EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110892/2019 (A)

Held via telephone conference on 5 August 2020

Employment Judge J Hendry

Ms F Mochar-Collins	**Claimant** **Represented by:** **Mr D Long - Solicitor**
Manpower UK Limited	**Respondent** **Represented by:** **Mr A Sutherland - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was a disabled person in terms of section 6 of the Equality Act 2010 during the period 20 November 2017 to 23 May 2019.

REASONS

1. The claimant in her ET1 contended that she was a disabled person in terms of the Equality Act 2010 ('E.A.') during her period of employment with the respondents. The respondent's position was that the claimant did not fulfil the requisite criteria set out in section 6 of the Act and was not a disabled person during the relevant period.

2. The issue for the tribunal was to determine whether or not the claimant met the various elements of the statutory test set out in section 6 of the EA. There was no dispute as to what the relevant period was namely the duration of the claimant's employment.

3. The tribunal heard evidence from the claimant who made reference to a number of documents contained in the Index of Documents lodged by the parties particularly to her General Practitioner's medical records. The respondents did not lead evidence.

Findings in fact

4. The claimant is Ms Fiona Mochar-Collins. At the time of the hearing, she was 37 years old.

5. The claimant worked for the respondent company from 20 November 2017 until 23 May 2019 as a call adviser placed with BT.

6. As part of the respondent's recruitment process the claimant submitted a Diversity Monitoring Form (JBp40 – 47). In that form, the claimant indicated that she had a disability (JBp38). She was asked to list absences in the past twelve months and wrote that she had absences totalling approximately ten days due to migraines. The claimant recorded in the form that her disability or health condition was 'severe migraines' (the form is dated 20 November 2019).

7. The claimant gave permission for her employers to contact her GP practice, the Mirin Medical Practice in Paisley. The claimant had a number of absences from work because of migraines and had submitted Fit Notes from the practice. The reason for absence put her GP on the Fit Notes was generally ''neurological''. The respondent's HR wrote to the practice (JBp42 – 44). The letter had a short summary of the claimant's work and confirmed that she had told the company that she suffered from migraines and cluster migraines and asked for advice in relation to reasonable adjustments. The following questions were posed:

    a. How long has Fiona suffered from migraines and cluster migraines?

    b. Has this incurred due to a previous health reason?

    c. Can you confirm the cause of these?

    d. What symptoms is Fiona suffering from?

e. Can you confirm how often Fiona comes to the surgery to discuss her migraines?

f. Has Fiona been given any health advice to carry out?

g. When did you as a medical profession become aware of her migraines?

h. What medication is Fiona currently prescribed?

i. When does Fiona need to take his/her medication?

j. Will her medication affect her carrying out her role as a call advisor?

k. What side effects does this medication have?

l. What can aggravate Fiona's condition?

m. In your medical opinion, do you believe that Fiona's condition has got worse or better?

n. We have made changes to Fiona's working station: fixed position; besides a window for fresh air, chair to help with her shoulder and neck pain that can cause migraines, white non- reflective keyboard and monitor arm to help with positioning and an anti-glare screen cover. Do you believe there is anything else we can look to implement to support Fiona at work?

o. Has Fiona been referred to a specialist?

p. Has Fiona been referred to the hospital?

q. How long has Fiona suffered from this condition?

r. Is there anything that can aid recovery of this condition?

8. The claimant's current GP, Dr Thomson, responded by letter dated 14 January 2019 (JBp45 – 46) as follows:

"Thank you for your recent letter requesting a medical report on the above named patient. I will endeavour to answer your questions as follows:

- *Fiona was first prescribed triptan in 2014 for migraine-cluster headaches.*
- *Presumably this was around about the time of her diagnosis.*
- *This did not occur due to a previous health reason.*
- *Migraines*
- *Headaches, photophobia, nausea pre and post aura*
- *Over the last 18 months, Fiona has been seen four times.*
- *Not with regards to her migraines.*
- *14*
- *She is currently under preventative treatment namely amitriptyline 10mgs 3 times a day, which was increased on 19 December 2018. She also takes relief medication, namely rizatriptan, as required.*
- *It is possible that the amitriptyline may make her somewhat drowsy the next day.*
- *Common triggers include stress, lack of sleep, alteration in diet and alcohol excess.*
- *Her symptoms have become worse.*
- *I am not a skilled occupational health practitioner.*
- *Fiona has not been referred to a specialist/hospital regarding her condition.*
- *She has suffered with the condition since 2014.*
- *We are continuing to adjust her amitriptyline medication.*
- *With regards to your questions about adjusting Fiona's hours and her conditions at work, I am not an occupational health physician."*

9. Dr Thompson wrote to the respondents again on 25 January 2019 (JBp47) indicating that he had taken an opportunity to review her paper file, which showed that she had suffered from migraines and was first prescribed triptan for this in 14 October 2004 and not 2014 which he had previously stated. He wrote again, on 21 February 2019 (JBp48), indicating that the claimant was suffering from migraines and that it was clearly related to stress.

10. During her periods of absence, the claimant was provided with Fit Notes by her GP.

- On 21 February 2019, the claimant was signed off work from 18 February 2019 until 25 February 2019 by Dr Thompson (JBp49). The reason given was migraines and stress.
- The claimant was signed off again by Dr Thompson on 25 February 2019 to 4 March 2019 (JBp50). The reason given was migraines and stress.
- The claimant was signed off again by her GP on 4 March 2019 to 31 March 2019 and the reason given was migraine and stress.
- The claimant was signed off once more from 2 April 2019 to 16 April 2019 by a Dr Mundal and the reason given was migraines plus stress (JBp52).
- The claimant was signed off by her GP, Dr Thompson, on 16 April 2019 to 19 April 2019 and the reason given was migraine plus stress.
- The claimant was signed off by Dr Thompson from 17 May 2019 to 25 May 2019 and the reason given was migraines plus stress.

11. The claimant's GP medical records (JBp56) are produced at JBp56 – 71. In the entry dated 15 January 2018 (JBp63), Dr Mundall wrote in the following terms:

"History: under a lot of stress, undergoing disciplinary at work, feels mood has cldpadd (slipped?) ++ and keen to restart anti-dap(depression) medication."

12. In an entry dated 18 July 2018 (JBp65), Dr Mundall writes as follows:

"Fully back to normal and back at work post lap chole but mood low ++ and migraines troublesome occurring once a week – long chat – trials, assert claimant was prescribed sertraline."

13. Sertraline is an anti-depressant medication.

14. In an entry dated 8 May 2015 from a Dr K.Usher (p68) in the following terms:

"Migraines – pizotifen, has been one year, less a year but just as frequent, wondering if she can change prophylads: occur three times a week, had these for over ten years now…"

15. The medical notes also contain details of prescribed medication given to the claimant (JBp70 – 72), which indicate the claimant was on repeat medication for rizatriptan from 10 August 2018 onwards. She was prescribed fluoxetine (an anti-depressant) as a repeat prescription from 17 August 2019, amitriptyline from 17 August 2019 and pizotifen from 27 February 2015.

Effects of condition

16. The claimant since diagnosis has experienced migraines or cluster headaches on average between one every week – fortnight on average, while having taken medication designed to reduce the frequency of the migraines and their duration.

17. There are many triggers for the claimant's migraines. On one occasion sunlight glanced from a vehicle into her eyes setting off an attack. Disruption to her routine such as not sleeping is a common trigger. If the claimant is under stress this is both a trigger migraine and likely to make them more common. Prior to having a migraine, the claimant begins to feel unwell. She is able to recognise the signals that she is about to have a migraine. She begins to feel nauseous and begins to suffer severe head pain which lasts for the duration of the attack. The claimant becomes sensitive to light, in particular strong light or flashing light, and noise. During an attack, which on average lasts between 3 and 4 hours (but which can extend in time to 5 or 6

hours), the claimant retreats to a darkened quiet room and stays there until the symptoms subside. During this period, she is able to carry out day to day activities. In particular she is unable to be physically active or carry out household tasks involving physical or mental effort. She is unable to carry out common tasks such as cleaning and 'hoovering'. During an attack the claimant is unable to concentrate. She is unable to meet friends, leave the house or converse with people during an attack. Following the attack, the claimant is left feeling tired.

Witness Evidence

18. I was prepared to accept that the claimant was both a reliable and credible witness. He evidence was given in a clear and understated way and was to a large extent corroborated by her medical records. Her credibility as in any event not challenged.

Submissions

Claimant's submissions

19. The claimant's solicitor Mr Long reminded the Tribunal that the issue to be determined was whether or not the claimant was a disabled person in terms of Section 6 of the Equality Act (''EA''). He took the Tribunal through the four elements of that test and referred to the cases of **Godwin v Patent Office 1999 IRLR 4 EAT** and to **McNicol v Balfour Beatty Rail Maintenance Ltd 2002 IRLR 711**.He indicated that he would also be referring to the Government Guidance. He asked the Tribunal to find that the claimant was a credible and reliable witness who had answered the questions put to her in a straightforward and honest manner.

20. The condition the claimant founded on was one of having a propensity to have regular disabling migraine attacks. This was a fluctuating condition similar to Fibromyalgia or Epilepsy. He drew parallels with the latter condition. He reminded the Tribunal of the evidence relating to 'triggers' and the physical effects on the claimant of an attack. It was clear that in layman's terms anyone looking at the claimant's condition would conclude that there was an impairment. It appeared to be a lifelong recurrent condition as the claimant

had been experiencing these attacks since 2004.The claimant had been asked what might occur if she was in a relaxed, rather than stressful environment and avoided triggers. She said that it was impractical to avoid triggers, they could be anything from strong sunlight reflected from a windscreen, and that at some point she would still expect to have a migraine. The medication she was on didn't not eradicate the migraines but reduced them.

21. The next issue that was the effect of the condition on the claimant's ability to carry out day to day activities. The Tribunal had heard evidence of the disabling effects of an attack. The claimant suffered pain and nausea and was unable to carry out normal household tasks or to drive and had to retreat to a darkened and quiet room until the episode subsided. These attacks had a 'substantial' effect in that they caused more than minor effects.

22. There was no cure for the claimant's condition and it was bound to recur. In summary the claimant fulfilled all the elements of the statutory test and was during her period of employment a disabled person in terms of the Act.

Respondent's submissions

23. Mr Sutherland began by accepting the legal framework outlined by Mr Long. He made some general comments about how the Tribunal should approach the issue in hand reminding the Tribunal that the condition founded upon was ''Migraine'' and not Migraine plus 'Stress' or 'Depression'. That was clear from the Claimant's Agenda document lodged at the Preliminary Hearing. (That document was not in the Joint Bundle). The condition had to fulfil the statutory tests at the relevant time which was during the claimant's period of employment. Finally, he said the onus was on the claimant to show that the condition was long term or recurrent.

24. The evidence that the condition was lifelong was in Mr Sutherland's view insufficient: there was no medical evidence to this effect. The claimant has accepted that the frequency was sporadic. To overcome this hurdle it was, he suggested, not as simple as just referring to the history. Considering whether the condition had a substantial effect he accepted that this meant more than

minor (Guidance Schedule B1). The evidence was that the claimant would suffer attacks once a fortnight and these would last two or three hours It was accepted that during an attack there was a debilitating effect and that the incident was inconvenient but there was no lasting or continuing consequence of any magnitude indicative of a disability. He had used hayfever as an example. It was excluded from the qualifying conditions. In the claimant's case there was no referral to a specialist or any or any ongoing health advice such as one might expect with a disabling condition. In summary the claimant had failed to show that her condition was long term or recurrent or that it had a substantial effect on her day to day activities.

Discussion and Decision

25. The statutory framework is set out in Section 6 of the EA which provides:

"(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..."

26. The Tribunal also had regard to the statutory Guidance referred to by both parties.

27. Parties agreed that there were four elements in the statutory test that required to be addressed. It is helpful to set out further guidance to the approach to be taken by Tribunals in applying the statutory provision which was given in the case of **J v DLA Piper UK LLP [2010] ICR 1052** at paragraphs 38 to 40:

"38. … There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the claimant is suffering from a condition which has produced that adverse effect - in other words, an "impairment". If that inference can

be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred. This approach is entirely consistent with the pragmatic approach to the impairment issue propounded by Lindsay P in the Ripon College case and endorsed by Mummery LJ in McNicol (loc. cit.). It is also in our view consistent with the Guidance. Paras. A3-A4 of the Guidance read as follows: A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects. UKEAT/0266/19/DA -4- A B C D E F G H A4. Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities…. Paras. A7-A8 read: A7. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a 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 a mainly physical nature may stem from an underlying mental impairment, and vice versa. A8. It is not necessary to consider how an impairment is caused … What it is important to consider is the effect of an impairment not its cause – provided that it is not an excluded condition.

39. *But we do not think that it follows – if Mr Laddie really intended to go that far – that the impairment issue can simply be ignored except in the special cases which he identified. The distinction between impairment and effect is built into the structure of the Act, not only in section 1 (1) itself but in the way in which its provisions are glossed in Schedule 1. It is also reflected in the structure of the Guidance and in*

the analysis adopted in the various leading cases to which we have referred, which have continued to be applied following the repeal of para. 1 (1) of Schedule 1 (see, e.g., the decision of this Tribunal (Langstaff J. presiding) in Ministry of Defence v Hay [2008] ICR 1247 – see paras. 36-38 (at pp. 1255-6)). Mr Laddie's recognition that there will be exceptional cases where the impairment issue will still have to be considered separately reduces what would otherwise be the attractive elegance of his submission. Both this Tribunal and the Court of Appeal have repeatedly enjoined on tribunals the importance of following a systematic analysis based closely on the statutory words, and experience shows that when this injunction is not followed the result is all too often confusion and error.

40. Accordingly in our view the correct approach is as follows:

(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.

(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para. 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

(3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above. In particular, we do not regard the Ripon College and McNicol cases as having been undermined by the repeal of para. 1 (1) of Schedule 1, and they remain

authoritative save insofar as they specifically refer to the repealed provisions."

28. The principal issue in the present case revolved around whether the claimant's condition was lifelong or recurrent. This is important when considering if the condition has a long- term effect as required by the Act. The meaning of 'likely' is relevant when determining: whether an impairment has a long-term effect (Sch1, Para 2(1) of the EA, see also paragraph C1 of the Guidance). Whether an impairment has a recurring effect also requires to be considered (Sch1, Para 2(2) of the EA, see also paragraphs C5 to C11 of the Guidance. The Tribunal requires to discount the effect of any medication which controls the condition (Sch1, Para 5(1)).

29. In these contexts, 'likely', should be interpreted as meaning that it could well happen. Recurring or fluctuating effects are considered at paragraph C5 of the Guidance. The Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur.

30. Tribunals seldom get to hear directly from a claimant's General Practitioner and they are the ones who have knowledge about a condition, who daily see their patients and complete short notes of those encounters. These documents, medical notes, are often relied on yet they have clear limitations being summaries written for the use of the Practitioner and their colleagues and not as an educational tool for Tribunals or lawyers. They also make reference to medications and it is helpful for Tribunals to have some evidence about the particular medication being prescribed rather than, as in this case, rely on solely the claimant's understanding of its purpose. As in this case those notes are usually supplemented by the evidence of the claimant and other reports or correspondence from Doctors but often many of the matters that might assist the Tribunal in forming a view as to whether the statutory tests is met can be less than clear from those notes.

31. An observation was made, quite understandably in the circumstances, by Mr Sutherland was that there had been no referral of the claimant to other

specialists which one might expect with a serious disabling condition. That is certainly the case with many if not most of the conditions the Tribunal is asked to consider. We did not have someone medially qualified to explain the current medical understanding of the claimant's migraine condition or the limitations of the current therapies or medication. In particular there was no direct evidence that the condition was lifelong. I think, however, that it is a reasonable assumption to make from the circumstances on this case that the claimant's General Practitioner of long standing, must believe that the diagnosis of the claimant's condition (Migraine) and its treatment (we heard about his adjusting the two main medications the claimant was prescribed) is within his own competence and skill to treat without there being added benefit in recourse to any specialist. The background shows that the GP continues to adjust the claimant's medication to find an optimal dose and the condition has been managed in this way since the claimant first consulted a G.P. If the suggestion is that the Tribunal should infer from the fact that the claimant has not been referred to a specialist that the condition is not a serious one with disabling effects then as a general proposition I reject that submission as this fact alone is insufficient to draw that conclusion.

32. It is not in dispute that the condition relied on is 'Migraine' being some neurological weakness that renders the claimant susceptible to such attacks and not some mixed or combination of conditions. Reference was made to the Fit Notes (JB 53-54) where the reason for absence is described. After 'migraine' there is added 'stress' (four occasions) and on another occasion 'depression' is added.

33. The Fit Notes need to be seen against the background of the claimant's condition and the prevailing circumstances at the time the Fit Note was completed by her Doctor and their purpose which is to describe the reason for absence. It is, I would suggest, to over analyse the words 'Migraine + Stress' to suggest that this is meant to connote two separate unrelated conditions. The underlying condition is migraine. The claimant gave clear evidence that there were a number of triggers that caused a migraine attack. These had been discussed with her G.P and one of these was stress. She

had reported to her GP that she was stressed at work because she had been placed on a disciplinary/capability process and this had led to an increase in the frequency and severity of her attacks. It seems perfectly understandable, therefore, that the Doctor states the condition as being ‘‘migraine plus stress’’ given that interrelationship. It provides the employer with this additional information which would allow them to examine If there was anything they could do to ameliorate that stress and in turn the migraines.

34. On occasion the claimant has also suffered from depression notably in May 2018 (p65) but there is nothing in the evidence to suggest that this was anything other than ancillary to the principal condition she had namely Migraine (although some interrelationship between them seems likely) and temporary in effect the notes recording on the 18 July that the claimant was back to normal).

35. The respondents also submitted that there was no direct medical evidence that the condition was lifelong although it was accepted that it had continued since 2004. The claimant was not asked to comment on her understanding of whether the condition was lifelong. He was asked: ‘‘Is there anything that can aid recovery of this condition?’’ His response (paragraphs 7 and 8), although not as clear as it might be was: not with regards to her migraines.

36. The evidence from the claimant which I accept is that her neurological system is not robust and reacts to various common triggers to cause migraine attacks. The GP when asked if there was anything that could be done to aid the claimant’s recovery (JBp44) had the clear opportunity to indicate if the condition could be cured. His response was just that she had suffered from the condition since 2014 (actually it was 2004 an error later rectified) and they had continued to adjust her Amitriptyline which was the prophylactic medication. It can perhaps be inferred that the hope was to find a dose of that drug that would reduce the frequency of the attacks but there is no reference to a possible cure.

37. In addition, we need to consider the position without such medication. It is difficult to envisage given these circumstances particularly that the condition has lasted so many years and having regard to the fact that the medical

intervention is aimed at trying to reduce the frequency of attacks (and during an attack it's severity) that in the absence of any new therapy or medication the condition cannot be regarded as being lifelong.

38. In any event even if I am in error the condition leads to a recurrence of such attacks. The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question

39. The evidence before the Tribunal is in parts not as comprehensive as it could be but taken in the round it is sufficient to demonstrate that the claimant satisfies the term of the Act. It showed that the claimant cannot function ''normally'' and must take to bed during an attack and that without the controlling medication these attacks could be both more common and of longer duration. The claimant cannot avoid all the possible triggers and cannot avoid attacks. It is apparent that the claimant is during an attack temporarily unable to carry out day to day activities and that these attacks are likely to recur as they have for the last 16 years.

40. I conclude therefore that the claimant had a qualifying disability namely Migraine during the relevant period which was the duration of her employment.

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Employment Judge: **J Hendry**
Date of Judgment: **17 August 2020**
Entered in register: **21 September 2020**
and copied to parties