



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss Joana António José Francisco v

Banham Poultry (2018) Limited

Heard at: Norwich (in person)

On: 27 April 2023

Before: Employment Judge M Warren

Appearances

For the Claimants: In person

For the Respondent: Mr A Francis, Counsel

Interpreter: Miss Carvalho, Portuguese speaking

JUDGMENT on OPEN PRELIMINARY HEARING

The Claimant was not a disabled person as at the material time and her complaints of disability discrimination therefore fail and are dismissed.

REASONS

Background

1. The issue before me today is to decide whether Ms Francisco meets the definition of a disabled person set out in the Equality Act 2010 during the relevant time which is between 4 August 2021, when there was a chemical spill at her place of work and 14 October 2021, when she was dismissed.
2. If she was not disabled, her claim of disability discrimination will not be able to proceed, but her claim of unfair dismissal will still be able to continue.

Papers before me today

3. I should record that I have a Bundle of documents prepared by the Respondent's Solicitors which contained the documents both sides wished to refer to. I had a small Bundle of Witness Statements and an opening note from Mr Francis.

Evidence

4. Miss Francisco gave oral evidence under oath and confirmed that the content of her Impact Statement which appears in the Bundle at page 52 was true.
5. There were some other statements in the Witness Statements Bundle Miss Francisco produced, the contents of which I have noted. However, I have explained that they deal with the events on 4 August 2021, that is the chemical spill, which is not my concern today.
6. I also had a statement from a Miss Jasinskyte from the Respondent, an HR and Payroll Advisor. I did not find it necessary to hear evidence from her.

The Law

7. The legal position is that it is up to Miss Francisco to prove that she was a disabled person. A disability is a physical or mental impairment that has a substantial adverse effect on the person's ability to do day to day things, which must be as at the time of the discrimination complained about, (in this case, between 4 August 2021 and 14 October 2021). The impairment must, at the time of the alleged discrimination, (not afterwards) have lasted for at least 12 months or be likely to last for at least 12 months or the rest of their life, or if it is likely to recur.
8. The important point is that I have to focus on the situation in 2021 and it does not help if Miss Francisco's problems have continued for more than 12 months since then.

Findings of Fact

9. Miss Francisco worked for the Respondent as a Production Operative since October 2016.
10. There was a chemical spillage at the factory on 4 August 2021 which resulted in chlorine gas being inhaled by people who worked in the area, including Miss Francisco. She felt unwell, went home and subsequently went to Accident and Emergency (A & E) at the James Paget Hospital in Great Yarmouth.
11. I have been referred to the discharge summary from A & E on 4 August 2021. This refers to her feeling dizzy and having head aches which are the impairments she complains about. She also complained of coarseness of voice. The Discharge Note states that there was no more cough or respiratory distress. The Note records that her blood tests were normal, her chest was clear and she was given reassurances.

12. Although she returned to work, Miss Francisco was certified as unfit to work due to chlorine gas exposure for a period of seven days on 9 August 2021. She was subsequently further certified as unfit to work for a period of nine days from 17 August 2021, again because of chlorine gas exposure.

13. Miss Francisco was referred by the Respondents to Occupational Health advisors, who arranged for her to see a Doctor Krishnan. She attended with a translator. The Occupational Health Report is in the Bundle at page 60. The Report includes the following remarks,

“Joana reported that she had been having hoarseness of voice since the incident. She also stated that she has headaches, however these are managed with paracetamol. On examination she has normal air entry and no added sounds. Following the Assessment, Dr Krishnan was of the opinion that she is fit to return to work full hours and duties from tomorrow 25 August 2021.”

14. Miss Francisco returned to work on 25 August 2021 and remained until 9 September 2021, from which date she was then subject to a further fit note, in the Bundle at page 63. She was certified for a period of two months, that she may be fit for work taking account of avoiding heavy lifting and physically arduous work. The cause was said to be,

“still feeling unwell after gas exposure at work, very tired and headaches”

15. A further fit note was provided dated 17 September 2021, certifying simply as “unfit to work”, (no adjustments were suggested) for a period of two weeks. The cause was said to be excessive fatigue after alleged gas exposure at work.

16. The Respondents say that they received no further fit notes or medical evidence from Miss Francisco, she remained absent from work and when she did not communicate with them any further, that led to her dismissal on 14 October 2021. Miss Francisco, it is fair to say, says that she did provide that information, but those are not issues for me to determine today, they will be matters for the unfair dismissal complaint in due course.

17. I do have before me further medical evidence. I have a letter dated 25 October 2021 from the Ear, Nose and Throat Department (ENT) of the James Paget Hospital. This refers to intermittent hoarseness in the last couple of months, some discomfort in her throat and phlegm. The Report states, (this is a Report to Miss Francisco’s Doctor from the Hospital):

“Oropharyngeal examination and neck palpation was unremarkable. Anterior rhinoscopy revealed pale and hypertrophied inferior turbinates suggestive of allergic rhinitis. A flexible laryngoscopy revealed normal looking post nasal space. Hypopharynx and larynx except for evidence suggestive of mild reflux. The vocal chords were normal in appearance and movement.”

18. There is a further Report to the GP from the Ear, Nose and Throat Department dated 20 June 2022. This Report includes the following:

“She tells me her symptoms are fine. We used the interpreter on the Language Line as she cannot speak any English. Her symptoms are much improved and her voice is back to normal. She has a lot of benefit from Avamys nasal spray and the proton pump inhibitor. Flexible nasal endoscopy today did not show any abnormalities whatsoever. I therefore reassured her I am happy to discharge her back to your care.”

19. Lastly, I have a letter from the GP Surgery dated 22 December 2022. This is of course long after the relevant period. Of note from this is as follows:

“She was seen at the Surgery on 9 August with a work colleague acting as translator. At this time she reported ongoing shortness of breath and exertion, loss of voice and headaches following chemical inhalation which had taken place on the 4th. Her examination at this time was unremarkable and it was felt that her symptoms were due to residue irritation of the respiratory mucosa and that they would settle with time.

One month later she contacted Surgery again to complain of ongoing headaches and discoloured sputum. She was also feeling tired all the time. She was invited to the Surgery for review, where her examination was once again unremarkable, but blood tests and ECG were organised. She was found to be slightly anaemic... but otherwise the bloods were largely unremarkable. Her symptoms were ongoing so once again she was signed off work.”

20. The Report then goes on to refer to the subsequent referral to ENT, which of course will have led to the letters from which I have already quoted. It records that the Surgery was last consulted with regard to these matters in February 2022.

Conclusions

21. Given that these symptoms did not begin until 4 August 2021 and the relevant period is from that date to 14 October 2021, that is a period of less than 12 months and so on the first part of the test, I cannot find Miss Francisco to be a disabled person at that time because the symptoms that she complains about had not lasted for at least 12 months. That is the first test.
22. The second test asks, is it likely to last for at least 12 months? In other words, between August and October 2021, could it be said at that time that what she was suffering from would be likely to last at least 12 months? There is no hint in the fit notes that her symptoms might be something that will last a long time, though perhaps one would not really expect that necessarily. It is evident from the excerpts that I have quoted in the medical reports and letters, that there was no anticipation that there was a problem that might last for more than 12 months. Because the burden of proof is on Miss Francisco, in other words it is up to her to prove to me that she was disabled at that time, she would really have had to have produced

some cogent evidence that she could have been said at that time, to be likely to continue to suffer from dizziness, headaches and leg pain and there is nothing to help me with that. So she falls down on that test.

23. The other two aspects to the test are, could it be said to be likely to last for the rest of her life? For the same reason we do not know that, as at August to October 2021. Nor is there any evidence on which I could say that it was something that would be likely to recur. There is no suggestion from the passages I have read that at that time anybody thought it likely that it would reoccur.
24. For these reasons I have to find that Miss Francisco was not a disabled person at the material time. It is worth adding, even if I were to have found that she were disabled on the basis of the information that she has provided, I cannot see how one could have said the Respondents would have known.
25. Case management is dealt with in a separate Hearing Summary of today's date.

Employment Judge M Warren

Date: 6 June 2023

Sent to the parties on: 7 June 2023

For the Tribunal Office.