



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No 4111971/2021

Held in Edinburgh on 22 August 2022

Employment Judge: M Sutherland

5 **Mrs Gillian Quinn**

**Claimant
In Person**

10 **Sense Scotland**

**Respondent
Represented by:
Mr B Doherty -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

15 The judgment of the Tribunal is that the claimant was not disabled at the relevant time and her complaint of disability discrimination is dismissed.

REASONS

1. The claimant has presented various complaints including of direct disability discrimination. An open preliminary hearing was arranged to determine
20 whether the claimant was disabled in terms of Section 6 of the Equality Act 2010 at the time of the alleged acts of discrimination ('the relevant time'). For the purposes of this hearing it was agreed between the parties that the relevant time was her dismissal on 27 July 2021.

2. The claimant appeared on her own behalf. The respondent was represented
25 by Mr B Doherty, Solicitor.

3. The claimant gave evidence on her own behalf and no other witnesses were called.

4. Parties had prepared a joint bundle of documents.

5. Tribunal required to determine the following issues: At the relevant time, did
30 the claimant have a physical or mental impairment? If so, did that impairment

have an adverse effect on her ability to carry out normal day to day activities? If so, was that effect substantial (more than minor or trivial)? If so, was the substantial effect long term having lasted, or being likely to last or recur, for 12 months?

5 6. The claimant advised in her further particulars that she relied upon the impairment of "Long Covid". During submissions the Claimant made an application to amend to include the impairment of Covid (in addition to Long Covid) which was opposed. Following discussion it was determined that the application to amend was unnecessary because she and her solicitor are not
10 medically qualified and had not defined what they meant by Long Covid. The impairment relied upon was understood to include having Covid for longer than normal.

7. The parties made oral submissions.

Findings of fact

15 8. The claimant was employed by the Respondent as Head of People from 9 December 2019 and until her dismissal on 27 July 2021.

9. The Claimant along with colleagues had in the main been working from home due to COVID restrictions since March 2020. The Claimant was due to have a week's holiday from 12 to 19 July 2021. On 12 July the Claimant advised
20 the Respondent that she was self isolating because her son, who lived with her, had tested positive for COVID. The Claimant herself then tested positive for COVID around 11 July 2021. She entered a period of self isolation which ended around 20 July 2021. On 13 July 2021 the Respondent advised the Claimant that she was to be credited back the week's holiday. On 19 July the
25 Claimant re-commenced working from home. On 21 July the Claimant attended the office for ½ a day. On 26 July the Claimant travelled to and attend a remote office in Dundee.

10. After she contracted COVID, the Claimant experienced fatigue, shortness of
30 breath, generalised aches, pain and discomfort, headaches, and brain fog (feeling less mentally alert) which negatively affected many aspects of her every day life and disrupted her sleep. She struggled with a number of

activities including shopping and driving. She no longer socialised or undertook any exercise. These symptoms and their effect continued after the termination of her employment. There was little change other than she no longer had a temperature and her sense of taste returned.

- 5 11. On 26 July 2021 the Claimant contacted her GP to make an appointment which was arranged for 2 August 2021.
12. On 27 July 2021 the Claimant was dismissed by the Respondent.
13. On 2 August 2021 the Claimant consulted with her GP who deemed her unfit for work because of an upper respiratory tract infection due to SARS-CoV-2 from 2 August until 8 August 2021. The Claimant was prescribed amitriptyline for her headaches and generalised pain which she continues to take.
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14. On 8 August 2021 the Claimant consulted with her GP who deemed her unfit for work because of an upper respiratory tract infection due to SARS-CoV-2 from 8 August until 22 August 2021.
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15. On 22 August 2021 the Claimant consulted with her GP who deemed her unfit for work because of ongoing symptomatic Covid-19 from 22 August to 12 September 2021. The Claimant was advised of a possible risk of long covid. She was referred for blood tests which took place shortly thereafter and a spirometry lung test which did not take place until July 2022.
- 20
16. On 12 September 2021 the Claimant consulted with her GP who deemed her unfit for work because of Post-covid-19 Syndrome (Long Covid) from 12 September to 27 September 2021. The Claimant was advised of a diagnosis of long covid.
- 25 17. On 23 September 2021 the Claimant secured full time employment with another employer which she has been able to perform with adjustments which include working from home and flexible hours.

Observations on the evidence

18. The standard of proof is on balance of probabilities, which means that if the Tribunal considers, on the evidence, that the occurrence of an event, etc was more likely than not, then the Tribunal is satisfied that the event did occur.
19. The Claimant's recollection of dates and the chronology of events was unclear but this was understandable given the passage of time. She was unclear about when she had tested positive and when she had ended self isolation. In chief she asserted that self isolation had ended 23 July but she accepted in cross that it ended prior to 21 July 2021 when she had attended the office for half a day. Accordingly it is considered likely that she tested positive around 11 July and entered a period of self isolation which concluded on 20 July.
20. The Claimant did not provide copies of her GP records and instead sought to rely upon her fit notes and a GP letter of 24 March 2022.
21. The parties agreed that the following National Institute for Health and Care Excellence (NICE) guidelines applied to the identification and diagnosis of the long term effects of COVID-19: Acute COVID-19 Signs and symptoms of COVID-19 for up to 4 weeks; Ongoing symptomatic COVID-19 Signs and symptoms of COVID-19 from 4 weeks up to 12 weeks; Post-COVID-19 syndrome Signs and symptoms that develop during or after an infection consistent with COVID-19, continue for more than 12 weeks and are not explained by an alternative diagnosis. The term 'long COVID' is commonly used by medical practitioners to describe signs and symptoms that continue or develop after acute COVID-19. It includes both ongoing symptomatic COVID-19 (from 4 to 12 weeks) and post-COVID-19 syndrome (12 weeks or more). Whilst Claimant accepted this categorisation, her symptoms had remained broadly the same at each stage – there was no material difference or improvement.
22. The Claimant initially asserted in evidence that it was possible to predict that she would develop long Covid prior to her dismissal (which was around 2.5 weeks after testing positive). Her assertion was based upon her understanding that other 50 year old women with no underlying health conditions had recovered more quickly than her. This assertion was not

consistent with her GP's prognosis as described by her. It was put to the Claimant in cross examination that there was about a 20% risk of Covid progressing to Long covid but without explanation for the basis for that assertion. The Claimant's position in response was that the risk was around 30% but again without explanation of the basis for that assertion. It was agreed by the parties that a significant majority of people who contract Covid do not go on to develop Long Covid. It is understood that a minority of people of who do develop Long Covid will suffer Long Covid for more than a year.

The law

- 10 23. Section 6 of the Equality Act provides that: (1) A person has a disability if: (a) that person has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
- 15 24. In determining disability status the Tribunal must take into account any aspect of the Guidance on the definition of Disability (2011) and the EHRC Code of Practice on Employment (2015) which appears to be relevant.
25. The burden of proof is upon the claimant.
- 20 26. The Equality Act does not define 'physical or mental impairment'. Paragraph A3 of the Guidance provides: "The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects."
- 25 27. Where there is no clear medical diagnosis it may be legitimate for a tribunal to first consider adverse effect and then to consider whether the existence of an impairment can reasonably be inferred from those adverse effects (*J v DLA Piper UK LLP 2010 ICR 1052, EAT*).
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Normal day to day activities

28. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc (Guidance D2– D3).

Substantial adverse effect

29. The impairment must cause an adverse effect on normal day-to-day activities but it need not be a direct causal link.
30. The adverse effect must be substantial. Section 212(1) of the Equality Act provides that “substantial” means more than minor or trivial. The EHRC Code notes that a disability is “a limitation going beyond the normal difference in ability which might exist among people”.
31. It is important to consider the things that a person cannot do, or can only do with difficulty (Guidance B9). This is not offset by things that the person can do.
32. The time taken by a person with an impairment to carry out an activity should be considered when assessing whether an effect is substantial (Guidance B2).
33. Schedule 1 paragraph (5) of the Equality Act provides that 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 measures are being taken to correct it and but for that, it would be likely to have that effect. The tribunal should deduce the effect on activities if medication or treatment were to cease unless it has resulted in a permanent improvement.
34. The Guidance provides at para B7 “Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the

extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.”

5 Long term effect

35. Schedule 1 paragraph 2(1) of the Equality Act provides that the effect of an impairment is long term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.
- 10 36. Schedule 1 paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In *SCA Packaging Ltd v Boyle 2009 UKHL 37*, the House of Lords ruled that “likely to” in this context means “could well happen” rather than “more likely than not”.
- 15 37. Where a person has an impairment with recurring or fluctuating effects, the effects are to be treated as long term if they are likely to recur beyond 12 months (Guidance C6). If a person has separate episodes of an impairment each of which last less than 12 months the issue is whether these are discrete episodes which are not connected by an underlying condition or whether
- 20 these short separate episodes are connected as part of a long term underlying condition the effects of which are likely to recur beyond the 12-month period.
38. Whether a person has an ongoing underlying condition and the likelihood of recurrence of its effects must be judged at the relevant time and not with the benefit of hindsight. An employment tribunal should disregard events taking
- 25 place after the alleged discriminatory act but prior to the tribunal hearing.

Claimant’s submissions

39. The claimant's oral submissions (given at times during her evidence) were in summary as follows –

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- a. Covid and Long Covid are part of the same condition. There has been no material change in her symptoms since she contracted Covid. Long Covid to her means having Covid longer than normal. Other 50 year old women with no underlying health conditions had recovered more quickly than her after 2 weeks.
- b. There has been a substantial adverse effect on her normal day to day activities ever since she contracted Covid.
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- c. The adverse effect has been long term having lasted over a year. It can be inferred from the fact that she went on to develop Long Covid that it was likely to do so. It can also be inferred from the fact other 50 year old women with no underlying health conditions had recovered more quickly than her. Anyone who contracts covid should be considered likely to develop Long Covid.
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- d. The Employment Tribunal has already accepted that long Covid is a disability (*Burke v Turning Point Scotland 2022 SLT (Tr) 33*)

Respondent's submissions

40. The respondent's oral submissions were in summary as follows –

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- a. The burden of proof is upon the Claimant.
- b. Disability status must be determined having regard to the circumstances at the time of the discriminatory act (her dismissal) and to the evidence available at that time (*Cruickshank v VAW Motorcast Ltd [2002]CR 729; McDougall v Richmomd Adult Community College [2008] ICR 431*). The issue of disability status cannot be determined with the benefit of hindsight and it is therefore irrelevant that she went on to develop Long Covid after her dismissal.
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- c. The Claimant did not have Long Covid at the time of her dismissal because less than 4 weeks had elapsed since she tested positive

- d. The Claimant had Covid at the time of her dismissal which did not have a substantial adverse effect on her normal day to day activities given that she worked and attended their offices after her period of isolation had ended.
- 5 e. The majority of people who have Covid do not go on to develop Long Covid. The Claimant was not at possible risk of Long Covid until after her dismissal. It cannot be said that it could well have happened and accordingly the Claimant was not likely to go on to develop Long Covid.
- 10 f. In the case of *Burke* at the time of his dismissal the employee had been absent from work with Covid for 9 months and there was no potential date of return.

Discussion and decision

Impairment

- 15 41. At the time of her dismissal the Claimant was suffering from the impairment of Covid.

Normal day to day activities

42. In the period between contracting COVID and being dismissed she struggled with a number of activities including shopping and driving and she did not
20 socialise or undertake any exercise.
43. Shopping, driving, socialising and exercising are all normal day to day activities.

Substantial adverse effect

44. Struggling to shop and drive and being unable to socialise and exercise are
25 more than minor trivial effects. Accordingly, the effect on her normal day to day activities was considered substantial.

Long term effect

45. The relevant time was the time of her dismissal. At the time of her dismissal the substantial adverse effect on her normal day to day activities had lasted 2 ½ weeks. At the time of her dismissal she did not have Long Covid. She was not advised of a possible risk of Long Covid until around 4 weeks after her dismissal. She was not diagnosed with Long Covid until around 6 weeks after her dismissal. Someone who has contracted Covid is at risk of developing Long Covid. Someone who develops Long Covid is at risk of suffering that for more than a year. Accordingly it can be said that it could happen that she would go on to develop Long Covid and suffer from it for more than a year. However the substantial majority of people who contract Covid do not go on to develop Long Covid and do not suffer from it for more than a year. Accordingly it cannot be said that the risk could well happen.
46. In the circumstances at the time of her dismissal the substantial long term effect had not lasted for 12 months and was not likely to last or recur for 12 months.

Decision

47. Accordingly, at the relevant time the claimant did not have a physical or mental impairment which had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. The claimant was not therefore disabled under Section 6 of the Equality Act 2010 at the relevant time. The complaint of disability discrimination cannot proceed and is therefore dismissed.

Employment Judge: Michelle Sutherland
Date of Judgment: 29 August 2022
Entered in register: 30 August 2022
and copied to parties