



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs K Avery

**Respondent:** Richmond Harbour Hotel Management Limited  
T/A Richmond Harbour Hotel

**Heard at:** Bristol Employment Tribunal via Video hearing  
**On:** 15 November 2022  
**Before:** Employment Judge Youngs

**Representation**  
**Claimant:** In person  
**Respondent:** Mr Moores, Solicitor

## JUDGMENT ON PRELIMINARY HEARING

**JUDGMENT** having been given 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) The claim form in this matter was issued on 11 June 2021, and included a complaint of disability discrimination.
- 2) At a closed preliminary hearing on 21 June 2022 before Employment Judge Bax, the Claimant confirmed that the disability she relied on was being immunocompromised due to not having a spleen. The case was listed for a preliminary hearing to determine whether the Claimant was a disabled person at the material time.
- 3) For this hearing, the Tribunal had before it a Bundle of Documents, which included *inter alia* the Claimant's Disability Impact Statement and evidence relied on, as well as the Respondent's response to the Disability Impact Statement. The Claimant gave oral evidence at the hearing.
- 4) I took into account the evidence to which I was referred and the submissions of both parties.

#### The issues

- 5) The issues to be determined were set out by Employment Judge Bax at the closed

preliminary hearing on 21 June 2022 and were as follows:

- a) Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
  - i) Whether the Claimant had a physical or mental impairment. Namely that she is immunocompromised due to not having a spleen and is highly prone to infections, in particular covid-19.
  - ii) Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?
  - iii) If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
  - iv) Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
  - v) Were the effects of the impairment long-term? The Tribunal will decide:
    - (1) did they last at least 12 months, or were they likely to last at least 12 months?
    - (2) if not, were they likely to recur?

### **Findings of fact**

- 6) On 18 July 1996, the Claimant underwent a partial splenectomy, which she says removed 95% of her spleen.
- 7) The Claimant describes herself as having extreme immuno-deficiency. The Claimant was advised to take antibiotics daily for life, but due to the health risks and potential risks to quality of life of doing so, she adopted other measures to protect herself from infections.
- 8) The impact of viruses and infections on the Claimant is greater than on individuals who do not have a weakened immune system, and poses a greater risk to the Claimant's health, and therefore she takes steps to avoid the risk of infection. The Claimant avoided sharing computers, phones and food. These are things that persons without a disability may do out of choice.
- 9) The Claimant takes ginger, garlic and honey daily, watches her weight, exercises daily and does yoga daily. Again, these are things that persons without a disability may do out of choice.
- 10) The Claimant also takes steps such as avoiding crowds, and avoiding cutlery touching tables if eating out, avoiding touching surfaces when out, all due to the increased risk of infection. She drove to work, rather than taking public transport.
- 11) The Claimant avoids stressful situations, as these exacerbate the on-set of health issues. This was challenged by the Respondent, who referred to the Claimant's senior sales roles, which the Respondent said came with a degree of stress. The Claimant was clear that she had not found her duties stressful over the years and that she had worked for supportive employers in the past.
- 12) As part of the Government's response to COVID-19, individuals whose weakened immune system meant they may be at higher risk of serious illness from COVID-19 were identified as "extremely clinically vulnerable". The Claimant was identified as one such person and was ultimately advised to shield in line with Government guidance.
- 13) The Claimant shielded as advised. The Claimant's evidence to the Tribunal, which I accept, was that during this period she was "trapped" in her home and that she didn't

do any day-to-day activities outside of her land for many months. I find this to be the case from the start of Lockdown on 23 March 2020 until at least the time that the Claimant returned to work on 24 February 2021, and she remained restricted in her activities other than attending work. During Lockdown she received food parcels for 15 weeks and was entitled to have any prescriptions delivered, so that she would not have to leave her home. For the avoidance of doubt, I make no finding as to any alleged requirement imposed by the Respondent.

### **The Law**

- 14) The tribunal must determine whether or not the claimant had a disability falling within s.6 of the Equality Act 2010, which 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.”*

- 15) The burden of proof lies with the Claimant to prove that she is a disabled person in accordance with that definition.

- 16) The expression ‘substantial’ is defined at s.212 as ‘more than minor or trivial’.

- 17) Further assistance is provided at Schedule 1 to the Equality Act 2010, which explains at paragraph 2:

*“(1) The effect of an impairment is long-term if—  
(a) it has lasted for at least 12 months,  
(b) it is likely to last for least 12 months, or  
(c) it is likely to last for the rest of the life of the person affected.  
(2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur”.*

- 18) 12. The word, “likely” in the context of the definition of disability in the Equality Act 2010, means, “could well happen”, or something that is a real possibility (SCA Packaging Ltd v Boyle [2009] ICR 1056 HL).

- 19) The question of how long a condition is likely to last should be assessed as at the date of the alleged discrimination, (not the date of the hearing) (Richmond Adult Community College v McDougall [2008] ICR 431 CA).

- 20) As to the effect of medical treatment, Schedule 1 paragraph 5 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 treat or correct it, and  
(b) but for that, it would be likely to have that effect.”*

- 21) Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government’s office for disability issues entitled, ‘Guidance on Matters to be Taken into Account in

Determining Questions Relating to the Definition of Disability', (the Guidance).

- 22) Section A.3 of the Guidance deals with the meaning of impairment. It provides that the definition requires the effects which the person may experience must arise from a physical or mental impairment. It is not necessary for the cause of the impairment to be established nor does the impairment have to be the result of an illness.
- 23) Section A.5 provides that a disability can arise from a wide range of impairments which can be sensory impairments, impairments with fluctuating or recurring effects and auto-immune conditions.
- 24) The Act and the Guidance make it clear that a substantial effect is one that is more than minor or trivial. Account should be taken also of how far a person can reasonably be expected to modify his or her behaviour, for example by using coping or avoidance strategies to prevent or reduce the effects of an impairment on normal day to day activities. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect.
- 25) The Guidance states at B7:

*"Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day to day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day to day activities".*

- 26) Environmental conditions may exacerbate or lessen the effects of an impairment (section B.11). The section in the Guidance refers to factors such as temperature, humidity, lighting and the time of day. When assessing whether adverse effects of an impairment are substantial the extent to which such environmental factors are likely to have an impact on the effect should therefore also be considered.
- 27) The Guidance at D3 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."*

## **Conclusions**

- 28) The definition of disability is a legal definition within the meaning of s.6 of the Equality Act 2010. The Respondent in its "Response to Disability Impact Statement" accepted that the Claimant had a physical impairment due to not having a spleen. She clearly does have.
- 29) The Respondent in its "Response to Disability Impact Statement" accepted that the Claimant's impairment was long term, although that is not the issue that the Tribunal

must determine. The Tribunal has to determine whether the impairment has a substantial and long-term adverse effect on her ability to carry out normal day to day activities.

- 30) The Respondent submitted that the tribunal should consider the whole picture in respect of the Claimant's alleged disability (*Vicary v BT* [1999] IRLR 680 and *Leonard v South Derbyshire Chamber of Commerce* [2001] IRLR 19). Mr Moores referred to the Claimant's grievance letter to the Respondent dated 25 May 2021 in which the Claimant describes herself as 'fit, target BMI, healthy lifestyle' and 'I have a black belt in Tae Kwon Do, jog daily, ride horses, have a shotgun license and have won shooting awards, consider myself an all-around sporty person'. The Claimant's evidence was that she does what she can to stay fit to protect herself. The Claimant's impact statement did not provide much detail in relation to day-to-day activities outside of the impact of COVID-19, and many of the measures she took to protect herself from the risk of infection were reasonable steps for her to take. However, during COVID-19 her activities were much limited.
- 31) From the start of March 2020 the Claimant was at increased risk of infection and took increased precautions to protect her health. This included staying at home (including shielding) from 23 March 2020 until 24 February 2021. As referred to above, the Claimant's evidence was that she did not leave her home for many months and that she was "trapped" in her home. Whilst this could have been clearer in the impact statement, the Claimant is a litigant in person, the advice in relation to shielding was included in the Bundle and the Claimant referred to shielding in her statement, including that she was provided with food parcels and a prescription delivery service.
- 32) The Claimant was not challenged on her evidence that she did not leave the house / her land for many months, save in so far as it was put to her that many persons remained at home during COVID. However, the Claimant was unable to do activities such as go to the shops or meet with persons outside of their household due to the risk of infection caused by her being immuno-compromised. These are normal day-to-day activities for persons who are not immuno-compromised, even during COVID-19 where people were able to carry out certain activities outside of the home at various points throughout the pandemic.
- 33) The impact on the Claimant's ability to undertake activities outside of her own property is more than minor or trivial, as day to day activities outside the Claimant's property ceased, and was caused by the impairment.
- 34) As at 24 February 2021, when the Claimant returned to the workplace, the impact had lasted 12 months and was likely to continue. The pandemic was ongoing at that time and the Government's advice about shielding remained in place, albeit that the Claimant did not comply with that advice to the extent that she complied with what she says was a requirement of the Respondent that she work at the Respondent's premises.
- 35) The material time for the purposes of the Claimant's claim is 24 February 2021 to the termination of the Claimant's employment on 11 June 2021. Lockdown having been announced on 23 March 2020, and the significantly increased restrictions adopted from that date, by 2 February 2021 the effects on the Claimant had lasted more than 11 months and were continuing, and had lasted 12 months as at 22 February 2021, which the Tribunal notes is prior to the Claimant's return to work on 24 February 2021. Therefore, the substantial adverse effects were long term or likely to be long term.

- 36) I therefore concluded that the Claimant is a disabled person within the meaning of s.6 of the Equality Act 2010 by virtue of her being immunocompromised.
- 37) No findings are made as regards the Respondent's knowledge (or lack of knowledge) of the Claimant's disability, which is to be considered at the final hearing.
- 38) The Claimant's application to amend was withdrawn at the hearing.

Employment Judge Youngs  
Date: 03 February 2023

Reasons sent to the Parties: 17 February 2023

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