



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mrs Mandy Aire

AND

Respondent
HF Trust Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY
By Video Hearing Service

ON

11 March 2022

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Miss S Crawshay-Williams of Counsel

JUDGMENT

The judgment of the tribunal is that:

REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant was a disabled person at the material times.
2. I have heard from the claimant, was questioned on her evidence. The respondent did not call evidence in person. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
3. The claimant Mrs Mandy Aire was born on 11 April 1964. The respondent is a charity and the claimant was employed by the respondent as a Support Worker. Her duties involved providing support to those with mild learning difficulties in their homes. The claimant commenced her employment on 3 January 2017, and she was dismissed by reason of conduct on 8 April 2021. The parties were in dispute about what the respondent perceived to be her non-compliance with its requirements for personal protective equipment during the Covid-19 pandemic. In particular they rely on the claimant's repeated refusal to wear the face masks/coverings issued by the respondent. The claimant argued that she was

- exempt from wearing the required facemasks because of her claustrophobia. She contends that this impairment amounts to a disability, which is not accepted by the respondent.
4. The claimant has served a statement explaining the impact which her impairment has on her normal day-to-day activities (her "Impact Statement"). There is very limited corroborating evidence in her medical records, but the claimant was consistent as to these effects under cross-examination and I find as follows. The claimant has suffered from what she perceived to be symptoms of claustrophobia from when she was a child. She did not like playing with hand puppets because being unable to move her fingers caused her to panic. She was unable to take part in hide and seek games, because she did not like hiding in enclosed spaces. As she grew older, she realised that she had a fear of going into lifts, rooms without windows and heavily crowded places. On one occasion when aged 16 she fainted whilst in the bathroom without windows. She describes panic attacks which can be triggered by such things as rooms without windows, small spaces, crowded spaces, tight clothing, polo neck tops, mittens, and she says (the subject of this case) masks. She has adopted coping mechanisms and likes to plan ahead to avoid anything which might trigger a panic attack. She still avoids using lifts and public toilets, and when shopping will not try clothes on in a cubicle. She does not accompany her husband on his motorcycle because she needs to avoid wearing a crash helmet.
 5. The claimant has disclosed an extract from her GP notes which is limited to the period between 31 December 2020 and 29 July 2021. The relevant extracts are these. On 22 January 2021 the claimant had a telephone consultation with Dr Carty which was described as "Anxiety disorder (First)" in other words this was the first occasion on which the claimant had consulted her GP about a mental impairment. The entry records: "really struggling with anxiety at the moment; being made to wear a face mask at work despite downloading an exemption card - has bad claustrophobia; panicky and starting to struggle - had some diazepam at home (for her back) which she resorted to taking to attend a meeting - Discussed - advised not to take further diazepam as addictive and will cause drowsiness etc - Discussed options - chat re mindfulness." The GP also prescribed propranolol tablets.
 6. The next relevant entry is on 19 February 2021 which was a telephone consultation with Dr Moore. This related to pains in the claimant's jaw and possible neuralgia. The entry recorded: "is very stressed re work suspension so I wonder if tension and tooth grinding".
 7. The next relevant entry is on 3 March 2021 when the claimant discussed with the receptionist appointments for various tests in which the claimant suggested that she was very anxious about coming to the surgery having to wear a mask because she felt she did not have to do so.
 8. There are no other relevant entries.
 9. The claimant also adduced a letter from Dr Carty dated 3 November 2021 which reads as follows: "I can confirm that I am Mrs Aire's GP. She has requested a letter from me as evidence that she suffers from claustrophobia and has done all her life. She tells me that her problems started as a small child when she would experience feelings of panic and dread in enclosed spaces. These feelings will also happen if she was wearing anything restrictive such as tight mittens. She describes classical symptoms of increased respiratory and heart rate, cold sweats and feelings of impending doom when she is in enclosed spaces or wearing anything restrictive. She must plan her days around not being in enclosed spaces, for example she cannot use public toilets for fear of being locked inside. She contacted me in January 2021 as she was significantly struggling with wearing a mask at work, she had downloaded an exemption card. Things had deteriorated significantly enough that she had resorted to taking diazepam (a sedative and muscle relaxant which was originally prescribed for back pain) to try and cope with the symptoms. I advised her to avoid using the diazepam and did a prescription for some beta-blocker medication to treat her symptoms. Her history is one that fits with claustrophobia and I would fully support her exemption from wearing a face covering on medical grounds."
 10. The respondent argues that the above assertions are inconsistent with what happened on a day-to-day basis, and, in short, the claimant simply chose not to wear the facemask which she was instructed to do. There was an exchange of Facebook messages between the claimant and a colleague Mrs Otto in which the claimant commented: "I've always been

- claustrophobic but didn't realise that the wearing of the mask was going to affect me so much. I have no problem wearing PPE when doing personal care, but wearing a mask for (in my view) no good reason, causes panic attacks the same as a claustrophobic attack."
11. In another Facebook message the claimant stated: "I think I'm going to have to admit defeat regarding the mask wearing and try and suffer to wear one if certain people are around, I'm being bullied and coerced but I cannot afford to lose my job."
 12. It is also clear from an email from the respondent dated 16 December 2020 that: "Mandy is wearing the PPE correctly at present. Jo is meeting with her to discuss her anxieties".
 13. The claimant also conceded under cross-examination that she was able to wear a loose-fitting chiffon scarf as a mask and/or her own cloth mask. She asserted that she could not wear the tightfitting paper mask which the respondent was insisting upon, but also conceded that she did wear this sort of mask when a service user complained to her on a visit to the Bank, and also wore it when carrying out personal care on service users. The respondent suggests that this shows that the claimant was not disabled as she asserts and was effectively just being difficult about which type of mask she chose to wear.
 14. Having established the above facts, I now apply the law.
 15. The claimant alleges discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from a disability, failure by the respondent to comply with its duty to make adjustments, harassment, and victimisation.
 16. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
 17. I have been referred to and I have considered the cases of: Boyle v SCA Packaging [2009] ICR 1056 HL; Cruickshank v VAW Motorcast Ltd [2002] ICR 729 EAT; All Answers Ltd v W [2021] EWCA Civ 606; Patel v Oldham MBC [2010] ICR 603; Royal Bank of Scotland plc v Morris [2012] CLY 1122 EAT. I have also been referred to and I have considered paragraph D3 of the Statutory Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) (which relates to the meaning of "normal day-to-day activities").
 18. I accept the respondent's assertion that there are some inconsistencies in the claimant's evidence, not least the absence of any medical records or reports which substantiate the allegations made in the claimant's Impact Statement. There are also occasions on which the claimant's evidence was confusing or at least counterintuitive, for instance the fact that she felt able to wear certain types of masks, but not the one supplied by the respondent. Nonetheless I apply the statutory test as to disability as follows.
 19. In the first place I find that the claimant was suffering from a mental impairment during the times relevant to this claim. It does not seem to matter to me whether this is described as claustrophobia, or alternatively some form of anxiety arising from the claustrophobia. Equally given the background evidence I do not consider that the absence of a formal diagnosis of claustrophobia is fatal to the assertion that the claimant was suffering from that mental impairment. Her own Impact Statement shows that she has suffered claustrophobia and related anxiety all of her life. Dr Carty's report confirms that the claimant's presentation of feeling panic and dread of enclosed spaces; increased respiratory and heart rate; cold sweats; and feelings of impending doom when she is in enclosed spaces or wearing anything restrictive is a medical history which "fits with claustrophobia".
 20. The next question to be addressed is whether the impairment was long-term. It is clear that the impairment has lasted longer than 12 months because the claimant (who was born in 1964) has suffered from it for most of her life.
 21. The next question to be addressed is the extent to which there has been a substantial adverse effect on the claimant's normal day-to-day activities. In this context substantial

means more than minor or trivial. The claimant has an ongoing fear of going into lifts, rooms without windows and heavily crowded places, and has to adopt coping mechanisms in order to avoid panic attacks which can be triggered by such things as rooms without windows, small spaces, crowded spaces, tight clothing, polo neck tops, mittens, and masks. She still avoids using lifts and public toilets, and when shopping will not try clothes on in a cubicle. She does not accompany her husband on his motorcycle because she needs to avoid wearing a crash helmet. In my judgment the claimant's impairment therefore has a substantial adverse effect on her ability to carry out normal day-to-day activities, in the sense that this is more than minor or trivial.

22. I therefore find that throughout the times material to this case the claimant was a disabled person by reason of claustrophobia because she had a mental impairment which was long-term, and which had a substantial adverse effect on her ability to carry out normal day-to-day activities.
23. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 3 to 13; a concise identification of the relevant law is at paragraphs 15 to 17; how that law has been applied to those findings in order to decide the issues is at paragraphs 18 to 22.

Employment Judge N J Roper
Dated 11 March 2022

Judgment sent to Parties on

