
- (d) and was “long term”.

22. S.212(1) of the 2010 Act defines “*substantial*” as “*more than minor or trivial*”.

23. Further, the 2010 Act states:

Sch 1, para 2 EqA 2010 defines “long-term” as follows:

“2 (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.”

24. “Likely” here means “could well happen”: All answers v W [2021] EWCA Civ 606.

MATERIAL FACTS AND FINDINGS

General Points

25. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant in evidence, both in her statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.

26. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

Concessions

27. The Respondent accepts:
- (a) the Claimant had the impairments of menopause and coccydynia;
 - (b) both of these had some impact on her ability to conduct normal day-to-day activities; and
 - (c) the claimant's backpain had a substantial impact
28. The issues were, therefore whether the Claimant's menopausal symptoms were substantial and, whether the claimant's Coccydynia was long-term.
29. All parties agree that the relevant time for this assessment is 6th June 2020.

Disability

Issues 1 and 2: Impairments and Adverse effect

30. The Respondent has conceded the claimant suffered the impairments contended at the material time and that these had an adverse effect on her ability to conduct normal day-to-day activities.

Issue 3: Was the Impairment's Adverse Effect Substantial?

31. The Respondent accept the Claimant's Coccydynia has a substantial adverse impact.
32. The issue for me, therefore in relation to the menopause is whether that had a substantial adverse effect at the material time.
33. Such evidence as there is appears inconsistent with that contained in the Claimant's impact statement.
34. There is no contemporaneous medical evidence concerning the Claimants menopausal symptoms before August 2019, and those records after that date are not corroborative of the account given by the Claimant in her impact statement, I was taken to pages 161-162 of the bundle and the

Claimant confirmed in cross-examination there were no other references to menopausal symptoms in the bundle of evidence.

35. The Claimant accepted there was no evidence in the contemporaneous documentation of any substantial impact on her normal day-to-day activities
36. No account of this difference in evidence was provided by the Claimant in her statement. In re-examination she explained it was because she wanted to deal with this matter privately. However, I consider that a discussion must have been had with the GP in August for the GP to record the symptoms (or lack thereof) set out in 161-162. Whether or not the word menopause was used it is clear the symptoms the claimant complains of were discussed, and a different account was recorded by the GP.
37. Further, there is reference to there being no hot flushes [164]
38. I am not satisfied, therefore, on the balance of probabilities that the Claimant has discharged the burden of proof in showing me that her menopausal symptoms satisfy the statutory test.

Issue 4: Was the Adverse Effect Long-term?

39. Turning then to the impairment of coccydynia. The issue here is whether in June 2020 this was long-term.
40. In the bundle was a definition from the NHS Website on the impairment:

“Coccydynia is a pain felt in your coccyx (tailbone). This is the last bone at the bottom of the spine (tailbone). In most cases, the pain will improve over a few weeks or months, but occasionally it can last much longer and severely affect your ability to carry out every day activities”
[105]

41. These symptoms commenced with a “sudden onset” in August 2019, (Claimant’s skeleton argument para 6) and the latest date for the Claimant’s allegations are June 2020. At the time of presentation, it is common ground that the impairment had not lasted 12 months.
42. The Claimant has presented her case on the basis that the impairment is likely to last 12 months. The Claimant puts her case on this basis, and not the that it was “likely to recur”.

43. I must make the assessment based on the evidence available, and assess this at the material time. At the time the Claimant had suffered from back pain for some 10 months. During these months the Claimant had been off work with the pain (2019 fit note [183]) but had returned to work in December 2019 and had remained at work since.
44. There was no skeletal or medical reason for the pain and no evidence was put before me showing any diagnosis of the reason for the pain.
45. I discount the Claimant's assertions that she thought the condition was "short-term" [39] insofar as the Respondent asks me to rely upon them, as showing anything more than the Claimant echoing the understanding of the medical practitioners at the time. Her view is, however, illustrative of the state of the medical evidence at the time. Indeed, the claimant accepted there was no medical evidence in the bundle showing that the condition was likely to last for 12 months, and so I am left to draw conclusions from that material I was shown.
46. Throughout the period, the medical evidence showed no definitive diagnosis or prognosis of the cause of the pain.
47. I note:
 - (a) that there was little medical evidence in the bundle for the relevant period in the year 2020;
 - (b) however, towards the end of this window, the medical evidence also "showed significant improvement" (May 2020 MRI scan results).
 - (c) there is no conclusion or estimation as to how long the condition would last for. The Claimant was candid in her evidence on this issue as well and agreed on a number of occasions that there was no evidence as to how long it would occur;
 - (d) the OH report's conclusions, although I am not bound by them, that say the claimant's condition did not fall within the statutory definition, and later that it was "may well" fall within the definition. However all parties agree the OH examiner had not seen the reports showing a significant improvement in the Claimant's coccyx, and this report marks a shift from the earlier reports that say the Claimant is unlikely to fall within the definition of the Equality Act 2010 [186]
48. The Claimant asks me to conclude that the pain had lasted for 10 months and so I can extrapolate in June 2020, from that, taking into account the claimant's evidence, that the pain has lasted over the 12-month threshold

required by the Act, or that the situation was such that in May 2020 it would or was likely to continue.

49. I decline to do so, there needs to be some material from which I can arrive at this conclusion, and the evidence I have before me confirms that at the time the view was the claimant had improved, the scan says significantly improved.
50. The surrounding evidence does not provide me with material from which I could conclude that it may well last a further 2 months. I do not consider that the fact it has lasted 10 months is a sound basis to conclude it may well last a further 2 in light of the circumstances of this case.
51. I have to base my conclusion on the evidence before me and as the situation that existed in June 2020. On this basis, looking at what was occurring at that time, and on what I have been shown, I do not consider that the Claimant has shown on the balance of probabilities that she satisfied the statutory definition of disability. She has failed to show on the evidence, that at the relevant time it could well happen that the Claimant's Coccydynia would last for another 2 months.

Employment Judge Salter
Date: 29 November 2021

Judgment & reasons sent to parties: 14 December 2021

FOR THE TRIBUNAL OFFICE

Notes

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.

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.