



## EMPLOYMENT TRIBUNALS

### Claimant

Mrs A Jaroszczak

### Respondent

v

Southampton Apartment Hotels Ltd

Heard at: Southampton (by Cloud Video Platform) On: 20<sup>th</sup> May 2020

Before: Employment Judge Dawson

### Appearances

For the claimant: In person

For the respondent: Ms C Hammond, Human Resources Officer

## RESERVED JUDGMENT

1. The claimant was disabled by reason of a physical impairment (back pain) from 6 May 2019.
2. The claimant was disabled by reason of a mental impairment (stress/anxiety/depression) from 1 July 2019.

## REASONS

**Background & Conduct of the Hearing**

1. In this claim Mrs Jaroszczak claims that she was unfairly dismissed and subjected to race and disability discrimination by Southampton Apartment Hotels Ltd (Southampton Apartment Hotels). This judgment is about whether or not Mrs Jaroszczak was disabled whilst she worked for Southampton Apartment Hotels, or for any part of the time that she worked for Southampton Apartment Hotels.
2. The hearing took place by way of CVP video hearing and Mrs Jaroszczak did not have a representative. Southampton Apartment Hotels was represented by its HR manager, Ms Hammond. An interpreter was provided for Mrs Jaroszczak and provided a full and helpful translation of everything in the first part of the hearing. Part-way through her evidence, Mrs Jaroszczak decided that she would prefer to give her answers without the benefit of an interpreter and was able to give coherent and fluid answers in English. Towards the end of the hearing, when matters became more technical the hearing was, again, translated.
3. Various breaks were taken during the course of the hearing, breaks were offered to the parties and whenever they asked for one it was given.
4. Mrs Jaroszczak had emailed a bundle of documents to the tribunal on the day before the hearing but it could not be opened by the Tribunal. It had been seen by Southampton Apartment Hotels. A further copy was sent by Southampton Apartment Hotels at 11:10 am, during the course of the hearing. Upon reading the bundle it became apparent that there was a document (at pages 2 and 3) which could have been a further witness statement from Mrs Jaroszczak. She confirmed that she did seek to rely upon the information set out in that statement. She wished to do so in addition to a statement dated 15 November 2019 and a statement which had the file name "Final Statement". Although Mrs Jaroszczak's statements substantially exceeded the word limit which had been given in respect of her evidence and Southampton Apartment Hotels had only received the extra statement within the bundle sent on the 19 May 2020, Southampton Apartment Hotels did not object to the tribunal considering the evidence. Thus those 3 statements stood as the evidence in chief of Mrs Jaroszczak.
5. Mrs Jaroszczak was cross-examined. Initially I had imposed a time limit on cross examination but, having regard to the need for translation and, also, Mrs Jaroszczak's way of giving evidence (which was characterised by giving a large amount of additional information in answer to each question) I did not, in fact, limit the cross examination. I did set a timetable for closing submissions but both parties were able to complete their submissions within the time allowed.
6. Mrs Jaroszczak asserts that she suffered and suffers from 3 disabilities- back pain, endometriosis and depression.

### Issues

7. The issues for the tribunal are, in respect of each of the alleged disabilities, whether at the time of her employment;
  - a. Mrs Jaroszczak had a physical or mental impairment;
  - b. the impairment affected Mrs Jaroszczak's ability to carry out normal day-to-day activities;
  - c. the effect on such activities was 'substantial';
  - d. the effects were 'long term'.
8. However, although each of the disabilities must be considered, it is also necessary for me to consider the cumulative effect of any impairments which I find Mrs Jaroszczak had. In fact, as set out below, I have not been able to find whether Mrs Jaroszczak's back pain was caused by her endometriosis or something else, and I have not found it necessary to do so.

### The Law

9. Disability is defined in section 6 of the Equality Act 2010. A person has a disability if they have a physical or mental impairment and that impairment has a substantial and long term adverse effect on their ability to carry out day-to-day activities.

10. "Substantial" means more than minor or trivial (section 212(1) Equality Act 2010)

11. In *Aderemi v London and South Eastern Railway*, Langstaff P stated

"It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other'. (paragraph 14)

12. The Guidance on the Definition of Disability provides that "The requirement that an adverse effect be substantial reflects the general understanding of "disability" as a limitation going beyond the normal differences in ability which may exist among people. A "substantial" effect is more than would be produced by the sort of physical or mental conditions experienced by many people which have only minor effects. A "substantial" effect is one which is more than "minor" or "trivial"."
13. The Appendix to the Guidance gives examples of what would or would not be considered a substantial adverse effect on normal day-to-day activities.
14. It states that it would be reasonable to consider difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage with one hand a substantial adverse effect. However, it would not be reasonable to consider the inability to move heavy objects without assistance to be a substantial adverse effect on normal day-to-day activities. It states that difficulty in using transport because of pain would be reasonably regarded as having a substantial adverse effect on normal day-to-day activities.
15. It also states that it would be reasonable to regard difficulty in getting dressed due to low motivation as being a substantial adverse effect on day-to-day activities as would persistent general low motivation and loss of interest in everyday activities.

#### **Analysis of the Evidence and Findings of Fact**

16. Mrs Jaroszczak worked for Southampton Apartment Hotels from September 2018 until September 2019. She was employed as a Room Maker Manager. Southampton Apartment Hotels provides rooms for people who need accommodation.
17. Mrs Jaroszczak tells me, and I accept, that she had suffered from endometriosis since she was 27 and had suffered back pain for many years. She said, in answer to an initial question by Southampton Apartment Hotels' representative, that she had suffered depression since May 2019.
18. One difficulty in analysing the evidence in this case arises from the way in which Mrs Jaroszczak has written her witness statements. No criticism is made of Mrs Jaroszczak, who has no representative, but her earlier statements do not really go into detail about how her impairments affected her day-to-day activities. Her most recent statement does that, but does not give dates. Thus, some clarification was provided by me asking questions of the claimant before she was cross-examined.
19. Mrs Jaroszczak's statement of 15 November 2019 contains the following paragraphs (which I have copied and pasted as they appear in the statement):

Respondent from March 2019 give me that much pressure,  
stress, overworked telling me on writing I have to clean all

room's I cannot cope. That's effect my health condition mental and physical. Since March every month responded expectations was more and more included extremely hard physical work to cleaning unbelievable amount of room's for 1 person.

That's why I go to see my GP doctor because I cannot sleep, eat I have panic attack ,I was cry every day. My body was in extremely pain of cleaning enormous amount of room's daily.

I had accident when I was cleaning a lot of room's I got hemorrhage I reported that to HR and GM answer from GM was "stop making drama " I go to GP because I was scared I never had that before. My doctor give me medication to stop the bleeding. I was full in pain every day. When I back to work no one no HR no GM fill in accident report or medical form return to work and they was fully aware what's happened. Since that day the bleeding was very heavily and painful. Doctor asked me what I did I told him daily more then 50 room's to be clean ,enormous amount bed to be made he said I cannot work like that. Doctor said this is health and safety issues.

Unfortunately the bleeding continues so the GP refer me to the gynaecology hospital. Because of the excessive workload everything is more complicated and I have to have high risk surgery Hysteroscopy otherwise the bleeding will continue and my health condition will go worse.

...

My social life stop exist. This stress destroyed my health and my life. My bad health condition start from the beginning of March 2019 and still under investigation. I still on antidepressants. I had 2 very painful biopsies ,all this because the doctor is very concerned about my symptoms. I suffer with extremely pain in my back. Doctor concern about it, the pain make me sick and is very strong. The respondent was fully aware of my back problems since February 2019 when first time I was on sick leave for 2 weeks because of the extremely pain in my low back. Even that didn't stop the respondent telling me I have to clean that many room's daily.

20. Mrs Jaroszczak gave oral evidence that her back, initially, became particularly painful in February 2019 after some months of being required to move mattresses. The doctor advised her that she could not perform heavy activities because the disc may start pressing on the nerve again. However, the pain improved. She told me that by April 2019 the pain had returned and that it was bad from the end of April 2019. Until April Mrs Jaroszczak said

that she could work for about half an hour and then she would need to sit down and then take painkillers. She could then start working again.

21. She told me that by around 10 May 2019 her pain had become particularly bad which is when she emailed HR (pages 51 and 52 of the bundle).
22. Mrs Jaroszczak said that it was not clear to her doctors whether the pain was being caused by her back or her endometriosis. She told me that since May 2019 she could not drive, she could not shop, she could not lift anything.
23. In answer to questions about her depression, Mrs Jaroszczak stated that she went to see a doctor in May 2019 because she could not cope with the stress at work. The stress, she said, was caused because since March 2019, Southampton Apartment Hotels had been failing to pay people in her team properly and they were complaining to her and leaving. She had not been paid properly. From April onwards, Southampton Apartment Hotels required her to clean more rooms and from 2 May she and her assistant were required to clean approximately 70 rooms a day which was impossible. She told me, in evidence which I found was given genuinely, that at that time she was going to work every day and crying. She did not know if anybody would come to help her, she was asking for assistance. She stated that she could not sleep or eat she was in pain every day and night and could not concentrate on her children. She told me she was having panic attacks and sometimes her body was frozen.
24. Mrs Jaroszczak was signed off sick from 28 May 2019 and did not go back to work after that.
25. In her additional statement (which appears at pages 2 and 3 of the bundle) Mrs Jaroszczak states that everything takes a double amount of time to do, to get dressed, shower etc. In answer to my questions she said that had been the case since she started taking antidepressants in July 2019. Mrs Jaroszczak also stated that she has been avoiding people since July 2019.
26. Mrs Jaroszczak had been learning to drive and said that she stopped those lessons in early May 2019 (on the 5<sup>th</sup> or 6<sup>th</sup>) because she had pain everywhere especially in her back and found it difficult to sit.
27. Mrs Jaroszczak has disclosed her medical records which show the following.
28. On 14<sup>th</sup> of February 2019 she was signed off sick for 2 weeks due to a back injury and right groin pain.
29. On 20 May 2019 Mrs Jaroszczak was signed off from work for 2 weeks because of stress at work. There were fitness for work statements to the same effect (being signed off for stress) on 10 June 2019, 25<sup>th</sup> of June 2019, 27<sup>th</sup> of July 2019, 25<sup>th</sup> of July 2019 and 14 August 2019.
30. On 6 September 2019 Mrs Jaroszczak was told she was not fit for work because of panic attacks, stress at work and UTI.

31. A fitness for work certificate was given on 1 October 2019 signing Mrs Jaroszczak off work until 19 October due to "IDA. Ongoing investigations"
32. On 17 October 2019 Mrs Jaroszczak was given a Statement of Fitness for Work stating that she was not fit for work due to severe anaemia which was under investigation and on 14<sup>th</sup> of January 2020 she was signed off for 2 weeks due to a hospital admission.
33. At page 24 of the bundle there is an undated letter, which Mrs Jaroszczak tells me was written in June 2019. It is from Mrs Jaroszczak's GP and states "I would be grateful if you could see Aneta who has symptomatic iron deficiency anaemia. The likely source is from menorrhagia however she does have some upper GI symptoms... She has a gynaecology appointment in October and I have referred her under the 2ww...".
34. On 21 August 2019, there was a letter from Mrs Jaroszczak's general practitioner, addressed "to whom it may concern". It opens by stating "I am writing a letter to you as requested by this patient give a medical report to support her ongoing work situation." It goes on to state " Aneta first presented at the surgery on 28 May 2019 with symptoms of anxiety, depression and difficulty sleeping which she attributed to problems at her workplace. She felt she was being unfairly treated at work because she made a complaint about the staffing issues. She was very distressed and was tearful at the consultation. A decision was made to give her some time off work to allow her to get help with speaking to her managers and Citizens Advice to see if the situation could be resolved. It appeared that the situation escalated to the point that Aneta was now having panic attacks and was unable to sleep. She described herself as being miserable, angry all the time and tearful... At this point it was decided to start her on antidepressants and she was started on sertraline 50 mg once a day in July 2019... Today she reports that she is now having panic sensations and describes having palpitations, shortness of breath, tingling sensation in her back..." The letter does not make any reference to physical problems caused by Mrs Jaroszczak's back problem or endometriosis beyond the reference to tingling in the back.
35. On 23 October 2019 (page 29 of the bundle) a Consultant Obstetrician and Gynaecologist wrote asking somebody to see Mrs Jaroszczak for consideration of a fibroid embolisation.
36. It is helpful to consider the emails which Mrs Jaroszczak had sent whilst at work.
37. On 10 May 2019 claimant wrote to Michelle Thomas the Housekeeping Supervisor. She made reference to her busyness and the fact that she had only 2 people to assist her for the weekend and 3 people in the following week. She stated "Physically I can't with Marta and Judith clean 30 stay over and 30 arrival tomorrow. Sunday again more than 40 depart and Monday again 30 arrivals. No one is calling or texting me from the advert and I don't know anybody from others hotels who wants to join us." She concluded "I wish to find people and make our team stronger again, but I start running out of option and ideas..."

38. On 12 May 2019 Mrs Jaroszczak wrote to Ms Hammond, Southampton Apartment Hotels' HR Officer. She stated that her team was extremely short of staff and she was cleaning more than 20 rooms. She stated "I am very helpful person I don't mind help, but I will not clean daily that many rooms. I had that issues before in Marriot and Hilton that's why I left them basically. Because of that I damage my back very badly and I have to be careful. I have extremely angry team better say 2 people..." (sic). The email goes on "People from downstairs don't help because Michelle says they're busy too and short of staff too. I really well understand but I cannot physically continue cleaning that many rooms and I will not." She concludes "I will be honest with you I love my job I love our property, but I will not clean that many rooms. I am 44-year-old and working 6 days cleaning that many rooms is just impossible for me to do it."
39. On 21 May 2019 Mrs Jaroszczak wrote to Michelle Thomas, copying Charlotte Hammond stating "I saw doctor today because I have heavy bleeding today morning second time in this month. I get medication to stop that bleeding and simple doctor says I overload myself at work. I will not made bed or clean rooms from tomorrow. As you know I carry like that from 2 weeks day by day a lot of room's, a lots of beds to help and support my team. But I can't do it anymore longer this is hard physical job." (sic, p59).
40. On 24 May 2019 Mrs Jaroszczak wrote to Michelle Thomas stating "I really need switch off my brain and my phone from work and the moaning team. I need to fix my health to, otherwise I wouldn't be good enough." (Page 55).
41. Southampton Apartment Hotels called no evidence. It put to Mrs Jaroszczak, in cross examination, that a Medical Questionnaire which appears page 31 of the bundle had been doctored by Mrs Jaroszczak and it produced a different version of the same Questionnaire. Mrs Jaroszczak replied by asserting that it was Southampton Apartment Hotels who had doctored the Questionnaire. Without Southampton Apartment Hotels calling evidence as to the document it had produced and where the same had come from, it is impossible for me to conclude, as Southampton Apartment Hotels requests, that it is Mrs Jaroszczak who has manufactured evidence. I do not, in the alternative, conclude that it is Southampton Apartment Hotels who has done so. There is simply no evidence on which I can make any findings of fact in that respect - beyond the fact that there are different versions of the same Questionnaire.
42. I have no doubt that Mrs Jaroszczak has genuinely believed everything that she has told me in her evidence. Her evidence was compelling and given honestly. However, it is difficult to reconcile all of the evidence which she has given to me today with the documents from around the time. I am particularly troubled by the fact that the Statements of Fitness for Work only refer to stress until 6 September 2019. The letter from Mrs Jaroszczak's doctor, specifically sent for the purposes of explaining to her employers what her medical position was (page 25 of the bundle) only refers to mental health conditions rather than substantial back problems or problems with her endometriosis.



43. On the other hand the letter from Mrs Jaroszczak's GP which, she says, was written in June 2019 does refer to menorrhagia.
44. When Mrs Jaroszczak wrote to Southampton Apartment Hotels' Human Resources Officer on 12 May 2019, she did not suggest that she was suffering from the level of symptoms which she now recalls. She did, however, state that she had to be careful not to damage her back and she does refer to not being physically able to continue cleaning that many rooms.

**Did Mrs Jaroszczak's Mental Impairment amount to a Disability?**

45. I find that Mrs Jaroszczak's recollection of going into work crying is likely to be true. However, in my judgment that is likely to have been a measure of the stress which she was under due to pay issues, a lack of staff and an increase in workload. I anticipate that she may well have been going home upset, however, given that on her own GP's report;
- a. when she was first seen at the surgery on 28 May 2019 she was treated by way of being given time off work,
  - b. thereafter the situation escalated to the point of having panic attacks and being unable to sleep, and
  - c. she was not put on antidepressants until July 2019,

I find that Mrs Jaroszczak's evidence as to her mental health in May 2019 has, to some extent, conflated different stages of her impairment.

46. Doing the best I can on the evidence before me, I find that by 28 May 2019 Mrs Jaroszczak was suffering from a mental impairment in that she was suffering from stress and anxiety as well as symptoms of depression. At that time the impairment affected her day-to-day activities to the extent that her sleep was affected and she was tearful. However, it was only between then and July 2019 that she started to have panic attacks and became miserable and angry all the time. From July 2019 things started to take her twice as long as they normally would.
47. The difficult question for me is at what stage Mrs Jaroszczak is to be treated as having a disability. I have had regard to the Guidance on the Definition of Disability and, in particular, the Appendix at the end of that guidance.
48. In my judgment there is insufficient evidence of any impairment on day-to-day activities which would allow me to find that Mrs Jaroszczak was disabled as at 28 May 2019. However, having regard to the fact that the Appendix to the Guidance suggests that having difficulty in getting dressed due to low motivation would amount to a substantial adverse effect on normal day-to-day activities, I find that there was such an adverse effect by July 2019. The evidence does not disclose a discrete day upon which I can say with confidence that Mrs Jaroszczak's impairment moved from not having a substantial adverse effect on her day-to-day activities to having such an effect, but I find, on the balance of probabilities, that it was on 1 July 2019.

49. The next question I must ask is whether those effects were long-term. That is to say whether they were likely to last for more than 12 months. I must ask myself that question as at 1<sup>st</sup> July 2019.
50. In my judgment it was likely that, at 1 July 2019, Mrs Jaroszczak's mental health impairment would last for more than 12 months. She had been removed from the workplace but the symptoms, rather than improving, had worsened. She was having panic attacks and, by August 2019 her condition was such that she was having palpitations, shortness of breath and other symptoms. I think it likely that if a doctor had been asked at the time, he would have said that her condition was likely to last for at least 12 months. I find, on the balance of probabilities, that is the case.
51. Thus, I find that from 1 July 2019 the claimant was disabled by reason of a mental impairment.

**Was Mrs Jaroszczak Disabled by Reason of a Physical Impairment?**

52. I find that for the entire period when Mrs Jaroszczak worked for Southampton Apartment Hotels she had a physical impairment, namely back pain and endometriosis.
53. Mrs Jaroszczak says that her back pain was severe in February 2019, however, the only clear evidence which I have heard in that respect, in relation to day-to-day activities, is that she was told to avoid heavy lifting activities. In my judgment that would not amount to a substantial adverse effect on day-to-day activities having regard to the Appendix to the Guidance.
54. I find it more difficult to determine the position in May 2019. Mrs Jaroszczak gave clear evidence that she stopped learning to drive on or around the 5<sup>th</sup> or 6 May 2019. She did so because of pain. Mrs Jaroszczak was making some (albeit relatively minor) references to her back pain in correspondence to her employer on 12<sup>th</sup> of May 2019. In her email of 21 May 2019 she records that she had suffered heavy bleeding and the doctor had said that was because she was overloaded at work.
55. The medical evidence (being the fitness for work certificates and the hospital correspondence) does not show anything significant in relation to either Mrs Jaroszczak's back or her gynaecological issues until, at the earliest, June 2019. Mrs Jaroszczak has told me that the doctors are unsure whether her back pain is due to spinal issues or gynaecological issues.
56. Being unable to drive on 5<sup>th</sup> or 6<sup>th</sup> May 2019 may, in my judgment, amount to a substantial adverse effect on day-to-day activities. I must decide whether to accept Mrs Jaroszczak's evidence in that respect, even though the contemporaneous medical evidence would tend to suggest a lower level of adverse impact on day-to-day activities.
57. Mrs Jaroszczak's evidence was compelling in this respect- not, primarily, because of the way in which it was given (mistaken witnesses can be both honest and moving in the way they give evidence) but because she was

able to give a precise date when she stopped learning to drive. I do not find that the medical evidence is sufficiently clear that I should reject Mrs Jaroszczak's evidence that she was suffering sufficient pain in May 2019 to stop driving. The medical evidence does cause me considerable concern but, on the balance of probabilities, I accept Mrs Jaroszczak's evidence about cessation of driving lessons on or around 5 or 6 May 2019.

58. I find that learning to drive is a normal day-to-day activity, particularly in circumstances where the claimant could not drive because she was unable to sit without pain in her car. It seems to me that there is no real distinction between a person who has already learnt to drive and who cannot do so because of physical pain and a person who is learning to drive but cannot do so because of physical pain.
59. As I have set out above, the Appendix to the Guidance suggests that difficulty in using transport because of pain would be reasonably regarded as a substantial adverse effect on normal day-to-day activities. I find that applies to this case
60. Thus, I find that from 6 May 2019 Mrs Jaroszczak had a physical impairment, back pain, which had a substantial adverse effect on her day-to-day activities.
61. The next question is whether the adverse effect was long term. An adverse effect will be considered long-term if it is likely to recur. It is clear that Mrs Jaroszczak's back pain has caused her ongoing issues since May 2019, and continues to do so.
62. Mrs Jaroszczak says that she can no longer do shopping or lift anything. Whilst I do not accept her evidence that her back was that bad in May 2019, I accept that it is that bad now. That was not really challenged by Southampton Apartment Hotels.
63. Thus, either, the position in relation to the claimant's back is that it was bad enough in May 2019 for her to stop learning to drive and it has continued to be bad and get worse over a period of 12 months or it has recurred.
64. I must consider the question of whether the back pain was likely to last for at least 12 months on 6<sup>th</sup> May 2019. The fact that it has, as a matter of fact, lasted for 12 months (or recurred within that time) is evidence that it was, at that stage, likely to last for 12 months. There is no evidence to the contrary. In those circumstances, on the balance of probabilities, I find that the adverse impact on day-to-day activities was long-term.
65. I have not heard any evidence that Mrs Jaroszczak's endometriosis caused her symptoms which had an adverse effect on her day to day activities beyond the back pain and I find there to be no other adverse effect on day to day activities.

### **Conclusions**

66. I find that Mrs Jaroszczak was disabled by reason of stress/anxiety/depression (being a mental impairment) from 1 July 2019.

67.I also find that Mrs Jaroszczak was disabled by reason of a physical impairment ( back pain) from 6 May 2019.

Employment Judge Dawson

Date: 1 June 2020

Judgment sent to parties: 10 June 2020

FOR THE TRIBUNAL OFFICE

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The hearing was conducted by the parties attending by video (CVP). It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because (a face to face hearing was not possible in light of the restrictions imposed by the Health Protection (Coronavirus, Restriction)(England) Regulations 2020 and it was in accordance with the overriding objective to do so