



EMPLOYMENT TRIBUNALS

Claimant: Miss J. Donnachie

Respondent: Telent Technology Services Ltd

Heard at: Birmingham CVP

On: 20 August 2020

Before: Employment Judge Connolly sitting alone

Representation

Claimant: In person

Respondent: Ms. E. Wheeler, Counsel

REASONS FOR A JUDGMENT ON A PRELIMINARY HEARING

Introduction

1. This claim was listed for an Open Preliminary Hearing to determine whether the Claimant was a disabled person in accordance with the Equality Act 2010 at all relevant times because of the following conditions:
 - a. Menopause – Symptoms of Menopause (including anxiety and problems with concentration); and/or
 - b. Raynaud’s Syndrome.
2. I gave oral reasons for my decision at the conclusion of the hearing and sent out the Judgment. The claimant requested written reasons thereafter and these are they.
3. At the outset of the hearing the parties and I narrowed the issues. The Respondent accepted, firstly, that the Claimant had two physical impairments: menopause/menopausal symptoms and Raynaud’s Syndrome. The Respondent also accepted that the Claimant’s menopausal symptoms had an effect on what one might term her mental health, or mental capabilities in the sense that it caused some anxiety and concentration issues. Secondly, the Respondent accepted that both conditions had *an adverse effect* on the Claimant’s day-to-day activities. Thirdly and finally, the Respondent accepted that both conditions were

long term at the relevant time. That relevant time was agreed between the parties to be the 30 September 2019 (the first date on which the Claimant complained discrimination had occurred) to the 11 or 18 November 2019 (the date on which the Claimant's contract was terminated).

4. The sole issue for me to determine therefore, was whether it could be said that the effect of these conditions on the Claimant's normal day-to-day activities was *substantial*.
5. In order to determine this issue, I heard evidence from the Claimant, I read a 143-page agreed bundle and I also read some additional documents provided by the Claimant under cover of an email dated 18 August 2020.

Relevant Law

6. The burden of proving that the Claimant has a disability and is therefore a disabled person is upon the Claimant. The definition of a disabled person is contained in Section 6 (1) of the Equality Act 2010 namely:

“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.”

According to Section 212 of the Equality Act, substantial means more than minor or trivial.

7. It is relevant to note that Schedule 1(5) of the Equality Act 2010 provides as follows: -
 - (i) 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.
 - (ii) “Measures” includes, in particular, medical treatment and the use of prosthesis or other aid”.
8. In addition to the provisions of the Equality Act, I considered the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) ('the Guidance') and the Equality and Human Rights Commission Code of Practice on Employment (2011). Neither impose legal obligations but I have taken them into account where they appear relevant to this case.

Facts Relevant to the Issue of Disability

Menopause

9. The Claimant first began to experience menopausal symptoms in July 2017 which she described as mild hot flushes. By the summer of 2018, these symptoms had increased to the point where she found them intrusive and disruptive. Specifically, the Claimant was experiencing hot flushes, seven or eight times a day which were regularly accompanied by palpitations and feelings of anxiety. The frequency of these flushes would increase to ten or twelve times per day if the Claimant was under stress or pressure. The Claimant also began to experience night sweats which disturbed her sleep, such that she would awaken six to eight times per night. Whether as a result of this disturbed sleep, or a feature of the hormonal imbalance itself, the Claimant then began to experience fatigue, memory difficulties and concentration difficulties by November 2018.
10. The Claimant attended her General Practitioner in December 2018 complaining of the above menopausal symptoms. She was prescribed hormone replacement therapy patches ('HRT patches'). The use of these patches improved her symptoms but the Claimant found that, from time-to-time her symptoms persisted, particularly if she was under pressure. I am satisfied that her symptoms would have continued at the level described above had the Claimant not been prescribed HRT.
11. The Claimant began to work for the Respondent on the 14 August 2019. I note that she attended her General Practitioner on the 17 October 2019. On that occasion he identified the problem as menopausal symptoms. He noted that the Claimant had started a new job, that she had moved into a noisy environment and that she was having difficulty concentrating which was being made worse by the noisy environment. He further noted that she had Raynaud's Syndrome and was seated under an air-vent which was making her symptoms worse. He observed that she felt anxious due to all of the above, that she was tired all the time and worn out. The GP also provided a letter dated 18 November 2019 in which he stated that the Claimant had presented to him with typical features of menopause which were causing her significant distress and that he had seen her multiple times.
12. In evidence, the Claimant described to me and I accepted that she suffered with the following symptoms: hot flushes, disturbed sleep, fatigue, memory and concentration problems and anxiety. I am satisfied that the last of these, anxiety, was caused or contributed to by the Claimant's menopausal symptoms. I have reached this conclusion in light of (a) the general information in the bundle of documents before me that this is one of the typical symptoms of menopause, (b) the GP letter that the Claimant suffered such typical symptoms, (c) the fact that the October 2019 entry specifically raises a complaint of anxiety associated with menopausal symptoms (d) the Claimant's description of palpitations and feelings of anxiety accompanying her hot flushes and (e) the coincidence in time between the onset of the menopausal symptoms and the onset of her symptoms of anxiety.

13. Individually, or in combination, the above symptoms affected the following activities of the Claimant:
- Her sleep was greatly disturbed (six to eight times per night).
 - Walking and any physical activity was much more laboured with the result that the Claimant avoided such activities when it was warm, reduced the amount of such activities she undertook and needed to rest if she undertook physical activity. This particularly affected her housework in that she was simply unable to do the full range of mowing, car-washing, vacuuming and ironing that she previously did. It also affected her hobby of going to the gym in which she was unable to attend the gym midweek in addition to the weekend as she had previously done. Further, she adjusted the routines which she undertook in the gym and it took her longer to undertake the same amount of exercise she would have taken before the onset of her symptoms.
 - She was distracted from conversations and tasks by hot flushes.
 - Her use of the computer was slower as a result of her difficulty concentrating and her difficulty remembering how to use certain software packages and because of her anxiety. The latter resulted in her over-checking any computer work that she had done.
 - Her ability to read or write at a reasonable pace was similarly affected.
 - Her weekend activities were greatly reduced by the fact that she needed a great deal of sleep to recover from the working week.
 - Finally, she found difficulties remembering previously simple things such as her car registration plate.
14. I am satisfied that her activities would have been affected as above in September – November 2019 were it not for the HRT and, indeed, that the Claimant was still affected in this way when she felt under pressure.
15. I note that the Claimant completed a pre-employment health questionnaire for the Respondent on the 12 August 2019 where she described her menopausal symptoms as a disability, particularly in terms of their effect on her memory and concentration and as a consequence of anxiety and fatigue. I note in the pre-employment health questionnaire, the Claimant did draw attention to the fact that she had Raynaud's Syndrome, and could not sit under an air-conditioning vent or near a draughty window. I note that she did not include this in the relevant section dealing with disability where she had entered the symptoms of her menopause and its disabling effects.

Raynaud's Syndrome

16. The Claimant has had Raynaud's Syndrome for most of her life. She suffers pain and discomfort in her hands and feet when exposed to cold, in particular, she is unable to tolerate a draught or a current of air from an air-conditioning unit. She can otherwise cope with an air-conditioned environment.
17. The Claimant deals with any symptoms in her feet by wearing sheepskin boots and socks at night if it is very cold. This means that she

avoids any symptoms in her feet and any impact of symptoms in her feet on her activities.

18. The situation in relation to her hands is slightly less straightforward. If she wears gloves, she can cope with cold weather outdoors. If indoors, she can undertake all her usual activities if she moves away from draughts. The only regular impact she was able to identify was that she was unable to wash her car outside in winter.

Conclusions in respect of disability

Menopause

19. In respect of whether the Claimant's menopausal symptoms have a substantial adverse impact on her day-to-day activities, the Respondent accepts that I should consider their effect were the Claimant not using HRT patches. The Respondent also accepts that the affected activities identified by the Claimant are day-to-day activities and that they are adversely affected by her menopause symptoms. In so far as it is necessary, I endorse the Respondent's concession in that regard, namely that chores, walking, reading, writing, using a computer, sleeping etc... are all day-to-day activities. I refer to the Appendix to the EHRC Code of Practice Appendix 1, Paragraph 15 in this regard.

20. The thrust of the Respondent's argument is that the Claimant suffers from "typical" menopausal symptoms and that, in the final analysis, she can undertake all relevant activities and therefore the impact is not substantial.

21. In this regard, I have referred to Paragraph 9 of Appendix 1 to the EHRC Code of Practice which states:

"Account should also be taken of where a person avoids doing things which for example caused fatigue or because of her loss of energy and motivation".

I also refer to Paragraph 10 which states as follows:

"An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time"

22. I see no reason why, in principle, 'typical' menopausal symptoms cannot have the relevant disabling effect on an individual. The descriptions of the potential impact of symptoms on day-to-day activities in the EHRC Code of Practice seems to me to be particularly relevant to the Claimant's situation. I have little hesitation in concluding that the effect of her menopausal impairment on her day-to-day activities is more than minor or trivial. The range of her daily activities and her ability to undertake them when she would wish with the rhythm and frequency she once did is

markedly affected as set out above. It would undoubtedly be even more so were she was not taking HRT.

Raynaud's Syndrome

23. I have found the decision in respect of Raynaud's syndrome more difficult. The Claimant is right to say that Raynaud's syndrome can be a disabling condition. It all depends on the nature, extent and impact of the syndrome on the individual. In the Claimant's case, the trigger and impact of the syndrome is very focused and specific. The Claimant suffers discomfort in cold draughts or in cold air conditioning draughts. She is able to take some sensible and reasonable measures to greatly reduce this effect particularly the wearing of boots on her feet and gloves on her hands outdoors and to avoid draughts when indoors.

24. This approach of wearing warm clothing or moving to avoid a draught does not seem to me to fall within the type of measures envisaged by Schedule 1(5) of the Equality Act. These seem to me to be more in the nature of behavioural modifications referred to in the guidance on the definition of disability at Paragraph B7. Paragraph B7 provides as follows:

“Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example, by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the effect that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities. The example given is of a person who needs to avoid certain substances because of allergies and might find the day-to-day activity of eating, substantially effected. The guidance advises that account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect.

25. In relation to the Claimant wearing warm clothing and moving away from draughts, these seem to me to be simple and effective avoidance measures which one would reasonably be expected to deploy. The consequence is that the Raynaud's syndrome does not have substantial adverse effect on the Claimant's day-to-day activities in my view. The Claimant is only exceptionally affected where her place is fixed in a draught or in respect of washing her car outside in the winter. In my opinion, the Raynaud's syndrome and its symptoms do not affect the Claimant's day-to-day activities sufficiently regularly or to a sufficient extent that the effect is more than a minor adverse effect.

26. I have noted also in this regard that the Claimant has not sought or obtained medical advice or treatment in respect of Raynaud's syndrome and I got the impression from her evidence that her symptoms were not at the level whereby she deemed that necessary. I have also noted that the

Case No: 1300005/2020

Claimant did not herself perceive the Raynaud's syndrome and its symptoms to be a disability as indicated in the health questionnaire. The Claimant's view as to whether she satisfies the definition of disability is in no way determinative, but these factors give me some very modest assistance in building an overall picture of how the Claimant feels Raynaud's syndrome impacts upon her life.

27. It is for the reasons set out above that I find that the Claimant is disabled by reason of menopause or symptoms of menopause (including anxiety and problems with concentration) but that she is not disabled by reason of Raynaud's syndrome.

Employment Judge Connolly

Signed: 4 September 2020