



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102728/2024

Held in Glasgow on 12 August 2024

Employment Judge: M Sutherland

5 **Mrs L Simon**

**Claimant
Represented by
Ms T Ahari - Counsel
(Instructed by
DLG Legal Services)**

10 **Manorview Hotels Limited**

**Respondent
Represented by
Ms J Barnett -
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was disabled at the relevant time.

REASONS

- 20 1. The claimant has presented complaints of disability discrimination. An open preliminary hearing was arranged to determine whether the claimant was a disabled person at the relevant time. Both parties had professional representation.
- 25 2. The claimant asserts that she was disabled at the relevant time by reason of the physical impairments of fibromyalgia and/or peri-menopause. At today's hearing the claimant confirmed that she was no longer relying upon the physical impairment of asthma.
- 30 3. At today's hearing the claimant confirmed that the alleged discrimination arising from disability arose in September 2023 and she advised that the alleged failure to carry out reasonable adjustments arose in June 2023. For the purposes of this hearing parties agreed that the relevant time was from June to September 2023 (when the alleged acts of discrimination occurred).

4. The claimant had advised in her Case Management Agenda that fatigue, body pain, cognitive issues (“brain fog”) and anxiety / low mood arising from her fibromyalgia and/or peri-menopause substantially affected following activities: walking for extended periods; sitting for prolonged periods; and concentrating on tasks, remembering information, and making decisions, particularly at work. At a Case Management Preliminary Hearing the claimant agreed to provide additional information but no impact statement was provided. At today’s hearing the claimant asserted that the following day to day activities were also affected: sleeping, showering, conversing, and cooking.
5. At today’s hearing the claimant gave evidence on her own behalf and no other witnesses were called. A joint bundle of documents was provided by the claimant. The bundle of documents was neither numbered nor bound and some time was lost to addressing this.
6. Any adjustments required for the hearing were discussed with the claimant and accommodated.
7. The issues to be determined were –

Disability status

- a. At the relevant time, did the claimant have the impairments of fibromyalgia and/or peri-menopause?
- b. If so, did those impairments, individually or collectively, have an adverse effect on her ability to carry out normal day to day activities?
- c. If so, was that effect substantial (more than minor or trivial)?
- d. If so, was the substantial effect long term having lasted (or being likely to last or recur) for 12 months?

Findings of Fact

8. The Tribunal makes the following findings in fact -
9. The claimant was employed by the respondent as Marketing Manager from 14 March 2022 until her dismissal effective on 29 September 2023.

10. The claimant was diagnosed with fibromyalgia in 2011. It is a permanent but not progressive condition. It cannot be cured but its symptoms can be treated. Fibromyalgia causes the claimant body pain, fatigue and cognitive issues ("brain fog"). These symptoms are largely addressed by medication but she experiences flare ups of her symptoms a couple of times a year. During a flare up she has difficulty sleeping, walking for more than 25 minutes, standing for more than 15 minutes, sitting for more than 1 hour, concentrating on tasks, remembering information, and making decisions, particularly at work. She would occasionally require time off work for a flare up, either by sick leave or taking a holiday.
11. From February 2013 to at least September 2023 the claimant was prescribed co-dydramol and/or co-codamol on account of her body pain. She also requires to take over-the-counter painkillers.
12. In March and April 2021, the claimant consulted with her GP regarding a flare up of her fibromyalgia symptoms (including pain, fatigue and insomnia) which was understood to be triggered by the stress of a new job.
13. In May 2021 the claimant consulted with her GP regarding increased overall body pain and fatigue and also low mood. She found that the usual remedies for fibromyalgia were not helping. The claimant was diagnosed as perimenopausal. Perimenopause leads to the menopause. Considered together it is temporary condition lasting a number of years. Perimenopause caused her similar symptoms to her fibromyalgia and in addition caused low mood/ anxiety. The claimant has been prescribed HRT on account of her perimenopausal symptoms from May 2021 to at least September 2023 which was increased to a high dose in October 2022. The claimant has been prescribed citalopram from 2021 to at least September 2023 on account of her low mood/ anxiety which arises from her menopause. Her perimenopausal symptoms were largely addressed by medication.

2022

14. In January 2022 the claimant consulted with her GP regarding a flare up of her fibromyalgia symptoms.

15. In July 2022 the claimant consulted with her GP regarding symptoms of insomnia and fatigue. They discussed lifestyle changes to her diet and exercise which the claimant found hard to undertake because of her fatigue. She was referred for a CBT programme by her GP which she did not attend.
5 She did however complete a patient questionnaire which was indicative of moderately severe depression and anxiety.
16. In September 2022 the claimant consulted with her GP regarding a flare up of her fibromyalgia.
17. In November 2022 the claimant consulted with her GP regarding issues
10 related to her fibromyalgia and perimenopause. It was noted that the most troubling symptoms were fatigue, insomnia, body pain and numbness.

2023

18. In August 2023 the claimant consulted with her GP regarding issues with her
15 mental health including anxiety. She was referred to the menopause clinic on account of her having suffered with significant menopausal symptoms since early 2021.
19. The claimant attended privately funded mental health counselling in September 2023.

Observations on the evidence

- 20 20. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur.
21. The claimant was on the whole a credible and reliable witness and her
25 evidence was largely consistent with the contemporaneous medical evidence. She was however on occasion prone to exaggeration. The claimant asserted that because fibromyalgia and perimenopause induce very similar symptoms this meant she suffered “double symptoms” once perimenopausal. There was however no medical evidence that her symptoms were doubly bad throughout the perimenopause and this was considered unlikely given that her
30 fibromyalgia was largely addressed by medication when she became

perimenopausal. Further, whilst her combined symptoms were initially worse, they were subsequently addressed through medication albeit still subject to flare ups.

5 22. Although there was no medical evidence regarding the impact of her fibromyalgia without treatment (because the medical records lodged started in 2021), the claimant herself gave evidence that her fibromyalgia caused body pain, fatigue and cognitive difficulties (“brain fog”). This reflected the symptoms she experienced during a flare up for which there was supporting medical evidence. Given the same symptoms, it can in turn be reasonably
10 inferred that without treatment she would be likely to experience the same effect on activities as she experienced during a flare up. Her description of the impact of her fibromyalgia without treatment was therefore considered credible and reliable.

15 23. Whilst the medical evidence did not always document the effect on her normal day to day activities during a flare up it did support her description of the symptoms which she asserted caused that effect (e.g. her assertion that her fatigue caused her to fall asleep at work is referred to in the medical notes as “getting some midday lull in energy/ fatigue”). Her description of the effect on her activities during a flare up was therefore considered credible and reliable.

20 **The Law**

Disability status

24. Section 6 of the Equality Act 2010 provides that: (1) A person has a disability if: (a) that person has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on their ability to carry out
25 normal day-to-day activities.

25. In determining disability status the Tribunal must take into account any aspect of the Guidance on the definition of Disability (2011) and the EHRC Code of Practice on Employment (2015) which appears to be relevant.

26. The burden of proof is upon the claimant.

Physical or mental impairment

27. The Equality Act does not define an ‘impairment’ which should be given its ordinary meaning. The cause of the impairment does not require to be established (Guidance A3). A person may have more than one impairment.
5 In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person’s ability to carry out normal day-to-day activities (Guidance B6).

Normal day to day activities

28. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food,
10 walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc (Guidance D2– D3).

Substantial adverse effect

15 29. The impairment must cause an adverse effect on normal day to day activities but it need not be a direct causal link.

30. The adverse effect must be substantial. Section 212(1) of the Equality Act provides that “substantial” means more than minor or trivial. The EHRC Code notes that a disability is “a limitation going beyond the normal difference in
20 ability which might exist among people”.

31. It is important to consider the things that a person cannot do, or can only do with difficulty (Guidance B9). This is not offset by things that the person can do.

32. The time taken by a person with an impairment to carry out an activity should
25 be considered when assessing whether an effect is substantial (Guidance B2).

33. Schedule 1 paragraph (5) of the Equality Act provides that 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 measures are being

taken to correct it and but for that, it would be likely to have that effect. The tribunal should deduce the effect on activities if medication or treatment were to cease unless it has resulted in a permanent improvement.

- 5 34. The Guidance provides at para B7 “Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer
10 meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.”

Long term effect

- 15 35. Schedule 1 paragraph 2(1) of the Equality Act provides that the effect of an impairment is long term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.
- 20 36. Schedule 1 paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In *SCA Packaging Ltd v Boyle 2009 UKHL 37*, the House of Lords ruled that “likely to” in this context means “could well happen” rather than “more likely than not”.
- 25 37. Where a person has an impairment with recurring or fluctuating effects, the effects are to be treated as long term if they are likely to recur beyond 12 months (Guidance C6).
38. Whether a person has an ongoing underlying condition and the likelihood of recurrence of its effects must be judged at the relevant time and not with the benefit of hindsight. An employment tribunal should disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing.

Submissions

39. The claimant's submissions were in summary as follows –

- 5 a. The claimant was diagnosed with fibromyalgia 2011 and perimenopause in 2021 which conditions had a “double effect” on her symptoms.
- b. The medical records note her symptoms during flare-ups and the claimant gave evidence about the effect of those symptoms on her activities. The medical records are brief notes, not a verbatim account.
- 10 c. The claimant received medication for both conditions and their deduced effect must be considered. In any event the claimant experienced regular flare up of her condition. During a flare up the claimant has difficulty sleeping, walking, standing, sitting, concentrating on tasks, remembering information, and making decisions.
- 15 d. The actual and deduced effects on her activities are more than minor or trivial and are long term.

40. The respondent's submissions were in summary as follows –

- a. The respondent accepted that fibromyalgia and perimenopause both constitute impairments.
- 20 b. Perimenopause is a natural part of life. Its symptoms should not be so severe that they interfere with daily activities and the medical records do not support this assertion.
- c. The claimant's treatment regime includes use of standard medications at normal doses suggesting that the symptoms were not severe and the medication was adequately managing her symptoms.
- 25 d. There was no medical evidence regarding the impact of her fibromyalgia without treatment.

- e. There was little or no medical evidence of the effect on her normal day to day activities. The claimant regularly consulted with her GP and would have done so if her symptoms had significantly impacted her daily life. Her evidence on adverse effect was therefore not credible.
- 5 f. The claimant has therefore failed to discharge the burden of proof.

Discussion and decision

At the relevant time, did the claimant have an impairment?

41. The claimant was diagnosed with fibromyalgia in 2011 which is a permanent condition. In May 2021 the claimant was diagnosed as perimenopausal. This is a temporary condition which considered together with the menopause lasts a number of years. At the relevant time (June to September 2023) the claimant had the impairments of fibromyalgia and perimenopause.
- 10

Did those impairments have an adverse effect on her ability to carry out normal day to day activities?

- 15 42. Fibromyalgia causes her body pain, fatigue and cognitive issues (“brain fog”). These symptoms are largely addressed by medication but the claimant experiences flare ups of her symptoms a couple of times a year. During a flare up she has difficulty sleeping, walking, standing, sitting, concentrating on tasks, remembering information, and making decisions, particularly at work. These are all normal day to day activities.
- 20

43. Perimenopause caused her similar symptoms to her fibromyalgia and in addition caused low mood/ anxiety. Her perimenopausal symptoms were largely addressed by medication.

44. If the medication or treatment for fibromyalgia and/or perimenopause were to cease it is likely that she would experience the same symptoms and effect on activities that she experienced during a flare up (the deduced effects).
- 25

Was that adverse effect on day to day activities substantial?

45. During a flare up she has difficulty walking for more than 25 minutes, standing for more than 15 minutes, sitting for more than 1 hour, concentrating on tasks,

remembering information, and making decisions, particularly at work such that on occasions she requires time off work. That effect is more than minor or trivial and is therefore considered substantial.

5 *Was that substantial effect long term having lasted (or being likely to last or recur) for 12 months?*

46. Whilst the claimant's symptoms are largely addressed by medication she experiences flare ups of her symptoms, and their substantial adverse effect, a couple of times a year. At the relevant time, the period of those flare ups (and in any event the deduced effects) had lasted and were also likely to last
10 for at least 12 months and the substantial effect was therefore long term.

Conclusion

47. The claimant's impairments of fibromyalgia and perimenopause had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities at the relevant time. Accordingly the claimant was disabled
15 under Section 6 of the Equality Act 2010.

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Employment Judge: M Sutherland
Date of Judgment: 21 August 2024
Entered in register: 23 August 2024
and copied to parties