Neutral Citation Number: [2024] EAT 50

Case No: EA-2022-001295-NT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 February 2024

Before:

HIS HONOUR JUDGE SHANKS

- -

Between:

MRS SHAUKIA MIR

Appellant

- and –

(1) IQVIA LIMITED
(2) MS S TRANTER

Respondents

- -
- -

MR RAD KOHANZAD (instructed by Public Access) for the **Appellant**
MS GEORGIA HICKS (co-counsel with IQVIA Ltd Legal Department) for the **Respondents**

Hearing date: 22 February 2024

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JUDGMENT

SUMMARY

TOPIC 12: DISABILITY DISCRIMINATION

C was dismissed by her employer R in March 2020. She alleged that she was disabled during the period January to March 2020 by reason of "golfer's elbow" and shoulder pain and that R had failed to make reasonable adjustments and that the dismissal was an act of disability discrimination under section 15 of EqA 2010. On a preliminary issue the EJ rejected C's case that she was disabled for the purposes of the EqA because, on the evidence, she had not established that as at March 2020 her impairment was likely to last 12 months.

On appeal C maintained that (i) the EJ had failed to consider whether the impairment was likely to recur and (ii) the EJ had failed to consider whether, but for measures taken, the impairment would have continued to have a substantial adverse effect on her.

The appeal was dismissed: although these two issues were not addressed by the EJ, there was no proper evidential basis for any findings to have been made about them which would have assisted the C.

HIS HONOUR JUDGE MURRAY SHANKS:

1. This is an appeal by Mrs Mir against the decision of the Employment Judge Laidler in the Bury St Edmunds Employment Tribunal, to the effect that she was not disabled for the purposes of the Equality Act 2010 at the relevant time. That decision followed a remote hearing held on 6 May 2022 at which both parties were legally represented. That decision was announced orally but written reasons were requested on 19 May 2022 and 13 July 2022. For some reason, those requests were not referred to the Employment Judge until 11 October 2022 and her written reasons were only sent out on 3 November 2022.

FACTS

2. IQVIA describes itself as a contract research and sales company operating in the pharmaceutical, biotechnology, medical device, and life sciences industry. Mrs Mir was employed as a senior medical editor from 21 October 2019. Her role involved proofreading and fact checking, checking documents and presentations.

3. Following a probationary review meeting on 20 March 2020, IQVIA dismissed her because they said her performance had not met the required standards. She was paid in lieu of notice. Her appeal against that decision was rejected on 12 May 2020.

4. On 3 August 2020, she brought a claim in the Employment Tribunal. She claimed she was disabled during the period of January to March 2020 and that in their treatment of her, IQVIA discriminated against her under s.15 of the Equality Act 2010 (EqA) and failed to make reasonable adjustments. She also claimed that her dismissal was an act of victimisation because she had asked for reasonable adjustments which IQVIA were unwilling to deal with.

5. The claims under s.15 and for failure to make reasonable adjustments required Mrs Mir to establish that she was, in fact, disabled for the purposes of the EqA at the time of the events in question, i.e. January to March 2020. That issue was listed for a preliminary hearing, which, in due course, took place on 6 May 2022.

6. In directions issued on 13 July 2021, which are at p.105 of the bundle, Employment Judge Milner-Moore recorded that the disability claimed was medial epicondylitis and painful arc syndrome. That is more colloquially known as 'golfer's elbow' and pain in the shoulder. The Employment Judge required Mrs Mir to make an impact statement and to provide copies of medical evidence relevant to whether she had the disability at the time of the events the claim is about, which, as I have said already, would have been March 2020. The Employment Judge also set out a list of issues relating to whether Mrs Mir had a disability which are at p.106 in my bundle. In due course, Mrs Mir provided an impact statement, which is undated but is at pp.126-131 of my bundle, and also a "medical report" from a physiotherapist dated 26 August 2021 and that is it pp.156-162 in my bundle.

7. On the eve of the hearing, Mrs Mir submitted a "supplemental impact statement" dated 5 May 2022 with a document, itself dated 3 May 2022, containing answers to questions put to the physiotherapist on 29 April 2022. The Employment Judge disallowed reliance on these documents at the hearing which came the following day. The Employment Judge received oral evidence for Mrs Mir and written and oral submissions from lawyers but had no medical evidence other than that in the report from 26 August 2021 to which I have referred. That report took the form of a questionnaire to the physiotherapist but it also included at pp.158-161 notes of

interactions between Mrs Mir and various healthcare professionals starting in March 2020.

8. I just observe at this stage that the only relevant one of those was the account of the first appointment with the physiotherapist, to whom she had been referred by her GP, which took place on 11 March 2020 and which goes from p.158 to two thirds down p.159. There was no kind of report setting out a prognosis as at March 2020 which would have been the most relevant material for the tribunal.

9. The essence of Mrs Mir's case was contained in pars.24-25 of her impact statement at p.130 which says this:

> "24. The main very heavy pain had subsided by the time of my dismissal but the substantial effect on my daily tasks was still happening, even though I was able to drive for short journeys and the extreme tiredness after showering had reduced. But I was still suffering from the physical impairment which was having a substantial and long-term adverse affect on my ability to carry out normal day-to-day activities and I was fearful this would continue for a long time.
>
> 25. If I did not have any treatment for my injury (which was actually starting in November/December) the difference on how I could go about my day to day life would have been huge. The intense pains would have lasted longer, I would not have been able to sleep, I would not have been able to do my job, my arm and hand would have even less movement and I would have been unable to do many more things than before. Also, not being able to get out of bed or speak to anyone, losing my appetite, having muddled irrational

> thinking, lacking ability to concentrate and constantly feeling irritable and despair [I suspect that means in despair]."

10. The next paragraph deals with the position in May 2020 by which time the evidence was irrelevant. On the basis of that material, the Employment Judge found that Mrs Mir suffered an arm and shoulder injury in December 2019, that it had a substantial adverse effect on her day-to-day activities, and was still doing so at the relevant time in March 2020; however, that in March 2020, the ongoing pain in her arm had gone or significantly diminished and that it had not been proved that the condition was, at that stage, likely to last twelve months. She therefore decided that Mrs Mir was not disabled at the relevant time. The essence of the decision is in para.29 which is at p.8, which says this:

> "As has been made clear throughout the issue of whether the condition was 'likely to last 12 months' must be assessed at the date of the act complained of. The tribunal cannot find that to be the case on the evidence before it. It must make the decision from the facts and circumstances existing at the relevant time. The physiotherapist's report relied upon from August 2021 is not conclusive enough to assist the tribunal and it cannot be satisfied that the physiotherapist was considering the likely length of time by reference to the dates of the act complained of. The evidence is that in March 2020 the pain had gone or significantly diminished such as to enable the claimant to state that at the meeting on 20 March and repeat that in her ET1 claim form. On the evidence available at the time the condition was not likely to last 12 months."

THE APPEAL

11. Mrs Mir now appeals on three grounds:

(1) The Employment Judge should have considered an alternative basis for finding that the effect of the impairment was long-term, namely that if the relevant effect had ceased, it was to be treated as continuing if likely to recur;

(2) The Employment Judge failed to consider whether, but for the measures taken by Mrs Mir, the impairment would have continued to be substantial; and

(3) The Employment Judge should have allowed Mrs Mir to rely on her supplementary impact statement. (It is accepted that she was entitled to exclude the additional questionnaire answers provided by the physiotherapist at pp.140-142.)

12. Logically, the third ground of appeal comes first. I was not sure what the practical significance of this issue was. I asked Mr Kohanzad to identify which parts of the supplementary impact statement did not form part of the evidence as given at the hearing. He was not able immediately to refer to any specific piece of evidence. However, as Ms Hicks pointed out, it is right that written evidence of this nature does have a status above that of oral evidence in that if unchallenged, it will inevitably be accepted as part of the evidence that the tribunal act upon.

13. In any event, it seems clear that the supplementary impact statement did contain some relevant and admissible evidence but in view of the numerous orders that had been made and the lateness of its provision, it was necessary for the Employment Judge

to give permission for it to be deployed at the hearing. Whether to do so was plainly a case management decision and such decisions can only be challenged on the basis that irrelevant factors have been taken into account, or relevant factors left out, or that the ultimate decision is irrational. The Judge's reasons for excluding consideration of the supplementary impact statement are set out, albeit briefly, at paras.4-8 of the reasons. The essence of her decision, insofar as it relates to the statement itself and not the medical questionnaire that was attached to it, are at pars.4-5 which say as follows:

> "4. There have been 4 preliminary hearings in this matter. The claimant has been represented throughout. The impact statement was ordered at the 1st of those hearings and it could not have been clearer what was required. The claimant was not advised as to what was required that is a matter between her and her representative.
>
> 5. It is not proportionate or in accordance with the overriding objective that this case to be postponed again. It was nearly struck out at the last hearing and now needs to proceed."

14. Mr Kohanzad says that the Employment Judge here failed to consider properly the question of relative prejudice, plainly a relevant matter and, in particular, to consider properly whether a postponement was really necessary in relation specifically to the supplementary impact statement with the further material from the physiotherapist removed.

15. I accept that the reasons given could have been much fuller but I do not think that the decision is open to legal challenge. It is plain the Employment Judge had in mind the overriding objective. She was entitled to take into account the history of non-compliance. Her decision assumes that an adjournment would be required if the

statement was allowed in and that would plainly have been highly prejudicial to the respondent without, I agree, analysing that question in detail. However, the fact was that the respondents were maintaining that time was needed and the Employment Judge was entitled to say that any adjournment would be wholly inappropriate and to decide that the fair way to resolve that was that the statement should simply not be admitted for that reason without further investigation. I reject this ground of appeal.

THE LEGAL FRAMEWORK

16. I turn to the more substantive matters. I deal first with the law in relation to disability. The main section in the Equality Act is s.6:

> "(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.
>
> (6) Schedule 1 (disability: supplementary provision) has effect."

17. Schedule 1 at para.2 deals with long-term effects and it says this:

> "(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.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur..."

18. Paragraph 5 deals with the effect of medical treatment and it says as follows:

"(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid..."

19. It is plain that the burden of proving disability lies on a claimant who alleges he or she is disabled and that the form of proof, if necessary, is likely to involve medical evidence although that is not essential in every case. It is clear from **McDougall v Richmond Adult Community College** [2008] ICR 431 that it is not open to the Employment Tribunal in considering whether effects are likely to last twelve months or likely to recur to take into account subsequent events. **McDougall**, in fact, only covered the question of the likelihood of recurrence but the logic must apply to both,

and the position in relation to lasting twelve months is reflected in para.C4 of the statutory guidance, which says this:

> "In assessing the likelihood of an effect lasting for twelve months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)."

The guidance also provides that the word "likely" should be interpreted as meaning that the relevant event "could well happen".

20. In relation to para.5 of Schedule 1, it seems, from a sensible reading and from the relevant paragraphs in the guidance, that "measures" are not intended to include things that the putative disabled person can reasonably be expected to do for him or herself to prevent or mitigate effects, for example avoiding substances to which she is allergic or taking exercise, as opposed to medical treatment, for example medication, or, as in this case, a course of physiotherapy. Relevant to this, the guidance says at para.C9:

> "Likelihood of recurrence should be considered taking all the circumstances of the case into account. This should include what the person could reasonably be expected to do to prevent the recurrence. For example, the person might reasonably be expected to take action which prevents the impairment from having such effects (e.g. avoiding substances to which he or she

> is allergic). This may be unreasonably difficult with some substances."

And at para C11:

> "If medical or other treatment is likely to permanently cure a condition and therefore remove the impairment, so that recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those effects. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur."

GROUND 1

21. I turn then to Ground 1. It seems clear to me that the issue of likely recurrence was, indeed, in play. It is mentioned in the list of issues and in the written submissions put forward on behalf of the claimant (see p.148, para.49 in particular). It is also plain that the issue was not directly considered by the Employment Judge in the written reasons. However, there was no relevant evidence on the point. The physiotherapist was asked at question 12 of the questionnaire dated 26 August 2021, at p.157, "If the impairment has in the past had, but has ceased to have, a substantial effect (in the sense of more than minor or trivial) adverse effect on the Patient's capacity to carry out normal day to day activities, is that effect likely to recur?" and the answer given was, "Do not Know." Quite apart from the fact that the physio ought to have been invited to consider the position as at March 2020, and it has clearly been considered as at 26

August 2021, this answer provides no basis at all for any finding by the Employment Tribunal that the impairment was likely to recur in the future.

22. Mr Kohanzad says that it would have been open to the Employment Tribunal to consider the issue in the light of all the evidence before it relating to the situation in March 2020 and possibly to conclude, using its industrial knowhow or common sense, that there was a likelihood of recurrence. I am afraid I cannot agree: although I reject Ms Hicks's suggestion that the issue of possible recurrence did not arise at all because as at March 2020 the condition was still having a substantial adverse effect, there would still have to be some proper evidential basis for a conclusion that Mrs Mir's condition, should it go away at some point after March 2020, was nevertheless likely to recur. That evidence was simply missing.

23. It was pointed out that there are certain conditions referred to in the guidance as being conditions which can recur. In particular, the guidance refers to:

> "...Menières Disease and epilepsy as well as mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list."

Mrs Mir's condition is not listed there. It is accepted that it was not open to the Employment Tribunal to do its own research on the point. So it would have been necessary for the tribunal to consider the position as it specifically related to Mrs Mir and to the condition she had as at March 2020. I simply fail to see how the Employment Tribunal, on the evidence before it, could have properly decided that that condition was likely to recur should it go away after March 2020. It seems to me that only one answer would have therefore been possible if the tribunal had specifically addressed the

question of recurrence in its reasons. In the circumstances, I do not see that this omission, or apparent omission, can give rise to a good ground of appeal.

GROUND 2

24. I turn to Ground 2. Ground 2 relates to the so-called "deduced effect". It is said that the Employment Tribunal ought to have considered what the claimant's condition would have been in the absence of the physiotherapy sessions that she apparently had between January and March 2020. This was not of great significance in relation to the position as at March 2020 because the Employment Judge found that regardless of the limited physiotherapy she had already received, she was still suffering a substantial adverse effect as at March 2020. However, it may have been relevant to the question as to whether the condition was likely to last longer than twelve months or likely to recur.

25. This issue was referred to in the list of issues. It is not entirely clear to me what its significance was in the way that the case was actually argued but, in any event, again the problem, it seems to me, is that there was no evidence or other proper basis for making a finding about this issue. To be of significance, it would have required a decision that, although continuing physiotherapy might alleviate Mrs Mir's problem after March 2020 to the extent it no longer involved a substantial adverse effect, if that physiotherapy was later stopped, the substantial adverse effect would come back. It seems to me that there was no basis for the Employment Tribunal to have reached such a conclusion.

26. I note in this context the case of **Woodrup v London Borough of Southwark** [2002] EWCA Civ 1716 where Simon Brown LJ said that in this sort of case "one would expect clear medical evidence to be necessary". In this case, there was no

medical evidence or any other kind of evidence about this point. I am therefore unable to see that the omission to expressly address this issue could have made any difference to the outcome and I therefore also reject this ground of appeal.

RESULT

27. Mr Kohanzad rightly reminds me of the stringent requirements of the Jafri test and makes the point that he is relying on two omissions, i.e. Grounds 1 and 2, and that I must be satisfied that even with both those matters brought into account, the result would have been the same. Given the state of the evidence actually put before the Employment Judge and, in particular, the fact that the physiotherapist or other medical expert was not directed properly to the relevant issues, I am satisfied that the result would not have been different if the Employment Judge had expressly considered the points raised in Grounds 1 and 2.

28. For all those reasons, I dismiss the appeal.