



EMPLOYMENT TRIBUNALS

Claimant: Miss R Stubbs

Respondent: London Borough of Hammersmith and Fulham

Heard at: London Central Employment Tribunal

On: 7th November 2024

Before: Employment Judge Hopton

Representation

Claimant: Mr Magier

Respondent: Mr Wilding

JUDGMENT having been sent to the parties on 13 November 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claimant brings claims of indirect discrimination on the grounds of disability and failure to make reasonable adjustments.
2. This hearing was to consider whether or not the claimant was disabled at the relevant time and her application to amend her claim to include harassment and victimisation claims.

Documents and evidence

3. I was referred to an agreed bundle of 295 pages, which included a skeleton argument from the respondent, originally prepared for the hearing on 7th May 2024 which was postponed. I also had a witness statement numbering 35 paragraphs from the claimant. I heard oral evidence from the claimant accurately.

Facts

4. The claimant has been employed as a sheltered housing officer at the respondent since 2016. She is based at Askham Court.

5. The claimant was first seen by her doctor for stress in 2017 and for depression and anxiety in 2018. In 2020, the claimant was diagnosed with depression, work related stress and anxiety. In 2020 she was also diagnosed with osteoarthritis and in October 2022 with a heart condition.
6. In 2021 the claimant made a claim for age discrimination. This was unsuccessful. From around 2021, the respondent told the claimant it wanted to move her from Askham Court to another sheltered housing scheme. The claimant was concerned about this and did not want to move. On 30th September 2022 she was told she would be moved from Askham Court to Munden Street and Vereker in February 2023, after she came back from annual leave. However, the claimant went off work sick. She produced a fit note from her GP which said she was fit to work if she was able to work from Askham Court. In April 2023 she raised a grievance about the situation.
7. Since September 2021, the respondents have received around five occupational health reports for the claimant. Two of these cover the period from September 2022 onwards. By and large, the occupational health reports cover the issues the claimant reported to the occupational health doctor about her work location and some physical issues such as her ability to climb stairs and use public transport. The occupational health reports do not note any questions the claimant was asked in more general terms about her day-to-day activities. They focus on the work environment, particularly the claimant's concern about moving locations and various issues around flexible working and workstation assessment.
8. The claimant said that she did not tell the occupational health doctor about the impact on her day-to-day activities because the doctor did not ask her about her day-to-day activities. She believed she was only there to discuss work issues. I accept her evidence on this on the basis that the clear focus of the occupational health reports are work issues. Although some of the instructions from the respondent to the occupational health doctor were quite detailed, they naturally focused on the claimant's ability to work and workplace adjustments. The instructions did not ask specifically about day-to-day activities. It is unsurprising therefore that the occupational health reports look in some detail at the disagreement between the claimant and the respondent at which site she should work, and other workplace issues, but aside from a few examples, they do not look, in any detail, at the impact of the claimant's conditions on her normal day-to-day activities. The GP records provide limited assistance as they contain few details.
9. The claimant gave evidence about the impact of her health conditions. She outlined the impact of her conditions on her day-to-day activities in her witness statement. She refers to her depression and anxiety making it difficult for her to get out of bed and do tasks such as cooking and cleaning. About her depression she says she has an *"inability to concentrate and do normal everyday activities such as getting out of bed, sleeping cooking and cleaning."* About anxiety she says, *"it prevents me from getting out of bed, wanting to go out. It makes it impossible to carry out simple tasks such as shopping cooking and cleaning for myself."* About stress she says she suffers *"An inability to concentrate and focus on the tasks at hand."* She says her stress exacerbates those conditions. It also makes it difficult for her to concentrate and focus on tasks and causes her physical pains. She is taking Sertraline, a well-known

anti-depressant for these conditions.

10. Regarding the osteoarthritis, an occupational health report and doctors' notes both refer to the claimant having difficulty with stairs as a result of her osteoarthritis. This appears to be noted by both because it is relevant to her work. The claimant also says that the osteoarthritis causes reduced mobility and makes it difficult for her to bend her knees. She said the *"the condition has a huge [effect] on my day-to-day life. At times it can make movement painful and difficult. It causes reduced mobility, pain fatigue, inability to bend my knees, therefore there are certain household tasks I can no longer perform which are necessary when cleaning my home. It takes me twice [as] long to put on a pair of socks/tights. If I sit too long my knee becomes stiff. It can affect my ability to sleep as I wake up in the middle of the night with pains in my knee."* This was apparent during the hearing as the claimant had to stand after she had been sitting for a while to alleviate her discomfort. She is taking medication for this progressive condition.
11. Regarding the heart condition, at the time at which she wrote her disability impact statement, the claimant expected her heart condition to be lifelong. Her symptoms included chest pain, dizziness, sweating, shortness of breath and feelings of anxiety. She was prescribed a number of different medications for this. However, at the hearing the claimant confirmed that this year she had been to the doctor and being told that her heart was now normal. She was now feeling fine in relation to this condition.
12. In making findings of fact in this case, on the one hand, I have the occupational health reports which did not ask about day-to-day activities, and I have the claimant's oral and written evidence about the impact of these conditions on her day-to-day activities. The claimant's oral evidence was consistent with her written evidence about her health conditions. Throughout thorough cross examination, she was adamant that the occupational health doctor had not discussed day-to-day activities with her. Her evidence was also consistent with the fact she had been signed off with these health conditions for many months and had attended doctors' appointments in relation to them. I found the claimant's evidence reliable, and accept her account of the impact her conditions had on her day-to-day activities.

Amendment – harassment

13. The claimant wishes to amend her claim to include an allegation of harassment. She wishes to rely on the unwanted conduct of:
 - 13.1. *On 1 March 2023 in an email from Yvonne Stony and Anne Needham excluded the claimant from her usual place of work. They asserted that another housing officer had replaced the claimant who had refused to work at Viking Court.*
 - 13.2. *on the same date Yvonne Stony and Anne Needham informed their manager that the claimant had 17 residents on disclaimers when in fact this was less than 12.*
14. The respondent contests this application to amend.
15. In her claim form, which she produced as a litigant in person, the claimant says in paragraph one at box 8.2, *"I was then sent emails from Anne Needham,*

stating I would be disciplined, I should not return to my usual place of work and I should go to a new location.” In paragraph 2 of box 8.2, she says, “I subsequently received emails from Theo Addae claiming I had 17 residents on disclaimers. He only wanted 2 residents on disclaimers. I was not checking residents.”

Amendment – victimisation

16. The claimant wishes to amend her claim to include protected acts of issuing an age discrimination claim in 2021 and raising a grievance in April 2023. She lists 11 detriments she says she suffered as a result of carrying out those alleged protected acts. These are largely new issues which are not referred to in her ET1.

Law

Disability

17. “Disability” is defined in section 6 of the Equality Act 2010 (EqA 2010) as follows:

- (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...*
- (4)...a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability...*

17.1. In *J v DLA Piper UK LLP 2010 WL 2131720*, the EAT suggested that in many cases, a tribunal may be able to infer an impairment, if it has found that there is a substantial adverse effect on the claimant's normal day-to-day activities on a long-term basis.

17.2. The *Equality Act 2010 Guidance* at paragraph D4 states that:

"In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or 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, and taking part in social activities."

17.3. Section 212(1) EqA 2010 defines substantial as *“more than minor or trivial”*

17.4. Schedule 1, part 1, para. 1 of the EA 2010 defines “long-term” (in relevant parts) as: *“(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 at least 12 months.”*

17.5. In *Herry v Dudley Metropolitan Council UKEAT/0100/16*, the EAT found that where an employee's work situation is the cause of their stress, and they become so entrenched in their position that they will not return to

work, this does not necessarily mean that they are suffering a mental impairment. It also said that a doctor may be more likely to refer to the presentation of such an entrenched position as “stress” rather than as anxiety or depression.

Amendment

18. The well-known case of *Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore* [1996] IRLR 661 set out factors a tribunal should take into account when considering whether to allow an amendment: the nature of the amendment, time limits, and the timing and manner of the application. In the case of *Abercrombie v Aga Rangemaster Ltd* [2013] EWCA Civ 1148, the Court of Appeal held that the *Selkent* factors should not be approached in a tick box fashion. In *Vaughan v Modality Partnership* UKEAT/0147/20/BA (V), the EAT confirmed that tribunals should consider the balance of injustice and hardship when deciding whether to allow or refuse an application. In *Chaudhry v Cerberus Security and Monitoring Services Ltd* [2022] EAT 172, the EAT clarified that tribunals should first identify the amendment sought then expressly balance the injustice and hardship of allowing or refusing the amendment taking into account relevant factors, including those referred to in *Selkent*.

Conclusions

Disability

Heart condition

19. I do not accept that the claimant’s heart condition amounts to a disability within the meaning of the Equality Act 2010. The medical evidence clearly shows this was an impairment. However, although the claimant describes the pain the heart condition caused her, she does not explain the effect on her day-to-day activities. There is therefore insufficient evidence in the papers available to me that the heart condition had a substantial adverse effect on the claimant’s day to day activities. There is also insufficient evidence that the condition would have lasted 12 months at the time it was diagnosed, given that she has confirmed it no longer has an impact on her, although clearly for a time it caused her pain and worry.

20. Regarding the other conditions, I accept that they did amount to disabilities within the meaning of the EqA 2010 for the following reasons:

Adverse effect on normal day-to-day activities

21. The claimant’s medical records and the occupational health report demonstrate that there was some impact on the claimant’s day-to-day activities from all of these conditions.

22. The question of whether or not this impact was substantial has been trickier to determine. Mr Wilding placed great emphasis on the occupational health reports which do not provide much if any detail about the impact the conditions have on the claimant’s day-to-day activities. This was in contrast to the claimant’s witness statement and impact statement which detailed a number of effects on her day-to-day activities. When considering if the effect on the claimant was substantial, I must look at what she can’t do rather than what she

can do, and consider that substantial means “more than minor or trivial”.

Depression, stress and anxiety

23. The claimant details an inability to get out of bed, sleep cook and clean as a result of the depression. She refers to her anxiety preventing her from getting out of bed. She is unable to concentrate and focus on tasks as a result of the stress. She takes Sertraline every day in relation to these three conditions. The impact the claimant describes is more than minor or trivial. As I have concluded above, the reason the occupational health reports provide little detail about the effect of the conditions on the claimant’s day-to-day activities is because the OH doctor did not ask her about them, rather than because they were not an issue for her. I have therefore concluded that these three conditions collectively had a substantial effect on the claimant’s day-to-day activities.
24. The Claimant suffered from these three conditions from around 2018 and they were diagnosed in 2020, more than a year before the acts of discrimination alleged. They were therefore long term. I can infer that they amount to impairments. The claimant was therefore disabled by reason of these impairments at the time of the incidents to which the claim relates.
25. The respondent argues that the claimant’s workplace issues including reactions to management decisions were the sole cause of her mental health conditions and that they should be categorised as reactionary stress/anxiety rather than mental impairments. I do not accept that the workplace issues were the sole cause of the claimant’s mental health conditions. These were diagnosed before the issue about moving workplace had been discussed and before the 2021 tribunal claim.

Osteoarthritis

26. The occupational health report and the GP’s notes both refer to the claimant having difficulty with stairs as a result of her osteoarthritis. The claimant describes the condition as having a “huge” effect on her day-to-day life. She is unable to sit for too long. She has difficulty putting on socks and tights.
27. Going up and down stairs, sitting and dressing are all day-to-day activities. The effect the claimant describes is more than minor or trivial and as osteoarthritis is a progressive condition, the effect is likely to get worse. The claimant was diagnosed with osteoarthritis in 2020. It had therefore lasted for 12 months by the time of the alleged discrimination. Having concluded that, it is also appropriate to conclude that the osteoarthritis was an impairment, which means that the osteoarthritis amounts to a disability within the meaning of the Equality Act 2010 and it affected the claimant at the time to which the claim refers.

Amendment

28. I allow the claimant’s amendment regarding the harassment claim. I do not allow the amendment to include a victimisation claim.
29. In deciding this, I have taken into account the *Selkent* factors. Regarding the harassment claim, I concluded that the nature of the amendment was minor. The harassment amendment was in effect a relabelling of a claim presented by a litigant in person. The amendment refers to issues raised in the claim form, it clarifies it. The issue of time limits, timing and manner of application are not

relevant because the claimant had already raised these issues in her claim form. To refuse to accept it would cause considerable prejudice to the claimant. However, the claim arises out of facts the respondent is already well aware of, as they were already present in the claim. There is therefore little prejudice to the respondent. The balance of injustice and hardship of allowing or refusing the amendment therefore favours the claimant.

30. The contrary is true of the application to include a victimisation claim. Although the claimant was a litigant in person at the time she made her claim, she does not refer, at all, to the previous tribunal claim or her grievance in the claim form. Many of the detriments alleged are not mentioned in the claim form either. The application for amendment was made many months after presenting the claim, and would be significantly out of time. Allowing this entirely new head of claim to proceed would be likely to increase the time of the hearing and significantly add to the burden on the respondent in terms of evidence, documents and costs. There would therefore be greater injustice to the respondent if I allow the amendment than to the claimant of refusing it. The balance of injustice and hardship in this instance therefore favours the respondent.

Employment Judge Hopton

Date 3 December 2024

REASONS SENT TO THE PARTIES ON

10 December 2024

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FOR THE TRIBUNAL OFFICE