EMPLOYMENT TRIBUNALS

Claimant: Ms Amanda Alger

Respondent: Rentokil Initial UK Limited

Heard at: London South (Croydon**)** **On:** 30/10/2023 - 1/11/2023

Before: Employment Judge Wright
Ms J Clewlow
Ms N O'Hare

Representation:
Claimant: Mr M Reffell – case management representative

Respondent: Ms Y Barlay - consultant

REQUEST FOR WRITTEN REASONS

Oral judgment having been given on the 1/11/2023 and further to the respondent's request for written reasons on the 6/11/2023, these written reasons are provided.

WRITTEN REASONS

1. It was the unanimous Judgment of the Tribunal that the claimant's claims under the Equality Act 2010 (EQA) are not well founded, they therefore fail and are dismissed.

2. The claimant presented a claim form on 13/7/2021 following a period of early conciliation which started on 3/6/2021 and ended on 15/6/2021. The claimant was employed by the respondent as a Customer Delivery Representative. Her employment ended on 4/8/2023, however the circumstances of the termination are not matters before the Tribunal.

3. The Tribunal does not have jurisdiction over events which post-date the presentation of the claim. There has been no application to amend the claim.

4. A case management hearing took place on 2/12/2022 and that resulted in an agreed list of issues.

5. Under the Equality Act 2010 (EQA), the claimant claims the protected characteristics of disability (s.6). She relies upon the cumulative conditions of: Fibromyalgia; Psoriatic inflammatory arthritis and Chronic daily migraines. The prohibited conduct upon which she relies is a breach of the duty to make reasonable adjustments for disability (s.20 and s.21). The complaint is detriment (s.39(2)(d)).

6. The respondent accepted the claimant was disabled from 11/1/2023 (page 281). Furthermore, the respondent said that it accepted the claimant was a disabled person in respect of the conditions of Chronic Migraines, Fibromyalgia and Psoriatic Inflammatory Arthritis from the diagnosis of the conditions in 2017 and 2020. The respondent did not specify which condition was diagnosed and when. Save that, the Tribunal accepts the claimant was diagnosed with Fibromyalgia in 2017.

7. The Tribunal heard evidence from the claimant. For the respondent it heard from Ms Melanie Fendick (Service Centre Manager at Mitcham) and Mr Andrew McLaren (Area Operations Manager for London and the Southeast). The Tribunal found all witnesses to be credible and there was not a great deal of factual dispute.

8. There was a 289-page bundle and the claimant's 32-page starter pack was added at the start of the hearing. The Tribunal had a hard and electronic copies.

9. Submissions were heard and considered. The respondent submitted that it did not have knowledge of the claimant's disability.

10. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by the witnesses during the hearing, including the documents referred to by them and taking into account the Tribunal's assessment of the evidence.

11. Only relevant findings of fact pertaining to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

Findings of fact

12. The claimant's service centre was in Maidstone. Her evidence was that she visited the depot twice a week and that she organised her route ('calls') around her health issues. She had supportive line managers (Jane and Sandy), her colleagues would help her out if she was struggling, as would her customers.

13. In January 2021 a change of depot was discussed with the claimant. This was due to an acquisition by the respondent. The claimant was informed in writing on 9/3/2021 of the move to Mitcham (page 128). At the same time her salary was increased. The move took effect from 15/3/2021. The respondent's position was that the change was not material.

14. The claimant took issue with (on her case) the lack of consultation about this change and said that she objected to it at the time. She also complained about the lack of written information and said she never received the letter of the 9/3/2021.

15. Ultimately, these are not matters which concern the Tribunal. The respondent had the contractual right to change the claimant's depot upon reasonable notice in writing and the claimant acquiesced to the change and accepted the increase in salary.

16. On the claimant's own case, for the first week, she was still doing her own route and the same workload as per her Maidstone depot; and so there was no work or duties which she could not manage. The respondent did accept this changed in the second week.

17. On the 16/3/2021 it is agreed there was a discussion between the claimant, Ms Fendick and Lorna (her line manager). The claimant referred to her migraines and said that she did not have to service air products due to this. Ms Fendick and Lorna had no knowledge of this and so they moved to a meeting room to discuss it and the claimant disclosed her medical conditions and difficulties they caused her.

18. The outcome of this was that Ms Fendick removed from the claimant's route 'air care' (changing air fresheners which triggered her migraines).

19. The respondent had no record of the claimant's diagnosis of Fibromyalgia. When she first joined the respondent, on her Health Assessment Questionnaire, the claimant had only disclosed: migraines, asthma, arthritis and mental health problems. Her Fibromyalgia was not diagnosed until 2017. The claimant had updated the respondent with her diagnosis of Fibromyalgia, however this does not appear to have been formally recorded or noted.

20. The claimant also informed Ms Fendick and Lorna that on the Maidstone route she did not have to complete several aspects of her role, which included servicing soap units, climbing more than one flight of stairs and other weight related issues (such as lifting mats).

21. As a result of that conversation, besides the immediate and temporary removal of air care, Ms Fendick asked the claimant to obtain a fitness for work note from her GP detailing what she could and could not do. This was intended to facilitate an Occupational Health (OH) assessment and it reflected that the respondent (or more properly the Mitcham depot) had no other record of formal changes being agreed to the claimant's role.

22. The Tribunal pauses here to consider the respondent's knowledge of the claimant's conditions. Information was diagnosed on the claimant's original Health Assessment Questionnaire, however, she had answered 'no' to the following questions:

> 'Do you have any illness/impairment/disability (physical or psychological) which may affect your work?
>
> Do you think you may need any adjustments or assistance to help you do the job?

23. It appears there was *ad hoc* or informal arrangements made at the Maidstone depot, however there was nothing to alert the respondent and to put it on notice that the claimant was struggling to perform day-to-day tasks. The simple reason was that she was managing and did manage (apart from one period of absence in January/February 2020) to perform her role. That is to her credit. Whilst it may be the case that the respondent now accepts the claimant was disabled at the relevant time, it denies that it had knowledge of the disability/ies.

24. What did the respondent know about the claimant's conditions in March 2021? The Maidstone depot knew of her diagnosis of Fibromyalgia and she had had one period of absence due to that condition in early 2020. That is not enough for that condition to amount to a disability under s.6 EQA. It was accepted or agreed that the claimant's route would only focus on Feminine Hygiene Units (FHUs), rather than on the Mat/Roll routes and Air Care routes. The claimant however did perform the Mat/Roll and Air Care routes on

Saturdays when doing overtime and on an *ad hoc* basis. From the respondent's viewpoint, the claimant had a preferred route which was mainly FHUs, but not exclusively so.

25. The respondent also had the knowledge of the other conditions disclosed by the claimant in her Health Assessment Questionnaire, however, the fact of these conditions or the diagnosis of Fibromyalgia in 2017 are not enough to put it on notice of the claimant being disabled for the purposes of the EQA.

26. The claimant was not happy about the move to Mitcham. She felt aggrieved that there had been no consultation and she said she did not receive formal notification of the move. On the respondent's case, she was abrasive and demanding.

27. The net result of that is that once she was working on the revised route, she was unhappy about it and about the physical requirements of the new role. She had already raised this with with Ms Fendick. Ms Fendick must have been aware of the claimant's dissatisfaction with the move and the new route; she, quite rightly, wanted to do things properly and formally. The most straight-forward way of doing that pending a referral to OH was to ask the claimant to produce a GP fitness for work certificate (a MED 3).

28. If what the claimant said was correct, then her GP would know of her diagnosis and could be expected to confirm that she was fit for work, with some adjustments and to say what those adjustments were. For example, to say the claimant is fit for work, but should not lift more than 5kg and not walk up more than one flight of stairs. This would then give Ms Fendick some basis to adjust the role, pending a referral to OH.

29. The Tribunal finds the claimant was not disabled as per the EQA at this point in time. All the respondent had been notified of, was the conditions disclosed prior to employment beginning, the claimant stating that she did not consider herself to be disabled and the claimant confirming a diagnosis of Fibromyalgia in 2017. Fibromyalgia is not a deemed disability.

30. The respondent had no knowledge of any difficulties the claimant was experiencing at home (such as the example given later by the claimant of not being able to lift shopping from her car or to hanging out washing). Apart from the informal adjustments to the claimant's role, such as her mainly focusing on FHUs, the claimant presented as fit and able to perform her role, including working overtime (which included the aspects of the role she said she struggled to perform).

31. All that had happened at this point in time, was that the claimant had indicated there were aspects of the new route she was physically struggling with. The

respondent did not have knowledge of any disability per the EQA and there was no duty upon the respondent to make reasonable adjustments.

32. Any reasonable employer would look to make adjustments if an employee was struggling with aspects of their role, whether or not they were or claimed to be disabled; and the respondent was taking that step by asking for a GP fitness for work note. If Ms Fendick unilaterally adjusted the claimant's role based on the claimant's say-so, then she risked not only other employees making the same request (but possibly without a formal diagnosis of a condition which affected their ability to physically perform the role); but also she may fail in her duty to other employees who may have a different disability, who also needed their role to be adjusted.

33. Notwithstanding Ms Fendick had removed air care from the claimant's route on the 16/3/2021, the claimant said that she began to experience symptoms of a severe migraine on Wednesday 24/3/2021 (the following week). The claimant was unfit for work on the 25/3/2021. The respondent recorded the reason for absence as gastrointestinal issues. According to her medical records, the claimant consulted her GP on 25/3/2021, which recorded (page 239):

Problem	Stress at work *(First)*
History	job has been changed so that it is now much heavier and confrontational - the stress has exacerbated her migraines and her fibromyalgia, so that she is exhausted and can no longer cope she has complained to management, but they say that she has to accept the job as it Is - ?belng set up for constructive dismissal
Document	eMED3 (2010) new statement issued, not fit for work 1 Fit Note Document (Diagnosis: Stress at work due to changing the nature of th...; Duration 25-Mar-2021 - 26-Apr-2021)
Comment	advise having a break from work and seeking support from Occupational Health/Union/CItlzens' Advice

34. The claimant did not ask her GP or produce a fit note dealing with the work related issues which Ms Fendick had asked her to provide at the meeting on the 16/3/2021. It could be considered that events were then overtaken by the claimant's subsequent illness, however from Ms Fendick's point of view, the lack of input from the claimant's GP then hampered her progressing the matter.

35. Unfortunately, there was then a breakdown in communication. Ms Fendick said she contacted the claimant via telephone, but the claimant did not answer any calls. She then invited the claimant via her work email to two welfare meetings on the 11/5/2021 (page 131) and 19/5/2021 (page 134), but

the claimant did not attend and did not respond to the correspondence. The claimant said that this contact was via her work telephone, which she had switched off.

36. The next interaction was on the 3/6/2021 when the claimant's representative sent a 'letter before action' (it was headed 'notice of claim') to the respondent's HR Manager (page 25). This was a four-page assertive letter. It stated that the claimant's medical conditions amounted to disabilities for the purposes of s.6 EQA.

37. The letter conceded the claimant was informed of the move to Mitcham in around February 2021. It is also the claimant's own case, as per the letter, that her Manager did call and speak to her, when she was first absent through ill-health, to ask how long the absence would last.

38. The letter also asserted there had been a failure to consult the claimant under the Transfer of Undertakings (Protection of Employment) Regulations 2006. A claim which has not been pursued. It also set out:

> 'In light of the above; we assert the Company has unlawfully discriminated against our client by:
>
> - failing to hold open or maintain her previous position duties whilst her disabilities were assessed and/or to alter the duties of her existing post, contrary to the Equality Act 2010, ss 20(3), 21, 39(5), and Sch 8 paras 2(3) and 5(1);
>
> - failing to offer our client an alternative post within the remit of her health limitations, which would itself have been a reasonable adjustment, contrary to the Equality Act 2010, ss 20(3), 21, 39(5), and Sch 8 paras 2(3) and 5(1);
>
> - failing to make reasonable adjustments to the duties of her new position, contrary to Equality Act 2010, ss 20(3), 21, 39(5), and Sch 8 paras 2(3) and 5(1).'

39. The letter went onto state that Acas early conciliation had commenced. Notwithstanding any time limits which applied under the EQA, this is a hostile stance to take in respect of an employee who remained employed, who wished to return to work and who had not instigated any internal formal process, such as raising a grievance.

40. In any event, the respondent's HR Manager responded on the 21/6/2021 (page 29) (the email refers to pervious emails sent to the claimant's representative, however they were not in the bundle).

41. The HR Manager's investigations were reported as:

> 'Her Team Leader has confirmed that Ms Alger's route was predominantly FHU with the odd customer that had a mat or a HAC on it due to access timings. The Team Leader has also advised that Ms Alger on occasion did cover other routes which did have mats and HAC on them.
>
> The Team Leader has also advised that they tried to keep them as separate areas due to Ms Alger advising them that she suffered from Migraines and if she did too much airfresh it would set off her migraines.'

42. The email went onto state that the claimant had verbally informed her line manager of the diagnosis 'a couple of years' after her employment commenced, but commented that she had not stated that she needed any support, such as assistance with lifting. It was asserted the claimant was informed of the change in depot verbally on the 15/1/2021. The conclusion was that although the claimant had informed her manager of her diagnosis of Fibromyalgia, she had not stated that her condition caused any difficulties in the working environment and as such, the respondent had not (up until Ms Fendick was informed) made a referral to OH as it was not necessary to do so. The letter concluded by stating that the way forward was for the claimant to attend the welfare meeting, in order that her needs could be discussed and she could be referred to OH in order that the respondent could consider that advice, adjustments needed and to facilitate her return to work. The email referred to the respondent's Employee Assistance Programme.

43. In concluding and denying any procedural failings on the respondent's part, the email ended:

> - 'Ms Alger's condition of Fibromyalgia was known to her previous Team Leader, however there were never any concerns raised by Ms Alger with regards to her ability to carry out her role due to this condition. If this had been raised then a referral to occupational health would have been arranged so the Company could gain advice on how best to support her.
>
> - Ms Alger reported to the new branch for 8 days before going absent and since then has not engaged with any communication attempts and also failed to attend two welfare meetings that have been arranged. Therefore the opportunity to reconsider redeployment to an alternative role or making adjustments to her current role have not been possible. Following a welfare meeting the next step would be a referral to occupational health, if it was deemed that it was needed and Ms Alger's failure to engage with our processes means we have been unable to gain any medical information so that we could consider any reasonable adjustments to her role.'

44. On the 26/7/2021 Ms Fendick confirmed arrangements made for a welfare meeting to take place on the 28/7/2021 (page 137). She also referred to the Employee Assistance Programme.

45. The claimant's claim had however been presented by the 13/7/2021. Any events after that date post-dated the presentation of the claim and are therefore outside the jurisdiction which arises under this claim.

46. The claimant was certified as unfit for work by her GP from the 25/3/2021 for one month, due to 'stress at work due to the changing nature of th…..' (page 239). The claimant began to feel unwell on the 24/3/2021. She called in as unfit for work on the morning of the 24/3/2021. She obtained a GP appointment on the 25/3/2021. It is considered that she could have consulted her GP and obtained the note Ms Fendick requested, between the 16/3/2021 and becoming ill. Furthermore, she could have asked her GP for their view on any restrictions which may have applied to her when she was fit for work; as per Ms Fendick's request. Thereafter, for one month from the 26/4/2021 she was certified as unfit for work due to stress at work (page 239); for one month from 26/5/2021 due to stress at work (page 238) and for four weeks from 22/6/2021 due to stress at work (page 238).

47. At the point the claimant's claim was presented, she was unfit for work and had been certified as such by her GP since 25/3/2021 due to stress at work. She was not absent due to any of the conditions which amounted to her disability.

The Law

48. Under s.6 EQA the definition of disability provides:

> (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.

49. The claimant asserts the respondent failed in its duty to make reasonable adjustments under s.20 and s.21 EQA:

> 20 Duty to make adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

50. Schedule 8 of the EQA provides:

Work: reasonable adjustments

Part 1

Introductory

Preliminary

1 This Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part of this Act.

…

Part 3

Limitations on the duty

Lack of knowledge of disability, etc.

20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) …;

(b) in any case referred to in Part 2 of this Schedule that an interested disabled person **has a disability and is likely to be placed at the disadvantage** referred to in the first, second or third requirement.

[emphasis added]

51. S.136 EQA provides:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
…

(6) A reference to the court includes a reference to-

(a) an employment tribunal;…

Conclusions

52. The respondent was not on notice of any potential disability until the meeting between the claimant and Ms Fendick on the 16/3/2021. At that stage, the claimant informed Ms Fendick of her diagnosis and the difficulties it was causing her at work. The claimant was still working under the route as per that agreed with Maidstone and so, she was anticipating difficulties in respect of the new route, to commence the following week. As per the claimant's evidence, there were no difficulties in the first week.

53. Ms Fendick agreed on the 16/3/2021 to remove the air care aspect of the new route, yet despite this, the claimant said she was getting symptoms of a migraine on the 24/3/2021 (by default, this must have been triggered by something other then the air care products).

54. The respondent was not informed what the specific physical problem actually was for the claimant once the new route started (and the Tribunal was never specifically informed what aspect of the route cause the claimant difficulties; for example, it was not informed that on day six, the claimant visited X's premises and discovered the 'call' involved three flights of stairs and there was no lift). The Tribunal finds that at this stage, the respondent was taking appropriate action in order to comply with its duties under the EQA, however it is not accepted that it had knowledge of an actual disability. All it was aware of was potential difficulties which the claimant envisaged.

55. Ms Fendick had instantly asked the claimant for the most immediate source of information, which was a GP's statement of fitness for work and to confirm suggested adjustments. The claimant consulted her GP on the 25/3/2021, but did not request the same.

56. The respondent had attempted to arrange two welfare meetings, to discuss in more detail what physical aspects of the role were causing the claimant difficulties.

57. When the claimant's representative wrote to the respondent's HR Manager on the 3/6/2021 and made assertions about the claimant being disabled, the respondent replied and confirmed the process and way forward; which would be for the claimant to attend the welfare meeting, following which the respondent would refer her to OH.

58. Although there was not an immediate adjustment put in place (save for the removal of the air care products), the respondent was taking steps to put in place adjustments, based upon medical advice. There cannot therefore have been a failure of the respondent to comply with its duties under the EQA. It was following its processes in order to comply with its duties.

59. As such, the claimant's claim is not well-founded, it fails and is dismissed.

Employment Judge Wright

8 November 2023