



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mrs H Marsen

AND

Respondent
Loungers Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY
By CVP Video Platform

ON

16 July 2024

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Miss A Greenley of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant was not a disabled person at the material times, and her claims for direct disability discrimination, discrimination arising from disability, indirect disability discrimination, and in respect of an alleged failure to make reasonable adjustments, are all hereby dismissed.

RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant was a disabled person at the material times.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 74 pages, the contents of which I have recorded.
3. I have heard from the claimant, who gave evidence following the submission of her Disability Impact Statement. Miss Greenley questioned the claimant on her evidence, and she made submissions on behalf of the respondent.

4. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The Facts:
6. The respondent Loungers Ltd is a café, bar and restaurant chain. The claimant Mrs Heidi Marsen was born in 1972 and she was employed as General Manager of the respondent's Rivo Bar in Chippenham from 17 May 2022 until 5 May 2023. She commenced these proceedings on 1 August 2023. Following a case management preliminary hearing on 1 February 2024 Employment Judge Bax prepared a detailed Case Management Order and List of Issues. He recorded in that Order the general background to this claim as follows:
7. [87] "The claimant was employed by the respondent between 17 May 2022 and 5 May 2023 as a General Manager. The claimant says that she was disabled by reason of symptoms of menopause. The claimant says that the kitchen was understaffed. She worked 50 to 60 hours per week. She was unable to take holiday because she was told that there was no cover. She had to work on the restaurant floor and undertake administrative duties. She says that she was constantly exhausted which exacerbated her symptoms of menopause, namely memory loss and brain fog. Towards the end of the financial year it was suggested that she took Fridays off in addition to her normal two days in order to use up holiday. She was criticised at a disciplinary hearing for not being at work more to take control of the issues raised. In April 2023 she asked HR if they had support or a menopause policy and was told they did not and suggested she contact her line manager. On 1 May 2023 she was asked to attend a meeting, at which she was criticised and suspended. She was then dismissed."
8. [87] "The respondent asserts that the claimant was regularly visited at the start of her employment by the operations manager and operations chef. Concerns were raised with her about lack of process and standards at the site, and delays in response to the operations team about when tasks had been completed. Her probationary period was extended. There continued to be ongoing issues with standards which were fed back to the claimant verbally and in emails. The claimant was given time to put her stamp on the site and build a strong team. On 28 April 2023 the claimant asked about the respondent's stance on menopause. This coincided with a serious concern about cash and stock disparities and a lack of management of the team. The claimant was suspended on 1 May 2023. No reference was made to the menopause at the meeting. The claimant was summarily dismissed by reason of gross misconduct following a meeting on 5 May 2023. The claimant appealed the decision, but later withdrew her appeal."
9. The agreed List of Issues in that Order recorded that the claimant pursues claims of direct and indirect discrimination on the grounds of her age, sex and her disability, and that she also pursues claims for discrimination arising from disability, and because of the respondent's alleged failure to make reasonable adjustments. The disability relied upon by the claimant is the menopause. The respondent denies that the claimant was a disabled person by reason of this impairment at the times material to the claims, which are agreed to be from 1 May 2023 (the date of suspension) until 5 May 2023 (the date of dismissal).
10. This preliminary hearing was then listed to determine the claimant's disputed disability status. The claimant was ordered to prepare and serve a Disability Impact Statement (DIS), which she has done, and to provide disclosure of such medical evidence and documents as she wished to rely on, which she has also done. However, the medical evidence in support of the claimant's assertions is sparse.
11. The claimant's DIS asserts that: "During my position immediately prior to joining Loungers I had begun to struggle with confidence at work and learning new systems. I couldn't juggle commitments as I have in the past and I was frustrated that certain aspects of my job were becoming a struggle. I was exhausted, emotional, highly stressed. My partner completely took over "home duties" of cooking, cleaning and everything relating to the boys and schooling. I slept and tried to carry out some work commitments from home assuming that it was the work environment as I assume the job was affecting me, I set out about finding another. I commenced work at Rivo Lounge and very soon day-to-day activities that I would

- normally have relished as a challenge became exhausting and anxiety inducing ... There were so many job deadlines, my mind just couldn't focus ... I was upset, anxious and exhausted and that made everything worse."
12. The claimant has provided no medical evidence which predates or covers the relevant times. The claimant has provided copies of the GP notes which appear to refer to three consultation appointments. The first is on 18 May 2023, two weeks after the claimant's dismissal. There appears to have been a second appointment, which is only partially disclosed and is undated, but it must have occurred after this first appointment, and before the third consultation which is dated 4 December 2023.
 13. At the first consultation on 18 May 2023 there is no record of any adverse symptoms other than bleeding on the day of dismissal, and HRT is prescribed for the first time. The GP notes do not describe or support any of the history which the claimant alleges in her DIS. The claimant asserts in her DIS that her symptoms started 18 months prior to joining the respondent, in other words in October 2020, and the notes give no indication why it has taken the claimant this long to seek assistance from her GP. In other words, the consultation on 18 May 2023 was the first consultation regarding the menopause.
 14. The second appointment only records "still getting some night flush symptoms and does not feel motivation back to previous levels" and "no further bleeding in last 12 months". The GP recommended increasing the dosage of oestrogen. It is not clear what was discussed or recorded at the third consultation on 4 December 2023, other than some reference to a shoulder pain exercise pamphlet, presumably relating to the claimant's rheumatoid arthritis.
 15. The claimant has also provided a copy of a repeat prescription list which refers to the period of May and June 2024, and this does not include HRT, although the claimant says that this was provided annually.
 16. The claimant has also provided a letter from her GP Dr Watson dated 22 March 2024, which is 10 months after the relevant time. It notes that the claimant started consulting with the GP regarding the menopause in May 2023 (which is consistent with the appointment on 18 May 2023 above) and it states that the claimant "had a background history of struggling at work due to lack of concentration and brain fog for several years". However, this conclusion is not noted in the initial consultation above, nor any time in the medical records, and neither does it cover the range of symptoms asserted by the claimant in her DIS. The GP letter then concludes with a generalised statement to this effect: "I can confirm that women with menopausal symptoms will often experience lack of concentration, reduction in brain function and brain fog and I feel that this should have been taken into consideration around her working week."
 17. The claimant has provided no medical records beyond the second undated consultation (which must proceed December 2023) to provide any evidence to suggest that there is any ongoing substantial adverse effect and, as noted above, her repeat prescription list does not include HRT.
 18. Other relevant facts are that the claimant suffered from rheumatoid arthritis, and she took advice from medical practitioners in connection with this condition. She says that she assumed that this condition might have been causing her fatigue until she began to understand the symptoms of the menopause. However, no medical evidence or notes have been adduced to suggest that the claimant discussed this condition, or the overlap with the menopause, with her medical advisers.
 19. The claimant says that she confided in a colleague in October 2022 that she was struggling at work, and they discussed the possible impact of menopausal symptoms. On 28 April 2023, a week or so before the claimant's dismissal, she sent an email to the respondent's confidential HR service stating: "I'm looking for some advice - I'm not sure whether Loungers has any experience with the effects of menopause in the workplace and this is new ground for me also! ... Finding myself with a lack of confidence and a memory like a goldfish. Feeling extremely tired and more stress than I have ever felt in my life! ..."
 20. In addition, it is worth recording that the claimant was used to working in the busy and stressful environment of hospitality. She was able to work in this environment in her previous job before she joined the respondent. That was the work she did for the

respondent until their performance criticisms of her which led to her dismissal. She then chose to obtain alternative employment after her dismissal in the same busy hospitality environment.

21. Having established the above facts, I now apply the law.
22. The Law:
23. The claimant alleges discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from a disability, failure by the respondent to comply with its duty to make adjustments, and harassment.
24. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
25. In addition, schedule 1(5) EqA provides that – (i) 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. (ii) "Measures" includes, in particular, medical treatment and the use of prostheses or other aid.
26. Under section 212(1) EqA "substantial" means more than minor or trivial.
27. The Secretary of State has published Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011) ("the Statutory Guidance"), which I have considered. Section B provides guidance on the meaning of "substantial adverse effect". This repeats section 212(1) EqA and confirms that "substantial" means more than minor or trivial. In it also addresses factors such as the time taken to carry out an activity; the way in which an activity is carried out; and curative effects of an impairment. Section D provides guidance on the meaning of "normal day-to-day activities". The EqA does not define what is to be regarded as a "normal day-to-day activity", but in general the Statutory Guidance states that it includes things which people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, and carrying out household tasks.
28. The Appendix to the Statutory Guidance provides "an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities". These include: "difficulty operating a computer, for example, because of physical restrictions in using the keyboard, a visual impairment or a learning disability; inability to convert or give instructions orally; difficulty understanding or following simple verbal instructions; persistent and significant difficulty in reading or understanding written material where this is in the person's native written language, for example because of a mental impairment; and persistent distractibility or difficulty concentrating."
29. I have also had regard to the relevant provisions of Appendix 1 of the Equality and Human Rights Commission Code of Practice on Employment - the Meaning of Disability. This says that a substantial adverse effect is something which is more than minor or trivial. In determining whether something has a substantial adverse effect, account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of the loss of energy and motivation.
30. This Appendix to this Code also says that normal day-to-day activities are those activities which are carried out by most men or women on a fairly regular and frequent basis. Day-to-day activities include activities such as walking, driving, using public transport, cooking, eating, typing, writing, going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction, or forming social relationships, nourishing and care for oneself. This is not an exhaustive list.
31. This Appendix to this Code also confirms that where someone receives medical or other treatment which alleviates or removes the effects, the treatment is ignored, and the

- impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (that is to say the impairment has been cured).
32. The following comments are taken from the judgment of HHJ Tayler in Seccombe v Reed in Partnership Ltd: In Goodwin v Patent Office Morison J set out for conditions that require consideration when assessing whether a person is disabled, at page 308B: “The words of the section require a tribunal to look at the evidence by reference to four conditions. (1) The impairment condition. Does the applicant have an impairment which is either mental or physical? (2) The adverse effect condition. Does the impairment affect the applicant’s ability to carry out normal day-to-day activities in one of the respects set out in paragraph 4(1) of Schedule 1 to the Act, and does it have an adverse effect? (3) The substantial condition. Is the adverse effect (upon the applicant’s ability) substantial? (4) The long term condition. Is the adverse effect (upon the applicant’s ability) long term?”
 33. While it is good practice to deal with each of the conditions identified by Morison J in Goodwin separately, there may be occasions on which it is permissible to focus on the question of whether there is substantial adverse effect on day-to-day activities without having to establish the precise medical nature of the impairment before so doing: Underhill J so held in J v DLA Piper UK LLP.
 34. A person can be disabled where the impairment has only a single long-term substantial adverse effect on one day-to-day activity: Sobhi v Commissioner of Police of the Metropolis. The claimant in this case relied on loss of concentration.
 35. In SCA Packaging v Boyle Lord Hope held that when considering whether an impairment is likely to recur the term “likely” means that it could well happen. That phrasing has been adopted in the Equality Act 2010 Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability.
 36. In McDougall v Richmond Adult Community College Rimer LJ held that it is necessary to decide whether the definition of disability is met at the time of the alleged discrimination. This reasoning was adopted by Lewis LJ in All Answers v W [2021] IRLR 612 at paragraph 26: “the question therefore is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paras 22 – 25 and Rimer LJ at paras 30 – 35). That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase “likely to last at least 12 months” in paragraph 2(1)(b) of the Schedule. I note that the interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 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”.
 37. In Mutombo-Mpania v Angard Staffing Solutions Ltd UKWEATS/002/18, the EAT held that it is incumbent on a claimant to provide evidence to the tribunal of the activities it is claimed they are less able to carry out. This approach was approved by the Court of Appeal in Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061 when it held that “the phrase “normal day-to-day activities” should be given an interpretation which encompasses the activities which are relevant to participation in professional life”. Underhill LJ preferred the term “working life”.
 38. It is not an error to consider an impairment to be more than trivial, and yet still minor rather than substantial (Anwar v Tower Hamlets College UKEAT/0091/10).

39. The simple fact that a claimant can only carry out normal day-to-day activities with difficulty does not establish that disability is made out. As confirmed in Condappa v Newham Healthcare Trust [2001] All ER (D) 38 the EqA is concerned not with any adverse effect rather with a substantial adverse effect. Whether or not difficulty is sufficient in any particular case is a matter for the tribunal to decide on the facts before it.
40. The effect of an impairment will only be a long-term effect if (a) it has lasted at least 12 months; (b) the period for which it lasts is likely to be 12 months; or (c) it is likely to last for the rest of the life of the person affected (paragraph 2(1)(a)-(c) Schedule 1 EqA)
41. In Tesco Stores Limited Tennant UKEAT/0617/19, the EAT confirmed that an impairment must have been long-term effect at the time that the alleged acts of discrimination are committed. Therefore, if a claimant's condition has not lasted at least 12 months at the time of the alleged discriminatory act (or, if there is more than one act, at the time of each act), the claimant will not meet the definition of disability unless they can instead show that, at the time of the alleged discriminatory act (or acts) their condition was likely to last 12 months or for the rest of their life.
42. In Seccombe v Reed in Partnership Ltd the EAT observed that the long-term requirement relates to the effect of the impairment rather than merely the impairment itself. It is not therefore sufficient that a person has an impairment that is long-term; the impairment must have had a substantial adverse effect on day-to-day activities that is long-term.
43. Having considered all of the above principles, my conclusion is as follows.
44. Judgment:
45. Applying Seccombe v Reed in Partnership Ltd: "The words of the section require a tribunal to look at the evidence by reference to four conditions ..."
46. The first question to be addressed is whether the claimant has an impairment which is either mental or physical. There has been some discussion in the press recently to the effect that symptoms of the menopause ought to be included in the list of impairments which amount to disabilities for the purposes of the EqA. That is not the case, but in principle there is no reason why symptoms of the menopause should not amount to a disability if the relevant statutory test is met. I am satisfied that the claimant did suffer from the menopause and that in her case it was a physical impairment. Although this was not diagnosed in the claimant's case until after the relevant times, she did email HR to raise the subject of the menopause just before her dismissal. I therefore conclude that the claimant did suffer from the menopausal symptoms during the relevant times in question.
47. The second question to be addressed is the adverse effect condition, in other words does the impairment affect the claimant's ability to carry out normal day-to-day activities and does it have an adverse effect. In her DIS the claimant largely complains of exhaustion and lack of concentration. The ability to concentrate at work is a normal day-to-day activity, and although the claimant fails to address the exact time or times when she says that she suffered this adverse effect, I am prepared to accept that this may well have happened during the relevant times in this case.
48. The difficulty which the claimant faces in my judgment are the third and fourth limbs of this test, namely whether the adverse effect on the claimant's normal day-to-day activities was substantial, and whether this substantial adverse effect was long-term. I find that neither of these conditions is met.
49. Put simply, the evidence before me does not support the claimant's contention that her symptoms of menopause had a substantial adverse effect on her normal day-to-day activities at the relevant time. On the contrary, there is no medical evidence which predates or covers the relevant time. The first consultation on 18 May 2023 was two weeks later and there is no description of any adverse symptoms other than bleeding on the day of dismissal. The medical notes do not set out any of the history which the claimant alleges in her DIS. There are no records to support the claimant's contention that her symptoms might have started since October 2020, which is a notable omission particularly as the claimant sought medical advice for rheumatoid arthritis during this period. If the symptoms were causing any substantial adverse effect, then one would have expected to have seen these being discussed with her GP during these appointments.

50. Similarly, the claimant suggests that she spoke with a colleague in October 2022, but if she were suffering any substantial adverse effect from the menopause, one would have expected her to have sought medical advice, rather than waiting a further six months until May 2023. In addition, in her email to HR at the end of April 2023 the claimant stated that: "this is a whole new thing for me to deal with" which further undermines her statement that she had been suffering since October 2020 and before joining the respondent in May 2022.
51. It is also clear that the claimant chose to pursue employment in the busy hospitality sector before joining the respondent, and again with a new employer after her employment with the respondent ended. Given the amount of hours that she worked, some of them antisocial, one would expect a degree of fatigue. Other than this, there is no evidence that as of the relevant times in early May 2023 the claimant had already experienced substantial adverse effect which had lasted for 12 months, nor any substantial adverse effect which was likely to last for the forthcoming 12 months.
52. For all these reasons I conclude that the claimant was not a disabled person by reason of the menopause at the relevant times. Accordingly, her claims of direct disability discrimination, discrimination arising from disability, in direct disability discrimination, and in respect of the alleged failure to make reasonable adjustments, are all hereby dismissed.

Employment Judge N J Roper
Dated 16 July 2024

Judgment sent to Parties on
13 August 2024 By Mr J McCormick

For the Tribunal Office