



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs H Matthews

**Respondent:** Razors Edge Group Limited (1)

Mr R Matthews (2)

**HELD AT:** Manchester (by CVP)

**ON:** 8 November 2022

**BEFORE:** Employment Judge Johnson

## REPRESENTATION:

**Claimant:** Mr A Marshall (counsel)

**Respondent:** Mr A McPhail (counsel)

# JUDGMENT

Upon hearing the parties:

- (1) The claimant was a disabled person at the material time;
- (2) The claimant's employment did not transfer from the first respondent to the second respondent pursuant to the relevant provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'); and,
- (3) The second respondent will at present remain as a party to the proceedings as the first respondent maintains an argument raised in paragraph 4 of its grounds of resistance that the claimant's decision to resign on 1 July 2020 was motivated by the imminent date of transfer on 6 July 2020.

# REASONS

## Introduction

1. The claimant presented a claim to the Tribunal on 12 August 2020 following a period of early conciliation from 7 August 2020 to 1 July 2020. She brought complaints of unfair dismissal, disability discrimination, sex discrimination, breach of contract, holiday pay, unpaid wages and other payments. The claim was initially brought against the Razors Edge Group Limited (first respondent),
2. The respondents resisted the claim and a preliminary hearing was listed to determine the question of the claimant's employment status. This was heard by Employment Judge Sharkett on 13 May 2021 and it was determined that the claimant was an employee.
3. A further preliminary hearing took place before Employment Judge Batten on 13 May 2021 and she dealt with matters of case management, including the addition of Mr Roberts (Manchester) Limited (second respondent). A final hearing was listed for 21 to 25 November 2021. It was also decided to list the case for a preliminary hearing to deal with preliminary issues.
4. There was insufficient time to conclude the hearing on 8 November 2021 and an order was made that they provide final submissions so a reserved judgment could be given. These submissions would also include suggested issues and case management orders. Employment Judge Johnson also informed the parties that the second respondent had been served with a Notice of Claim, but that a response had not yet been presented.
5. I have not considered the present position regarding the second respondent's involvement in these proceedings since the preliminary hearing and this will be considered as part of general case management by the Tribunal.

## The Issues

6. The issues to be determined at the preliminary hearing before me were as follows:
  - a) Whether the claimant was disabled within the meaning of section 6(1) of the Equality Act 2010;
  - b) Whether the claimant's employment transferred from the first respondent to the second respondent in accordance with the provisions of the TUPE Regulations 2.
7. Further case management orders would then be made to deal with outstanding procedural matters which needed to be completed so that the case was ready for the final hearing.

## Evidence Used

8. The claimant gave evidence in support of her case concerning the preliminary issues.
9. Stewart Black who was the owner of the first respondent business and Miss Amy Cross gave evidence in support of the first respondent's case regarding the preliminary issues.
10. An agreed hearing bundle was also provided, and some additional pages were included involving emails between Mr Marshall and the claimant's legal advisor concerning the provision of medical evidence.
11. The hearing took place remotely using the Tribunal's Cloud Video Platform ('CVP') and due to difficulties experienced by the claimant in getting her microphone to work on the platform. She eventually began to give her evidence after the lunch break, but it did mean that there was insufficient time to complete the hearing on the day and it was only possible to hear the witnesses with the hearing concluding at 4.15pm.

## Findings of Fact

### Introduction

12. The claimant started working for the first respondent from 7 August 2007 as a hair stylist. It is understood that her working relationship with the first respondent was uneventful until 2018, when issues arose relating to the claimant's employment status and then from 2020 when the Covid pandemic reached the UK.
13. It is not necessary to consider the question of the claimant's employment status as this was determined at a previous preliminary hearing before Employment Judge Shakett. In relation to the impact of Covid upon the claimant, I heard evidence and saw documents within the hearing bundle. Like all businesses across the UK, the first respondent's business was required to enter lockdown and close temporarily from late March 2020.

### The claimant's health in 2020

14. The claimant developed Covid related symptoms from late March 2020 and these symptoms increased in their severity from mid-April 2020. This resulted in her being admitted to hospital on two occasions because of breathing difficulties. She was diagnosed as suffering from Covid when she tested positive.
15. Unfortunately, the claimant continued to have symptoms despite having been told that she was recovering from Covid some 6 weeks following her initial diagnosis. The ongoing symptoms included chronic fatigue, poor blood circulation, low iron levels and asthma. This resulted in the claimant being monitored by a nurse from her local 'Crisis' team.

16. The available contemporaneous medical records reveal prescriptions being given to the claimant from June 2020 onwards of asthma type inhalers and other medicines connected with the claimant's symptoms including strong painkillers and at antibiotics. These prescriptions appear to have continued. There is a clear indication of her diagnosis of Covid 19 from May 2020.
17. The claimant has described that since she contracted Covid 19, she has found it difficult to lift heavy shopping bags because her hands go numb, that she cannot do her own housework and finds it difficult to cook and that standing for any length of time can be a problem because her oxygen levels are very low. The claimant has also described how her mental health has also suffered as a result of the initial illness and her subsequent longer term symptoms.
18. The claimant's GP Dr Mohindra produced a letter for these proceedings dated 12 February 2021 which summarised her medical conditions relating to this case. It was effectively a summary of the GP record entries which confirmed that the claimant reported to the GP with a persistent cough from mid-April 2020 and which resulted in several admissions to Accident and Emergency and a diagnosis of Covid 19. It confirmed that the claimant continued to suffer from persistent symptoms of *'recurrent episodes of chest pain, shortness of breath, tingling in hands and fingers, headaches and also intermittent problems with swelling in the groin'*. This was described as having *'an impact on her ability to undertake her activities at home and also specifically to continue in her work as a hairdresser.'*
19. At the point at which the letter was drafted, the claimant was described as being *'post Covid'* and while no specific treatment had been identified, she was under the care of Chest Physician. A letter from the Department of Respiratory Medicine at The Pennine Acute Hospitals NHS Trust dated 23 March 2021 was also included in the bundle before me and which confirms the description given by Dr Mohindra. Subsequent medical letters from treating doctors also demonstrate ongoing symptoms of long Covid, although these of course were produced long after the claimant's termination of employment and in support of this litigation.
20. I noted that Dr Mohindra said that *'It is very likely that Hayley's problems may last longer than 12 months'*. However, I have exercised caution in my consideration of this opinion, given that it was made on 12 February 2021 and not at the relevant time in these proceedings, being June to July 2020.
21. Dr Mohindra confirmed that during June and July 2020, the claimant was advised to reduce her working hours for her initial 4 week return to work period, with the position to be reviewed thereafter.
22. I therefore accept that during June and July 2020, the claimant was suffering from ongoing Covid related symptoms as described by Dr Mohindra and these had an affect at that time upon her ability to return to work as lockdown restrictions were eased. However, no medical prognosis was given concerning the length of these symptoms at that time and this is not surprising given the recent arrival of Covid 19 to the UK in March 2020.

23. The question of whether these symptoms resulted in the claimant being disabled at the material time, will be considered below in the discussion section of this judgment.

The claimant's termination of employment

24. As the initial wave of government Covid restrictions were lightened in the summer of 2020, the first respondent intended to reopen its business from 7 July 2020. It is understood that the claimant had arranged furlough payments during the lockdown period, but as the first respondent at that stage believed her to be self-employed, this was something that she sorted out herself.
25. The claimant messaged Mr Roberts on 22 June 2020. She explained that she had contacted her GP who advised her that she was only fit to return to work on a part time basis, working 2 days per week for the initial 4 weeks of reopening of the business. Mr Roberts did not reply immediately and instead confirmed on 23 June 2020, that he would telephone her the next day. The call did not appear to go well subsequent discussions indicated that while the first respondent might agree to 3 days per week, the claimant maintained that her GP advised her to only work 2 days per week as part of what was effectively a phased return to work.
26. This culminated in the claimant sending an email to Mr Roberts on 26 June 2020. It is perhaps best to repeat what she says in this relatively short email:
- 'Hi james I'm writing this email because you asked me to get a fit to work note from my doctor I did this it stated I will be well enough to come back to your salon on 2 days a week for the next 4 weeks to keep an eye on my recovery from covid 19 and pneumonia, you have said on the phone and messages that 2 days a week isn't suitable for your company. You have suggested financially, 3 days a week is too much at the moment as I can't commit and I wouldn't want to let people down. In a text message you have told me I could come back week 1 do 1 day week 3 do 3 days week 4 do 4 days, this is impossible for me to do with my recovery so their for I have no choice to tell you I will not be coming back, please could you give one of the girls my hair dryer. Thanks Hayley'*
27. There then followed a series of messages between the claimant concerning her hairdryer and also her decision not to return to work. The claimant also received a message from Mr Roberts on 30 June 2020 which confirmed to her that she could have her hairdryer back. It does not provide the reader with any indication that he was seeking to persuade the claimant to return to work and suggested a degree of acquiescence on his part concerning her notice to terminate her employment. However, it should be noted that at no stage during the period following 22 June 2020, is there correspondence either by way of message or email, where Mr Roberts confirms that the claimant has resigned or seeks to challenge her decision.
28. On 2 July 2020, the claimant sent a further email to Mr Roberts. The email opened with the claimant expressing her concern about the way in which she

believes Mr Roberts had treated her following her ill health. She repeated her doctor's recommendation that she should initially only work 2 days a week and why she believed the options suggested by Mr Roberts would not be practicable for her. The third paragraph of her email says the following:

*'As you didn't even have courtesy to respond to my email of last week, I feel that I have had no alternative other than to resign with immediate effect and pursue appropriately paid work to look after my future in line with my doctor's orders. I am therefore recording my leave date as yesterday 1<sup>st</sup> July 2020'.*

29. In her claim form, the claimant claims that she resigned on 1 July 2021 when she sent an email on that date. Whereas in her evidence she said that she actually resigned on 26 June 2021 when she sent an earlier email to Mr Roberts. Her evidence concerning this matter was somewhat confused but she did give sufficiently convincing evidence that on one of those days, she had no choice to continue working with first respondent and that she wished to resign. She did not receive a response to either of these emails and it is really not necessary to identify the precise date of termination by way of resignation for the purposes of the preliminary issues and the dates which appear to be in issue.
30. Nonetheless, I would make a finding concerning for the purposes of this preliminary hearing and in doing so, do not intend to fetter the discretion of the Tribunal hearing the case at the final hearing concerning this particular matter. On balance and having considered the evidence, it appeared to me that from 26 June 2021, the claimant had reached a point where she felt an impasse had been reached between Mr Roberts and her concerning the manner of her return to work. She did communicate at this point her intention to resign, but recognised that this might be considered as an *'ultimatum'*, which could reinvigorate their discussions. Mr Roberts failure to reply suggested that he was not sure of what to do regarding that email and the claimant expected a reply before she would consider her resignation to take effect. This resulted in the email being sent on 1 July 2020 which was unequivocal in her intention to resign and gave the impression that she felt her earlier email had not resulted in her resignation on 22 June 2020.
31. It is telling that she chose to present her claim relying upon the termination date on 1 July 2020 and while upon reflection as the case progressed, she has readdressed this belief, I am satisfied that the date of termination for the purposes of considering the preliminary issues before me was 1 July 2020.

The transfer from the first respondent to the second respondent

32. The hearing bundle included a copy of the Business Sale Agreement between the first respondent as the seller (or 'transferor') and the second respondent as buyer (or 'transferee'). It was dated 17 August 2020, but the *'Interpretation' section at paragraph 1*, the *Effective Time* is described as being *'close of business on 6 July 2020'*.
33. The first respondent says that it transferred its hairdressing business to the second respondent on 6 July 2020. They assert that this was a relevant transfer

in accordance with regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') and this legislation is referred to within the Agreement and section 12 under the heading '*Employees*', each parties' compliance with TUPE is agreed. Subsection 12.2.10.2 records that the seller will indemnify the buyer against all losses in connection with '*the employment of the Employees or the termination of their employment by the Seller up to and including the Effective Time*'.

34. There appears to be little dispute between the parties as to whether a relevant transfer took place under TUPE and indeed, that the transfer took place on 6 July 2020. Schedule 3 describes the employees who were working for the first respondent at the date of transfer and it does not include the claimant's name. It is acknowledged that the first respondent did not believe the claimant to be an employee, since their discussions in 2018 concerning self-employed status. However, this matter is now academic and no longer of practical relevance as the question of employment status was determined by Employment Judge Sharkett at an earlier hearing and also, when we take into account my findings concerning the termination date, above.

35. Accordingly, I accept that the relevant transfer took place on 6 July 2020, when the first respondent transferred its hairdressing business which is relevant in this case and that this was in accordance with TUPE. The relevance of this finding of fact to the preliminary issues will be discussed below.

## The Law

### Disability

36. Section 6(1) of the Equality Act 2010 ('EQA'), provides that disability is a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.

37. Substantial is defined as meaning '*more than minor or trivial*' in section 212(1) EQA. Paragraph 5, schedule 1 EQA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and but for that, it would be likely to have that effect. Likely means 'could well happen', not that it is more probable than not.

38. Paragraph 2(1) of Schedule 1 EQA, provides that the effect of an impairment is long-term if it has lasted or is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.

### The parties' references to case law in respect of disability

39. Both the claimant's and the first respondent's representatives provided details of relevant case law as part of their written submissions.

40. Both parties referred to the case of **McDougall v Richmond Adult Community College [2008] EWCA Civ 4** and Mr McPhail noted that the

question of whether an act of discrimination has taken place must be judged upon the basis of the evidence at the time of acts alleged to amount to discrimination.

41. The ***Daouidi v Bootes Plus SL Case C -395/15*** was referred to by Mr Marshall in a report in the Official Journal of the European Union. He noted that the operative part of the judgment interpreted Council Directive 2000/78/EC and held that '*...the evidence which makes it possible to find that such a limitation is 'long-term' includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that incapacity is likely to be significantly prolonged before that person has recovered*'.
42. Mr Marshall went on to refer to the Employment Appeal Tribunal ('EAT') case of ***Ministry of Defence v Hay [2008] IRLR 928***, where the claimant had tuberculosis and while that disease would not last 12 months, it left the victim with many symptoms that would last more than a year. I took his reference to this case as a reminder that when considering the question of disability, I was looking at the impairments at the material time and not the identified condition which gave rise to those impairments.
43. The ***SCA Packaging Ltd (Equality and Human Rights Commissions intervening) [2009] ICR 1056*** was referred to by Mr Marshall and he reminded me that the House of Lords in this case found that when considering disability, the term '*likely*', should in this context mean '*could well happen*'. This means that a test which is *lower* than the test of balance of probabilities should be applied.

#### TUPE Regulations 2006

44. The parties have not placed any reliance upon the provisions of TUPE in their submissions concerning the law. However, by way of a reminder, I have noted that regulation 3 provides an explanation of the application of TUPE and that regulation 3(1)(b) which is relevant in this case, involves a service provision change. Regulation 3(1)(a) of course describes the more traditionally understood form of TUPE transfer, namely the transfer of an undertaking or business, being an economic entity which retains its identity.
45. Additionally, I have reminded myself of regulation 4 of TUPE which describes the effect of a relevant transfer under regulation 3 upon the contracts of employment. Regulation 4(3) mentions that affected persons are those employed immediately before the transfer.

#### **Discussion**

##### Disability

46. In considering this preliminary issue, I have taken account of the fact that I must consider the claimant's impairments at the relevant date in June and July 2020 and not when later medical evidence became available following



the claimant's termination of employment and when the question of her return to work was considered following the initial lockdown. However, while Dr Mohindra's letter provided in March 2021 post dates the claimant's resignation, it includes a summary of her health in the summer of the previous year. This is consistent with the decision in the case of **McDougall** referred to above.

47. Mr Marshall notes that *'as a novel disease, the term "long-Covid" has, as yet , no formal medical definition. Notwithstanding this, I would submit that it is well established that there is no need for a formal medical diagnosis in order for a tribunal to identify the existence of an impairment. The absence of any formal diagnosis of a "post-acute" or "chronic" condition should not therefore be determinative.'* He goes on to say that the Tribunal *'should adopt a "functional" approach, which involves identifying the effect of the impairment, not necessarily its clinical name or its underlying cause.'*
48. I agree with this submission and acknowledge that at the time of the claimant's resignation, Covid 19 was a new illness not only in the UK, but globally. It may have derived from other older viruses which were more localised in their geographical reach, but its impact was not fully understood and especially in the context of its long-term consequences. However, while this might be the case, I have considered the question of disability in the context of the impairments experienced by the claimant in the summer of 2020. In relation to this matter, the case of **Ministry of Defence v Hay** is relevant.
49. I have been taken through a detailed consideration in Mr McPhail's submissions of the claimant's medical notes and the medication that she was provided, and I am grateful for these submissions. However, I do think that in considering the question of disability and extent of the claimant's submissions, there are more basic considerations as to the state of the claimant's impairments in June and July 2020.
50. There is record of the claimant contracting Covid 19 in the spring of 2020. Although she fought off the virus within a few months of contracting it and was expected to make a full recovery, she was left with a number of symptoms which had not existed prior to this diagnosis. A particular challenge with Covid 19 which is now understood, is that it is not clear which people will continue to suffer prolonged symptoms. At the time of the claimant's resignation, long Covid was something which was not understood as a widely occurring issue.
51. In terms of the claimant's impairments however, at the time the first respondent was looking to reopen its salon, she was experiencing significant symptoms of recurring chest pains, shortness of breath, tingling in her hands and fingers and headaches. These had a functional impact upon her ability to stand for prolonged periods of time, the ability to carry heavy items and her overall stamina. As a consequence, Dr Mohindra had recommended that the claimant return to work, but for the first month, only working 2 days each week. There was no indication that this condition would improve after the first

month, but I understood that any improvement would be considered after the claimant had concluded a month working 2 days each week.

52. On balance of probabilities, I must conclude that the claimant was suffering from a physical impairment which was substantial in nature when she was discussing her return to work with Mr Roberts in June 2020. While the claimant has no doubt experienced mental health issues since her resignation, I am unable to find that she was experiencing a mental impairment which was substantial in nature in terms of its impact on her day to day activities. This may well have developed into something more significant following her resignation and the available medical evidence in the hearing bundle suggests that this is likely to be the case. This, however, is not relevant for my consideration of disability.
53. At the time of the claimant's discussions with Mr Roberts concerning her return to work, she had only contracted Covid a few months earlier and her symptoms which were restricting her return to work, had only become clear as the virus subsided and she did not recover as anticipated. There was no medical evidence available at that time which gave a prognosis as to the duration of the physical symptoms which while substantial, could not with any certainty be assessed as lasting beyond 12 months in duration.
54. However, as I discussed above, in applying the decision in **SCA Packaging** the question of whether disability was likely to be long term in nature means that I need to consider it in the context of *could well happen, (or could well last longer than 12 months)*. This is supported by section C3 of the Guidance on Matters to be taken into account in determining Questions of Disability (2011).
55. Taking into account the circumstances at the time the alleged discrimination took place, (when the claimant's return to work was being discussed in June and July 2020), I find that it would be reasonable to conclude that the physical symptoms could well last longer than 12 months. As a consequence, I am satisfied that these impairments could be considered long term in nature.
56. For these reasons, I find that the claimant was disabled at the material time in accordance with section 6(1) EQA. I do not make any findings concerning the question of the respondents' knowledge at this time as it falls outside of the preliminary issues to be considered today. That particular matter will be determined at the final hearing.

#### Transfer from First Respondent to Second Respondent

57. There does not appear to be any dispute that the relevant transfer of the first respondent's business to the second respondent in accordance with TUPE, took place on 6 July 2020. Mr McPhail in his submissions, concedes at paragraph 45 that the relevant dates in issue concerning the claimant's effective date of termination predate the transfer date.
58. As a consequence of my findings made above that for the purposes of this preliminary hearing the claimant's employment was terminated on 1 July 2020, it must be the case that her employment did not transfer to the second

respondent when the transfer took place on 6 July 2020. Accordingly, the first respondent was her employer when she resigned.

59. Mr McPhail explained that the first respondent reserves its position concerning its argument that the claimant's decision to resign was motivated by the imminent transfer. However, this matter falls outside of the preliminary issues to be considered today and will be determined at the final hearing if it is an argument that they wish to continue with in these proceedings.

## Conclusion

60. As a consequence, my decision in this preliminary hearing is as follows:

- a) The claimant was a disabled person at the material time; and,
- b) The claimant's employment did not transfer from the first respondent to the second respondent pursuant to the provisions of TUPE.
- c) The second respondent will at present remain a party to the proceedings as the first respondent maintains an argument that the claimant's decision to resign on 1 July 2020 was motivated by the imminent date of transfer on 6 July 2020.

61. I did confirm I would consider further case management orders to ensure that the case is ready for the final hearing on 21 to 25 November 2022 and these will be provided to the parties in a separate case management order.

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Employment Judge Johnson

Date 9 March 2022

JUDGMENT SENT TO THE PARTIES ON  
24 March 2022

FOR THE TRIBUNAL OFFICE