



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Hunter

Respondent: Lorne Stewart plc

Heard at: Bristol (by video-VHS)

On: 6 October 2022

Before: Employment Judge Livesey

Representation:

Claimant: In person

Respondent: Mr Scuplak, consultant

JUDGMENT having been sent to the parties on 11 October 2022 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:

REASONS

1. Claim

1.1 By a Claim Form dated 21 April 2021, the Claimant brought complaints of unfair dismissal and discrimination on the grounds of disability.

2. Issue for determination

2.1 The issue for determination at the hearing was whether the Claimant was disabled at the material time (see the Order of 7 April 2022). The Claimant's disability had been identified to Employment Judge Rayner as "*anxiety and panic attacks*"... "*if required to wear a face covering*" (see paragraph 12 of the Order).

2.2 The Respondent's denial of the Claimant's disability was set out in its email of 16 June 2022.

3. Relevant background

3.1 The Claimant was an Accounts Assistant with the Respondent between December 2018 and February 2021. During the Covid-19 pandemic, she indicated that she could not wear a mask or face covering. She claimed that she ought to have been allowed to work from home. She was dismissed for alleged gross misconduct in February 2021 and alleged that the disciplinary process was unfair and that her refusal to comply with the Respondent's policies arose from a disability and that her dismissal was

therefore discriminatory.

4. Evidence

- 4.1 The following witnesses gave evidence;
 - 4.1.1 The Claimant;
 - 4.1.2 Mr Cox; the Respondent's Regional Account Manager.
- 4.2 The following documents were produced;
 - 4.2.1 R1 - an agreed hearing bundle, containing two impact statements from the Claimant;
 - 4.2.2 R2 – The Respondent's written closing submissions.

5. Facts

- 5.1 The following findings were reached on a balance of probabilities. Page references cited within these Reasons are to the pages within the hearing bundle R1 and relate to the electronic pages on the pdf.
- 5.2 The Claimant described her disability in her Claim Form as follows (paragraph 3 [14]);

"The claimant has previously experienced anxiety and panic attacks in certain situations which includes anything covering her face."

When she had joined the Respondent in 2018, she did not declare any disability because, she said, she was not then aware that she had one [47-8].
- 5.3 Before the issues which arose at work, it was clear that the Claimant espoused some reasonably forthright views about the requirement to wear face masks during the Covid-19 pandemic and the Government's handling of the crisis. Notices were displayed by her in her car whilst parked in the Respondent's car park which included statements such as "*masks = muzzles = silence*", "*your body + brain needs oxygen*", "*pandemic = plandemic*" and a suggestion that government figures were "*lies*" [49-53]. She also sent emails in a similar vein to colleagues [54-5]. Mr Cox described her conduct in the following terms (paragraph 9 of his witness statement);

"She made it abundantly clear from the very start of the pandemic that she thought it was a lot of fuss about nothing and that it was simply an invention by governments, ours included, to keep their populations in line. The term conspiracy was often used by her, and when I say that she made it abundantly clear that that was her view, I do not mean that she expressed that view only when asked or when the issue was raised. She vented that view continually and openly, whether prompted or not. She did so with almost religious fervour."
- 5.4 The matter was addressed in a meeting on 21 January 2021 [58-9]. At that point, the Claimant said that she did not have any medical condition. At a subsequent meeting on 5 February, she said that she was exempt from wearing a face covering because she had a disability [60], a mental impairment that she was unable to discuss with anyone except her GP [61]. At a further meeting on 10 February, she stated that she experienced panic attacks and became stressed if she put on a face covering [64].
- 5.5 In the Claimant's two impact statements of 25 November 2021 and 27

April 2022 and in her oral evidence at the hearing, she stated that, when she attempted to wear a face mask, she hyper-ventilated and had a panic attack [81]. She described the attack as lasting approximately 30 seconds before she regained her equilibrium over a further period of 30 seconds. She had tried other means of achieving a face covering (visors and bandannas), but the effect had been the same.

5.6 The panic attacks were said to have commenced on 23 July 2020 [84]. The Claimant had not been aware of such difficulties before that date because she had not tried to wear a face mask before. She had only tried when the wearing of a face mask had become necessary as a result of Government legislation.

5.7 The Claimant said that her difficulties stemmed from painful childhood memories but, despite several invitations to discuss and/or describe those memories or the causal link in more detail, she declined to do so. She said that she was unable to remember any incident since her childhood when her face had been previously covered such that she had suffered similar problems. The Respondent's representative asked her about instances when she may have covered her face against the weather with a scarf or when she may have had a piece of clothing trapped on her head whilst trying to remove it. She denied that she had had any such experience.

5.8 The medical evidence which was produced was very limited. Three letters from her GP had been served. The first, dated 9 February 2021 [63], merely stated that "*Susan has disclosed that wearing face coverings makes her panic; I am unable to add any further details.*" The second, dated 17 February 2021 [71], did not take matters much further; "*Ms Hunter informs me that the mask causes anxiety and brings back difficult memories. She therefore feels unable to wear one.*" The last letter, dated 1 March 2022 [83], stated as follows;

"I can confirm that Ms Hunter consulted with us over the telephone on two occasions: 9th September 2020 and 16th February 2021. On both occasions, it is documented that she has stated to the consulting clinician that the wearing of a face mask makes her panic, gives her anxiety and brings back difficult memories from the past."

Those letters were of limited diagnostic and/or prognostic value. They contained little more than self report from the Claimant herself.

5.9 Whilst the Respondent accepted that the Claimant had complied with its other Covid policies (for example, the taking of her temperature), it was only after its encouragement that she did so.

6. Relevant law

6.1 A person had a disability if she had a physical or mental impairment which had a substantial and long-term adverse effect on her ability to carry out normal day to day activities (s. 6 of the Equality Act). Those questions may overlap to a certain degree. However, the Tribunal had to ensure that each step was considered separately and sequentially (*J v DLA Piper* [2010] ICR 1052, and *Goodwin v Patent Office* [1999] ICR 302). The burden was on the Claimant to prove the four conditions (*Kapadia v London Borough of Lambeth* [2000] IRLR 699 (CA)).

- 6.2 Schedule 1 of the Act contains further guidance in relation to the definition. In addition, I have taken into account the '*Guidance on the Definition of Disability*' which we are required to do where relevant under Schedule 1, Part 1, paragraph 12.
- 6.3 In *Goodwin-v-Patent Office* [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation was needed; a tribunal had to remember that, just because a person could undertake day-to-day activities with difficulty, that did not mean that there was no substantial impairment. The focus ought to have been on what the Claimant could not have done, or could only have done with difficulty. The approach in *Goodwin* was approved in *J-v-DLA Piper UK LLP* [2010] ICR 1052, at paragraph 40.

Impairment

- 6.4 Whether some one had an impairment was a question of fact and the word was to have been given its ordinary meaning. Its cause was likely to have been irrelevant.

"Impairment for this purpose and in this context, has in our judgment to mean some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition. The phrase 'physical or mental impairment' refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally." (*Rugamer-v-Sony Music Entertainment UK Ltd* [2001] IRLR 664).

Day- day activities

- 6.5 The activities affected must have been "*normal*". The Equality Act *Guidance* stated:

"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." (Paragraph D3)

- 6.6 Normal day-to-day activities included those which were normal for the Claimant as long as they were not specialised activities, as defined in paragraphs D8 and 9 of the *Guidance*. The correct approach involved a consideration of all matters, but particular attention had to be paid to those activities that she could not do or could only do with difficulty (*Leonard-v-Southern Derbyshire Chamber of Commerce* [2000] All ER (D) 1327).

Substantial effect

- 6.7 The statutory definition of "*substantial*" was "*more than minor or trivial*" under s. 212 (1). Section B1 of the Equality Act *Guidance* stated "*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*".

- 6.8 Factors that illustrated "*substantial effect*" under Section B of the

Guidelines include: the time taken to carry out an activity; the way in which an activity is carried out; and the effects of environment. The *Guidelines*, however, ought only to have been considered if the answer could not have been found from a simple application of the statute (*Elliott-v-Dorset County Council* UKEAT/0197/20).

Long term

- 6.9 It was clear from paragraph 2 of Schedule 1 of the Act that an impairment was long term if it had lasted for 12 months or more, or was likely to have lasted that long or for the rest of the life of the Claimant. All three possibilities had to be considered (*McKechnie Plastic Components-v-Grant* UKEAT/0284/08). As to the question of likelihood, the Tribunal had to determine whether it ‘could well happen’ (*Guidance*, paragraph C3 and *SCA Packaging Ltd-v-Boyle* [2009] IRLR 746).
- 6.10 In *Tesco Stores Ltd-v-Tennant* [2020] IRLR 363, the EAT confirmed that a disability must have had a long-term effect at the time that the alleged acts of discrimination were committed. Therefore, if the substantial adverse effect has not lasted at least 12 months at the time of the alleged discriminatory act (or, if there is more than one act, at the time of each act), the Claimant will not have met the definition she could instead show that, at the time of the alleged discriminatory act (or acts), her condition was likely to have lasted 12 months or for the rest of her life.
- 6.11 The Tribunal’s determination of this “*long-term*” condition had to be based upon what was known when the alleged discrimination took place, not with the benefit of hindsight (*Richmond Adult Community College v McDougall* [2008] EWCA Civ 4 per Pill LJ at [24], more recently been ratified in *All Answers Ltd-v-W and another* [2021] EWCA Civ 606).

Mental impairments

- 6.12 In cases involving mental impairments, the use of terms such as ‘anxiety’, ‘stress’ or ‘depression’, even by GPs, would not necessarily amount to proof of an impairment, even if such terms, or similar, had been referred to as part of one of the World Health Organisation’s International Classification of Diseases (*Morgan-v-Staffordshire University* [2002] IRLR 190 and *J-v-DLA Piper UK LLP* [2010] IRLR 936, paragraphs 42 and 43).
- 6.13 The EAT in *Morgan* underlined the need for a claimant to prove his or her case on disability; tribunals were not expected to have anything more than a layman’s rudimentary familiarity with mental impairments or psychiatric classifications. The use of labels such as ‘anxiety’, ‘stress’ or ‘depression’ would not normally suffice unless there was credible and informed evidence that, in the particular circumstances, so loose a description nevertheless identified an illness or condition which caused the substantial impairment required under the statute. The EAT recognised that there were significant dangers of a tribunal forming a view on the presence of a mental impairment solely from the manner in which a claimant gives evidence on the day of the hearing.
- 6.14 Paragraph 55 of the decision in *Royal Bank of Scotland plc-v-Morris* UKEAT/0436/10 was also relevant:
“*The burden of proving disability lies on the Claimant. There is no rule of law that that burden can only be discharged by adducing*

first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in Morgan v Staffordshire University [2002] ICR 475 this Tribunal, Lindsay P presiding, observed that “the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion” (see para. 20 (5), at p. 485 A-B); and it was held in that case that reference to the applicant’s GP notes was insufficient to establish that she was suffering from a disabling depression (see in particular paras. 18-20, at pp. 482-4). (We should acknowledge that at the time that Morgan was decided paragraph 1 of Schedule 1 contained a provision relevant to mental impairment which has since been repealed; but it does not seem to us that Lindsay P’s observations were specifically related to that point.)”

- 6.15 Nevertheless, it was not always possible or necessary to label a condition, or collection of conditions. The statutory language always had to be borne in mind; if the condition caused an impairment which was more than minor or trivial, however it had been labelled, that would ordinarily suffice. Appendix 1 to the EHRC Code of Practice of Employment stated that there was no need for a person to establish a medically diagnosed cause for their impairment. What was important to consider was the effect of the impairment and not the cause.
- 6.16 In the case of mental impairments, however, the value of informed medical evidence was not to have been underestimated (see *Ministry of Defence-v-Hay* [2008] ICR 1247). Nevertheless, where there was no evidence that demonstrated that an employee was suffering from a disability at the time the alleged act of discrimination occurred, a tribunal was entitled to consider evidence of disability more generally and to infer from that evidence that the disability existed at the relevant time (*All Answers Ltd-v-Wain and another* UKEAT/00232/20/AT).

7. Conclusions

- 7.1 The Respondent did not address the issue as to whether or not the wearing of a face covering was a day-to-day activity. In my judgment, it had certainly become a normal day-to-day activity after March 2020, even if it had not been one before.
- 7.2 As to the issues of impairment and substantial effect, they were examined together. Two preliminary issues were made concerning, first, the Claimant’s credibility and, secondly, the genesis of her objection to wearing face coverings in the workplace.
- 7.3 As to the first matter, at several points during the Claimant’s evidence, her account was far from convincing. Her suggestion that her face had never been previously covered since childhood (e.g. when removing clothing) was one such example. She also attempted to distance herself from the literature which she had published at work; she sought to allege that she had not suggested that the government had lied but that she had merely posed questions in her posters which urged her colleagues to think about the position. That was not how some of the literature read (e.g. [52]).
- 7.4 But, secondly, the assessment of the Claimant’s credibility took place against the background of her having decried the pandemic and the

requirement to wear face coverings. That evidence was not irrelevant, as the Claimant had suggested. It was not *directly* relevant to the question of disability but it fed into an assessment of her credibility which was a significant issue in the case in the absence of helpful medical evidence.

- 7.5 In conclusion, whilst I did not take the view that the Claimant had deliberately exaggerated her condition or lied about her problem, the quality and nature of the evidence, both oral and documentary, did not enable me to reach the conclusion that she probably had an impairment which had a substantial effect upon her day-to-day activities at the material time.
- 7.6 Yet further, the long term requirement was also not met. The Claimant was dismissed in February 2021 and she first identified and/or complained of her condition in July 2020, seven months earlier. There were therefore two problems that she faced; first, by the date of her dismissal, her condition had not lasted for 12 months. On the basis of the evidence taken as a whole, it could not have been said that it may well have continued for up to 12 months at that point. There was no reliable evidence upon which that prediction or assumption could have been made. Secondly, by July 2021, when the requirements to wear face coverings had lapsed, any substantial effect, even if there was one, fell away because there was then no need for her to wear a covering, and there has not been since. The requirement lapsed before the first anniversary of the Claimant having identified her condition.
- 7.7 Accordingly, the Claimant was not disabled at the material time and her complaints of discrimination on the grounds of disability were dismissed.

Employment Judge Livesey
Date :14 October 2022

Reasons sent to the Parties: 19 October 2022

FOR THE TRIBUNAL OFFICE