



EMPLOYMENT TRIBUNALS

Claimant: Miss K Walsh

Respondent: Newross Impex Ltd

Heard at: Leeds **On:** 20 May 2020

Before: Employment Judge Cox

JUDGMENT

1. The claim of direct disability discrimination is dismissed on withdrawal by the Claimant.
2. The Claimant was a disabled person within the definition in the Equality Act 2010 during the period from 24 December 2018 to 28 February 2019.

REASONS

1. The Claimant brings claims under the Equality Act 2010 (EqA) of discrimination arising from disability, failure to meet the duty to make reasonable adjustments and victimisation. A claim of direct disability discrimination was withdrawn at a Preliminary Hearing for case management on 19 July 2019 and is now formally dismissed on withdrawal.

Procedural background and evidence

2. The claim was listed for hearing on 23 to 25 March 2020 but that Hearing was converted to a Preliminary Hearing for case management due to the COVID-19 pandemic. At that Preliminary Hearing, held on 23 March, the parties

- agreed that the preliminary issue as to whether the Claimant was a disabled person within the definition of that term in the EqA should be determined on the papers and the Tribunal so ordered.
3. The Order did not identify the period during which that definition needed to be met by the Claimant. Her allegations of discrimination arising from disability and victimisation relate to acts in the period from 23 January 2019 to 28 February 2019. The date at which the Claimant is alleging the Respondent breached its duty to make reasonable adjustments is unclear. In her claim form the Claimant says that the Respondent had knowledge of her condition in April/May 2018 and knew that it was likely to amount to a disability. The Tribunal has proceeded on the basis that that was the first point at which a duty to make adjustments could have arisen (para. 20 of Schedule 8 EqA) and so could have been breached. The question the Tribunal therefore had to decide was: did the Claimant meet the definition of a disabled person at any time from 1 April 2018 to 28 February 2019 and, if she did, during which period?
 4. Case management Orders were made to prepare for the determination on paper. As a result, the Tribunal had the following documents before it:
 - a. the Claimant's witness statement on the impact of her alleged disability dated 4 October 2019, produced pursuant to an Order made at the Preliminary Hearing on 19 July 2019;
 - b. the Respondent's two sets of written questions in its cross-examination of the Claimant on the issue of disability and her written responses;
 - c. an agreed bundle of relevant documents of 255 pages; and
 - d. both parties' written submissions.
 5. The Tribunal referred to only the pages in the agreed bundle that were mentioned in the parties' submissions or the Claimant's witness statement.

The law

6. To establish that she was a disabled person at the relevant time, the Claimant had to satisfy the Tribunal that she met the definition of a disabled person in Section 6 EqA. A person has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. When deciding whether a person is a disabled person, the Tribunal must consider any provisions of the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" that it thinks are relevant (para.12 of Schedule 1 EqA).

7. An effect is “substantial” if it is more than minor or trivial (Section 212(1) EqA). The effect of an impairment is long-term if it has lasted for at least 12 months or is likely to do so, or if it is likely to last for the rest of the person’s life (para. 2(1) of Schedule 1 EqA). 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 (para.2(2) of Schedule 1). An impairment is to be treated as having a substantial adverse effect on the ability of a person to carry out normal day-to-day activities if measures are being taken to treat or correct it and, 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 (para. 5(2)). For all these purposes, something is “likely” if it “could well happen” (paragraph C3 of the Guidance).

Findings

8. On the basis of the Claimant’s witness statement and the documents in the agreed bundle to which the Tribunal was referred, it makes the following findings of fact. The Tribunal has limited its consideration to the evidence relevant to the Claimant’s condition in the material period.
9. The Claimant has endometriosis. This condition involves the tissue that normally lines the womb growing outside the womb, normally in the pelvic region, including on the bowels and the bladder. The growth of this tissue in these abnormal areas causes pain which becomes more severe during ovulation and menstruation. At this time, the cells of the tissue become inflamed, bleed and shed, as they would in the womb, but are unable to be expelled from the body, resulting in internal bleeding and blood pooling.
10. As an opening summary, the Tribunal accepted as credible the Claimant’s evidence on the progress and effects of her condition and the treatment she received for it, which was either supported by or not inconsistent with the medical evidence. The Tribunal rejects the Respondent’s submission that the Claimant’s evidence was inconsistent with the medical records. The Respondent points out that in a report dated 22 January 2019 to the Claimant’s GP a consultant commented that “the symptoms of the patient are most unusual for endometriosis”, but the Tribunal notes that the consultant went on: “but they have occasionally been described”. Likewise, the Respondent says that on 18 March 2019, after the material period, the consultant commenting on the Claimant’s MRI scan said that “this was not suggestive of any deep infiltrating endometriosis”, but the Tribunal notes that that sentence of the report continues: “in the pelvic side wall or along the sciatic nerve.” The doctor goes on to observe from the Claimant’s previous records that she “still has endometriotic lesions in situ in the uterovesical space although she has little in the way of urinary symptoms” and that the Claimant had opted for surgery to have those lesions excised.

11. The Claimant was not clinically diagnosed with endometriosis until she underwent surgery in December 2018, but she first began experiencing its symptoms in January 2018. At that point she began to suffer from pain in her pelvis, groin, hips, legs and toes. At first the pain arose only when she ovulated or menstruated and was very limited. She took solpadeine, an over-the-counter painkiller, to relieve the pain. Over the course of the following months the level of pain she was experiencing increased from menstrual cycle to menstrual cycle.
12. By July 2018 the pain was beginning an hour after her period started and lasting around three days. At this point, the Claimant could not bear the pain without stronger pain relief and sought medical help for the first time. She was prescribed pain relief of 500mg of mefenamic acid to be taken three times a day. The pain continued to increase month on month, starting earlier and lasting longer on each occasion, and by September 2018 she was in some degree of pain at all times. It appears from her GP records that she was referred for a gynaecology specialist appointment to investigate whether she had endometriosis on 8 October 2019. On 17 October her GP prescribed her with 30mg of codeine to be taken four times a day and 500mg naproxen to be taken twice a day. The Claimant was prescribed these painkillers again in November and December 2018.
13. The Claimant had her first sickness absence, covered by a Med3 certificate saying she was unfit for work due to “abdominal pain”, in mid-October 2018. The Tribunal does not accept that the fact she took no sickness absence before this time in and of itself undermines the credibility of her evidence that she was experiencing significant pain before this. She was in pain but managing to attend work.
14. In her answers to cross-examination, the Claimant accepted that on 22 October 2018 Ms Jane Barrass, HR Co-ordinator for the Respondent, asked the Claimant to discuss chair and desk adaptations with her, to assist with the Claimant’s condition, and that the Claimant did not immediately agree. The Tribunal does not accept, however, that this was because the Claimant was not in fact experiencing significant pain. The reason the Claimant was unable to talk to Ms Barrass immediately was that she was involved in a time-critical task with a deadline to meet. The Respondent accepts in its response that the Claimant and Ms Barrass had a follow-up discussion on 25 October.
15. From 12 November to 3 December 2018 the Claimant went on a holiday to the Far East. The Respondent submits that the fact that the Claimant was able to take this trip undermines her evidence about the severity of her pain. The Tribunal accepts as credible the Claimant’s evidence in cross-examination that she could manage this trip by adjusting how she did it. She took taxis rather than walking, ensured that hotel rooms were on the ground

- floor or the hotel had a lift, minimised her luggage so that her partner could carry it, made accommodation arrangements that could be cancelled at the last minute in case her pain flared up, rested in her hotel room on five days when that proved necessary to manage her pain, took heat pads for the flights, checked that the plane seats reclined, regularly stretched and moved around during the flights and used a wheelchair to manage the transfers on her return journey.
16. By December 2018 the Claimant's pain was substantially affecting her ability to walk. On 17 December, apparently as a result of the 8 October referral by her GP, she underwent a laparoscopy and diathermy treatment. The procedure confirmed that she had endometriosis. There were deposits of tissue in the pelvic area and around her bladder. Some of the deposits were removed during the surgery but some were not, because of their proximity to her bladder and the risk of damaging it.
 17. The Tribunal had no medical evidence on whether at any point in the material period it could be said that surgery was likely to have ended the pain that the Claimant's endometriosis was causing her. The Claimant's own evidence was that there was "a large chance that [the surgery] could have cured all my pain", even though in the event it did not.
 18. On 24 December 2018 the Claimant contacted her GP as her pain levels had not improved after the surgery and she now had new and additional pain from the surgery and scar tissue. By the time of her return to work on 3 January 2019, she was having difficulty in getting up and ready for work, the short walk from the office car park to the office was causing her intense pain and she was finding it difficult to walk and sit whilst at work. On 17 January 2019 the Claimant saw a consultant gynaecologist again and was referred for an MRI scan to ascertain the areas that the endometriosis had affected. On 29 January and 4 February, she was prescribed 50mg of Tramadol, one or two tablets to be taken every 4 to 6 hours depending on the severity of her symptoms. She also started to use a TENS (transcutaneous electrical nerve stimulation) machine to assist her with the pain.
 19. The Claimant applied for a Blue Badge to assist with parking but not until early February 2019. The Tribunal does not accept that her delay in applying for the badge undermines her evidence that she was having mobility problems substantially before this. It accepts her evidence that she applied for the Badge once she realised that surgery had not helped her, she had time to research what support she could access and felt psychologically ready to be in possession of a government document stating that she had a disability.
 20. Because of its link with her menstrual cycle, the pain that the Claimant experienced as a result of her condition was not at a constant level and its effect on her ability to carry out day-to-day activities therefore varied over

time. On her “bad days”, however, it reached a level of severity that, if she had not been taking painkillers, she would have been unable to walk further than 400 yards or sit down for more than half an hour at a time. The Guidance states that ability to walk only a short distance without difficulty should reasonably be viewed as having a substantial adverse effect on normal day-to-day activities (Appendix to Guidance). On occasions, she had to use a cane to assist her when walking. The effect of her pain on her mobility affected her ability to take walks with her partner, which she had formerly enjoyed, and to go shopping. Even when the Claimant was taking painkillers, at times when her pain levels were moderate or severe, she had to lie down in order to tolerate the pain.

21. The pain also affected her ability to concentrate and to sleep, leading her to feel tired all the time. Because of the side effects of her painkiller medication, which made her feel drowsy, she was unable to drive even short distances safely when taking them. The unpredictability of her pain levels also interfered with her social life, in that it made it difficult for her to plan participation in social events or take part in them on days when her pain was too severe.

Conclusions

22. From these findings of fact, the Tribunal draws the following conclusions.
23. From January 2018 the Claimant had a physical impairment, diagnosed in December 2018 as endometriosis.
24. Discounting the effects of the painkilling medication the Claimant was prescribed, the Tribunal is satisfied that the endometriosis and the pain associated with it had a substantial adverse effect on the Claimant’s ability to carry out day-to-day activities, and in particular on her ability to walk and sit, on at least some days each month from mid-October 2018. By this time, she was being prescribed very strong painkillers and was unable to attend work because of the pain.
25. Given the cyclical nature of the Claimant’s pain, the Tribunal accepts that the substantial adverse effect on her ability to carry out normal day-to-day activities was likely to recur from the time it first arose in mid-October 2018 onwards. In any event, from December 2018 onwards, the substantial adverse effect was continuous.
26. There was little evidence before the Tribunal to establish when it became the case that it could well happen that the substantial adverse effect would last 12 months or more. The Claimant was referred on 8 October 2018 for an investigation to address whether she had endometriosis. The Tribunal assumes that surgery could have been one outcome of that referral. There was no medical evidence on the likelihood of surgery having a sufficient effect

on the pain associated with the Claimant's condition as to reduce the effect of it to something less than substantial: the Tribunal has only the Claimant's evidence that she considered that there was "a large chance" that surgery could have removed all her pain. The Tribunal does not accept, therefore, that the Claimant has established that at any point in the period before her surgery on 17 December 2018, the substantial adverse effect of her condition was likely to be long-term, that is, last until at least mid-October 2019.

27. By a week after the Claimant's surgery, however, on 24 December 2018, it had become apparent to her that the surgery had if anything increased her levels of pain and she needed to ask her GP for a sick note because she felt unable to return to work. From this point, the Tribunal accepts that the substantial adverse effect of her condition on her ability to carry out normal day-to-day activities could well last until at least mid-October 2019.

28. The Tribunal concludes that throughout the period from 24 December 2018 to the termination of her employment on 28 February 2019 the Claimant was a disabled person within the definition in the EqA.

Employment Judge Cox
Date: 21 May 2020

Judgment and Reasons sent to the
parties on: 26 May 2020
For the Tribunal : E Mahon