



EMPLOYMENT TRIBUNALS

Case Reference: 1400873/2021
Claimant: Mr A Wilde
Respondent: The Goodwood Hotel Limited
Heard at: Southampton by CVP

On: 10 February 2022

Before: Employment Judge Lowe

Representation

Claimant: Mr T Megone (Representative)
Respondent: Mr J England

PRELIMINARY HEARING JUDGMENT (AMENDED 9 MARCH 2022)

1. The Judgment of the Tribunal is that the claimant has not established that he was a disabled person as defined in section 6 of the Equality Act 2010, at the relevant time. Accordingly, the Tribunal does not have jurisdiction to hear claims relating to disability under the 2010 Act. The discrimination claim on the grounds of disability is, therefore, dismissed.
2. The claims yet to be determined are: 1. discrimination on the grounds of sex, including whether the claims are within time for the purposes of section 123 Equality Act 2010; and 2. unfair dismissal.

REASONS

Issue for determination

1. This preliminary hearing has been listed in order to determine whether the claimant was a disabled person, for the purposes of section 6 of the Equality Act 2010, at the relevant time.
2. The claimant contends that he was a disabled person due to a hereditary condition 'migraines with aura'. An Impact Statement and medical evidence have been produced as outlined below.

Hearing

3. The preliminary hearing took place remotely by way of Cloud Video Platform. This was not objected to by either party. An 'In Person' hearing was not practicable due to the Covid-19 pandemic and resultant risk implications for the parties, court staff and wider public.
4. A joint bundle of documents was lodged in advance of the preliminary hearing, extending to 115 pages. In addition, the claimant and Miss Herbert gave evidence at the preliminary hearing.
5. The Tribunal invited the parties to indicate if any reasonable adjustment were required. After discussion, other than regular breaks, no further adjustments were identified. Accordingly, the Tribunal had regular breaks at the request of the claimant or as deemed appropriate.
6. References in this Judgment to the agreed hearing bundle are in the form [B/page number].
7. At the conclusion of the hearing, the Tribunal gave an oral Judgment to the parties. Subsequent to the hearing, the claimant has requested a written Judgment be provided.

Medical evidence

8. The evidence before the Tribunal on the issue of the claimant's disability consisted of the

following:

- (1) The claimant's Impact Statement [B/43] and his oral testimony to the Tribunal.
- (2) The claimant's redacted GP notes for the period 11 May 2018 to 13 November 2019.
- (3) Letter from GP dated 8 June 2021, confirming a diagnosis in respect of a consultation on 13 November 2019.

Findings in fact

9. The Tribunal made the following relevant findings in fact.
10. The claimant was employed as a bar tender in the Farmer Butcher Chef, a restaurant attached to the Goodwood Hotel, from December 2017 until his dismissal on 28 October 2020 for gross misconduct.
11. The respondent is part of the Goodwood Group of companies which operates a hotel on the Goodwood Estate. The claimant's duties are listed fully at paragraph 2 of the Particular of Claim at [B/34]. In summary, these relate to the running and management of the hotel bar and front of house duties.
12. The ET1 Claim Form relating to disability indicates that the claimant does not have a disability. Mr Megone has informed the Tribunal that this was an error on his part.
13. On the commencement of his employment, the claimant completed the Employment Health Questionnaire (dated 9 December 2017). This included answering the following questions: 1. 'Do you have any impairment which may affect your ability to work safely?', and 2. 'Do you regularly take tablets or medicine?'. The answer provided to the first question was 'No' and to the second 'No. Suffer from migraines on occasion'.
14. The claimant accepts that this was the case [B/90] as the 'effects were limited and manageable as at the time they were very infrequent, so I did not anticipate them affecting my day-to-day activities'.

Claimant's Impact Statement/evidence

15. At [B/90] the claimant identifies the symptoms of his condition to be: throbbing headache, increased temperature (on occasion hot sweats), blurred vision and sensitivity

to light, flashes of light and loss of half the field of vision (mainly on the left hand side), smells that can cause nausea, loss of consciousness and increased sensitivity to sound.

16. In evidence, he confirmed that the reference to 'loss of consciousness' was a reference to having to sleep in a darkened room. The claimant also highlighted sensitivity to sound.

17. After commencing employment with the respondent, the 'headaches' became progressively worse and more frequent.

18. In terms of impact, in evidence the claimant described a typical impact when experiencing a migraine. Initially, for a period of approximately 10 minutes, there was a loss of sight out of his left eye, light sensitivity and flickering. Thereafter, there was an onset of pain, which became debilitating to the extent that he would need to go to sleep in a darkened room. This would typically be the position for approximately a day.

19. After a period of sleep, the claimant would feel fatigued and experience a loss of energy on the following day. However, the claimant accepted, that he was able to carry out normal activities on this day.

20. The claimant took over the counter medication, Annadin Extra being an example, and this was sufficient to manage the migraines initially. However, as the medication had begun to be less effective, the claimant sought advice from his GP.

21. On 13 November 2019, the C was prescribed Sumatriptan, a drug which can be used during the 10 minute 'pre-onset period' in order to try to remove or lessen the symptoms of the migraine. The claimant has continued to use this medication.

22. The claimant has not sought any further medical intervention or advice from his GP, this being the only occasion that he has done so.

23. Dr Goonetilleke confirms in a letter dated 8 June 2021 a diagnosis of migraine with aura on 13 November 2019 and a prescription of Sumatriptan.

Claimant's Absence Record:

24. During the month of December 2017, the claimant was not absent from work.

25. During 2018, the claimant was absent for work on 5 separate occasions, a total of 5 days;

4 of which were for migraine (the other being food poisoning). The period of absence on each occasion was one day.

26. During 2019, the claimant was absent from work on 10 separate occasions, a total of 15 days. 6 of these were for migraine, each for an absence of one day. 6 days were recorded as flu (2 periods of 4 days and 2 days respectively), 1 day for food poisoning, 2 days for a headache.

27. During 2020, the claimant was absent from work on 3 occasions, a total of 14 days. 8 days for a urine infection, 5 days for coronavirus and 1 day for migraine. This entry on 23 January 2020 is the last recorded period of sickness due to migraine.

28. The claimant has accepted in evidence today that this represents the full extent of his migraines for the relevant periods.

29. The totality of absence during the claimant's employment with the respondent, was 34 days, 11 of which related to migraines.

30. The claimant was Furloughed for the period March – 24 September 2020.

Relevant law

31. Disability Status

Section 6(1) Equality Act 2010 provides:

'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'.*

Schedule 1 of the Equality Act 2010 contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

'2(1) The effect of an impairment is long-term if-

- (a) it has lasted 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 life of the person affected'.*

Paragraph 5 states:

'5(1) 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 –

- (a) measures are being taken to treat or correct it; and*
- (b) but for that, it would be likely to have that effect'.*

The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the Guidance) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 Equality Act 2010).

The Guidance at paragraph A8 states *'It is not necessary to consider how an impairment is caused... What is important to consider is the effect of an impairment, not its cause'*.

The Guidance at paragraph B1 deals with the meaning of 'substantial adverse effect' and provides:

'The requirement that an adverse effect on normal day-to-day activities should be substantial alone 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 one that is more than a minor or trivial effect'.

Paragraphs B4 and B5 provide that:

'An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect.

For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of day-to-day activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities'.

Paragraph B1 should be read in conjunction with Section D of the Guidance which considers what is meant by 'normal day-to-day activities'.

Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.

Paragraph D3 Provides that:

'In general, day-to-day activities are things that 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.'

In *Goodwin v Patent Office [1999] IRLR 4*, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

- a. Does the person have a physical or mental impairment?
- b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- c. Is that effect substantial?
- d. Is that effect long-term?

32. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.
33. It is important to note, that for the purpose of determining whether a person is disabled for the purpose of the Equality Act, the employer's knowledge is not a relevant factor.

Decision

Relevant period

34. The Tribunal considers that the starting point for its determination on disability status is the question of the relevant date for assessing whether the claimant is disabled for the purposes of the Equality Act 2010.
35. The case of *McDougall* (above) makes it clear that this needs to be assessed as at the date of the alleged discrimination. In this case, the claimant makes allegations of discrimination (in relation to lack of adequate breaks generally and meal breaks) from the start of his employment in December 2017. Additional, specific allegations of discrimination are detailed in the CMO at paragraph 5 [B/85] between 14 February 2019 – 7 October 2020.
36. The relevant period for assessing whether the claimant was disabled is therefore December 2017 until 28 October 2020.

Impairment

37. Did the claimant have a physical or mental impairment. The claimant argues that hereditary migraine was a physical or mental impairment. I accept that, on balance, the claimant has suffered a migraine during the relevant period; and, that for the duration of this, this constitutes a physical impairment. The claimant has detailed the symptoms experienced during such an episode.

Adverse impact on day-to-day activities

38. The Tribunal then considered whether the impairment had an adverse effect on the claimant's ability to carry out normal day-to-day activities. I am satisfied, on balance, that during a migraine, the claimant did suffer an adverse impact on his ability to carry out day-to-day activities. At the onset and during the immediate period thereafter, the claimant was unable to undertake any routine tasks, other than those relating to basic needs.

Substantial effect

39. The Tribunal then considered whether that adverse effect was substantial. The Guidance makes the following clarification on this issue: 'the requirement that an adverse effect on normal day-to-day activities should be a substantial one 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 one that is more than a minor or trivial effect'.
40. Harvey details the case of *Foster v Hampshire Fire and Rescue Service EAT/1303/97 (23 June 1998)* in which the EAT upheld a decision that a woman who suffered from both asthma and migraine was not disabled, on the grounds that although she suffered from a physical impairment which had a long-term adverse effect on her mobility, that effect was not 'substantial', taking into account all the evidence. She suffered from asthma attacks about two or three times a year, and when these took place she was unable to walk or breathe properly. Also she suffered about eight or nine migraine attacks a year, during which she had to lie down in a darkened room.
41. Taking all the evidence into consideration, I do not consider that the effect was substantial. The claimant has accepted that the period of impairment was always limited to an approximate period of not more than 24 hours after the onset of the migraine. By the second day/end of this period, these symptoms had subsided, leaving only feelings of fatigue and energy loss. The claimant's sickness record reflects this position, with periods of absence all being confined to 1 day. By the second day, the claimant's recovery was such that he was able to resume his routine work commitments at the hotel.
42. The frequency of adverse impact is limited to 4 occasions in 2018, 6 in 2019 and 1 in 2020. The claimant's period of absence from work in 2019 and 2020 was higher due to other illnesses, in comparison, to migraines.
43. I am also of the view that if the adverse impact was substantial, the claimant would have sought further medical assistance other than a single occasion in November 2019. The redacted medical notes provided highlight that the claimant did attend his GP on a number of occasions during this period. This, coupled with the background pressure as described by the claimant in relation to his work attendance record, magnifies the point.
44. There is no medical evidence before the Tribunal which outlines the severity or general circumstances surrounding the claimant's migraines during this period.

45. Further, the claimant was able to regulate the impact of migraines with over-the-counter medication until the additional assistance of Sumatriptan from November 2019. This, combined with a period of rest, was effective in managing the migraine until it had subsided.
46. The limited duration and frequency of the impairment, the ability to self-manage coupled with the claimant's own assessment when he commenced work in December 2017 that he did not take medication, and suffered from migraines only on occasion, support the conclusion that the impact was not substantial.

Long Term

47. In *Seccombe v Reed in Partnership Ltd: EA-2019-000478-00*, the EAT observed 'that the long-term requirement relates to the effect of the impairment rather than merely the impairment itself. It is not sufficient that a person has an impairment that is long-term; the impairment must have a substantial adverse effect on day-to-day activities that is long term'.
48. Chronologically, at the outset of his employment in 2017, the migraines were capable of self-management. The first period of one day absence was 23 February 2018. The claimant argues that he suffered from a reoccurring, fluctuating condition which was exacerbated by work stress from this period onwards. This resulted in the 4 absences in 2018, 6 absences in 2019 and 1 in 2020; the last date being 23 January 2020 - an overall period of 23 months.
49. The occurrence of adverse effect on day-to-day activities over this period, extends beyond the 12-month period specified within Paragraph 2 of Schedule 1 of the Equality Act 2010. As such, I accept that this element has been satisfied.

Conclusion

50. In these circumstances, the claimant has not discharged the burden in relation to satisfying the Tribunal that the definition of disability as contained within the Equality Act 2010 has been met.

Employment Judge Lowe
Date: 11 April 2022

Reasons sent to parties: 27 April 2022

FOR THE TRIBUNAL OFFICE