



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Alonto

Respondent: FIL Investments Management Limited

Held at: London South Employment Tribunal

Before: Employment Judge L Burge

Representation

Claimant: In person

Respondent: Mr Cordrey, Counsel

JUDGMENT having been delivered orally on 30 November 2022 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 (“ET Rules”), the following reasons are provided:

REASONS

1. On 10 August 2022 Judge Andrews Ordered that a one-day preliminary hearing be held to determine if the Claimant was “disabled” at the relevant time and if so, whether the Respondent had the necessary knowledge. An additional issue was added at the start of the hearing, with the Claimant’s consent, of whether the cough arose from the Claimant’s alleged disability.
2. The Claimant said that her medical condition of long covid constituted a disability for the purposes of section 6 Equality Act 2010. However, the Claimant is a litigant in person and during the hearing the Claimant focused on her cough and so I considered both alleged impairments.
3. A bundle of 318 pages and a supplemental bundle of 91 pages was provided to the Tribunal. The Claimant Mrs Alonto, provided a witness statement and gave evidence on her own behalf. Jo Lewis and Jonathan Watkins provided witness statements and gave evidence on behalf of the Respondent. Both the Claimant and Mr Cordrey gave oral closing submissions.

Findings of Fact

4. The Respondent is a wholly owned subsidiary of FIL International Limited, a large investment management company. The Respondent's business is to provide investment management services including mutual funds, pension management and fund platforms to private and institutional investors.
5. On the balance of probabilities, the Claimant had covid in September 2020. From September 2020 until she started work at the Respondent over a year later, the Claimant sought medical help for vertigo and headaches. She then attended A&E on 1 October 2021 with a fever and cough and received antibiotics for a lower respiratory tract infection. When the antibiotics ran out she started to feel unwell again, she went back to the doctors on 14 October 2021. She was recorded as having a mild wheeze and treated with medication. She was exercising in the gym 3 days per week at that time and her general health was good.
6. The Claimant started work as a Client Services Associate on 18 October 2021. The primary responsibility of a Client Services Associate is to help the Respondent's customers manage their investments, mainly through incoming telephone calls. The Claimant was placed on a probationary period for 6 months.
7. When the Claimant started work she had a cough, it was referred to by colleagues. The Claimant asked to defer a call because of her cough. The Respondent had a covid protocol which required anyone with cold and flu like symptoms to work remotely and not attend the office in person to avoid the risk of passing on covid. The Claimant described to the Tribunal being fatigued by the long commute but she did not provide the detail of how she was feeling to the Respondent at the time. In evidence to the Tribunal she said "I don't normally show my symptoms, if I can manage it myself I can manage it". The Claimant asked to work from home but she was not allowed.
8. In an internal discussion on Teams the Claimant's cough was mentioned and one co-worker wondered if it was a nervous cough as her view was that it did not seem to happen when the Claimant was listening, only when she was speaking. On 18 November 2021 the Claimant was asked to go home because of her cough in accordance with the protocol.
9. The Respondent considered that the Claimant was not meeting the standards required of her during assessments and telephone calls and dismissed her on 18 November 2021.
10. I reject the Claimant's evidence that she gave at the hearing that she mentioned long covid to a co-worker as this was the first time she has raised it and I prefer the Respondent's evidence on this point.

The Law

11. Section 6 of the Equality Act 2010 ("EqA") 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...

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

12. The questions for the Tribunal to answer therefore are:

- a) Did the claimant have a mental or physical impairment?
- b) Did the impairment affect the claimant's ability to carry out normal day-to-day activities?
- c) Was the adverse condition substantial? And
- d) Was the adverse condition long term?

13. Paragraph 5 of Schedule 1 EqA provides:

"(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 correct it, and*
- (b) but for that, it would be likely to have that effect.*

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid."

14. Paragraph 12 of Schedule 1 EqA provides that when determining whether a person is disabled, the Tribunal "must take account of such guidance as it thinks is relevant." The "Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability" (May 2011) (the "Guidance") was issued by the Secretary of State pursuant to s. 6(5) of the EA 2010.

15. The Guidance sets out a number of factors to consider including: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3]; the cumulative effects of an impairment [B4]; the cumulative effects of a number of impairments [B5/6]; the effect of behaviour [B7]; the effect of environment [B11] and the effect of treatment [B12].

16. The Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) ("the Code"). Both the Guidance and the Code do not impose legal obligations but tribunals and courts must take into account any part of the Guidance and/or Code that appears to them relevant to any questions arising in proceedings.

17. "Substantial" is defined in S.212(1) EqA as meaning "more than minor or trivial". Appendix 1 to the Code provides guidance on the meaning of "substantial":

"Account should... be taken of where a person avoids doing things which, for example, causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation."

18. Under para 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:
- a) has lasted for at least 12 months
 - b) is likely to last for at least 12 months, or
 - c) is likely to last for the rest of the life of the person affected.
19. For impairments that have not lasted 12 months, the tribunal will have to decide whether the substantial adverse effects of the condition are likely to last for at least 12 months. The Guidance stipulates that an event is likely to happen if it "could well happen" (paragraph C3).
20. How long an impairment is likely to last should be determined at the date of the alleged discriminatory act and not the date of the tribunal hearing (*McDougall v Richmond Adult Community College* 2008 ICR 431, CA). The Guidance stresses that anything that occurs after the date of the discriminatory act will not be relevant (paragraph C4). It also states that account should be taken of both the typical length of such an effect on an individual and any relevant factors specific to this individual, such as general state of health and age.
21. The claimant must have been disabled at the time that the treatment occurred, in this case, the date at which the Respondent dismissed the Claimant, 18 November 2021.

Did the Claimant have a mental or physical impairment?

22. The Claimant said that she had long covid at the time she worked for the Respondent from 18/10/2021 to 18/11/2021. It is for her to show that she did. The Claimant's medical records do not say that she had long covid at the time of her dismissal. She now thinks that she does and her records show that she was unwell with various illnesses at different times over the last few years but crucially she could not point to a medical record that says she had/has long covid, or that doctors thought she might have it, or that she was being investigated for it. I therefore conclude that the Claimant has not shown that she had the impairment of long covid at the time of her dismissal and she was not "disabled" pursuant to s.6 EqA in respect of this.
23. Throughout the hearing the Claimant, a litigant in person, focused on the cough that she had at the time of her employment. She said that she had a cough while she was employed and that she was dismissed for coughing - she has been consistent about this since she put her claim in. I therefore go on to consider whether her cough could be a "disability" in accordance with s.6 EqA.

Did the impairment (the cough) affect the claimant's ability to carry out normal day-to-day activities? And was the adverse condition substantial?

24. "Day to day activities" encompass activities which are relevant to participation in professional life as well as participation in personal life, and I should focus on what the Claimant cannot do, not what they can do.
25. The Claimant's disability impact statement does not say what she could not do at the time that she was dismissed. There is little evidence on what the Claimant could not do because of her cough, she said to the Tribunal that the commute was making her tired. However, she was working, she was commuting, she was exercising. The Claimant did have a cough during some of the phone calls and she asked to defer a phone call. The Claimant was sent home because of the cough, but this was because the Respondent's protocol was to send home anyone with flu/covid symptoms. Other than deferring a call, the cough did not hinder the phone calls, although the Claimant was sent home so as to avoid the potential of passing on covid. She was still expected to work from home.
26. I conclude that the Claimant's cough was minor or trivial, it did not have a substantial adverse effect on her ability to carry out normal day-to-day activities.

Was it long term – was the cough likely to last for 12 months?

27. If I am wrong about the cough not having a substantial adverse effect on her ability to carry out normal day-to-day activities, I now consider whether the cough was "long term". The cough appeared to be as a result of an infection which the Claimant had attended A&E for, some weeks earlier. The Claimant has not shown that there is a link to the covid that she caught a year earlier. The infection was treated with antibiotics and then medicine for the wheeze. The cough had not lasted 12 months. I conclude that the Claimant's cough was not likely to last 12 months - it was a recent cough which would have resolved. The meaning of "could well happen" is not satisfied.
28. The Claimant's cough therefore does not meet the definition of "disability" in s.6 for each part of the test. I therefore do not need to go on to consider whether the Respondent had the necessary knowledge or whether the cough arose from the Claimant's alleged disability.
29. I conclude that the Claimant is not "disabled" pursuant to s.6 EqA and she cannot bring a claim for disability discrimination. Her claims are therefore dismissed.

Employment Judge **L Burge**

Date: 5 January 2023

