



EMPLOYMENT TRIBUNALS

Heard at: Ashford (by video) **On:** 17 January 2024

Claimant: Mrs Noopur Masson

Respondents: Novo Nordisk Limited & Claire Parsons

Before: Employment Judge Fowell

Representation:

Claimant Richard Wayman of counsel, instructed by Backhouse Solicitors

Respondent Lydia Banerjee of counsel, instructed by Doyle Clayton Solicitors

JUDGMENT ON A PRELIMINARY ISSUE

1. The claimant was disabled at the material times.
2. The claims will proceed to a hearing on 16 September 2024

REASONS

Background

1. These reasons are provided at the request of the respondent following an oral decision. As usual, some editing has taken place to avoid any repetition or unnecessary detail, so these written reasons stand as the final version. They were prepared on 17 January 2024 but unfortunately I did not submit them correctly. This has led to an unfortunate delay for which I apologise.
2. Mrs Masson is still employed by the company. She works in a pharmaceutical sales role with the job title Senior Diabetes Care Specialist. She says that she contracted covid early on in the pandemic and then suffered severe adverse reactions to the vaccines so that her health broke down and she had a long period off work. The conditions which she relies on as disabilities are long covid and chronic fatigue syndrome, although the chronic fatigue syndrome may well be a feature of long covid.

3. This hearing was to determine whether she was disabled at the material times. Those times are from August 2021, when she had the second covid vaccine, until 17 October 2022 when she received the outcome of her grievance about various matters which had arisen in the meantime.

Disability

4. To start with the basic test, s.6 Equality Act 2010 provides that:
 - 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.
5. According to the definitions section of the Act (s.212), “substantial” means more than minor or trivial.
6. The question of what is a long-term effect is dealt with at Schedule 1 to the Act, where it states that:
 - 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 ...
7. The main dispute in this case is not about whether Mrs Masson’s health was badly affected, but whether her symptoms were caused by the two conditions relied on or by a variety of others.

Procedure and evidence

8. I heard evidence from Mrs Masson and had a bundle of about 400 pages, about 300 of which was medical evidence of one sort or another. There were sick notes, occupational health reports and some GP records, together with exchanges with work about her progress. The GP records go back to August 2021, the start of the relevant period, but it would have been helpful to have some earlier records, for example covering her first bout of covid in March 2020. I am satisfied however that she, and her solicitors, provided the records they thought appropriate without any attempt to conceal things, and they do not suggest that she was disabled before that time. There is also no independent medical report explaining what symptoms were caused by what condition. Such evidence is rare in employment tribunal cases but a short report from her GP about which symptoms are attributable to which condition would have helped. Again, I do not make any adverse inference from the lack of such a report.
9. Subject to those reservations, the body of evidence in the bundle shows a high degree of consistency. There is little, if any, difference between the information given by Mrs Masson to her GP, to occupational health, to her colleagues or to the various clinics and other agencies to which she was referred. She gave her evidence at this hearing in a considered way, did her best to recall the episode in

question and conceded points that were put to her where appropriate. I see no reason to doubt her account.

10. Having considered that evidence and the submissions on each side, I make the following findings.

Findings of Fact

11. Long covid is now a well-recognised condition or collection of symptoms. No doubt our understanding of it will continue to develop but a number of symptoms are clearly associated with it and appear from her GP records and elsewhere. They include breathlessness or having a tight chest, fatigue or lack of energy, and brain fog or confusion. Those problems lead on in turn to such problems as inability to walk for any significant distance and an inability to remember things.
12. Mrs Masson also lists in her witness statement others symptoms which *may* be connected with long-covid, such as insomnia, depression and anxiety. Again, a medical report on the condition would have helped.
13. Other symptoms are less obviously associated with long covid. These include pain in various areas - neuropathic pain, pain on mobility, sciatic pain, neck and back pain and joint pain. She also mentions general stiffness, unexplained tachycardia, sweating, headaches and migraine.
14. Even these however are difficult to rule out as being connected with long covid. When she went to see her GP in August 2021 he immediately identified the main concern as long covid and made various referrals. One was to a chiropractor, because of the pain she had in her spine and neck and back, and she was seen at Spinal Care Clinics. Her GP told her that nerve root irritation in her spine may also be a consequence of long covid, and this term is referred to in their assessment. Another possibility is that this was the result of a car accident she had in 2019, the effects of which returned or were exacerbated in some other way.
15. Similarly, she was referred to cardiology. Here again, she had had a previous relevant condition – “right bundle branch block” – and again this had not needed any treatment for some years. Her GP was concerned that there may have been some heart damage. Again, it is hard to know whether this is due to Covid or had a separate cause.
16. Other issues may have been behind her symptoms, especially her anxiety and depression. She suffered two bereavements in the family during this period and was looking after three children as well as trying to return to work.
17. I prefer to take the view, suggested by Mr Wayman, that it would be simpler to concentrate on those symptoms which are clearly attributable to long covid, such as breathlessness, fatigue and brain fog. There is a risk of some unfairness to the claimant in doing so, in that it involves ignoring the debilitating effects of anxiety and depression and other symptoms. However, facts have to be established on the balance of probabilities and on the evidence available I cannot

be satisfied that those symptoms, together with the cardio and spinal problems, are attributable either to long covid or to chronic fatigue syndrome.

18. Concentrating on those aspects, the first problems arose after Mrs Masson's first covid jab on 17 August 2021. She reported afterwards to her managers [74] that it had caused palpitations, arrhythmias, difficulty in breathing, confusion and constant muscle pain, and that she had been given a diagnosis of long covid, anxiety and depression. She had already been referred to rheumatology, cardiology and the long covid clinic.
19. Her GP records of this first consultation [297] are in shorthand form but are to much the same effect. They record "multiple symptoms" plus tiredness, "SOB" (shortness of breath), anxiety, and work stress. On 6 September [76] she was signed off for a month work with "long covid, severe depression and anxiety".
20. On 4 October [79] she spoke to her manager again by phone and explained that she was bed ridden and could not catch her breath, had pain everywhere and brain fog. A further sick note followed on 6 October for another month [80].
21. After that she started to recover. In the next work conversation on 29 October [81] she said that she was feeling a lot better but she was still breathless. She said she had managed to walk the whole length of her patio without sitting down.
22. By then she had had an Occupational Health appointment and been told there was no hope of return to work this side of Christmas. That report, dated 2 November [88] recorded that she had long covid, that her fatigue levels were badly affected, as was her ability to concentrate. It is mainly notable for its conclusion that the duration was impossible to predict but it was common for long covid to last 5 months or more and there were several reports of it lasting 12 months or more.
23. That was the first of three Occupational Health reports. The second [106] refers to "significant long covid and possible chronic fatigue". The author could hear her breathing during the consultation. Similarly her GP noted "extreme fatigue" [300] a few days later.
24. She was referred to the long covid clinic in December and remained off work into the New Year. She continued to have what appear to be supportive conversations with her manager and was sending in her sick notes on a regular basis. On 10 January she told Claire Parsons [126] that her GP was very sure that she also had chronic fatigue syndrome. This was formally diagnosed by the clinic in February and appeared on her sick notes from 9 February onwards [148]
25. On 25 February 2022 she had a further covid jab, and a further adverse reaction. (I note at this point that no distinction has been drawn between long covid and adverse reactions of this sort, and none was suggested.) That led to a further Occupational Health report on 10 March 2022 which records [171]:

"Ms Masson was informed that she may suffer from Chronic fatigue syndrome (CFS). This is a complicated disorder characterised by extreme fatigue that lasts for at least

six months and that can't be fully explained by an underlying medical condition. The fatigue worsens with physical or mental activity but doesn't improve with rest. Other characteristic symptoms include:

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- Sleep that isn't refreshing
- Difficulties with memory, focus and concentration
- Dizziness that worsens with moving from lying down or sitting to standing

While there is currently no cure for CFS, there are treatments that may help manage the condition.”

26. There was then a meeting with her managers to discuss the report [178]. She reported that she was getting better. She had been short of breath moving from the car to the OH appointment but she was able to walk the dog for 20 to 30 minutes a day. The report had recommended a phased return-to-work and they agreed to implement this.
27. That seems to be the high point of her abilities. She made the return to work shortly afterwards, starting at the beginning of April. It soon became apparent that it was not sustainable. A meeting was held among her managers on 20 April [187] and they noted that she had had a two-hour appointment with the long covid clinic that day, been diagnosed with chronic fatigue syndrome, and that her position was that she had returned to work against her GP's advice. She was still struggling to stay awake and with driving.
28. Shortly afterwards she suffered a relapse and was confined to bed. On 6 May, despite this, she had a further telephone discussion with her manager [196] and said she was still struggling with brain fog, was feeling wobbly, and that her GP now said it would be 18 to 24 months before she was back to normal.
29. Again, there was some improvement over the next few weeks, but her sick notes continued on a monthly or near-monthly basis for the rest of the year. In October she qualified for PIP (Personal Independence Payment). The assessor found that she was not able to walk 200m.

Applicable Law and Conclusions

30. In **Goodwin v Patent Office** 1999 ICR 302 the Employment Appeal Tribunal said that tribunals should break down the test for disability into four stages, i.e.
 - a) did the claimant have a mental and/or physical impairment? (the 'impairment condition')
 - b) did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')
 - c) was the adverse condition substantial? (the 'substantial condition'), and
 - d) was the adverse condition long term? (the 'long-term condition').

31. These four questions should be posed sequentially and not together. This 'step' approach has subsequently been approved by the Court of Appeal in **Sullivan v Bury Street Capital Ltd** 2022 IRLR 159, CA.

32. I will therefore deal with each in turn, setting out any further relevant legal guidance as necessary.

The impairment condition

33. It is not disputed that Mrs Masson suffered from both long covid and from chronic fatigue syndrome.

The adverse effect condition

34. Nor is it disputed that these conditions had an adverse effect on her health.

The substantial condition

35. These conditions of course affect fundamental abilities like breathing, not to mention walking or exercising or driving. And again, the test is whether the effect was minor or trivial. In broad terms, people are unlikely to trouble their GP with minor or trivial conditions, and their GP is unlikely to treat them for such difficulties, especially over a long period and by referring her on to more specialist advice.

36. It is the case that at one point Mrs Masson was able to walk for 20 to 30 minutes, and she accepted at one point in her evidence that she had been on a two hour car journey, albeit with a break after an hour. But that is very much the high point. For most of the period in question she was suffering with a severely debilitating condition, as indicated by the fact that she was bed-ridden, or that crossing her patio was an achievement.

37. It is not in fact possible, looking at the records available, to identify any period when she was altogether free of these debilitating symptoms. Being able to walk for 30 minutes, no doubt with some effort on her part, still represents a considerable reduction in her previous degree of mobility, and hence the effect of her condition, even at that point, was more than minor or trivial. Hence, I conclude that the substantial condition is met.

38. That conclusion is clear, even before taking into account the effect of her medication, without which her difficulties would of course have been considerably greater. It is never possible to know how great the difference would have been, but I note that she was in receipt of ten different medications, plus ordinary painkillers.

The long-term condition

39. Again, this means asking whether it has lasted for at least 12 months, or is likely to last for at least 12 months. That cannot be judged in hindsight and the test is whether an impairment of that duration "could well happen": **Boyle v SCA Packaging Ltd** (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL.

40. The only evidence about the likely duration of her condition comes from the Occupational Health report on 2 November 2021 [88], i.e. that the length of time is impossible to predict, that they commonly last five months or more, and that there were several reports of it lasting 12 months or more. That is the full extent of the evidence on this important issue.
41. Both counsel agreed that I had to approach this on the basis of the medical knowledge at the time, and this comment reflects that understanding. I can only interpret that statement as an indication that her condition “could well” last for 12 months or more. There was clearly a good deal of uncertainty about long covid generally at the time, but Mrs Masson had been suffering with severe symptoms since her first jab in August, nearly 3 months earlier. There was some indication at that things were improving, but no one could have said with any confidence that it would have resolved itself by the following August. On that simple basis, I conclude that the long-term condition is met too.
42. Hence, it seems to me that the test of disability was met from the time of the second covid vaccine on 17 August 2021. On that basis, all of the complaints need to proceed to the final hearing.

Employment Judge Fowell

Dated: 13 March 2024

Corrected on: 18 March 2024

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