EMPLOYMENT TRIBUNALS

Claimant: Ms S Phillips

Respondent: Tilehouse Counselling

HEARD AT: CAMBRIDGE **ON**: 10th March 2017

BEFORE: **Employment Judge Warren**

For the Claimant: Mrs Ismail (Counsel)

For the Respondent: Mr Murray (Counsel)

RESERVED JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The Respondent concedes that the Claimant was an employee.

2. The Claimant is and was at the material time a disabled person as defined in the Equality Act 2010.

3. The question of whether or not any of the Claimants claims are out of time will be determined by the Tribunal that hears this case at its final main hearing.

REASONS

Background

1. Ms Phillips issued this claim on the 19th August 2016 following termination of her employment in March 2016; it is an issue in this case whether Ms Phillips employment came to an end on the 10th March or 31st March 2016.

2. Ms Phillips was employed by the Respondent Charity as a Counsellor. She complains about the following:-

   2.1 That she was subject to unreasonable and spurious disciplinary matters in January 2016.

   2.2 Following a period when the number of clients allocated to her were reduced to allow her time to care for her terminally ill parents, the Respondent failed to increase the number of clients allocated to her.

   2.3 The Respondent failed to renew her annual contract in April 2016.

   2.4 The Respondent questioned her fitness to practice.

   2.5 The Respondent failed to make reasonable adjustments to accommodate Ms Phillips alleged disability, namely asthma. In particular, it failed to make a parking space available to her and did not prevent the use of aerosol spray in the vicinity of where the Claimant worked.

3. Ms Phillips brings complaints of unfair dismissal, direct associative discrimination, discrimination arising from disability, failure to make reasonable adjustments, harassment and victimisation. The issues in this case are set out in detail in the case management summary arising out of a preliminary hearing before Employment Judge Palmer on 27th October 2016.

The Issues Before me

4. At the preliminary hearing before Employment Judge Palmer in October 2016, he identified 3 issues to be determined at this open preliminary hearing:

   4.1 Whether the Claimant is a disabled person under Section 6 of the Equality Act 2010;

   4.2 Whether the Claimant was an employee within the definition in Section 83 of the Equality Act 2010 or under Section 230 of the Employment Rights Act 1996, and

   4.3 Whether any of the Claimants claims are out of time and if so, should the Tribunal exercise its discretion in order to extend time.

5. During this hearing, after an adjournment for me to read the witness statements and the documents referred to therein, I was informed that the Respondent conceded that Ms Phillips was an employee. Unfortunately, that concession was not enough to enable me to complete the matter with an *extempore* decision on the day.

6. Both parties agreed during preliminary discussions, that it would not be appropriate for me to deal with the time issue. All agreed that the question of the date on which Ms Phillips resigned, whether that be the 10th or the 31st March 2016, was better dealt with at the substantive hearing after the Tribunal has had the benefit of hearing all of the evidence in the case.

Admissibility of Late Evidence

7. At the start of this hearing, the Respondent objected to Ms Phillips producing late evidence. Employment Judge Palmer had ordered exchange of documents on the 24th November 2016, the bundle of documents for the hearing to be produced by the Respondent's Solicitors by the 22nd December 2016 and full witness statements to have been exchanged by the 26th January 2017. I was told that on the day before this hearing, the Claimant served additional documents and a witness statement, offering no explanation. Some of this documentation went to the issue of the Claimants disability and included documents relating to her medical records.

8. Having regard to the overriding objective and seeking to balance the relative prejudice to the parties, whilst making it clear that I wholly deprecated the late service of this documentation which was highly unsatisfactory, I nevertheless permitted the document to be allowed in evidence. The witness evidence and some of the documents were plainly relevant to the issue of disability. The Claimant would be prejudiced if I disallowed the documents. Further unnecessary cost would be incurred if I adjourned the case. The Respondent was represented by able Counsel whose clients were here and able to give instructions. There would be a long adjournment whilst I read the documentation (at that point I was concerned with the status argument as well as disability) and Mr Murray would therefore have plenty of time to take instructions and prepare his cross examination or supplemental questions arising out of the additional evidence.

Evidence

9. I had before me a witness statement regarding disability from Ms Phillips herself and a further statement on that subject from her friend, Mr Miller.

10. For the Respondents, I had witness statements from Ms Sue Barnes, Ms Pam Firth and Ms Kim Kirby. All three had comments to make on whether or not Ms Phillips was a disabled person.

11. I had before me a properly paginated and indexed bundle of documents which originally ran to page number 217 and to which the documents at page numbers 218-264 were added.

12. Since the hearing on the 10th March 2017, the Claimant through her Solicitors, has sought to introduce further evidence. This is a symptomatic

of the poor way in which this case has been prepared. Ms Phillips' Solicitors have written to the Tribunal to ask me to take into account that Ms Phillips has now been granted a blue badge and purports to submit in evidence a letter from her Doctor dated 31st March 2017.

13. It is not appropriate for parties to seek to submit further evidence after the hearing has concluded and each of the parties have made their representations. It is incumbent upon the parties, in accordance with the overriding objective, to muster their evidence and present it at the hearing which is to determine the issues. Of course, if relevant and probative evidence comes to light, it may be in the interests of justice that evidence be brought to the attention of the Employment Judge in a situation where there is to be a reserved decision. In those circumstances, the other party would have to be given an opportunity to respond to the evidence. Usually, that would entail reconvening the hearing when the other party would have the opportunity to provide evidence to challenge the new evidence and cross examine the relevant witness in respect of the new evidence. Such measures entail further delay and additional costs which are contrary to the overriding objective. There would need to be compelling reasons to justify this.

14. In this case, I have read the evidence produced late by the Claimant, simply so that I may determine whether there are compelling reasons why I should allow the evidence. The letter from the Claimant's Doctor dated 31st March 2017 is of no or little value as the Doctor merely recites what Ms Phillips reports. The Doctor's comments are prefaced by phrases such as, “she reports …..” and, “she states ….”. The Doctor does not assist by providing his or her own observation or opinion.

15. As for the fact that Ms Phillip has been issued with a blue badge, this tells me nothing other than that another individual has reviewed a set of facts and documents presented on behalf of Ms Phillips, applied a different set of criteria and decided that she qualifies for a blue badge. That does not assist me in reaching my decision on the basis of the evidence before me, as to whether or not Ms Phillips is a disabled person as defined in the Equality Act 2010.

16. I do not permit the late evidence submitted by Ms Phillips' Solicitors and I disregard it.

<u>The Law</u>

17. For the purposes of the Equality Act 2010 (EqA) a person is said, at section 6, to have a disability if they meet the following definition:

“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."

18. The burden of proof lies with the Claimant to prove that she is a disabled person in accordance with that definition.

19. The expression 'substantial' is defined at Section 212 as, *'more than minor or trivial'*.

20. Further assistance is provided at Schedule 1, which explains at paragraph 2:

    "(1) 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 least 12 months, or

    (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".

21. As to the effect of medical treatment, paragraph 5 provides:

    "(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 …"

22. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled, 'Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability'.

23. As to the meaning of 'substantial adverse effect', paragraph B1 assists as follows:

    "The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A

substantial effect is one that is more than a minor or trivial effect".

24. Paragraph B12 explains that where the impairment is subject to treatment, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or the correction, the impairment is likely to have this effect and the word 'likely' should be interpreted as meaning, 'could well happen'. In other words, one looks at the effect of the impairment if there was no treatment.

25. As for what amounts to normal day-to-day activities, the guidance explains that these are the sort of things that people do on a regular or daily basis including, for example, things like shopping, reading, writing, holding conversations, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, taking part in social activities, (paragraph D3). Whilst specialised activities either to do with one's work or otherwise, are unlikely to be normal day-to-day activities, (paragraphs D8 and 9) some work related activities can be regarded as normal day-to-day activities such as sitting down, standing up, walking, running, verbal interaction, writing, driving, using computer keyboards or mobile phones, lifting and carrying (paragraph D10).

26. As to what amounts to a 'substantial effect', the guidance is careful not to give prescriptive examples but sets out in the Appendix a list of examples that might be regarded as a substantial effect on day-to-day activities as compared to what might not be regarded as such. For example, *'difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage, with one hand'* which would be regarded as a substantial effect, as compared to, '*inability to move heavy objects without assistance or a mechanical aid, such as moving a large suitcase or heavy piece of furniture without a trolley'* would not be so regarded. Also compare, *'a total inability to walk, or an ability to walk only a short distance without difficulty'* which is a substantial effect to, *'experiencing some tiredness or minor discomfort as a result of walking unaided for a distance of about 1.5 kilometres or one mile'*.

27. In Goodwin v Patent Office [1999] ICR 302 the EAT identified that there were four questions to ask in determining whether a person was disabled:

    1. Did the Claimant have a mental and/or physical impairment?

    2. Did the impairment effect the Claimant's ability to carry out normal day-to-day activities?

    3. Was the adverse condition substantial? And

    4. Was the adverse condition long term?

28. In J v DLA Piper UK LLP [2010] IRLR 936 Mr Justice Underhill, President of the EAT at time, observed that it is good practice to state conclusions separately on the one hand on questions of impairment and adverse effect and on the other hand, on findings on substantiality and long term effect. However, Tribunals should not feel compelled to proceed by rigid consecutive stages; in cases where the existence of an impairment is disputed, it makes sense to start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely effected on a long term basis and then consider the question of impairment in light of those findings. It is not always essential for a Tribunal to identify a specific 'impairment' if the existence of one can be established from the evidence of an adverse effect on the Claimant's abilities. That is not to say that impairments should be ignored, the question of impairment can be considered in light of findings on day-to-day activities.

Facts

29. I begin with a summary of the entries into the Claimant's medical records relating to her asthma as follows:-

29.1 27th July 1998 handwritten doctors entry which is difficult to read; it seems to contain references to asthma worsening and the further prescriptions of inhalers.

29.2 24th September 1998 prescription of Salbutamol and Flixitide inhalers.

29.3 1st October 1998 diagnosis of asthma, prescription of Fluticasone Propionate inhaler.

29.4 13th January 1999 reference to prescription of Salbutamol inhaler.

29.5 May 1999 prescription of Salbutamol inhaler.

29.6 October 1999 prescription of Salbutamol and Fluticasone.

29.7 19th July 2000 doctors handwritten note which is hard to read; refers to asthma attack 2 night previously, reference to not being happy and being referred to Asthma Nurse.

29.8 27th July 2000 doctors handwritten entry at page 215 appears to refer to Claimant being well since further prescription of Fluticasone and Salbutamol.

29.9 26th April 2001 asthma review handwritten entry at page 213 seems to refer to wishing to wean off Fluticasone. A typed template entry for the same date at page 195 refers to asthma never causing day

time symptoms, asthma never causing night symptoms, asthma sometimes restricting exercise, reliever use rare, inhaler technique use good.

29.10 10th August 2002 a hand written entry at page 213 isdifficult to read but appears to refer to a flare up of asthma and widespread wheezing with prescription of Ventolyn and Benticide.

29.11 There then follows a significant gap in Ms Philips notes which she says is because she moved surgeries.

29.12 17th July 2003 entry is Asthma worsening overnight, feels very tight, reference to needing steroids once every three years or so hardly needs Salbutamol, airways tight but can talk in sentences, prescription for Salbutamol and Prednisolone peek flow rate recorded as 200 litres per minute against expected rate of 488 litres per minute.

29.13 10th August 2004 reference to prescription for Prednisolone and advised to double inhaler use, peek flow recorded 280 litres per minute against expected 486 litres per minute. Oral use of steroids, sees a shortness of breath, chest tightness, disturbed sleep, asthma limiting activities all recorded.

29.14 21st December 2004 peak flow 270 litres per minute against expected 486 litres per minute, dry cough and wheezing, shortness of breath, asthma disturbing sleep, reference to asthma limiting activities, comment that recommended use of inhaler or oral steroids but that Ms Phillips appears reluctant to do so.

29.15 12th January 2005 reference to admission to A&E.

29.16 28th July 2006 reference to exacerbation of asthma.

29.17 27th August 2006 prescription for Beclometasone inhaler, Salbutamol inhaler and a Fucidin H Cream. Reference to being an ex-smoker, stopped smoking in 2001. Peak flow 180 litres per minute against expected 484 litres per minute.

29.18 5th September 2008 prescription for Salbutamol, reference to asthma being much worse, prescription for Prednisolone soluble tablets appears to be related.

29.19 Reference to admission to A&E on 23rd November 2008, Ms Phillips says and I accept, this was admission to A&E because of an asthma attack.

29.20 9th July 2010 reference to asthma being “miles better”. Is taking Symbicort peak flow 300 litres per minute with compliance with inhaler recorded.

29.21 22nd December 2011 reviewed for repeat prescription of Symbicort and of Salbutamol, review of inhalers and how to take them.

29.22 4th January 2012 attending surgery with history of cough, confirms using Ventolyn a bit more than had been and is managing. given general advice about management.

29.23 11th January 2013 asthma review, not been using inhalers. Peak flow 230 litres advised to resume using inhalers. Recorded as not limiting activities or disturbing sleep. Further prescriptions for Budesenide and Ventolyn.

29.24 There are very many repeat prescriptions for the inhaler medications between 31st March 2003 and February 2013 appearing at pages 207 and 209, which I will not recite.

29.25 26th March 2014 asthma recorded as causing day time symptoms one or two times per week but not disturbing sleep, peak flow recorded at 310 litres per minute. A series of asthma triggers mooted including animal, seasonal, cold air, airborne dust, perfumes, dust mites, pollen.

29.26 13th January 2016 peak flow recorded 230 litres per minute against expected 417 litres per minute, patient said to be very stressed and asthma control very variable, using Symbicort in reactive may up to 3 or 4 times a day, assessment records no wheezing or breathlessness, no disturbed sleep, asthma never causing day time symptoms, asthma sometimes restricting exercise, asthma trigger emotions, using inhaled steroids normal dose, asthma management plan declined. Some of these printed entries are clearly contradictory and it seems to me, most likely as a result of data input errors.

30. Ms Phillips told me in evidence that she had been admitted to hospital twice with asthma attacks. Whilst this was challenged by the Respondent, a review of the medical notes appears to corroborate this assertion.

31. It would have assisted greatly if the above analysis of Ms Phillips medical records had been set out in her witness statement. As it is, I have been left to go through the medical records for myself and prepare the above summary. It is clear that notwithstanding the skeptical evidence from the Respondent’s witnesses and the challenges made to Ms Phillips in cross examination, that she has indeed suffered from asthma for the last 20 years, that from time to time asthma attacks are serious and that she regularly takes preventive medication, but there are also times when occasionally she lapses.

32. There was another occasion when Ms Phillips was taken seriously ill with an asthma attack and an ambulance was called. It was not necessary to convey her to hospital, but she received emergency treatment with a nebulizer and was left at home on the basis that she would dial 999 if she became worse again.

33. Mr Murray has sought to challenge the credibility of Ms Phillips evidence. He made the following points:-

    33.1 He said that it was not credible that the Respondents witnesses have barely seen the Claimant using an inhaler and that her evidence as to the effects of asthma on her were not credible in the face of the Respondents witnesses. In fact at the opening of cross examination of the Claimant, it was put to her that Ms Kirby had never seen her with an inhaler. Ms Phillips did not accept that. It is interesting to note that in cross examination, Ms Kirby acknowledged that she had seen Ms Phillips with an inhaler once and she acknowledged that her witness statement was wrong when it said that she had not. I do not think that it is necessarily strange as is suggested, that the Respondent’s witnesses did not see Ms Phillips using an inhaler frequently or any obvious effects of her asthma. It would not be unusual as Ms Phillips says; many people using asthma inhalers do not to make a great exhibition of doing so and on Ms Phillips case, the use of the inhalers kept her asthma under control.

    33.2 Mr Murray made a great deal of the fact that one of the entries on Ms Phillips medical records record her as stating she is a non-smoker. In fact, a review of the medical records as a whole shows that she was always entirely open about the fact that she was a smoker. There was no obvious reason why she should lie to her doctors on one occasion. In fact, it seems to me that the entries on this particular part of the medical records, (page 195) indicate that they are not entirely reliable, given that one entry for the 13th January 2016 refers to the Claimant has having never smoked tobacco, as alluded to, whereas an earlier entry on the same page for 27th July 2000 reveals her as a cigarette smoker one a day. This lends credibility to Ms Phillips explanation that the medical staff were using a tick box form. She explains why some of the entries read, “asthma not disturbing sleep, asthma never causes day time symptoms” which is in the same entry for that which states that she never smoked tobacco. In an earlier entry she acknowledges she was a smoker, refers to asthma causing day time symptoms and causing night time symptoms. This accords with other entries in the medical records, as noted above.

    33.3 Mr Murray challenged Ms Phillips’ assertion that she was suffering from disturbed sleep by making reference to this entry on page 195 for the 13th January 2016. Ms Phillips was prescribed sleeping tablets, we see one such prescription for July 2016 at page 254.

33.4 Mr Murray makes a fair point when he refers to the Claimant's witness statement at paragraph 6, in which she refers to a diary entry for the 17th November 2016, (long after the relevant period for the purposes of this case) and yet she has not produced a diary. In answer to a the question about this in cross examination, she said that she had only been keeping a diary recently.

33.5 Mr Murray submitted that Ms Phillips and indeed Mr Miller, were evasive in cross examination. I did not find them so.

34. I find that Ms Phillips:-

34.1 Sometimes found getting dressed in the morning exhausting.

34.2 Would have to stop swimming if she had forgotten to take her inhaler, before proceeding.

34.3 Does have a bicycle and can ride it, but she cannot do so without having taken her inhaler.

34.4 Asthma does disturb her sleep sometimes.

34.5 Does have difficulty in walking long distances and could not walk more than a mile.

34.6 Does become wheezy, experiences a tightness of chest, has difficulty in breathing unless and until she uses her inhaler, if she has forgotten to do so.

34.7 If rushed and becomes anxious, becomes breathless, which slows down her movement and effects her ability to talk until she is able to regain her breath.

34.8 Finds that walking out into cold air causes her to become breathless.

34.9 Must wear a face mask for hovering and dusting.

34.10 Finds that mould and spores from leaf mould cause aggravation to her asthma during the Autumn and Winter.

34.11 Finds that pollen in Spring and Summer will set off her asthma.

34.12 Uses her inhaler regularly, daily.

34.13 Finds that if she does not use her inhaler, she experiences an asthma attack and in particular, the effects described above. On occasions, that has warranted emergency medical treatment.

Conclusions

35. Ms Phillips suffers a physical impairment which is the medical condition of asthma, which causes her to become breathless. Her breathlessness impairs her ability to carry out physical tasks and in extreme episodes, debilitates her so that she is only able to breath and requires emergency medical intervention.

36. The treatment for this physical impairment administered to Ms Phillips is the taking of oral steroids and the use of 2 different types of inhaler: one preventive called Symbicort and the other a reliever in the event of an asthma attack, Ventolyn.

37. It is the effect of her asthma condition on Ms Phillips were she not take this medication, that I must consider when assessing the impact of any impairment on her ability to carry out normal day to day activities. Without taking the medication, Ms Phillips experiences difficulty in getting dressed and is unable to swim or ride a bicycle, is unable to walk any distance and not as far as a mile, becomes breathless and her ability to talk is impaired and she is unable to move quickly. These are day to day activities.

38. These impairments are not trivial and they are more than minor. On occasion, the impairment becomes extremely serious.

39. This medical condition and these impairments have been experienced by Ms Phillips for at least 18 years and are therefore long term.

40. For these reasons, I conclude that Ms Phillips is a disabled person and was throughout her employment with the Respondent and during the period in respect of which the conduct alleged to amount to discrimination took place.

Judicial Mediation

41. The parties indicated that in the event I find that the Claimant is disabled, they would both be willing to take part in Judicial Mediation. I have therefore directed that the file be passed to the Regional Employment Judge so that he may consider this.

Employment Judge Warren, Cambridge.

Date: 13 June 2017……………………

Sent to the parties on: ....

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For the Tribunal Office