



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms A Robinson**

v

**Middlesex Learning Trust**

**Heard at:** Watford (by CVP)  
**Before:** Employment Judge Cowen

**On:** 8 January 2024

## **Appearances**

**For the Claimant:** Ms Robinson (in person)

**For the Respondent:** Mr Starceric (counsel)

## **RESERVED JUDGMENT**

1. The Claimant was disabled by reason of back pain and migraines between March 2020 and 31 August 2021.
2. No order for costs will be made in relation to the Claimant's failure to provide disclosure.

## **REASONS**

### **Background**

1. Apologies are provided to both parties with regard to the delay in providing this decision.
2. The purpose of the Preliminary Hearing was to consider whether the Claimant was disabled within s.6 Equality Act 2010 at the time of the alleged discriminatory acts.
3. A further issue emerged at the hearing with regard to the fact that the Claimant had been asked by the Respondent on 28 November 2023 and ordered by the Tribunal on 3 January 2024 to provide clean copies of the documents she relied upon. The Claimant had failed to do so. It transpired that the bundle for this hearing had been sent to the Claimant only 1 working day prior to the hearing, due to this problem with the documents.

4. Although he initially raised the issue of postponement, the Respondent's counsel indicated that he was able to proceed with the hearing and did not therefore press for a postponement. The Tribunal indicated it was content to disregard any highlighting or comments on documents. The Respondent asserted that it would be proper to mark the Claimant's actions by a costs order.
5. The postponement and costs applications were dealt with as a preliminary issue to the hearing. Submissions from both sides were heard. It was decided having taken into account the position of both sides, that the hearing would not be postponed as it would not be in the interests of justice to do so, nor would an 'unless order' be made as this would not be necessary or helpful. The issue of whether to award the Respondent costs was left to the end of the hearing, in order that the Tribunal could assess for itself whether the failure to provide clean copies had been prejudicial to the fair hearing of this preliminary hearing.
6. The parties discussed the period of disability which the claim refers to. They agreed that the first act of discrimination referred to in the ET1 occurred in November 2020 (rejection of UPR application). The last act is dismissal which occurred on 31 August 2021. The material period is therefore Nov 2020 to 31 Augst 2021.
7. The Claimant asserted that she was disabled by way of her physical impairments;
  - a. Migraines, and
  - b. Back pain.
8. The Claimant provided an impact statement dated 10 August 2022 and a further statement dated 19 October 2023 which were both contained in the bundle. The Claimant also gave oral evidence and was cross examined by Mr Starceric.
9. The bundle was in two parts A and B and ran to over 700 pages in total.

## **The Facts**

9. Having considered all the evidence, I find the following facts on a balance of probabilities.
10. The parties will note that not all the matters that they told me about are recorded in these findings of fact. That is because I have limited them to points that are relevant to the legal issues.

11. The Claimant worked for the Respondent as a teacher at their school known as Southgate Academy between 1 September 2020 and 31 August 2021.
12. In preparation for the position as a teacher of Design Technology, the Claimant filled in a pre-employment health questionnaire dated 6 June 2020. She indicated on this form that she had had 33 days off sick in the last 12 months and that she had been off work for more than a month for medical reasons. She provided the detail that she was off work from 25 February 2019 to 19 July 2019 with "Chronic Daily Migraine". The Claimant also referenced this on a tick box list of ailments. She indicated at that time that she had "currently no medication". Amongst the other conditions which the Claimant declared, she also indicated that she had "recurring sciatica". She provided the detail that she had been bedridden on 3 occasions with this.

### **Migraine**

13. The Claimant suffers from chronic daily migraines. These are headaches which are a dull, all-over throbbing pain in the head and stabbing pains through the eyes, face and neck. These fluctuate in intensity and the extent to which they debilitate the Claimant varies. They interrupt her ability to look at screens, read or even move around. Activities such as cooking, map and timetable reading are difficult. The symptoms tend to respond to medication and the Claimant is then able to continue with her day. If the Claimant did not take medication she would be in pain throughout the day. She does not believe that she could have a period of functioning without the medication.
14. She also suffers from episodic attacks, during which she has to lie down and cannot proceed with her day at all.
15. The Claimant described that these migraines have a global impact on her life, including her ability to look after her children, to socialise and to go on holiday. The pain she suffers also has an impact on her mood and thus on her relationships.
16. The medical evidence produced by the Claimant included a report written by her consultant neurosurgeon Professor Goadsby at King's College Hospital London, dated 15 March 2023 indicates that the Claimant's condition is within the most disabled (for which I read effected) group of people. She had suffered from such migraines from at least 10 December 2019 when she first was consulted at King's College Hospital.
17. His report was written retrospectively about the Claimant as she was in 2020-2021, given that this was the relevant period of time for the claim. It is appropriate that the report should reflect the Claimant's status at that time.
18. The emails between the Claimant and Professor Goadsby in March 2020 with regard to the trans cranial machine indicate that the Claimant had constant pain,

every day at that time.

19. The Claimant also kept a migraine diary at that time, which indicated that she was suffering on the majority of days in March and April 2021. Even on the days she did not have a headache, she often felt washed out and hungover as a result of a previous headache. She was having to take medication almost every day.

### **Back pain**

20. The Claimant's significant back pain started in March 2020 with severe sciatica. She had previously had periods of pain, particularly after sports injuries. From March 2020, the Claimant found that she was in pain but was able to move with it. This deteriorated by June 2020 when she struggled to walk and to sit down and was reliant on strong painkillers. She also suffered from a 'drop foot' which caused her to trip over. She was not able to push a trolley in a supermarket and struggled to lift her toddler son and to bend to change his nappy. The Claimant became anxious and avoided going out. She was reliant on medications to be able to move around, but these caused significant side effects.
21. This condition worsened by October/November 2020 she spent a period where she could not leave the house, having to lie flat for most of the day. She was unable to wash herself or look after her son.
22. After she underwent nerve decompression in November 2020 she had to lie flat for a period of about 6 weeks. Thereafter she continued to have lower back pain, loss of sensation in her foot and sciatica.
23. The report by Mr Michael Mokawem FRCS, a Consultant Spinal Surgeon dated 18 November 2021 indicates that the Claimant underwent discectomy on 4 November 2020 and again on 24 November 2020. He indicates that the Claimant remains in pain and has problems standing up from a lying down position in November 2021.
24. The Respondent's Occupational Health report dated 5 October 2020 indicated that the Claimant had problems with the activities of daily living being 'substantially reduced'.

## **THE LAW**

### **22. Disability**

22.1. **Section 6(1) Equality Act 2010 (EqA)** states:

*"A person (P) has a disability if—*

*P has 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."*

22.2. **Part 1 of Schedule 1 to the EqA ;**

*“Long-term effects*

*The effect of 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*
- c. it is likely to last for the rest of the life of the person affected.*

*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.*

...

*Effect of medical treatment*

*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.*

*“Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.”*

23. ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) (‘the Guidance’) sets out:-

“that anything which occurs after the date of the discriminatory act will not be relevant to the consideration of definition of disability.”

24. The time at which the Tribunal is to consider the disability is the date of the alleged act of discrimination. This is also the relevant date when considering whether any impact is long term. **All Answers Ltd v W** 2021 IRLR 612, CA, set out that the Tribunal must look at the facts and circumstances existing at the date of the discrimination and not to events which occurred subsequently.

25. The Tribunal must take into account Statutory Guidance on the definition of Disability (2011) which stresses that it is important to consider the things that a person cannot do, or can only do with difficulty (B9). This is not offset by things that the person can do: **Aderemi v London and South Eastern Railway Ltd** 2013 ICR 391. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc ( Guidance D2 – D7)

26. In **Paterson v Commissioner of Police of the Metropolis** [2007] IRLR 763, Elias J said: "... when assessing the effect, the comparison is not with the population at large. As paragraphs A2 and A3 [of the then Guidance] make clear, what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out

if not impaired.”

27. To consider whether a condition meets the definition in the Equality Act, it must exist or be likely to exist for 12 months. The Tribunal should consider **SCA Packaging Limited v Boyle [2009] ICR 1056, HL**; which says that whether something is ‘likely’ is to be considered as to whether it could well happen. Information known at the time can be taken into consideration, but hindsight should not be used.
30. The burden of proving disability lies with the Claimant who must provide evidence of circumstances which fall within s.6 Equality Act 2010. Each disability must be considered independently.

### **Decision**

31. The Claimant asserts that she has two separate impairments under s.6 Equality Act 2010. The first is back pain. This is a physical pain which causes limitation of the Claimant’s ability to carry out certain tasks, or to limit her ability to move around. Pain also has a psychological impact in that the Claimant felt that she could not go out of the house, socialise with others and was tired and irritable. These are impairments in the sense that they impact on one’s ability to do normal day to day activities.
32. Secondly, the Claimant asserts that she suffers from migraines. These are severe headaches, which also cause an inability to carry on with normal day to day activities, along with the pain which is suffered. This too would amount to an impairment if the evidence supports that the criteria of s.6 EqA are met.

### **Back pain**

33. The Claimant’s evidence shows that prior to March 2020 her back pain was intermittent and mostly related to sports injuries. However, from approximately March 2020 onwards she started to experience more significant and intrusive pain. The Claimant was open and honest in her pre-employment questionnaire In June 2020 about her previous back pain when she said she had ‘recurring sciatica’.
34. Unfortunately, this condition deteriorated, due to its nature as a degenerative condition. By October/November 2020 the Claimant was severely restricted by her back pain. She was not able to leave the house, go shopping, push her child’s pram, or lift him and needed help at home to deal with tasks there. Despite surgery in November 2020, her restrictions continued to some degree up to 31 August 2021 when her contract was terminated. At that time she still could not carry or move shopping or her child and was not able to drive.
35. The tasks outlined above are all day to day activities. I am satisfied that the Claimant has shown that she was substantially affected by her disability with

regard to these activities.

36. With regard to the time period, I conclude that although she had suffered intermittently prior to March 2020 from back pain, it was in March 2020 that the pain related to the degenerative condition started to have a significant impact on her life. The evidence shows that those restrictions continued, even after the Claimant's surgeries in November 2020. By March 2021 she continued to have stiffness in her back and the restrictions on her ability to shop and to care for her child and to drive remained. This was a period of 12 months from the first indication of pain in the back which was disruptive to day to day activities.
37. Even if I am wrong on the Claimant having had 12 months of impairment as a result of back pain by March 2021, it was clear that she continued to have significant restriction on her day to day activities at that time. I am satisfied that it was possible, on a balance of probabilities, to say that it was likely that her pain and restriction would continue for a period of 12 months, or more. The result of the surgery had not been to cure the pain and this is what led to the restriction in activity.
38. I am therefore satisfied that the Claimant was disabled for the purposes of the Equality Act with regard to her back pain between November 2020 and 31 August 2021.

### **Migraine**

39. The Claimant has suffered with chronic daily migraines since childhood. They involve a throbbing pain in the head and neck, stabbing pains in the eyes and a sensitivity to light, sounds, smells and movement.
40. The Claimant described the activities which are affected by her migraines; including looking at screens, reading, language processing, decision making, map reading. She asserted that it affects her memory and concentration. It also affects her ability to hold a conversation and causes brain fog. All of these are daily activities. It would appear from the evidence given by the Claimant that the adverse effect on her was severe. The Claimant was absent from work as a result of the migraines.
41. In August 2019, the Claimant was suffering from headaches which were lasting several days and described as severe exacerbations.
42. In March 2020 she was suffering from pain everyday which was affecting her ability to carry out day to day tasks such as reading, cooking and screen work. These are day to day activities and the repetitive nature of her pain indicates a substantial affect. The Claimant referred to some episodes where she could not continue to function and had to lie down.
43. In May 2021 the Claimant wrote that her headaches were "more broken up", indicating that the severity fluctuated throughout the day. The Claimant believed

that this was due to the new medication she had been prescribed. She continued to experience substantial effects on her day to day activities and requested that the Respondent obtain a further Occupational health report about her. No such report was made and therefore the evidence is not up to date on that basis.

44. I am satisfied that the effects of the migraines were substantial and effected the Claimant on a regular basis throughout the relevant period of November 2020 to 31 August 2021.
45. I therefore conclude that the Claimant was disabled within the meaning of s.6 Equality Act 2010 with regard to both her back pain and her migraine, during the relevant period.
46. The Claimant's claims in respect of disability discrimination shall therefore be allowed to proceed.

### **Costs**

47. Having considered the evidence in the bundles provided to me, I do not consider that the Tribunal's ability to consider the issue of disability has been compromised by the provision of documents which have been annotated.
48. The Respondent is correct to assert that the documents to be placed before the Tribunal should be 'clean copies' unannotated and free from any comment. However, I also take into account the fact that the Claimant is a litigant and person and not familiar with the process of disclosure.
49. On this occasion, I do not consider it appropriate to make any costs order in respect of the Claimant's failure to provide 'clean copies' of documents. However, she must be aware that in future, any documents provided to the Tribunal must be free of any markings or writing.

Employment Judge Cowen

Date \_\_ 4 April 2024 \_\_\_\_\_

JUDGMENT SENT TO THE PARTIES ON

5 April 2024

FOR THE TRIBUNAL OFFICE

### **Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.