

Neutral Citation Number: [2024] EAT 55

Case No: EA-2023-000038-RS

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 15 May 2024

**Before:**

**JASON COPPEL KC, DEPUTY JUDGE OF THE HIGH COURT**

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**Between:**

**MS HAYLEY YOUNG**

**- and -**

**COMMISSIONER OF POLICE OF THE METROPOLIS**

**Appellant**

**Respondent**

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**Ms H Young** the **Appellant** in person  
**Mr A Sendall** (instructed by **Gowlings WLG (UK) LLP**) for the **Respondent**

Hearing date: 18 January 2024  
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**JUDGMENT**

## **SUMMARY**

### **DISABILITY DISCRIMINATION; MEANING OF DISABILITY**

The appellant had been dismissed following a series of absences on account of various reasons which she claimed were manifestations of an underlying condition of fibromyalgia, which satisfied the statutory definition of “disability”. The tribunal held that her symptoms, whilst substantial, were not due to fibromyalgia or any other underlying health condition and that she had not been disabled at the material time. The tribunal did not err in failing to accept that the appellant had suffered from fibromyalgia at the material time or in focusing its attention on whether the appellant had suffered from that or any other underlying health condition, in determining whether there had been a long-term, substantial impact on the appellant’s ability to carry out normal day-to-day activities at the material time.

**JASON COPPEL KC, DEPUTY JUDGE OF THE HIGH COURT:**

Background

1. The appellant was dismissed by the respondent from her position as a communications officer dealing with emergency 999/101 calls with effect from 19 November 2019 on account of her attendance level being unacceptable. The panel which decided to dismiss her based its decision on 17 occurrences of sickness absence, totaling 100 working days (see §6 of the employment tribunal’s judgment), over a 26-month period between February 2017 (when she had commenced employment) and April 2019. The employment tribunal analysed the appellant’s absences between June 2017 and April 2019 as attributable to various reasons which included digestive disorders, respiratory influenza, psychological disorders, genito-urinary conditions and musculoskeletal pain including significant ankle sprain, foot/leg injury, back injury, back and hip pain (§7 of the judgment).

2. The appellant claimed that she had been unfairly dismissed and had suffered disability discrimination, through being dismissed and as a result of various other aspects of her treatment by the respondent. In its judgment sent to the parties on 20 December 2022, the tribunal held that she had not been unfairly dismissed and that she had not had a “disability” at the material time, and so had not suffered disability discrimination. The appeal to this tribunal seeks to challenge the tribunal’s findings on the issue of disability and the appellant seeks a re-hearing of her disability discrimination claim by a freshly constituted tribunal.

The tribunal’s findings on “disability”

3. The first of the agreed issues on “disability” was framed as follows:

*“At the material time (between February 2018 and the date of dismissal on 9 November 2019) was the claimant disabled within the definition of section 6 of the Equality Act 2010 (EQA 2010) by reason of the physical and mental impairment of fibromyalgia”.*

4. It will be noted that the appellant’s case that she had been disabled at the material time was based upon her suffering from fibromyalgia. The evidence she relied upon in support of that claim

consisted of certain correspondence from medical practitioners. There was no expert or other oral evidence called on whether, and if so from when, the appellant had suffered from fibromyalgia; nor was there any medical report or other documentary evidence on that subject more detailed than the correspondence. As for the correspondence:

- (1) A letter from the appellant's GP dated 4 July 2019 stated a belief that various symptoms suffered by the appellant, including depression, tiredness, headaches, joint pain and tenderness were due to fibromyalgia (§9 of the judgment).
- (2) A letter from a physiotherapist dated 9 October 2020 stated that the appellant had "presented today with a diagnosis of fibromyalgia as of June 2019", which the tribunal understood to be a reference to the GP's letter of 4 July 2019. The physiotherapist's letter went on to say that that diagnosis "was then confirmed by our internal rheumatology team in August 2020" (§12 of the judgment). There was no further evidence before the tribunal of that (or any other) confirmatory diagnosis.
- (3) The appellant relied upon various items of correspondence from the Department of Work and Pensions awarding her the daily living and then mobility components of Personal Independence Payment and Universal Credit/Employment Support Allowance, which did not refer to fibromyalgia (§§15-16 of the judgment).

5. The tribunal held that, contrary to the belief expressed in the GP's letter, the adverse effects experienced by the appellant from July 2019 were not attributable to fibromyalgia. It stated (§59):

*".. The first reference to fibromyalgia is the GP's letter of 4 July 2019 as set out above. However we have carefully considered the weight that we can place upon this letter. There are obvious errors within this letter such as reference to a fall from 'a wall'. It is possible that the GP did not have an accurate picture of the claimant's initial fall at work. The GP attributes his reference to fibromyalgia to falls experienced by the claimant at work without reference to other falls experienced by the claimant. We have found that the claimant's evidence in relation to the falls that she has experienced is unreliable. The claimant has a tendency to downplay or omit references to falls she has experienced*

*outside work. The end result is a likelihood that the GP has not been provided with a comprehensive history of relevant events that could have given rise to musculoskeletal issues. The contemporaneous evidence of subsequent falls including the need for the trip to A&E and x-ray suggest that these are significant events that may well have given rise to some symptoms. There is a real risk that any belief of 'fibromyalgia' by the GP in July 2019 has been influenced by an absence of potential alternative reasons for the claimant's musculoskeletal pain such as subsequent accidents/falls. Fibromyalgia is by its nature, a difficult condition to identify. For these reasons we place considerably reduced weight upon this GP letter. There is no other medical evidence supporting the existence of fibromyalgia until the reference to the diagnosis in August 2020. Taking the entirety of the evidence into account we conclude that while the claimant has shown she had considerable symptoms during the material time we consider that it is more likely than not that these arose from conditions other than fibromyalgia which she had not mentioned in her original claim. The claimant has not shown on the balance of probability that the difficulties that she experienced with her day-to-day activities as of June/July 2019 were attributable to fibromyalgia."*

6. The tribunal proceeded to find that the appellant's symptoms had deteriorated following July 2019 (§61). That finding was based upon the DWP awards and upon the claimant having received a diagnosis of fibromyalgia from a hospital rheumatology team in August 2020 (which the tribunal accepted had occurred, on the balance of probabilities and notwithstanding the absence of first-hand evidence of that diagnosis). It stated (§61):

*"We consider that it is more likely than not that the claimant received a diagnosis of fibromyalgia in August 2020. Due to the length of time following the various falls experienced by the claimant as set out above and the claimant's ongoing symptoms, we consider this diagnosis to carry more weight. We conclude, by reference to both the DWP awards indicating a likely substantial adverse effect on the claimant's ability to carry out her day-to-day activities and the claimant's diagnosis, that the claimant was a disabled person by reason of fibromyalgia with effect from August 2020. The material time identified ends on 9 November 2019. We conclude that the claimant was not a disabled person*

*by reference to fibromyalgia during the material time.”*

7. The tribunal continued (§63):

*“We have considered whether any of the various absences that led to the claimant’s dismissal, can be attributed to fibromyalgia. All of these absences predate the claimant’s first mention of potential fibromyalgia. Further, potential causes other than fibromyalgia for the various absences can be found within the documentation, for example the claimant has been diagnosed with IBS and depression, she experienced repeated falls including identifiable ankle injuries that warranted x-ray in May 2018. We do not have reliable evidence to link any of the claimant 17 absences for work to any underlying health condition or in particular fibromyalgia either at the time of her dismissal or subsequently.”*

8. The tribunal therefore concluded that the appellant had not been disabled at the material time and that her claim of disability discrimination must fail for that reason (§64). The tribunal also noted that even if the appellant had been suffering from fibromyalgia as of July 2019, there was insufficient evidence to link the absences from work which had led to the appellant’s dismissal, and which had all preceded July 2019, to fibromyalgia. Therefore, in its view, the claims of disability discrimination “*appear destined to fail in any event*” (§65).

### The grounds of appeal

9. The first ground of appeal is that it was perverse for the tribunal to disagree with the opinion of the appellant’s GP that she was suffering from fibromyalgia in July 2019. I do not accept that this ground surmounts the high hurdle which is necessary to establish perversity. In support of the diagnosis of fibromyalgia in July 2019, the appellant had relied upon a single, briefly expressed conclusion of a non-specialist medical practitioner which – as the tribunal pointed out – was set out in a letter which contained significant factual errors. The tribunal gave detailed reasons in §59 for its decision to “*place considerably reduced weight*” upon the GP’s letter, none of which are themselves challenged in this appeal as perverse (or even as incorrect). Another tribunal might have deferred to the limited medical evidence relied upon by the appellant, but I cannot agree that it was perverse for

this tribunal to decline to do so.

10. The second ground of appeal is that it was perverse for the tribunal to conclude that the appellant was not suffering from fibromyalgia in July 2019 but to accept that she was suffering from fibromyalgia, and was a disabled person, from August 2020, when her symptoms were unchanged as at that latter date. Again, however, the tribunal gave reasons for its acceptance of fibromyalgia from August 2020, in contrast to July 2019, which are not challenged on this appeal as perverse (or even as incorrect). In relation to the latter date, the tribunal relied upon a specialist medical diagnosis which was not known to be affected by the same or similar errors as had been the GP's letter, as well as DWP awards. It also made an express finding in §61 that the appellant's symptoms had deteriorated between July 2019 and August 2020. In my judgment, these reasons were sufficient to provide a rational basis for the tribunal's acceptance that the appellant was suffering from fibromyalgia from August 2020 when she had not been suffering from fibromyalgia in July 2019. There was no contradiction between these findings.

11. The third ground of appeal is that the tribunal erred in placing weight, in §62 of the judgment, on the appellant's failure to identify a trigger for the onset of fibromyalgia. It had stated:

*“We also address the claimant's submission in respect of the cause of her fibromyalgia. The claimant also places significant emphasis on her first fall of February 2018 and alleges that this is the trigger for her subsequent development of fibromyalgia. While it is common ground between the parties that a fall potentially may trigger the onset of fibromyalgia, it is one of a host of potential causes and there is no medical evidence produced by the claimant providing any indication as to the cause of the claimant's fibromyalgia. Further, even if the claimant's fibromyalgia was triggered by a fall, as the claimant has experienced multiple falls and produced no reliable evidence commenting on potential triggers, we conclude that the claimant has not shown on the balance of probability that her fibromyalgia was triggered by her fall at work in February 2018 as alleged or indeed any other identifiable event.”*

12. The appellant's argument is that the tribunal erred in attributing “significant or perhaps

decisive weight” to the issue of a trigger event, thereby distracting it from the statutory criteria for disability. That is not a fair characterisation of the tribunal’s reasoning. The tribunal was of the view that the appellant was not suffering from fibromyalgia prior to August 2020 for the reasons described above. However, it recognised that if – as the appellant had maintained – her fibromyalgia had been triggered by an event in February 2018, that could serve to undermine the conclusion that fibromyalgia did not manifest itself until more than two years later. In §62, the tribunal was simply rejecting a submission which had been made by the appellant herself and which, if correct, would have called into question the tribunal’s preferred view of the date of onset of fibromyalgia.

13. By grounds 4, 5 and 6, which I take together, the appellant submits that the tribunal erred in prioritising or treating as determinative the diagnostic label of fibromyalgia when the appellant had relied upon her having an impairment described in more general terms (“a complex of leg, hip and back injuries” and “an underlying musculoskeletal condition”) and the tribunal had made findings which in substance accepted that, as of July 2019, she had suffered from an impairment sufficient to meet the statutory test of disability.

14. It is plainly correct, as a matter of law, that it is not necessary for “a physical or mental impairment” having “a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities” (s. 6(1) of the Equality Act 2010) to correspond to a specific medical diagnosis (see, for example, *Ministry of Defence v Hay* [2008] ICR 1247). It would be an error of law for a tribunal to decide that an impairment meeting the description in s. 6(1) was not a disability simply because it was not an identified medical condition. However, that is not what happened here:

- (1) It was the appellant’s own case, encapsulated in the agreed issue set out in §3 above, that she satisfied s. 6(1) of the Equality Act 2010 at the material time “by reason of the physical and mental impairment of fibromyalgia” (and see the first sentence of §59 of the judgment). True it is that she had used different and less specific descriptors in her ET1 and witness statement for the hearing, but the tribunal cannot be criticised for deciding the case that the parties, including the appellant, invited it to decide.



- (2) That the appellant had tied her case on “disability” to fibromyalgia was not an accident of pleading or case management. The absences which had led to her dismissal had had a range of immediate causes (see §1 above), many of which could have been discrete or short-term events which would not assist the appellant in establishing that she suffered from an impairment having a substantial and long-term adverse impact upon her ability to carry out day to day activities. Also, the tribunal pointed out that some of the reasons for absence had not been relied upon at all by the appellant in support of her claim to have been disabled at the material time (see §59: “it is more likely than not that [the appellant’s symptoms] arose from conditions other than fibromyalgia which she had not mentioned in her original claim”). Characterising the various reasons for her absences as manifestations of the same condition, namely fibromyalgia, was a considered legal strategy on the appellant’s part which sought to knit together discrete symptoms into an overarching, substantial and long-term impairment. That strategy was rejected by the tribunal on the facts, and I have rejected grounds one to three of the appeal which seek to challenge that conclusion of the tribunal. Contrary to ground six, the tribunal also considered whether there was any other underlying condition to which the appellant’s disparate symptoms could be attributed during the material period. This again does not evidence an erroneous focus on the need for a specific diagnosis but was a legitimate enquiry into whether there was anything to link disparate and potentially short-term symptoms so as to evidence a long-term, substantial impairment.
- (3) The position might be different if the tribunal had made findings which amounted in substance to a finding of disability at the material time if the appellant’s “target” of fibromyalgia were discounted. In fact, and as I have already noted, the tribunal considered whether the appellant’s absences from work had been due not merely to fibromyalgia but to any underlying health condition and concluded that they were not. It stated (§78, in the section on unfair dismissal): *“The claimant’s individual absences were not connected to her fibromyalgia or any underlying health condition linking the various reasons. This is a*

*scenario of intermittent absences due to a multitude of ailments.”* Similarly, in the section of its judgment concerned with the “disability” issue, the tribunal stated (§63): “*We do not have reliable evidence to link any of the claimant 17 absences for work to any underlying health condition or in particular fibromyalgia either at the time of her dismissal or subsequently*”. The tribunal accepted that the appellant had experienced “*considerable symptoms during the material time*” (§59) and that her symptoms were, from at least 8 July 2019, “*having a substantial detrimental effect on her ability to carry out her day-to-day activities*” (§58). However, its conclusion expressed in §§63 and 78 that these symptoms were not at that time attributable to any underlying health condition but evidenced a multitude of different ailments clearly indicates that, in its view, the appellant’s impairment did not, at the material time, satisfy the statutory condition of having a long-term, substantial adverse impact on her ability to carry out normal day to day activities. That was a conclusion which the tribunal was entitled to reach on the evidence.

15. Accordingly, I dismiss the appeal.