



EMPLOYMENT TRIBUNALS

At an Open Attended Preliminary Hearing

Claimant: Mrs V McDonald
Respondent: Amber Valley Borough Council
Heard at: Midlands (East) Region in Nottingham
On: 8 June 2023
Before: Employment Judge M Butler (sitting alone)

Representation

Claimant: In person
Respondent: Mr R Choudry, Advocate

RESERVED JUDGMENT

1. At all material times, the Claimant's impairments of colitis and stress amounted to a disability within the meaning of Section 6 of the Equality Act 2010.
2. The Claimant's impairments of chemo brain, anxiety and depression and urticaria did not amount to disabilities within the meaning of Section 6 of the Equality Act 2010.

RESERVED REASONS

Background

1. The Claimant presented her claim to the Tribunal on 29 April 2022. She remains employed by the Respondent as a Principal Solicitor and Deputy Monitoring Officer. In August 2018, she was diagnosed with breast cancer and underwent a mastectomy and chemotherapy. She commenced a phased return to work in October 2019 and worked from home during lockdown because of her vulnerability and needing to shield. It is, of course, accepted that she is disabled by virtue of breast cancer.
2. Whilst still homeworking, in March 2021 the Respondent introduced a new electronic attendance recording system which the Claimant says she could not cope with because she was suffering from chemo brain, which she says is cancer related cognitive memory and thinking problems. This meant she

would forget to “clock in” and properly record the time she was working and resorted to manually overriding the system.

3. In July 2021, the Claimant then left her work bag containing her laptop and mobile, which both belonged to the Respondent, on the floor of the Respondent’s car park and drove off. Disciplinary actions ensued. These matters were discussed at a telephone preliminary hearing before Employment Judge Britton on 10 August 2022 at which the Claimant indicated that she proposed to submit an amended claim setting out what she considered amounted to continuing discrimination.
4. The Claimant then submitted amended particulars of claim and the Respondent submitted an amended response.
5. There was then a further telephone preliminary hearing before Employment Judge Adkinson on 6 December 2022 who identified that the Claimant had pleaded other claims and EJ Adkinson directed that the Claimant provide further information setting out what type of discrimination was being claimed within the various additional allegations she had made.
6. EJ Adkinson also made some general observations. Specifically, he noted that the Claimant appears to have approached the case that the more claims she makes the better. He further noted that these additional claims made it difficult for the Claimant to present her case and risked hiding what the case was really about. As will become apparent within this Judgment, I entirely endorse those comments.
7. After what was the second case management hearing before EJ Adkinson, orders were made that the Claimant give information in relation to chemo brain, depression and anxiety so that this hearing before me could determine whether they amounted to disabilities under Section 6 of the Equality Act 2010 (“EqA”). By the time the hearing today began, colitis, urticaria and stress had been added to the conditions upon which a determination must be made. Already, therefore, the case had approached the stage where both parties were having difficulty seeing the wood for the trees.
8. EJ Adkinson observed that he was of the view the claim was essentially one of failure to make reasonable adjustments. Even though other claims have been added, which are of no concern today, the addition of these further impairments do not seem to take the Claimant’s case any further.
9. Throughout the hearing before me, the Claimant frequently became upset, and breaks were afforded whenever necessary. However, at one point, the Claimant seemed so distressed that I invited her to consider whether she ought to continue and suggested as an alternative that today’s hearing be adjourned and relisted to be heard by video, which she might find less challenging and more comfortable. After an early lunch adjournment, the Claimant elected to continue with the hearing.

The issues

10. As I understand it, today’s hearing was to determine whether the Claimant was at the material time disabled due to chemo brain and anxiety and

depression and also to consider a further application to amend her claim to include disability due to colitis and urticaria.

Evidence

11. The Claimant provided a written disability impact statement and was questioned on oath. There was a bundle of almost 300 pages, although I was taken to relatively little of it. There are within the bundle some recent GP records, a number of occupational health reports and various other medical correspondence.
12. Both parties made brief oral closing submissions which I took into account in considering my decision.

The law

13. The law is found principally in Section 6 and Schedule 1 EqA, including the 2011 guidance made under Section 6(5) EqA (“The Guidance”). Section 6 EqA states:

“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.

...”

14. It remains good practice to state conclusions separately on the questions of impairment, adverse effect, substantiality and long-term nature (***Goodwin v The Patent Office [1999] ICR 302.***) However, in reaching those conclusions a Tribunal should not proceed by rigid consecutive stages. A purposive approach should be taken without losing sight of the overall condition.
15. Impairment is to be given its ordinary meaning without more. Where there are more than one impairments, the totality of their effects may need to be considered when assessing the linked concepts of substantial and long-term (see paragraph B6 of the Guidance, ***Ginn v Tesco Stores Ltd [2005] AER(D)259*** and ***Patel v Oldham Metropolitan Borough Council [2010] ICR 603.*** Where the presence of a disputed impairment is not clear, it may be left until after the analysis of long-term substantial effects. As Underhill P said at paragraph 40(2) of ***J v DLA Piper UK LLP [2010] ICR 1052:***

“... Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, ... to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.”

16. Adopting that approach in ***Herry v Dudley Metropolitan Borough Council [UKEAT/0100/16/LA]***, HHJ Richardson noted:
- “... an Employment Tribunal might start with the question whether the Claimant’s ability to carry out normal day-to-day activities had been impaired. This would assist it to resolve, in difficult cases, whether an impairment existed.”*
17. By Section 212(1) EqA and paragraph B1 of the Guidance, “substantial” means more than minor or trivial.
18. This is a relatively low threshold for a claimant to establish. Substantial may be considered in respect of different times, different activities, the way an activity is done and having regard to modifications which are reasonable for a claimant to make but based on what the deduced effect, that is excluding the effect of medical treatment. There must be clear evidence on what the deduced effect would be (***Woodrup v London Borough of Southwark [2003] IRLR 111***). Although a low threshold, the Claimant carries the burden of showing it. Substantial is likely to be made out where the degree of limitation established in the adverse effect goes beyond the normal differences in ability which may exist among people without a disability in the general population.
19. The focus in an assessment of disability should be on what an employee cannot do, or can only do with difficulty and not what they can do. I am required to look at the whole picture and it is not simply a question of balancing what an employee can do against what they cannot. If the employee is substantially impaired in carrying out normal day to day activities then they are disabled notwithstanding their ability in further activities.
20. Long-term and substantial go hand in hand. They each qualify the other and the adverse effect within the statutory test (***Cruickshank v Vaw Motorcast Ltd [2002] ICR 729 EAT***). The effects need not be the same over the period.
21. Schedule 1 EqA makes further provision for the determination of the question whether a person is disabled. Specifically, paragraph 2 provides:

“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. Where it is necessary to project forward to determine whether an impairment is long-term, the Tribunal must consider the evidence as it stood at that point in time and address the question whether it was likely to last the necessary period. In that regard, whether something is "likely" under the EqA is to be interpreted as "could well happen" (***SCA Packaging Ltd v Boyle [2009] ICR 1056 HL*** and paragraph C3 of the Guidance).
23. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appear during the material time (***Cruickshank***).

The Claimant's evidence

24. That the Claimant is disabled due to breast cancer is beyond doubt. It is not for me to speculate on the reason why she has found it necessary to apply to make further amendments to her claim. As EJ Adkinson said at the second preliminary hearing, more claims essentially just means more claims when they may be unnecessary for the purposes of determining what is the essential claim made by the Claimant. The latest proposed amendments are confusing. Having perused in some detail the latest amended claim, which is very long, and the Respondent's response, it was perfectly clear that the proposed amendments have led to some considerable confusion. Even now, I am not entirely sure whether the Claimant relies on urticaria as a disability or whether she relies on stress, anxiety or depression, or all three. Accordingly, I make a determination in respect of all of these conditions.
25. I was not assisted in making my determinations by the lack of GP records within the bundle. Indeed, I note from pages 245 to 248 that only 4 pages out of 198, which I assume comprise the full GP records, have been produced. I have therefore considered the various conditions in the light of these records, various medical letters, occupational health reports and the Claimant's evidence.

Chemo brain

26. It is clear that the Claimant did not mention, nor is there any evidence that she experienced, issues with her thinking and memory until she was challenged about her failure to properly record her working hours on the new programme introduced by the Respondent and, even then, there is no evidence that she attributed a title to her alleged symptoms. This came later when she left her work laptop and mobile 'phone in the car park. The

symptoms of chemo brain include disorganised behaviour or thinking, confusion, memory loss, and trouble concentrating, paying attention, learning, and making decisions. The medical records provided by the Claimant do not say when her chemotherapy ended but it seems that, for most patients, any symptoms of chemo brain improve within 9 to 12 months after completing chemotherapy. The Claimant does not give any indication that she suffered from any of the symptoms of chemo brain prior to the computer and laptop incidents nor are there any GP records to support the view that she was suffering from chemo brain. In fact, her GP notes make no reference to chemo brain until she actually raised this with her GP on 8 December 2022. My suspicion is that these alleged symptoms have been used as a shield rather than a sword in relation to her claims. It is unlikely that these alleged symptoms began suddenly at a very specific point in time and there is no evidence before me that they existed prior to the incidents referred to above. The Claimant has not satisfied the burden upon her that she suffered from chemo brain symptoms at the material time.

Urticaria

27. There is insufficient evidence within the bundle to determine that the Claimant's condition of urticaria amounts to a disability. She does have this impairment and appears to have been treated for it. However, I note from page 245 of the bundle that her GP records show that she experienced a flare up of the condition in around November 2021 (following potential disciplinary action over her laptop being initiated) and, prior to that, she had not had a serious flare up for 7 years. Insofar as I understand the GP's records, the condition is akin to hives where the skin can become blotchy and itchy. In her impact statement, the Claimant refers to this condition as "*chronic*". This is not supported by her GP records and there is only evidence of two flare ups in 7 years, which I do not find to be sufficient to have a long-term adverse effect on the Claimant's ability to undertake normal day to day activities.

Colitis

28. In my view, the Claimant is clearly disabled due to this condition. From the documents before me, it was first noted in the occupational health report at page 211 confirming that the Claimant was being investigated for "some gastrointestinal symptoms". She seems to have been formally diagnosed with chronic colitis in October 2021 (page 213) and this followed a period of several months with symptoms of that condition. Its effect on those who suffer from it is well known resulting in abdominal pain and bouts of diarrhoea. It is exacerbated by stress which the Claimant has endured because of her work issues compounded by this litigation. The condition is long-term and, particularly with the need to access toilet facilities on an urgent basis at times, it has an adverse effect on the Claimant's ability to undertake normal day to day activities which will include socialising, shopping and attending to normal family activities. I find the Claimant to be disabled due to this condition.

Stress, anxiety and depression

29. The Claimant has clearly suffered from stress and this is mentioned in her

GP notes at pages 245, 246, 247 and 248 and all entries in her GP notes qualified the stress she suffers as work-related stress. This is all confirmed most recently in an occupational health report dated 3 May 2023 (page 228). A letter from Trent PTS to the Claimant's GP dated 20 July 2022 (page 250) also refers to:

"... The stress of her work situation triggered her to suffer with Colitis (sic) and Urticaria. Venice has felt very hurt, frustrated and confused with her employer and legal advice has been sought to come to a resolution. This is prolonged and ongoing, massively impacting Venice, disrupting sleep and creating high anxiety. Correspondence from her employer was a huge trigger for panic and a downward spiral in mood.

..."

The occupational health report dated 12 August 2022 (page 220) notes that the Claimant found the new clocking in system to be "really stressful". It goes on to record that:

"... she already experiences massive spikes in her anxiety levels upon receipt of emails – to the extent her colitis flares up and she has to urgently get herself to the bathroom or risk becoming faecally incontinent – an added layer of distress for Venice. ..."

In the same report (page 224), the therapist states:

"... from speaking to Venice, I do not feel she is any better than in December 2021. In fact, I feel her acute levels of distress are now worse and continue to add to her physical health symptoms. The best way to resolve these would be for the court case to be completed as this will enable Venice to concentrate on her recovery.

..."

Further, at page 225, the therapist states:

"... I consider Venice's mental health concerns are due to work-related stress and these are in turn, significantly affecting her physical health concerns.

..."

30. There are a number of references in the medical records describing the distress experienced by the Claimant and all of these are described as having their origin in work-related stress. The Respondent will argue that these symptoms are a reaction to her work situation and not a long-term impairment but rather one from which she will recover when the work situation has been resolved.
31. I saw at first-hand the Claimant's inability to get through cross-examination without becoming very upset on several occasions. This had nothing to do with the manner of Mr Choudry's cross-examination, which was not particularly challenging. Indeed, he appeared to approach that cross-

examination in a very sympathetic way and immediately responded positively to my suggestion that the hearing might be adjourned to a later date.

32. It is perhaps unfortunate that there is no detailed medical opinion as to whether or not the Claimant will recover from her stress related symptoms once her work situation and this litigation is resolved. I am not qualified to give a medical opinion, but I must apply the law. But when there is some medical evidence available, I can consider it along with the Claimant's own evidence. In her impact statement at page 170, the Claimant only refers to depression and anxiety. She has received two courses of counselling but has not been given medication. She refers to having very low moods, suicidal thoughts, lack of sleep and feeling hopeless, nervous and tense. Her GP records at page 248 note the same answer to every one of the usual questions in relation to mental health issues such as having little interest or pleasure in doing things, feeling down, depressed, trouble sleeping, feeling tired, trouble concentrating and moving or speaking slowly.
33. I find that the Claimant genuinely found herself unable to cope with her work situation and that once this issue began with the clocking in system issues, it just got worse. All the evidence points to work-related and very acute stress. Stress is, of course, usually defined as a perceived inability to cope with a particular situation. In the Claimant's case this is work which, unsurprisingly, has carried on into these tribunal proceedings. On the balance of probabilities, and in the light of all the evidence before me, I do not find that the Claimant's stress remains a mere reaction to her workplace issue from which she will recover once those issues have been resolved. I find that her stress is a factor which, when considered in the light of her other conditions and the impact of stress on them, is a mental impairment which is long-term and adversely affects her ability to carry out normal day to day activities.
34. I do not reach the same conclusion in relation to anxiety and depression. There is simply a lack of any significant medical evidence to support the view that the Claimant is suffering from anxiety and depression. The evidence before me is that it is her stress which is affecting her normal day to day activities and no other condition. Of course, stress, anxiety and depression are often confused and there is certainly some overlap between them. There is, however, no formal diagnosis of depression and the overwhelming weight of evidence points, not to anxiety and depression, but stress.

Conclusion

35. For the above reasons, I find the Claimant to be disabled for the purposes of the EqA due to the conditions of colitis and stress but not chemo brain or urticaria.

Employment Judge M Butler

Date: 6 July 2023

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