



EMPLOYMENT TRIBUNALS

Claimant

Sarah Brown

Respondent

v

Cambridgeshire and Peterborough
NHS Foundation Trust

Heard at: Bury St Edmunds

On: 2 May 2023

Before: Employment Judge K J Palmer (sitting alone)

Appearances

For the Claimants: Mr Brady, Counsel

For the Respondent: Ms Jennings, Counsel

JUDGMENT

Pursuant to an Open Preliminary Hearing

It is the Judgment of this Tribunal that the Claimant is a disabled person for the purposes of s.6 of the Equality Act 2010, at the material time between February 2022 and June 2022.

REASONS

1. This matter came before me today listed as an Open Preliminary Hearing to determine whether the Claimant is a disabled person at the material time under s.6 of the Equality Act 2010 ("EqA"), and also whether any or all of the Claimant's claims should be struck out under Rule 37 of the Employment Tribunal Rules of Procedure.
2. At the outset of the Hearing Ms Jennings, Counsel for the Respondent, confirmed that the Respondents had never sought to pursue the Strike Out Application and did not propose to do so today. The only issue therefore before me today, was the issue of the disability under s.6 EqA 2010.
3. The Claimant presented a claim to this Tribunal on 17 November 2022. In it she claims constructive unfair dismissal and disability discrimination under s15 and 20 / 21 EqA 2010. The Claimant relies upon the impairment of psoriatic arthritis.

4. I had before me a Bundle running to some 142 pages and I have heard evidence this morning from the Claimant and both parties are represented by Counsel. The Claimant by Mr Brady and the Respondents by Ms Jennings.
5. The Claimant produced a Witness Statement, or Disability Impact Statement for the purposes of this Hearing, plus various medical records.
6. The Respondents accept that the Claimant has the impairment, but do not accept that it amounts to a disability under the tests set out in s.6 EqA 2010.
7. I had helpful Skeleton Arguments from both Counsel and also heard oral submissions.
8. In the Claimant's Disability Impact Statement she sets out the effects that she says she suffers as a result of the impairment and these appear at paragraphs 3 and 15 of the Statement.
9. The Claimant worked as a Senior Joint Emergency Team Practitioner in the Respondent's Older People and Adult Community. She is a Senior Band 7 Nurse Practitioner. Her role involved her contacting patients and visiting them in their homes and carrying out certain examinations and procedures whilst there. She would assess their condition and liaise with their GPs and assess what further treatment might be required. She would visit many such patients on a daily basis.
10. Her impairment which was diagnosed many years ago in 2010 meant that she was taking immunosuppressant drugs. In March 2020, when the Covid-19 pandemic hit the UK, she was classed as an extremely vulnerable person under the Government Guidelines and as a result she was required to shield. The reason for this was that she was on the immunosuppressant drugs. She therefore stepped back from patient facing duties and worked from home undertaking an adjusted role.
11. After October 2021, when the requirement for shielding and the Government Guidelines were amended and lifted, she continued to work in the adjusted role for the Respondents. However, in February 2022 she was asked to undertake an Occupational Health Assessment and the Respondents sought to consider whether it would be possible for her to go back to patient facing duties. She wished to continue in the adjusted role and the non-patient facing duties that she had previously undertaken since the pandemic hit.
12. Subsequently, the Claimant ultimately resigned in June 2022 claiming constructive dismissal and disability discrimination under s.15 and 20 EqA 2010. These claims are all resisted by the Respondent.

13. In her Disability Impact Statement she says, in paragraph 15, that the impairment means she suffers the effects of the impairment and that the effects are substantial and adverse on her ability to carry out day to day activities. Paragraph 15(a) describes difficulties she experiences when she is having a flare up of arthritis in her spine and she describes this as happening twice a year. In paragraphs (b) to (h), she describes difficulties experienced on a daily basis such as with cooking and cleaning, lifting, shopping, gripping objects, writing, weeding and using a lawn mower. She also describes difficulty concentrating. At paragraph 59 she describes the impact of her shielding due to the immunosuppressant medication.
14. Ms Jennings submitted that on the evidence before me the tests set out in s.6 EqA 2010 are not met. She says I have no evidence as to the effect during the material period which is February 2022 to June 2022. Both parties accept that is the material period.
15. In cross examination the Claimant admitted that her condition had not previously affected her ability to perform her role pre-pandemic. Ms Jennings says that this does not marry up with the evidence at paragraph 15 of the Claimant's Disability Impact Statement. She said the medical evidence does not support the effects being relied upon and neither does the Occupational Health Report. She says there is no evidence of what the effect would be, but for the medication being taken. She says the effects arising as a result of the shielding cannot satisfy the tests as they cannot be shown to be long term, as the requirement for shielding was only a Government advisory and was effectively lifted in the autumn of 2021.
16. Ms Jennings reminds me that the burden of proof is on the Claimant to provide sufficient evidence to persuade me that the tests are passed under s.6 EqA 2010.
17. Mr Brady says that Ms Jennings is setting the bar too high. He says the impairment is accepted. He reminds me that there is a statutory definition to assist me with a part of the test which requires the impairment to have a substantial effect and that is that the effect has to be more than minor or trivial only to satisfy that definition. He says the condition which the Claimant has had for many years is well documented. He says it persists and it is not improving, but is managed by medication. He says it is a consistent condition and he says the effects are set out at paragraph 15 of her statement. He says that I have to look at the evidence in the round. He argues that the s.6 test is satisfied, not only in respect of the effects described at paragraph 15(a) – (h), but also in respect of paragraph 59 in that the effect of the shielding due to Covid constitutes an effect sufficient to satisfy the s.6 test.

The Law

18. I have to be concerned with s.6 of the Equality Act 2010 and the test that is in that section. The test says as follows:

Disability

- (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.
19. When considering whether a person is disabled under s.6 of the EqA 2010, supplementary provisions for determining that disability appear in Part 1 of Schedule 1 to the Equality Act 2010.
20. Guidance is also given in the Disability Discrimination meaning of Disability Regulations and the Equality Act 2010 Disability Regulations as well as the Government Guidance on matters to be taken into account in determining questions relating to the definition of disability. Tribunals should take this Guidance into account where they consider it to be relevant.
21. With respect to 'substantial', the substantial part of the test is defined in s.212(1) of the Equality Act 2010 as meaning more than minor or trivial. I should take into account the Authorities that relate to this section, including Anwar v Tower Hamlets College EAT0091/10, and Aderemi v London & South Eastern Railway Ltd. [2013] ICR591.
22. I am also reminded of the case of Igweike v TSP Bank Plc [2020] IRLR267, where His Honour Judge Auerbach reiterated the established principle that a Tribunal should always consider the effect on the particular individual concerned and specifically whether that effect was more than minor or trivial.
23. When assessing whether a Claimant satisfies the s.6 test, the Tribunal must consider the effect of the impairment and those effects are to be considered as what they would be but for the medication that that individual is taking. It should always be remembered that the burden of proof is on the Claimant, on the balance of probabilities, to demonstrate whether the s.6 test is satisfied.
24. The bar is not exceptionally high for the test to be satisfied.

Conclusions

25. The Respondents accept the impairment, but argue that I have insufficient evidence before me to conclude that the Claimant has discharged the burden of proof on her to show that the impairment was substantial and long term. Further, they say, the effects relied upon in the Disability Impact

Statement do not marry up with the Claimant's own evidence in cross examination that the impairment did not affect her ability to carry out her role prior to the advent of Covid.

26. However, the Claimant was not closely cross examined on that apparent disparity. I therefore accept the Claimant's evidence at paragraph 15.
27. There is little evidence which relates specifically to the material period between February 2022 and June 2022, but I am entitled to look at the evidence before me in the round. I have evidence that the impairment has been diagnosed for many years. The effects described at paragraph 15 are effects after taking medication. This evidence indicates that those effects without medication would be greater.
28. Those effects were not sufficiently challenged in evidence for me to doubt them. They clearly relate to the Claimant's ability to carry out normal day to day activities. The effects are substantial in that they are more than minor or trivial as they are considerable and involve normal day to day activities such as cooking, cleaning, shopping and gardening, to name a few.
29. The evidence is sufficient for me to conclude that the effects set out at paragraphs 15(a) – (h) are long term, in that they have lasted or are likely to last for more than 12 months, as set out under Part 2(1) of Schedule 1 to the Equality Act 2010.
30. That is the same for the effect at 15(a).
31. As to the effects set out at 15(i), I am with Ms Jennings on this point. The effects on the Claimant from shielding are in my judgement short lived as the shielding Guidelines were only advice and were lifted. I do not have sufficient evidence before me that the effect would be continuing in this particular Claimant's case.
32. However, for the reasons I have set out, the Claimant is therefore a disabled person under s.6 of the Equality Act 2010, at the material time I have described.

3 August 2023

Employment Judge K J Palmer

Sent to the parties on: 4 August 2023

For the Tribunal Office.