



EMPLOYMENT TRIBUNALS

Claimant: Ms L Patterson
Respondent: LADN Avelely Ltd t/a Angels Day Nursery
Heard at: East London Hearing Centre (by CVP)
On: 28 September 2023
Before: Employment Judge A Hook

Representation

For the Claimant: In person
For the Respondent: Mr S Joshi, counsel

RESERVED JUDGMENT

1. The claimant does not have the status of a disabled person within the meaning of Equality Act 2010 s. 10.
2. Therefore, all of the claimant's claims (direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment related to disability) are not well founded and are dismissed.
3. The final hearing listed for 29 May 2024 to 31 May 2024 and 4 June 2024 is vacated.

REASONS

1. The claimant was employed by the respondent as a nursery nurse from 29 November 2021 until 31 March 2022. She has brought a number of discrimination claims related to disability. The claims and issues are set out in the record of a preliminary hearing that took place before Employment Judge O'Rourke on 10 March 2023.

2. One of the issues that is disputed between the parties is whether the claimant had the status of a disabled person. The disability she relies on is having anxiety and depression.
3. On 3 July 2023 Employment Judge Gordon Walker ordered, following a consideration of the papers in the case, that a further preliminary hearing should be held to determine the issue of whether the claimant has the status of a disabled person. Having that status is a necessary requirement to bring the claims she has brought. If the claimant does not have the status of a disabled person then her claims cannot succeed. If she does have that status then her claims should move forward to a final hearing for the other disputed issues to be resolved.
4. The second preliminary hearing took place before me on 28 September 2023.

EVIDENCE

5. In the course of the hearing the Tribunal reviewed the documents provided by the parties to set out their cases. The Tribunal also heard evidence from the claimant and from two witnesses for the respondent, Carlie Marie Allen and Kelly Woodhall. The claimant and the respondent's two witnesses all provided witness statements and were asked questions at this hearing.
6. The Tribunal thanks the parties for preparing a bundle of documents for this hearing. I shall refer to certain documents in the bundle by page number.
7. The claimant commenced her claim with an ET1 form in which she says that she was claiming discrimination on grounds of disability and sought compensation. She attached a document to her ET1 which provides more detail about her claim. This is pages 14-15 in the bundle. In summary, it says:
 - a. She was signed off sick by her doctor for mental health problems in January 2022;
 - b. She would go home daily from work and breakdown emotionally, struggling to cope with pressure and stress she was feeling at work;
 - c. After a time, she was required to phone in and say she was too unwell for work rather than just send an email;
 - d. On 11 March 2022 she was visited at home by two senior staff members who proposed she return to work on limited hours and then return to full-time hours in due course but she could not swap to work in a room other than the toddler room which she said contributed to her stress;
 - e. Her mother was concerned for her;
 - f. She decided to resign effective from 31 March 2023;
 - g. The document then deals with her offer of a job at another nursery and issues over her reference from the respondent which do not impact on the matter before the Tribunal in this hearing.
8. The claimant's witness statement was before me at pages 79-81 in the bundle. It was in fact two documents: an untitled one-page document and a two-page

document headed “witness statement”. The claimant adopted them both as her evidence- in-chief for this hearing. These documents, in summary, say:

- a. She was “in a good place” mentally when she started working for the respondent but found it hard to settle into her new workplace;
 - b. She felt unsupported when she raised concerns and found it hard to get along with other staff;
 - c. She was anxious about Covid;
 - d. She would cry on coming home from work daily and felt sick physically and mentally, she would not eat, would struggle to sleep and saw no way out;
 - e. In January 2022 she saw her GP who signed her off work and prescribed antidepressant medication and CBT;
 - f. She had suffered mental health problems before, but gave no details of these;
 - g. Her medication was increased in February 2022 and again in March 2022;
 - h. She had CBT from January to September 2022;
 - i. She believes that if she had continued to work at the respondent’s nursery her mental health would have deteriorated further;
 - j. She describes further how she felt drained and sick, unable to sleep at night but sleeping in the day, feeling unable to leave her house, unable to do chores or socialise with anyone;
 - k. Her mental health was especially impacted by issues at work such as settling into the room she was allocated to work in, getting along with staff, feeling overworked and unsupported;
 - l. She suffers from OCD and Covid played a “big part” in her difficulties;
 - m. She was scared and referred to risks from germs from working with children.
9. The claimant was asked questions by counsel for the respondent. She agreed that in the seven weeks from when she started work before she went off sick she had worked in the toddler room for children aged 12-36 months. She agreed that she had expressed a wish to work with older children. She had not had a Covid vaccination. This was because she suffers from a number of allergies and she was unsure how these would be affected by the vaccine or what the vaccine’s side effects may be. She said she was worried about Covid being brought into the nursery.
10. The claimant was asked questions about a number of documents. She agreed she completed a pre-employment questionnaire (page 53 of the bundle) and did not mention having any mental health difficulties. She selected “no” in answer to whether she considered herself to have a disability. This was dated 29 November 2021.
11. There were some documents produced that had been created in connection with a benefits claim. These included a report from her GP which referred

(bundle page 68) to “depression Jan 2022”. The report mentioned (in the form of brief notes) that this was work related stress, there was tiredness and medication was prescribed.

12. I was shown a blank “patient health questionnaire and general anxiety disorder” document (bundle page 90) and a letter dated 23 September 2022 (page 75) discharging her from CBT sessions which noted that her scores on this questionnaire had improved from 23 and 10 to 10 and 8. There was no expert evidence before me to assist in the interpretation of the scores or what might be considered to indicate being unwell or being “normal” but it was agreed between the parties that these scores represented a meaningful improvement in the claimant’s mental health between January 2022 and September 2022.
13. The respondent called two witnesses.
14. Carie Marie Allen said in her statement that she is the deputy manager of the nursery where the claimant worked. The nursery has 11 staff and places for 60 children. Her statement says that when the claimant started she was a helpful member of the team and seemed to settle well. The claimant would often raise the challenge of dealing with the volume of nappy changes required in the toddler room. She wanted to move to the room for 3-5 year olds where they were far fewer children who wore nappies. The claimant would get upset about this issue.
15. There was also an issue over break timings. The claimant was allocated 11.30-12.30 for her lunchbreak which she was unhappy about. On one occasion the claimant was found lying on the floor behind a door crying and said her distress was about the issue of her lunchbreak time. She said in answer to a question from the Tribunal that this incident was shortly before Christmas and after a Covid-outbreak at the nursery in mid-December.
16. The claimant never referred, when speaking to the witness, to having any history of mental health problems. She did say that she was concerned about catching Covid and would get upset suddenly sometimes.
17. The witness was asked question by the claimant. She said she saw a change in the claimant in December when there was a Covid outbreak and a child attending the nursery whose family had Covid. The claimant seemed very worried about catching it and taking it home to her family. Other staff were unhappy about the claimant’s complaints about nappies and cleaning duties. The witness confirmed she had seen the claimant upset “a couple of times” and on other occasions seen her go to the nursery office. She would sometimes leave the room without telling colleagues and this was a problem because the usual ratio was one staff member per four toddlers with a total of 16 toddlers in the room. If one staff member left the room that made the number of children per staff member significantly greater.
18. The claimant had told the witness her anxiety was high due to Covid but not due to any other issues.
19. Kelly Woodhall’s statement says that she is the room lead for the toddler room where the claimant worked. She has known the claimant as a family friend for many years. She said the claimant seemed happy when she started working

at the nursery but things changed “when Covid hit us”. The claimant would also appear to become upset if she was corrected on the right way to do certain things. The claimant told colleagues that things were done differently at nurseries where she had worked previously. The claimant would tell Ms Woodhall that she felt picked on.

20. She said the claimant was concerned about Covid and did not like the fact that, by the time in question, Covid regulations permitted children to come to nursery even if a member of their family had Covid, which had not been the case earlier in the pandemic. The claimant would complain that other staff were not cleaning well enough and accuse staff of spreading Covid.
21. The claimant disclosed to the witness that she was having mental health problems and that she was planning to see her doctor.
22. This witness was also asked questions by the claimant. She said she recalled the claimant talking to her about anxiety and OCD but did not remember her referring to depression. She did not remember her ever being upset in front of the children but did see her upset at lunchtimes and recalled her leaving the room to go to the nursery office. No complaints were made about the claimant to the witness.

LIST OF ISSUES

23. The record of the preliminary hearing before Judge O'Rourke on 10 March 2023 includes a list of issues for all aspects of the claims brought by the claimant. This includes a list of factual matters concerning whether the claimant has the status of a disabled person that is necessary to pursue her claims:
 - 1.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
 - 1.1.1 Whether the Claimant had a physical or mental impairment. She asserts that she has the condition of anxiety and depression.
 - 1.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?
 - 1.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
 - 1.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
 - 1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

1.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

1.1.5.2 if not, were they likely to recur?

THE LAW

24. The list of issues above properly reflects the relevant law.
25. Section 6(1) of the Equality Act 2010 provides that a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
26. This definition is clarified by Schedule 1, Part 1 of that Act. Paragraph 2 of that Schedule says that “an impairment is long-term if it has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to last for the rest of the life of the person affected. However, 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.
27. Under paragraph 5 of the schedule, 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. “Measures” includes, in particular, medical treatment.
28. Statutory guidance has also been issued which the Tribunal must take account of. A link (webpage address) to this guidance was provided in the record of the previous preliminary hearing.
29. I shall summarise parts of the guidance that have relevance to this case.
30. Paragraphs A3-A8 of the guidance deal with the meaning of “impairment”. The word must be given its ordinary meaning. An impairment usually means an inability or reduced to ability to function. The guidance states that whether a person is disabled is generally to be determined by reference to the effect (or effects) than an impairment has on their ability to carry out normal day to day activities. Mental illnesses “such as depression” are listed (A5) as an example of an impairment from which a disability may arise.
31. It is unnecessary to consider how an impairment is caused (A7).
32. The meaning of “substantial” is addressed in part B of the guidance. It notes that a substantial effect is “more than minor or trivial” and the time taken by a person to carry out normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial (B2) and the way in which a person with an impairment carries out normal day-to-day activities (B3). Account must be taken of how far a person can reasonably be expected to modify their behaviour to cope with the effects of the impairment (B7)

33. As noted above the Act provides that medical treatments are to be disregarded for the purpose of assessing whether a person is disabled. The guidance says (B16) that account should be taken of where the effect of continuing medical treatment is to create and permanent or temporary improvement and cessation of any substantial adverse effect.
34. The meaning of “long-term” is addressed in part C of the guidance and notes that is where an impairment’s effect has lasted at least 12 months or is likely to last at least 12 months or likely to last for the rest of the life of the affected person.
35. It is important to note that here “likely” in this context does not mean, as it often does in legal proceedings, “more likely than not” or “at least 50%” probable. The guidance states that “likely” here “should be interpreted as meaning that it could well happen” (C3).
36. Paragraph C4 provides:

“In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).”
37. The meaning of “normal day-to-day activities” is addressed in section D of the guidance. An exhaustive list of activities is not provided but these are generally things people do on a regular basis both domestically and in relation to work (D2, D3).

THE PARTIES’ SUBMISSIONS

38. After the Tribunal heard the evidence, the parties made submissions.
39. The respondent, in summary, submitted that the burden of proof is on the claimant to establish she meets the test for disability and submitted that the evidence, in particular the documentary medical evidence indicates a single period of depression from January to March 2022 or January to September 2022. The mental health scores of the claimant dramatically improved. It was submitted that she has not shown there to be long-term effects on her day-to-day activities and no evidence of any recurrence. The respondent relied on the claimant having not mentioned anxiety or depression or any mental health issues in her medical questionnaire when her employment began. There was absolutely no medical evidence provided to the Tribunal of any previous episode. It was submitted that the burden of proof on the claimant was not discharged.
40. The respondent submitted that on the evidence the mental health problems of the claimant had not lasted for 12 months and there is no evidence that it was

likely to and certainly no evidence of a condition that will last for the rest of the claimant's life.

41. The respondent also provided written submissions which the Tribunal has had regard to, and which are reflected in the summary above.
42. The claimant also made submissions. She made a number of points (for example that she believed she had been discriminated against) which did not directly relate to the issue before the Tribunal today of whether or not she has a disability. With direction from the Tribunal she addressed the relevant matters. She submitted that she had shown evidence of her anxiety and depression. In relation to the effect on her day-to-day activities she asked the Tribunal to consider what is said in her statements and in the medical documentary evidence. She said that medication and CBT had made a big difference to her.
43. When invited to address the issue of how long she suffered with these for she said that she had an episode in 2018. She accepted this had not been mentioned in her evidence (neither her own evidence nor the documents from her doctor that were produced). She said she has evidence that she could provide. She offered no explanation for having not provided this material other than saying she had not understood that she ought to do so.
44. The Tribunal indicated it would not agree to adjourn to another day for a further hearing for her to produce evidence that was not put before the Tribunal today. In March 2023 Judge O'Rourke had made extensive orders at the telephone hearing which the claimant attended. He had ordered relevant documents to be disclosed in June 2023 and a bundle to be agreed and witness statements to be exchanged by 18 August 2023. The record of preliminary hearing produced from that hearing made it clear what the issues were, and that the claimant needed to provide material that she relied on. On 3 July 2023, Judge Gordon Walker made further orders. In addition to ordering this hearing to take place, Judge Gordon Walker made further orders that reiterated the orders made previously, in particular in relation to medical records to be relied up (see paragraph 6 of Judge Gordon Walker's orders set out in a letter from the Tribunal to the parties dated 3 July 2023).
45. The Tribunal had no doubt that the claimant was properly on notice that she needed to provide any medical evidence that she wished to rely on well ahead of this hearing (the date of the hearing having been given to her by writing on 8 July 2023) and there was no explanation for why the existence of evidence from 2018 was not mentioned until closing submissions.
46. Counsel for the respondent fairly pointed out that that adjourning to another day for further evidence to be provided would increase the respondent's costs and undermine their reasonable expectation that the hearing would be dealt with on this day. He indicated that if the case was adjourned for the claimant to supply further evidence, he would argue that amount to unreasonable conduct on the claimant's behalf, raising a possibility of costs being applied for against her.

47. I indicated to the claimant I could not, in all the circumstances, fairly adjourn to another day for her to provide further evidence and would reach a decision based on the material before the Tribunal at this hearing.

THE TRIBUNAL'S FINDINGS

48. I will set out findings of fact with reference to the list of issues.

Whether the Claimant had a physical or mental impairment. She asserts that she has the condition of anxiety and depression.

49. The statutory guidance referred to further above is clear that the word "impairment" must be given its ordinary meaning and this is an inability or reduced ability to function.
50. The claimant has given evidence that from December she was suffering from anxiety and depression and this was causing her to breakdown sometimes and work and frequently at home. This was corroborated by the medical notes that recorded she had depression from January (when she went to see her doctor) and was prescribed medication and treatment. The presence of anxiety and depression is also supported by how she was observed at work by the respondent's witnesses, especially the incident where she was seen laying on the floor crying.
51. I find that the claimant was suffering with anxiety and depression and this was an impairment to her.
52. The claimant indicated that her state of anxiety and depression was caused by Covid and working at the nursery although the guidance is clear that it is not necessary to show how the impairment was caused, only that an impairment existed.

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

53. The claimant gave evidence about the effects on her. She would cry and feel sick, she would struggle to eat and sleep, she said. She found herself unable to socialise with other people and it was difficult to even leave her home. She said that going to work became too distressing for her such that she went to her doctor who signed her as unfit to work in January 2022.
54. The claimant did not call any other witness (for example a family member) to corroborate what she said about the effects on her at home.
55. Carlie Marie Allen's evidence was that she had seen the claimant upset sometimes at work but aside from complaints she would make about some of the work required in the toddler room (nappies and cleaning) and that she would sometimes leave the toddler room she functioned satisfactorily at work. Kelly Woodhall's account was similar. She saw the claimant distressed at work and anxious about Covid and cleanliness but was able to function sufficiently most of the time at work.

56. Neither of the respondent's witnesses addressed, understandably, what the claimant was like at home after work and their contact with her was during working hours at the nursery.
57. It appears to me that on the claimant's account her anxiety and depression did have an adverse effect of her ability to carry out day-to-day activities. She says he could not eat or sleep properly, socialise or leave her home without becoming very distressed. Those things are normal day-to-day activities and the anxiety and depression she suffered either prevented her entirely from doing them or meant she could not do them without becoming very distressed.
58. It might have been desirable for the claimant to be able to call another witness to corroborate her account of how she was affected but the respondent was not able to contradict her account of how she was suffering at home. I have to make a finding based on the evidence actually before me and applying the standard of proof (the balance of probabilities). I find that the claimant probably was suffering the adverse effects she described.
59. The guidance says that "substantial" means more than minor or trivial. What the claimant described is, on any reasonable view, more than minor or trivial.

If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

60. I have found that the claimant's anxiety and depression from December to when her employment ended in March 2022 did have a substantial adverse effect on her ability to carry out day-to-day activities, so I do not need to consider this question.
61. This question does not therefore need to be addressed but I note that she began medical treatment in January (anti-depressant medication and CBT) but these had not, on the claimant's evidence, counteracted the claimant's impairment to the extent she could return to work by the end of March when she resigned.

Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

62. This question does not need to be addressed in light of my findings above.

Were the effects of the impairment long-term? The Tribunal will decide: did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur?

63. The claimant's account was that she "was in a good place" when she started work at the nursery at the end of November 2021 and, indeed, she had not alluded to any mental health issues on the health questionnaire she completed for the respondent. The weight of evidence points towards her becoming unwell in December. She was made anxious by the situation where children could come to nursery in spite of family members having Covid.

64. The claimant's role was necessarily hands on with toddlers including changing nappies and cleaning up after them. I have no difficulty accepting that the claimant genuinely feared that work of this nature necessarily exposed her to a certain risk of transmission of illness. The evidence was that in December there was a particular occasion when a child was attending nursery when members of his family had or had had Covid. The evidence is that this was somewhat triggering for the claimant's anxiety.
65. She went to the doctor in mid-January 2022 and her presentation was such that the doctor prescribed anti-depressant medication, CBT and certified her as unfit for work. The medication appears to have lasted until March and the CBT until September 2022.
66. The claimant answered certain questions about her mental state in January in September and although there was no expert evidence before me the parties were broadly agreed that the scores indicated a significant improvement in the claimant's mental health. Indeed, she was discharged from the clinic providing CBT.
67. The evidence therefore indicates a period of illness and treatment from December 2021 to September 2022. On the claimant's account this was triggered by Covid and working at the nursery (which she perceived to be a medically risky environment). It is perhaps to be expected that by September 2022, five months after her short period of employment at the nursery, Covid had somewhat receded, and she had received treatment that she would feel better.
68. December 2021 to September 2022 is obviously a period of less than 12 months.
69. The claimant's statements refer to struggling with mental health before but in the vaguest of ways with no real specifics provided about the nature and degree of problems she suffered and when. In closing submissions, she claimed to have suffered a previous episode of mental health problems in 2018 but had not referred to this in evidence.
70. The medical evidence provided makes no mention of any mental health problems before she saw her doctor in January 2022. In particular, the report prepared for the DWP by her doctor dates "depression" at January 2022 and under "history of conditions" appears to only refer to this episode of depression. In my view, it is very likely that a doctor preparing a report such as this would have mentioned any past history of this mental health condition if there was any known to him or on the patient's records.
71. The overall evidential picture is this episode of anxiety and depression December 2021 to September 2022 was certainly either the first such episode or the first or such substantial adverse effect. There is no evidence on which I could reasonably find that the impairment that arose in December 2021 pre-dated then.
72. I find that the claimant's condition lasted for less than 12 months. It was not likely to last for 12 months as it was, it appears from the evidence, effectively

treated and the particular circumstances that triggered it (working in a nurse's office at a severe point in the Covid pandemic when she was unvaccinated) were removed.

73. I have to consider whether the effects of the impairment are likely to recur. I find that they are not based on the evidence before me. The Covid pandemic was an unusual occurrence that is arguably unique in living memory. There is no comparable event in the UK's modern history where such a grave medical threat to the general population was perceived to be present, resulting in "lockdowns" and other major restrictions on normal life. The claimant did not invite me to consider that these events were likely to recur and I would not find that they are likely to recur unless presented with cogent evidence to that effect. Importantly, the claimant did not argue that the mental health crisis she suffered from December 2021 was likely to recur.
74. For these reasons, I am bound to find that the effects of her impairment were not long-term within the meaning of Equality Act 2010 s. 6.

CONCLUSION

75. In light of my finding that the claimant's condition was not long-term she is not disabled for the purposes of section 6 and in law the claims she had brought, of disability discrimination in various forms, cannot succeed in law.
76. The claims must be dismissed.
77. I would only add that the evidence is clear that the claimant was unwell in the period in question. I accept that she was genuinely anxious about Covid as someone who felt she could not have a Covid vaccine and working in the environment she was. The respondent did not suggest she had not been unwell and it was clear to the Tribunal from the respondents' witnesses that they were upset at seeing the claimant distressed at work.
78. It has been well documented in reputable public sources of information that the Covid pandemic was injurious to the mental health of many people, of whom the claimant is one.
79. The Tribunal wishes the claimant well for continued good health.

**Employment Judge A Hook
Date: 11 October 2023**