



EMPLOYMENT TRIBUNALS

Claimant: Mrs Christine Cassells **Respondent:** Tesco Stores Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford

On: 23 May 2022

Before: Employment Judge Bedeau

Appearances

For the claimant: Ms A Sarjoo, Employment Consultant

For the respondent: Mr H Zovidavi, Counsel

JUDGMENT

At all material times the claimant was not a disabled person having regard to section 6, schedule 1, Equality Act 2010.

REASONS

1. This case was listed by Employment Judge J Lewis at a preliminary hearing held on 8 December 2021, for me to hear and determine whether, at all material times, the claimant was suffering from a disability.

The evidence

2. I heard evidence from the claimant. No oral evidence was called by the respondent.
3. In addition, the parties referred to a joint bundle of documents comprising of 164 pages. The claimant produced a much smaller bundle of 33 pages.

Findings of fact

4. The claimant commenced employment with the respondent, a large retailer, on 10 April 2012. Her job title was that of a Price Integrity Assistant, working on part-time basis, 17½ hours a week. Her place of work was at the respondent's

store in Greenford. Her duties were to make sure that the prices displayed on the shelves correctly matched the products on display. Where there were changes to the price of goods, she would ensure that the old price labels were removed and replaced with the new ones.

5. On or around 24 June 2017, she said she sustained an injury at work when her right hand was caught in the respondent's lift door, causing injury to the index and first finger of her right hand. She was treated in hospital and discharged, and was off work from June to 27 September 2017, when she had a return to work meeting.
6. The Urgent Care Centre, Ealing Hospital, Discharge letter dated 24 June 2017, states that the claimant hit the right side of her head on a lift door as it was closing, had vomited, and had a "left sided headache". Her complaint was that of a headache. She was discharged the same day. (pages 83-84 of the bundle)
7. In a report by Mr Enrique Saavedra, Consultant Orthopaedic Surgeon, dated 4 July 2017, he wrote:

"I reviewed this lady today in the clinic who sustained an injury affecting her right index finger a few weeks ago. She works in Tesco. Xray did not show any bone abnormality. Clinically she presents with a nodule effect at the base of the right index finger. I am going to get an MRI scan of her hand and I will keep you updated." (85)
8. That report was sent to the claimant's surgery and refers to an injury to her right index finger with her right hand to have an MRI scan.
9. The fit notes sent to the respondent, diagnosed the medical reason for her absence as work-related stress. (86-87)
10. On 4 September 2017, Mr Saavedra again wrote to the claimant's GP stating the following:

"I reviewed this lady today in the clinic who unfortunately is still waiting for an ultrasound scan. She is due to have the scan next week and I will see her after the scan and keep you updated." (89)
11. A further report was sent to the surgery on 25 September 2017, in which Mr Saavedra wrote:

"I reviewed this pleasant 57 year old right-handed lady today. I am glad to report that her symptoms have settled but not fully. She had an ultrasound scan which did not show any pathological changes in the tendon or the pulley? I have reassured her and discharged her back to your care." (90)
12. The claimant was medically fit and able to return to work and returned on 27 September 2017, when a return to work meeting was held with, Mr Carl Ashton, Shift Leader.
13. In the notes of that meeting, Mr Ashton invited her to talk through what happened in relation to her accident. She said that she had fractured her finger, "aggravated pain by the facility lift. Wear and tear on my finger and right breast& head". The outcome was that the claimant would work Monday to Friday, but her daily shifts would be

no more than three hours. The respondent was to take into account that exposure to cold environments affected her fingers and intensified the pain. (91-95)

14. After a brief period of not being engaged in the work she was contracted to do, she returned to her price integrity duties. In carrying out her work she was able, using both hands, to remove and replace the price labels.
15. She told me that from June 2017 to June 2019, she was working less than 3 hours a day with tea breaks to enable her to warm her fingers.
16. In her Availability Form submitted on 13 August 2019, to the respondent, it is written,

“Cold environment & ongoing pain due to injury at work in 2017.” (99)
17. In September 2019, the respondent announced that it was going to reorganise the store resulting in a change to the claimant’s hours of work. She was required to work 5 hours on Wednesday and Thursday, and 4 hours Friday and Saturday. She objected to the changes. The respondent say that she was required to work 4 hours per shift.
18. On 11 November 2019, Dr Emma Newman, of the claimant’s GP surgery, wrote to Accident and Emergency, the identification of the hospital is not given, thanking them for seeing her, who, at the time, was suffering from chest pains and stress due to redundancies and having to work in a cold environment. (100-101)
19. She went on long-term sickness absence from 10 December 2019. From the fit notes her absence was due to work-related stress. No reference is made to any pain and suffering in her right hand. (103-105)
20. In her Wellness meeting held on 15 January 2020, with Mr Nick Marsh, Store Manager, she said that she had been treated unfairly and that another staff member was accountable for her stress. When she returned to work in October, she found out that her shifts had changed, and her “work-life balance had gone.” She also said that when it is cold it affected her hand, and it becomes painful. (107-111)
21. She was seen by Carr Barnes, Occupational Health Nurse Specialist, who wrote in a report dated 29 January 2020, about a number of matters but focussed on the reason for the claimant’s absence, namely work-related stress which the claimant put down to changes in her working hours; how tasks were allocated; a breakdown in her relationship with her manager and the respondent; and dissatisfaction with her grievance outcome. (113-115)
22. In response to an order by Employment Judge Lewis, for further particulars, she describes in a Disability Impact Statement dated 19 April 2021, the alleged adverse effects on her normal day-to-day activities. In paragraph 1.2, in answer to the question, “What/are the effects of the impairment on the claimant’s ability to do day activities?”, she lists a range of activities which she either was unable to do or could do in a limited way. They are:

“On a daily basis the claimant’s fingers and joints are cold, painful and swollen.
The claimant’s dexterous work is significantly restricted.
The claimant cannot wash dishes and cannot do most household chores.
The claimant cannot handle a Hoover, sweep the floor and do any other tasks which involves pressure in her right hand.
The claimant is unable to cut her own nails/toe nails.
The claimant cannot tie her shoelaces and has to wear slip on shoes.
The claimant cannot open cans (eg tin food).
The claimant cannot peel or chop vegetables and fruits.
The claimant cannot unscrew jars.
The claimant struggles to brush her teeth, her hair or attend to her own personal hygiene.
The claimant can no longer do her gardening.
The claimant cannot lift heavy items.
The claimant’s cooking abilities have been affected.”

23. I refer to her Disability Impact Statement because having considered the Occupational Health report dated 29 January 2020, what is singularly absent from it are any references to the claimant’s daily activities being severely impacted by the injury to her index and first finger. As I have already found, the report focuses on the claimant’s work-related stress, and she continued to be absent from work due to that diagnosis.
24. She did not call her husband to corroborate her account of the adverse effects on normal day-to-day activities. He accompanied her at the second long-term sickness absence meeting on 21 April 2020, the first was held on 4 March 2020.
25. The claimant continued to provide fit notes covering her absence to 6 November 2020, for work-related stress. (116, 122, 130, 134-135, 141-146, 152)
26. In a further report dated 17 August 2020, by Dr Galia Sperber, Occupational Health Physician, stated that the claimant’s absence was due to work-related stress which was the result of organisational changes in her workplace and how they impacted on her. She said that there were redundancies, and her job was at risk, but there was no consultation, and she was forced to work more days and longer hours, five hour a day. She said that the store can be cold making her hand injury painful. She asked for a copy of her contract of employment but was sent a one with her forged signature on it. She lodged a grievance and was signed off work by her doctor since December 2019. Of significance, is the penultimate paragraph in which Dr Sperber wrote:

“In my opinion, Ms Cassells is fit to return to work in early September. However, it is plausible that the cold work environment is adversely affecting her right hand, which can occur after an injury, as frequently arthritis can set in after a fracture and become more painful in the cold. I suggested to her to try wearing fingerless gloves at work to keep her hands warm. However, if this is not feasible or does not help her hands sufficiently, I would recommend that management consider allowing her to reduce her hours to three hours a day to support her health.”
27. That reference is not based on physical examination and diagnosis by Dr Sperber of the claimant’s right hand but an opinion that it is plausible that the cold work environment may adversely affect her right hand. (149-150)

28. On 10 September 2020, the claimant attended a final sickness absence meeting when she was dismissed on grounds of capability. She appealed and at the appeal hearing held on 1 October 2020, the decision to dismiss her was upheld.
29. The claimant referred to a report by Dr Ajay Sahu, Health Care Professional, dated 28 October 2020, who did not examine her, nor was he in a position to give a diagnosis as well as a prognosis on her right hand. He wrote about her clinical history and noted that there was a hand Xray. He then wrote,
- “There are mild degenerative changes noted on the ulna aspect of the distal interphalangeal joint of the right finger but otherwise no significant abnormality identified, No loose bodies demonstrated. No chondrocalcinosis. No evidence of deformity. No significant periarticular osteopenia periosteal reaction identified”. (160)
30. On 20 November 2020, Dr Emma Crust had a telephone conversation with the claimant who reported,
- “longstanding pain in base of index finger and middle finger on the right hand, worse in cold weather, does exercises with hand exercise ball, explained that x-ray showed degenerative changes in the ring finger, prefers not to take painkillers but occasionally takes paracetamol if severe, hand exercises printed.” (161)
31. The hand exercises document is from Whipps Cross University Hospital NHS Trust. (159)
32. Dr Christine Osterling, from the claimant’s surgery, gave a history of the claimant’s consultations on 15 October 2020 and on 20 November 2020 as summarised above. (162)
33. The claimant told me that she was able and is able to wash and dress herself but she maintains that what she described in her Disability Impact Statement at paragraph 1.2, is correct.
34. The respondent’s position is that it was not told by the claimant or any of the medical professionals, that she is disabled, nor did it have knowledge of the substantial adverse effects on normal day-to-day activities.

The law

35. Section 6 and Schedule 1 of the Equality Act 2010, “EqA” defines disability. Section 6 provides;
- “(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.”
36. Section 212(1) EqA defines substantial as “more than minor or trivial.” The effect of any medical treatment is discounted, schedule 1(5)(1).
37. Under section 6(5) EqA, the Secretary of State has issued Guidance on matters

to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as “it thinks is relevant.”

38. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24

39. In Appendix 1 to the Equality and Human Rights Commission, Employment: Statutory Code of Practice, paragraph 8, with reference to “substantial adverse effect” states,

“A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.”

40. Paragraph B11 of the Guidance states,

“Environmental conditions may exacerbate or lessen the effect of an impairment. Factors such as temperature, humidity, lighting, the time of the day or night, how tired the person is, or how much stress he or she is under, may have an impact of the effects. When assessing whether adverse effects of an impairment are substantial, the extent to which such environmental factors, individually or cumulatively, are likely to have an impact on the effects should, therefore, also be considered. The fact that an impairment may have a less substantial effect in certain environments does not necessarily prevent it having an overall substantial adverse effect on day-to-day activities.”

41. Paragraph B1 on the meaning of “substantial adverse effects”, states,

“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.”

42. Paragraph D3 on the meaning of “normal day-to-day activities”, states,

“In general, day-to-day activities are things people do on a regular 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. Normal day-to-day activities can include general work related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.”

43. The time taken to perform an activity must be considered when deciding whether there is a substantial effect, Banaszczyk v Booker Ltd [2016] IRLR 273.

Submissions

44. I have taken into account the written and oral submissions by Ms Sarjoo, Employment Consultant, on behalf of the claimant who submitted that from the documentary evidence and from the claimant’s oral testimony, she satisfies the

disability requirements and was disabled at all material times because of the injury to her right hand.

45. Mr Zovidavi, Counsel on behalf of the respondent, submitted that the medical evidence does not support the alleged disability. It reveals that the claimant was suffering from work-related stress.
46. I do not propose to rehearse their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Conclusion

47. I have to consider what the claimant's position was at the date of dismissal because her claim in respect of disability is the failure to make reasonable adjustments with reference to her dismissal and that has been confirmed by Employment Judge J Lewis in the case management summary. However, Ms Sarjoo submitted that disability commenced in June 2017 and is ongoing. The discriminatory act was the failure to make reasonable adjustments from June 2017 when, she submitted, the claimant was on sick leave due to the cold weather environment.
48. The cold work environment appears to cause pain in her fingers. I was not told in what ways the working conditions since June 2017, adversely affected her save that her fingers became painful. The medical report by Dr Saavedra, dated 25 September 2017, states that her symptoms had settled down, though not fully. An ultrasound scan did not reveal any abnormalities. From September 2017 to August 2019, she had not sought medical treatment for her hands and fingers. She was able to carry out her work and was not taking any medication. I wanted to know from the contemporaneous records the information regarding whether her work rate was slower than normal; whether she would need to stop at certain intervals to rest her hand; and the activities she was unable to do. Outside of her work, there was no medical evidence given on whether her home was cold and, if so, how it adversely affected normal day-to-day activities. There is no reference in the medical evidence to her being a disabled person, though I accept that such a statement is not conclusive, and the determination is a judicial one.
49. The issue in relation to pain in her hand and fingers seem to have arisen when the respondent decided to reorganise the Greenford store in 2019 and to increase her shift hours. Her dispute was that she did not want to work longer than 3 hours a day.
49. She had not been working for the respondent from December 2019 to her dismissal. During that time, she did not complain about pain in her right hand and fingers. In Dr Sperber's report, dated 17 August 2020, no reference is made as to how the use of her right hand and fingers affected normal day-to-day activities. The report focuses on the causes of the claimant's work-related stress which were organisational changes and management decisions, and states that it is plausible that the cold working environment adversely affects her right hand, but this was in the context of her work environment. The medical evidence is that the claimant was suffering work-related stress, and when she met with Occupational Health, she did not say to them how the injury to her hand and

fingers adversely affected her normal day-to-day activities. The last medical report sets out her brief medical history. I accept that she sustained an injury to her index and middle fingers and is a physical impairment though, initially, the diagnosis was injury to the index finger.

50. There is very little medical evidence relating to the claimant's right hand and fingers, as at September 2020, when she was dismissed and how her impairment substantially adversely affected normal day-to-day activities. I was mindful of paragraph D3, of the Guidance in looking for adverse effects on normal day-to-day activities.
51. As regards paragraph 1.2 of her Disability Impact Statement, I do accept that a person's account of any adverse effects on normal day-to-day activities is relevant in determining disability. However, I do question the claimant's written evidence on this. I take the view that it was produced for the benefit of these proceedings to bolster her case and is unsupported by any external evidence, such as from her husband. The medical evidence does not disclose any of the adverse effects she has listed when on sick leave from February 2020. She told me that in carrying out her work, after returning from sick leave in September 2017, she was able to use both hands and fingers in removing and replacing the price labels.
52. She also said to me, and I accepted as fact, that she was able to wash and dress herself. This does not sit well with what she wrote in paragraph 1.2.
53. Unfortunately, based on the evidence in this case and my findings of fact, I am unable to accept what the claimant described in her Disability Impact Statement in support of her contention that she, as of 10 September 2020, or at all material times, was a disabled person. I remain unconvinced by the evidence. I have come to the conclusion that, at all material times, she was not a disabled person.
54. After giving judgment Mr Zovidavi invited me to consider whether or not the orders issued by Employment Judge J Lewis requires any variation. It was agreed that the order in paragraph 20 be varied from 30 May 2022 to 3 June 2022. Paragraph 22 is deleted. The parties should comply with paragraph 23. The remaining orders do not require variation.
55. As the claims now are unfair dismissal and breach of contract, it does not require a full tribunal but a judge sitting alone. The parties will liaise with each other to agree an appropriate time estimate for the hearing and inform the tribunal by 27 June 2022.
56. Ms Sarjoo to undertake to liaise with the claimant to consider whether or not to continue with the breach of contract claim as currently pleaded as it reads as if it is a negligence claim to which the Tribunal has no jurisdiction.

Employment Judge Bedeau

Date: 4 July 2022

Sent to the parties on:

9 July 2022.

For the Tribunal:

N Gotecha