



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms K-M Barnett

V

HM Courts and Tribunal Service

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Birmingham by CVP

On: 14 October 2022

Before: Employment Judge Dean

Appearance:

For the Claimant: in person

For the Respondent: Mr Keith, of counsel

JUDGMENT having been sent to the parties on 17/10/2022 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

Background

1. The claimant was employed by Brook Street Recruitment Agency who provided the claimant's services as an agency worker to the respondent, who manage the administration of the courts and tribunal services. The claimant was contracted to work at the respondent's Stoke on Trent County Court as an administrative assistant from December 2019 and her contract was terminated on 6 November 2020. Early conciliation started on 2 January 2021 and ended on 13 February 2021. The claim form was presented on 10 March 2021.
2. The claim is about unlawful discrimination because of the protected characteristic of disability and in particular an allegation that the respondent

failed to make reasonable adjustments to accommodate the claimant's disability and that her contract was terminated for reasons arising from her disability.

3. The respondent's defence is that it is denied that the claimant was disabled at the relevant time, that the respondent had no knowledge of the alleged disability and could not reasonably have been expected to have had knowledge that the claimant was disabled at the relevant time. The complaint has been listed for a hearing to determine the Preliminary Issue of disability.

The Preliminary Issue

4. Whether or not at the relevant time from 19 December 2019 to 6 November 2020, while the claimant was engaged to work by the respondent through a recruitment agency Brook Street she was disabled as defined by section 6 of the Equality Act 2010 ("EqA") by the impairment of Functional Neurological Disorder.

The law

5. The definition of disability as defined by law is contained in section 6 of the Equality Act ("EqA") 2010 as follows:
 - (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.

Section 212(1) of the EqA states that :

"in this Act, 'substantial' means more than minor or trivial".

Further guidance states that:

"the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people".

"Normal day-to-day activities" are described to be activities that are carried out by most men and women on a fairly regular and frequent basis such as walking, driving, typing, and forming social relationships.

An impairment is 'long-term' if it has lasted for 12 months, is likely to last for 12 months or for the rest of the person's life. If it has ceased to have that effect but is likely to recur, then it is treated as long-term.

6. Statute places the burden of proving the existence of a disability upon the Claimant asserting its existence.
7. The Guidance on the definition of disability (2011) provides a guide of those matters to be taken into account when determining whether a person is a disabled person and gives illustrative examples. The relevant guidance to which

I have been referred and properly ought to consider is to be found at the following paragraphs:

“Substantial” B1 describes substantial as being more than minor or trivial and I have had regard also to the provisions of paragraphs B2-11 in relation to the carrying out of activities and the effects of the impairment and of behaviour.

“Long term” C1 describes the nature of the meaning of long terms as being something which has lasted or **likely to last for 12 months** for the rest of the affected persons life.

“Likely” means in context that the likely long term effects could well happen as described at C3

8. In considering the Relevant period whether a claimant is disabled the relevant time to consider whether a person was disabled is the date of the alleged discrimination (i.e. the Relevant Period) and not at the date of the Employment Tribunal complaint is heard or, as in the case, at any time after the employment has ended. For any claim to succeed, the burden is on the claimant to show, on the balance of probabilities, something in the nature of an 'impairment' whether it is a mental or physical condition which is **substantial** in nature and **long term** in effect.
9. In *Nissa v Waverly Education Foundation Ltd* [2018] UKEAT/0135/18, EAT HHJ Eady QC held that the correct question was to consider what the effects of the impairments were at the material time, and then to consider whether there was information before the Tribunal which showed that, viewed at that time, it could well happen that the effects of the impairments would last for more than 12 months.
10. Furthermore, the Court of Appeal held in *Richmond Adult Community College v McDougal* [2008] IRLR 227, CA that relapses occurring *after* the date of the alleged discrimination must be disregarded in assessing whether it was likely that the effect would recur. Whilst Richmond is a DDA case, the relevant provision in the EqA has the identical wording such that the same analysis must apply.
11. Claimant relies on the stress or anxiety mentioned in her medical evidence, as the impairment she asserts is a relevant disability and authority directs Tribunals to approach unsupported oral evidence with caution. In Dunham v Ashford Windows [2005] IRLR 608 EAT Judge Burke QC quoted Mr Justice Lindsay in Morgan v Staffordshire University: [2002] IRLR 190 EAT

[8] The dangers of the tribunal forming a view on “mental impairment” from the way the claimant gives evidence on the day cannot be overstated. Aside from the risk of undetected, or suspected but non-existent, play-acting by the claimant and that the date of the hearing itself will seldom be a date as at which the presence of impairment will need to be proved or disproved, tribunal members will need to remind themselves that few mental illnesses are such that their symptoms are obvious all the time and

that they have no training or, as is likely, expertise, in the detection of real or simulated psychiatric disorders.”

12. In the Court of Appeal authority of McNicol v Balfour Beatty Rail Maintenance Ltd [2002] IRLR 711 CA Lord Justice Mummery stated:

“[26] I agree with the guidance recently given by Lindsay J in Morgan v Staffordshire University. The onus is on the applicant to prove the impairment on the conventional balance of probabilities. In many cases there will be no issue about impairment. If there is an issue on impairment evidence will be needed to prove impairment.”

Evidence

13. The agreed Bundle before me at the Preliminary Hearing to determine the disability issues is indexed and extends over 75 pages, in particular the impact statement [42-43] and medical records [60-57] and additional medical records from hospitals have founded the findings of fact upon which I reach my determination.

Findings of Fact

14. The Claimant was engaged by the Respondent through a recruitment agency, Brook Street, between 19 December 2019 and 6 November 2020 and that is the relevant period in respect of which I must make my determination whether or not at that time the claimant was a disabled person.
15. The Claimant relies on a diagnosis dated 25 January 2022 some 14 months after the end of the relevant period, which states that she has *“possible functional neurological symptoms”* [54]. I am mindful that the diagnosis is based upon the outcome of tests and their results not contemporary with the relevant time.
16. Based upon the documentary evidence and the claimant’s impact statement and pleaded complaint and her answers to questions in examination I make the findings of fact that are set out below in a chronological order.
17. In her particulars of complaint, [15] para 3, the claimant states that July 2019 was the date of onset of her symptoms, specifically that she struggled with pain and weakness down the left-hand side including back and leg pain.
18. The claimant began her engagement with the respondent in December 2019.

The claimant gives her account in her impact statement that in January 2020 she began to experience poor vision and headaches [38] para2. and that by March 2020 her vision in her left eye had deteriorated she says that she was *“unable to focus, concentrate and read”* [38]para 2.

19. In her impact statement [38] para the claimant describes that in July 2020 she had weakness and pain down her left-hand side, causing her to feel *“extremely fatigued, in constant pain and in low mood”*. The claimant states that she: *“struggled with [her] mobility, walking upstairs, self-care and daily household chores due to the weakness and pain down [her] left side”* [38] para 3, and on her account at that point the claimant says that her *“condition was deteriorating at a rapid rate”*.
20. By August 2020, the claimant asserts in her disability impact statement that *“the headaches and poor vision had become severe”* [38] para 4 and the claimant asserts that her eyesight was deteriorating. I have had sight of a GP report dated 17 August 2020, which records that the claimant reported to Dr Arepalli that she had a *“slight headache on and off”* [59] and informed the GP that her *“vision is deteriorating”*, [59] The claimant reported that she had then recently had a pair of glasses and that her sight using them had since deteriorated within 2 months but that the optician had not been helpful. I find that the claimants contemporary account to her GP is the more reliable explanation than that later informed with the benefit of hindsight.
21. On 25 August 2020 the claimant visited her GP with “backache” and was signed off sick for a week [40]. Dr Maheepathi the GP noted that in respect her back pain that the *“numbness could be due to a trapped nerve”* for which she was to be seen in the musculoskeletal clinic [58].
22. On 7 September 2020 the claimant informed the musculoskeletal expert that her *“12-month history of pins and needles and numbness through her left side”* was *“associated with some neck and left sided lower back pain”* [41]. On examination it is reported that she *“had full pain-free neck and lower back movements”*[42]. I find that the claimant account to her GP is the contemporary and objective account and the more faithful recollection of history.
23. On 7 October 2020, at a telephone appointment with a consultant neurologist the claimant reported to him that she had:
 - a. *“numbness affecting her left arm since March [2020]”* as well as her deteriorating vision.
 - b. a *“history of severe headache affecting her all over ... a history of migraines in the past since a very young age but had improved from there ... a history of fatigue affecting her since age 15 and low mood”*. She stated that she *“finds it hard to do her daily chore activities for example putting washing in the washing machine”*.
 - c. described lower back pain and pain going into her left leg as well as anxiety symptoms which were *“different to her usual anxiety related symptoms”*.

The consultant described her condition as “*complicated and concerning*”. He arranged for MRI scans of her brain and thoracic spine as well as an ophthalmology appointment. He was unable to explain her symptoms over the telephone but noted a “*clear possibility of neuro-inflammation or some form of headache disorder*”. He did not opine as to how long the symptoms were likely to last. The claimant’s account is inconsistent with the rather more plain account that she gave to her GP.

24. On 26 October the claimant had a week’s sickness absence due to her wisdom teeth [19 para9 and at the beginning of November the claimant began a period of self-isolation related to Covid-19. On 6 November 2020 the claimant’s engagement with the respondent that was arranged through the recruitment company was terminated.

25. Following the termination of the claimants placement with the respondent and over the next year or so, the claimant underwent a number of medical tests which returned negative results [38-39 para4-5] until eventually the claimant was diagnosed with “possible functional neurological symptoms” on 21 January 2022 [54-55].

26. In her Impact statement [42-43] the claimant states:

“The onset of my symptoms which began during my employment started in January 2020 where I started to experience poor vision and headaches. In March 2020 the vision in my left eye had deteriorated and four months later the vision in my right eye had also deteriorated. I was unable to focus, concentrate and read. I experienced painful headaches every day.

I find that the contemporary GP records do not reflect the claimants account now given in 2022 or as described to the neurologist in October 2022.

27. The claimant has confirmed that although it was originally it was suspected the symptoms may have been MS, that proved not to be the case following a brain scan on 10th December 2020 and on 2nd September 2021 a lumbar puncture. The MRI scans and the spinal tap showed nothing.

28. The claimant saw a consultant ophthalmologist on 18 August 2021 who found there was nothing wrong with her eyes.

29. The claimant describes that since her contract working for HMCTS was terminated her symptoms have persisted and on the claimant’s account have deteriorated. Subsequent tests including nerve conduction tests have proved negative and another Neurologist Dr O Salim diagnosed the claimant with Functional Neurological Disorder (‘FND’) having found 6 Feb 2022 that:

“There was no evidence of fibre peripheral neuropathy, mononeuritis multiplex, or myopathy. This is good news. The above report further supports that the symptoms Miss Barnett has been experiencing are most likely functional neurological symptoms. She will be reviewed in clinic in due course.” [56]

30. Before this hearing, on 10 October 2022 the claimant has provided further evidence confirming a diagnosis of Functional Neurological disorder and

chronic migraine without aura provided by Dr Omar Salim Consultant Neurologist following a clinic on 30 September 2022.

31. What is self-evidence is that in 2022 the claimant was given a confirmed diagnosis of Functional Neurological disorder and migraine without aura. However, my task is to consider whether, in the period 19 December 2019 to 6 November 2020 the claimant was disabled by the range of impairments described by the claimant. In particular I must consider whether at that time and not informed by subsequent diagnosis, the claimant suffered from an impairment that had a substantial adverse impact on her ability to carry out normal day to day activities that was then or then likely to be long term.
32. I find that while the claimant had a physical impairment that occasionally affected her eyesight whilst working on contract for the respondent, the letter of 3 October 2022 is confirming the original tentative diagnosis on 25 January 2022 some 14 months after the end of the relevant period. The in her impact statement claimant reported numbness and from 2020 she describes she was experiencing weakness and pain down her left side. This included her arm, lower back and leg which made her feel extremely fatigued, in constant pain and in low mood. She describes that she struggled with her mobility, walking upstairs, self-care and daily household chores due to the weakness and pain down her left side. My condition was deteriorating at a rapid rate where I was experiencing severe anxiety and depression. I have not been referred to GP records which substantiate severe anxiety and depression at the relevant time.
33. In making my findings of fact I find that the claimant's later recollection of events July to 6 November 2020 are not a reliable recollection of history. In answer to questions in cross examination the claimant stated that she had not made the statements recorded by her GP. It is not unheard of for a claimant to say they had not said something as recorded to their GP, but it is highly unlikely that a GP would say the opposite of what the patient said as claimed in this instance to write the patient had reported a slight headache if in fact the claimant in this case had instead said that the headache was constant. Sadly, in this case the claimant's evidence in that regard was unconvincing.
34. In answer to questions in relation to her back pain the claimant asserts that at the relevant time the back pain was then constant but is not anymore. The evidence the claimant gives is inconsistent with the contemporary account given that on examination there was pain free range of movement which stands in conflict with the claimants account in her impact statement and account at the hearing.
35. Although in her impact statement [para6] the claimant says her disability in relation to walking difficulty became mildly worse, as a result of discrimination after loss of job I am required to disregard subsequent progression of any impairments after the engagement was terminated. The determination I must make is that based upon the claimants state of health at the relevant time and not upon what happened thereafter. I find that the evidence given by the

claimant in her impact statement and at the hearing has been tainted by the fact that the claimant conflated various periods of time when reporting her history and the severity of symptoms which came on after her work for the respondent came to an end.

36. Any relapses after the date of the alleged discrimination are to be disregarded and even taking the effects of the evolving compromises to the claimant's eyesight it has not been suggested that the degree of reduced vision was a substantial impairment at the relevant time. Moreover even if the effect on the claimant's vision was substantial there was nothing to suggest that the effect had then been or was likely to last more than 12 months to be long term.
37. The first contemporaneous account of the claimant's headaches was not until August 2020 and in answer to cross examination the claimant confirmed that in September 2020 no one knew what the cause of her headaches, deteriorating vision and numbness was nor how long it would last. In the event it was not until January 2022 that the claimant received a tentative diagnosis of the cause of her various difficulties.
38. I conclude that from September 2020 the claimant suffered what has subsequently been found to be a neurological impairment which caused symptoms on headaches, eye and optical disturbances that fluctuated and pins and needles and numbness. The constellation of the claimant's disparate symptoms caused investigations to be undertaken but they were without explanation. The impairments to vision such as they were in July to November 2020 had a fluctuating impact on the claimant ability to undertake normal day to day activities. The claimant has referred in her impact statement to the fact that in July 2020 she had weakness and pain down her left-hand side, causing her to feel "*extremely fatigued, in constant pain and in low mood*". However, at no time in the relevant period or from July 2020, the earliest date from when the impairments became more intrusive, did the claimant or any medical professionals or the respondent consider that the symptoms were likely to or could well last more than 12 months.

Argument

39. The Respondent acknowledges the existence of a physical impairment but refers me to the statutory requirements for "substantial" and "long-term adverse effect".
40. The claimant asks me to accept that this is a complex case the history of which none one understood, she accepts that the evidence is not in her favour and that no one knew what going on. The claimant has asserted in cross examination that her GP was not helpful that she discussed her symptoms at length with her and that despite that the GP certified on her fit note the cause of her being not fit to work was back ache, simply because no one knew what going on despite the fact that she saw various people and consultants and had a variety of tests.

41. The claimant argues that her symptoms were substantial being more than minor or trivial and she refers the Guidance which references the time taken to carry out a task as the effect of an impairment and that it takes her longer to walk and that when I make my assessment I should compare the effect of her impairments in relation to the time it would take a person who does not have the disability.
42. The claimant says that the condition was Long term that it had lasted 12 months and was likely last at least 12 months. The claimant asserts that the effects of her various impairments started for in July 2019 and then lasted 12 months. I have not seen any evidence to suggest that there was a concern raised with her GP in 2019, on the contrary the GP records disclosed to the respondent and in the bundle are those started 23 July 2020 [60-57]. While the claimant may have experienced some symptoms that looking back may have been the onset, there is no clear evidence before me to that effect.
43. The claimant has referred to letter from Dr Salim 3 October 2022 following the consultation 30 Sept 2022 but it is the history as reported in 2022 to him by the claimant.
44. Mr Keith for the respondent has submitted a skeleton argument and makes oral submissions that, while acknowledging that there is a physical impairment, the burden on the claimant to establish she was disabled as defined at s6 Eq Act and she has not discharged the burden to show the impact was substantial and she manifestly failed to show long term at relevant time.
45. With reference to consideration of whether the impairment's effect was 'Substantial' the burden is on the claimant. The Employment Tribunal cannot rely heavily on the impact statement because of the various discrepancies between it and medical evidence. I am reminded that the most stark discrepancy is the claimants description in her impact statement and in cross examination that the headache she says was constant and severe is not consistent with the account given contemporaneously to her GP [59] when she told her GP she had a slight headache on and off. In describing the effects of the various conditions, she experienced I her impact statement para 6 and 7 in particular the account of the effect on normal day to day activities is in relation to the impact of the conditions post termination of her contract.

Decision

46. Having considered the evidence before me and the legal test to be determined I have in light of my findings of fact found that the claimant was at the material time suffering from a physical impairment from in or about July 2020 that had impact on her ability to carry out normal day to day activities.

47. The impairment from about July 2020 was substantial, the claimant walking gait was unsteady with what is described as drop foot dragging left foot.
48. The claimant experienced eye sight disturbances, had varying symptoms of back pain and in her impact statement and in her evidence to me describes difficulty washing her hair and doing housework or tidying up that was present from August 2020. The claimant has described she had to be helped upstairs by partner and explained that the time it took her to do physical things was longer than normal. I have found that the claimant is not an entirely faithful historian of the progression of her condition. The impact statement written in 2022 clearly records the very significant deterioration in her condition which she says was as a result of the discrimination she suffered. There is however nothing before me which leads me to conclude that while employed by the respondent the impairment when it acquired a substantial adverse impact on her ability to undertake normal day to day activities had then nor was likely to last more than twelve months.
49. The claimant had a physical impairment substantial adverse effect which at the relevant time had not been and was not likely to last 12 months.
50. The claimant at the material time was not disabled within the meaning of s6 Equality Act 2010.

Employment Judge Dean
9 March 2023