



EMPLOYMENT TRIBUNALS

Claimant: Ms Julie Stacey
1st Respondent: MSI Reproductive Choices
2nd Respondent: Nicola Moore
3rd Respondent: Richard Bentley

DECISION FOLLOWING A PRELIMINARY HEARING

Heard at: London Central in public by video **On:** 15 November 2023

Before: Tribunal Judge Plowright

Appearances

For the claimant: Mr A Philpott, Counsel
For the respondents: Mr S Keen, Counsel

DECISION ON DISABILITY

The claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 at the relevant times, by reason of Long COVID.

REASONS

Claims and Issues

1. By a first claim presented on 14 July 2022, the claimant brought complaints of disability discrimination, whistleblowing and health and safety detriment, and other payments. By a second claim presented on 14 October 2022, the claimant brought a further complaint of victimisation. By a third claim presented on 23 January 2023, the claimant brought a complaint of unfair dismissal and automatic unfair dismissal (whistleblowing) and further complaints of disability discrimination. The respondents resist these claims.

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2. Preliminary hearings have been heard on 01 and 08 June 2023 and 25 July 2023. At the hearing on 25 July 2023, the claimant withdrew the complaints of health and safety detriment and indirect discrimination.
3. At the hearing on 25 July 2023, the Judge also listed the case for a preliminary hearing in public to determine the following issue:

“Whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 at the relevant times, by reason of Long COVID?”

Procedure, documents and evidence heard

4. In terms of documentation, I had before me the following documents:
 - Preliminary Hearing Bundle of 432 pages and Index
 - Witness Statement of Julie Stacey dated 31/10/23
 - Witness Statement of Nichola Dowell dated 30/10/23
 - Authorities of Chacon Navas v Eurest SA (ECJ) [2007] ICR, Boyle v SCA Packaging Ltd [2009] ICR, The Guinness Partnership v Mr P Szymoniak UKEAT/0065/17/DA,
 - Employment Tribunal decision of Burke v Turning Point Scotland
 - Letter from the claimant to Simon Cooke dated 01/04/23
 - Email from the claimant to the respondent’s solicitor dated 27/10/23
 - Skeleton Argument for the Claimant
 - Skeleton Argument for the Respondent
5. I heard evidence from the claimant and Ms N Dowell. After their evidence both Counsel made submissions.
6. At the end of the hearing, I reserved my decision. In reaching my findings, I have taken account of all the evidence before me and the submissions made by both Counsel.

The Facts

7. The claimant’s employment with the first respondent commenced on 4 June 2007 until she was dismissed on 28 October 2022. She was most recently engaged as Head of Ultrasound Services and Assessor.
8. On 02 November 2020, the claimant contracted COVID. On the same date the claimant was issued with a fit note which made reference to ‘cough’.
9. On 09 November 2020, the claimant was admitted to hospital as a consequence of contracting COVID and was discharged on 16 November 2020.
10. On 13 November 2020, the claimant was issued with a fit note which made reference to ‘Lower respiratory tract infection – COVID 19’.
11. On 23 November 2020, the claimant was issued with a fit note which made reference to ‘Coronavirus infection’.

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12. The claimant's GP records show that throughout November 2020 and December 2020, she was suffering from the effects of COVID. In particular, she was struggling with fatigue. She also went for various medical tests.
13. On 04 January 2021, the claimant returned to work.
14. On 13 May 2021, the claimant's GP records identify the problem as 'Post-COVID-19 syndrome'. The history is recorded as 'Long COVID symptoms since November'. At this point in time the claimant is referred to the Long COVID clinic. In the referral form, under the heading 'Presenting Problem', the following is written:

'Recurrent pneumonia (3rd episode this year), Hair loss, tiredness and breathlessness'

15. On 25 October 2021, following her appointment at a Long COVID clinic, the claimant, was issued with a letter which stated the following:

"I reviewed this patient in a BLIS clinic appointment with my GP colleague Dr Collins. She had a one week hospital admission in November 2020 due to COVID. She was treated with CPAP and her main symptoms include shortness of breath, lethargy, reduced appetite and nausea. She has since been followed up in our 12 week COVID clinic where she completed normal lung function. She had a 6 minute walk test which showed ongoing exertional desaturation. She has since had a repeat CT scan and her chest shows no PE and an improvement in her inflammatory changes. She reports current symptoms of ongoing fatigue, brain fog, shortness of breath mostly on exertion and joint pain. She does not have any joint swelling or morning stiffness in her joints. She does acknowledge previous spinal injury that contributes to some of her pain. Overall she feels her symptoms have improved since November last year. She takes over the counter medication to improve her vitamin D levels. She has returned to working full time in a private ultrasound department as a manager, and does some of this from home. She is living with her daughter who she supports with her learning disabilities. She manages to walk her dog regularly.

Today we discussed the following:

1. *Information regarding long COVID.*
2. *Fatigue management advice.*
3. *The long COVID workbook and Pain Speaks podcast particularly around the topic of brain fog.*
4. *Utilising the charitable partnership with Nirvana Spa*

..."

16. On 03 February 2022, the second respondent (Nicola Moore) emailed the claimant stating the following:

"...As shared by you today, you continue to suffer from long COVID, which has left you with ongoing tiredness, cough, and breathlessness."

17. On 08 March 2022 the claimant was absent from work until 15 March 2022 due to a chest infection.

18. On 15 March 2022, the second respondent (Nicola Moore) had a meeting with the claimant and noticed that she was breathless and unable to speak. The second respondent asked her not to speak, rather to sit calmly for a few minutes to catch her breath. The claimant did this and the second respondent then asked her how she was. She stated that she was tired and that she gets home exhausted.
19. On or about 16 March 2022, the claimant took sick leave until 04 July 2022.
20. On 18 March 2022, the claimant was issued with a fit note which made reference to 'Stress'.
21. On 23 March 2022, the claimant emailed the second respondent (Nicola Moore) in which she stated the following:

"...Tuesday 15th March was the first time we had a face-to-face conversation around my Long COVID..."

...

I returned to work on Monday 4th January 2023, informing Betty Njugina of my long COVID diagnosis – explaining to her that I can become tired and breathless on exertion..."

...

To date I have not been off sick with anything related to long COVID, although I have had 4 days sick with a chest infection from 8 – 11th March, returning to work in Hillingdon on 14th March 2022.

...

On 15th March 2022 you invited me to speak with you whereupon we discussed my diagnosis for long-COVID – I was open and honest with you, informing you that I get breathless and tired, this wasn't something that I could hide as I'd just walked up several flights of stairs to get to the office where you were working that day..."

22. On 04 April 2022, the claimant was issued with a fit note which made reference to 'Stress-related problem'.
23. On 31 May 2022, the claimant was issued with a fit note which made reference to 'Stress-related problem'.
24. On 06 June 2022, the claimant had a telephone assessment with an Occupational Health Physician who wrote a letter on 09 June 2022 stating the following:

"...

Ms Stacey states that she suffers from work-related stress. She tells me that in March 2022, the management told her to take time off from work due to long COVID symptoms. She states that she had a COVID infection in November 2020 and has suffered from tiredness and shortness of breath. She has had several investigations, including lung scans which are all normal. Despite having long COVID symptoms, she worked and continued to perform for 15 months until March 2022. She states that she does not understand why the management has deemed her unfit to work suddenly. She states that she worked full-time without any adjustments despite having long COVID symptoms. She tells me that she has suffered from work-related stress since March and was signed off by her GP.

...

In terms of functionality, she lives with her daughter and manages her day-to-day routine without any problems. She has been driving without having any problems recently. She states that she feels slightly short of breath on exertion and tired at the end of the day.

The above is reported by Ms Stacey, and I cannot confirm the veracity or otherwise of the comments made.

Long COVID can have unusual patterns, relapses, phases with new, sometimes bizarre symptoms, and can last for a long time. However, most people with long COVID symptoms have returned to work with adjustments and support.

Opinion and Outcome

In my opinion, based on the assessment and the information given to me by Ms Stacey, the barrier to a return to work in her case seems to be more related to perceived workplace concerns rather than a primary medical problem. She has stated a number of workplace issues that she feels have contributed to the development of stress. If such concerns can be resolved through constructive dialogue, then the prognosis for a successful return to work will be greater.

Answers to Specific Questions

...

4. Are they likely to be covered by the Equality Act?

The decision as to whether disability legislation applies is essentially a decision for an employment tribunal; however, in my opinion, the Equality Act 2010 is likely to apply.

..."

25. On 24 August 2023, the claimant spoke with Dr Catherine Yeo, who wrote a letter stating the following:

"...It is obvious from our conversation today, that as a result of COVID infection, Miss Stacey continues to suffer with symptoms of Long-COVID and it is the overwhelming fatigue which has undermined both her quality of life and her ability to pursue the activities she was enjoying pre-COVID. She also suffers with joint pain and brain fog which are attributed to her COVID infection/Long-COVID."

26. The claimant gave evidence regarding her claimed disability of long COVID. She relied upon her disability impact witness statement dated 29 August 2023 and a further witness statement dated 31 October 2023.

27. In her disability impact statement, the claimant describes the effect of the impairment on her day to day activities as follows:

- Walking the dog shortened considerably whereas she would take the dog on long walks previously;
- Taking a chair to sit down when going to craft and antique fayres owing to the debilitating effects of the fatigue;
- Unable to enjoy time with her friends as she once did owing to tiredness;
- Daily routines such as washing and dressing taking longer;

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- Reading and writing done in short bursts because of reduced concentration levels;
 - Inability to drive herself around the country;
 - Getting tired and having to rest when gardening;
 - Suffering from brain fog and an inability to function some days;
 - Having to write everything down at work owing to brain fog;
 - Whilst at work, having to rest in her car or find a quiet place to sleep in the clinic;
 - Significant hair loss;
 - No longer able to do general household cleaning owing to fatigue.
28. The claimant was cross-examined about these effects. It was suggested to her that the extent of these symptoms was not consistent with the medical evidence that had been provided and that she was exaggerating her claims. It was pointed out that she returned to work in January 2021 and although she was off sick with chest infections and stress, she never took any time off owing to long COVID. It was also pointed out to her that although she had consulted her GP over numerous issues, she had not made further complaints relating to long COVID. The claimant's evidence was that she had been diagnosed with long COVID, there was nothing that the doctors could do and that she had to learn to live with it. She self-managed the effects of COVID, namely fatigue and brain fog, predominantly by taking naps whilst at work and note taking.
29. Nichola Dowell gave evidence. She was based at the Central London clinic from June 2022 and the claimant was there approximately twice a week from September 2022. Ms Dowell stated that that she did not see the claimant sleeping or taking notes at work. However, Ms Dowell agreed that she was only in the same building as the claimant on approximately six occasions and she acknowledged that she was not monitoring the claimant at all times when she was at work.
30. I find that the claimant's evidence is consistent with the documentary evidence before me, both in terms of the medical documentation and the email correspondence. The documentation shows a history of the claimant self-reporting the effects of long COVID.
31. The claimant contracted COVID in November 2020 and on 13 May 2021 she was referred to the long COVID clinic when she was displaying the effects of long COVID, hair loss tiredness and breathless. There was some discussion as to whether hair loss was a symptom of long COVID. I find that it is a symptom of long COVID. In the 'Worker's experiences of long COVID – A TUC report', hair loss is identified as a symptom of long COVID. Furthermore, the document 'NHS inform – Long-term effects of COVID- 19 (long COVID)' identifies hair loss as a symptom of long COVID.
32. On 25 October 2021, the claimant went to the long COVID clinic and her main symptoms included shortness of breath, lethargy, reduced appetite and nausea.
33. Between February 2022 and March 2022, there was email correspondence between the claimant and the second respondent (Nicola Moore) in which the claimant's long COVID and the impact it was having on the claimant was discussed.

34. In June 2022, the claimant was seen by an Occupational Health Physician when she reported that she had long COVID.
35. On 24 August 2023, the claimant had a conversation with Dr Catherine Yeo, who then wrote a letter stating that the claimant continues to suffer with symptoms of Long-COVID. Although it was pointed out that the doctor's opinion was based on the self-reporting symptoms of the claimant, these are symptoms that the claimant has been self-reporting since November 2020.
36. I had the benefit of hearing oral evidence from the claimant and I found her to be an honest and reliable witness. She gave measured evidence and was not prone to exaggeration in her answers. Her oral evidence is consistent with the documentary evidence and I find that she has accurately reported her symptoms and the effects that her symptoms have had on her day to day to day activities.

The Law

Disability

37. Section 6(1) of the Equality Act 2010 read as follows:

- (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**...*

38. Section 212 Equality Act 2010 defines "substantial" as being more than minor or trivial.
39. Para. 12 of Schedule 1 of the Equality Act 2010 provides that when determining whether a person is disabled, the Tribunal "must take account of such guidance as it thinks is relevant." **The "Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability"** (May 2011) (the "Guidance") was issued by the Secretary of State pursuant to s. 6(5) of the EA 2010.
40. The Guidance sets out a number of factors to consider including: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3] and the cumulative effects of an impairment [B4].
41. The Guidance provides the following examples of what is meant by "normal day to day activities" at [D3]:

"In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities..."
42. Schedule 1, part 1, para. 2 of the Equality Act 2010 defines "long-term" as follows:
 - (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.

43. In **Goodwin v Patent Office [1999] I.C.R. 302**, Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of the Disability Discrimination Act 1995. Morison J set out four questions to be answered by the Tribunal in order. This four-stage approach was approved more recently by the Court of Appeal in **Sullivan v Bury Street Capital Limited [2021] EWCA Civ 1694**, where Singh LJ listed the questions as:

- Was there an impairment? (the ‘impairment condition’);
- What were its adverse effects [on normal day-to-day activities]? (the ‘adverse effect condition’);
- Were they more than minor or trivial? (the ‘substantial condition’);
- Was there a real possibility that they would continue for more than 12 months? (the ‘long-term condition’).

44. Singh LJ emphasised that these are questions for the Tribunal; although it may be assisted by medical evidence, it is not bound by any opinion expressed.

45. Underhill J (President) in **J v DLA Piper UK LLP 2010 WL 2131720** suggested (para [40]) that although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, as recommended in **Goodwin**, there will generally be no need to actually consider the ‘impairment condition’ in detail:

“In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant’s ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues.”

46. In **Goodwin** Morison J warned of the risk of “disaggregating” the 4 questions – i.e. whilst they can be addressed separately, it is important not to forget the purpose of the legislation, and to look at the overall picture. This warning was emphasised by HHJ Tayler more recently in **Mr A Elliot v Dorset County Council, UKEAT/0197/20/LA**. He also held that the focus is on what a disabled person cannot do or can only do with difficulty, rather than on the things that the person can do.

47. The relevant point in time to be looked at by the Tribunal when evaluating whether the claimant is disabled under s. 6 is not the date of the hearing, but the time of the alleged discriminatory act: **Cruickshank v Vaw Motorcast Ltd [2002] I.C.R. 729**.

Conclusions

Does the claimant have a physical impairment

48. The respondent submits that although the claimant suffered from a sickness, namely COVID in November 2020 and that the effects may have lingered for a time, she is not suffering from long COVID and further or alternatively does not have any physical impairment as a result of long COVID. Any issues that she may have such as shortness of breath cannot be attributed to long COVID. However, as I have already found, the claimant is not exaggerating her symptoms and she is suffering from long COVID. Whilst the claimant has experienced a variety of symptoms, I find that she has, in particular, been suffering from fatigue, breathlessness and brain fog and these do amount to physical impairments.

Do the impairments have an adverse effect on the Claimant's ability to carry out normal day-to-day activities?

15. The respondent submits that even if she does have any impairments, these have not affected her day-to-day activities. The respondent argues that many of the claimant's complaints, such as long walks of 17 miles or driving around the country, do not amount to normal day-to-day activities.
16. However, on the findings I have made, I conclude that the claimant's impairments have had an adverse effect on her ability to carry out normal day-to-day activities. She cannot walk as far as she used, she gets more tired, she regularly gets breathless, she gets brain fog and cannot remember things, she cannot socialise as much as she used to and she cannot do her own housework. Walking, socialising, remembering things and housework are normal day-to-day activities and as a result of long COVID, the claimant cannot do these things in the way that she used to.

Is that effect substantial?

17. The effect of her impairments is substantial, in that it is more than minor or trivial. As I have already found, the claimant has not been exaggerating her complaints. She is unable to do the things that she used to and has had to adjust her lifestyle to manage the effects of long COVID. She is no longer able to walk in the way she used to, socialise in the way she used to, clean her house in the way she used to or work in the way that she used to. The claimant has had to significantly readjust her life to take into account the effects of long COVID and I conclude that the effect of her impairments on her life has been a substantial one.

Is the effect long-term

18. The claimant began experiencing fatigue and breathlessness when she first contracted COVID in November 2020. Whilst her condition in November 2020 was far more serious than that it is now, and her health has improved, she has continued to suffer from the effects of COVID and continued to experience breathlessness, fatigue along with other symptoms. It is difficult to identify when the claimant first began to have long COVID as opposed to COVID itself but she has continued to have physical impairments, namely fatigue and breathlessness since November 2020 and then additional impairments since then. Although she

was not referred to the long COVID clinic until May 2021, I find that she had been suffering from physical impairments long before that and at least from January 2021. She continues to suffer from physical impairments and I conclude that these impairments have lasted significantly longer than 12 months. These are long-term impairments.

Conclusion

19. I conclude, looking at all the evidence in the round, and having reminded myself that whilst it is helpful to address each of the Goodwin questions not take my eye off the whole picture, that the claimant has shown that she was suffering from a disability at the material time, namely between January 2021 and October 2022.

Date: 20/11/23

Tribunal Judge J E Plowright acting as an Employment Judge

Sent to the parties on:

20/11/2023

For the Tribunal: