

Neutral Citation Number: [2024] EAT 164

Case No: EA-2023-000666-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 September 2024

Before:

HIS HONOUR JUDGE TAYLER

Between:

MR CHRISTOPHER ZAGORSKI

Appellant

- and -

NORTH WEST ANGLIA NHS FOUNDATION TRUST

Respondent

Mrs H Winstone (instructed by **Capital Law LLP**) for the **Appellant**.

Mr T Perry (instructed by **Mills & Reeve LLP**) for the **Respondent**.

Hearing date: 12 September 2024

JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The Employment Tribunal erred in law in its analysis of whether the claimant was a disabled person at the relevant times. A finding that the claimant was disabled was substituted.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is a judgment against a decision of the Employment Tribunal sitting at Watford on 2 May 2023, Employment Judge Klimov. The decision was sent to the parties on 10 May 2023. The Employment Tribunal found that the claimant was not a disabled person.

2. I take the facts from the findings of the Employment Tribunal. The claimant commenced work for the respondent on 1 October 2019 as a consultant radiologist, working three days a week. The claimant's wife suffered serious injury when giving birth to triplets in 2015 and thereafter has required considerable care and assistance. The claimant has substantial caring responsibilities for his wife and their children. In August 2021, the claimant relocated to Surrey to be closer to his family, increasing their availability to assist with care, but substantially increasing his commute to work. It takes 2.5 to 3 hours to drive one way.

3. In late December 2019, GP records showed that the claimant had started developing headaches. He was also feeling excessively tired, run down and physically exhausted. The claimant was seen by a consultant neurologist on 23 January 2020. The claimant described dull pressure-like headaches with nausea and extreme fatigue. Blood tests and an MRI were undertaken. The MRI scan results were ready when the claimant made a further visit to his GP on 12 February 2020. They were considered to be "fine".

4. The claimant was seen by a consultant neurologist again on 7 July 2020. He was still suffering from headaches and the prescribed medication was not proving effective. The claimant referred to exhaustion because of his caring responsibilities.

5. On 20 November 2020, the claimant's GP recorded that he was seeking a further referral to a neurologist due to the claimant's headaches and the fact that he found that the prescribed medication was not assisting.

6. On 7 December 2021, the claimant commenced a period of sick leave, from which he did not return.
7. The claimant's medical records show that on 14 December 2021 he was provided with a Fit Note which stressed the need for rest and noted that this would give an opportunity to see what happened in respect his migraine headaches.
8. On 5 March 2022, there was a further consultation with a new Fit Note diagnosing migraine and debility.
9. On 18 March 2022, while off sick leave, the claimant completed an appraisal for a colleague by Teams Meeting.
10. The claimant met with his doctor again on 12 April 2022. It was recorded that he was having migraines twice a week. A further sick note was issued. On 9 May 2021, the GP recorded that the claimant had ongoing migraines and he was signed off for a further eight weeks.
11. On 10 May 2022, the claimant conducted a colleague's appraisal by Teams Call.
12. On 25 May 2022, the claimant was recorded as struggling with migraines located in the front and back of his head.
13. On 8 June 2022, the claimant attended a training meeting, having driven to the respondent's premises.
14. On 14 June 2022, the claimant's GP again recorded that he was suffering from migraines.
15. On 15 July 2022, the claimant's GP recorded that the claimant was feeling physically better and less fatigued and that he had resigned from his job.

16. On 17 September 2022, the GP noted that the claimant continued to have headaches which could last for more than 24 hours. On 22 December 2022, the claimant's GP recorded an increased frequency of migraines. The GP records did not list migraine or debility as active problems or significant past problems, but there were repeated references to migraine in the records of attendances of the claimant at his GP practice, that I have set out above.

17. The Employment Judge conducted a detailed self-direction as to the relevant law concerning disability, which is not the subject of challenge in this appeal. The Employment Judge concluded that exhaustion did not constitute a disability. The Employment Judge considered that the claimant could take steps to decrease his exhaustion:

102. I find that it was reasonable to expect for the claimant to make these changes. However, instead the claimant chose to move at a significant distance from his workplace, which increased his commute time from 35 minutes to 2.5 - 3 hours. His evidence is that he moved to be closer to his family. However, it appears that this "trade-off" did not result in the claimant having less demanding schedule.

103. Of course, it is not for me to tell the claimant how he should have organised his work-life balance. However, what I do find is that if the claimant had made reasonable changes to his extremely demanding schedule, as it was recommended to him, the adverse effect on his day-to-day activities would not have been substantial.

104. I anticipate the claimant might say that it was precisely what he wanted the respondent to do by allowing him to work less and to work from home as a reasonable adjustment. However, the duty to make reasonable adjustments arises only if the claimant can prove that he had a disability within the meaning of the Equality Act, and not before.

18. The Employment Judge dealt with migraine at paragraphs 107 through to 125.

107. I accept, and it was not argued otherwise by the respondent, that migraine is a medical condition that amounts to an impairment. Whether it is physical or mental impairment is not material and not something I need to resolve to determine the issues before me.

108. The impairment condition, therefore, is satisfied, and the real question is whether the claimant's migraines had a substantial adverse effect on the claimant's ability to carry out day-to-day activities, and if so, whether the adverse effect was long-term.

109. The statute (s.212(1) EqA 2010) says that effect will be substantial if it is "more than minor or trivial." It is not immediately apparent whether "minor" and "trivial" are

used to describe different properties, or intensity, or propensity of the same “effect”, or just as synonymous terms. If the former, it is not obvious to me where, as a matter of ordinary language, those lines are to be drawn. If the latter, using two adjectives to describe the same “effect” when one would be sufficient seems superfluous and is unlikely to be what Parliament intended.

110. However, nothing turns on this. The way the definition is worded (“substantial” means more than minor or trivial) seems to me that only one of the two qualifications need to be satisfied for the effect to be substantial. That is to say that if I find that the effect was more than “minor” I do not need to consider whether it was more than “trivial” as well, because it would already be substantial, even if I were to find that it was no more than “trivial”. Equally, if I find that the effect was more than “trivial”, it will be substantial, even if I do not find that it was more than “minor”.

111. The claimant describes in his disability impact statements the symptoms of migraine attacks:

- o vertigo,
- o altered vision, including:
 - o visual Auras, commonly flashing lights and hallucinations,
 - o on a number of exceptional occasions temporary loss of entire vision.
- o nausea and vomiting,
- o headache,
- o sensitivity to light and sound,
- o difficulty focusing, lack of concentration, and
- o slowed responses.

112. These symptoms are evidently serious. However, I must assess not the seriousness of the symptoms, as such, but how they, as the manifestation of the claimant’s impairment of migraine, affect the claimant’s day-to-day activities.

113. The claimant states in his disability impact statement that when he suffers from an occurrence of a migraine his ability to do day-to-day activities is affected substantially. He describes the above symptoms and that when he suffers them, he cannot focus on a computer screen thus making it impossible to do his job. He also says he feels unsteady on his feet and needs to lie down. He says that when symptoms are severe, he cannot read, write, or use screens at all.

114. He says that intensity and duration of symptoms vary from hours to “multiple days”, and when they happen, he feels unsafe to work as a doctor.

115. In giving his evidence to the Tribunal, the claimant said that he would typically have migraines once or twice a week. This is consistent with what he reported to his

GP. That means that he did not suffer the described symptoms on most of the days during a week.

116. Furthermore, except for one example when on 28 March 2022 the claimant attended a sickness review remote meeting from a dark room because of suffering from migraine (and even then, he asked for the meeting to go ahead), the claimant gave no other concrete examples of when migraine symptoms actually caused him not to be able to undertake a particular activity.

117. On the other hand, the claimant confirmed to me that he continued to drive long distances despite the risk of having a severe migraine attack and did not report to the DVLA what he describes as a “debilitating” condition making him feel unsafe to work.

118. Also, the claimant felt capable of taking on additional work as an appraiser in November 2021 and conducting colleagues’ appraisals in March and May 2022, despite being signed off work. In June 2022, he felt able and safe to drive to the hospital in Peterborough to attend a meeting in his capacity as the Deputy Foundation Training Programme Director.

119. His medical records show significant periods when migraines are not raised with his doctors despite the claimant continuing to attend his GP practice with other health problems. The GP records do not record migraines as the claimant’s “Active Problems” or “Significant Past”.

120. I do have regard to the fact that the claimant’s GP had been assessing the claimant as unfit for work due to migraines and debility from 14 December 2011 for four, six and even eight weeks at a time. This, however, in my view, is not conclusive.

121. Firstly, the claimant’s evidence is that he had migraine attacks one or twice a week. It is during such attacks he claims his ability to carry out day-to-day activities was significantly affected.

122. The claimant does describe feeling foggy, spaced out, confused, and nauseated during what he calls “the post-migraine stage”, and as a result having reduced response and thinking speed. The claimant claims that the post-migraine stage could endure over days and sometimes even into the next migraine episode. He, however, does not say how his ability to carry out normal day-to-day activities is affected during such post-migraine stage. In particular, he does not say what day-to-day activities are affected in that stage. He does not state how much more time he needs to complete such activities when compared with when he is not in the post-migraine stage.

123. Furthermore, the assertion that the claimant’s migraines merged into some kind of a constant condition of reduced cognitive functionality with varying degree of intensity does not sit well with the fact that the claimant was able to continue to drive, attend on his demanding caring responsibilities, conduct colleagues’ appraisals, attend a meeting in the hospital. It is also not supported by the claimant’s medical evidence.

124. Finally, the claimant says in his disability impact statement that “due to [his] increasing exhaustion [the migraines] began occurring more frequently”. As with respect of exhaustion and debility, in considering whether the migraines impairment had a substantial and long-term adverse effect on the claimant’s ability to carry out day-to-

day activities, I must take into account whether and if so, how far the claimant could reasonably be expected to modify his behaviour to prevent or reduce such effects. Therefore, my findings at paragraphs 99-105 above are equally applicable to migraines.

125. Stepping back and looking at the entire picture, I am not satisfied that the claimant has discharged the burden of showing on the balance of probabilities that his migraines at the relevant times had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

The Law

19. Section 6 of the **Equality Act 2010** (“**EQA**”) defines the protected characteristic of disability:

- (1) 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.
- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability –
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) –
 - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
- (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
- (6) Schedule 1 (disability: supplementary provision) has effect.

20. The term “substantial” is defined by section 212 **EQA**:

“(1) In this Act –

...

‘substantial’ means more than minor or trivial;

21. The general approach to be adopted when considering disability was set out by Morrison J in **Goodwin v Patent Office** [1999] ICR 302; see p308(b) to (c). Morrison J suggested that a tribunal may be assisted by considering four different conditions; the impairment condition, the adverse effect condition, the substantial condition and the long-term condition. There is no requirement that the Tribunal should adopt that approach (see the judgment of the Court of Appeal in **Sullivan v Bury Street Capital Limited** [2021] EWCA Civ 1694 and [2022] IRLR 159), but it can be helpful for an Employment Tribunal to do so. In **Goodwin** at p309(d) Mr Justice Morrison noted that the emphasis should be on the things that the applicant either cannot do or can only do with difficulty, rather than on the things that the person can do.

22. In **Ahmed v Metroline Travel Limited** [2011] EQLR 464, Cox J emphasised that it is not a question of weighing up what the claimant can do and what the claimant cannot do. One should focus on what the claimant cannot do.

23. The Equality Act 2010 Guidance on Matters to be taken into account in Determining Questions Relating to the Definition of Disability at paragraphs B(7) to B(10) deals with matters such as the possibility of an individual modifying behaviour to prevent or reduce the effects of an impairment on normal day-to-day activities.

24. The eight grounds of appeal overlap substantially. The first job of an Employment Tribunal when assessing whether a person has a disability is to consider whether there is an impairment. The Employment Tribunal accepted that there was an impairment.

25. At paragraph 108, the Employment Tribunal accepted that the claimant’s symptoms were serious.

26. The Employment Tribunal next had to consider whether the symptoms had an effect on day-to-day activities and whether that effect was substantial.

27. I find the judgment of the Employment Tribunal a little difficult to follow. I consider, on one view, the Employment Tribunal simply did not make any firm findings of fact about whether the impairment had an adverse effect on day-to-day activities, or whether that effect was substantial.

28. The respondent stated that I should accept that, where the Employment Tribunal referred to what the claimant described as his symptoms at paragraphs 113 to 115, I should take it that the Employment Tribunal accepted his evidence, because there is nothing in the judgment expressly stating that the evidence was rejected. On that basis, one would have a situation in which the claimant suffered migraines approximately two times per week, during which he could not focus on a computer screen, it was impossible for him to undertake his job, he was unsteady on his feet and would need to lie down and, when the symptoms were severe, he could not read, write or use screens at all. Much of his role as a consultant radiologist required him to use screens to interpret scans.

29. It has long been accepted that normal day-to-day activities can include work activities: see **Paterson v Commissioner of Police of the Metropolis** [2007] ICR 1522 at paragraph 67:

We must read s1 in a way which gives effect to EU law. We think it can be readily done, simply by giving a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment. Since the effect of the disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life.

30. The respondent accepted that it would be hard to see how the effects of the impairment described by the claimant were not effects on day-to-day activities and were not substantial.

31. The respondent contended that the answer was to be found in a section of the judgment in which it was stated that the claimant could be expected to modify his behaviour to prevent or reduce the effects of the impairment at paragraph 124, which incorporated paragraphs 99 to 105. I will start with the ground of appeal that challenges that determination. Ground 7 asserts that the Employment Tribunal erred in law and/or was perverse in finding that the claimant should modify his lifestyle in order to reduce his exhaustion/migraines.

32. The Employment Judge made no reference in the judgment to the fact that the claimant had been absent from work from 7 December 2021 until he resigned on 6 July 2022. During that period, the modifications to the behaviour of the claimant that might reduce migraines had, in large part, been in effect. Yet the medical evidence showed that the migraines had continued at a similar level. Accordingly, I cannot see that there was a rational basis upon which it could properly be concluded by the Employment Tribunal that modification to behaviour would have prevented the migraines. I consider the decision in that respect is perverse.

33. Furthermore, I consider that, in considering the effect that modifications to behaviour might have, an Employment Tribunal should generally consider the effect of the impairment on day-to-day activities absent the modification, and reach a reasoned conclusion as to the change that would occur if the behaviour was modified. An Employment Tribunal should generally consider whether any day-to-day activities would still be affected and, if so, whether they would be affected to a degree that is more than minor or trivial.

34. Accordingly, I uphold ground 7. On the basis that the appeal was argued by the respondent that necessarily means that the decision falls, because what the Employment Tribunal described as biweekly migraines that prevented the claimant functioning such that he could not do his job, had to take to his bed and could not read or write or use screens, on any view, involved a substantial adverse effect on day-to-day activities.

35. Dealing briefly with the other grounds of appeal. Ground 1 asserts that the Employment Tribunal erred in finding that the claimant did not adequately describe the effects of migraine episodes on his ability to carry out day-to-day activities. As I have set out above, it is clear that the claimant did explain the effect on day-to-day activities sufficiently to establish that, during a migraine episode he was unable to work and was substantially debilitated, as set out at paragraphs 113 to 115 of the judgment. Accordingly, I uphold Ground 1.

36. Ground 2 asserts that the Employment Judge erred in finding that the recurring nature of the migraines meant that the claimant was not disabled. The Judge did refer to this factor. It is not entirely clear what the Employment Judge concluded from the fact that there were more periods when the claimant did not have a migraine than periods when he did. That factor does not prevent there being a substantial adverse effect on day-to-day activities. So, insofar as this formed part of the Employment Judge's reasoning, Ground 2 is upheld.

37. Ground 3 challenges the Employment Judge's focus on symptoms during the post-migraine stage. Again, I am not clear that this formed a major part of the Employment Judge's reasoning, but, insofar as the Employment Judge appears to suggest that significant adverse effects on day-to-day activities were not established during the post-migraine phase, that does not alter the fact that, during a migraine episode, there were substantial adverse effects on day-to-day activities.

38. Ground 4 asserts that a pedantic approach was adopted by separating out the post-migraine and migraine stages. On the basis of my determination of the other grounds, that ground does not require determination.

39. Ground 5 contends that certain factual findings were incorrect. There is an error of date in paragraph 120, but I do not consider that is anything more than a slip. While the Employment Tribunal noted that there were significant occasions when the claimant attended his GP without

raising his migraines, the focus should be on those occasions when he did. In the light of the view I have formed about Ground 1, I do not consider that Ground 5 adds to my determination.

40. Ground 6 asserts that the Employment Tribunal erred in law or was perverse in treating the fact that the migraines might be caused by exhaustion as a reason why the claimant was not disabled. Ground 6 is made out. The fact that an impairment results from exhaustion does not prevent it from being an impairment or from it having substantial adverse effects on day-to-day activities.

41. Ground 8 challenges the Employment Tribunal's finding that the claimant had failed to report his condition to the DVLA as contraindicative of the claimant's evidence. That was a matter that the Employment Tribunal was entitled to take into account, but, on the assumption that the respondent suggests I should make, that the Tribunal accepted the claimant's evidence described at paragraphs 113 to 115 of the judgment, it is clear that the claimant had established in evidence that the impairment had a substantial adverse effect on his day-to-day activities. Therefore, while I reject Ground 8 in that the failure to report to the DVLA was a matter that the Employment Tribunal was entitled to take into account, it has no significant effect on my overall conclusion.

42. Accordingly, the appeal succeeds.

43. I have concluded in circumstances in which the respondent accepts that I should take it that the effects on day-to-day activities as described by the claimant, set out in paragraphs 112 to 115 of the judgment, were accepted by the Employment Judge and, in the light of my conclusion that it was perverse to conclude that modification to behaviour could prevent those adverse effects on day-to-day activities or render them insubstantial, I conclude that this is a case in which there can only be one possible correct answer. Accordingly, I substitute a finding that the claimant was a disabled person at the material times.