



EMPLOYMENT TRIBUNALS

Claimant: Miss M McGuinness

Respondent: Keys PCE Limited

Heard at: Manchester

On: 28 February 2020

Before: Employment Judge Phil Allen (Sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr Mensah, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant did have a disability as defined by section 6 of the Equality Act 2010 at the relevant time (that is between 6 March and 3 July 2019).

In the applications to amend, the Tribunal's decision is that:

1. The claimant is given leave to amend her claim to include the allegations of discrimination arising from disability under Section 15 of the Equality Act as they were identified and recorded at issue 9 of the List of Issues appended to the case management summary following the Preliminary Hearing on 14 October 2019; and
2. The claimant is not given leave to amend her claim to include the allegations of discrimination arising from disability as raised in her application to amend dated 16 December 2019.

REASONS

Introduction

1. This was a Preliminary Hearing which had been arranged at a Preliminary Hearing (Case Management) held on 14 October 2019. The hearing was arranged to determine specific issues.

Claims and Issues

2. The Preliminary Hearing was originally arranged to determine the following issues:-
 - (i) Whether the claimant has leave to amend her claim to include an allegation of discrimination arising from disability under Section 15 of the Equality Act 2010 (as recorded at Issue 9 in the List of Issues appended to the Case Management Order made on 14 October 2019); and
 - (ii) Whether the claimant had a disability at the relevant time (that is between 6 March and 3 July 2019).
3. It was identified that the question the Employment Tribunal needed to decide for the second issue was whether the claimant's heart condition was a physical or mental impairment which had a substantial and long term adverse effect on her ability to carry out normal day to day activities.
4. Following the Preliminary Hearing (Case Management) but prior to this Preliminary Hearing, the claimant had made a further application to amend her claim in a document emailed to the Tribunal and the respondent on 16 December 2019. That application was to amend the claimant's claim to include other claims of discrimination arising from disability. The parties were informed by the Tribunal on 14 January 2020 that (if that application went beyond the application made on 14 October 2019) it would also be determined at this Preliminary Hearing.
5. At the start of this Preliminary Hearing it was clarified with the claimant whether she believed her application to amend did go beyond the amendments she had sought to make at 14 October 2019 hearing, and the claimant confirmed that it did. Accordingly, the Tribunal considered two applications for leave to amend: one relating to the amendment sought on 14 October 2019; and one to consider the amendment sought on 16 December 2019.
6. In the course of the hearing it became evident that if the claimant's application to amend her claim to include the matters raised in 16 December 2019 application was granted, the Tribunal would also need to consider whether the claimant had a disability over a more extensive period than that previously identified (6 March to 3 July 2019). The relevant time for the amended claim would run from April 2018 until July 2019. The medical report and other documents prepared in advance of the Preliminary Hearing had not

specifically addressed this point and the respondent's representative contended that the Tribunal should not, and could not, consider whether the claimant had a disability throughout that period

Procedure

7. In accordance with the orders made at the previous Preliminary Hearing, the claimant had prepared a statement of disabilities which ran to 29 paragraphs. At the Preliminary Hearing the claimant gave evidence and confirmed the accuracy of this statement. She was cross examined upon the content of the statement by the respondent's representative.
8. The Tribunal was also provided with a bundle of documents containing 83 pages. Pages 65 to 83 were a medical report prepared by Dr R Thaman, a Consultant Cardiologist from Wrexham Maelor Hospital which had been prepared on 11 February 2020. It was confirmed that this was an expert report jointly prepared at the request of the parties. The claimant did not think that the report necessarily addressed all the questions asked or in the right order, but it was essentially accepted that this was a jointly instructed expert's report.
9. In the course of the hearing, the claimant also produced two letters which related to her medical condition now, and to a forthcoming operation. The Tribunal looked at those letters, but did not take copies.
10. Following the evidence, submissions were made by the respondent's representative and the claimant. The respondent's representative provided a submissions document to which he referred in his verbal submissions. The claimant made verbal submissions only.
11. At the end of the hearing judgment was reserved.

Facts

The expert's report

12. From about October 2018 the claimant started to feel extremely tired and fatigued, both physically and mentally (page 72 – Dr Thaman's report). The claimant's statement referred to a feeling that she had depleted stamina and unusual fatigue throughout the majority of 2018. Dr Thaman's report (75) records any lack of energy for the claimant in 2018 (prior to December) being non-cardiac. He records that it may have been related to a mild degree of anaemia. The claimant is not relying upon anaemia as a disability.
13. Dr Thaman reports that the cardiac symptoms started at the beginning of December 2018. On 4 December 2018 the claimant had a heart attack (Myocardial Infarct), at the very mild end of the spectrum. The fact this had occurred was not identified until late March 2019.
14. Following the heart attack, the claimant had symptoms of angina. Dr Thaman records that he would have expected the claimant to have suffered symptoms on fairly minimal exertion, such as climbing a flight or two of stairs or walking up inclines (77).

15. The claimant underwent a successful stent operation on 26 March 2019. This was recorded by Dr Thaman as having been “*carried out with an excellent final result*” (70). The claimant was placed on medications which she will be required to take for the rest of her life (77). Dr Thaman records that, following the operation and being discharged from hospital, the claimant would have been advised to have a four to six-week period of convalescence and he would have expected an individual to return to work on a phased return after around four weeks (80).
16. Dr Thaman records that side effects of the medications being taken are relatively common and include tiredness and fatigue (77). He records (78) that the fatigue and breathlessness which the claimant was suffering when she saw Dr Thaman were, on the balance of probability, likely to be side effects of her medication. Dr Thaman records that the claimant’s angina would have limited her ability to walk distances/shopping and perhaps carrying/lifting (housework).
17. In relation to the claimant’s complaints of chest pains, breathlessness and tiredness, in Dr Thaman’s opinion these symptoms were not related to angina, but were in his opinion likely to be related to, at least in part, side effects of the medication. Dr Thaman confirms that the claimant does require these medications and they cannot be stopped without a detrimental long-term effect on her health (81).
18. In the future, the claimant’s risk of recurrence of her symptoms is recorded as low, as long as the claimant continues her medications. Dr Thaman does not explicitly record what would happen if the claimant ceased to take her medications, but from the statements (81) in the report it can be implied that if she ceased to take her medications there is a significant risk of angina or heart attack and/or a long term detrimental effect on her health.

The claimant’s evidence about her health

19. The claimant’s own evidence referred to the impact of her condition being:
 - often needing to sit down to catch her breath;
 - being extremely tired and fatigued;
 - impacting upon her memory;
 - she found it difficult to retain and recall information;
 - she was breathless when she walked up the stairs at home;
 - she could not drive long distances;
 - she can no longer drive more than 30 minutes;
 - she is often too tired to attend events, especially if they are far away or outdoors as she cannot stand for long periods; and
 - she hasn’t been able to dance.

20. The claimant's evidence also records that on three occasions, when she had to stop taking her medication for 48 hours in order to receive major dental surgery, within 12 hours she felt the effects of ceasing to take such medication and found the stairs at home a real challenge, needing to take a break to reach the top.
21. The claimant was asked about the day to day activities upon which she relied. She confirmed that they were day to day activities relating to sleeping problems, fatigue and memory problems. She also referred to driving and dancing.
22. In the hearing, the claimant gave evidence that in fact her condition has worsened and the operation has not been as successful as was recorded by Dr Thaman and she is now going to need to undertake a further operation.

The application to be allowed to amend her claim

23. In relation to the application to amend, the claimant confirmed that she did not take any advice prior to entering her claim or attending the Preliminary Hearing on 14 October. Approximately two weeks after the hearing on 14 October the claimant had obtained some advice from a pro-bono advice service. The claimant provided no evidence or reason for any delay in making an application to amend after she had received the advice. The claimant also confirmed that she had read the ACAS guidelines and was aware of reasonable adjustment claims prior to entering her claim, but she had not understood the difference to a claim for discrimination arising from disability claim.
24. The last day of the claimant's employment was 23 April 2019. The claimant had undertaken ACAS early conciliation from 18 to 24 May 2019. The originating application had been entered at the Employment Tribunal on 22 June 2019.
25. In terms of the claimant's application to amend her claim of the 16 December 2019, the application particularly related to the matters recorded under the heading "page six" on the second page of the email. In summary, this was an allegation that the claimant said that her clear thinking and normal good and clear decision making were impacted upon by her illness. In the course of the preliminary hearing she summarised this claim as being that: she had become too poorly to resolve her own car issues or to go out and buy a car or to sort out the car on her drive, simply because she was using her energy to go to work. She had therefore used the respondent's car and not sorted out problems with her own car because that was the simplest thing for her to do. Accordingly, the claimant's allegation was that her use of the respondent's vehicle was something arising in consequence of her disability, and this related back to April 2018.

The law and argument

26. Section 6 of the Equality Act 2010 provides the following:-

"(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*".
27. Section 212 of the Equality Act 2010 says that "substantial" means more than minor or trivial.
28. Schedule 1 of the Equality Act 2010 provides some additional provisions relating to determination of disability. Section 2 in relation to long term effects says the following:-
- "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*".
29. Section 2(2) says:
- "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"*
30. Section 5 of Schedule 1 says that
- "(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...*".
31. Likely means could well happen (**SCA Packaging Ltd v Boyle 2009 IRLR 746**).
32. The Tribunal is required to take account of the guidance on matters to be taken into account in determining questions relating to the definition of disability, and has done so. The respondent's representative in particular highlighted paragraphs B12 and B13 of the guidance. The Tribunal has also taken account of the elements on long-term (Section C) and normal day-to-day activities (Section D). In particular, the Tribunal has taken note of Section D3 which explains that day to day activities are things people do on a regular or daily basis, and includes in the list shopping, carrying out household tasks, walking, travelling by various forms of transport, taking part in social activities and driving.

33. The Tribunal has considered the submissions made on behalf of each of the parties. In his submissions the respondent's representative referred to the following authorities: **Aderemi -v- London and South Eastern Railway Ltd 2013 ICR 591** (emphasising in particular that the focus of a Tribunal must necessarily be upon that which a claimant maintains she cannot do); **Cruickshank -v- VAW Motorcast Ltd 2002 IRLR 204**; **McDougall -v- Richmond Adult Community College 2008 IRLR 227**; **Chief Constable of Sussex Police v Millard UKEAT/0341/14**; **London Borough of Lewisham -v- Malcolm 2008 IRLR 700**; **Anwar -v- Tower Hamlets College UKEAT/0091/10** (which is authority for the fact that an impairment could be more than trivial; and yet still be minor and therefore not substantial); **Patel -v- Metropolitan Borough Council 2010 IRLR 280** (as authority for the fact that the Tribunal needs to look at the effect of the impairment at the relevant time); **Mutombo Mpania -v- Angard Staffing Solutions Ltd UKEATS/0002/18**; **Condappa -v- Newham Healthcare Trust [2001] all ER (D) 38**; and **Mahon -v- Accuread Limited UKEAT/0081/08**.
34. The respondent accepted that the claimant's heart condition between 6 March and 3 July 2019 was a physical impairment. It denied that the effects of the impairment had a substantial long-term adverse effect on the claimant's ability to carry out normal day to day activities.
35. The claimant submitted that the effects had already lasted for twelve months at the relevant time, or in the alternative, were likely to last at least twelve months.
36. In the course of arguing her case, the claimant did make reference to the impact her condition has upon her now, and the fact that it has worsened. The Tribunal highlighted to her that the question was whether the claimant's condition was likely to last for at least twelve months as at the relevant period. Accordingly, the Tribunal gave no genuine weight to what was heard about the impact which the claimant's condition has in fact had recently or the need for a further operation.
37. In relation to the application to amend, the respondent referred to the well-known authority of **Selkent Bus Company Limited -v- Moore 1996 IRLR 661**, which the Tribunal has taken into account. The Tribunal has also considered the Presidential Guidance on general case management and the guidance note on amendment of the claim.
38. In relation to the allegation to amend, the issues which are identified in Selkent as being relevant are:-
- The nature of the amendment;
 - The applicability of time limits; and
 - The timing and manner of the application.
39. The overriding issue for the exercise of the discretion is taking account of all the circumstances and balancing the injustice and hardship of allowing the

amendment against the injustice and hardship of refusing it. That is the paramount consideration.

40. The respondent's representative confirmed that the respondent's contention was that the primary time limit for claims arising from employment ended on 27 September 2019. The application to amend made at the Preliminary Hearing was made on 14 October 2019 (that is approximately 2½ weeks after the expiry of the primary time limit) and the further application to amend had been made on 16 December 2019 (being approximately 2½ months after the expiry of the primary time limit).

Conclusions

41. As the report of a jointly appointed expert, the Tribunal places particular reliance upon Dr Thaman's report.

Day to day activities

42. The Tribunal does find that the claimant's condition had an adverse effect upon her day to day activities. In particular the aspects of Dr Thaman's report highlighted above show the claimant having difficulty climbing stairs, carrying shopping and undertaking other day to day issues which require any form of exertion. The claimant's evidence also records issues in relation to driving, remembering, concentrating and socialising (including dancing), which are all day to day activities.

Substantial

43. The Tribunal also finds that the impact on these day to day activities was substantial, that is more than minor or trivial. The claimant's evidence and the aspects from the medical report cited above make clear the impact was more than minor or trivial. For example, being unable to climb a flight or two of stairs, and the tiredness and fatigue resulting from doing so, is sufficient for the impact to be more than minor or trivial.

Long term

44. In relation to long term, the Tribunal does not find that the impact on the claimant's ability to undertake day to day activities had lasted for twelve months as at the relevant time. In particular, the Tribunal notes the report of Dr Thaman and the distinction he draws between the impact of the claimant's anaemia in 2018, and cardiac symptoms from December 2018. The Tribunal is not considering the impact that the claimant's anaemia had upon her, only the cardiac symptoms. Dr Thaman is the expert appointed to provide advice in this matter and the advice cited above is clear that the impact commenced in December 2018. Accordingly, the Tribunal finds that as at 3 July 2019 (that is the end of the relevant time) the impact of the claimant's condition had not lasted for more than twelve months.
45. However, the Tribunal does find that the impact on the claimant's day to day activities was likely to last for at least twelve months as at the relevant time. Dr Thaman's report makes clear that the side effects of the medication taken

are relatively common. That means that the impact that the claimant's medication (taken for angina) has had on her health, was likely to last for at least twelve months as at the relevant time, in that it could well happen. The respondent's representative argued that a distinction should be drawn between the impact on the claimant of her condition and that of the medication that she was taking. The Tribunal accepts the claimant's evidence about the impact on her day to day activities which the claimant has felt which appears to be as a result of her (heart-related) medication. Dr Thaman records the fatigue, aches and breathlessness reported to him by the claimant as being on balance side effects of the medication she is required to take – and the Tribunal finds that those side effects were likely to happen as at the relevant period.

46. As a result of the finding in paragraph 45, the Tribunal does not necessarily need to go on to consider what the impact of the claimant's condition would be upon her if she ceased to take medication (applying section 5 of schedule 1 of the Equality Act 2010). However, the Tribunal finds that on the basis of Dr Thaman's report it is quite clear that if the claimant did not take her medication the impact of the claimant's angina would be that it would have a substantial adverse effect on her ability to undertake day to day activities. This is clear cited from Dr Thaman's report (81) as referred to in the facts above. Whilst Dr Thaman does not explicitly go on to answer this question in full, it is implicit from what he says that if the claimant had ceased to take the medications during the relevant period, the impact of her condition upon her would have been that it was likely to have had a substantial adverse effect on her ability to undertake day to day activities. This finding is also based upon the claimant's own evidence, referred to at paragraph 20, about what the impact on her of her condition has been when she has briefly ceased to take her medications. Accordingly, even had the Tribunal not concluded that the impact was long-term because it was likely to last for at least 12 months, it would have concluded that the claimant's condition at the relevant time was a disability, when the effect of it upon her without measures is considered.

Disability at the relevant time

47. The question which the Tribunal was asked to determine was whether the claimant had a disability as at the relevant time, being between 6 March and 3 July 2019, and the Tribunal finds that the claimant did have a disability at the relevant time.
48. Dr Thaman's report evidences that prior to 4 December 2018 the claimant would not have had a disability. For the reasons outlined below it is not necessary for the Tribunal to make findings on when the claimant first had a disability, but it is clear in any event that she did not have a disability prior to that date (at least in relation to the disability relied upon).

The applications to amend

49. In relation to the application to amend made at the hearing on 14 October 2019, the key factors taken into account by the Tribunal, applying the law as explained above, are as follows:

- a. The facts upon which the claimant wishes to rely are all included in the claim form;
 - b. Whilst it is not quite simply a relabelling, it is close to a relabelling;
 - c. The application to amend was made only two and a half weeks outside the primary time limit;
 - d. Time limits are important, but this a relatively limited period;
 - e. The claimant had not previously received advice about her claims;
 - f. The application was made at a Preliminary Hearing arranged to determine the issues and the amendment (if it were granted) is clearly recorded in the list of issues;
 - g. The test which would have been applicable to the claim if it had been entered at the Tribunal when the amendment request was made was one of whether it is just and equitable to extend the time;
 - h. There is no identified hardship to the respondent, save for the fact that it will need to respond to the additional claim, and that additional claim was identified at the time that the issues in the claim were first clarified;
 - i. The evidence which the respondent will need to call in relation to the amended claim appears to be very similar (if not the same) to that which it will need to call for the other claims being brought; and
 - j. The hardship to the claimant is potentially significant if she is not able to pursue a claim which may otherwise have merit.
50. Accordingly, the Employment Tribunal grants the claimant's application, made at the hearing on 14 October 2019, to amend her claim.
51. Similar issues arise in relation to the claimant's application to amend made on 16 December 2019. However where the factors differ, these are as follows:
- a. The application to amend was made some 2½ months after the primary time limit had expired;
 - b. The claimant appears to have received advice approximately a month and a half before the application to amend was made;
 - c. The amendments sought would raise issues of fact going back to April 2018, they are not focussed on the same issues and evidence as the other allegations, and would require a notable amount of additional evidence covering a considerably longer period of time;
 - d. The application was not made at the Preliminary Hearing when the issues in the claim were discussed and confirmed; and
 - e. The length of time involved would mean that witnesses may be less able to recall the issues, creating some hardship for the respondent.

52. In the light of these factors, and in particular the difference in the balance of hardship, on balance the Tribunal has decided that it will not grant the claimant leave to amend her claim, in relation to her application on 16 December 2019.

Case Management

53. At the end of the Preliminary Hearing it was agreed that the following variations would be made to the Orders made following the Preliminary Hearing (Case Management) held on 14 October:
- a. The final hearing bundle to be prepared by the respondent (Order 5) should now be prepared no later than Monday 6 April 2020. The parties will need to liaise in advance of that day in relation to the content of the bundle; and
 - b. The date for each party to send to the other any witness statements upon which that party wishes to rely (Order 6), is extended to 27 April 2020.
54. Save for these amendments, the parties should prepare the case for hearing in accordance with the orders made at the previous Preliminary Hearing. The List of Issues to be determined will be as recorded in the Appendix to that order: including Issue 9; but the Tribunal will not need to consider Issue 7 which has been determined by this Judgment.

Employment Judge Phil Allen
13 March 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
16 March 2020

FOR THE TRIBUNAL OFFICE

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