



EMPLOYMENT TRIBUNALS

Claimant: Ms R George

Respondent: Cariad Domiciliary Support Services Ltd

Heard at: Cardiff and video (CVP) **On:** 14 December 2023

Before: Employment Judge R Brace

Representation

Claimant: Mr M Harris (Lay representative)

Respondent: Ms L Williams (Legal Executive)

RESERVED JUDGMENT

At the material times the Claimant was a disabled person as defined by section 6 Equality Act 2010 because of asthma.

Written Reasons

1. This has been a wholly remote hearing which proceeded with some technical difficulties in the afternoon during Mr Harris' cross-examination of the Respondent's witness, resulting in a late finish and a reserved judgment being given.
2. This was a public preliminary hearing to determine whether the Claimant was at the relevant times a disabled person for the purposes of s6 Equality Act 2010 by reason of asthma. The Respondent does not dispute that the Claimant has the impairment of asthma and that on occasions has had chest infections. It is the impact of that impairment on the Claimant's day to day activities, and in turn whether the Claimant was disabled, that is disputed. Knowledge of disability is not being determined at this hearing.
3. I had before me an agreed bundle ("Bundle") of some 71 pages and references to the hearing Bundle appear in square brackets []. I also permitted a further bundle of some 22 pages that had been prepared by the Respondent ("Further Bundle").
4. This Further Bundle contained full copies of the documents that the Claimant had referred to in extract form in her witness statement, but which the Claimant's representative had also objected to being included in the Bundle as not relevant. I permitted this further bundle (documents referenced as [FB] within these written reasons).

5. The Bundle contained the Claimant's undated Disability Impact Statement [6]. The Claimant was also permitted to rely on a further witness statement that largely covered the same areas as her Disability Impact Statement. I also had written statement from Kari Bailey, the Responsible Individual and owner of the Respondent.
6. The Claimant's representative objected to Kari Bailey giving evidence on the impact of the impairment on the Claimant's day to day activities, being concerned that Ms Bailey had given opinion evidence in the last paragraph of her witness statement. I permitted that witness evidence as relevant evidence and did not accept that it amounted to opinion evidence. Rather it was her evidence on what she had observed of the Claimant's behaviour during her time working with the Claimant and was admissible.
7. Both witnesses were subject to questioning from the other parties' representative and from the tribunal.
8. At the date of filing the first claim on 18 May 2023 ("First Claim"), the Claimant was still in employment as the Respondent's Registered Manager and brought claims of discrimination arising from disability (s.15 Equality Act 2010 ("EqA 2010")) and failure to comply with the duty to make a reasonable adjustment (s.20/21 EqA 2010) in relation to disciplinary and grievance processes that had commenced against the Claimant on 10 February 2023. Since the issue of that First Claim, the Claimant had been dismissed on 3 July 2023 and had issued her second claim on 10 November 2023 ("Second Claim") claiming that she had been treated to further acts of disability discrimination that post-dated the First Claim as well as unfair dismissal.
9. It was agreed with the parties that the First Claim and Second Claim should be consolidated and that the material time for assessing whether the Claimant was a disabled person was therefore in the period from February 2023 to 4 October 2023, the latter date being the date of the last act complained of, in the Second Claim.
10. The parties agreed that if I determined that the Claimant was not a disabled person, the disability discrimination claims should be dismissed. Findings are made based on balance of probabilities and on the evidence before me.

Law

11. The Equality Act 2010 ("EqA 2010") provides that a person has a disability if he or she has a 'physical or mental impairment' which has a 'substantial and long term adverse effect' on his or her 'ability to carry out normal day to day activities'. Supplementary provisions for determining whether a person has a disability is contained in Part 1 Sch 1 EqA 2010 which essentially raises four questions:
 - a. Does the person have a physical or mental impairment?
 - b. Does that impairment have an adverse effect on their ability to carry out normal day to day activities?
 - c. Is that effect substantial?
 - d. Is that effect long term?
12. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (**Goodwin v Patent Office** [1999] IRLR (EAT)). In **Goodwin** Morison P,

giving the decision of this Court, also set out very helpful guidance as to the Tribunal's approach about the determination of the issue of disability. At paragraph 22 he said: "*The tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question.*"

13. Appendix 1 EHRC Employment Code states that there is no need for a person to establish a medically diagnosed cause for their impairment, what is important is to consider the effect of the impairment and in **J v DLA Piper UK LLP** 2010 ICR 1052, EAT, Mr Justice Underhill observed that in reaching conclusions, tribunals should not feel compelled to proceed by rigid consecutive stages. Specifically, in cases where the existence of an impairment is disputed it would make sense for a tribunal to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings.
14. The EqA 2010 Guidance states; '*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*' (D3).
15. The EqA 2010 Guidance (D3) indicates that normal day-to-day activities can include general work. The EAT in **Paterson v Commissioner of Police of the Metropolis** [2007] IRLR 763 concluded that 'normal day-to-day activities' must be interpreted as including activities relevant to professional life. It emphasized that the phrase is to be given a broad definition that can include irregular but predictable activities that occur in professional life.
16. Furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities, is contained in the Appendix to the Guidance on matters to be considered in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations, tribunals must take account of it where they consider it to be relevant.
17. A substantial effect is one that is more than minor or trivial (s.212 EqA 2010 and B2 Guidance) and the requirement that the adverse effect on normal day to day activities should be considered a substantial one is a relatively low threshold, although the claimant does carry the burden of showing it. Para 5 Sch. 1 Part 1 EqA 2010 provides that an impairment is treated as having a substantial adverse effect on the ability of the person to carry out normal day to day activities if measures, including medical treatment, are being taken to treat or correct it and, but for that, it would likely to be the effect. In this context, likely is interpreted as meaning 'could well happen'. The practical effect is that the impairment should be treated as having the effect that it would have without the treatment in question (B12 Guidance) but there must be clear evidence on what the deduced effect would be (**Woodrup v London Borough of Southwark** [2003] IRLR 111).
18. The question of whether the effect is long term is defined in Sch. 1 Part 2 as
 - a. Lasting 12 months;

- b. likely to last 12 months;
 - c. likely to last the rest of the person's life.
19. Again, the Guidance at C3 confirms that in this context 'likely' should be interpreted as meaning it could well happen. The Guidance (C4) also clarifies that in assessing likelihood of the effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything which took place after will not be relevant in assessing likelihood. The Respondent also referred me to the case of **Morris v Lauren Richards Ltd** EAT 19.
20. When applying section 6, there has to be evidential basis for concluding that there is an objective causal link between the adverse effect and the impairment and a belief on the part of the claimant that there is a link is not enough (**Carl Room Restaurants Limited t/a McDonald's Restaurants Limited v Da Silva Primaz** EAT 2020-278).
21. Finally, the burden of proof is on the Claimant to show they satisfied this definition and the time at which to assess the disability i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities, is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd** 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect.

Facts and Conclusions

22. The Claimant was at the material times a 43-year-old female and had been employed by the Respondent since 13 September 1999.
23. That the Claimant has asthma, the impairment relied on, is not in dispute. What is in dispute and is challenged by the Respondent, is the impact that such an impairment has had on the Claimant's day to day activities.
24. The Claimant has had asthma since around 2000, a diagnosis that she received following a serious respiratory infection. She had also been a smoker of around 20+ cigarettes daily for around 25 years of her adult life, giving up smoking in 2020. Her asthma left her vulnerable to re-occurring respiratory infections and when she suffered such a chest infection, she had symptoms of coughing, difficulty speaking, faster heartbeat and chest tightness. She historically suffered around one chest infection a year usually between the period October through to March [14].
25. The GP records provided in the Bundle, disclosed by and relied upon by the Claimant, were printed in September 2023 and related to the period from 1 January 2018 to 25 September 2023. Those records reflect that the Claimant's asthma was not well managed prior to November 2021 but thereafter her symptoms improved [19] as follows:
- a. In October 2018, after an asthma exacerbation the Claimant told her GP that she believed she had a chest infection and her GP recorded that the Claimant was not at that time taking a regular inhaler and did not have an inhaler in the house [35];
 - b. In October 2019, the Claimant attended her GP again with an acute exacerbation of asthma, when the Claimant again believed she had a chest infection [34/35 and 49];

- c. She attended for an asthma review in February 2020, having attended A&E the week before with a chest infection [13/47/48]. The Claimant was prescribed a reliever, Ventolin, and a preventative, Relvar Ellipta [33]; This prescription was repeated in the June 2020 annual asthma review [31];
 - d. In August 2021, the Claimant again had an acute exacerbation of her asthma, the notes recording that this arose as soon as the Claimant '*gets a cold gets chest inf*' [29];
 - e. In November 2021, the Claimant was prescribed an additional preventative medication, Montelukast, in addition to the preventative Relvar Ellipta and reliever medication, Ventolin [25], that appeared to have settled the Claimant's symptoms of asthma as there are no GP records of any further attendances for asthma related issues save for January 2023 when the Claimant presented to her GP with a cough but no signs of asthma exacerbation [26].
 - f. On 22 March 2022, the Claimant was discharged from the nurse led asthma clinic following a review of the Claimant's asthma at that appointment. The Claimant confirmed that she was not at that time using her short-acting beta agonist, i.e. her Ventolin reliever, and that she was not complaining of any asthma symptoms [21].
26. That preventative and reliever medication appears to have been an 'on repeat' prescription, with the last prescription being issued, for 28 tablets of Montelukast, 30 doses of Relvar Ellipta and one Ventolin inhaler, on 25 May 2023 [25]. The Claimant did not receive any further prescription for such medication from this point prior to 25 September 2023, being the date that the GP notes were printed.
27. The Claimant was suspended on 7 February 2023 and was referred to an Occupational Health Adviser ("OHA") by the Respondent. Advice was sought by the Respondent regarding the Claimant's fitness to attend meetings and what adjustments would facilitate her attendance at those meetings. That assessment took place over the telephone on 9 May 2023 and a report was prepared based on information provided to the OHA by the Claimant and the Respondent [52].
28. The OHA reported that the Claimant had told them that she had developed worsening symptoms of asthma and also complained that she was having recurring shortness of breath in her daily living, was taking more of her blue inhaler to relieve symptoms, that she was experiencing limitations in her functional ability and was not able to engage with her usual physical activities due to shortness of breath. She also reported that her sleep was impacted [52].
29. The Claimant also reported that she had developed increasingly worsening anxiety and stress related to her workplace since her suspension and was suffering from excessive worry.
30. The Claimant within her witness statement made reference to triggers for asthma in particular anxiety and stress and that her asthma had become exacerbated during the period after her suspension with the OHA reporting that the Claimant was anxious because she was '*aware of the possibility of experiencing an asthma attack*'

and that the Claimant had identified stress as a likely trigger for her worsening breathing difficulties. Based on that information, it was the opinion of the OHA that the Claimant was suffering with severe anxiety and stress as well as asthma and that her breathing difficulties had been exacerbated by stress.

31. The OHA report further confirmed what the GP notes reflected, that the Claimant had not accessed GP support for her asthma by that time i.e. 9 May 2023. Indeed, the GP notes reflect and I found that the Claimant did not access GP support for any asthma-related issues at any time from her suspension to 25 September 2023, nor had she any asthma medication since the end of May 2023 to that date, despite telling the OHA that she was taking more of her 'blue inhaler' i.e. her Ventolin reliever.
32. Within her witness statement ("CWS") the Claimant reported her physical symptoms during periods when she experienced a respiratory infection (CWS§4) and what she considered the triggers that increased the likelihood of experiencing exacerbated asthma symptoms, including cold weather, aerosol spray, as well as situations which caused an increased level of worry, increased stressful experiences/situations and periods of unforeseen events (CWS§5). However, I found that her claim that her asthma was exacerbated by stressful situations was not supported by any medical evidence provided by the Claimant, the GP notes reflecting only an exacerbation of asthmatic symptoms when the Claimant also experienced a chest infection as reflected in §6CWS.
33. The Claimant gave evidence of the adverse impact that an exacerbation of her asthma had on her day to day activities (CWS§7-8), that she struggled to carry out every tasks such as showering and dressing, and household chores such as cleaning and shopping. She also spoke of how such tasks took her longer and that she had to stop frequently and would need to allow herself more time. She also gave evidence that she would have extreme difficulty in driving during such times. I accepted the particular evidence as set out in CWS§7 and §8. I concluded that such an impact was adverse and was substantial in that it was more than minor or trivial.
34. This was despite and also accepting the evidence from Ms Bailey as to how the Claimant presented in the workplace. Whilst I accepted that Ms Bailey may not have witnessed the impact that the Claimant spoke of in her witness statement, it did not in my mind undermine the Claimant's evidence and was merely reflective of the Claimant seeking to manage her symptoms with her work. That the Claimant returned to work following an attack was also not relevant to my assessment of the impact on the Claimant's day to day activities.
35. In any event, I concluded that the effects of asthma on the Claimant's day to day activities likely fluctuated and were not constant but had recurred over the space of at least three years and likely prior to 2018 when the GP records before me first commenced, but that the Claimant had not experienced such impact on her day to day activities again after November 2021 when she had been prescribed the additional preventative and had in fact been taking such medication. I therefore concluded that the Claimant's asthma had a long term adverse impact on those day to day activities.
36. The Claimant had also provided evidence regarding the impact of her asthma on her ability to engage with the disciplinary process. Whilst I concluded that this evidence related more to the triggers and symptoms of her asthma, as opposed to

impact on day to day activities, I was not persuaded by the Claimant's evidence as to the impact of her asthma on her ability to engage with the activity of managing the disciplinary correspondence. She had provided evidence that the process caused her to become anxious, worried and upset and had told the OHA that it had led her to become breathless and rely on her inhaler.

37. This was surprising, as the Claimant's GP records reflected that the triggers for the Claimant's asthma was respiratory infections and there was no evidence that stressful situation exacerbated her asthma. There was also no contact from the Claimant regarding asthma over the period from February 2023 to through to September 2023. She also did not collect her repeat prescription for any asthma medication including any Ventolin inhaler from May 2023, a time when she says she suffered an exacerbation of her asthma triggered by the stress of the disciplinary and grievance process.
38. The Claimant had told the OHA that she had not accessed GP support as she was *'aware of how difficult it is to access and receive help from the NHS services at the moment'*. I did not accept this explanation as credible as the Claimant had in fact contacted her GP on a number of occasions from the start of the initial March 2020 Covid-19 lockdown period [32] through to January 2023 [26]. The Claimant had also agreed with the OHA that she would contact her GP after the May assessment. She had not.
39. Whilst I accept that the OHA had drawn their own conclusions on the basis of what the Claimant had told them, they had not seen the Claimant's GP records and had based their assessment on what the Claimant was telling them rather than a review of the Claimant's medical history.
40. I was therefore not persuaded by the Claimant's evidence that the Claimant had demonstrated that her asthma had an adverse impact on the activity of managing correspondence and attending meetings with the Respondent.
41. However, I also consider the 'deduced effects', had the Claimant not been taking the medication, namely her two preventatives and one reliever inhaler, at the material time.
42. The Claimant gave evidence of how, if she did not take those prescribed medications, she feared that she would not live a normal active life and that she would require excessive emergency medical assistance; that she feared that her condition would be life threatening. Whilst I struggled to accept such evidence as credible, taking into account despite being a heavy smoker with asthma the Claimant had not up to 2019 been taking regular medication, this was evidence of the Claimant's fears as opposed to what actual impact not taking medication did have on the Claimant's day to day activities.
43. That said, the medical evidence before me indicated that the Claimant had recurring infections and had gone to NHS Accident & Emergency before she managed her asthma with regular prescribed medication. It followed that I considered that there was evidence to conclude that had the Claimant not been taking her regular medication, her asthma would not be well managed and the Claimant would have been more symptomatic.

44. On the basis of the activities that I had found impacted i.e. those set out in CWS§7 and 8, I concluded that the impact of the Claimant's asthma on those day to day activities without the medication would be adverse and concluded that such adverse impact would be 'substantial' in that it was more than minor or trivial and had lasted or were likely to last in excess of 12 months at any point during the material time.
45. In this case, I concluded that the Claimant's asthma treatment prevented or limited a recurrence of the impact of the asthma and a recurrence would be likely if the Claimant stopped the treatment. I concluded that effect of the asthma on the Claimant's day to day activities without such treatment was likely to be that set out by her in CWS§7 and §8 and was likely to recur.
46. I therefore concluded that the Claimant did have at the material time a disability of asthma as defined by the Equality Act 2010.

Employment Judge R Brace

Date 20 December 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 3 January 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche