



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss K O'Driscoll

v

Maria Lewis

Heard at: Cambridge Employment Tribunal (via CVP)

On: 20th January 2023

Before: Employment Judge King

Appearances

For the Claimant: In person

For the Respondent: Mr Chehal (consultant)

JUDGMENT

1. The claimant was disabled within the meaning of s6 Equality Act 2010 at the relevant time.

REASONS

1. Following the oral judgment given on the day the respondent requested written reasons and these are as set out below and given orally on the day. The case was listed for a preliminary hearing on 20th January 2023 to deal with the preliminary matter of whether the claimant was disabled within the meaning of the Equality Act 2010 and the Tribunal was able to give judgment with reasons having heard the evidence on that day.
2. The claimant was not represented and in person. The respondent was represented by Mr Chehal (consultant). I heard evidence from the claimant and she provided witness statements in advance. As one would expect, I heard no witness evidence from the respondent. The claimant and respondent exchanged documents in advance and prepared an agreed bundle of documents which ran from pages to 1 to 372 to which I have had regard in so far as the documents were relevant today. Much of the bundle was relevant to issues not to be determined today such as knowledge and the claims itself. I make no findings in respect of other matters. I heard submissions from both sides.

The issues

3. The issues to be determined at the preliminary hearing had been set out in the notice of hearing of 16th October 2022 as follows:
 - 3.1 To determine whether at the relevant time the claimant was disabled for the purpose of section 6 of the Equality Act 2010 and if not whether her claim should be struck out pursuant to Rule 37 of the Employment Tribunal Rules of Procedure.
4. At the outset of the hearing It was clarified that the claimant relied on the disability of fibromyalgia. Endometriosis was also mentioned in the claimant's impact statement but not identified in the list of issues by Employment Judge Tynan back in 2020.
5. We discussed the case and identified that whether or not endometriosis was a disability was not relevant as this was not the reason for the dismissal. The respondent says the reason for dismissal was redundancy but the claimant says it's because of her fibromyalgia. This is brought as a direct disability discrimination complaint. Endometriosis may be relevant to the background but not to the actual issue in dispute between the parties. Whether the endometriosis is a disability or not doesn't matter as the claimant relies upon this simply as causing her to be unwell initially and as background. Her pleaded case is not about the endometriosis but her treatment she says once the symptoms of fibromyalgia commenced.
6. The claimant did not provide copies of her GP records but had provided letters from doctors concerning both her fibromyalgia and endometriosis, fit notes and her impact statement. I spent some time with her in evidence understanding both if the statements contained in these documents were at the relevant time or subsequently and to pick apart matters she says relates to fibromyalgia or her other conditions including endometriosis because she has unfortunately a complex medical history. This is dealt with in the findings of fact having heard that evidence.

The law

Discrimination

7. The provisions concerning disability in respect of discrimination claims are set out in s6 Equality Act 2010 as follows:
 - 6 Disability**
 - (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.
 - (2) A reference to a disabled person is a reference to a person who has a disability.
 - (3) In relation to the protected characteristic of disability—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
 - (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
 - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
 - (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).
 - (6) Schedule 1 (disability: supplementary provision) has effect.
8. Section 212 of the Equality Act 2010, clarifies that:
- (1) In this Act- ...
 - 'Substantial' means more than minor or trivial.
9. There are supplementary provisions in relation to disability in Schedule 1 of the 2010 Act. Guidance has been issued by the Secretary of State regarding matters to be taken into account by Employment Tribunals in determining questions relating to the definition of disability particularly with regard to long terms effect, effect of medical treatment, certain disabilities being classed as disabilities, (which actually doesn't apply in this case) and other matters.
10. I am required to take into account any aspect of the Guidance which appears to be relevant. Paragraph A2 of the Guidance contains a helpful analysis of Section 6 of the Equality Act 2010:

Main elements of the definition of disability

A1 ...

A2 This means that, in general:

- the person must have an impairment that is either physical or mental;
- the impairment must have adverse effects which are substantial;

- the substantial adverse effects must be long term; and
- the long term substantial adverse effects must be effects on normal day to day activities.

All of the factors above must be considered when determining whether a person is disabled.

12. Paragraph 2 of Part 1 of Schedule 1 to the Equality Act 2010, clarifies:

Long term effects-

(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 at least 12 months; or
- (c) it is likely to last for the rest of the life of the person affected.

13. Under Paragraph 5 of Part 1 of Schedule 1 to the Equality Act 2010 medical or other treatment is considered:

"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 measures are being taken to treat or correct it, and but for that, it would be likely to have that effect"

14. It is well established that the onus of proving a disability is on the Claimant, on the balance of probabilities (Morgan v Staffordshire University [2002] IRLR 190).

15. I have had regard to the EHRC Code of Practice on Employment and Appendix 1 in particular and the Equality Act 2010 Guidance.

16. We also discussed that in accordance with Goodwin v Patent Office [1999] IRLR I must apply the test and its contingent parts.

17. The respondent's representative also referred me to a case in his oral submissions to which I have had regard of *Tesco Stores v Tennant UKEAT/01617/19* in which the EAT confirmed that an impairment must have long-term effect at the time that the alleged acts of discrimination are committed. Therefore, if the claimant's condition 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 meet the definition of disability unless they can instead show that, at the time of the alleged discriminatory act (or acts), their condition was likely to last 12 months or for the rest of their life. The first issue that needs to be determined today was the relevant date.

18. In accordance with the case of *Cruickshank v VAW Motorcast Ltd [2002] ICR 7291* the date for the purpose of determination of disability is the date when the alleged act occurred. So the claimant says the dismissal was the 13th February 2019 and the respondent says the decision was taken at the

meeting on the 17th January 2019. The claimant was sent a letter of dismissal dated 13th February 2019, which the claimant says she received later. I make no findings as to when this letter was received at this stage. The respondent's case is that the claimant was told in a board meeting on 17th January 2019 that she was to be removed from her role as a bar manager and given other work. So for the purposes of determining disability this is the earliest time and latest time would be when she was dismissed. The determination needs to be at the relevant time. So I explained the parties that I would need to make a decision on the relevant time without determining a disputed fact which was a matter for the final hearing but noting that it was important to assess the claimant's disability at that time and not now or at any other point since in between.

19. I consider the relevant time for the purposes of this claim to be in January 2019 onwards until dismissal was communicated without hearing evidence as to the substance of the claim. It's difficult to know when the decision was taken and who knew what. I must therefore exercise some caution, so as not to stray outside the purposes of today's hearing.
20. Fibromyalgia is as the claimant described, a chronic long-term condition for which there is no cure. Taking the earliest date of 17th of January 2019, and considered the short period from then to dismissal I have considered the s6 Equality Act 2010 test and whether the claimant met that disability at that stage.

Findings of fact

20. The claimant was diagnosed with fibromyalgia on 12th February 2019 having been referred to a consultant rheumatologist previously by her GP. The document that is closest in time to the diagnosis and the events in this case and it is fairly close in terms of contemporaneous evidence is the letter at page 360. I went through this letter with the claimant to distinguish her symptoms of endometriosis and also to look at her medication. Her evidence was that the relevant matters contained in the first paragraph of that letter were that those symptoms had by the 12th February 2019 been troubling her for well over a year.
21. The symptoms included overwhelming fatigue, her body constantly aching, constant flu-like symptoms and forgetfulness. She also reported some limited stiffness in the mornings. The letter outlined that she took in particular two medications relevant to the condition of fibromyalgia, Zomorph and Oramorph. She tells me that Zomorph and Oramorph are effectively slow release, pain relief, morphine like medications. I found the

claimant to be an honest witness and accepted her evidence on these matters.

22. So notwithstanding the letter also states on examination there was no inflammatory signs whatsoever, how in fact all of her trigger spots were tender and overwhelmingly so. The claimant explained in evidence that fibromyalgia is not like arthritis with swollen or inflamed joints. It is a pain condition, it becomes painful to move her joints.
23. A second letter comes later in May 2019 which is the letter on page 363 which is from the pain clinic. This describes her lower pain starting around July 2018. The claimant gave evidence that her fibromyalgia was primarily for her leg pain and this impacted on her ability to stand and mobility due to pain. Her medication only took the edge off the pain and by May 2019 she was taking medication for analgesia which according to the medical letter had increased.
24. The respondent referred the claimant to the sentence contained in the explanation in that letter "*There was no clear causative factors for her lower limb pain.*" The claimant did not write that document and could not assist, but the doctor knew at that stage of the diagnosis and it could be read to be that there was no physical reason for that pain as in some swelling, etc in that area.
25. In the claimant's impact statement at page 366, she described symptoms for a period before her diagnosis. She described leg pains, fatigue, aches, pains, migraines, and brain fog. The claimant provided a medical note in August 2018 which described fatigue. There is no fit note referring to fibromyalgia until the 15th of February 2019. These are the documents at page 358 and 359.
26. The claimant described how she would feel very tired, pains and aches in both of her legs and feel like flu-like, tired with aches and pains in both of her legs and feel like the whole time that her body was heavy and stiff. She described not being able to stand for long periods. She tells the tribunal it did impact on work which is why the meeting of 17th January 2019 was called and she was unable to perform to the same level as before and needed help with her workload. I make no findings as to whether this reason is correct, but it is not in dispute that a meeting took place on 17th January 2019.
27. I do however find that at the relevant time (January 2019) the claimant could not take heavy deliveries such as bottles and crates, etc at work and could not stand for long periods to prepare for large catering events. She was able to work until her dismissal but the claimant's evidence was she had no choice and when there was cover she did not cover the late nights or larger events in the run up to her dismissal.

28. We explored in evidence whether these matters impacted her home life. Her evidence was at that time she had to have help from her partner or other members of her family with shopping and preparing meals for her family. She became particularly distressed during evidence when describing she could no longer care for her home such as hoovering etc. She couldn't carry a wash basket up and down the stairs. She was unable to even wash her hair and shower without the help and support of her partner and family. She explained that she struggled to get out of bed to do the school run and had to rely on others. Her evidence was medication was taking the edge off the pain, but when I asked what the effect would be if she stopped taking that medication, she confirmed she would not have been unable to get out of bed. I accepted the claimant's evidence.
29. The claimant explained she still suffers and despite having had CBT, physio etc, she is still on medication but I must assess what was relevant at the time of the alleged discriminatory act and not today.

Conclusions

Does the claimant have a physical or mental impairment?

30. I find that the claimant did have a mental or physical impairment at the relevant time. The question I spent some time considering was whether this was a physical or a mental impairment. It manifests itself physically, but there are some mental aspects such as brain fog. The physical symptoms are pain in the legs, migraines and it is primarily a physical condition with some mental impairments. She has something wrong physically.
31. I had reference to the guidance on the Equality Act which states that it is not necessary for the cause of the impairment to be established nor does the impairment have to be the result of the illness (A3).
32. At A5 of the Guidance, it states a disability can arise from a range of impairments which can be impairments with fluctuating or reoccurring effects such as, and it gives a list including fibromyalgia. Of course, the fact that the Guidance mentions this condition does not mean that in this case it is a disability as it is about the impact of such a condition on a case by case basis.
33. I also considered A6 of the Guidance. It may not always be possible, nor is it necessary to categorise a condition as either a physical or a mental impairment. There may be adverse effects which are both physical and mental in nature. On this occasion, this is where I have had some difficulty, but I find that it is primarily a physical impairment, although it may have some mental impairment and impact.

Does that impairment have a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities?

34. It is for the claimant to establish she is disabled within the meaning of the Equality Act 2010. The focus should be on what the claimant cannot do or can only do with difficulty not what she can do. The effect should be more than minor or trivial.
35. Here the claimant gave compelling evidence as to the adverse effects on her personal life. Here I earlier referred the parties to the fact that normal day-to-day activities is not defined in the Equality Act, but it should be taken effectively as given an every day meaning. In general day-to-day activities are things people do on a regular daily basis. This includes shopping, reading, writing, having conversations, using the telephone, watching TV, 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 as set out in D3 of the Guidance.
36. Given, the findings of fact, it is clear the impact on the claimant's work was more than trivial or minor. It also impacted her day-to-day activities in her personal life. The examples that were given in evidence including getting washed, preparing food, shopping, household tasks like hoovering and cleaning, lifting, mobility and standing for long periods. The claimant described this as debilitating and she became emotional when describing the life changing effect this condition had had on her.
37. In addition, contained in the Guidance at D22, it is noted that an impairment may not directly prevent someone from carrying out one or more day-to-day activities, but it still may have a substantial adverse effect on how the person carries out their activities. The Guidance gives a specific example concerning pain and fatigue where an impairment causes pain and fatigue, someone may be restricted in the way they carry out those activities due to pain or indeed an impairment might make the activity more than usually fatiguing. So that person might not be able to repeat the task over a substantial period of time. The claimant's evidence was that this was the case with regard to her work and the shifts, given that she worked a split shift. When on a split shift and when she particularly needed on occasions to work in the evenings, she found this increasingly difficult. The effects the claimant describes and the impact on her day-to-day activities are with the benefit of medication for pain without which the claimant would have been further impacted as she gave in evidence.
38. She was working but this does not mean she was not disabled. Lots of disabled employees work. The respondent's implied submission that

because she was working she was not disabled is rejected. What is important is what she cannot do rather than what she can do.

39. I therefore find that there was an adverse impact on her day-to-day activities. Turning now as to whether this was substantial, this must be more than trivial or minor. Given the claimant was prescribed painkillers which have to be disregarded and based on all the evidence it is clear that the impact was substantial. It was more than trivial or minor. It had deeply impacted the claimant in particular in her home life and her ability to carry out household tasks, motherhood and all that entailed and even self-care.
40. Turning now to whether the matter is long term, the claimant's condition is long term. There is no cure. It had not lasted 12 months or more by January 2019 as the earliest evidence in the medical documents was that she experienced pain in her legs from July 2018, which would not be 12 months by the time it got to January 2019. Given it is a long-term condition for which there is no cure, it was likely to last 12 months or more at the time of the alleged discriminatory act.
41. Taking all these conclusions together, I am satisfied that the claimant was disabled at the relevant time. Having heard the evidence from the claimant it is obvious that she was disabled at the relevant time and meets the statutory test in every regard.
42. It therefore follows that my conclusion is that the claimant is disabled within the meaning of s6 Equality Act 2010. Following this determination the matter proceeded to case management and the parties have been sent separate orders in this regard.

Employment Judge King

Date:03.03.23.....

Sent to the parties on: 11th March 2023

GDJ
For the Tribunal Office