



THE EMPLOYMENT TRIBUNALS

Claimant: Miss Chloe Bage

Respondent: Valuation Office Agency

Heard at: Newcastle, but remotely (CVP)

On: 22 November 2018

Before: Employment Judge Beever (sitting alone)

Representation:

Claimant: In Person

Respondent: Mr Maxwell, Counsel

RESERVED JUDGEMENT

1. The claimant was a disabled person within the meaning of section 6 of the EqA at all material times during her employment with the Respondent (15 June 2019 – 4 February 2020)

REASONS

Introduction

1. This Preliminary Hearing was listed to deal with the preliminary issue of disability pursuant to paragraph 1 of the order of EJ Shore on 12 February 2021. It is common ground that if the claimant is found to be a “disabled person”, the

tribunal will go on to make case management orders for the final hearing. Conversely, if the claimant is found not to be a “disabled person”, the claimant’s claims could not proceed and would fall to be dismissed.

2. The hearing took place as a video hearing which the parties consented to and was necessary as it was not practicable to hold an in-person hearing. In the event, the majority of the time was spent with cross examination of the claimant and there was insufficient time to provide an oral decision at the hearing. Judgment was reserved.

Scope of Determination

3. The tribunal is being asked to determine whether the claimant is a disabled person. She claims to be so by reason of Hypermobility connective disorder, Premenstrual syndrome and Anxiety and depression.
4. The Grounds of Claim (GoC) recite events during the claimant’s employment between 15 June 2019 and 4 February 2020. The case Management order of EJ Morris dated 11 August 2020 set out the issues of discrimination that a final hearing panel would determine. These relate to matters occurring during the claimant’s employment including the decision to dismiss the claimant which occurred at a decision-maker’s meeting on 31 January 2020. The claimant’s effective date of termination was 4 February 2020.
5. The question that the tribunal is to determine is whether the claimant was a disabled person at the material times identified in the GoC, being the dates of the acts complained of. In this case, without making specific findings about any allegation or timing of any allegation, they relate to date(s) between 15 June 2019 and 4 February 2020.
6. The tribunal concluded that it should determine the question: whether the claimant was a disabled person by 15 June 2019 and if not, whether at any point prior to the claimant’s dismissal on 4 February 2020 was the claimant disabled within the meaning of the Equality Act 2010 (EqA).

The Law

7. Section 6 of EqA provides that a person has a disability if he or she “has a physical or mental impairment and the impairment has a substantial and long term adverse effect on his/her ability to carry out normal day to day activities”.
8. In *J v DLA Piper* [2010] ICR 1052, the EAT approved the 4 “step” sequential approach in *Goodwin v Patent Office* [1999] ICR 302: (i) did the claimant have a mental and/or physical impairment? (the “impairment condition”); (ii) did the impairment affects 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”), (iv) was the adverse condition long term? (the “long-term condition”).

9. The case of *MOD v Hay* [2008] IRLR 928 EAT dealt with what amounts to an impairment, which is to be regarded as a functional concept: Langstaff J said that the observations in *MacNicol v Balfour Beatty* [2002] ICR 1498 were “plainly right” which was that “the term “impairment” bears its ordinary and natural meaning. It may be an illness. It may result from an illness. It is not necessary to consider the cause of it.”. Given Langstaff J’s words of approval, this tribunal reminds itself of the observations of Mummery LJ (see para 38 of *Hay*):

“38. In *MacNicol v Balfour Beatty Rail Maintenance Ltd* [2002] ICR 1498, para 19, Mummery LJ observed:

“The essential question in each case is whether, on sensible interpretation of the relevant evidence, including the expert medical evidence and reasonable inferences which can be made from all the evidence, the applicant can fairly be described as having a physical or mental impairment. The ordinary meaning of the statutory language and of the Guidance issued by the Secretary of State under section 3(1) is sufficiently clear to enable the tribunal to answer the question on the basis of the evidence.”

10. Referring to the Guidance on Disability, at paragraphs A6-A7, it may not always be possible, nor is it necessary, to categorise a condition either as a physical or mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore effects of the mainly physical nature may stem from an underlying mental impairment and vice versa. It is not necessary to consider how an impairment is caused.
11. As to substantial effect, in *Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591 guidance is given on what might be termed “substantial” (para 14): “.... Once [a claimant] has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial. Here, however, it is to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly a substantial effect those matters which are clearly trivial. It provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other”. See also the Guidance on disability paragraph B1.

12. In addition to section 6 of the Act, Schedule 1 provides further relevant provisions:

Paragraph 2 provides that 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, or

.....

Paragraph 2(2) provides 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.

Paragraph 5 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 (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect.

13. The question of disability must be determined as at the date of the alleged discriminatory act, not at a later point including the date of hearing. Insofar as there is a predictive exercise as to whether an effect is "likely", this is to be interpreted as "could well happen" – SCA Packaging v Boyle [2009] UKHL 37, a threshold which is lower than the balance of probabilities test applied in other situations. The question for the tribunal is whether the claimant was disabled at the relevant time, and that the focus is on the relevant time and it is not permissible to look at evidence which postdates that relevant time. See McDougall v Richmond Adult Community College [2008] IRLR 227. The tribunal re-inforced this point in the course of the hearing as the claimant did raise evidence about events and diagnoses that occurred post-employment. The tribunal did not take those into account.
14. Tying these various elements together, the tribunal's task is to assess whether an impairment has an adverse effect which has been established by a claimant as substantial. If it is, whether that substantial effect is long-term either in the sense that it has (i) lasted 12 months, (ii) is likely to last 12 months or (iii) if not, whether it is likely to recur.
15. The tribunal has also considered the Equality Act guidance on matters to be taken into account in determining questions relating to the definition of disability. It reminds itself that at all times the focus is on what the claimant cannot do, rather than what she is able to do.

The evidence

16. The tribunal was provided with an electronic bundle of documents of 240 pages. The claimant gave oral evidence and she relied upon an impact statement [64] served in consequence of the order of EJ Morris. The claimant's father, Ian Bage,

affirmed the truth of his witness statement and he was not asked any questions in cross examination. MK, a former co-worker of the claimant, gave evidence on behalf of the respondent and was cross examined by the claimant. Mr Maxwell provided very useful written submissions and supplemented those with oral submissions as to the facts. The claimant made oral closing submissions. Those submissions have been taken into account even if they are not comprehensively repeated in these reasons.

17. The findings of fact made by the tribunal are made on the balance of probabilities having heard the witnesses' evidence and upon consideration of the documentation. The tribunal has not made reference to all facts adduced in evidence and instead has concentrated upon findings of fact that are relevant to the determination required for the purposes of this preliminary hearing.

Findings of Fact

18. First, the claimant has a physical condition arising from the flexibility of her joints. This is a condition that she has had from being a child. The tribunal understands that it might colloquially be referred to as being double-jointed. The result is that the claimant's joints may over-extend. Far from merely being flexible as a result, the frequent consequence of such over-extension is pain and stiffness in joints and muscles with consequent tiredness and fatigue. Hypermobility syndrome is a generally recognised umbrella term for the potentially complex disorders that may arise. The claimant in the present case contends that she has a condition called "Hypermobility Connective Disorder" which for present purposes might sufficiently be interchangeable with "JHS" or Joint Hypermobility Syndrome. The claimant was assessed in January 2020 [228] by Nicola Urquhart, at the Durham musculoskeletal service, who, following examination, had "explained assessment findings of JHS". One objective measure of assessment is the Beighton Score [240] where a finding of between 5-9 indicates a positive finding. The claimant's score was 6.
19. The claimant describes in her witness statement waking each morning feeling fatigued, aching and exhausted. She has pain and stiffness across her upper body resulting from the fact that her joints, such as shoulder blades elbows back and neck, overextend and may lie in a fixed position for a period of time during sleep. The stiffness and restriction in movement is something that she would need to walk off over the first few hours of waking up. Carrying out certain domestic tasks, such as carrying a washing basket, may result in overextension of her fingers causing significant pain. The claimant struggles to wash her hair which she now limits to once a week. She finds it difficult to bend to put on jeans or to wash her feet. The claimant describes this in her impact statement as meaning that she has, "spent my whole life in daily pain". The statement says that, "during my employment period of time, the symptoms were the same". Walking any significant distance gives her hip, pelvis, back and arm pain. The effect of such pain causes fatigue. The claimant was late into work on numerous

occasions due to pain and fatigue and the consequent extra time required to get ready and travel to work.

20. Secondly, the claimant has engaged with mental health services on and off since her teenage years. The GP records identify numerous occasions up to 2014 making reference to anxiety and depression. The claimant has since September 2018 been prescribed a regular prescription of lamotrigine which is a mood stabiliser. These two features the tribunal finds persuasive evidence that the claimant has endured mental illness over a significant period of time and has received support over the period of time, including in particular 2018 onwards, from her GP in respect of her mental health. The respondent challenged the lack of express reference to anxiety consultations with the GP in the period since 2014. Notwithstanding that, the tribunal finds that the claimant has in fact continued to have the support of her GP, as set out above, and that she has been treated by psychiatrists and had callouts from mental health services. She could not account for why this medical information is not noted in the disclosed evidence. The tribunal throughout this case is alive to the absence of express expert diagnoses and takes full account of that in its decision-making. That said, the ongoing prescription of lamotrigine is in itself indicative of ongoing GP support that the claimant was receiving.
21. In her impact statement, the claimant describes frequent panic attacks, and being of low self-esteem. She said that, "I do not socialise any more, and do not see anybody other than my son my father or my boyfriend. If I do try to socialise, have drank far too much alcohol, and this has resulted in self harm behaviours". The claimant says that, "I do not use public transport and on my last attempt I had a huge panic attack and left the bus". The claimant describes becoming easily upset, frustrated and not coping well with change. She describes spells of crying and feeling suicidal, lacking motivation and feeling tired. She describes only being able to, "hold a telephone call down when something literally depends on it or it is extremely quick".
22. Thirdly, the claimant's impact statement refers to "Premenstrual Syndrome". The tribunal takes note of the fact that there is no express reference in the GP disclosure nor any expert evidence. The claimant stated that this was likely to be because it was simply a fact of life that she would "just deal with" and she would not have likely raised it with her GP as all they might say is "nothing we can do". The tribunal understands that Premenstrual syndrome is again an umbrella term for symptoms which may vary but which are experienced by women in the weeks before their period, such symptoms might be emotional or physical including tiredness, physical tenderness, headaches, pain and discomfort.
23. The variety of such symptoms is illustrated by the claimant's description in her impact statement at [66] of physical symptoms of bloating, swelling and severe shooting pains and back pain, together with emotional symptoms such as paranoid thoughts irritability and snappy mood. She described the symptoms of

exhaustion somewhat descriptively as occurring “to point that I can fall asleep standing up”.

24. The respondent suggested that the combination of these physical and mental health symptoms that the claimant had described were inconsistent with the fact that she was consistently able to attend work (her hours of work 08.15hrs-16.15hrs). The claimant recognised that point of view but maintained that her ability to carry out a job was impacted and that she had constant pain at work as a result of her chronic pain and she did her best to mask her symptoms. It was her evidence that she made every effort to keep up with the expected workload notwithstanding that the frequency of her coming to work late increased such that she took her entire year's holiday entitlement in the space of a few months albeit she was sick. This was to avoid increasing her existing absence levels. On several occasions she would ask to take a part day's holiday in order to go home early. That evidence was not challenged.
25. The respondent referred to its KIT notes which suggested that there were a number of occasions in which the claimant had provided practical reasons (e.g. the bus was late) for her late arrival at work. The claimant acknowledged that but said that there were other times which related to her symptoms for example the reason that she may have missed the bus was through anxiety. There are a number of occasions of lateness that do not state any explanation.
26. Respondent understandably challenges the claimant because her GP evidence shows no consultations in connection with her anxiety for a period of at least four years prior to her employment. The claimant referred to the fact that she was regularly prescribed Codeine as well as Lamotrigine as indicative of GP involvement even if not evidenced in the papers in front of the tribunal. She described Lamotrigine as a strong mood stabiliser given to her as a result of conversations with her GP about her mental health and this prescription commenced in September 2018.
27. When the claimant started employment, she signed a health declaration [141] and failed to declare the extent of her symptoms. She frankly stated in response to Mr Maxwell's questions that, “I agree, it's inconsistent” and she explained that she did not want to jeopardise the chances of getting employment. In her words it was, “not a lie as much as masking her situation”. The claimant did disclose that she had underlying medical conditions in a workplace assessment on 16 July 2019. The respondent placed emphasis on the comment that the claimant would, “experience discomfort to some degree” as a statement of modest symptoms which were alleged to be inconsistent with what she claims to be her true level of symptoms. This “pattern of inconsistency” as it was described by Mr Maxwell was said to be evident in the suggestion that the claimant could barely “hold down” a telephone call. The claimant in response stood by her statement and asserted that her job in fact depended on her taking phone calls, “I did the job and it made me poorly mentally”.

28. Claimant relied upon the evidence of MK, a co-worker, who did not witness any physical indicators of the claimant's pain. He did however acknowledge that there were occasions when the claimant would disclose that she was aching and in discomfort. He had other personal experience of hypermobility and he acknowledged and did not contest the fact that the claimant was suffering from hypermobility.
29. There were a series of short term absences which are recorded in the preliminary bundle in return to work forms. In many albeit not all, reference is made to symptoms which are consistent with the claimant's case today. In August 2019, [147], the claimant complained of hip pain. She declined an offer of OH. She told the tribunal that she did so because she was not wanting to cause a fuss and more particularly felt that she simply had to live with and deal with what she had done throughout her life. Symptoms in September 2019 [149] referred to PMT. There is no reference to PMT or similar in any GP notes – the claimant was challenged repeatedly about this and she said that there would have been some telephone conversations with her GP but in the main during her employment it was impossible to make appointment which she attributed in large measure to not being allowed a personal telephone at her desk (to make or to receive GP calls) and not being allowed time off to visit the GP.
30. The respondent did in fact obtain an OH report on 10 November 2019 [159]. The report recounts the claimant advising that she had multiple conditions – Hypermobility syndrome, PMS, anxiety and depression. The OH adviser said that it was, “not possible to explore and advise on all these conditions in one appointment. I will therefore advise on the symptoms mostly affecting at this time”. Those symptoms were described [160] as, “fatigue, anxiety and generalised pain. Feeling low and has problems with concentration, at times she feels physically and mentally exhausted. She has pain all time in her joints and muscles”. Claimant said that she did not know what would help in work and that when her symptoms were bad she found it difficult to leave the house and has exhaustion blurred vision significant pain and needs to sleep. The OH advice [162] was that, “the symptoms of her underlying condition do appear to impact on each other” and that these are likely to have repeated symptoms on a regular basis. The OH recommended postural changes and a workstation assessment. It also recommended flexible work hours and paced workload.
31. The claimant was absent from work for 1½ days on 5-6 December 2019. She arrived at work at 1:15 PM on 6 December. Notwithstanding apparently significant symptoms, the claimant was able later on that day to attend the Christmas outing. A social media posting established that she was well enough to attend the outing. MK suggested that she played a full part in the evening. The claimant said that she was still unwell but went out because she felt under pressure to be part of the team and in addition wanted to “push herself to go as she had not been socialising didn't want to be seen as avoiding people”. She

dressed for the outing at the end of the shift along with a number of colleagues. She accepted that her written statement that she “did not socialise” was not right in that she made an effort at least once a month but her socialising in employment was very rare. The statement of the claimant’s father reinforces this picture of feeling under pressure and obligation to attend. Mr Bage gives descriptive evidence of having to go to the claimant’s house on 6 December 2019, “to help with her pain, and get into work as she felt under pressure and an obligation to attend”.

32. The claimant was dismissed following a Formal meeting which took place on 31 January 2020. The reason for dismissal is said to be related to her absences. The hearing noted that the OH report was “very generic and that the [decision-maker] is considering a further referral”. In her statement for that hearing [180], the claimant had described her mood stabilising medication for her anxiety as well as her Hypermobility Disorder in which she describes herself as “always in discomfort to some degree”. In the course of the meeting the claimant described how her anxiety interacted with her mood and contributed to an increase in pain.
33. The claimant’s dismissal took effect on 4 February 2020

Discussion and Conclusions

34. Having established those facts the tribunal turned to its conclusions. It took into account the guidance of the Piper case and in particular to pay attention to the dangers of applying labels to situations where there may be difficult distinctions to apply. It also found great assistance could be gained from the MOD v Hay case as well as the statutory Guidance on disability. Throughout its deliberation, the tribunal remained cautious given the absence of any expert medical diagnosis and a surprising absence of GP records since 2014 notwithstanding its finding above that the claimant had been receiving support from her GP.
35. In this case the approach referred to by the MOD v Hay case has some relevance. The term “impairment” should bear its ordinary and natural meaning so that it could be an illness or result from an illness and it was not necessary to consider its cause: the question of impairment is, as Mr Maxwell correctly identifies, a functional one, what the claimant cannot do practically. Fundamentally what is at issue is whether the claimant is suffering adverse effects of a degree sufficient to meet the definition of the Equality Act (Guidance A6-A7).
36. Mr Maxwell described the claimant’s evidence as a “statement of absolutes” in that the claimant refers to her symptoms as happening “every” day or that she is “unable to...” as opposed to “on this day, I find it difficult” or “I can do it once a fortnight perhaps..”. A statement of absolutes cannot it is said reflect the reality of the situation and must in addition be manifestly inconsistent with the claimant’s regular attendance at work. He submits that the tribunal is therefore placed in an

invidious position of having to guess at the true position. For example, the claimant suggests that she does not socialise at all and yet the Christmas outing of 6 December 2019 plainly disproves that: the same can be said of her statement that she does not use public transport.

37. Mr Maxwell also criticised the inadequacy of the medical records and the lack of expert evidence on the medical position which he submits means simply that the tribunal cannot properly reach appropriate findings of fact in support of the claimant's case.
38. The tribunal agrees that elements of the claimant's statement are not wholly consistent with the position as it in fact was at the time of her employment. The claimant did travel on public transport and the claimant did socialise. But in each of these two examples the claimant explained in evidence that it was rare and when it happened it was accompanied by serious side effects. The tribunal accepts her evidence that her socialising was infrequent and that that was because of a combination of her fatigue and her anxiety. It is wholly consistent that she should attend work on the afternoon of 6 December 2019 (with the help of her father) despite being unwell and then attend the Christmas outing from a sense of pressure and obligation. The claimant can socialise and can travel on public transport but the correct focus is on what the claimant cannot do. Her impact statement is simply a genuine attempt to explain how she perceives her ability to undertake those activities. The tribunal's conclusion is that the claimant is unable regularly to do either. She is significantly hampered by a combination of both physical and mental effects.
39. The evidence of the claimant being at the Christmas outing and also the evidence of MK who did not witness the claimant's physical discomfort at work is to be treated with caution. The tribunal recognises and accepts the claimant's evidence that she had sought to mask her symptoms so that it would not necessarily be obvious (or even at times visible) at work and that was because during her time in employment "she wanted to make a good impression". That much is supported by the fact that the claimant used her entire holiday entitlement in a short space of time so as to avoid further increasing her recorded sickness absence. She did have a number of sickness absences after which she disclosed symptoms that are consistent with what she says in her impact statement.
40. The respondent has identified examples of where the claimant has exaggerated the position. It has caused the tribunal to consider the effect of that exaggeration. It does not negate the fact that the claimant has suffered a physical condition from being a child and it does not negate the fact that she has had physical symptoms of pain and consequent fatigue as a result. The tribunal accepts the graphic illustrations given in her impact statement that she struggles with a number of daily tasks such as washing her hair; tending to her feet; climbing out of the bath; carrying a washing basket. The tribunal noted the specific reference in her impact statement to that fact that, "even typing this document, my fingers

are very painful due to the bending joints". The claimant specifically said that during her employment these symptoms were the same.

41. The fact that the claimant's case cannot reliably be described in absolute does not mean that the claimant has not symptoms at all. That would, to coin a phrase, be to throw the baby out with the bath water. The tribunal accepts that the claimant has had a lifetime of pain and fatigue as a result of her joint overflexibility and tendency to overextend. The tribunal accepts that the claimant consistently suffers pain and consequent fatigue and exhaustion as a result. The claimant's engagement with mental health services over the years has exacerbated her situation significantly. The tribunal agrees with the OH advice in November 2019 that the claimant has symptoms of her underlying conditions that appear to impact on each other.
42. The claimant contends that she has multiple conditions of hypermobility syndrome, PMS and anxiety and depression. The tribunal however does not have medical expertise and must reach its findings on the evidence available to it at the hearing. There is no clinical evidence of a diagnosis of Hypermobility syndrome albeit that the physiotherapist evidence is consistent with such a finding. Nor is there medical evidence that the claimant is in fact suffering for Premenstrual syndrome albeit that the claimant's evidence (which the tribunal accepts) is that she consistently suffers physical and emotional symptoms at the time of her periods. There is no clinical diagnosis of anxiety and depression.
43. The tribunal is not able to conclude that the claimant does in fact have the condition of Hypermobility syndrome or Premenstrual syndrome. It may be that she does or indeed it may be that she does not. Each syndrome is not capable reliable analysis by a tribunal which does not have medical expertise and has not been presented with expert medical evidence.
44. If it were necessary for the claimant to establish the fact of her diagnosis, then she may well be in some difficulties. In that respect, the respondent is right to submit that the tribunal would be in an invidious position. That is, however, not the end of the matter as the tribunal has concluded that the combined effect of the claimant's pain, fatigue and exhaustion together with her anxiety are adverse effects of both a physical and mental nature which amount to an impairment. The question of an impairment is a functional one and it is not necessary to consider how an impairment is caused. It is not necessary for the claimant to prove that she has the alleged conditions. See Guidance A7 and MOD v Hay.
45. The claimant's impairment plainly has had an adverse effect which can properly be described as substantial and she has endured those effects for a significant period of time prior to the commencement of her employment. The tribunal accepts the claimant's evidence that she experiences fatigue, anxiety and generalised pain together with feelings of low mood and problems with concentration such that at times she is both physically and mentally exhausted

and consistently, if not all the time, enduring a substantial level of pain in her joints and muscles. In terms of the Aderemi test, the claimant's symptoms are plainly more than trivial.

46. These symptoms have been endured by the claimant for many years and in some respects for a lifetime. They may well have been exacerbated during employment (in respect of which the tribunal makes no findings) but the fact remains that by the time she commenced her employment in June 2019 she had already endured those symptoms many years. By June 2019, the substantial adverse effect was long-term in that it had already existed for a period in excess of 12 months. Without doubt, it was also likely that such symptoms would recur and would last for the foreseeable future. The claimant's pain referable to her overextended joints is a lifetime condition for which there is no cure but only amelioration in the form of exercise in strengthening of muscles.
47. In summary, the tribunal concludes that the claimant has met the definition of disability for the purposes of section 6 the Equality Act 2010 because her impairment of pain, fatigue and exhaustion, and anxiety amount to an impairment which had a substantial effect on her ability to carry out normal day-to-day activities and did so at all material times during her employment between 15 June 2019 and 4 February 2020.
48. The claimant's case will proceed to a final hearing which is listed to be heard in November 2021. The parties have already received a Notice of Hearing. As was agreed at the video hearing, the tribunal will (by way of separate Order) issue case management directions for the purpose of preparation toward that hearing. The parties should, in accordance with that Order respond to the tribunal to the extent they would wish to apply to vary the proposed directions made.

EMPLOYMENT JUDGE BEEVER

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

2 July 2021

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