



EMPLOYMENT TRIBUNALS

Claimant: Ms S Alam

Respondent: Barts Health NHS Trust

Heard at: London Central (by CVP)

On: 25 October 2023

Before: Employment Judge Davidson

REPRESENTATION:

Claimant: Mr A Pickett, Counsel

Respondent: Mr D Bayne, Counsel

PRELIMINARY HEARING IN PUBLIC JUDGMENT

The judgment of the Tribunal is as follows:

On 8 September 2021, the claimant was a disabled person as defined by section 6 Equality Act 2010 because of disc bulge/prolapsed disc.

The complaint of failure to make reasonable adjustments can therefore proceed.

Judgment having been given orally at the hearing and sent to the parties on 25 October 2023 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 by email dated 26 October 2023, the following reasons are provided:

REASONS

Issues

1. The issue for this hearing was whether the claimant was a disabled person pursuant to section 6 of the Equality Act 2010 and, if so, from what date did she become disabled? In particular, the tribunal must decide:
 - a. Does the Claimant have a physical impairment? The claimant relies on disc bulge/prolapsed disc?
 - b. Does that impairment have a substantial adverse effect on her ability to carry out day to day activities?
 - c. If so, when did that effect become long term? In particular:
 - d. By what date had the significant impact lasted for 12 months; or
 - e. By what date did it become likely to last for 12 months?
2. The parties agreed that relevant date is 8 September 2021.
3. The respondent does not challenge the impact of the claimant's condition on her ability to carry out day-to-day activities. It disputes that the claimant had an impairment or, if she did have an impairment, whether it was long-lasting at the relevant date.

Evidence

4. The tribunal heard from the claimant, who had submitted an impact statement and was cross examined. There was also a bundle of 334 pages before the tribunal.

Relevant facts

5. The respondent is a NHS Trust in Central London. The claimant started work with the respondent on 2 November 2020 as a Therapeutic Radiographer.
6. The claimant suffered an injury at work on 10 June 2021. She saw her GP on 22 June 2021 and was prescribed medication for pain relief. The GP originally signed her off until 6 July 2021 and the claimant and her doctor hoped that the issue would resolve quickly.
7. The Occupational Health 'Management Referral Report' dated 23 June 2021, following a telephone consultation with the claimant, recorded that the claimant suffered from back pain which had progressively worsened and that her functionality had been impacted. However, the conclusion was that the claimant

was 'likely to be able to return to work in 1-3 months' and that her condition was unlikely to be covered by the Equality Act 2010.

8. Subsequent Management Referral Reports in June and July updated the position but retained the conclusion that the claimant's condition was unlikely to be covered by the Equality Act 2010 (while recognising that this is a legal question, not a medical one).
9. The claimant was on sick leave until 1 September 2021, when she came back to work on a phased return. Occupational Health made a number of recommendations relating to her work environment, all of which related to her back problem.
10. A Management Referral Report was made following a telephone consultation with the claimant on 7 September 2021. She described her functional limitations in carrying out many day-to-day activities but added that her symptoms were better than when she started her sickness absence. The conclusion of this report is that the claimant was likely to meet the criteria for disability under the Equality Act 2010. It was noted that she was likely to experience flare-ups and relapses of her symptoms.
11. The claimant told the tribunal that her symptoms fluctuated and that some days she felt better than other days and that the level of pain was not consistent.
12. The claimant went back on sick leave on 12 November 2021.
13. On 12 November 2021, the claimant had an MRI scan to investigate whether she had 'cauda equina syndrome'. The MRI report states 'no cauda equina compression. Unremarkable lumbosacral spine'. The MRI report notes that there is a minor disc bulge at L4/L5 level.
14. On 10 February 2022, the claimant's GP records state that she was 'found to have degenerative disc disease'.

Relevant law

15. Section 6 of the Equality Act 2010 provides that a person has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
16. The interpretation provisions of the Equality Act 2010 provide that 'substantial' means more than minor or trivial.
17. Long-term means that the effect 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.

18. If measures are taken to treat or correct the effect of an impairment, the effect of the impairment on the individual must be assessed as if the measures were not being taken.
19. It is for the claimant to show that he has a disability (Royal Bank of Scotland v Morris UKEAT/0436/10/MAA).
20. The tribunal must assess the issue having regard to the circumstances at the time of the alleged discrimination and to the evidence available at the time and not with the benefit of hindsight. This includes the issue of long-term effect. The tribunal must consider whether the impairment was likely to last 12 months or more on the basis of the evidence available at the relevant date (McDougall v Richmond Adult Community College [2008] ICR 431)
21. 'Likely' to last 12 months or more means that it 'could well happen' (SCA Packaging Limited v Boyle [2009] ICR 1056).
22. Disability is ultimately a matter for the tribunal to decide, not the medical experts, taking into account all the relevant available evidence.
23. Physical impairment means that the person has something wrong with them physically (College of Ripon & St John v Hobbs [2002] IRLR185). The claimant does not need to identify an organic cause. It is the effect of the impairment that must be considered, not its cause.
24. Back pain alone is not sufficient to amount to an impairment.

Determination of the Issues

25. The claimant relies on the physical impairment of disc bulge/prolapsed disc. I find that there is sufficient evidence that the claimant has a disc bulge (from the MRI scan) and she is not simply relying on the fact that she was in pain.
26. I do not find that the descriptor of 'minor' in relation to the disc bulge MRI diagnosis is relevant. It is the effect of the impairment which matters and the claimant's symptoms are consistent with a disc bulge. Her symptoms were sufficiently substantial and they adversely affected her ability to carry out day-to-day activities. There was no evidence that a minor disc bulge suggests that the impact on the patient's health is minor.
27. I therefore find that the claimant had an impairment.
28. I need to consider whether the claimant's impairment was likely to last another nine months in September 2021. At that time had already lasted three months. Likely means 'could well happen'. I must assess the likelihood at the date of the act of discrimination, namely 8 September 2021.

29. It is clear that Dr Elekima of Occupational Health, who was aware of the claimant's condition, thought that she met the definition of disability in early September 2021. In the Management Referral Form, completed by Occupational Health, there is a direct question whether the condition is likely to be covered by the Equality Act 2010. The question includes a definition which refers to long-term adverse effect. Dr Elekima was therefore aware of the statutory test. Although the determination is one for me to make, I must take into account the contemporaneous evidence. I am not bound by Dr Elekima's conclusion but I find it informative and relevant.
30. At the relevant time in September 2021, the claimant had returned to work on a phased return with significant reasonable adjustments recommended by Occupational Health.
31. I have considered whether the adjustments recommended by Occupational Health to enable the claimant to return to work indicated nothing more than what was needed at the time or whether they reflected the ongoing requirements of the claimant. It might be said that the fact the claimant was attempting to come back to work signified that she was on the mend and the impairment was diminishing. However, the comments from the Occupational Health report make it clear that she would only be able to return with considerable adjustments and that this was going to be a long-term process. Taking into account this evidence and the other evidence before me, including the claimant's impact statement and GP records, I find that the situation in September 2021 was that the claimant's impairment could well last for another 9 months. That is the test the claimant has to satisfy.
32. I find that she does satisfy the test and that she was a disabled person by reason of a physical impairment of disc bulge in September 2021.

**Employment Judge Davidson
21 November 2023**

Judgment sent to the parties on:

21/11/2023

For the Tribunal:

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