



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000291/2024

Hearing Held on 30<sup>th</sup> August 2024

Employment Judge Hendry

**A**

**Claimant  
Represented by:  
Ms G Donald, Solicitor**

**Royal Mail Group Ltd**

**Respondent  
Represented by:  
Dr A Gibson, Solicitor**

**JUDGMENT SUBJECT TO A RULE 50(3)(d) RESTRICTED REPORTING  
ORDER**

### **Reasons**

**The Judgment of the Tribunal is that the claimant is a disabled person in terms of Section 6 of the Equality Act 2010 in respect of the following effects namely joint pain in her wrists and ankles and bowel incontinence.**

1. The claimant in her ET1 makes various claims including claims for disability discrimination. The respondent opposes the claims and argues that the claimant was not disabled at the relevant time which is December 2023.

2. The case proceeded to a Case Management Hearing on the 13<sup>th</sup> of May 2024. At that point the claimant did not have legal representation. She has since that point instructed solicitors and was represented at the hearing by Ms Donald.

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**Issues**

3. The principal issue was to determine whether or not the claimant was disabled in terms of Section 6 of the Equality Act 2010 in relation to either/or the condition of fatigue including joint pain and bowel incontinence and if the respondent was or should have been reasonably aware of this.
4. The claimant's solicitors put the matter in the following way namely that the claimant suffered from an undiagnosed illness that included severe joint pain and fatigue along with severe bowel symptoms of incontinence.
5. The respondent was sceptical about the claimant's alleged disabilities. They raised the claimant's participation in what they described as a strenuous sporting activity namely a charity swim and suggested that the claimant's purported physical impairments could not, therefore, have had a substantial adverse impact on her ability to perform normal day to day activities. They suggested that she was acting in bad faith and that it suited her as the mother of three young children not to return to work. They also pointed to the terms of two Occupational Health reports which they had obtained in 2023 which indicated that the claimant was not regarded as disabled in terms of the Equality Act.

**Evidence**

6. The claimant gave evidence on her own behalf. A Joint Bundle of documents was lodged to which the Tribunal was directed. These included numerous medical records which the claimant had recovered from her GP practice.

7. At the close of the hearing the Tribunal heard short oral submissions. The respondent's solicitor also lodged detailed written submissions.
8. In order to understand the issues raised at the hearing it is helpful to consider the following background matters which I understood to be uncontentious before setting out the contentious findings.

### Background

9. The claimant is employed by the respondent as a Customer Operations Manager at their Inverness Delivery Office. Her employment commenced on 12<sup>th</sup> February 2018 and is continuing. The claimant was due to return from a period of maternity leave in January 2023. On the day that she was due to return from maternity leave she submitted a Fit Note which indicated that she was unfit for work. Thereafter, she submitted Fit Notes for the period through to 4<sup>th</sup> February 2024 when she commenced another period of maternity leave. Her GP had noted: *"Fatigue has been the reason for her absence at each Fit Note covering this 13 month period"*.
10. The respondent referred the claimant to their Occupational Health providers in 2023. A Report dated 19<sup>th</sup> of May 2023 was prepared following a telephone consultation which concluded that the claimant was not disabled for the purposes of the Equality Act 2010. The Report stated that the claimant was unfit for work as she had reported experiencing significant joint pain and fatigue as well as episodes of bowel incontinence. It was also noted that the claimant reported a broken sleep pattern and that she was unable to exercise due to pain. The author was unable to confirm a likely return date. The Report made no reference to the claimant preparing for a charity swim.

11. A second Occupational Health Report was prepared in August following a telephone discussion. It also concluded that the claimant was not disabled because the symptoms had not lasted 12 months.
- 5 12. On the 25<sup>th</sup> of June 2023 the claimant took part in a charity swim called the “Kessock Ferry Swim 2023” in which 270 people participated in a 1200 metre swim across tidal narrows following the old ferry route between South and North Kessock on the 25<sup>th</sup> of June 2023.
- 10 13. The claimant’s Line Manager met the claimant on the 4<sup>th</sup> of June asking an explanation why whilst unfit for work she had taken part in the swim. The claimant accepted that she had taken part in the swim but indicated that her GP had advised her that cold water immersion was beneficial for her joints and mental health. He met her again on the 26<sup>th</sup> of July 2023 to discuss her  
15 return to work but at that meeting the claimant advised him that she was pregnant and experiencing bouts of morning sickness.
14. The claimant was referred again to Occupational Health. She spoke to an adviser by telephone. The subsequent Report was prepared (dated 29<sup>th</sup>  
20 August 2023) and indicated that the claimant would not be considered to be disabled for the purposes of the Equality Act 2010. The Report indicated the claimant had told the Occupational Health Adviser that she had widespread joint pain and fatigue and she had been given a potential diagnosis of Fibromyalgia. The Report then went on to state that the  
25 claimant had advised that her daily activities such as washing, dressing, housework and cooking were significantly affected by her symptoms and that she relied on her husband for support.
15. The claimant submitted a Fit Note to her employers dated 8 November 2023  
30 for a period of three months. The reasons for her absence was given as “fatigue”. It was also stated: “associated with joint and bowel symptoms awaiting specialist review. Currently also pregnant with persistent nausea and vomiting.”
- 35 16. **Medical Information (GP Notes Entries)**

1. 16/12/2022 - telephone encounter - ongoing pain, no better no worse, just the same. Sometimes palpitations with it.
- 5 2. 26/01/2023 – telephone triage encounter – 1) blood in stool passed couple of days - fresh blood on wiping, very small amount, no palpable lumps, can't see anything. No change in bowel habit, not constipated, no change in weight. Youngest child just turned 1. No relevant family. Make checks (history). Imp (like either internal haemorrhoids or fishers, no red  
10 flags).
3. 09/02/2023 – telephone encounter – 1) PR bleeding mostly on wiping, also with mucus. Bowels reg. No ABDO pain. 2) Chest pain - no changes had R tests. 3) Pain in wrists or ankles – no changes, blood NAD.  
15 4) Fatigue – Await outstanding investigations and review then.
4. 23/23 – Pain in arm, Hx as per call. No change in activity. No heavy lifting. No periods of long travel or immobility, not working currently. Young children x, 3 at home.  
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5. 24/23 – telephone encounter – Ongoing Fatigue and Joint pains, no joint swelling, no stiffness, generalised pain.
- 25 6. 25/4/23 – clinical management plan agreed. Discuss clinical dialogue from Neurology noting loaded rectum – wonder if there is an element of overflow diarrhoea, so will trial Laxido to try and clear bowels.....Right wrist no bony tenderness, good ROM. No swelling Left wrist some tenderness over wrist, good ROM no swelling. Mild tenderness over breastbone, MCP joint, squeeze negative....Patient reviewed, ongoing  
30 fatigue for last year or so feels like she needs to ration her energy through day and doesn't have enough to do everything she needs to. Never wakes up feeling rested. Is still waking up a couple of times through the night to feed son but is in bed between 10 and 8. Joint pains affect wrists, ankles and chest. No pattern as to when these flare up other than it is

worse if she has another illness such URTI. No swelling or joint stiffness. Other main issues are with bowels opens 2-3 times a day, very soft/loose but not watery. Some mucus in bowels and occasionally streak of blood.....Over last 8-9 months has had episodes of bowel incontinence. Needs to rush to the toilet and occasionally hasn't made it in time and gets period like cramps before opening bowels.

7. 15/5/2023 - Diagnosis fatigue. Reason – fatigue associated with joint and bowel symptoms – has been referred to Rheumatology and Gastroenterology for further assessment...Urinary tract US has confirmed two tiny stones on lower L kidney but suspicious these are not cause of the pain. Note comment on faecal loading on XR.

8. 13/7/23. Telephone encounter – looking for letter to give boss to stay “cold water swimming”. Cold water immersion is good for you she posted on FBK and then this was shown to her boss – who questioned if appropriate and if so would need a written letter from GP. was told by EH this was ok to do. I explained difficult to state if every new activity appropriate or not (I know very little of cold water immersion) but in general terms swimming non load bearing exercise and helps Joints however, not realistic to state every new activity and inform employer. If employer is questioning medical fitness then there are proper channels to go through. They have issued Med 3 form and OCCY health also assessed not fit to work. If issues then they can contact us directly and request what information etc.

Dr Rachida Khamam.

## 17. Clinical Advice Service

1. 29/3/2023 – I have looked at her and am struck how loaded her rectum with faeces.

2. A letter was sent by Dr Hazel Young the Consultant Physician/Gastroenterologist to the claimant on 2 May 2023. It read:

5       *"Your GP has been in touch regarding the problems you have been having with your bowels for the last few months. All the test results we have available to us so far are reassuring and therefore, if you've not already done so, I would be very keen for you to try an anti-diarrhoeal tablet such as Loperamide to see if this will help control your symptoms as we try to work out what might be going on."*

18.   **Occupational Health Report 19/5/23**

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15       *"Thank you for referring A to Occupational Health. I have consulted with her today 19/5/2023 regarding issues at work relating to fatigue, joint pain and bowel issues.....A has been absent from work since 30/1/2023. Her current fit note runs until 26/6/23. A has reported experiencing significant fatigue, joint pain especially in her wrists and ankles and palpitations. Investigations have been carried out regarding her reported fatigue and palpitations and her GP and Cardiologist are currently reviewing results with a view to deciding on whether to carry out further investigations or even commence treatment. No diagnosis has yet been made. She remains under the care of her GP and Rheumatologist regarding the imported joint pain and appropriate medications. I can prescribe no formal diagnosis for the cause of A's joint pain as being determined.*

25       *A has advised she is experiencing bowel incontinence. Appropriate investigations and treatment have been carried out. Further investigations are to take place under the care of our Gastroenterologist and no diagnosis has yet been concluded.....A's symptoms would appear to impact on her activities of daily living. She reports a broken sleep pattern and states she is unable to exercise due to her pain. She advises she often experiences many frequent visits to the toilet and has episodes of bowel incontinence.....*

30       *Disability advice*

35       *"In my opinion A is not covered by the Equality Act. – because her issues have not lasted longer than 12 months."*

19.   The claimant received a letter from her Line Manager on 17 July 2023 headed "Your absence from work":

40       *"Following from the last meeting we had on 04/7/23 where we have discussed your current absence from work. I was pleased to hear you are starting to feel better and able to engage with outdoor activities. I would like to arrange a meeting with you to discuss return to work plan as I trust I will be able to facilitate phased return to work that will support your recovery."*

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20. The claimant received a letter from her Gastroenterologist on 25 August 2023 indicating that it was unlikely that her symptoms were due to Inflammatory Bowel Disease. The symptoms she described could be due to Irritable Bowel and she was on an urgent waiting list for a clinical appointment with a view to further investigations being carried.

21. **Second Occupational Health Report August 2023**

*"During the consultation today she made me aware of multiple conditions, unfortunately, I am unable to address all these in the time allocated for a standard occupational health assessment. I have concentrated on the most pertinent. If management require additional information regarding the other health issues we wish a further referral on request and double appointment.*

*She tells me she is 13 weeks pregnant. She reports having severe nausea and vomiting. She is being monitored by her GP due to the potential risk of dehydration.*

*In addition she tells me she has widespread joint pain and fatigue. She has been given a potential diagnosis of Fibromyalgia however this is not confirmed. She has been referred to a specialist for an opinion. She needs multiple medications including strong pain relief.*

*She tells me that her daily activities such as washing, dressing, housework and cooking are significantly affected by her symptoms. She tells me she relies heavily on her partner for support. A is in my clinical opinion unfit for work in any capacity due to the severity of her ongoing symptoms affecting her daily activities.*

*Disability Advice*

*My interpretation of the relevant UK registration is that A's condition/impairment is unlikely to be considered a disability because it – does not last longer than 12 months nor is likely to last longer than 12 months (the appointment was for 45 minutes)."*

**Additional Findings**

22. The claimant lives in Muir of Ord some 14/15 miles from Inverness. She has always been a keen swimmer and worked at one point as a Lifeguard. She promised to try and support a friend who suffers from muscular sclerosis who intended trying to swim the annual Kessock Charity swim if she was well enough to do so. Her swim was untimed. To prepare she would sit in a



barrel of cold water in her garden. She did this for a few weeks prior to the swim. She believed that this was sufficient preparation. The event was not a race but had to be completed before the tide changed in or around an hour from the start. The swimmers were accompanied by support vessels.

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23. The claimant had 3 young children under five years of age and was pregnant with her fourth child in December 2023.

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24. The claimant has reported a number of medial issues to her GP and had been referred for various investigatory tests. In particular she has reported fatigue, joint pain and bowel incontinence.

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25. The Occupational Health assessments that took place were by telephone. She was asked about exercise at the second Occupational Health encounter. She indicated that she was not exercising.

26. The claimant's husband is a police officer and works full time.

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27. In September 2023 the claimant was successful in obtaining a "blue" parking card from the local authority which is provided for those who are disabled (JB174). The claimant was awarded adult disability payment in or about October 2023 (JB196).

### **Disability Findings**

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28. The claimant has had persistent joint pain for some years prior to the relevant date in December 2023. She has had bowel incontinence from 2022. Both of these symptoms have an adverse impact on her life.

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29. In relation to her joint pain this makes it difficult to carry out routine housework as the pain in her hands affects her grip and ability to squeeze and hold objects. If she does this the pain will significantly increase. It also limits her walking. It also interrupts her sleeping and causes additional tiredness. The joint pain in her right and left ankles has a substantial impact

on the claimant's ability to carry out day to day activities such as cleaning, looking after her children, standing and walking. The claimant regularly takes painkillers for the joint pain.

5 30. In relation to bowel incontinence the claimant has to plan her day around access to a toilet and this has a substantial impact on what activities she can carry out and the time she can spend on them. It makes it difficult for her to leave home for any length of time as there can be no guarantee she will be able to get speedy access to a toilet. It has a substantial impact on  
10 her day to day activities.

31. The impacts on the claimant's life and her ability to carry out day to day activities and to work were and are substantial. The effects are long term. As at December 2023 both symptoms had persisted for in excess of a year.

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### **Witnesses**

32. The claimant was a confident witness. I concluded that she was generally credible and reliable as a witness. The one area of her evidence which was  
20 not particularly persuasive related to her final Occupational Health encounter. Although she says the context to the question posed to her about taking exercise was of her having a 'bad day' (and I accept that on some days her various symptoms particularly joint pain are worse than on others) she said she did not exercise meaning not regularly. At the time of  
25 the appointment she was considering if she would be fit enough to take part in the charity swim. It does seem odd that she made no mention of this or the fact she was training for the event by immersion in cold water. She might have mentioned this in the context that she thought it would be beneficial for her joint pain. My belief is that she was probably being  
30 somewhat guarded in what she said and not volunteering information. Conditioning her body to a cold water swim is not perhaps strictly exercise but it is preparation for a relatively strenuous event.

33. Dr Gibson suggested that it was impossible for the claimant to have completed the swim without training. I did not accept he could be so adamant about that given that although the swim took place in the sea and had to be finished in about an hour it does not seem to require a particularly fast pace. Given that the claimant is relatively young and an experienced swimmer I am prepared to accept her evidence on that matter. Even if she had trained for the event unless that training itself was inconsistent with her symptoms, and there was no medical evidence to suggest that, then taking part does not in some way disprove the existence of these symptoms. The claimant would have been playing a very long game indeed to have started complaining about joint pain and bowel incontinence to her GP and to subject herself to the various investigations that have taken place. In short it seems an improbable suggestion.

### 15 **Submissions**

34. Ms Donald first of all took the Tribunal through the essential requirements that the claimant had to prove to come within the ambit of the Act. She had two key ailments namely joint pain and bowel incontinence. Her evidence that the severity of these symptoms varied but that they were particularly bad for four or five days every week. They had a severe impact on her day to day activities. She had given evidence about problems gripping objects, shopping, cooking and so forth.

35. The solicitor turned to the issues that had been raised in the claimant's participation in the charity swim. She accepted that an average swimmer might struggle with the swim but the claimant was a keen swimmer and had been a life guard. The pace was akin to walking pace to cover the 1200 metres in less than an hour. The last Fit Note had been issued signing her off work for three months and so the symptoms documented in the GP's notes were documented as lasting at least until the end of this period which was longer than a year.

36. The claimant's evidence should be taken as being credible and reliable and consistent with the medical evidence provided.

5 37. The respondent's solicitor set out the definition of disability under section 6 of the Equality Act 2010 and reminded the Tribunal that the burden of proof was on the claimant to show that she satisfied the requirement that her disability had an impact on her normal day to day activities. He made reference to the Guidance and Code. His position was that the correct approach in this case was for the Tribunal to look at the evidence by  
10 referring to the four questions (***Goodwin v Patent Office***) namely whether the claimant did have a mental and or physical impairment, did the impairment affect the claimant's ability to carry out normal day to day activities, was the adverse condition substantial and was the adverse condition long term.

15 38. He took the Tribunal to the guidance given by Justice Underhill in the case of ***J v DLA Piper UK LLP*** [2010] ICR 1052 EAT. This was a case where the existence of an impairment was disputed. The Judge suggested that it would make sense for a Tribunal to start by making findings about whether  
20 the claimant's ability to carry out normal day to day activities was adversely affected on a long-term basis and then to consider the question of her impairment in light of those findings. As HHJ Auerbach observed in the case of ***Igweik v TSB Bank PLC*** the lack of cogent medical evidence might affect the outcome of a disability claim as it could legitimately lead to a  
25 finding that the claim has not been made out.

39. The material time during which the claimant alleges she was subjected to acts of disability discrimination in December 2023 the issue is whether or not she was disabled at this point and also at this material time whether the  
30 impairment has a long-term effect.

40. The solicitor pointed out there was no statutory definition of physical impairment and that the physical impairment he relied on was an undiagnosed illness that includes severe joint pain and fatigue along with

severe bowel symptoms. In the **DLA Piper** case the EAT accepted there would be cases where identifying the nature of the impairment in question involves difficult medical questions and that in most cases it would be easier and legitimate for the Tribunal to “park that issue and first consider adverse effect”. However, the EAT did not go so far as to say that the impairment issue can be ignored. It is not always necessary to identify an underlying disease or trauma where the claimant’s symptoms clearly indicate the claimant is suffering physical impairment. However, as here where a claimant is seeking to rely on a number of potential conditions and it is unclear which condition might have led to the various symptoms it is important that the Tribunal makes clear findings as to the nature of the disability and which symptoms are attributable to it.

41. Reference was made to the case of **Morgan Stanley International v Posavec** EAT0209/13 and the need to identify the nature of the disability and make findings as to which symptoms were attributable to the conditions. It is important here to recall that the claimant cannot rely on pregnancy and the transient symptoms which are attached to it as they do not last longer than 12 months. The respondent’s position was that the condition clearly did not affect the claimant’s ability to carry out her day to day activities.

42. Turning to the facts of the case, he reminded the Tribunal, that the claimant was a mother to 3 children under the age of 5 and had become pregnant with a fourth in June 2023. Her husband worked full time and they lived on their own in a remote area. In June 2023 the claimant swam 1.2 kilometres. It was “inconceivable that she did not train for this event”. Her evidence was not credible that she did not train for the event. She said that she was given medical advice that cold water swimming would be good for her. There was no reference to this in her medical notes. Other than the claimant there was no evidence supporting this contention.

43. The claimant was being untruthful in her evidence. The Tribunal also had to consider whether the condition was long term. In the case of **Tesco Stores Limited v Tennant** UKEAT/01617/2019 the EAT confirmed that an impairment must have a long-term effect at the time that the alleged acts of

discrimination occurred. If it had not lasted at least 12 months at the time the alleged discriminatory act then it will not meet the definition unless it could be shown that the time of the alleged discriminatory act the condition was likely to last 12 months or more.

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## Discussion and Decision

### Disability Status

44. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability contained in Section 6(1) of the Equality Act (the Act) which provides:

***“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.”***

45. Schedule 1 of the Act contains supplementary provisions in relation to the determination of disability. Paragraph 2 is in these terms:

***“2(1) The effect of an impairment is long-term if- (a) it has lasted 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 life of the person affected.”***

46. Paragraph 5 states:

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***“5 (1) 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.”***

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47. It should be noted that the “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (the Guidance) does not impose legal obligations, but the Tribunal must take it into account where relevant. The Guidance at paragraph A8 states:

***“It is not necessary to consider how an impairment is caused... What is important to consider is the effect of an impairment, not its cause.”***

- 5     48.     The Guidance at paragraph B1 deals with the meaning of “**substantial adverse effect**” and provides:

10            ***“The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.”*** Paragraphs B4 and B5 say: ***“An impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on***  
15 ***more than one activity, when taken together, could result in an overall substantial adverse effect. For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of day-to-day activities such as***  
20 ***getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.”***

- 25     49.     Paragraph B1 should be read in conjunction with Section D of the Guidance 15, which considers what is meant by “**normal day-to-day activities**”. The paragraph states that it is not possible to provide an exhaustive list of day to-day activities but ***“In general, day-to-day activities are things that***  
30 ***people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.”*** The Equality and Human Rights Commission: Code of Practice on Employment  
35 (2011) at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that: ***“There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.”*** It goes on:

***“Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).”***

50. In the case of ***Goodwin v Patent Office*** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are: (1) Does the person have a physical or mental impairment? (2) Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities? (3) Is that effect substantial? (4) Is that effect long-term?
51. The Act does not require a diagnosed condition as a prerequisite for a finding that someone is disabled. However, the lack of a diagnoses which usually also comes with an indication of the likely duration or course of the illness and the expected effects provides important information. In this case the claimant has symptoms or effects but the condition or conditions have not been diagnosed. She has faced numerous investigatory tests and examinations which so far have identified some matters such as kidney stones but have been unable to pinpoint a cause or causes of her joint pain, bowel incontinence and fatigue.
52. As a general rule there is always a danger in too closely analysing GP records. We did not have the authors of the records to assist. Such records are there to record the nature of the complaint/symptoms and treatment offered but not every exchange is routinely recorded. They are not verbatim records. Nevertheless, they provide corroboration that the claimant has been seeing her GP and complaining about the symptoms she has experienced for some time.



53. The first Occupational Health Report indicates that the claimant is not likely to be disabled in terms of the Act because “her issues” have not lasted 12 months. The Report is unclear what information they are founding on or their reasoning for this conclusion. They do not say for example that the GP records were reviewed or that the claimant pinpointed when the conditions began. I suspect that the second report may have just followed the terms of the first in this regard. There was certainly the possible complication of the claimant’s multiple pregnancies but there is nothing in the GP notes or the reports to suggest that the symptoms she suffered for these periods, straddling as they do two pregnancies were directly related to a current pregnancy and therefore only likely to last during the pregnancy.
54. The GP records first record fatigue as being a condition or symptom on the 9 February 2023. It could be assumed that the GP used the term as being something more than tiredness. The claimant certainly describes struggling to get out of bed but also associates this with joint pain and lack of sleep.
55. The GP records are clear that in relation to joint pain this had lasted since the birth of the claimant’s first child some years earlier (JBp150). The bowel issues seem to have been noted as having been an issue by her GP in a referral in 27/4/2023 for between 8-9 months (JB148). Unfortunately, records lodged start in December 2022.
56. The respondent’s agent put it to the claimant that with three young children and a husband who worked full time it would be natural to be fatigued in the sense of being very tired. He described the claimant living in a remote area as adding to her difficulties. The claimant in fact lives close to Inverness and I am not sure the term remote can be usefully applied but the more general point is a valid one. It is not clear whether the GP is using this as a broad description of the impact of the two other main symptoms (joint pain and bowel incontinence) or as a separate effect with some separate cause. The questions are firstly whether the fatigue she experiences is mostly cause by the demands of her life, looking after three you children etc, or by the two symptoms of as yet undiagnosed conditions or some other undiagnosed condition.

57. The claimant's position was that her two symptoms contributed to her fatigue. I was not convinced that a large element of that fatigue could not be explained as being caused by something other than a physical impairment.
- 5 Unfortunately, the claimant's GP was not present to explain the use by her of the description fatigue. The consequence of this was that I reluctantly concluded that the claimant had not made out that fatigue was a symptom of some undiagnosed condition.
- 10 58. The claimant's credibility was strongly challenged in cross examination as noted earlier and there was some basis for doing so. It is somewhat odd that the claimant's managers who were clearly unimpressed by the claimant taking part in the charity swim did not seek further guidance from their Occupational Health provider perhaps asking the claimant to attend a more
- 15 in depth assessment which might have allowed an expert Physician to take account of the claimant's participation in the swim and whether this undermined her position in any way. It was put forcefully to her that her GP would not have agreed that cold water immersion might assist her joint pain. Without commenting on its efficacy it is within judicial knowledge that for
- 20 some years there have been some very public proponents of such exercise. Leaving aside element of the swimming being in cold water this does not appear to have been the immediate reaction from the claimant's current GP, Dr Khanum, who in the note (page 80) when asked to confirm whether such cold water immersion might be appropriate recorded that in general
- 25 swimming was helpful to the joints as the water supported the bodies weight.
59. As an observation the days when people who were sick were expected to simply take to their beds is long past and it did not strike the Tribunal as
- 30 odd that such a remark might have been made by the claimant's GP Dr Heathcote (who had been the claimants GP for some years) or that the claimant if feeling well enough to swim took part in the swim on that day.

**Employment Judge: J M Hendry**

**Date of Judgment: 25 November 2024**

**Date sent to Parties: 25 November 2024**