



EMPLOYMENT TRIBUNALS

Claimant: Miss K Howard

Respondent: Smith and Graham Solicitors

Heard at: Newcastle CFCTC by CVP **On:**16 January 2024

Before: Employment Judge Arullendran

Representation:

Claimant: In person

Respondent: Miss Mihad Wahabi (litigation consultant)

Judgment having been sent to the parties on 19 January 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The issues to be determined by the Employment Tribunal were set out by Employment Judge Sweeney at the Case Management hearing on 4 September 2023 and can be seen at paragraph 1.3.1 of the case management order dated 4 September 2023. The purpose of this hearing was to consider and determine whether, at all material times, whether the claimant was a disabled person within section 6 of the Equality Act 2010.
2. I heard witness evidence from the claimant and was provided with a joint bundle of documents consisting of 77 pages.

The facts

3. The claimant was diagnosed, as a result of a MRI scan on 6 December 2018, as having two minor bulging discs at T6 - T9 and T9 - T10 with small posterior protrusions indenting ventral thecal sac without causing critical neural compromise, as set out in the claimant's medical record from West View Millennium Surgery at page 74 of the bundle.
4. The claimant was employed by the respondent from January 2022 to December 2022. During this period of time, the claimant experienced some good days and some bad days with her back pain which she described today as amounting to 90% bad days and 10% good days.
5. Claimant's condition worsened from the end of 2020 and the beginning of 2021 after she had moved out of her parents' home and into her own accommodation with her boyfriend. Between January and December 2022, the claimant experienced pain in her back as a dull ache accompanied by numb tingling pain, which at times was excruciating. As a result of the pain in her lower back, the claimant experienced difficulties with sleeping, lifting and carrying, standing, walking distances and bending.
6. The claimant did not contact her GP or go to the hospital about her back pain between January and December 2022 because she had been dealing with the condition since 2018 and tried to deal with the pain herself by taking two paracetamol three or four times each day. The notifications of sickness completed by the claimant during her employment with the respondent (pages 63 to 72 of the bundle) do not refer to the claimant's bulging discs. The claimant refers to pain from her ovaries on several of these forms as that was the main cause of her absences from work but did not think to add the back condition at the time she completed the forms as that information was contained in messages she had already sent to the office manager.
7. At the time the claimant began her employment with the respondent she stated on the "recruitment of apprentice - review application" form that she did not have a disability or health problems, as can be seen at page 61 of the bundle. The claimant explained to the respondent's office manager at the time the form was completed that she had a back condition which prevented her from lifting heavy items and walking long distances. The office manager told the claimant that the job would not include those activities and he advised her to say no to the question which asked "Do you have a learning difficulty, disability or health problem?".
8. Between January and December 2022, the claimant's pain would be more severe on the days when she had slept at a particular angle in her bed; she tried to remedy the situation herself by obtaining a V pillow in or around mid-2022. The claimant was unable to remove wet clothing from the washing machine or to lift the wet clothing into the tumble dryer because of the pain in her back. The claimant was unable to wash dishes standing at the kitchen sink for more than two or three minutes and she was unable to pick up and wash pots and pans due to the pain in her back as the effect of both standing and lifting items caused the claimant to experience greater pain. As a result of the difficulties in carrying out the daily tasks of washing and drying clothes and washing the dishes, the claimant avoided these tasks in the hope that

she would reduce the pain and discomfort and they were carried out by her boyfriend instead.

9. Between January and December 2022 the claimant was incapable of using the Hoover for any longer than five minutes because of the weight of the machine as the requirement to hold and push and pull the Hoover caused an exacerbation of the back pain. The claimant was also incapable of changing the bed sheets as she could not lift the duvet in order to remove the cover or to replace it with a clean cover as this can cause severe pain in her lower back.
10. Between January and December 2022 the claimant experienced back pain whenever she tried to carry out any of the daily tasks set out above and she describes this as amounting to a 7 out of 10. On each occasion when the claimant exacerbated her back pain by trying to carry out activities such as the hoovering, washing, washing up and other housework, it would take a long time for the pain to settle down.
11. Between January and December 2022 the claimant's ability to drive was affected by her back pain, although this was intermittent. On days when the claimant had difficulty with driving because of her back pain she used a pillow which she placed behind her back and adjusted her car seat so that she could sit upright, however she still experienced pain and difficulty with the act of driving.
12. Between January and December 2022 the claimant adjusted her chair in the workplace whilst she was working for the respondent in order to ensure that it was as upright as possible to provide extra support for her lower back as she experienced discomfort and pain when sitting down.
13. The claimant did not receive any medical treatment from her doctors in 2022 for her back pain, however the claimant made efforts herself to alleviate the back pain with the use of various pillows, hot baths and by taking paracetamol. On the bad days, which occurred 90% of the time, the claimant took the maximum dose of paracetamol i.e. two tablets four times per day.

Submissions

14. The respondent submits that the claimant did not meet the definition of disabled under section 6 of the Equality Act 2010 because, although the claimant had an impairment, it did not have an adverse effect on the claimant's ability to carry out day-to-day activities as her main duties were required to be performed sitting down. The respondent relies on the sickness note at pages 63 to 72 of the bundle and the fact that none of them referred to bulging discs and submits that the condition must not have been substantial enough at the time for the claimant to mention it on the forms.
15. The respondent submits that the claimant indicated at page 61 of the bundle that she did not have a disability when she began her employment with the respondent and that there is a lack of evidence that the claimant's meets the definition of long-term.

16. The claimant submits that she did meet the definition of disabled at the time she was employed by the respondent because she was diagnosed with her back condition in 2018 and it had worsened from the end of 2020. The effect of the bulging discs is that it causes pain and affects the claimant's ability to carry out the hoovering, washing dishes, changing the bedding and, without her partner, she would not be able to do these things. The claimant also submits that other activities including driving, walking and going to the gym had also been adversely affected.

The law

17. I refer to section 6 of the Equality Act 2010 which sets out the definition of disability as set out below:

- “(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.
- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability—
- (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.”

18. In determining whether the adverse effect is substantial, a Tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability the claimant would have if not impaired. I refer myself to the guidance in the Employment and Human Rights Commission Employment Code of Practice on Employment (2011) (“the EHRC Code) which states in Appendix 1 that account should be taken not only of evidence that a person is performing a particular activity less well but also evidence that “a person avoid doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of loss of energy and motivation”.

19. What is a ‘reasonable’ modification will depend on the circumstances and is a matter of degree. The “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (2011) (“the Guidance”) suggests that ‘it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such as shopping, or using public transport’ — paragraph B7.

20. When determining whether a person meets the definition of disability under the Equality Act, the Guidance emphasises that it is important to focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she can do. As the Employment Appeal Tribunal held in Goodwin v Patent Office 1999 ICR 302, even though the claimant may be able to perform a lot of activities, the impairment may still have a substantial adverse effect on other activities, with the result that the claimant is quite properly to be regarded as meeting the statutory definition of disability. Equally, where a person can carry out an activity but only with great difficulty, that person's ability has been impaired.
21. Normal day-to-day activities are described in the EHRC Employment Code as activities which are carried out by most men or women on a fairly regular and frequent basis and gives examples, such as, walking, driving, typing, lifting and carrying.

Conclusions

22. Applying the relevant law to the facts, I find that the claimant had a physical impairment at the material time, i.e. between January 2022 and December 2022. The impairment is the bulging of the discs at T6 to T9 and T9 to T10 in the claimant's thoracic spine. The claimant started experiencing symptoms related to the impairment in 2018 and got significantly worse from the end of 2020 and, on that basis, I find that the impairment had lasted for at least 12 months as at the date she commenced her employment with the respondent in January 2022 and, therefore, meets the definition of "long term" under section 6 of the Equality Act 2010.
23. The question for this Tribunal to determine is whether the claimant's impairment had a substantial adverse effect on her ability to carry out day-to-day activities at the material time. I remind myself that I must look at the situation as it existed at the relevant time, i.e. January to December 2022, and not what the claimant's current situation is with her back pain and her mobility. I also remind myself that I must make my findings based on the deduced effects, i.e. looking at the substantial adverse effect the claimant would have experienced had she not been taking the maximum permitted dose of paracetamol each day, but in this case the claimant did not give any evidence to this Tribunal as to what might have happened between January and December 2022 if she did not take the paracetamol.
24. I find that the adverse effects of the claimant's lower back pain on her ability to carry out day-to-day activities from January to December 2022 were not minor or trivial. The claimant either avoided carrying out day-to-day activities, such as removing wet clothing from the washing machine and putting it in the dryer, Hoovering and washing up, or she carried out the tasks with difficulty and tried to make modifications herself in order to try and cope with the discomfort and pain she was experiencing, for example by placing a cushion behind her back whilst driving or sleeping and by restricting the amount of washing up she did or which items she washed up in order to avoid the pain. These are all normal day-to-day activities and I find that the claimant's ability to carry them out was substantially adversely affected because of the pain and discomfort she experienced, leading to her either avoiding the activity altogether or making modifications to try and carry them out whilst dealing with the

pain. The claimant had been experiencing an increased adverse effect on her ability to carry out the day-to-day activities from the end of 2020, when she moved into her own property, and, therefore, she had been experiencing the substantial adverse affects for at least 12 months as at the date she began her employment with the respondent and those substantial adverse effects continued between January and December 2022.

25. For all the reasons I have set out above, I find that the claimant met the definition of disabled under section 6 of the Equality Act 2010 between January and December 2022 by reason of her lower back pain caused by the bulges the discs in her thoracic spine.
26. The complaints of failure to make reasonable adjustments and unfavourable treatment because of something arising in consequence of the disability can proceed to a final hearing.

Employment Judge Arullendran

Date: 14 February 2024