



EMPLOYMENT TRIBUNALS

Claimant: Mrs Sarah Williams

Respondent: Countryside Estate Agents Ltd (R1)
Sue Ford (R2)
Catherine Dente (R3)

Heard at: Birmingham Employment Tribunal (via CVP)

On: 11 December 2024

Before: Employment Judge Boyle

Representation

Claimant: Ms Anita North (Solicitor)

Respondent: Mr Rahul Kumar (Counsel)

RESERVED JUDGMENT

1. The claimant was a disabled person by reason of migraine with typical auras and chronic migraine between 24 May 2023 and 30 June 2023.
2. The claimant was not a disabled person by reason of Empty Sella Syndrome and Idiopathic Intracranial Hypertension between 24 May 2023 and 30 June 2023.
3. The claimant's claims for disability discrimination remain and this matter will be listed for a further short Case Management Hearing.

REASONS

The REASONS for the judgment are as follows:

Background

1. The purpose of the Preliminary Hearing was to consider whether the claimant was a disabled person within s.6 Equality Act 2010 at the time of the alleged discriminatory acts.
2. The case was well prepared with a joint bundle and impact statements prepared. This case was heard by CVP and all parties had a strong internet connection. I have been able to assess the claimant's evidence and form a view of their evidence.
3. The claimant says she suffers from the following conditions which separately amount to disabilities:
 - a. Empty Sella disease or Empty Sella Syndrome ("ESS")
 - b. Migraine with typical auras
 - c. Chronic Migraine and
 - d. Idiopathic Intracranial Hypertension ("IIH")

Procedure Documents and Evidence

4. I heard evidence from the claimant at the Preliminary Hearing. She also provided two impact statements (dated 24 May 2024 and 9 August 2024) together with supporting medical evidence. She was cross-examined by Mr Kumar.
5. I was supplied with a bundle of 224 pages which I was referred to by both parties.
6. Both parties made submissions (the claimant's were in writing: the respondent delivered theirs orally). I reserved my decision in order to consider this matter further.

Fact Findings

7. After a careful consideration of all the evidence before me I make the following findings of fact on the balance of probabilities.
8. The parties will note that not all the matters that they told me about are recorded in these findings of fact. That is because I have limited them to points that are relevant to the legal issues.

9. The claimant was employed by the first respondent as a team manager between 21 February 2022 and 30 June 2023. She resigned from her employment with the first respondent on 30 May 2023 giving one month's notice.
10. The claimant took a period of sick leave from 27 February 2023 to 20 March 2023. The claimant conceded that the reasons given for the leave were "heavy bleeding/anxiety and depression". The claimant accepted that she was not relying on these impairments in relation to a disability discrimination claim and that she was not complaining about the respondents' actions until around 13 April 2023.
11. The claimant took a further period of sick leave from 11 April 2023 to 23 May 2023 with her fit notes describing "ongoing headaches and pain in the eyes".
12. I must make a finding in relation to the relevant period of disability for which the claim refers. The parties did not agree on this. The claimant said in submissions that this period was between 27 February 2023 and 30 June 2023, although in evidence she confirmed it was in fact from April 2023. In fact, in her submissions, if you put aside the initial period, the claimant's claims begin on 24 May 2023 through to her employment ending on 30 June 2023. The respondent says the relevant period was mid April 2023 to 30 June 2023.
13. Considering the evidence including the pleadings I find that the material period is between 24 May 2023 and 30 June 2023 and therefore the claimant must establish that she was disabled with at least one condition during that period.

ESS

14. The claimant says she suffers from ESS and pointed to the outcome of an MRI scan on March 2023 with a discharge summary from Northampton General Hospital dated 10 April 2023 which refers to the claimant being found to "have a partially empty sella".
15. The claimant also refers to her GP notes on 6 April where Dr Azhar refers to the results of the claimant's recent MRI and "also partially empty sella". One further reference to this appears in a letter from Dr Tomlinson (a consultant neurologist) who refers to a separate MRI scan on 12 June 2023 and "alongside the partially empty sella".
16. The claimant stated that the following were impairments caused by this condition

- a. blurred vision
 - b. struggling to look at screens due to pain in her eyes when she is having an episode
 - c. drowsiness from the medication needed to treat the pain in her eyes meaning she cannot drive or travel alone
 - d. premature menopause in November 2022 which led to increased anxiety depression and abnormal periods
 - e. premature menopause also caused irregular and heavy bleeding
17. The claimant could not point to any formal diagnosis but was firm in her evidence that she has ESS and that this had been the cause of her early menopause (which started in her very early 40s) and infertility problems prior to this.
18. She says she talked “a lot” about ESS with her GP and consultant, but this does not appear to be borne out by the medical notes produced.
19. Whilst I can see the references to an “empty sella” I am troubled that there is a lack of a formal medical diagnosis and believe that this is a case of the claimant making the diagnosis. She conceded in evidence that there was no formal diagnosis.
20. I am not a medical expert and therefore do not understand the difference between it being noted that a person has an empty sella as the result of an MRI and having a formal diagnosis of ESS. The claimant said that they automatically followed, but I saw no medical evidence to support this. The claimant said she could produce this, but it was not before the Tribunal at the hearing. On balance, and relying on the absence of medical evidence, I am of the view that they are separate things, and having it noted that you have a partially empty sella is not the same as a diagnosis of ESS.
21. The impairments she describes about could (save for those relating to menopause for which she is not relying) could quite readily be caused by the claimant’s migraine conditions.

IIH

22. The claimant relies on a number of documents to support her claim that she has IIH. These are a letter dated 25 July 2023 from Dr Tomlinson (Consultant Neurologist) . This letter actually states:

“ However, the scan on this occasion showed some distension of the optic nerve sheaths which alongside the partially empty sella, could suggest IIH. A lumbar puncture could be conducted to confirm or exclude this possibility”

23. The claimant relies on the impairment of struggling to look at screens (phones computers) due to the pain in her eyes when she is having an episode.
24. As a result of the letter above, she was referred for a lumbar puncture. The first took place on 22 August 2023 – sadly this was unsuccessful. She underwent a further lumbar puncture on 18 March 2024 although the claimant still does not have a positive confirmation of a diagnosis of IIH and is awaiting a further appointment/MRI.
25. The claimant is currently no further to a diagnosis, and the Doctor's opinion as set out in the letter date 25 July 2023 is couched in terms of "could suggest".

Migraine

26. Whilst the claimant describes two types of migraine - with auras and chronic – I will deal with these together. Migraine is a form of severe headache that can also affect the vision and can be both mentally and physically exhausting due to the pain involved.
27. The claimant appears to have suffered from headaches for many years. From around October 2022 she started experiencing eye pain for which she was referred for an MRI scan.
28. She says the effects of these conditions are:
 - a. Inability to care for her children without assistance, and inability to leave the house alone for long periods due to the numbness in her limbs
 - b. inability to leave her bed for days when the pain is severe
 - c. inability to visit places where there are loud noises which means that the claimant cannot socialise with friends or take her children out
 - d. inability to leave her house to collect her children from school on occasion
 - e. severe nausea to the point of vomiting which occurred from around December 2022 and continued until the employment ended
29. These effects were not challenged by the respondent and are supported by notes in her medical reports of conversations with her doctors. I am satisfied that these refer to day-to-day activities and the level she describes suggests a substantial effect on her ability to undertake these tasks.
30. The claimant also referred to various medical notes and diagnosis. Whilst the claimant was formally diagnosed with chronic migraine and migraine

with typical aura by Dr Tomlinson on 26 April 2023, the claimant reported symptoms to her doctor dating back to at least October 2022.

31. Whilst the claimant believes her eye pain is associated with either ESS or ITH it is noted that her doctors believe that this is more likely associated with her migraines. (see letter dated 26 April 2023 from Dr Tomlinson). The claimant continues to take medication for migraine and eye pain to date (see medical records but this includes Pizotifen, Venlafaxine and Zapain). I am satisfied that if the claimant did not take this medication the effects of her migraine would be much worse.
32. Bearing in mind the claimant's history and reporting of increased headaches with eye pain from October 2022, I am satisfied that you could describe her conditions of migraine as being long-term during the relevant period. (i.e between 24 May 2023 and 30 June 2023). It was not ever described as a temporary condition and the medical evidence suggest it was one for the claimant to have to learn to manage. Therefore even if had not lasted for 12 months by this time, I am satisfied that it was likely to last at least 12 months. Whilst not relevant, this condition prevails to date.

I have applied the following LAW to these facts

33. Disability Section 6(1) Equality Act 2010 (EqA) states: "A person (P) has a disability if— P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."
34. Part 1 of Schedule 1 to the EqA ; "Long-term effects 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.
35. 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. ...
36. Effect of medical treatment - 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.

"Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid."
37. 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') sets out:- "that

anything which occurs after the date of the discriminatory act will not be relevant to the consideration of definition of disability.”

38. The time at which the Tribunal is to consider the disability is the date of the alleged act of discrimination. This is also the relevant date when considering whether any impact is long term. All Answers Ltd v W 2021 IRLR 612, CA, set out that the Tribunal must look at the facts and circumstances existing at the date of the discrimination and not to events which occurred subsequently.
39. The Tribunal must take into account Statutory Guidance on the definition of Disability (2011) which stresses that it is important to consider the things that a person cannot do, or can only do with difficulty (B9). This is not offset by things that the person can do: Aderemi v London and South Eastern Railway Ltd 2013 ICR 391. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc (Guidance D2 – D7)
40. In Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763, Elias J said: "... when assessing the effect, the comparison is not with the population at large. As paragraphs A2 and A3 [of the then Guidance] make clear, what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired."
- 41.. To consider whether a condition meets the definition in the Equality Act, it must exist or be likely to exist for 12 months. The Tribunal should consider SCA Packaging Limited v Boyle [2009] ICR 1056, HL; which says that whether something is 'likely' is to be considered as to whether it could well happen. Information known at the time can be taken into consideration, but hindsight should not be used.
42. The burden of proving disability lies with the Claimant who must provide evidence of circumstances which fall within s.6 Equality Act 2010. Each disability must be considered independently.

Conclusions

43. I will consider each of the claimant's disabilities separately.

ESS

44. Based on my finding that there has been no formal diagnosis, and very limited medical evidence and the claimant appears to have self-diagnosed this condition, I am not satisfied that the claimant suffered from the condition of ESS at the relevant time and that the headache/eye pain impairments she describes are more like associated with her migraine condition.

45. I therefore find that the claimant was not disabled withing the meaning of s6 Equality Act 2010 in respect of ESS within the relevant period.

IIH

46. Whilst the claimant's medical advisor talk about the possibility of this condition, the claimant still does not have a diagnosis. Whist she describes impairments associated this this condition, again, I believe these impairments are more likely associated with her migraine condition. Therefore I find that the claimant did not have the condition of IIH at the relevant time.

47. I therefore find that the claimant was not disabled withing the meaning of s6 Equality Act 2010 in respect of IIH within the relevant period.

Migraine

48. Based on my findings of fact above, I am satisfied that the claimant suffers from the impairments described and the effects of her migraines are substantial and long-term and affected her during the period of 24 May 2023 to 30 June 2023.

49. I therefore conclude that the claimant was disabled within the meaning of s.6 Equality Act 2010 with her migraine conditions, during the relevant period.

50. The claimant's claims in respect of disability discrimination shall therefore be allowed to proceed.

Employment Judge Boyle

Date: 11 December 2024

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