



# EMPLOYMENT TRIBUNALS

**Claimant**

A

v

**Respondent**

National Examining Body  
of Occupational Safety and Health

**Heard at:** Leicester

**On:** 18 April 2024

**Before:** Employment Judge Fredericks-Bowyer

**Appearances**

For the claimant: Mr L Murdin (Counsel)

For the respondent: Ms J Duane (Counsel)

## RESERVED JUDGMENT FROM PUBLIC PRELIMINARY HEARING

1. The claimant was not disabled as a result of her uterine fibroids at any point during the course of her employment.
2. The claimant's disability related complaints are dismissed. They are:-
  - 2.1 Direct discrimination;
  - 2.2 Indirect discrimination; and
  - 2.3 Discrimination for something arising from disability,
3. None of the claimant's claims survive this judgment and the final hearing listed stands vacated.

## REASONS

### Introduction

1. This is my reserved judgment. At the hearing, I heard evidence from the claimant and had access to a bundle of documents which ran to 155 pages. Page references in this judgment refer to pages in the bundle of documents.

### Anonymity Order

2. During the hearing, I asked Mr Murdin whether anyone had explored an application for an anonymity order with the claimant. The issue of disability relates to her uterine fibroids, and I heard deeply personal evidence from the claimant about the symptoms of that condition. It was clearly upsetting for the claimant to talk about those matters in this hearing. Mr Murdin made an application after taking instructions. The application was not opposed, and in my view the right of the claimant to her privacy in respect of these matters outweighs any public interest in the public knowing that she suffered from those symptoms.
3. I do not consider there is a realistic argument that the order inappropriately impinges the principles of open justice because (1) the respondent remains identifiable, (2) the public will know that someone encountered these issues and asserted that they had this disability, and (3) I can think of no legitimate interest the public could have in the claimant's private medical information and the personal impact of her condition upon her.
4. The terms of the anonymity order have been provided to the parties separately.

### Issues

5. This hearing was listed to consider whether the claimant was disabled at any time to which her claim relates (March 2022 to 20 April 2023). The legal framework for determining that issue is set out below. The respondent does not accept that the claimant was disabled at any point of her employment.

### Relevant law on disability

6. A person (P) has a disability they meet the criteria set out in section 6 Equality Act 2010:-

*“(1) 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 do normal day to day activities.”*

7. The claimant bears the burden of showing me that he meets this definition, on the balance of probabilities (Morgan v Staffordshire University [2002] IRLR 190; Tesco Stores Limited v Tennant [2020] IRLR 363). When determining the question of disability, I must take account of such guidance as I think necessary (paragraph 12, Schedule 1 Equality Act 2010). I consider it is necessary to take into account the government guidance “*Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability*” (“**Guidance**”). Such guidance is guidance only and should not be taken too literally or used to adopt a checklist approach (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19).

8. In Goodwin v Patent Office [1999] ICR 302, it was held that there are four limbs to the definition of disability and this is reflected in the legislation:-

8.1. Does the person have a physical or mental impairment?

8.2. Does that impairment have an adverse effect on their ability to carry out normal everyday activities?

8.3. Is that effect substantial?

8.4. Is that effect long-term?

9. The term 'substantial' is defined under s212 Equality Act 2010 as being "more than minor or trivial". Normal day to day activities are things people do on a regular basis such as shopping, reading, writing, conversing, getting washed and dressed, preparing food, eating, carrying out household tasks, walking and travelling, socialising and working (Guidance, D2 to D9). Normal day to day activities must be interpreted as including activities relevant to professional life (Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763).

10. The focus should be on what the claimant cannot do, rather than on what they can do. It is generally not permissible to weigh a balance between what can and what cannot be done, but considering what the claimant is able to do may assist in determining a factual dispute about the claimant cannot do. This principle was articulated by Mr Justice Cox in Ahmed v Metroline Travel Ltd UKEAT/0400/10/JOJ:-

*"Each case will, of course, depend on its own particular facts, and there will sometimes be cases where there is a factual dispute as to what a claimant is asserting that he cannot do. In such circumstances I agree with Mr Dyal that findings of fact as to what a claimant actually can do may throw significant light on what he cannot do".*

11. Paragraph 2(1) Schedule 1 Equality Act 2010 says:-

*"(1) 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.*

*(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal everyday activities, it is to be treated as continuing to have that effect if that effect is likely to recur."*

12. For current impairments which have not lasted 12 months, I should decide whether the substantial adverse effects of the condition are likely to last for at least 12 months, where 'likely' is defined as "could well happen" (C3 Guidance). 'Could well happen' is the meaning of 'likely' in respect of disability in the Equality Act 2010.

13. The issue of how long an impairment is likely to last is determined at the date of the alleged discriminatory act and not the date of the tribunal hearing (McDougall v Richmond Adult Community College [2008] ICR 431, CA). Subsequent events should not be taken into account.
14. An impairment is treated as having a substantial adverse effect if it 'could well happen' that the substantial adverse effect could occur if the person who may be disabled stopped implementing supportive or preventive measures, such as medical treatment (SCA Packaging Limited v Boyle [2009] ICR 1056).
15. The question to be determined is whether or not the claimant was disabled at the time to which the disability claim relates, and it must put itself into that time to resolve the Goodwin questions (All Answers Ltd v W [2021] IRLR 612). In that case, Lewis LJ said:-

*"A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months".*

### **Findings of fact about disability**

#### The onset of symptoms and approach to the evidence

16. The facts as I find them on the balance of probabilities are as follows.
17. The claimant relies on the physical symptoms associated with the uterine fibroids which were discovered at a hysteroscopy in December 2022. There is an immediate conflict in the evidence about when those symptoms began. The claimant's disability impact statement says, at paragraph 1:-

*"I began experiencing symptoms in February 2022. These symptoms included irregular periods every two weeks. The severity of my symptoms increased and blood tests in October 2022 showed I was anaemic..."*

18. The claimant clarified that the symptoms began with heavy bleeding between periods, which presented as additional periods. This eventually caused anaemia, which presented in the claimant with shortness of breath and general weakness. The claimant does not speak to a doctor about those symptoms until 17 October 2022 (page 65). There, the GP records that the claimant had been "*having period every 2 weeks for the last 4 months prior to this every 25-28 days*". On this timeline, the claimant's symptoms would have begun in June 2022, not February 2022. In terms of the onset of anaemia, it is relevant that her blood results on 4 October 2022 record her haemoglobin levels as "*borderline*", rather than "*abnormal*", which appears later on 24 October 2022.
19. The claimant was challenged about this point in cross examination. She says that she thinks she said that the symptoms had been persisting for "*4 or 5 months*". At best, this places the symptoms beginning in May 2022. This is a potentially

inconvenient 11 months before the dismissal which is the culmination of events which are the subject of the claimant's disability discrimination claim.

20. The claimant only spoke to her GP on one occasion between February 2022 and 17 October 2022. This was on 28 September 2022. Of the symptoms which the claimant relies upon in this hearing, only shortness of breath appears to have been mentioned. The contact was in the context of the claimant's relationship breakdown. The notes (page 67) read: "*patient separated from \*\*\*\*\*, felt nauseous and vomited, slept this morning to midday feels better, having constant chest tightness as upset, worse when she cries... occasional palpitations on and off.*" The claimant was signed off work for 10 days following this consultation with "*chest tightness and vomiting*" (page 115).
21. June 2022 is recorded as the start of the symptoms elsewhere in the claimant's medical notes. A letter from her GP dated 28 April 2023 begins "*since June 2022, she has been suffering with heavy periods and bleeding between her periods*". May 2022 is recorded as the start of symptoms in a letter from Spire Hospital dated 21 December 2022 (page 109), which reads "*you have been having irregular bleeding since May*". June 2022 is given again as a start date on page 111. The GP notes show a record from a face to face consultation on 26 April 2023 (page 57), which includes the words "*since last June 2022 heavy menstrual bleeding..*" and "*feels multiple health issues since June 2022*".
22. In light of these entries, the claimant was asked for an explanation. She said that she suffered with the symptoms for some time before thinking to go to a doctor. She said that she has had a lot on personally, including becoming a single mother, and that it was only when her sister saw her and how ill she had become that she contacted the GP. She said that she was probably vague about when the symptoms started, not thinking it important, and that that initial error has carried throughout the notes.
23. I am sceptical about this explanation for three reasons. First, the time of onset of such symptoms (which are indicative of life ending illnesses) is obviously of vital importance and it seems to me that that importance must have been communicated. Second, it seems highly unlikely that the claimant would be vague in an initial conversations with both her GP and the private clinician at Spire so that both professionals come out with inaccurate information: one recording May 2022 and the other recording June 2022. Third, the claimant never clarified or corrected the notes, despite them forming opening lines of the histories being used in referrals to other services or advice to the claimant.
24. In my view, it is more likely than not that the claimant reported accurately to her medical professionals. She told them that the symptoms had been persisting for 4 or 5 months, which would put their onset into the May or June 2022 window. She did not correct those records because they are accurate. The inaccuracy is in her disability impact statement. Even when orally clarifying the onset of the symptoms, the claimant did not overtly state "*February 2022*", she was vague about the date of onset even whilst explaining that she had been vague initially. The inescapable conclusion, I find, is that the symptoms began in May or June 2022. The claimant

more consistently reported, or allowed to be reported, June 2022. I therefore find the symptoms began in June 2022.

25. In my judgment, there are two possible reasons for the inaccuracy in the statement. The first is mistake. This seems unlikely to me, in a document which is verified by a statement of truth and which the claimant has read and answered questions about without flagging the error. The second is that February 2022 has been adopted because it is around 12 months before most of the events complained about in this claim, including dismissal on 20 April 2022. This seems more likely. Whichever is the case, the discrepancy causes me to treat the claimant's evidence in this hearing with a significant degree of caution. Where there is such caution, support from other documentation is crucial when finding facts on the balance of probabilities.

The claimant's evidence about substantial adverse effect on day-to-day activities

26. In the hearing, the claimant described how she would not feel able to go outside during periods of heavy bleeding. This evidence did not appear in her witness statement, but was given in response to questions about her condition. She said that the bleeding was profuse such that she could not be sure that blood would not be visible through her clothes. There is no evidence that this bleeding interfered with the claimant's work. The claimant also described being very busy with raising her child, including managing school and childcare and meeting needs. The claimant offered no oral evidence about how her condition interfered with these activities, other than being offered as a reason why she delayed with engaging with her doctor about the condition.
27. The claimant says, in her witness statement, that the injection she received to control her bleeding in January 2023 led to "*severe menopausal symptoms including severe fatigue, palpitations, migraines, insomnia, hot flushes and dizziness*". This is described as having "*a big impact on [her] life*" because she did online food shopping because she could not go to the shops due to "*due to severe fatigue and dizziness*". The claimant goes on to say that these caused her to require help with tasks such as gardening and washing and driving because she felt too unwell to drive "*when symptoms were severe*". The claimant says that she did not plan or attend any social activities and had to stop going to the gym for personal training as she would "*feel really tired and dizzy*".

The medical notes evidence

28. In addition to the points from the medical evidence outlined above, the following entries in the notes appear relevant:-
- 28.1. On 8 November 2022, the claimant was advised to contact the surgery or call 111 if she felt "*faint or dizzy*" (page 64) and that her presentation had "*no fainting or dizzy spells*" (page 113);
- 28.2. On 14 November 2022, the claimant's GP made a gynaecology referral which included the comment that her presentation is "*not associated with fainting or dizzy spells but feels quite weak*" (page 111);

- 28.3. On 21 December 2022, the claimant reported bleeding every 2 weeks across early December, with associated cramping pains, with the patient being *“upset by this as effecting life”* (page 62);
- 28.4. On 23 December 2022, the claimant was issued with further iron tablets and her iron levels were described as *“satisfactory”* (page 61);
- 28.5. On 23 December 2022, the claimant is advised *“your blood results show your haemoglobin has significantly improved but iron stores remain low”* (page 61);
- 28.6. On 9 January 2023, the claimant wrote to her GP (page 101) and described having *“worsening symptoms”* and *“struggling a lot to cope with all the heavy bleeding during periods”*;
- 28.7. On 20 February 2022, the claimant had her second injection and reported that, after the first injection, she was *“feeling well”* and had experienced *“no unwanted s.e [side effects]”* (page 59);
- 28.8. On 20 March 2022, the claimant had her third injection and no side effects are recorded as being reported (page 59);
- 28.9. On 23 March 2022, the claimant was issued with more iron tablets (page 58);
- 28.10. On 30 March 2022, the claimant was signed off work with *“work-related stress”* (page 58);
- 28.11. On 7 May 2023, the claimant had vaginal hysterectomy with conservation of ovaries, and was discharged from hospital the same day (page 57); and
- 28.12. On 15 May 2023, the claimant attended a wound clinic where she reported *“intermittent pain”* (page 56).

Factual findings and cessation of symptoms

29. The claimant had surgery, which removed the fibroids as well as her uterus, on 7 May 2023. From this date, she no longer had the fibroids condition which she says caused her to be disabled. In her evidence, she said that her recovery took several months. There was an initial period of 8 weeks where she said she needed assistance with personal care and household chores. She then said that *“to avoid complications, I had to avoid lifting heavy things for months”*. She says that she has still not returned to long walks, gym use, or personal training. In closing submissions, Mr Murdin suggested that the fibroids condition should still be considered to have had impact for around 6-8 weeks after surgery. I accept that it would take around this long to recover from significant surgery, but I am less persuaded that the impact would be as severe as the claimant implies in her statement. None of the documentary evidence or advice provided in the bundle suggests the claimant should avoid heavy lifting for months.

30. Indeed, I am concerned that the claimant has exaggerated or mis-remembered aspects of this recovery which has had the effect of (1) extending the time she was symptomatic with her condition, and (2) over-emphasising the impact of those symptoms upon her. This concern is what led me to be cautious about the claimant's evidence overall, and adopt the approach outlined earlier where I am guided by the support offered from the contemporaneous documents in the bundle. Where the documentary evidence directly contradicts the claimant's evidence, I prefer the documentary evidence.

31. Adopting that approach, I find the following facts about the claimant's condition:-

31.1. The claimant began to experience heavy and more regular bleeding from June 2022;

31.2. The claimant struggled with the amount of bleeding, which made her want to go out less during the bleeding;

31.3. The claimant became anaemic in October 2022 which caused her to feel tired and weak but this was generally resolved as an acute condition by 23 December 2022 and was not a concern at all by May 2023 when she had her surgery;

31.4. The claimant did not suffer any dizziness or palpitations and she did not contact anyone as she was advised to do if she did experience those; and

31.5. The claimant felt well after her first injection in January 2023 and had no unwanted side effects, as she reported at the time of her second injection in February 2023 when she had a second injection which did not cause a report of side effects.

32. It follows that I do not accept that the claimant had any of the menopausal symptoms she claims she had following her injections. No symptoms or side effects were reported to her GP or by her specialist. I do not take her evidence at face value for the reasons outlined above. Those injections also stopped the bleeding.

33. The claimant said that her symptoms impacted her on the ways set out at paragraphs 26 and 27 above. I have found that the claimant did not have the dizziness which she emphasised as causing most of those effects. I accept that the claimant was reluctant to go out when she was bleeding through clothes and pads, as she described. This is what, in my view, she referred to when she told the doctor that she was struggling to manage her symptoms. I do not consider that the claimant was unable to go to the shops generally, or drive, or was unable to do any of the other things she said she could not do, or could do with difficulty, as a result of her condition. It is telling, in my view, that the claimant linked her not going to the gym or having personal training with how busy she had also become following the breakdown of her relationship. That breakdown, and the physical impact upon her, is recorded in her medical notes.



34. Consequently, the only impact I find on the claimant's life caused by her condition was some weakness and tiredness associated with anaemia which made things more difficult, and a reluctance to go outside when she was bleeding.

### **Conclusions on disability**

*Did the claimant have a mental or physical impairment during the time of her employment?*

35. The claimant had uterine fibroids which caused her symptoms from June 2022 until her uterus was removed in May 2023. Her employment ended prior to that removal, and so the claimant did have a physical impairment during the time of her employment.

*Does that impairment have an adverse effect on their ability to carry out normal everyday activities?*

36. I have found that the claimant was reluctant to go out during the time of her bleeding. She was, though, able to go out. She was worried about bleeding, but performed mandatory activities. I have not accepted the impact on the day to day activities the claimant alleges. I have not found there was an adverse effect on the claimant's shopping, driving, or generally managing her life as she alleged. I have found that the claimant's stopping going to the gym and having personal training was more likely a result of her other personal life circumstances than her condition because this is how she placed those things into context.

37. A reluctance to go outside necessarily means that there is a reluctance to engage in normal day-to-day activities on days where the fibroids caused heavy bleeding. This will have an adverse effect on the claimant's ability to carry out normal everyday activities.

*Is that adverse effect substantial?*

38. Here, I must consider whether a reluctance to go outside during symptomatic episodes represents a "*more than minor or trivial*" adverse effect on day to day activities. During the adverse impact caused by the condition, the claimant was able to do her work. She was able to manage her children. She was able to go about her usual day to day activities without concern when not bleeding. She was capable of doing all of those things when she was symptomatic, but with anxiety about managing that bleeding.

39. In my judgment, the claimant was able to continue with her day to day activities and, to the extent she did not, that was by choice rather than by necessity or because her symptoms made those activities too difficult to achieve. A reluctance to go outside is, in my judgment, a minor adverse effect because, by definition, the claimant was able to engage in those activities but she chose not to.

40. I do not consider that the claimant's fibroids caused symptoms which had a substantial adverse effect on her day to day activities. Only one of the claimed effects was sustained on the facts found from the evidence, in circumstances where the claimant's evidence could not be trusted. That one effect was minor.

Is that adverse effect long-term?

41. There is no substantial effect on day to day activities, and so there is nothing to consider in terms of long term effect.

42. In any case, the adverse effect was caused by the bleeding, which resolved itself in January 2023 with the injections. If I had found substantial adverse effect, there would not be any adverse effect beyond that point. Most of the matters complained of in this claim happen after this date. For those that occurred during the period of the bleeding, I would need to consider that it “could well happen” that the symptoms would last more than 12 months. In my judgment, I would not find that. The claimant was seeing a private doctor, who immediately recommended the injections. The claimant was then given those injections within three months, and it was known that those hormone drugs would resolve the bleeding.

Overall conclusion and consequences on disability

43. The claimant was not disabled during her employment. Her disability claims fall to be dismissed because she did not have the protected characteristic required to bring them. These are her only claims. All claims under this claim number are dismissed.

Signed:  
**Employment Judge Fredericks-Bowyer**

Date: 20 April 2024