



EMPLOYMENT TRIBUNALS

Claimant
Miss K Dailyeva

v

Respondent
JTL

Heard at: London (South) (via CVP)

On: 5 March 2025

Before: Employment Judge Fredericks-Bowyer

Appearances

For the claimant: Mr H Bayram (Lay Representative)

For the respondent: Mr J Scarborough-Lang (Litigation Consultant)

RESERVED JUDGMENT

The claimant was not disabled at the material time and consequently all of her disability based claims, advanced on the condition she was disabled, are dismissed.

REASONS

Introduction

1. This is my reserved judgment on the question of the claimant's claim to have been disabled as a result of (1) the psychological impact of having IVF treatment, (2) anxiety, (3) stress, and (4) depression.
2. There was a hearing before Employment Judge Cawthray on 13 June 2024. That hearing also listed this hearing to consider any application to amend the claim brought by the claimant. There was an application lodged by the claimant on 26 June

2024, but that application had not been sent to the respondent. The respondent had not seen the application by this hearing and so it could not be dealt with. The claimant is to send the application to the respondent so the matter can be considered further.

3. The relevant issues for this hearing are as is set out in the relevant law below. The claimant's disability claim is for harassment related to disability. There is an outstanding application to amend the claim to include a failure to make reasonable adjustments claim which falls away as a result of this judgment. The disability harassment claim relates to allegations which take place between November 2022 until June 2023. This is the 'relevant time' for the purposes of the claimant's claim.
4. The claimant gave evidence in the hearing. I also had access to a bundle of documents which ran to 88 pages.

Relevant law on disability

5. A person (P) has a disability they meet the criteria set out in section 6 Equality Act 2010:-

"(1) 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 do normal day to day activities."*

6. The claimant bears the burden of showing me that he meets this definition, on the balance of probabilities (Morgan v Staffordshire University [2002] IRLR 190; Tesco Stores Limited v Tennant [2020] IRLR 363). When determining the question of disability, I must take account of such guidance as I think necessary (paragraph 12, Schedule 1 Equality Act 2010). I consider it is necessary to take into account the government guidance "Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability" ("**Guidance**"). Such guidance is guidance only and should not be taken too literally or used to adopt a checklist approach (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19).
7. In Goodwin v Patent Office [1999] ICR 302, it was held that there are four limbs to the definition of disability and this is reflected in the legislation:-

7.1. Does the person have a physical or mental impairment?

7.2. Does that impairment have an adverse effect on their ability to carry out normal everyday activities?

7.3. Is that effect substantial?

7.4. Is that effect long-term?

8. The term 'substantial' is defined under s212 Equality Act 2010 as being "*more than minor or trivial*". Normal day to day activities are things people do on a regular basis such as shopping, reading, writing, conversing, getting washed and dressed,

preparing food, eating, carrying out household tasks, walking and travelling, socialising and working (Guidance, D2 to D9). Normal day to day activities must be interpreted as including activities relevant to professional life (Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763).

9. Paragraph 2(1) Schedule 1 Equality Act 2010 says:-

“(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 everyday activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”

10. For current impairments which have not lasted 12 months, I should decide whether the substantial adverse effects of the condition are likely to last for at least 12 months, where ‘likely’ is defined as “*could well happen*” (C3 Guidance). ‘Could well happen’ is the meaning of ‘likely’ in respect of disability in the Equality Act 2010.

11. The issue of how long an impairment is likely to last is determined at the date of the alleged discriminatory act and not the date of the tribunal hearing (McDougall v Richmond Adult Community College [2008] ICR 431, CA). Subsequent events should not be taken into account.

12. An impairment is treated as having a substantial adverse effect if it ‘could well happen’ that the substantial adverse effect could occur if the person who may be disabled stopped implementing supportive or preventive measures, such as medical treatment (SCA Packaging Limited v Boyle [2009] ICR 1056).

13. There is particular case law relating to the impairments depression and anxiety (both of which are often claimed alongside ‘stress’). I must not merely seek out a medical diagnosis and end an analysis on the basis there either is or is not one. In Nissa v Waverly Education Foundation Limited UKEAT/0135/18, HHJ Eady QC (as was) said:-

“the correct question was to consider what the effects of the impairments were at the material time and to consider whether there was information before the ET which showed that viewed at that time it could well happen that the effects of the impairments would last for more than 12 months”.

14. The question to be determined is whether or not the claimant was disabled at the time to which the disability claim relates, and it must put itself into that time to resolve the Goodwin questions (All Answers Ltd v W [2021] IRLR 612). In that case, Lewis LJ said:-

“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”.

Findings of fact about disability

15. The claimant did not provide a witness statement in respect of the contention she was disabled at the material time. She had, though, provided written responses to questions at the direction of the Tribunal. Those responses covered the subject areas which would be expected to be found in an impact statement, and were at pages 31 to 33 of the bundle. I was content to treat that as the claimant's evidence in chief.

16. I have considered all of the available evidence and highlight the relevant parts for this determination below:-

16.1. The claimant had her first IVF consultation in January 2020.

16.2. The claimant received IVF protocols in November 2021, August 2022, November 2022, January 2023, and August 2023. The protocols caused hormone imbalances which were experienced between the protocols taking place.

16.3. During the relevant time, the claimant was undergoing IVF treatment. I accept that the claimant considered that she had the following side effects to some degree during that time period (she lists the symptoms on page 31):-

16.3.1. fatigue;

16.3.2. inability to sleep;

16.3.3. mood changes;

16.3.4. stress;

16.3.5. depression;

16.3.6. very strong headaches;

16.3.7. low mood;

16.3.8. anxiety;

16.3.9. abdominal blooming;

16.3.10. disorientated; and

16.3.11. difficulty concentrating.

- 16.4. The claimant's evidence is that the *"medication she was on and the apparent failure of JTL to make reasonable adjustments"* (page 31) caused the impacts below on day to day activities. The claimant's list includes complaints or allegations about the respondent's treatment of her. I pick out only those points which can be considered to be impact on day to day activities caused by the medical conditions:-
- 16.4.1. found it hard to concentrate after using a computer more than 2 hours;
- 16.4.2. found it difficult to drive long distance (clarified as above 90 minutes), often missing road turnings and feeling disorientated;
- 16.4.3. found it difficult to concentrate on long conversations or team meetings;
- 16.4.4. forgetting quickly, getting anxious when partaking in long conversation, and impatient with colleagues and family members.
- 16.5. The claimant did not receive any treatment for any conditions claimed as disabilities until she began counselling in May 2023. She told the practitioner that she was struggling to sleep (page 59). No associated medication was prescribed although it was discussed. The claimant alleviated symptoms with routine and exercise.
- 16.6. On 7 December 2022, the claimant told the respondent about the IVF treatment and subsequently took sickness absences:-
- 16.6.1. 9 December 2022 – 14 December 2022 (no note);
- 16.6.2. 30 January 2023 – 12 February 2023 (fertility treatment page 69);
- 16.6.3. 14 March 2023 – 17 April 2023 (stress related problems page 70);
and
- 16.6.4. 26 June 2023 – 7 September 2023 (IVF page 71).
- 16.7. The claimant raised a grievance about the way she felt she was being treated by the respondent, and considers that the respondent treatment is a significant cause of the mental health illness she relies upon as disabilities in the claim.
- 16.8. The claimant says (page 31) that the stress has subsided since no longer working at the respondent.
- 16.9. Most of the medical evidence disclosed, save for page 59 and 70, relate to the IVF treatments received by the claimant at her own choice.
- 16.10. On 31 May 2023, the claimant underwent a work-related stress risk assessment. The risk assessment was at pages 74 to 81. The claimant

confirmed that the summary was an accurate record (page 76). The relevant parts in respect of what was said at the time, are:-

16.10.1. the claimant said the stress being suffered was caused by work-related issues, worrying about work tasks which led to loss of sleep and being signed off;

16.10.2. the manager reported the claimant as saying *“work load, lack of communication, and lack of direction. The investigation meeting also causing stress for Krass”*.

16.11. In the ‘employee detail’ summary, the claimant described entirely work related matters as causing her stress and symptoms which led to her being off work. The symptoms described were vomiting, headache and lack of sleep. The causes stated were in respect of management expectations and workload. The claimant described experiencing issues since December 2022. She said that she had had time off work for IVF treatment prior to this. This is the only mention of IVF. There is no mention of psychological issues caused by IVF. There is no mention of depression or anxiety.

16.12. On 27 March 2024, the respondent’s Tanya Parkin spoke to the health and safety officer to investigate the claimant’s grievance. She asked him if what are now the medical impairments being relied on as a disability were mentioned at the return to work and risk assessment phase. He said they had not, and that the stress identified was to do with a grievance against a colleague. He said that IVF was mentioned at the time in the context of a complaint from the claimant that her private information had been shared.

17. On the basis of the above, I find the following facts:-

17.1. The claimant had a series of IVF treatments which caused side effects which she has described above.

17.2. There is no independent corroboration of the symptoms the claimant describes, other than the respondent and a healthcare practitioner confirming that the claimant was describing sleep loss, headaches, vomiting and stress.

17.3. The claimant sought no advice about or treatment for the impairments now complained of until she sought counselling in May 2023.

17.4. The claimant has not been diagnosed with depression, anxiety, or psychological illness following IVF treatment.

17.5. The claimant’s concentration was impeded at the relevant time when required to do tasks which require considerable amounts of concentration or stamina, such as working for more than 2 hours on a computer at a time or driving more than 90 minutes at a time. Even then, the claimant was able to do these tasks but not as effectively as when rested and fresh.

- 17.6. The claimant suffered from work related stress caused by the situation she was in with working at the respondent.
- 17.7. The claimant had periods of absence from work for significant periods. All but one of these were as a result of the IVF treatment itself. The other was for the work-related stress as outlined above.

Conclusions on disability

Did the claimant have a mental or physical impairment at the relevant time?

18. The respondent accepts that the claimant was suffering from stress at the relevant time, and this is supported by its own risk assessments and investigations which indicated to it that the claimant was suffering from situational work-related stress.
19. The only evidence that the claimant had depression, anxiety or psychological illness caused by IVF comes from the brief document the claimant wrote where she listed side effects caused by the IVF treatment. These are framed as being caused by the treatment. The claimant does not explain what symptoms she experienced which led her to conclude that she was suffering from psychological issues, anxiety or depression. Specific symptoms listed alongside those headings – the vomiting, lack of sleep, lack of concentration, and headaches – may well have been caused by stress or a physical manifestation of side effects to treatment.
20. There is a notable lack of medical evidence in this case which, in my view, would be required to establish a link between the symptoms complained of and an impairment which caused them. Without that, I am being asked to trust that the claimant has accurately categorised the symptoms she says she experienced into diagnosable impairments without reference to medical evidence. I may, on the balance of probabilities, accept that where the claimant themselves has some medical experience or qualification which meant that their self-assessment of symptoms and likely causes was grounded in some expertise. Where this claimant has no such expertise, I am not able to simply hear their self-labelling as someone with anxiety and depression and accept that evidence.
21. Indeed, here, there is adequate evidence that those conditions were not being discussed at the relevant time, either with or by the respondent in occupational health processes, for me to conclude on the balance of probabilities that the claimant was not suffering with the impairments of (1) psychological issues following IVF treatment, (2) depression, or (3) anxiety.
22. I find that the claimant was suffering from stress, with all of the symptoms attributable to a combination of stress and the physical side effects generally known to be caused by IVF treatment (with which the claimant agrees).

Does that impairment have an adverse effect on their ability to carry out normal everyday activities?

23. I now only consider the stress identified by both parties, as this is the only impairment relied upon I find the claimant has.

24. In my judgment, the claimant has not given much evidence about the impact of stress on day-to-day activities. The only adverse effects I identify as having been given in evidence are:-

24.1. Difficulty to concentrate on a computer for more than 2 hours;

24.2. A lack of sleep significant enough to discuss medication with a health professional (although the medication was not taken);

24.3. An increased likelihood to take a wrong turn or feel lost when driving for time in excess of 90 minutes.

25. Are these day-to-day activities? In my judgment, they are. Working on a computer is an essential part of many job roles, and computer use also occurs recreationally as an activity which I consider is day to day. In my view, although it is perhaps more arguable, sleep is also a day to day activity. Every person must sleep and take rest, and I consider that sleeping is an 'activity' in terms of rest and replenishment even though the sleeping is not usually an active state. Similarly, I do not think that driving for 90 minutes or more is so unusual or specialised that it is elevated beyond the realms of 'day-to-day' activity. That is entirely normal for many working people and is accessible to anyone who has passed their driving test.

Is that adverse effect substantial?

26. The question here is whether the three adverse effects identified are more than minor or trivial. I consider each in turn:-

26.1. In my view, the claimant's description of the computer concentration effect indicates it was not substantial. The claimant did not say in evidence that 2 hours is her daily limit of concentration and that then she would be unable to work anymore. Instead, she said that she needed some time away from the screen to refresh and then could continue, albeit with reduced stamina from the first stint. In my judgment, this is an entirely common feature of computer screen use. This is the reason why blocks of screen use as long as 2 hours are usually discouraged, and why screen breaks are advised to be built in to the working day. I consider it appropriate to take judicial notice of this widespread guidance because it is a well known feature of occupational health advice regarding screen use. I do not consider that reduced concentration after two hours is a more than minor or trivial adverse effect.

26.2. I consider that the claimant's sleep problems did have a substantial adverse effect. Although the claimant did not quantify the amount of sleep she was able to get or was missing, I consider that the fact the issue was severe enough to raise with the respondent and a healthcare professional show that there was a more than minor or trivial effect on the claimant's sleeping patterns. The conversation recorded on page 59 shows that medication was discussed and that the reason it was not prescribed was because the claimant wished to try a non-medical remedy first.

26.3. Conversely, I consider the claimant's higher likelihood of taking a wrong turn when driving for longer periods of time was not a substantial adverse effect.

The claimant did not give any specific indications of when this had happened to her but, even if the propensity arose at much shorter lengths of time, I do not consider this increased likelihood was more than minor or trivial. The claimant's evidence indicates she was able to drive for any distance she might need to but, as she fatigued from driving, she may make an uncharacteristic error and go the wrong way. That is an inconvenience. It is a minor or trivial consequence of stress which can be quickly corrected. Again, as with the computer use issue, drivers are advised to take rest breaks when experiencing tiredness or diminished concentration. It is recognised that driving will cause the issues experienced.

Is that adverse effect long-term?

27. Here, I consider only the sleep disruption caused, as I have found, by the claimant's stress. The claimant describes inability to sleep as being a symptom of the IVF first apparent in 2020 and then ongoing. The difficulty is that there is no evidence indicating that the sleep disturbances have been constant, or only held at bay with treatment, throughout that period. I accept that sleep disturbances may have been caused by the IVF treatment. I do not consider that they were a constant feature of the claimant's life, principally because the claimant presented this as a new issue caused by stress in March to May 2023. In my view, and on the claimant's own evidence, the May 2023 sleep disturbance was caused by stress – an impairment she relies upon. The earlier sleep disturbance was caused by the IVF treatment – an impairment she does not rely upon (to the extent that having IVF treatment can even be considered a medical condition or impairment).
28. Consequently, I am considering only the isolated reports of sleep disturbance in March to May 2023 as a result of the work-related stress reported. There is no evidence that that sleep disturbance lasted much the beyond last documented reference on 24 May 2023. That issue was reported to have arisen around the time the claimant went on sick leave for stress-related problems on 17 March 2023. This is around a two-month period. In my judgment, the substantial adverse effect did not last beyond that two-month period. There is no direct evidence that the situational work stress identified did last longer than that.
29. Having considered that the substantial adverse effect did not last for 12 months, I consider whether it was likely to when viewed through the lens of what was happening in May 2023. I do not consider that it would be. There is no supporting evidence for a proposition that the sleep disturbance would not resolve when the causes of immediate acute stress resolves. In my judgment, that resolution was likely to come within 12 months either because (1) the issue would resolve, or (2) the claimant would be removed from the situation through being off sick or leaving employment. That may have led to on-going stress, but I consider it would likely have resolved this sleeping disturbance caused by the stress. The sleep problem is the adverse effect.
30. It follows that there is not substantial adverse effect caused by an impairment which was long-term. The claimant was not, therefore, disabled at the material time. The disability founded claims are dismissed.

Case Number: 2305822/2023

**Approved by:
Employment Judge Fredericks-Bowyer**

Date: 6 May 2025