



## EMPLOYMENT TRIBUNALS

**Claimant:** Ms L Goulden

**Respondent:** Simmons and Simmons LLP

**Heard at:** London Central Employment Tribunal  
**On:** 12 June 2025

**Before:** Employment Judge Keogh

### Appearances

For the claimant: Mr C Price (Counsel)

For the respondent: Mr T Goodwin (Counsel)

## JUDGMENT

1. The claimant was not at the times material to the claim disabled within the meaning of section 6 Equality Act 2010.
2. The claim is therefore struck out.

## REASONS

1. The claim in this matter is for direct disability discrimination, discrimination arising from disability, and failure to make reasonable adjustments related to the claimant's probationary employment with the respondent from 27 February 2023 to 27 September 2023. The claimant's employment was terminated by the respondent, it says, as a result of the claimant's failure to meet the required standards of her role, following two extensions to her probation on 23 May 2023 and 17 August 2023.
2. The hearing was listed to determine the following matters:
  - 2.1 To decide on any amendment application which is made by the claimant.
  - 2.2 To decide whether the claimant was disabled at all relevant times, if that issue remains in dispute.

- 2.3 To decide on whether it would be just and equitable to extend time (all the complaints being prima facie out of time).
- 2.4 Alternatively, to decide on whether the claim should be struck out as having, on time grounds, no reasonable prospect of success.
- 2.5 If any of the complaints proceed, to make case management orders as necessary, including the provision of an amended response, an updated schedule of loss and a counter-schedule of loss.
3. No application was made to amend the claim.
4. Following a discussion at the outset of the hearing, I determined that evidence on the issues of disability and time limits should be heard together, and submissions made on both applications together, given the overlap in the material to be considered in relation to the claimant's health. Adjustments were made to enable the claimant to have a 15 minute break each hour, and not to give evidence before 11am each day. The claimant produced witness statements and gave oral evidence. I refused permission for her to adduce and rely on a statement from Ms Abigail Findlay-Stankovic for the reasons given in the hearing. I received and considered in full written and oral submissions from both parties. It was not possible to conclude deliberations and give a decision during the time allocated for the hearing, therefore this decision was reserved.

## **Factual findings**

### **Medical records**

5. The claimant contends in her witness statement that she started suffering from heightened symptoms associated with fibromyalgia in around April 2023. In submissions it was contended that the claimant had been complaining of symptoms as soon as she started work, i.e. from 27 February 2023. I reviewed the available medical records from that date to the date of presentation of the claim form.

6. On 25 May 2023, two days after the first extension of probation, the claimant wrote to her GP online seeking a GP appointment, using an 'eConsultation':

*"Medical problem: Chronic pain and fatigue. I had Covid several times and suffered from Long Covid for around 2 years. ...*

*During the last 4 weeks I have been in constant pain (bones) headaches, extreme tiredness and brain fog. I am also struggling cooking washing hair etc.*

*Duration of symptoms and whether improving: Around 3-4 weeks*

*Ideas and concerns: The length of time of feeling this unwell. I am also struggling at work as a result."*

7. This is consistent with the claimant experiencing symptoms from around the end of April 2023.
8. The claimant was asked to book an appointment and was offered one on 19 June 2023. She sent a further eConsultation on 1 June 2023, stating that 19 June was too far away:

*"I have already messaged and was told someone would contact me. I am in week 5 of chronic fatigue and pain. I am struggling to do normal tasks, feel very unwell and dizzy, and it is impacted on work and home. I have had Long Covid previously however this feels like I have something very wrong.*

*Duration of symptoms and whether improving: Around 5 weeks*

*Ideas and concerns: Fatigue and tiredness – I can drop asleep at any moment. Pain in my bones and dizziness and brain fog which is making day to day usual tasks and life challenging."*

9. The claimant received a telephone call from her GP on 1 June 2023. Her GP recorded:

*"in week 5 of chronic fatigue and pain. struggling to do normal tasks, feel very unwell and dizzy, and it is impacted on work and home. started a new job from feb 23. also pain in multiple joints. unable to even wash hair and do rtn tasks due to fatigue and pain. had COVID x 3 in 21. sometimes struggles to find words."*

10. The claimant was booked in for blood tests.
11. On 19 June 2023 the claimant's GP made a rheumatology referral for the claimant:

*"Thank you for seeing this lady who has had two episodes of COVID during the pandemic time. She has been feeling increasingly tired since then and she was thinking it could be long-COVID symptoms. However, I did refer her to them when it existed, but she was not given an appointment.*

*Her breathing is fine at the moment, but she is suffering from chronic fatigue and pain and increasing tiredness. She is struggling to do her normal tasks and feels very unwell and dizzy and it is impacting on her work and private life.*

*She gets pain in multiple joints. She says she is unable to wash her hair properly when she feels fatigue and gets pain in all her joints. I did a recent blood test for her and all the bloods were normal including diabetes and thyroid. She has a bit of raised cholesterol. Her white blood cell count was tiny little bit raised at 10.9 with a lymphocyte count of 3.5, nothing else is abnormal in her blood tests. CCP antibodies and rheumatoid factor were normal. I am wondering whether she has either fibromyalgia or chronic fatigue syndrome.*

*I would be grateful for a kind appointment for assessment and advice on management.”*

12. A response was received on 21 June that there was no long covid or fibromyalgia clinic.
13. The claimant made a further eConsultation application on 22 June, reporting the same symptoms.
14. She had a further telephone consultation on 3 July 2023. Various matters were discussed, including CFS (chronic fatigue syndrome), long covid and menopause (which she had no symptoms of). It was noted the claimant was getting better so no further action.
15. Of significance around this time is that a close family member had been diagnosed with terminal cancer, and another close family member was undergoing cancer investigations.
16. The next entry of relevance is on 21 August 2023, four days after the second extension of probation, when the claimant again put in an eConsultation, stating:

*“Medical problem: Chronic fatigue, pain and brain fog, palpitations  
Duration of symptoms and whether improving: Ongoing  
Ideas and concerns: Chest pain and palpitations – anxiety”*

17. On 22 August 2023 the claimant had a telephone consultation, not with her regular GP. The GP's record is as follows:

*“Feeling tired after contracting COVID in 2021  
pain in arms and shooting pains in legs  
normal bloods including inflammatory markers  
periods are regular as before, struggle to sleep at night”*

18. The claimant was prescribed 25mg daily amitriptyline, starting on a half dose for a few days. Drowsiness was discussed. The claimant was referred to community therapy for further support. Further blood tests were ordered. There is no recorded diagnosis.
19. It was on 29 August 2023 that the claimant states she informed the respondent that she had consulted her GP and had been diagnosed with fibromyalgia.
20. The respondent disputes however that there was such a diagnosis at this point. I conclude that on balance the claimant was not diagnosed with fibromyalgia on 22 August 2023. It appears from the previous records that the next stage in obtaining a diagnosis (and presumably ruling out CFS or Long Covid as a possible cause of symptoms) would be a formal rheumatology assessment, which did not take place. More significantly,

this was a telephone consultation with a locum GP rather than the claimant's regular GP, and there is no diagnosis noted in the medical records. I find it highly unlikely that if a doctor, who was not the claimant's regular doctor, over the telephone and without the benefit of a rheumatology assessment, nevertheless decided to make a significant diagnosis of fibromyalgia, he would then fail to record it in the claimant's medical record. The fact that the claimant was prescribed Amitriptyline does not take the matter further. The documentation provided by the claimant herself shows that this can be prescribed for a variety of reasons, including neuropathic pain. It is however by no means prescribed exclusively for the treatment of fibromyalgia. I therefore conclude that the claimant must have misunderstood whatever was said to her on that day. At this stage I find that fibromyalgia was considered by the claimant's GP surgery as one of a few possibilities, no further progress having been made with the rheumatology clinic. This is supported by discussion of the outcome of the rheumatology referral with the claimant's regular GP in the next relevant entry.

21. On 5 September the claimant had a telephone consultation with her regular GP. The record notes a problem that the claimant was tired all the time and states:

*discussed outcome of the rheumatology clinic referral. started amitriptyline, all inflammatory markers, BNP normal. wc [white blood cell count] was mild raised, but its eosinophil, she has hayfever. can contribute to tiredness. try acupuncture, if wants physio, can make referral in future..."*

22. Around this time on 4 September a member of the claimant's family had life support switched off following an accident and sadly passed away on 6 September. The claimant commenced grief counselling paid for by the respondent.

23. It is noted at this point that the claimant had not been to the rheumatology clinic (see letter of 21 June 2023 above) and the claimant confirms in her witness statement this is when she was notified of that letter. There was no mention in this consultation of any symptom other than tiredness, and no mention of fibromyalgia.

24. On 21 September 2023 the claimant sent an eConsultation as follows:

*"Medical problem: I have been referred to occupational health and follow ups following my recent fibromyalgia diagnosis. Could you please arrange for a letter for me to collect for employer so that they can make adjustments for me."*

25. This is the first time a diagnosis of fibromyalgia is mentioned in the medical records.

26. The claimant was requested to book an appointment in order to obtain the letter.
27. These are the only relevant records prior to termination of employment on 27 September 2023, and therefore the only relevant records in relation to the issue of disability. I have reviewed subsequent records however as these may be relevant to the question of an extension of time.
28. The claimant's GP attempted to contact her by telephone on 28 September 2023 but could not reach her. She was advised to complete a further eConsultation, and did so that day:

*Medical problem: I have had my job terminated as I am not well enough to perform. I was diagnosed with fibromyalgia in August and I am really struggling to manage. I am also really upset and not been sleeping and feel upset. I don't know what to do.*

*Duration of symptoms and whether improving: Worse*

*Ideas and concerns: Mental health coping and sleep*

*Expectation: Speak to doctor for help and referral for bereavement counselling as I had this with my employment and it's now gone"*

29. A telephone consultation was held on 3 October 2023. This notes "Depressed mood (New)":

*"had job terminated, not well enough to perform. was diagnosed with fibromyalgia in August and really struggling to manage. in the space of 4 weeks, 1 ca dx, one cancer scare and 1 death in the family. very upset and not been sleeping. low mood. had a melt down last week. spoke to a charity counselling service. found it useful. poor appetite, sleep disturbed, no EMW. tearful at times, stressed as well. felt life was not worth living last week, this week pulled herself out of the situation. we discussed crisis helpline, will use if needed. no self harm/suicidal thoughts this week.*

30. A Fit Note was issued for "Depressed mood Bereavement multiple joint pain".

31. The claimant was reviewed on 25 October 2023, which is after the claimant had been on holiday with friends. This records:

*"came from Bali, feeling energised, needed less pain killers. used mindful techniques, visited temples, prayed, felt a lot better. sun helped..."*

32. On 8 February 2024 the claimant completed an eConsultation:

*"I have been in bed for two weeks with flu like / long Covid symptoms and chronic pain and headaches..."*

33. On 14 February 2024 the claimant completed an eConsultation seeking a fit note and repeat prescription of Amitriptyline:

*"I was diagnosed with Fibromyalgia in August 2023... I have been bed ridden for four weeks. I am currently trying pacing and dietary changes to help me with exhaustion."*

34. On 15 February 2024 the claimant had a telephone consultation, not with her regular GP. History was noted as *"been in long covid clinic"* and *"seen in hosp – and think maybe fibromyalgia"*. A Fit Note was issued with diagnosis *"Depressed mood Multiple Joint pains – under assessment Bereavement"*.

35. On 28 February 2024 the claimant completed an eConsultation, having missed a number of calls from the GP regarding a talking therapies referral:

*"I am feeling very low and depressed... I am really struggling with pain from my Fibromyalgia and Long Covid... My pain, brain fog and lethargy is not dissipating."*

36. On 12 March 2024 the claimant completed an eConsultation:

*"I am continuing to have chronic pain in my bones [presumably 'bones']. I have dizziness and headaches. I have also had intermittent sickness and flu like symptoms and struggling doing any tasks. My mood is still low and I really struggling emotionally. I have asked for a referral to talking therapies..."*

37. On 15 March 2024 the claimant was issued with a further Fit Note with diagnosis *"depression, on medication. Multiple joints pain. Bereavement."*

38. This concludes the records prior to the issue of proceedings. The claimant was taken to further records during cross examination however I do not consider them to be relevant to the legal issues I have to determine.

#### Other documentary evidence

39. The bundle contains various documents pertaining to the claimant's employment, which the claimant was taken to in cross examination.
40. This includes a Teams message record between the claimant and her line manager, Ms Camilla D'Arcy.
41. For the first month of the claimant's employment, these are ordinary, cordial messages with no mention of the claimant's health or other difficulties.
42. On 30 March 2023 the claimant wrote:

*"I felt awful yesterday and have been struggling to eat and have a horrible headache. I think it's best I stay WFH just in case I feel heaps worse. I will be online and I'm sure it will pass. I just feel really off..."*

43. It was put to the claimant that whatever was ailing her, it was not so significant that she was prevented from working, as she continued to work from home. The claimant stated that if she had been there longer it would have been different, and she tried to do as much as possible despite her worsening condition.

44. I conclude that this was a one off episode where the claimant felt unwell but well enough to work. The claimant herself contends her heightened symptoms from her condition did not commence until around the end of April.

45. There are no messages pertaining to health in April.

46. The respondent drew attention to a message sent by the claimant on 2 May 2023 in relation to the bank holiday weekend, in which she writes:

*"...Did you do anything nice? I helped with my friends garden, spa day on Sunday then helped my Mum decorate yesterday. Sunday spa day was my absolute highlight"*

47. At this point the claimant was working from the Manchester office, which she said was in part to accommodate a family event. The claimant suggested in cross examination that 'helped with my friends garden' meant helping pick plants and selecting a hot tub. 'Decorate' meant helping her mother pick bedding. She states that when she started seeking help from doctors her symptoms were bad and progressively got worse. It is noted that this is around the beginning of the time the claimant states she was experiencing heightened symptoms.

48. The next messages of significance are also on 2 May 2023, when the claimant suggested meeting up for coffee or wine after school to discuss a work matter. She refers to her family event on 10 May in Manchester and goes on:

*"...We do need wine though... How about team drinks 25<sup>th</sup> as its my birthday the day after?"*

49. On 24 May 2023 the claimant asked for an early start and finish to the following day:

*"I am having horrible shoulder pain and managed to book in for a massage at 4.30pm..."*

50. As it turned out she could not book the massage and worked as normal.

51. On the same day, the claimant sent the following:



*“...I was going to do a couple drinks after work on Tuesday if you are free? I will send an invite tonight, but so it is on your radar.”*

52. The claimant confirmed in cross examination she did organise drinks for a team of about 8 people for around 30 May. She arranged drinks at a bar close to the office for around 30 May. She states her symptoms were fluctuating at this point, and she felt obliged to go out. She went out for an hour and a half then went home. She cancelled plans for the bank holiday weekend as she had felt so unwell.

53. In her witness statement the claimant suggests that at this point:

*“I withdrew almost all social time with others, and this was impacting on my personal relationships, I hoped this would be temporary sacrifice. An example, over my birthday weekend in May 2023, I cancelled my birthday plans as I did not have the energy to socialise, and I was in a lot of pain the entire weekend. This was again articulated to my line manager and team members the following week. They praised me for having the conviction to listen to my body and cancel plans.*

*...I was experiencing excruciating pain in my bones and joints. Sensitivity to lights and constant headaches, palpitations, dizziness. These symptoms fluctuated and intensified over the course of each day and night.”*

54. While some of the symptoms described here accord with what the claimant said in her eConsultation on 25 May, this description is somewhat inconsistent with the claimant actively going about arranging drinks for herself and her team.
55. The respondent then notes messages on 15 June 2023 from 10.44pm about an evening out, which the claimant confirmed in cross examination were about drinks after work which she went to that day, having worked to 6.50pm.
56. There is a further reference to the claimant offering to buy a glass of wine for Ms D’Arcy for a 5.30pm meeting about work on 27 June 2023, and further message on 26 July 2023 about the claimant wanting to join a drinks celebration for a colleague if this were moved to after her holiday in Turkey. The claimant was also able to travel on holiday, and states that she undertook some work while on this holiday.
57. The claimant suggested in cross examination that she was only having occasional drinks with her colleagues, and not with friends and family, and that this was not a normal level of socialising for someone her age, however I conclude that the claimant’s witness statement significantly downplays the claimant’s ability and willingness to socialise at this point in time. The messages and the claimant’s activities around this time are also inconsistent with the claimant’s suggestion that she was suffering from

constant pain, headaches and brain fog which affected her capacity for work.

58. The only messages pertaining the claimant's health during this period are around 7-8 June 2023 when the claimant reported to Ms D'Arcy having a 'summer cold'. It appears that despite feeling ill the claimant continued to work through this at home, and must have been back in the office to have been working late and going out for drinks the following week.
59. On 8 August 2023 the claimant messaged Ms D'Arcy to inform her that she had received upsetting news (about her family member's diagnosis) and would find it easier to work from home that day. There are further messages about this situation and its impact on the claimant's ability to work, but no further messages relating to the claimant's condition.
60. The claimant contends that there are messages missing from this record for her last day of employment, which show that she worked late conducting a handover. If these exist, they were not disclosed prior to or during the hearing. However I do not consider messages about a handover to be relevant to the issues to determine at this stage. It was also suggested in submissions that there were missing messages between 5 and 12 September to do with the death of a family member, and on 9 September when the claimant was ill. However the messages for 5 September and 12 September are on the same page of the record. There is therefore no 'cherry picking' as the claimant suggests. I conclude it is unlikely there is anything missing, as this would likely require a deliberate manipulation or doctoring of the screen shots taken, which claimant's Counsel expressly stated in submissions was not being suggested.
61. There are emails relating to the claimant's condition from 29 August 2023, when the claimant states to Ms D'Arcy:

*"I spoke with the Doctor on Friday and he diagnosed me with Fibromyalgia. He has made several referrals and prescribed me Amitriptyline to help with neuropathic pain and I will be reviewed in one month.*

*This has sedatary qualities and since starting on Saturday PM I have been sick and really sleepy. Whilst this is a normal side effect I am struggling to even send this email. He has suggested a little time off to adjust to this medication which I am going to need as it has floored me. I will check in with you in a couple days. I don't believe I have anything imminent but will review when I can."*

62. Later that day she notes:

*"I'm so sorry every time I move I feel sick. I'm just laid up and feel like I'm getting a migraine. As mentioned the initial symptoms are unpleasant but hoping they pass soon."*

63. The following day the claimant states:

*“Just to say I still feel awful. I am questioning if it’s viral as I’ve been in bed since Sunday and still really sick and off. But it does align with the medication too.*

*I sadly won’t be in tomorrow as I’m still pretty much sleeping but really hoping I’m better towards the end of this week.”*

64. On 31 August 2023 she states:

*“I still feel pretty rotten but have made it downstairs and just had some porridge which is progress. I am going to see how this afternoon fares but in honesty, I don’t think I’ll be magically ok for tomorrow.*

*I have asked for a call back from my doctors to check in which will be this afternoon or tomorrow am. I may also need some anti sickness medication to help.*

*I am going to rest all weekend and aim to be working, brighter and more me on Monday. I have a lot to do and hopefully will be in a much better position to do so.”*

65. On 1 September 2023 the claimant was recovering:

*“I wanted to follow up and say today, for the first time the sickness had dissipated and I feel a lot less groggy. I have spoken to the on call doctor and have a prescription for anti sickness meds to help me manage next week - if needed. I may have been unlucky and had a bug but whatever it was I definitely feel an improvement and ate non dry food last night. I’m going to keep resting so I’m ready for Monday and beyond.”*

66. I conclude that the difficulties the claimant was experiencing at this point was largely to do with the side effects of getting used to taking Amitriptyline, or possibly a viral illness. This was caused by her condition.

#### Claimant’s evidence

67. The claimant’s pleaded case is set out in an attachment to the claim form. In this she includes the following relevant matters:

*“During the early months of her employment, the Claimant suffered a series of health issues which had an impact on her working and personal life. This was flagged to her Management at the time but unfortunately the Claimant’s health continued to deteriorate with the Claimant being diagnosed with Fibromyalgia in August 2023. On top of this, the Claimant suffered multiple family deaths and a terminal diagnosis related to a close family member.*

*... the Claimant was regularly working 12 hours per day plus occasional weekends. This was way above and beyond the scope of the contract.*

*...Despite the Claimant's health suffering, she delivered all of these things to a high level whilst her health suffered. When she was diagnosed with Fibromyalgia in August 2023, she commenced a course of Amitriptyline to help with Neuropathic pain.*

*...The Claimant believes she was dismissed as a result of her deteriorating health and her unexpected personal issues which, of course, would impact on performance."*

68. The claimant's witness evidence was presented in a number of documents:

- 68.1 Disability impact statement dated 13 February 2025
- 68.2 Second disability impact statement dated 26 May 2025
- 68.3 Witness statement dated 26 May 2025
- 68.4 Out of time witness statement dated 26 May 2025

69. I was assisted during the hearing by a document, apparently prepared by the claimant's former representatives, which showed the changes made to the initial disability impact statement in the second disability impact statement. There are a number of significant revisions. The respondent submits that these revisions were made purposely to improve the claimant's case, having seen its letter to the Tribunal dated 28 March 2025 in which it confirmed that disability remained in dispute and set out in its explanation various deficiencies it saw with the claimant's evidence, including:

69.1 That it is only on 3 October 2023, after dismissal, that there is mention in the GP notes of a diagnosis of fibromyalgia, and there is no evidence of a diagnosis in August 2023;

69.2 The claimant had indicated she had found it difficult to wash her hair, cook and clean, but had given no evidence as to the degree to which she was affected. The claimant continued to attend work throughout the period prior to her dismissal and there was no indication she was suffering from the effect relied upon, such that there was no clear evidence that the effects were more than 'minor or trivial' having regard to the statutory guidance;

69.3 The claimant had, on her own evidence, started to experience symptoms fewer than 5 months prior to her dismissal;

69.4 At the point the claimant informed her manager she had a verbal diagnosis of fibromyalgia on 29 August 2023, she did not require any adjustments other than a few days to adjust to the short-term effects of medication and to take regular breaks.

70. My attention was drawn to a number of passages where revisions had been made. By way of example:

71. The claimant adds at paragraph 2 that fibromyalgia is a long-term chronic condition for which there is no cure.
72. New paragraph 5 bears repeating in full (with alterations as shown in the tracked changes version):

*"I started suffering from heightened symptoms associated with Fibromyalgia in around April 2023. My symptoms progressively worsened ~~and~~, and my GP verbally advised in June 2023 that she thought I had Fibromyalgia or a form of chronic fatigue syndrome and made a referral on this basis. I received a ~~formal verbal~~ the fibromyalgia diagnosis on 22 August 2023- when other conditions were ruled out. I was subsequently prescribed medication to help manage neuropathic pain from Fibromyalgia and was referred to occupational ~~health~~ therapy immediately after this diagnosis. I am still suffering from this condition."*

73. Again in relation to the alleged diagnosis on 21 August 2023, new paragraph 40 is as follows:

*"On 21 August 2023, I consulted my GP surgery again. I was concerned that my symptoms had severely worsened, and I had continued to experience chronic fatigue, brain fog and severe joint pain. I was also experiencing heart palpitations, chest pain and anxiety. I requested a further consult with my GP. This ~~consult~~ consultation took place on 22 August 2023. I spoke to another locum doctor on this date who spent a considerable amount of time discussing my symptoms and other potential causes or diagnoses, including menopause-, which was again discounted. My notes were reviewed as I ~~was~~ had been referred for blood tests which did not show the presence of any inflammatory markers such as CCP or Rheumatoid factors. This ruled out conditions such as Rheumatoid Arthritis. Due to the longevity of my symptoms, the GP advised me that ~~he~~ had Fibromyalgia, and we discussed Amitriptyline for pain management. Although I acknowledge my medical records do not expressly state that I was diagnosed with Fibromyalgia on this date, I am clear that I received this verbal diagnosis of Fibromyalgia during this consultation. Furthermore, this Doctor reviewed my medical notes, and the recent referral from my GP stating that she believed I had Fibromyalgia, and we discussed the use of tricyclic antidepressants or chronic fatigue syndrome."*

74. There are a number of revisions which significantly alter the tenor of the evidence. By way of examples:

- a. At paragraph 7: *"I started to experience ~~increased~~ intolerable levels of fatigue, as well as widespread aches and pains, headaches and brain fog. The main ~~symptoms~~ symptoms of Fibromyalgia ~~is~~ are chronic widespread pain, persistent exhaustion and cognitive difficulties known as 'fibro fog'."*

- b. New paragraphs 9, 10, 11, 13, 18 to 20, most of 21, 22 are lengthy additions and provide various practical examples of tasks the claimant says she found difficult.
  - c. In new paragraph 32: *"I continued to experience symptoms, and these continued to have ~~ana~~ debilitating impact on my daily life" ... "My symptoms were ~~continuing~~ persistent throughout this period and, although we discussed ways to try and alleviate my symptoms, these were continuing and affecting my life and wellbeing."*
  - d. In new paragraph 44 *"sleeping excessively"* becomes *"unable to keep awake"*
75. In terms of describing the medical history and the impact of the claimant's condition, the other witness statements broadly mirror what is in the second disability impact statement.
76. The first disability impact statement was prepared by solicitors for the claimant. It must be assumed that they were aware of the requisite legal tests and took instructions accordingly to produce a statement. The second disability impact statement and other statements were prepared without the assistance of those solicitors, as they were at pains to point out when they served the various statements on 26 May 2025. The claimant was unable to provide a reasonable explanation in cross examination as to why her instructing solicitors would have produced a statement which effectively downplayed her condition and the status of the diagnosis given, if the second disability impact statement was an accurate reflection of the history of the matter. She said that 'Lots of my descriptions were taken back', which implies she had given this information to her solicitors and it was, against her instructions, removed from the statement. I find this inherently unlikely, not least because the claimant signed the first disability impact statement confirming that the facts stated were true to the best of her knowledge and belief. When it was put that the claimant had set about radically improving her evidence to improve on the gaps identified by the respondent, the explanation given was that when she had representation, she did not have all the information, and had found it all difficult to talk about. She was able to build a bigger picture by looking through Whatsapp messages (which I note have not been disclosed), conversations and meetings. This does not explain at all the significant changes the claimant has made to her evidence as to how her condition impacted her at various times, which are a matter of recollection and ought not to have altered significantly between February 2025 and May 2025. Further, the claimant repeatedly mentioned that when the first disability impact statement was prepared, she did not have her subject access request documents. However, as the respondent pointed out, the SAR had still not been provided when the second disability impact statement was prepared.
77. I conclude on balance that the claimant's evidence has been altered, and deliberately so, to improve her case having seen the respondent's letter of

28 March 2025. In those circumstances the claimant's written evidence produced on 26 May 2025 is unreliable. I am supported in this conclusion by the inconsistencies between the claimant's written account and the documentary evidence about her activities during her employment.

78. Given this, I find it is likely on balance that the oral evidence the claimant has given at the hearing about her condition is equally unreliable. The claimant's explanations as to matters which on the face of it appeared to show that she was able to do things which would be inconsistent with constant pain and debilitating symptoms, such as regularly attending work drinks and suggesting and arranging these herself, and undertaking gardening and decorating, were not credible, and I find the claimant has sought to minimise the things she was able to do during this period.
79. I have considered whether I can rely on the first disability impact statement as a true reflection of the claimant's medical history. I conclude that the claimant's credibility is sufficiently impaired that it is not reliable. The claimant has shown by her amendments to the statement that she is prepared to exaggerate her situation to bolster her claim. I have no confidence that the claimant had not already sought to do in the first version so before improving upon the evidence with a second version. In addition to the matters already discussed above, I am supported in this by the marked inconsistencies between the claimant's pleaded case and the disability impact statement, relating in particular to the difficulties she contends she had at work (a demonstration of which would be vital to both the discrimination arising from disability claim and the reasonable adjustments claim). For example:
- 79.1 The claimant contends that she was referring to handover notes to recall processes and training information and was making more than typical grammatical errors, impacting upon the quality and content of her work (paragraph 9) – this is inconsistent with the claimant's contention in the Particulars of Claim that she delivered her work to a high level;
- 79.2 The claimant contends that by 1 June 2023 she was exhausted and would often fall asleep during waking hours, and was '*simply unable to stay awake*', and that '*The pain in my joints was extreme and was causing me to feel nauseated and I regularly felt dizzy and like I might faint whilst walking*' (paragraph 13) – this is inconsistent with her pleaded case that she was regularly working 12 hour days plus occasional weekends. Long hours are borne out by some of the messages already alluded to, at which point the claimant has on occasion gone out for drinks rather than needing to go home immediately to rest as one might expect. Drinking is also somewhat inconsistent with the claimant's suggestion that she felt nauseous and dizzy.
80. The claimant's response to the apparent inconsistency when raised by me in submissions was that the claimant had 'a series of health issues which

had impact', as stated in her claim form, and that the claimant's position was that she did perform well and impressed clients and had good feedback, but generally her work was impacted by fibromyalgia, which has a fluctuating effect. The claimant also suggested fibromyalgia had a fluctuating effect on her during cross examination when apparent inconsistencies were noted. However this is not consistent with the general tenor of her disability impact statement, which suggests that her symptoms were 'having an impact on her daily life' (paragraph 11), that she was 'struggling to complete daily activities' (paragraph 13).

81. It was not, however, put to the claimant that she exaggerated matters when discussing with her GP. In the circumstances I find the GP records are likely to be the most accurate reflection of the symptoms the claimant was experiencing.

### **The law and issues - Disability**

82. Having made factual findings relevant to both disability and time limits, it is convenient to consider my conclusions in relation to disability first.

83. Section 6(1) of the Equality Act 2010 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."*

84. The questions to ask, therefore, are (**Goodwin v Patent Office** [1999] ICR 302, and Guidance paragraph A2):

- a. Did the claimant have a mental and/or physical impairment?
- b. Did the impairment have an adverse effect on the C's ability to carry out normal day-to-day activities?
- c. Was that adverse effect substantial?
- d. Was the adverse effect long term?

85. Schedule 1 paragraph 5 provides:

*"(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."*

86. Section 212 provides that 'substantial' means 'more than minor or trivial'.

87. In order to be substantial, the effect must fall outwith the normal range of effects that one might expect from a cross section of the population. However, the comparison is not with the population at large. 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 (**Paterson v Commissioner of Police of the Metropolis** [2007] ICR 1552).

88. The focus should be on what the claimant cannot do because of her impairment (**Aderemi v London and South Eastern Railway Ltd** [2013] ICR 591), however findings of fact as to what a claimant can actually do may throw significant light on the disputed question of what she cannot do. For example, if a Claimant asserts that she cannot do a particular activity at home but has in fact been seen doing it at work, that will clearly be relevant to an assessment of the Claimant's credibility and therefore to resolving the question of disability (**Ahmed v Metroline Travel Ltd** UKEAT/0400/10).
89. Schedule 1 paragraph 2 provides:
- “(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 day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”*
90. The question which the tribunal has to ask itself is not whether the mental health impairment was likely to last at least 12 months but whether the substantial adverse effect of the impairment was likely to last more than 12 months (**Royal Borough of Greenwich v Syed** UKEAT/0244/14), or whether the effect is likely to recur (**Swift v Chief Constable of Wiltshire Constabulary** [2004] ICR 909. Where it is necessary to project forward to determine whether an impairment is long-term, in considering whether something was likely, it must be asked whether it *could well happen*. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material time. This must be viewed at the relevant time and not with the benefit of hindsight (**Nissa v Waverly Education Foundation Limited** UKEAT/0135/18/DA).
91. The question of whether impairment either had lasted or was likely to last 12 months must be assessed by reference to the evidence available at the date of the alleged discriminatory acts, excluding evidence as to what happened after that date. If the evidence relating to the relevant time does or does not prove the likelihood of recurrence. It is fallacious to assume that the occurrence of an event in month six proves that, viewing the matter exclusively as a month one, that occurrence was likely. It merely proves that the event happened. To take into account matters after the dates in dispute would be to take into account irrelevant evidence (**McDougall v Richmond Adult Community College** [2008] ICR 431).

92. Schedule 1 paragraph 6 of the Equality Act 2010 lists certain conditions which are a disability, such that a person will be considered disabled from diagnosis of such a condition. Schedule 1 paragraph 7 provides for Regulations to be made to provide for persons of prescribed descriptions to be treated as having disabilities. Fibromyalgia is in neither list.
93. I have been referred to various parts of the 'Equality Act 2010 – Guidance on matters to be taken into account in determining questions relating to the definition of disability' and have taken the Guidance into account in considering my conclusions.

### **Conclusions on disability**

94. I consider first whether the claimant had a physical or mental impairment. The claimant relies solely on her condition of fibromyalgia. I have found that the claimant did not have a diagnosis of fibromyalgia during the relevant period. She was mistaken about this. However, a diagnosis is a label used to describe a particular impairment. The focus of the legislation is to determine whether there is an impairment, not whether any collection of symptoms has been diagnosed.
95. Relying on the medical records, I find that the claimant did have an impairment by the end of May 2023, namely she was experiencing pain in her bones, headaches, extreme tiredness and brain fog. These symptoms are mentioned on further occasions in the medical records thereafter, and chronic fatigue, pain and increasing tiredness are recorded in particular in the claimant's GP's referral letter of 19 June 2023. This is a combination of physical and mental impairments.
96. The next question is whether the impairment had an adverse effect on the claimant's ability to carry out normal day to day activities. I have reviewed with care what is said about this in the claimant's GP records, having rejected the claimant's witness evidence as a reliable account:
- 96.1 On 25 May 2023 the claimant reported '*struggling cooking washing hair etc*';
- 96.2 On 1 June 2023 the claimant reported '*I am struggling to do normal tasks, feel very unwell and dizzy, and it is impacted on work and home... I can drop asleep at any moment. Pain in my bones and dizziness and brain fog which is making day to day usual tasks and life challenging.*'. The claimant's GP in this date records, '*is impacted on work and home... unable to even wash hair and do rtn tasks due to fatigue and pain. ... sometimes struggles to find words.*'
- 96.3 In the referral of 19 June 2023 the claimant's GP records '*She is struggling to do her normal tasks and feels very unwell and dizzy and it is impacting on her work and private life... She says she is unable to*

*wash her hair properly when she feels fatigue and gets pain in all her joints;*

96.4 On 22 August 2023 it was noted by the GP '*struggle to sleep at night*'.

97. The focus of the Tribunal at this stage is on the effects of the impairment, not the impairment itself. The extent of this in the medical records, therefore, is some difficulty struggling with routine tasks, including washing hair and cooking, falling asleep at any moment, and struggling to sleep at night, and sometimes struggling to find words.
98. I am prepared to conclude from this that there was some adverse effect on the claimant's ability to do normal day to day activities as a result of the physical and mental impairments she was suffering from at the time.
99. The third question is, was that adverse effect substantial? I remind myself that this means 'more than minor or trivial', that the effect must fall outwith the normal range of effects one might expect in the population at large, but that what is required is to compare the difference between the way in which the claimant in fact carries out the activity in question and how she would carry it out if not impaired. At this point, there is a paucity of reliable evidence as to extent to which the claimant was struggling as a result of the effects of the impairment. Taking the matters recorded in the medical records in turn:

99.1 Washing hair, cooking and other routine tasks: These difficulties are mentioned a few times in the medical records. However, it is difficult to assess whether the adversity was more than minor or trivial. There is no information as to how the claimant ordinarily performed; how long she was taking to undertake tasks compared to normal; whether she required assistance from another person; how frequently the difficulties arose. There is not even an indication what the problem was, for example whether such issues arose because the claimant was too tired, or because she had muscles pain and therefore struggled with physical activity, for example. I find the claimant has not proven on balance that she had more than minor difficulty with these matters, particularly where all the evidence in the medical records comes from her self-report rather than from any independent assessment;

99.2 Issues with sleep: The claimant reported both struggling with sleep and falling asleep at any moment. These effects are not necessarily inconsistent with each other, and would likely have a knock on impact on other daily tasks. However, there is no evidence that these effects are more than minor. I take into account the claimant's own pleaded case that she was working long hours and at weekends, such that she could not have been falling asleep during the day on anything like a regular basis. She was also able to keep up a social life at least with work colleagues, including drinks after a long day, which suggests her tiredness was not impacting on her substantially;

99.3 Sometimes struggles to find words: This is mentioned once only in the medical records. There is no indication of frequency, the extent of any difficulty, and whether this caused any substantial impact on the claimant's ability to communicate.

100. In the circumstances I find that the claimant has not demonstrated on balance that any adverse effects she experienced were substantial.
101. For completeness, if I am wrong on that point, I go on to consider the question of whether the effects were, at the relevant time, long term as defined by Schedule 1 paragraph 2. I remind myself that I should only consider the evidence available as at the relevant point in time, namely between the end of April 2023 when effects were first reported to have been experienced, and the end of September 2023 when the claimant was dismissed. The claimant submits that the condition of fibromyalgia is a life long condition, and that it therefore qualifies as a disability. That is not a correct approach. As the respondent counters, even if one accepts that the claimant had been diagnosed with fibromyalgia, which I have not, treating the condition as automatically a disability because there has been a diagnosis would be tantamount to making it a deemed condition within either Schedule 1 paragraph 6 or 7. Parliament has not seen fit to do this. Rather, the question is whether any adverse effects on day to day activities were, assessed as at that point in time, likely to last more than 12 months, or for the claimant's lifetime, or to recur.
102. Taking the latest possible date of 27 September 2023, the claimant had been experiencing adverse effects from her impairments for a period of around 5 months. The question to ask is what could well happen at that point in time, based solely on the evidence available at that point in time.
103. As I have already found, the claimant did not have a diagnosis of fibromyalgia at this point. It was one of a few possibilities, the other suggestions being CFS or Long Covid. The claimant had not had a rheumatology assessment, and had been trialling Amitriptyline for pain relief for a period of only one month. While the claimant may have thought she had a verbal diagnosis of fibromyalgia, a mistaken belief cannot make something more likely to happen.
104. I discount the short period of illness the claimant had from the Amitriptyline itself as she adjusted to taking it. I must also discount the undoubted disruption to the claimant's life and mental health caused by the various family tragedies which she endured at this time.
105. I conclude that the claimant has not shown sufficient evidence that at the relevant time, even allowing for the latest possible date of 27 September 2023, it could well be said that her impairments were likely to be long term, i.e. to last a further 7 months. There was no more than a possibility of a long term condition at that point.

106. In the circumstances, I would also conclude that the claimant was not under a disability within the meaning of section 6 at the relevant time because the condition had not been, and was not at that point likely to be, long term or to last for the claimant's lifetime.
107. As each of the claimant's complaints of discrimination relies on the claimant being disabled within the meaning of section 6, there is no alternative but to strike out the claim.
108. In the circumstances I have not gone on to consider whether it would have been just and equitable to extend time.

**Employment Judge Keogh**

**10 July 2025**

JUDGMENT SENT TO THE PARTIES ON

16 July 2025

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FOR THE TRIBUNAL OFFICE