



EMPLOYMENT TRIBUNALS

Claimant: Miss Bahar Rasti Nosrani

Respondent: Cygnet Health Care Limited

RECORD OF A PRELIMINARY HEARING

Heard at: East London Hearing Centre (by CVP)

On: 12 July 2023

Before: Employment Judge L Omambala

Representation

For the Claimant: In person

For the Respondent: Ms G Williams (Solicitor)

RESERVED JUDGMENT

- (1) *The Claimant is not a disabled person within the meaning of section 6 of the Equality Act 2010.*
- (2) *Accordingly, the Employment Tribunal does not have jurisdiction to hear the Claimant's complaints of unlawful disability discrimination and those claims are dismissed.*

REASONS

1. This was a preliminary hearing held by CVP on 12 July 2023 to decide whether the Claimant meets the definition of disability within the meaning of section 6 of the Equality Act 2010.
2. The issues to be determined at this preliminary hearing were identified by an Employment Tribunal on 23 January 2023 as follows: -
 - 2.1 Did the Claimant at the material time have physical impairments, namely Musculo-skeletal problem and chronic muscle pain?

- 2.2 If so, did the impairments have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- 2.3 If so, were the effects of the impairments long-term? In particular, when did it/they start and
- (a) has it/have they lasted for at least 12 months?
 - (b) Is/was the impairment likely to have lasted at least 12 months?
- 2.4 Were any measures taken to treat or correct the impairment? But for those measures, would the impairments have been likely to have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?

3. The Tribunal heard oral evidence from the Claimant. During the course of the hearing the Tribunal was referred to documents in an agreed bundle of 113 pages.

Background

4. The Claimant was engaged as a Mental Health Support Worker for the Respondent from 13 December 2021 to 23 February 2022. Her engagement was terminated with immediate effect during a probation review meeting.

5. The Claimant has Musculo-skeletal problems which she asserts amount to a disability for the purposes of section 6 of the Equality Act 2010.

Relevant Legal Framework

6. Section 6 of the Equality Act 2010 provides that:

- (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.

7. Tribunals should adopt a purposive approach to the interpretation of the legislation so as to give effect to the stated or presumed intention of Parliament. Regard should also be given to the ordinary and natural meaning of words.

8. When considering the requirement that a physical or mental impairment is substantial and long term the Tribunal must have regard to the statutory guidance on matters to be taken into account in determining questions related to the definition of disability which was issued in 2011 by the Secretary of State under the Equality Act 2010 where it appears to it to be relevant. The Guidance is not an authoritative statement of the law.

9. It is not always necessary for a Tribunal to identify a specific impairment if the existence of one can be established from the evidence of an adverse effect on the Claimant's abilities.

10. Appendix 1, paragraph 7 of the Equality and Human Rights Commission ("EHRC") Employment Code provides that a Claimant does not need to establish a medically diagnosed cause for their impairment. It is the effects of an impairment or condition that are important, not the cause.

11. Where a Claimant is relying on a number of potential conditions and it is unclear which might have led to the symptoms complained of, it is important that the Tribunal makes clear findings as to the nature of the disability and which symptoms are attributable to it.

12. Paragraph B6 of the EHRC guidance states that although a person may have more than one impairment, any one of which alone would not have a substantial adverse effect, account should be taken of the cumulative effect of the impairments and whether, taken together, they have a substantial effect on the Claimant's ability to carry out normal day to day activities.

Findings of Fact

13. The Claimant was diagnosed with a Functional Neurological Disorder ("FND") following a consultation with a Consultant Neurosurgeon on 8 November 2022, more than eight months after the end of her engagement.

14. The cause of FND is not known. Its symptoms vary from person to person. They can be long term or short-lived. They include arm and leg weakness. FND can be associated with fatigue and/or pain. FND occurs when there is a problem with how the brain is sending and receiving information to itself and other parts of the body.

15. The Claimant received her diagnosis after four years of suffering from intermittent symptoms which included muscle weakness, numbness, altered sensation in her hands, diffuse pain, anxiety, frustration and low mood.

16. The history which the Claimant reported to a Consultant Neurologist on 27 November 2018 following referral by her general practitioner is the most comprehensive description of her symptoms available to the Tribunal. The Tribunal places weight on it because, although it is an example of the Claimant self-reporting her symptoms, it precedes her engagement and subsequent dispute with the Respondent.

17. In November 2018, the Claimant complained of numbness involving both hands and all the fingers since May and June 2018. Her symptoms appeared at night but did not occur every night. They might occur for a few nights, disappear for a month and then return. She also reported episodes of severe muscle pain in both legs since July 2018 especially if she exercised or danced but sometimes even at rest. She described some pain in her lower spine and very occasional involuntary, intermittent movement of the head and neck. She reported that she has had neck pain since a whiplash injury in 2013

but distinguished it from the other symptoms she described. The Claimant also reported intermittent severe pain in muscles, precipitated by exercise.

18. By 13 December 2018, the Claimant continued to report numbness to her GP but did not report limb weakness. In January 2019 the same GP reported that the Claimant was complaining of intermittent “right flank pain” in the form of a low-grade ache which lasted five minutes and which she experienced most days of the week. The Claimant underwent an MRI scan and when she visited her GP practice on 17 April 2019, the same GP she had seen previously discussed the outcome of the scan. The GP recorded that the Claimant’s functional symptoms were due to anxiety and suggested a course of CBT or psychotherapy.

19. The Claimant returned to family in Iran from May to July and November to December 2020 and from January to March 2021 having caught Covid in January 2020. The Claimant provided an undated and unsigned manuscript note from an Iranian Neurologist who provided her with treatment whilst she was overseas. The Claimant was prescribed 1000mg of paracetamol if she was in severe pain and 2 x 20mg per day of an anti-depressant medication which she was reluctant to take. He stated that the Claimant was under his care from May 2020 to January 2022 and offered a diagnosis of fibromyalgia, noting that it is a condition that “can be quite debilitating.”

20. There are no other relevant entries in the Claimant’s disclosed GP records which predate her engagement with the Respondent.

21. On 27 January 2022, the Claimant saw a different GP and reported that she had neck pain and a headache as a result of physical training at work as a Mental Health Support worker. She had taken paracetamol which had eased her pain a little. Her GP advised rest, ice, compression and elevation (“RICE”). Overnight the Claimant called 111 and had a telephone consultation with a different GP on 28 January 2022, in which she reported pain in her right arm between shoulder and elbow which started after physical training at work two days earlier and also of sometimes feeling numb. The Claimant had a normal range of movements. She was advised to take simple analgesia and to keep movements gentle.

22. On 26 May 2022 the Claimant saw a different GP and relayed her history of numbness in both hands since 2018 and of muscle weakness and severe pains. She said no firm condition had been identified as the cause of her symptoms. The Claimant sought a further referral to a neurologist. She also explained that she was going through a “work tribunal” and wanted “supporting documents.”

23. The Claimant was seen by a Consultant Neurologist, Dr J Baker on 8 November 2022 who reported on 3 December 2022. Dr Baker noted that the Claimant was describing “very similar symptoms” to those reported in 2019 except then there appeared to be more asymmetrical with altered sensation, pain and weakness in predominantly her right hand. He records that since January 2022, the Claimant describes “constant neurological symptoms which have been quite disabling.” These included generalised pain in arms and legs, a constant sense of fatigue in her muscles, weakness and numbness affecting her hands and arms symmetrically and, on some occasions, finding it difficult to walk.

24. The Claimant declined to provide any further information about her symptoms when she was asked to do so in cross examination. She did tell the Tribunal that when she took up her role with the Respondent, she was not experiencing severe or significant symptoms. She also said that the last episode of severe pain she had experienced before the treatment she complains about, was in August 2021. At that time, she had daily symptoms of “quite severe pain” for about ten days and experienced intense muscle pain, spasms and numbness.

25. When her evidence was challenged, the Claimant was unwilling to engage in consideration of the detail of her case or to reflect on apparent inconsistencies in her evidence. Her evidence was unsatisfactory in some material respects and as a result the Tribunal has placed significant weight on the contemporaneous documents available to it, particularly those produced by those who are not party to the dispute.

26. Both parties have accused each other of altering and omitting important documents in ways which were self-serving. It is not necessary for me to resolve those peripheral disputes in addressing the question of the Tribunal’s jurisdiction to further consider this complaint.

Submissions

27. On behalf of the Respondent, Ms Williams submitted that the Claimant had failed to discharge the burden of proof which she bears. Her primary challenge was to the substantial adverse effect of any impairment on the Claimant’s normal day to day activities. She argued that any adverse effect demonstrated was not long term and at the material time i.e., February 2023 it was not likely to have lasted at least twelve months.

28. The Claimant explained that she had not exaggerated her symptoms and had explained them fully to the doctors who were treating her. She said the symptoms were intermittent and when at their worst she could not hold a baby for longer than a minute, or cycle for more than a few minutes. The Claimant considered that she fell within the protection of the Act.

Conclusions

29. *Did the Claimant at the material times have physical impairments, namely Musculo-skeletal problems and chronic muscle pain?*

The Claimant’s evidence about her health conditions was not always clear. However, her evidence to the Tribunal was that at the time that she commenced work for the Respondent she was not experiencing musculo-skeletal problems and chronic pain. That oral evidence is consistent with the disclosed, contemporaneous medical records which show no contact between the Claimant and her GP practice between April 2019 and January 2022.

Accordingly, the Tribunal has concluded that the Claimant has failed to prove that she had the physical impairments she relies on for the purpose of this claim at the material time, which is during the course of her engagement with the Respondent.

30. The Tribunal reminds itself that the Claimant's case is not predicated on a diagnosis of FND or fibromyalgia.

31. For completeness the Tribunal goes on to consider the other questions identified at the case management preliminary hearing.

Did the impairments have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?

32. A substantial effect is one which is more than minor or trivial. The Claimant's evidence was that she experienced musculo-skeletal issues and chronic muscle pain intermittently and with varying degrees of severity. At their most severe, the impairments could, as she alleges, cause the Claimant difficulty in managing her day-to-day activities. The Claimant has provided only vague and generic evidence about the substantial adverse effect on her normal day to day activities. She told the Tribunal that her impairments sometimes reduced her mobility and prevented her from carrying out tasks such as hoovering, lifting or carrying heavy bags or cooking without help. Aside from the evidence considered at §33 below, the Claimant provided no examples of occasions when her day-to-day activities had been adversely affected. Beyond this evidence there was no evidence that the Claimant was restricted in her working and personal life. There was no evidence from which the Tribunal could assess the extent to which environmental factors impacted on the Claimant's conditions.

33. On balance the Tribunal was satisfied that in August 2021 the Claimant experienced an episode of intense muscle pain and spasm and "quite severe" pain which was debilitating and affected her ability to carry out daily tasks for a period of about 10 days.

*Were the effects of the impairments long-term?
Did they last at least 12 months, or were they likely to last at least 12 months?
If not, were they likely to recur?*

34. The Tribunal considered the cumulative effect of each of the impairments since it was not in a position to relate particular adverse effects to particular impairments.

35. Reviewing the Claimant's oral and written evidence together with the documents before it, the Tribunal was prepared to accept that the impairments relied on by the Claimant may have had a substantial adverse effect on her normal day to day activities in the past. The only episode with such an effect of which the Tribunal had evidence was in August 2021. It had not lasted for at least twelve months nor was there evidence that it was likely to have lasted at least twelve months.

36. The Tribunal then considered the likelihood of that effect recurring, interpreting "likely" as meaning that it could well happen. It disregarded matters which happened after the time the alleged discrimination took place as irrelevant to the assessment of likelihood. The Tribunal had no evidence before it that, at the material time, the Claimant was likely to suffer a substantial adverse effect by reason of musculo-skeletal issues and chronic muscle pain that would last for twelve months or longer. In these circumstances it could not treat the substantial effect as continuing. There was also no

evidence before the Tribunal that the substantial adverse effects the Claimant described were likely to recur beyond twelve months after their first occurrence.

31. For these reasons the Tribunal concluded that the effects on the Claimant's ability to carry out normal day to day activities had not lasted at least twelve months at the time of the alleged discrimination. Further the Claimant has not produced evidence that at the time of the alleged discrimination the effects of the impairments were likely to have lasted at least twelve months or to recur. Accordingly, the Tribunal did not consider that they could properly be described as long term.

32. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: <https://www.gov.uk/appeal-employment-appeal-tribunal>

Employment Judge L Omambala KC
Dated: 13 July 2023