



EMPLOYMENT TRIBUNALS

Claimant

Mrs A Roofe-Stewart

v

Respondent

MacIntyre Care Limited

Heard at: Watford (by CVP)

On: 27 September 2022

Before: Employment Judge S Moore

Appearances

For the Claimant: In person

For the Respondent: Mr J Jenkins, counsel

JUDGMENT ON PRELIMINARY ISSUES

- (1) The Claimant did not have a disability within the meaning of s. 6 of the Equality Act 2010 at the time relevant to her claim.
- (2) The Tribunal has no jurisdiction to hear her claim of disability discrimination and it is struck out.

REASONS

Introduction

1. The Claimant has brought claims of unfair dismissal and disability discrimination following her dismissal with effect from 22 June 2021 for refusing to take PCR and lateral flow tests for the purposes of the Respondent's testing procedures for Covid-19.
2. This hearing was listed to determine whether the Claimant has a disability within the meaning of s.6 of the Equality Act 2010 (EqQ).

Evidence

3. By letter dated 14 March 2022 the Claimant was asked to provide details of the nature of her physical and/or mental impairments relied upon by 11 April 2022 as well as copies of the relevant parts of her GP notes and other medical records by 25 April 2022.
4. The Claimant subsequently submitted an undated impact statement stating that in 2010 she had been diagnosed with the condition called Mixed Connective Tissue Disease (MCTD) that can reduce mobility and cause joint pain and swelling. She stated she was also made aware of another health issue a few years later but did not state what that issue was. A further impact statement from the Claimant dated 13 May 2022 states that while there are different strands to the disease she is impacted by joint pain, fatigue, and weakness, and that the frequency and severity of flare ups cannot be predicted.
5. In a further undated impact statement the Claimant states she has problems walking due to pain in her knees, standing to prepare a meal and normal household work is problematic and her ankles and hands are often swollen. She often struggles to open jars and can wake with one side of her arm numb, along with shoulder pains and pains in her hips and legs. Carrying shopping is also a problem and also writing because after writing a few lines she gets a pain in her wrist. She has changed her car to an automatic to lessen the pressure on her knee joints and when travelling will ask for wheelchair assistance at the airport. In 2010 she was put on immo-suppression drugs but was taken off in 2015 due to side effects, she was then given an injection in her knee and since then has only been taking over the counter medication along with herbal remedies.
6. In cross-examination, the Claimant rowed back somewhat from her impact statement. She stated that she suffered from the symptoms set out above most days when the weather was hot. On behalf of the Respondent, Mr Jenkins put it to her that in fact the evidence before the Tribunal was that for a period of years prior to her dismissal the Claimant's symptoms had not bothered her at all.
7. In this respect an Occupational Health Report by Dr K K Sarangi of Health Assured dated 12 November 2015 refers to the Claimant stating that she had been diagnosed with MCTD. Dr Sarangi's recorded that the Claimant told him her symptoms were "fluctuant on a day-to-day basis, including pain, stiffness and swelling". He records "On bad days she has difficulty with her hands, finding it difficult to open jars or carry for example... She tends to drive an automatic car to avoid difficulty should her left knee become problematic... the spiral staircase is always a struggle. She is able to manage this on a normal basis but it becomes more of a problem when her symptoms are more prominent...she tends to manage at work as best she can, taking a few minutes to rest if significantly tired and avoiding activities such as shopping on bad days. However, when her pain is particularly prominent she is unable to attend work." The report concludes "taking into consideration her medical history, I would suggest

that she is likely to fall under the remit of the Equality Act 2010 in relation to disability.”

8. A second Occupational Health Report by Dr Jackson Brown of Medigold Health dated 10 April 2017 reports the Claimant as stating her condition tended to flare up every one to two months. The report referred to the fact that the Claimant had taken medication for another condition which might have exacerbated the symptoms of her CTD between October 2016 and February 2017 and noted the medication had been discontinued. While the Claimant reported ongoing joint and muscle pains which worsened with activity, Dr Jackson Brown noted the Claimant was able to attend normal daily activities and walk reasonable distances without severe pain. Further after physical examination Dr Jackson Brown found that the Claimant’s “physical disability does seem to be minimal”. He was of the opinion, that when not experiencing a flare up, the Claimant’s CTD “has minimal effects on function”. He considered the Claimant was fit to climb stairs, though she might have difficulty performing this activity repetitively, fit to undertake patient transfers, to push wheelchairs, drive company vehicles and undertake shift work.
9. On 17 August 2017 Dr Raj Gupta also of Medigold Health states that following the Claimant’s consultation with Dr Jackson Brown further medical information was requested from the Claimant’s treating doctors, and that a report had been received from the Rheumatology Department of Milton Keynes hospital. From those records Dr Gupta noted that in fact “the Claimant has been without any treatment for mixed connective tissue disorder since 2015. From her clinical letters over that period of time, the disease appears to be stable without reporting any flare ups.” Dr Gupta further stated, “The most recent time that [the Claimant] was seen at the Rheumatology Clinic was in January 2017 by the Specialist Rheumatology Nurse. [The Claimant’s] disease was stable and quiescent and she was not on any treatment. She also had a pulmonary function test and a heart ultrasound, which were both reported to be normal.”
10. The only other medical evidence in the bundle is a letter from the Rheumatology Department of Milton Keynes hospital dated 14 May 2020, this provides:

“I arranged for a telephone consultation with [the Claimant] today. The patient mentioned that she is doing really well regarding her disease. The patient mentioned that in January she visited Jamaica and in February she experienced swelling of her knee which lasted for a week and she dealt with this with Paracetamol. The patient is experiencing clicking knees and ankle pain when she is standing for a long period of time, so for these reasons she is having a short rest during the day. Otherwise, she is feeling very well and we both agreed to reschedule her appointment in six months’ time. If Ms Roofe has any queries she can contact our helpline with the numbers at the top of this letter.”
11. The Claimant’s evidence was vague on the point, but it appeared that, with one proviso, she had not in fact had contact with the Rheumatology

Department by telephone or in person until the Friday before this hearing (which would have been 23 September 2022). The proviso is that in answer to Mr Jenkin's questions the Claimant said she had contacted the helpline (referred to in the letter of 14 May 2020) during the very hot weather in the summer. However, when I asked the Claimant about her conversation when she called the helpline, she said she had explained why she had missed a previous appointment.

12. In submission Mr Jenkins accepted that MCTD is a physical impairment and that before 2015 it had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities. However, the Claimant has to prove that as at April and June 2021 these effects were likely to recur. In this respect the Claimant's evidence in the form of her impact statements was clearly inconsistent with the documentary evidence. Further the Specialist Rheumatology Nurse (referred to in Dr Gupta's letter) described the disease as being quiescent in January 2017 - which means dormant - and there was no evidence that during the period relevant to the Claimant's dismissal from April to June 2021 this was likely to change. Indeed the Claimant did not appear to have had any meaningful contact with the Rheumatology Department for more than two years after her telephone consultation on 14 May 2020.
13. The Claimant submitted that only she knew the impact of her disease and that further medical information should be sought, particularly from her Rheumatologist. During the Covid Pandemic she had received notification from the Government that she had been identified as clinically extremely vulnerable ("CEV") and should shield, which indicated she was a disabled person. She further submitted she should be regarded in the same way as someone who had cancer, who remained covered under the Equality Act 2010. Although she wasn't taking prescribed medication she took herbal remedies.

Conclusions

14. Section 6 of the Equality Act 2010 states that a person has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day to day activities.
15. As regards long-term effect, paragraph 2 of schedule 1 provides:
 - "(1) The effect of an impairment is long-term if-
 - (a) It has lasted for 12 months,
 - (b) It is likely to last for 12 months
 - (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 day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

16. The Respondent accepts the Claimant has MCTD and that before 2015 this had a substantial adverse effect on her ability to carry out normal day to day activities.
17. The question is whether by the period April-June 2021 the MCTD had ceased to have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities and, if so, whether at some point it was likely to recur.
18. Despite the Tribunal's order of 14 March 2022 Claimant has not provided any medical evidence to support her claim to be disabled other than the letter from the Rheumatology Department of 14 May 2020, and I can only make a decision on the basis of the evidence in front of me.
19. In this respect the Occupational Health Report of 10 April 2017 refers to the Claimant's physical disability as 'seem[ing] to be minimal'. Dr Jackson Brown was of the opinion, that when not experiencing a flare up, the Claimant's CTD "has minimal effects on function". Further, Dr Gupta, who did see some medical evidence, stated in his letter of 17 August 2017 that there had been no reported flare ups in the Claimant's disease since 2015 and that in January 2017 the Specialist Rheumatology Nurse had described the Claimant's MCTD as stable and quiescent. It is also clear from the letter from the Rheumatology Department of Milton Keynes that as at 14 May 2020 the Claimant's MCTD was not having a substantial adverse effect on her ability to carry out normal day-to-day activities.
20. On this basis of this evidence, I find that the Claimant's MCTD ceased to have a substantial adverse effect on her ability to carry out normal day-to-day activities at some point between 2015 and 2017. Further I am not satisfied that as at the period April to June 2021 that substantial adverse effect was likely to recur. By that time the disease had been dormant for a number of years and there is no medical evidence before me to suggest it was likely to recur. The Claimant's situation is different from somebody who has cancer; cancer is specifically stated to be a disability under paragraph 6(1) of schedule 1 to the Equality Act 2010 whereas it is incumbent on the Claimant to prove that her MCTD amounted to a disability for the purposes of the Act and for the reasons given I am not satisfied she has done. I would add that in this respect, the fact the Claimant received a letter from the Government requiring her to shield during the Covid-19 pandemic is not evidence she satisfies (or satisfied at the relevant time) the requirements of the Equality Act as regards disability.
21. Since the Claimant did not have a disability in the period April to June 2021 within the meaning of s. 6 Equality Act 2010 it follows the Tribunal has no jurisdiction to hear her complaint of disability discrimination and it is struck out.

Employment Judge S Moore

Date: 28/9/2022

Sent to the parties on: 7/10/2022

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For the Tribunal Office