



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Board

**Respondent:** EDF Energy Limited

**Heard at:** Southampton

**On:** 27 November 2019

**Before:** Employment Judge Rayner

## Representation

Claimant: Miss A Johns (Counsel)

Respondent: Mr G Graham (Counsel)

**JUDGMENT** having been sent to the parties on 11 December 2019 that the Claimant is and was at all material times a disabled person within the meaning of section 6 of The Equality Act 2010 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

1. By a claim form presented on 13 September 2018 the Claimant claims unfair dismissal; discrimination arising from disability; failure to make reasonable adjustments; indirect disability and sex discrimination.
2. Following a preliminary hearing by telephone before Employment Judge Maxwell the matter was set down for a preliminary hearing to determine whether at the material times the Claimant was a disabled person within section 6 of the Equality Act 2010 by reason of migraine headaches and/ or sinusitis.
3. The material time in respect of the Claimant's claim is 27 January 2017 until 24 April 2018, when the Claimant was dismissed for capability following a period of long-term absence or stress and anxiety.
4. The issues that I had to determine were set out in the case management order of Employment Judge Maxwell and were as follows:
  - a. did the Claimant have a physical or mental impairment at the material time namely
    - i. sinusitis
    - ii. migraine headaches

- b. if so did the impairment(s) have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities
  - c. if so was that effect long term, in particular when did it start and has it lasted for at least 12 months?
  - d. is it, or was the impairment likely to have lasted at least 12 months or the rest of the Claimant's life if less than 12 months
  - e. in assessing the likelihood of an effect lasting 12 months account should be taken of the circumstances at the time the alleged discrimination took place and not any matters occurring after the alleged discrimination?
  - f. were any measures taken to treat or correct the impairment?
  - g. But for those measures would the impairment have been likely to have had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
5. A preliminary hearing in person took place on 27 November 2019 at which the Claimant was represented by Miss Johns and the Respondent by Mr Graham both of Counsel. I am grateful to both of them for their submissions in this case.
  6. I had before me a bundle of documents running to some 325 pages which included the pleadings; the Claimant's disability Impact statement; an Occupational Health report and the Claimant's medical notes. In addition; the parties had agreed to instruct a medical expert and I had in front of me the instructions to medical expert and the experts report.
  7. The experts report is 16 pages long and was prepared by a Dr Charles Trevarthen Benedict Vivian, who states that he became an accredited specialist in occupational medicine in 2004. The medical report was written following an hour long meeting with the Claimant on 29 July 2019 at her home address. Dr Vivian had also reviewed the Claimant's medical records.
  8. The Claimant relies upon sinusitis and migraine individually and in combination, as physical impairments which give rise to a disability.
  9. I have seen evidence from the Claimant's GP notes, from the expert report prepared for the purposes of this hearing as well as those from the Respondents occupational health.
  10. I have also read the Claimant's disability impact statement and heard oral evidence from the Claimant.

### **Findings of fact**

#### **The Claimant's GP records**

11. I have seen the records from the Axminster Medical Practice and accept the Claimant's evidence that these are the only medical notes which she has been able to obtain.

12. I find that the Claimant's GP notes do record incidents of the Claimant suffering from both sinusitis and from migraine both before, during and after the material period of time. I find there are reports of sinusitis on 16 April 2016 and in October 2016 which record that the Claimant has been *ill on and off since the beginning of September 2016, now getting alto fo sinus pain and headache, fluctuates but getting a lot of pain on bending forward*; on 13 March 2017 sinus congestion and headaches were reported; on 12 June 2017 the Claimant presented with acute sinusitis, on 3 July 2017 maxillary sinusitis was diagnosed and noted that it was much worse bending down. The Claimant was provided with a medical certificate for 8 days.
13. I find that on 1 June 2018, which is after the material time in this case, there is a report of sinus problems and migraines headache and sinus pain and specific reference is recorded to the Claimant having *had something similar last year*. Whilst the event of the 1<sup>st</sup> June 2018 is not relevant to my determination, the reference to the similar condition in the previous year is.
14. In respect of migraine I accept that there are very few specific references to migraine in the notes, although the Claimant does report headaches in October 2016 and on 13 March 2017.
15. I accept the Claimant's evidence that the GP reports do not reflect each and every concern reported by the Claimant to her GP on every occasion that she visited, and find as fact that she did tell her GP on numerous occasions that she was suffering both with sinus problems and with migraines.
16. I find as fact that there are two reasons why the GP notes do not reflect either the regularity or the seriousness of the Claimants migraine headaches.
17. Firstly, I find as fact that the Claimant did not attend at her GP surgery on many or most occasions when she was suffering with debilitating migraine or with symptoms of sinusitis. I accept her evidence that she did not particularly like going to the doctors, and further that when she suffered from migraine she was physically unable on many occasions to get up and go to the doctor.
18. Secondly, I find as fact that whilst each of her migraines tended to be of short duration, usually a day with a couple of days to recover, that the Claimant did not require a medical certificate for her short term absence for work purposes.
19. The Claimant's evidence which I accept was that her general practitioner had not made a note of every matter which she had raised on each occasion, and that the Claimant believed that she had often told the GP that she had been suffering with migraine and that she had described all the effects of migration on her.
20. I accept her evidence that she had no control over what the GP wrote and that she had no idea that this was something that would become important to her at some point in the future.

21. She gave the example of being prescribed a particular type of contraception because other types aggravated her migraine.
22. I accept her evidence that the content of the general practitioner notes was not necessarily a full and accurate picture of the discussions that took place between her and her GP on every occasion, and I find as fact that she was concerned about her symptoms and the impact they had on her, and find as fact that she did raise the symptoms and the conditions of sinusitis and migraine with her GP on occasions during and before the material time when they were not recorded. I accept the Claimant's evidence that the GP notes I have seen do not reflect each and every concern reported by her to her GP on every occasion she visited.
23. I accept the Claimant's evidence and find as fact that she did suffer with serious sinus problems and serious migraines on a regular basis prior to and throughout the material period in this case.
24. I also find as fact that once the Claimant realised that her GP had not been recording each and every concern she raised she did raise a complaint with GP practice.

#### **The expert report of Dr Vivian**

25. The Respondent's Counsel Mr Graham agreed with Miss Johns, Counsel for the Claimant, that the medical expert report does not really assist in determining whether or not the Claimant had or did not have an impairment by way of sinusitis at the material times.
26. At page 319 of his report Dr Vivian accepts that he is not an expert in the Claimant's condition and that he is providing a non specialist medical opinion. Whilst he pieces together what the Claimant tells him, the medical report does not give any clear expert medical guidance to the Tribunal.
27. What is helpful, it that Dr Vivian does recognise that there is an intermittent physical impairment compatible with sinusitis.

#### **Impairment - Migraine**

28. I note from the Claimant's medical records that she was diagnosed as suffering from Rehman ( sic) as child and I note further that there have been incidents on a regular although intermittent basis in the GP notes where it is recorded that she has suffered with migraine.
29. I find as fact, based on the medical evidence I have seen, and the Claimants own testimony that the Claimant has suffered with migraines throughout her life and that she suffers with headache pain on an almost daily basis, and that this was true during the material times.

30. I find as fact that there have been periods of time falling within the material times in this case when the Claimant has suffered on an almost daily basis with migraine.
31. I find as fact that whilst there were occasions when the Claimant was debilitated and unable to attend work there were also many occasions when she did carry on attending at work despite being in pain and whilst suffering difficulties with vision for example.
32. I find as fact that the Claimant adapted her behaviour in order to cope with her migraine and that she also took steps herself to manage the adverse impact of migraine. The steps included wearing sunglasses; avoiding bright lights and avoiding reflections and glare from screens. I find that these were steps that she took on a regular basis and that they were significant for her because the steps had the effect of reducing although not removing the pain and other effects of migraine/sinusitis.
33. I also find as fact that the Claimant managed both her migraine and her sinusitis by taking prescription medication following advice from a pharmacist and that this included decongestants and antihistamines on a daily basis for a period of 18 months.

### **Impairment - Sinusitis**

34. Whilst the expert Medical report is a helpful overview of the Claimant's medical history, the author accepts that he is not an expert in sinusitis.
35. There are references to sinusitis made in the Claimant's medical notes but more importantly there are references to symptoms which the Claimant was complaining of. I accept that the references to symptoms are not frequent but I do find that there are a number of occasions when the specific reference to the symptoms
36. In addition, I note that there appears to be some inconsistency over whether or not there can be a diagnosis of sinusitis. However, the expert states in respect of a specific question raised with him that there is an intermittent physical impairment.
37. The Respondent Counsel has referred me to the occasions on which sinusitis is mentioned in medical notes and I accept that there is reference in September 2014; 1 April 2016; one in October 2016; in March 2017 and that there are only 2 incidents that are identified as sinusitis.
38. The medical evidence in respect of sinusitis is that there have been occurrences of it and that a collection of conditions which the Claimant has suffered from on occasions have been described as sinusitis

39. I accept the Claimant's evidence as set out in disability impact statement that she has suffered from the condition since around 2014 and continued to suffer intermittently during the material times.
40. I also accept the Claimant's evidence that her condition has worsened over time and that it is sometimes difficult for her to distinguish between her sinus headaches and pain and her migraines. I accept and find as fact that the combination of sinusitis and migraine have caused her to suffer pain and debilitating symptoms on a regular basis and that when she suffered from them they have had a substantial adverse impact upon her ability to carry out normal day-to-day activities from 2014 until after the end of her employment.

### **Impact of the conditions on the Claimant**

41. I find as fact that the Claimant's evidence of the impact that her migraine and her sinusitis had upon her as set out in her disability impact statement, and as stated in oral evidence before me is true.
42. I accept the Claimant's evidence that even when her migraine was not debilitating, a migraine meant that the Claimant's ability to do ordinary everyday activities was often significantly adversely. Part of the adverse effect upon her was that she often suffered significant pain and felt very unwell. An example she gave of the family trip to Legoland illustrated that whilst she would engage in everyday activities, she would often do so despite feeling extremely unwell.
43. I accept the Claimant's evidence that when suffering from migraine and /or sinusitis that the Claimant would avoid bright lights; not sit near reflective surfaces or direct sunlight and would not be able to tolerate pressure or anything touching her head.
44. I find this fact that at the material times the Claimant would wear polarised sunglasses most days to counteract daylight and artificial light.
45. I find as fact that when suffering from a full attack she would be unable to think clearly; her speech would be slurred she would become forgetful and be unable to put a coherent sentence together or hold a conversation. I also find as fact that she would be prevented from driving due to the pain and would suffer with an inability to think clearly when suffering from migraine and or sinusitis.
46. I find as fact that the combination of her conditions regularly stopped her from doing everyday things such going to shops, cooking, driving, having normal conversations, talking on the phone, having a social life, and I accept the Claimant's evidence that because of her migraines/sinusitis she became in her words *a bit of a hermit*.
47. I accept her evidence that although her migraine stopped her from doing lots of everyday things, because she had family and because she was working she would in her words *just punch through to get things done*. I accept her evidence

that she would do everyday things whilst in pain, and often wished she had not done them. An example was the family trip to legoland. The Claimant stated she had made a real effort to go, but felt really ill all day and wished she had not gone.

48. The Claimant stated and I accept that not every occasion when she suffered with a migraine would lead to her having an absence from work and that not every occasion when she had an absence from work partly or wholly because of migraine would lead to her visiting her doctor. I note that the Claimants case arises from difficulties with short-term absences of the type that not only require a doctors certificate.
49. I find as fact that the Claimant has been prescribed antibiotics to deal with sinus infections but that otherwise she takes non prescribed medication to avoid attacks on a daily basis including Migraleve; ibuprofen; nasal decongestants; sinus spray; nasal steroid spray; antihistamine and cool pads and that the Claimant has also undertaken acupuncture and used sinus steaming to alleviate her symptoms.

### **The Applicable Legal Principles**

50. Both Counsel relied upon the statutory provisions within the Equality Act 2010. Neither Counsel referred me to any particular case law principles or to the code of guidance. I raised the following legal principles and referred to the Codes of practice in discussion with both Counsel.
51. In considering the findings of fact and in drawing my conclusions I have taken into account the following legal principles and relevant guidance.
52. Section 6 of part 2 of the Equality Act 2010 states that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
53. Schedule 1 of the Equality Act 2010 states that the effect of an impairment is long-term if it has lasted for 12 months, or if it is likely to last for at least 12 months; or it is likely to last for the rest of the life of the person affected.
54. Regulation 2 states that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities it is to be treated as continuing to have that effect if that effect is likely to recur.
55. Physical or mental impairment means 'some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition'. See **Rugamer v Sony Music Entertainment UK Ltd and another** 2002 ICR 381, EAT.

56. Section 5 of Schedule 1 Equality Act 2010 provides that where measures are being taken to correct the impairment, and but for those measures the

impairment would be likely to have the substantial adverse effect, it is to be treated as having that effect.

57. I reminded myself that the word impairment bears *'its ordinary and natural meaning... It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects.'* See **McNicol v Balfour Beatty Rail Maintenance Ltd** 2002 ICR 1498, CA,

58. The 2011 Guidance to the Act on **Matters to Be Taken Into Account in Determining Questions Relating to Disability** supports the view that the term impairment has a broad meaning. It is noted in the guidance that in many cases there will be no dispute as to whether a person has an impairment, adding that any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the S.6(1) definition (see para A3).

59. It is for each Claimant suffering from an impairment to show that they are affected by the condition to an extent that brings them within the act's parameters. Temporary conditions, such as a sprained ankle, or minor conditions (in the sense that the condition would not generally be regarded as a disability), will not be protected. I remind myself that I must consider both the frequency that any impairment has an impact upon the Claimant and the severity of that impact upon her as well as the likelihood of it recurring.

60. In order to answer the question whether or not the Claimant is disabled I have considered the evidence by reference to four different questions as follows

- i. did the Claimant have a mental and/or physical impairment? (the 'impairment condition')
- ii. did the impairment affect the Claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')
- iii. was the adverse condition substantial? (the 'substantial condition'), and
- iv. was the adverse condition long term? (the 'long-term condition').

61. I remind myself of the guidance of the then President of the EAT, Mr Justice Underhill (as he then was), in the case of **J v DLA Piper UK LLP 2010 ICR 1052**, EAT) that it may be possible in some cases to deduce the existence of an impairment from the effect that it has on an individual's day-to-day activities.

62. I remind myself of section B1 of the 2011 Statutory Code of Practice on matters to be taken into account in determining questions of disability, which states that a substantial effect is one that is more than a minor or trivial effect. This is the definition in section 212(1) Equality act 2010.

63. It will not always be necessary to identify an underlying disease or trauma where a Claimant's symptoms clearly indicate that she is suffering a physical impairment (See **College of Ripon and York St John v Hobbs** 2002 IRLR 185, EAT ).

64. I have taken into account Appendix 1 to the EHRC Employment Code which states that 'There is no need for a person to establish a medically diagnosed



cause for their impairment. What is important to consider is the effect of the impairment, not the cause' — para 7.

65. I have taken into account the decision in **Ministry of Defence v Hay** 2008 ICR1247, EAT, where the EAT held that an 'impairment' under S.1(1) DDA could be an illness or the result of an illness, and that it was not necessary to determine its precise medical cause. The statutory approach, said the EAT, 'is self-evidently a functional one directed towards what a Claimant cannot, or can no longer, do at a practical level'.

66. In that case the EAT concluded that someone who suffered from a combination of impairments with different effects, to different extents, over periods of time which overlapped could be regarded as disabled. This view is supported by the Guidance, which states that although a person may have more than one impairment — any one of which alone would not have a substantial adverse effect — account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities (see para B6).

67. In order to determine whether or not any impairment has had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities I have taken into account the guidance and dicta from the EAT from **Goodwin v Patent Office 1999 ICR 302, EA.**

68. In that case, the EAT explained that when judging whether the effects of a condition are substantial the requirement is as follows:

*'What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. .... Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.'*

69. This approach reflects the guidance in Appendix 1 to the EHRC Employment Code that account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that 'a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation' see para 9.

70. I remind myself that the question of whether a particular impairment has a substantial effect is a matter for the employment tribunal to decide.

## Conclusions

71. I conclude that the Claimant was suffering from physical impairments of sinusitis and migraine individually and in combination from 2014 onwards until after the end of her employment in April 2018.
72. I conclude that the combination of migraine and sinusitis had an adverse effect on the Claimant's ability to carry out normal day-to-day activities, on numerous occasions for a period of several years dating back at least to 2014 and on numerous occasions throughout the material time.
73. I conclude that the adverse effect in the Claimant's case was substantial because she was less able to carry out ordinary day-to-day activities either at all or without continuing to suffer pain and other ill effects. I conclude that medication and her own self-help methods reduced the impact upon her to some extent but I conclude that even with her treatment and self-help she suffered substantial adverse effects as a result of the individual and combined effects of her impairment. I find that on numerous occasions within the material time the impact of the Claimant's conditions individually and in combination was to render incapable of activity of any kind, and that on numerous other occasions the impact of the Claimant's conditions individually and in combination was such as to significantly impair her ability to do ordinary things such as hold conversations; work with screens or look at screens; deal with bright lights; drive or take part in ordinary social activities or ordinary workplace activities.
74. I conclude that without the use of both prescribed and non-prescribed medication and self-help methods, the adverse impact upon the Claimant would have been significantly worse and that the adverse impact upon the Claimant would have been even more substantial. I find it is more probable than not that without medication and self-help methods that she would have suffered a higher number of attacks and would have struggled even more to carry out normal day-to-day activities.
75. I conclude that the Claimant's adverse conditions had lasted for at least 12 months in that she had suffered from them individually or in combination from 2014 onwards until after the end of her employment in April 2018;
76. Insofar as there may have been periods of time when the Claimant's conditions did not have a substantial adverse effect on her ability to carry out normal day-to-day activities, in that there were days when she was free of both migraine and sinusitis I find as fact on the evidence before me that this was in part the result of medication and self-help methods but that in any event both conditions were likely to recur and to recur on a regular basis.
77. I therefore conclude that the Claimant was at all material times a disabled person within the meaning of section 6 of the Equality Act 2010.

Employment Judge Rayner

Date: 30 December 2019

Reasons sent to parties: 13 January 2020

FOR THE TRIBUNAL OFFICE