



EMPLOYMENT TRIBUNALS

Claimant: Mrs B Warburton

Respondent: Genesis Homes (North) Limited

HELD AT: Manchester (Via CVP) **ON:** 29th June 2023

BEFORE: Employment Judge Anderson
(sitting alone)

REPRESENTATION:

Claimant: Mr Foy (Counsel)

Respondent: Ms Bayliss (Counsel)

RESERVED JUDGMENT

1. The Claimant was a disabled person for the purposes of s.6 Equality Act 2010 in the relevant period of 10th January 2022 to 24th March 2022.

Employment Judge Anderson

3rd July 2023

JUDGMENT SENT TO THE PARTIES ON

11 July 2023

FOR THE TRIBUNAL OFFICE

REASONS

Introduction

1. This matter came before me today by way of public preliminary hearing to determine whether or not the Claimant was a disabled person for the purposes of s.6 Equality Act 2010 in the period of her employment with the Respondent between the 10th January 2022 and the 24th March 2022.
2. It was agreed that in order to answer this question, I must address:
 - a. Whether the Claimant had a physical or mental impairment?
 - b. Did that impairment have an adverse effect on her ability to carry out normal day-to-day activities?
 - c. Is that effect substantial?
 - d. Is that effect long term?
3. I had a bundle of agreed documents. The Claimant had produced two disability impact statements, both of which were taken as read. The Claimant gave live evidence and was cross examined.
4. Both counsel produced written submissions which I was grateful for and read in full. Both parties also addressed me orally following the conclusion of the evidence.

The Facts

5. I made the following findings of fact on the balance of probabilities.
6. I considered that the Claimant was generally a credible witness. She was not attempting to mislead me. She was clearly anxious about these proceedings and as can be seen in many cases sought to go further than the question she was being asked. There was some degree of wishing to advocate her position. I took the view that I could generally rely upon her written and oral evidence.
7. In June 2021, the Claimant had the booster AstraZeneca vaccine. In her oral evidence, the Claimant has treated this as causative of her impairment. She had a telephone consultation with her GP on 11th June 2021, the notes recording a temperature and rash.
8. An entry on 7th September 2021 records "Last 2 weeks c/o SOB on exertion 100 yards. Occasional chest tightness and palpitations. Parathesia to left arm. No chest pain." I find that this entry means is a record of the Claimant complaining of shortness of breath for two weeks prior to this appointment. This

would roughly indicate that the breathlessness symptoms started around the 24th August 2021.

9. An entry on 17th September 2021 records the results of a chest x-ray. Consolidation in both lungs in bilateral mid and right lower zones likely infective, follow up after treatment is recommended. A text to the Claimant on 22nd September refers to 'evidence of infection' Antibiotics are prescribed and a telephone consultation on the 1st October 2021 records Dyspnoea, feeling better after antibiotics, but still shortness of breath on exertion.
10. A note from 14th October 2021 records the Claimant informing her GP that she was "very breathless still." The note appears to be in the context of the Claimant chasing up a possible referral.
11. On 3rd November 2021, the Claimant had a telephone appointment with the chest pain clinic. This records amongst other matters "on talking to her today, her main symptom is in fact shortness of breath on exertion over the past two to three months on routine activities such as housework."
12. In December 2021, via telephone consultation, the Claimant was described as having some ongoing shortness of breath symptoms.
13. On 21st December 2021, the Claimant is referred to Dr Henton, a respiratory physician. I note that the referral letter refers back to the shortness of breath presenting in August and September.
14. On 10th January 2022, the GP notes record an improvement in the Claimant's scans. A further X ray in 8 weeks is advised.
15. The 16th February 2022 letter from Dr Redfern a consultant cardiologist records: "...exertional breathlessness which has now been ongoing for around 6 months or so. She reports getting quite breathless just climbing a flight of stairs but denies any symptoms suggestive of decompensated heart failure."
16. The Claimant's oral evidence was that she experienced breathlessness a few weeks after her COVID booster jab and that it continued thereafter. The Claimant gave oral evidence, consistent with the written evidence that activities such as housework, climbing the stairs, walking relatively short distances resulted in her being breathless.
17. It is common ground between the parties that the Claimant was employed by the Respondent between 10th January 2022 and 24th March 2022. Her employment was terminated without notice.

The Law

18. The burden of proof is on the Claimant to establish that she is a disabled person for the purposes of s.6 Equality Act 2010.

19. Section 6(1) of the Equality Act 2010 provides the following:

“A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.”

20. As provided for in s.212 of the Act, “substantial” means “more than minor or trivial.”

21. Schedule 1, Part 1, para 2 of the Act provides as follows:

“Long-term effects

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 at 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.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.”

22. In **SCA Packaging Ltd v Boyle [2009] ICR 1056** the House of Lords held that “likely” was to be taken to mean “it could well happen.”

23. It is settled law that disability must be assessed as of the dates in the relevant period, i.e. the dates of the alleged acts of discrimination. In the present case, the relevant period is the 10th January 2022 to the 24th March 2022.

24. The Equality and Human Rights Commission has produced detailed guidance in respect of the definition of disability. I was referred to it in submissions and I have had regard to that guidance in reaching my conclusions below.

Conclusions

25. The Respondent takes the point that much of the evidence relied upon by the Claimant is based on events after the relevant period. I accept this submission. It is important that I consider the medical position as it was in the relevant period. For example, where the Claimant's supplementary disability impact statement clearly covers events post-employment. I do not take it into account.
26. I do not make any findings that the booster vaccine was the cause of the impairment. COVID itself could be a cause, with someone having it without being aware of the fact or indeed a different illness. This is not a case in which causation affects the application of the s.6 test. It is clear that the Claimant had an impairment in the form of breathing difficulties, even if there was as yet no formal diagnosis. Beyond that, it is important that I focus on the symptoms that the Claimant had.
27. At the relevant time, the key symptom being experienced by the Claimant was breathlessness. There have been subsequent diagnoses, but at the relevant time, this is the label that could be put on the symptoms. I accept the Claimant's submission at para 27 of their written submissions on this point.
28. The day to day activities affected include, going up stairs, walking modest distances and undertaking household chores such as Hoovering or doing the laundry.
29. I find that the effect was substantial. It was more than minor or trivial. This was impacting the Claimant's daily life. Even if the Respondents terminology of 'flare-ups' is adopted I accept what is said at para 29 of the Claimant's submissions.
30. Furthermore, the Respondent places reliance on examples (e.g. 10th Jan 22) where there is possible improvement or variation in the Claimant's symptoms. I regard this as entirely consistent with someone experiencing breathlessness but also the Claimant's oral evidence, which I have accepted. The overarching evidence is ongoing breathlessness which causes the Claimant difficulty.
31. For the purposes of determining whether the effect on day to day activities was long term, I find that symptoms commenced around the 24th August 2021. This is not the most favourable date that the Claimant advanced, but it is the date that can be corroborated with contemporaneous medical records.
32. I find that in January 2022, the position is that the Claimants breathlessness was likely to last for a period of 12 months or more. At this point it had lasted for 4-5 months and by the end of the Claimant's employment had lasted for 6-7 months.

33. The medical evidence is contemporaneously recording the Claimant's breathing difficulties. There is no suggestion in the relevant period that the symptoms will be ending before September 2022 is reached.
34. In making this finding, I apply the approach in SCA Packaging Ltd v Boyle [2009] ICR 1056 and treat 'likely' as meaning 'could well happen'.
35. I have considered deduced effect. There is some evidence that antibiotics potentially had an impact on symptoms for a short period, but Claimant through her Counsel in closing submissions placed minimal weight on this. This did not influence my decision.
36. The Respondent asked that I consider the time period as divisible and that I could reach a different conclusion depending on the date within the period of employment. I have considered this point and do not reach a different conclusion. This conclusion covers the entirety of the period of the Claimant's employment. The answer is the same irrespective of whether it was the start of the Claimant's employment or the end of it. There is additional evidence in the form of the February 2022 letter from Dr Redfern, but this simply adds to the Claimant's case post that letter.
37. I therefore find that the Claimant was a disabled person for the purposes of s.6 Equality Act 2010 in the relevant period of 10th January 2022 to 24th March 2022.
38. Nothing in this Judgment is to be taken as a view on the strengths or weaknesses of the overall claim.

Postscript

39. At the end of the hearing, I raised the issue of whether there were any further case management orders sought. Neither party sought any further orders.
40. The full hearing of this matter has already been listed and case managed.
41. In the event of there being a suggestion that the final hearing convert to CVP, having heard the Claimant give evidence via CVP, it would be my preference for the full hearing of this matter to take place in person. Though I don't overstate the point, there were some communication and other problems that interrupted the flow of cross examination and it seems to me that an in person hearing would be preferable. I recognise that this isn't straightforward and that the Claimant having agoraphobia has been referenced during the hearing today. The parties and the Tribunal will need to give proper consideration to this around one to two months prior to the final hearing.

42. None of the above was raised with the parties. It does not bind the parties. I simply record this so that either party may cite this as they see fit in any application regarding the form of the final hearing.

Employment Judge Anderson

3rd July 2023