



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Maryana Ivanova

**Respondent:** Zurich UK General Services Limited

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Southampton (in public, by CVP)

**On:** 19<sup>th</sup> January 2022

**Before:** Employment Judge Dawson

### **Appearances**

For the claimant: Representing herself

For the respondent: Ms Casserly, counsel

## REASONS

**JUDGMENT** having been sent to the parties 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:

### **Introduction**

1. The case was listed for a hearing today to consider whether the claimant was disabled at the material times (being whilst employed by the respondent from 6 April 2020 to 31 July 2020). The order listing the matter for hearing makes clear that the tribunal is not deciding, today, whether the employer knew about the disability or the effect of it.
2. For the purposes of making the decision, I have been provided with a bundle of documents running to 177 pages, two email chains sent by the claimant prior to the hearing and, contained within the bundle of documents, two disability impact statements from the claimant.

3. The claimant has represented herself and the respondent has been represented by counsel.
4. Given that the claimant has a hearing impairment, I asked at the outset of the hearing whether she needed any adjustments to be made. She indicated that she may need repetition of matters. I also ensured reasonably frequent breaks.

**Issue**

5. The issue for me is whether the claimant had a physical or mental impairment which had a substantial and long-term adverse effect on her ability to carry out day-to-day activities in between April and July 2020.

**Relevant Statutes and Guidance**

6. Disability is defined in section 6 of the Equality Act 2010. As stated, a person has a disability if they have a physical or mental impairment and that impairment has a substantial and long term adverse effect on their ability to carry out day-to-day activities.
7. “Substantial” means more than minor or trivial (section 212 (1) Equality Act 2010)
8. In *Aderemi v London and South Eastern Railway* [2013] ICR 591, Langstaff P stated

“It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other’. (paragraph 14)

9. The proper approach in determining whether a person has a disability is to consider:
  - Whether the person has a physical or mental impairment;
  - Whether the impairment affects the person's ability to carry out normal day-to-day activities;
  - Whether the effect on such activities is 'substantial';

- Whether the effect on such activities is 'long term'.

*Goodwin v The Patent Office* [1999] ICR 302

10. The Guidance on the Definition of Disability provides that 'The requirement that an adverse effect be substantial reflects the general understanding of "disability" as a limitation going beyond the normal differences in ability which may exist among people. A "substantial" effect is more than would be produced by the sort of physical or mental conditions experienced by many people which have only minor effects. A "substantial" effect is one which is more than "minor" or "trivial".'

11. In *Seccombe v Reed in Partnership Ltd* UKEAT/0213/20/OO, the EAT held

**[33]** The claimant relied on *Lawson v Virgin Atlantic Airways Limited* UKEAT/0192/19/VP for the proposition that the respondent's knowledge of disability is irrelevant to the question of whether a person is disabled: see paras 40 to 43. At any point in time, there is an objective question to be asked, whether the claimant has a mental impairment that has a substantial adverse effect on his ability to carry out day-to-day activities that has lasted 12 months or is likely to last 12 months, or is likely to recur. The respondent's knowledge is not relevant to that question. However, that does not mean that what a person says, or does not say, about their abilities is irrelevant to the objective question of whether, at the time in question, the person was disabled; often the claimant will be best placed to explain what effects any impairment has on day-to-day activities. What is important is what the person says, rather than to whom it is said - so, for example, if there is a period in respect of which there is no medical evidence the fact that a claimant told friends, family or an employer that he was continuing to be effected by the condition could be relevant. Similarly, it could be relevant that a claimant did not tell people that an impairment was continuing to have an effect. While caution should be taken to considering what is not said about an impairment, because disabled people may wish to maintain their privacy, particularly if they perceive that there may be an adverse reaction to their disability, there is no rule of law, as the claimant's Counsel contended for, that the fact that a claimant does not refer to ongoing symptoms can never be relevant to the question of disability.

12. I have noted the following extracts from the "Guidance on matters to be taken into account in determining questions relating to the definition of disability":

- a. B7. Account should 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. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities
- b. D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a

conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.

13. The Appendix to the Guidance gives examples of what would or would not be considered a substantial adverse effect on normal day-to-day activities. Something which it would be reasonable to regard as having that effect is difficulty hearing and understanding another person speaking clearly over the voice telephone. Something which would be unreasonable to regard as having that effect is the inability to hold a conversation in a very noisy place, such as a factory floor, a pop concert, sporting event or alongside a busy main road.

### **Findings of Fact**

14. It is not disputed that the claimant has a hearing impairment. She says, and I do not understand it to be disputed, that she has a total loss of hearing in her left ear. I accept that.
15. The medical evidence suggests that, as at August 2019, the claimant was not suffering from balance problems and as at 17 April 2020 the claimant was described as asymptomatic of symptoms but “there is nothing we can do regarding her hearing loss”. I have not found the medical evidence to be of much assistance in this case.
16. The claimant’s first disability impact statement stated “due to the partial deafness I may completely miss a conversation, public announcement, traffic noise or environmental sounds. I have developed mental confusion and fatigue is exposed and concentrated listening for a prolonged period.” She goes on to state “I may not hear people talking to me from the left.... In live face-to-face environment I speak privately to a person at the conversational distance. I am unable to follow conversations where people are talking in a group with any background noise. I do not feel confident attending meetings or busy social gatherings.” The impact statement goes on to state that the claimant does not use a phone in public where there is street noise and avoids phone calls. She says that at home she is unable to use audio devices without headphones (pages 88 to 89 of the Bundle).
17. The respondent set out why it did not accept the claimant was disabled and, at the hearing at which this hearing was listed, the claimant was directed to serve a further disability impact statement. She did so. In that statement she repeated much of what she had said in her earlier conversation but went further. Some points noted by the respondent are:
  - a. Where, in her original statement, the claimant said “my companions aware that I am hard hearing occasionally repeat what is said in casual settings” (sic), in her later statement she stated “my companions aware that I am hard of hearing and will often repeat to make sure I hear.”

- b. In her 2<sup>nd</sup> statement, the claimant stated that she was unsafe to “daily navigate physical environment” but, it was put to her by counsel for the respondent, that is not in her 1<sup>st</sup> disability impact statement.
  - c. In the 2<sup>nd</sup> statement the claimant says that she experiences “anxiety listening and learning information in an unfamiliar context” but did not say that in the 1<sup>st</sup> disability impact statement.
18. The respondent says that the claimant has exaggerated her 2<sup>nd</sup> disability impact statement in the light of the respondent’s response to her first statement. The claimant says that her 1<sup>st</sup> disability impact statement was word count limited and when the word count was extended for her 2<sup>nd</sup> statement she was able to write more. It is right to say that the first statement is very close to the word limit.
19. The respondent also says that the claimant’s disability impact statement is not consistent with documents from the time. I record the most salient of three points made by the respondent, with some comments of my own.
- a. The claimant was required to complete a health assessment questionnaire before she commenced work with the respondent, she was asked the question “do you think you may need any adjustments or assistance to help you do the job?” She answered that question “no”. She told me that was because she was required to give a yes or no answer and was not aware of the job description at that time.
  - b. On 6 February 2020, the respondent wrote her stating “just to let you know that your health questionnaire has been completed and they have deemed you as fit for work with no further action” but the claimant did not reply to suggest she did need any adjustments.
  - c. Subsequently the claimant was asked to complete another questionnaire with various personal details. She was asked the question whether she had a disability, long-term injury or health condition. Immediately after that statement is the statement “this could include a physical or mental condition and includes common conditions like dyslexia, epilepsy, asthma, cancer, depression, back problems and heart problems.” The claimant answered “no”(page 128 of the bundle.) She told me that was because she did not have a progressive condition or one which affected her total functionality and thought, given the examples given that was the appropriate answer. Although that answer is difficult to fully fathom, on the next page she was asked the question “what type of disability do you have” and ticked that she had a hearing impairment. Thus it seems to me that document is not inconsistent with the claimant’s case that she was disabled at the material times.
  - d. By June 2020 it was clear that the respondent was unhappy with the claimant’s performance and there was various correspondence to and from the claimant by email. Although, I find, the claimant was not shy about setting out her position and things that she found were wrong with her employment, according to the documents in the bundle she did not, prior to the probationary meeting on 23 July 2020, suggest that she was

disadvantaged by reason of her hearing impairment. The claimant said in evidence that she had referred to her “disadvantage” in an email in June. The claimant was not able to produce that email despite being given the lunch hour to do so.

- e. On 17 June 2020 Louise Gambs of the respondent wrote a lengthy email to the claimant summarising a discussion and recording expressly that the claimant had mentioned that her softphone was not very clear. She had said that she could hear the other person but they were not able to hear her clearly. A softphone was explained to me as a digital phone whereby one speaks over a digital platform using a headset. In answer the claimant asserts that she had requested modifications to her training and that she assumed that Ms Gambs would know about her hearing impairment due to the fact that she had told HR.

20. In the meeting on 23 July 2020 the claimant stated that she was deaf in one ear so it was hard to hear and meetings that go on for 3 hours are too much. She confirmed that she had a dedicated space but had problems in noisy environments and became concerned that she would mis-hear something.

21. In one answer in cross examination, the claimant explained that if she was working in London and would have, say, 60 seconds to board a train, if she could not hear the announcements on the platform it would be an impairment for her. She described herself as being the last person running to the platform. She described the urban environment as being very complex with sounds from everywhere. I accept that evidence.

### **Analysis**

22. In my judgment if what the claimant says in her 1<sup>st</sup> impact statement is true, as amplified in her evidence today, her hearing impairment would have an impact on her day-to-day activities. In particular there would be an impact in that the claimant cannot easily hear public announcements which would be relevant when she was travelling and her hearing loss would have an impact on conversations with other people where there is background noise. There is also an impact insofar as the claimant cannot use audio devices at home without headphones.

23. The difficult question for me is whether I should reject the evidence in the claimant’s first disability impact statement because of the exaggeration (as the respondent says) between the 1<sup>st</sup> and 2<sup>nd</sup> disability impact statements and because of the apparent contradictions with the contemporaneous supporting evidence. To be clear, there is contemporaneous evidence that the claimant had a hearing loss, there is no real contemporaneous evidence that it was having an impact on her day-to-day activities before she mentioned that when she was called to a probationary meeting.

24. The way the claimant gave evidence did not assist her. It is fair to say that the claimant was combative and unwilling to focus on the questions that she was being asked. At times she was unwilling to answer questions when the answer would clearly be detrimental to her case (such as when she was asked if she had made complaints prior to attending the probationary meeting).

25. I think it is likely that the claimant's evidence has become somewhat exaggerated over time. However, that is not the same as saying that there is no truth in anything that the claimant says.
26. Notwithstanding the points made by the respondent, I have come to the conclusion that the claimant was disabled at the relevant times for the following reasons.
27. The claimant lost her hearing at once, it was not a progressive condition. She lost the hearing in one ear. It seems to me that it is more likely than not that the effect of losing her hearing would have been to have the impact which the claimant sets out in her 1<sup>st</sup> disability impact statement. I think it is likely that the claimant would have easily missed public announcements, would have had difficulty in holding conversations where there was background noise and it would have affect her desire to attend social gatherings.
28. The fact that the claimant did not raise those matters with her employer is somewhat surprising, particularly as I accept the respondent's argument that the claimant was not shy about raising things she was unhappy with. However, the statement that the claimant did not raise those matters with her employer is something of a gloss on the evidence.
29. The claimant did state that she was disabled by reason of a hearing impairment as set out in paragraph 19c above and I accept that the claimant had a genuine belief that the respondent would have known about her hearing impairment because she had disclosed it. She also referred to difficulty with hearing it in the meeting on 23<sup>rd</sup> July. Thus the period when the claimant did not refer to her hearing was only between June and 23 July 2020. The fact that the claimant could hear somebody over a softphone does not mean that she could also do those things which I have referred to in paragraph 27 above.
30. Therefore, although not without some hesitation, I accept the evidence of the claimant as set out in her 1<sup>st</sup> disability impact statement.

### **Conclusions**

31. I then turn to apply those findings to the relevant law.
32. There is no doubt that the claimant had a physical impairment in respect of her hearing.
33. I have found the impairment affected claimant's ability to carry out normal day-to-day activities and in particular it is likely that the claimant would have easily missed public announcements, would have had difficulty in holding conversations where there was background noise and it would have affected her desire to attend social gatherings.
34. The next question is whether the effect is substantial. Focusing on the wording of the legislation and bearing in mind the guidance in *Aderemi* I must ask myself whether the effects can be classified as within the heading of trivial or insubstantial.

35. Whilst I do not regard the impairment to be particularly severe, I cannot say that it is trivial or insubstantial. I am fortified in that view in that I find that the impact on the claimant's day-to-day activities is more serious than an inability to hold a conversation in a very noisy place. I find that the claimant struggles to hold conversations in a place where there is any substantial background noise.
36. In those circumstances I find that the effect on day-to-day activities was substantial.
37. The respondent concedes the effects were long term.
38. In those circumstances I conclude that the claimant was disabled at the relevant times

Employment Judge Dawson  
Date: 11 February 2022

Reasons sent to parties: 17 February 2022

FOR THE TRIBUNAL OFFICE