



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Miss J Neels

Trident Reach The Charity People

Heard at: Birmingham (via CVP)

On : 23 May 2022

Before: Employment Judge Choudry

Appearances

For the claimant: Mr C Green (Counsel)

For the respondent: Mr B Patel (Head of HR)

JUDGMENT

1. The judgment of the Tribunal is that the claimant not disabled at the material time by reason of claustrophobia. Accordingly, the claimant's claim for disability discrimination must fail and is struck out.
2. The claimant's remaining claims remain listed for a final hearing to take place in Birmingham on 4, 5 and 6 October 2023.

REASONS

Background

1. The claimant has been employed by the respondent as a support worker since 31 July 2018. The respondent is part of Trident Social Investment Group which consists of Trident Charitable Housing Association and Trident Star. On 1 January 2021 the claimant chose to transfer to a casual contract. By a claim form received on 24 February 2022 the claimant brought a claim for discrimination on the grounds of religion and belief. In May 2023 the

claim brought a separate claim (under case number: 1303375/2023) for disability discrimination.

2. Following a preliminary hearing on 14 December 2022 the matter was listed for an open preliminary hearing to determine whether the claimant was disabled by reason of claustrophobia. That hearing came before me today.

Issues

3. The issue for me to determine today was whether the claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? This requires me to determine whether:
 - 3.1 Did the claimant have a physical or mental impairment: the claimant relies on claustrophobia. The respondent accepts that claustrophobia is capable of amounting to a disability under the Equality Act 2010;
 - 3.2 Did the claimant's claustrophobia have a substantial adverse effect on her ability to carry out day-to-day activities?
 - 3.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment;
 - 3.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
 - 3.5 Were the effects of the impairment long term? The Tribunal will decide:
 - 3.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
 - 3.5.2 If not, were they likely to recur?

Hearing

4. The hearing took place via CVP. The claimant was represented by Mr Green and the respondent was represented by Mr Patel, its Head of HR. There was a short adjournment at the start of the hearing to enable Mr Patel to undertake the hearing from the respondent's premises due to technical difficulties that Mr Patel was experiencing.
5. I was provided with an agreed bundle of 85 pages which had been put together by the respondent. Mr Green, for the claimant, confirmed that the claimant had no further documents to add. I also heard evidence from the claimant who affirmed her impact statement which was contained in the bundle. I had the opportunity to see the claimant's evidence tested under cross examination and to put questions to the claimant myself.

Facts

6. The claimant has been employed by the respondent as a support worker since 31 July 2018. The respondent provide a range of support and care services across Birmingham, the wider West Midlands, Derbyshire and Shropshire. The respondent's services are provided under a CQC registration and were therefore bound by the testing regime that was

introduced as a result of COVID-19 and its requirement in relation to the wearing of PPE.

7. The claimant asserts that she is claustrophobic and has been so since she was a child. Her earliest memory of experiencing claustrophobia is from when she was 7 or 8 years old. This stems from abuse the claimant states she experienced as a child. This abuse has caused the claimant to experience anxiety and fear of her breathing being restricted, including having her nose and mouth covered and being in small/tight closed spaces/places. The claimant indicated that she did not see a doctor at the time of her abuse and it was only later that she realised that her claustrophobia stemmed from the abuse she experienced as a child. The claimant also has anaemia although she does not rely on this for her claim for disability discrimination.
8. The claimant indicated in her evidence that this prevented her from wearing a face mask whilst at work and undertaking certain duties including undertaking personal care tasks such as: showering/bed bathing care users, drying care users, dressing/changing care users, as well as other duties such as help and support/encouragement with personal hygiene/appearance.
9. The claimant indicated that undertaking these tasks were challenging enough in themselves but having to undertake them whilst wearing a mask made it more difficult for her to undertake her duties because of her being claustrophobic and also due to her having anaemia as some of the places where she had to undertake her duties were not very well ventilated. She gave the example of carrying out personal care tasks involving showering a care user in a small shower room with no windows and very little ventilation. After a few minutes of being in the shower room carrying out these tasks the shower room would steam up creating an environment like a sauna. This was more of an issue in the warmer months.
10. The claimant has received no medical diagnosis of her claustrophobia, she has not received any advice from her GP for her claustrophobia nor does she take any medication for it. The claimant says that prior to September 2021 she had not been expected to wear a face mask and therefore she was able to manage her condition. She also worried about the possible side effects of pharmaceutical drugs. Instead, she sought out natural/holistic treatment/medicine to maintain her fear/anxiety. The natural/holistic treatment/medicine involved a healthy diet (vegetarian) and natural remedies, daily exercise, daily meditation, breathing techniques and spiritual counselling. For the anaemia she also sought natural over the counter blood/iron boosters in addition to the other remedies she used to maintain her fear/anxiety. The claimant was mindful of what she put into her body. Using creams without alcohol. However, the claimant confirmed that she did take pain killers sometimes if natural remedies did not work.
11. The claimant was asked in cross examination what the impact of her claustrophobia would be if she did not take steps to maintain her fear/anxiety. The claimant indicated that her anxiety would be triggered and she would experience headaches. However, she would not get heart palpitations.
12. When asked how her claustrophobia affected her on a day to day basis the claimant indicated that she did not like small or enclosed spaces such as lifts and did not like things covering her face. She confirmed that this had happened consistently since she was 7 or 8 years old. The claimant was

also asked in cross examination how long it took for her to become extremely anxious. The claimant indicated that it depended on the environment. In a shower room she became anxious immediately as the room became hot and steamy within 5 minutes.

13. The claimant also confirmed in cross examination that she had not been issued with an exemption certificate from wearing masks. When asked how she managed to do her shopping when it was mandatory to wear face masks in shops, the claimant indicated that she has not been required to display the fact that she was exempt in any shops she went to. Furthermore, she did online shopping.
14. The claimant did not produce any medical records apart from an occupational health report dated 24 January 2023 which was produced following a telephone consultation during which the claimant explained that she had a background history of claustrophobia and anaemia. No formal assessment was taken of the claimant and the claimant confirmed that the occupational health report was produced without access to her medical records.
15. The claimant was asked during cross examination how she could be certain that she had claustrophobia in the absence of a medical assessment. The claimant indicated that she knew how she felt and did not need anyone to tell her that she had claustrophobia.

The Law

16. The principles which I must apply in reaching my decision are set out below.
17. The burden of proof is on the claimant to show, on a balance of probabilities, that she is disabled within the meaning of section 6 of the Equality Act 2010 at the material time.
18. Section 6 of the Equality Act 2010 provides that:

“(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. In considering whether the claimant is disabled under section 6(1) above I should have regard to four questions as set out in ***Goodwin -v- Patent Office [1999] ICR 302***, namely:

19.1 Did the claimant have a mental or physical impairment at the material time?

19.2 Did the impairment affect her ability to carry out normal-day-to-day activities?

19.3 Was the adverse effect substantial; and

19.4 Was it long-term (i.e. had it lasted, or was it likely to last, at least 12 months)?

Submissions

20. In his submissions Mr Patel referred to the fact that the claimant and not produced any medical evidence of her diagnosis and that the claimant was not herself a medical professional. Mr Patel was of the view that one would expect some medical diagnosis of the claimant. He did not accept that the claimant had a physical impairment, that she was able to undertake day to day activities, had no prescribed medication and the fact that she did not like having her face covered was not substantial enough for the claimant to satisfy the definition of disability under the Equality Act.
21. In his submissions Mr Green pointed out that the question of whether or not the claimant was disabled was a legal decision and not a medical one. The respondent accepted that claustrophobia was capable of amounting to a mental impairment. For an impairment to be substantial it needed to more than “minor” or “trivial”. He submitted that the claimant’s condition was more than minor or trivial as she found it difficult to breath, her claustrophobia came on quickly, she did her shopping online, she took the stairs if a lift was full and she got headaches. He submitted that this showed that her claustrophobia had an substantial adverse effect on the claimant’s ability to carry on normal day to day activities.
22. Mr Green referred to the first instance decision of **Mrs L Convery -v- Bristol Street Fourth Investments Limited case number:1807364/2020** in which the Tribunal found that wearing a face covering was a normal day to day activity as at 24 July 2020 by reference to paragraphs D10 and D3 of the *Guidance on the definition of disability (2011)*. Whereby the Tribunal found that the wearing of a face mask at work was a work related activity which was also a normal day-to-day activity. Mr Green took the view that mask wearing remained a normal day-to-day activity notwithstanding the fact that mask wearing ceased to be mandatory by 27 January 2022.
23. Finally, Mr Green referred me to the case of **Mr S Morter -v- (1) Ecoclean Services Limited (2) Perenco UK Limited (3) KGM Services Limited case number: 3305846/2021** a case where the scarcity of medical evidence was not fatal to the Tribunal finding that the claimant in that case was disabled by reason of anxiety.

Conclusions

24. In reaching my conclusions I have considered the evidence before me and the submissions made by and on behalf of both parties. I have also read the two cases to which Mr Green referred me. Both of these cases are of first instance and therefore can only be persuasive and not binding on this Tribunal.
25. In determining whether the claimant is a disabled person within the meaning of the Equality Act 2010 I considered the 4 questions set out in paragraph 19.1 to 19.4. My conclusions are:
- 25.1 I considered whether the claimant had a mental or physical impairment at the material time: I have seen no evidence of a formal diagnosis of

claustrophobia but I am satisfied on the evidence before me that the claimant does experience anxiety and fear of her breathing being restricted, including having her nose and mouth covered and being in small/tight closed spaces/places.

- 25.2 I then considered whether the claimant's anxiety and fear affected the claimant's ability to carry out normal day-to-day activities. I am satisfied that wearing a face mask was a normal day-to-day activity from 24 July 2020 until 26 January 2022 (during the period that wearing face masks was a legal requirement). I also accept the claimant's evidence that she will not get into a lift if it is crowded and that she does some shopping online – both shopping and getting into a lift are normal day to day activities;
- 25.3 I then considered whether the adverse effect of the claimant's impairment was substantial. I am not satisfied that the adverse effect of the claimant's impairment is substantial. I consider the claimant's dislike of getting into crowded lifts and doing some shopping online to be minor affects of her impairment. Many people without the claimant's impairment avoid crowded lifts and do shopping online is common for most people and has been for a significant period of time.
- 25.4 Finally, I am satisfied that the claimant's impairment was long-term as it had lasted for more than 12 months.
26. Given my conclusion that the claimant's impairment does not have an substantial adverse effect, I am not satisfied that the claimant is a disabled person within the meaning of the Equality Act 2010.

Employment Judge Choudhry
06 August 2023