



EMPLOYMENT TRIBUNALS

Claimant: Mr M Scharf

Respondent: JOP Ltd (1)
South Hook LNG Terminal Company Ltd (2)

Heard at: Cardiff and video (CVP) **On:** 2 February 2023
December 2020

Before: Employment Judge R Brace

Representation

Claimant: Mr E Lowe (TU representative)
Respondent: Mr G Pollitt - R1 (Counsel)
Ms J Williams - R2 (Counsel)

RESERVED JUDGMENT

The claims of disability discrimination are dismissed as at the relevant times the Claimant was not a disabled person.

Written Reasons

1. This was an open preliminary hearing to determine:
 - a. Whether the Claimant was at the relevant times a disabled person for the purposes of s6 Equality Act 2010;
 - b. If so, whether the disability or disabilities caused the Claimant to be unable to wear a mask; and
 - c. The Claimant's amendment application.
2. This has been a wholly remote hearing which proceeded with some significant technical difficulties for all, including the tribunal administration, which delayed the commencement of the hearing and as a result, a reserved judgment has been given.
3. I had before me a 108 page preliminary bundle ("Bundle") and references to the hearing Bundle appear in square brackets []. Whilst the Claimant's representative indicated that the Claimant's pre-employment 'New Starter' form was not included in the Bundle but was relevant, as it reflected that the Claimant had ticked a box indicating that he had asthma and anxiety/depression, the First Respondent conceded that this was in fact the case and that the content of the document was not disputed.

4. The hearing Bundle contained the Claimant's Disability Impact Statement dated 11 August 2022 [52] and a further Personal Impact Statement [77] which Judge Ryan had given permission for at the case management preliminary hearing on 30 August 2022.
5. I also had written statements from:
 - a. Paul Dodd, Site Supervisor for the First Respondent;
 - b. Mr Andrew Street, HR Manager of the Second Respondent, and
 - c. Rob Hughes, Maintenance Superintendent at the Second Respondent.
6. All witnesses were subject to questioning from the other parties' representative and from the tribunal.
7. Findings are made based on balance of probabilities and on the evidence before me.
8. The parties agreed that if I determined that the Claimant was not a disabled person, the disability discrimination claims should be dismissed.
9. It was also agreed that I would deal with the amendment application from the Claimant, to re-label his claims of direct discrimination to indirect discrimination, discrimination arising from a disability and a failure to comply with the duty to make reasonable adjustments, after I had first made a determination on the issue of disability and, if necessary, on whether any disability caused the Claimant to be unable to wear a mask.

Claims

10. The Claimant was at the relevant times a 36-year-old male, employed by the First Respondent as an industrial painter to carry out a contract that it had with the Second Respondent for industrial painting at one of the Second Respondent's site. He commenced employment on 1 September 2021 and his employment with the Respondent ended on 24 December 2021, following the termination of the contract by the First Respondent.
11. On 17 February 2022, the Claimant commenced early conciliation against both respondents which ended on 31 March 2022 [1] and on 31st of March 2022 his ET one claim [3].
12. In the ET1 claim form the Claimant claimed direct discrimination under the Equality Act 2010 on the grounds of religion or belief and disability. He asserted he had been removed with immediate effect from the site of the Second Respondent, and from employment with the First Respondent, for being exempt under government Covid-19 guidelines from wearing a face covering. He asserted he had medical issues that put him in the exempt category and he directly was discriminated against because he spoke up about that issue.
13. The First Respondent admits that the Claimant was dismissed but denies the Claimant had a disability capable of protection. It asserts that the Claimant made it plain, verbally to the First Respondent, that he would not wear a mask as he did not believe in the disease Covid-19, that the Second Respondent had a requirement for the wearing of masks on site and that the Claimant had also worn facemasks as

personal protective equipment (“PPE”) for working with blasting and painting equipment.

14. The First Respondent further asserts that on 15 December 2020, after an employee of the Second Respondent had seen the Claimant on site without a face-covering in a vehicle which was not compliant with the site’s safety measures about Covid-19, that a meeting had been held to discuss the Claimant’s failure and refusal to wear such a mask. The conclusion of the meeting led to the Claimant’s site access to the Second Respondent site being removed. The First Respondent further asserts that as a result of that site access removal, the First Respondent had to dismiss the Claimant as they had no other work for him.
15. The Second Respondent asserts that following government guidelines and in response to a full risk assessment conducted by them, they initiated temporary safety measures on site to combat the spread of Covid-19 and that part of the measures implemented included the wearing of face masks, that these safety measures were communicated to all contracting companies and in this instance the Claimant’s employer dealt with non-compliance of their rules.
16. Since the issue of these proceedings the Claimant has withdrawn any claims based on religion or belief. He relies on seasonal asthma and anxiety with depression for the purposes of his claim that he is a disabled person. The Claimant does not now claim acne vulgaris as an impairment for the purposes of claiming that he is a disabled person. He does assert that his acne is a trigger for his seasonal asthma, social anxiety and depression (§9 Amendment Application [74] and §4 Personal Impact Statement [77]).

Facts

Social anxiety/Depression

17. Whilst the Claimant gave evidence that he had felt social anxiety for years as a result of acne breakouts, he provided no evidence as to when that anxiety had commenced or how frequently it had recurred. The Claimant no longer relies on acne as a discrete impairment giving rise to disability, a condition that he was diagnosed with in 2014. Since August 2015, when some medication was prescribed to the Claimant, the Claimant has taken no further medication for the treatment of his acne. He has managed his acne by avoiding triggers, such as a dusty environments and maintaining a skin care routine.
18. The Claimant’s GP records provided date back to March 2013, but there is no record of the Claimant raising any issue with his mental health until 20 February 2019, when he spoke to his GP about his anxiety. At that point he was diagnosed with anxiety with depression and referred to the crisis team. He was prescribed a course of 50mg of the anti-depressant Sertraline, which he continued with until March 2019. He was discharged from the mental health clinic at a mental health assessment on 29 April 2019.
19. The Claimant gave evidence that his depression started with him not been able to sleep, that he stopped eating, training, showering and getting out of bed. He gave no evidence of how long this lasted. I accepted that evidence, which was unchallenged on cross-examination, but found it more likely than not that the Claimant was speaking of a period which had started in January/February 2019 and had ended at the end of April 2019.

20. Whilst the Claimant also relied on GP records from January-March 2022, in which he reported that he could feel his mood slipping again and was again prescribed anti-depressant medication, this does post-date the alleged last act of discrimination i.e. his dismissal, and there was no record of the Claimant attending his GP in the period from February 2019 up to or including the relevant time of December 2021.
21. Indeed the Claimant was well during the whole of the period of employment with the First Respondent. He expressly confirmed this on cross-examination.
22. I found it more likely than not that, apart from the period from February 2019 to April 2019 when the Claimant did have a period of depression that impacted on his day to day activities of eating, physical exercise, showering and physically getting out of bed, the Claimant had not had a period of depression from that time until a date post-dating the termination of his employment.
23. In terms of impact on day to day activities during the relevant time, the only day to day activity relied on by the Claimant was the wearing of a mask.

Asthma

24. Nothing in the Claimant's GP records indicate a medical diagnosis of asthma, rather a history of a "*chesty cough*". Whilst the Claimant asserts in his Disability Impact Statement that he was first 'diagnosed' with suspected seasonal asthma in February 2016, the medical evidence the Claimant relies on to support such a claim is a Radiology Request Form from his GP dated 11 February 2016 for an x-ray following which refers to the Claimant having recurrent chesty coughs and "*suspected seasonal asthma*" [45].
25. In terms of medication prescribed, the Claimant was prescribed one dose of asthma medication in February 2016, a 100mg dosage of the reliever medication Salbutamol, and a device to dispense the Salbutamol, an 'AeroChamber' device with mask. This prescription was not on repeat and the Claimant still retains that same 100mg inhaler some 5-6 years' later.
26. In January 2020, a subsequent chest infection was treated with antibiotic medication and no further or repeat asthma medication such as Salbutamol was prescribed [38].
27. Whilst I accept that Appendix 1 EHRC Employment Code states that there is no need for a person to establish a medically diagnosed cause for their impairment, what is important is to consider the effect of the impairment, I did not find that the Claimant lived with an impairment of 'seasonal asthma'. Rather I found that it was more likely than not that the Claimant suffered a series of chest infections that did not result in either a diagnosis of asthma or more regular treatment to address the repeat chest infections.
28. Indeed the medical records indicated that the Claimant had seasonal chest infections which had been treated only once with a dosage of a reliever medication in the early part of 2016 and no preventative medication for such a condition had ever been prescribed.

29. I was not persuaded that the Claimant had suffered what he termed asthma attacks, which I took to mean breathlessness or wheezing or a tight chest, as a result of wearing a mask, as the Claimant had asserted.
30. I found that had the Claimant been suffering asthma attacks as a result of, in fact, wearing a mask (whether as a PPE requirement within the workplace environment or latterly and/or since 2020, as part of any Covid-19 preventative measures) or otherwise:
- a. he would more likely than not, have informed a GP of that fact, particularly taking into account the wearing of a mask was potentially part of work PPE required for any painting role that he undertook in the years prior to 2020;
 - b. he would not have had any reliever medication left from his 2016 Salbutamol device.
31. I found that the Claimant had not proven that the wearing of a mask caused the Claimant to have an asthma attack or indeed breathlessness.
32. Save for the day to day activity of wearing a mask, no other day to day activity was relied on for the purposes of asserting that he was a disabled person by reason of asthma.

Day to Day Activities/Wearing a mask

33. The Claimant has in fact avoided wearing masks altogether for a number of years and gave evidence that he was worried that they would cause his acne to break out, which in turn would make him become anxious and depressed.
34. In cross-examination, the Claimant clarified that in previous employments he had worn rubber masks as part of PPE but, due to acne breakouts, had not worn and had refused to wear a Particle Filtering Half Mask of the type photographed [104-104] ("PPE mask"). Instead, he had worn a hood helmet with an air-fed visor, describing it as more akin to a motorbike helmet with padding around the ears and neck, as rubber from the PPE masks caused issues with his skin.
35. In response to additional questions that I permitted the First Respondent's representative to ask Mr Dodds, the First Respondent's witness, disputed this giving evidence that he had seen the Claimant wear such a PPE mask during his employment with the First Respondent. This had not been referred to in Mr Dodds' witness statement however and I found that it was more likely than not that the Claimant had not in fact worn a PPE mask during his time with the First Respondent, but had worn a hood helmet as his PPE when required to do so.
36. Either way, the masks or face-coverings that gave rise to the exclusion of the Claimant from the Second Respondent's site were not of the PPE mask-type photographed in the Bundle, but general face-coverings for Covid-19, which were either fabricated from paper or cloth.
37. The Claimant had not told his GP during the Covid-19 pandemic, which I took to be in the period from summer 2020, that masks were causing him anxiety as he had not in fact worn a Covid-19 preventative mask, He considered he could 'self-exempt' and did not wear one.

38. The Claimant also considered that the face-coverings that were required to be worn as part of Covid-19 measures, were not effective; that he had refused to perceive Covid-19 as a real threat; that he considered such masks a '*mark of slavery*'. He confirmed this view to Andrew Street and Rob Hughes when they questioned him in December 2021.
39. I found that it was more likely than not that the Claimant did not tell Andrew Street and/or Rob Hughes that he believed that he was exempt from wearing a face-covering or mask during Covid-19 pandemic because of his acne or indeed asthma as:
- a. the Claimant had not included such evidence in his witness statement;
 - b. the Claimant failed to answer questions directly on the issue on cross-examination, changing his answers on repeated questioning;
 - c. I preferred the evidence of Mr Street and Mr Hughes when they were both clear and unequivocal on the point.
40. In addition to his own personal opinions on the Covid-19 masks, the Claimant also considered himself exempt from the obligation to comply with any government guidelines on the wearing of such masks as part of the Covid-19 measures. He considered that he was able to 'self-exempt' on the basis that he was concerned that they could cause his acne to flare and that if that arose his acne would cause him anxiety and depression.
41. Within his Personal Impact Statement, the Claimant gave evidence that the *thought* of wearing such a mask caused him anxiety, rather than the actual wearing of a mask had in fact caused him anxiety. He has provided no medical evidence to support his exemption and no medical evidence to support his assertion that such masks cause acne and/or asthma attacks and/or in turn anxiety and depression.

Law

42. The Equality Act 2010 ("EqA") provides that a person has a disability if he or she has a 'physical or mental impairment' which has a 'substantial and long term adverse effect' on his or her 'ability to carry out normal day to day activities'. Supplementary provisions for determining whether a person has a disability is contained in Part 1 Sch 1 EqA which essentially raises four questions:
- a. Does the person have a physical or mental impairment?
Does that impairment have an adverse effect on their ability to carry out normal day to day activities?
Is that effect substantial?
Is that effect long term?
43. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (**Goodwin v Patent Office** [1999] IRLR (EAT)). In **Goodwin** Morison P, giving the decision of this Court, also set out very helpful guidance as to the Tribunal's approach about the determination of the issue of disability. At paragraph 22 he said: "*The tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question.*"

44. The EqA 2010 Guidance states; *'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'* (D3).
45. The EqA 2010 Guidance (D3) indicates that normal day-to-day activities can include general work. The EAT in **Paterson v Commissioner of Police of the Metropolis** [2007] IRLR 763 concluded that 'normal day-to-day activities' must be interpreted as including activities relevant to professional life. It emphasized that the phrase is to be given a broad definition that can include irregular but predictable activities that occur in professional life.
46. Furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities, is contained in the Appendix to the Guidance on matters to be considered in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations, tribunals must take account of it where they consider it to be relevant.
47. The requirement that the adverse effect on normal day to day activities should be considered a substantial one is a relatively low threshold. A substantial effect is one that is more than minor or trivial (s.212 EqA and B2 Guidance).
48. Para 5 Sch. 1 Part 1 EqA provides that an impairment is treated as having a substantial adverse effect on the ability of the person to carry out normal day to day activities if measures, including medical treatment, are being taken to treat or correct it and, but for that, it would likely to be the effect. In this context, likely is interpreted as meaning 'could well happen'. The practical effect is that the impairment should be treated as having the effect that it would have without the treatment in question (B12 Guidance).
49. The question of whether the effect is long term is defined in Sch. 1 Part 2 as
- a. Lasting 12 months;
 - b. likely to last 12 months;
 - c. likely to last the rest of the person's life.
50. Again, the Guidance at C3 confirms that in this context 'likely' should be interpreted as meaning it could well happen. The Guidance (C4) also clarifies that in assessing likelihood of the effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything which took place after will not be relevant in assessing likelihood.
51. Finally, the burden of proof is on the claimant to show she or she satisfied this definition. The time at which to assess the disability i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities, is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd** 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect.

Conclusions

52. I was satisfied that from January 2019 to April 2019 the Claimant was suffering from depression albeit this was not diagnosed until February 2019. I concluded that this had an adverse effect on the Claimant's normal day to day activities of eating, sleeping and exercising and that affect was substantial. In coming to this conclusion I took into account that the threshold of what is substantial is low; it is more than minor or trivial and where I hear evidence of an individual who is clearly struggling to cope with basic everyday life I was persuaded that the impairment had a substantial adverse impact on the Claimant's day to day activities for that period.
53. I then turned my mind to the question of whether those substantial adverse effects on day to day activities was long term. In that regard I concluded that there was a substantial adverse effect on the Claimant's normal day to day activities for a period of 3 months only and from the end of April 2019 the Claimant's depression was no longer having a substantial adverse effect on his to day activities. On the basis that the Claimant's medication had also ceased at that time, I did not need to consider the deduced effects i.e. whether without the medication and counselling the effects would have continued to have been substantial and to a point whereby it could be said that they would be long term.
54. I did not find that the Claimant's depression had recurred in the period from April 2019 leading up to and including the Claimant's termination of employment in December 2021, albeit I did accept that the Claimant did have a period of depression in January 2022 following his dismissal.
55. On the face of it, this would therefore not be of a sufficient length of time to meet the 'long term' aspect of the s.6 definition in that the substantial adverse effects had not lasted 12 months nor could they be said at the relevant time to be likely to last 12 months or the rest of the person's life.
56. Whilst I accept that depression and anxiety can and do recur, I did not consider that it could be said that the effect of the Claimant's depression was likely to recur or 'could well happen' (para C3 and C6 Guidance and **Boyle v SCA Packaging Ltd 2009 ICR 1056**). There was no evidence as at the relevant time that the 2019 episode of depression was part of an underlying condition of depression that was likely to recur beyond the 12 month period.
57. On that basis I concluded that the Claimant had not persuaded me that he was a disabled person by reason of social anxiety and/or depression.
58. With regard to asthma, I was not satisfied on the medical evidence before me, of a 2016 referral for 'suspected' asthma and one dosage of Salbutamol only, that the Claimant had proven that he had an impairment of asthma. Rather the Claimant had not demonstrated that he lived with anything more than recurrent infections that by definition come and go, which was not an impairment within the meaning of s.6 Equality Act 2010. On that basis, the claim that he was a disabled person by reason of asthma fails.
59. However, even if I was wrong to take this approach to both conditions, I was also not satisfied that the Claimant had demonstrated that such conditions had a long term adverse impact on the Claimant's day to day activities.
60. The only activity that the Claimant had relied on, for the purposes of demonstrating that his depression and social anxiety and asthma were disabilities, was the activity of wearing a mask. He had not on his own evidence actually worn

one however and sought to argue that *thought* of wearing a mask might trigger an asthma attack and might trigger further bouts of acne and in turn anxiety and depression, not that they did in fact trigger an asthma attack or further bouts of acne and in turn anxiety and depression.

61. The Respondents submit that the wearing of a mask is not in fact an 'activity'. The Claimant's representative submits that in the last three years, and to an extent to this day particularly within the health sector, the wearing of a Covid-mask is a 'day to day activity'.
62. I have a wide discretion in determining what is a 'day to day activity' and whilst such an act is not referred to in the Guidance, considering that the concept of wearing a mask daily outside of a specific work environment was unlikely to have been contemplated when the Guidance was drafted, that was not surprising. In this case, specifically during a time when the Welsh government prescribed or recommended their use during the Covid-19 pandemic, I concluded that the wearing of a Covid-19 face-covering could, in theory, be capable of being a general day to day activity - it was an activity which was carried out by most men and women on a fairly regular and frequent basis during the specific period of the pandemic.
63. However, in practice the Claimant by his own admission did not in fact carry out such an activity, whether as a daily activity or otherwise. He had not at any time during the period of his employment with the First Respondent, worn a Covid-19 mask or face-covering (or indeed a PPE mask).
64. I was not persuaded that the Claimant had proven that any of the impairments relied on, whether each in isolation, or in conjunction with each other or his acne, did in fact have any adverse impact on this activity, whether on a long term basis or at all.
65. Whilst I don't accept that a negative opinion on the effect and purpose of Covid-19 face coverings (such as the one held by the Claimant) and a disability adversely effecting one's ability to wear one, are mutually exclusive concepts, I was not satisfied that the Claimant had proven that the social anxiety and/or depression and/or asthma as impairments, individually or collectively, impacted on his ability to wear such a mask.
66. Whilst I did accept that the Claimant might have chosen to wear a hood helmet with an air-fed visor as alternative PPE to the particle filter mask when required to wear PPE in the workplace, I concluded that the Claimant did not and would not wear a Covid-19 mask as a preventative measure, due to his opinion that they were ineffective against Covid-19 and were a '*mark of slavery*' and not because his acne and/or asthma and/or anxiety and/or depression had any or any substantial adverse impact on his ability to wear such a mask. This conclusion was based on my finding that the Claimant had not at any time told the Second Respondent's witnesses that he was exempt because of any condition that he lived with. Rather, when questioned by them as to why he was not wearing one, he told them that this was because they were ineffective and a mark of slavery.
67. I therefore concluded that the Claimant had not demonstrated that he was a disabled person by reason of his social anxiety/depression and/or asthma at the relevant time and that his claims should be dismissed.

68. Further, whilst not required to do so in light of my conclusions on disability, if the Claimant was disabled at the relevant time, I concluded that any disability or disabilities did not cause the Claimant to be unable to wear such a mask. Rather the cause of the Claimant not wearing a Covid-19 mask was his choice not to wear one based on his opinion that they were ineffective and were a 'mark of slavery' and not related to his disability or disabilities.

Employment Judge R Brace

Date 14 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 15 February 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche