EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111083/2019 (V)
Held by video on 9, 10, 11 and 12 November 2020
Employment Judge: W A Meiklejohn

Ms S Wood	**Claimant** **Represented by:** **Ms M McGrady, Solicitor**
Pepperwood Care (Management) Ltd	**Respondent** **Represented by:** **Mr S Morris, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that at the relevant time (a) the claimant was disabled within the meaning of section 6(1) of the Equality Act 2010 (by reason of physical impairment caused by fibromyalgia) for the purpose of her complaint of unlawful discrimination and (b) the respondent (i) had shown that it did not know that the claimant had that disability but (ii) had not shown that it could not reasonably have been expected to know that the claimant had that disability.

REASONS

1. This case came before me for a preliminary hearing, conducted by means of the Cloud Video Platform ("CVP"), to determine the following issues –

   (i) whether at the relevant time the claimant was a disabled person under the Equality Act 2010 ("EqA") and,

   (ii) if so, whether the respondent knew or ought reasonably to have known that under section 15(2) EqA.

2. Ms McGrady appeared for the claimant and Mr Morris appeared for the respondent.

Procedural history

3. The claimant's ET1 claim form was submitted on 19 September 2019. This contained complaints of unfair dismissal, breach of contract (in respect of

notice pay) and unlawful discrimination, the protected characteristic being disability. The disability discrimination complaints were brought under section 15 (**Discrimination arising from disability**) and section 26 (**Harassment**) of the Equality Act 2010("EqA"). The respondent submitted an ET3 response form on or around 22 October 2019 resisting these claims and reserving their position as to whether the claimant was disabled at the relevant time.

4. A preliminary hearing for the purpose of case management took place on 20 November 2019 (before Employment Judge Kemp). It was agreed that there should be a 5 day final hearing, preceded by a one day preliminary hearing on disability status and knowledge of disability. Subsequent to this the claimant's medical records and a disability impact statement were produced but disability status remained in dispute.

5. The progress of the case was then hindered by the Covid-19 pandemic. I understood that a hearing on disability status was fixed but required to be discharged.

6. A further preliminary hearing for the purpose of case management took place on 15 July 2020 (before Employment Judge Hendry). It was confirmed at this hearing that disability status was still in dispute and it was agreed that the preliminary hearing on disability status and knowledge of disability should be conducted by CVP and should be set down for 3 days.

7. One other point of note is that at the first preliminary hearing the respondent's representative confirmed that no argument as to objective justification was made under section 15 EqA.

Applicable law

8. The definition of disability is found in section 6(1) EqA –

"*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."

9. This definition is supplemented in Schedule 1 EqA which contains the following provisions –

"***2 Long-term effects***

(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…."

"*5 Effect of medical treatment*

(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.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid…"

10. Section 6(5) EqA makes provision for guidance to be issued about matters to be taken into account in deciding any question for the purposes of section 6(1) EqA. This is found in the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (the "Guidance").

11. Section 15 EqA, so far as relevant, provides as follows –

"*(1) A person (A) discriminates against a disabled person (B) if –*

(a) A treats B unfavourably because of something arising in consequence of B's disability….

(3) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

Evidence

12. For the claimant I heard evidence from the claimant herself and from her daughter, Ms B Wood. For the respondent I heard evidence from Ms M Thomson, Home Manager, Mr R Aliaga, Care Assistant and Mr B Toriola, Registered Nurse. The evidence in chief of each witness was contained in a written witness statement (supplemented in the case of the respondent's witnesses by some additional questions).

13. There was a joint bundle of documents extending initially to 349 pages and supplemented by two additional documents added at the hearing. I refer to this by page number.

Findings in fact

14. The claimant was a registered nurse. She was employed in that capacity at Eastleigh Care Home, Peterculter ("Eastleigh") from 1 May 2014. Her employment ended on 27 May 2019.

15. The respondent was a care home operator. It operated Eastleigh. Ms Thomson was employed as Home Manager from April 2017.

16. At the time her employment at Eastleigh started, the claimant completed a Pre-Employment Medical Questionnaire (59). In this she answered "*No"* to the following questions –

- *Are you currently receiving treatment for any physical or mental condition?*
- *Do you suffer from any injury, illness, medical condition or allergy that might affect your ability to perform your duties?*
- *Do you consider yourself to have a disability?*

17. In answer to a question about prescribed medication the claimant wrote "*inhaler for asthma".*

18. In terms of her contract of employment dated 5 January 2017 (49-56) the claimant was employed to work 33 hours per week. On 2 September 2017 the claimant wrote to Ms Thomson (239) requesting to reduce her contracted hours to 22 per week. She said –

"*I will be able to work every Thursday & Friday night, as you know I have increasing family commitments.*

Hopefully I can pick up a Saturday night if circumstances allow, and if things change in time I may be able to increase my hours again if at all possible."

Claimant's medical history

19. The bundle of documents included the claimant's GP records from September 1989 (77-125). These disclosed a history of (a) depression, first referenced in December 1991 (115), (b) knee pain, first referenced in February 2009 (93) and (c) neck, arm and shoulder pain, first referenced in August 2013 (91).

20. The claimant underwent bilateral knee replacement surgery in 2015 and 2016.

21. In 2013 the claimant attended a course of treatment by an osteopath who indicated to her that, based on the symptoms she was experiencing, she might be suffering from fibromyalgia.

22. The claimant's GP notes disclosed a consultation with Dr E Paterson on 23 August 2018 (86) –

"*Tentative fibromyalgia diagnosis. Things getting worse. Pain and muscle stiffness."*

23. There was an earlier reference to fibromyalgia in the claimant's GP records. The note of a consultation with Dr C J Howarth on 15 August 2017 (87) stated –

"*managing to work but fibromyalgia bad"*

24. A number of the statements of fitness for work issued by the claimant's GP surgery referred to fibromyalgia –

- On 23 August 2018 (68) – *"Fibromyalgia"*
- On 12 December 2018 (69) – "*Fibromyalgia exacerbation and family stress"*
- On 27 December 2018 (70) – "*family stress, exacerbation of fibromyalgia*"

- On 16 April 2109 (71) – "*Fibromyalgia"*
- On 29 April 2019 (72) – "*Fibromyalgia"*

25. In all of these statements of fitness for work the references to the claimant benefitting from "*a phased return to work", "amended duties" "altered hours"* and "*workplace adaptations"* were deleted. There were comments in two of the statements –

- On 23 August 2018 (68) – "*Struggling with pain"*
- On 16 April 2019 (71) – "*Stress and anxiety contributing to Fibromyalgia flare"*

26. Dr Paterson wrote a letter to the claimant's solicitor on 27 March 2020 (47-48) in which he stated that the claimant *"does appear to suffer from fibromyalgia".* He described the claimant's main symptoms as "*pain, muscle stiffness and fatigue".* In relation to day-to-day activities Dr Paterson stated –

"*Unfortunately it is hard for me to comment on Mrs Wood's ability to carry out her normal day to day activities as I can only rely on what the patient is telling me at consultation. I have never been aware of her being unable to complete her day to day activities but clearly the symptoms of fibromyalgia would potentially make these more difficult."*

27. Dr Paterson's letter also contained the following statements –

"*8. Mrs Wood's fibromyalgia definitely appears to be worse when her stress and depression is worse. This would be normal for fibromyalgia. Conversely fibromyalgia of course can also contribute to stress and depression given these symptoms that it causes.*

9. Fibromyalgia treatment in general is aimed at improving mood and anxiety/stress as well as reducing some of the pain symptoms. It would be unusual for pain medication to fully eradicate this set of symptoms.

10. In terms of prognosis this is very difficult to predict for fibromyalgia but it does tend to be a chronic enduring condition which fluctuates with the patient's mental state."

Claimant at home

28. In her disability impact statement (43-46) and in her witness statement, the claimant has described her symptoms and their impact from 2013 onwards. However, given that the alleged acts of discrimination took place in April/May 2019 and having regard to the statutory definition of disability, I have focussed on her evidence relating to 2018 onwards.

29. The claimant described a number of impacts of her fibromyalgia when she is at home and/or carrying out normal day-to-day activities –

    (a) "*Fibro-fog"* - causing the claimant to feel confused and be forgetful (not locking her door, losing her keys, getting names and dates mixed up).

    (b) Communication – difficulty in finding words to express herself, difficulty in responding to a question, calling people by the wrong name.

    (c) Fatigue – being kept awake at night or being woken up by pain, being exhausted after a trip to the supermarket, doing housework at her own pace or leaving it to another day; the claimant also referred to "*sudden exhaustion".*

    (d) Stiffness – being unable to move around until medication taken.

    (e) Muscle weakness – making it difficult to dress, do housework and shower.

    (f) Social interaction – finding it difficult to maintain social and family relationships, exacerbating depression and low mood.

30. There was a conflict in the claimant's evidence where she said (describing her symptoms from 2018 onwards) "*I had good days and bad days where the symptoms would flare up and I would be almost completely debilitated by the pain and exhaustion"* and then later "*From 2018 onwards, I would say I've never had a "good day" and am in constant pain".* My view of this was that the former statement about good and bad days was more accurate, but a good day for the claimant was one where the pain caused by her fibromyalgia was controlled by her medication.

31. The claimant lived close to and provided support and care to her mother. She visited her mother daily and did her shopping. The claimant's mother suffered a stroke in April 2018 and, according to the claimant and her daughter, this caused the claimant's symptoms to worsen. The claimant's daughter's evidence supported the impacts of her fibromyalgia described by the

claimant. The claimant said that rest was her "*key to coping"* and that she would "*preserve my energy".*

Claimant at work

32. Ms Thomson's evidence was that she became aware of the claimant's fibromyalgia when the claimant mentioned this at a return to work meeting on or around 1 February 2018 (75-76). The claimant described her reason for sickness absence as "*exacerbation of fibromyalgia syndrome".* The claimant stated that she had *"been diagnosed as having FMS 5 years ago"* and said *"I am living with it".* The note made by Ms Thomson recorded that the claimant felt "*fully fit to return to work"* and had "*no concerns with returning to work".*

33. The claimant went through an annual appraisal including one which took place on 23 October 2018 (131). She attended one-to-one supervision meetings including 10 October 2017 (236-237) and 1 June 2018 (136-137), both with Ms R Watt (then Deputy Manager at Eastleigh), and 25 March 2019 (350-351) with Ms Thomson. She attended a staff supervision meeting with Ms Thomson on 18 June 2018 (240). None of these disclosed any issues regarding the claimant's ability to carry out her nursing duties.

34. The claimant worked on night shift and would be on duty with three care assistants. Two of these worked on the upper floor of the building while the claimant and the other care assistant worked on the ground floor where the office used by the claimant was located. There were certain tasks such as giving residents their medication which only the claimant as a registered nurse could perform. Other tasks such as moving and handling and taking residents to the toilet were shared.

35. The claimant worked regularly with Mr Aliaga. Their evidence differed as to how much time they spent together during a shift – Mr Aliaga said 60% while the claimant said 40%. The difference was not particularly material in that it was clear that they spent a significant amount of time working together. In contrast, Mr Toriola did not work with the claimant and they met only at handover times (start/end of shift). Ms Thomson did not work with the claimant and would see her only briefly when the claimant was finishing night shift.

36. The claimant told Mr Alagia about her fibromyalgia. The evidence did not disclose when this conversation took place. Mr Alagia said that the claimant had not told him about being in pain but about being absent from work because of pain. As the claimant had mentioned fibromyalgia at her return to work interview in February 2018, it seemed more likely than not that her

conversation with Mr Alagia had taken place around that time. Mr Alagia had told the claimant that he had a brother who suffered from fibromyalgia.

37. All of the respondent's witnesses said that they had not observed the claimant displaying any of the symptoms of her fibromyalgia which she described (see paragraph 29 above). This was of little evidential value in the case of Ms Thomson and Mr Toriola as they did not routinely work with the claimant in the way that Mr Alagia did. Mr Alaiga denied seeing the claimant in pain. He had "*never witnessed all the claimant's energy being taken up doing simple work tasks and leaving her exhausted"* nor had he witnessed any "*sudden exhaustion".* He had not witnessed the claimant having difficulty concentrating or struggling to communicate.

38. Ms Thomson said that if any of the claimant's colleagues had concerns about her ability to work they were expected to bring those concerns to her attention. Noone had done so. Ms Thomson also said that *"it would have been required"* for the claimant to tell her about her difficulty with day-to-day tasks and her sudden exhaustion *"given her role and also the professional conduct rules"* which applied to the claimant as a nurse. This was a reference to the fact that, as a registered nurse, the claimant was regulated by the Nursing and Midwifery Council ("NMC").

39. As a registered nurse the claimant had to go through a regular revalidation process with the NMC which included making a declaration – *"I declare that my health and character are sufficiently good to enable me to practice safely and effectively…."*. It was not clear from the evidence whether the beneficial effect of medication had any bearing on a registrant's ability to make this declaration.

40. On 14 January 2019 the claimant completed a Night Time Workers' Health Questionnaire (129-130). Ms Thomson's evidence initially indicated that this was connected with the return to work interview in February 2018 but she later acknowledged that this was incorrect, and that it followed an annual health and safety audit. In the questionnaire the claimant answered "*No"* to a number of health questions including whether she suffered from "*any of the following ill health conditions"* –

    - *Any condition which may cause you difficulty sleeping?*
    - *Any medical condition requiring medication to a strict timetable?*
    - *Any other health factors that might affect fitness at work?*

41. The claimant's evidence was that she could not remember completing this questionnaire. She could not provide an explanation for her answers but denied she was trying to hide her condition from the respondent as they already knew about it. Under cross examination the claimant accepted that she had not declared her difficulty sleeping as she might have lost her job. She had not disclosed her medication as it was not taken to a strict timetable. She had not declared any other health factors as they did not affect her fitness at work and, as she put it, "*I always managed to get through my shifts".*

42. The claimant then said that she did not think about the questions at the time and that she could not think clearly because of her fibromyalgia. She repeated her concern about losing her job. I considered that it was more probable than not that the claimant had been aware, at the time she did so, of the way in which she answered these questions and did not wish to provide answers which might have placed her employment at risk, particularly when she regarded her own practice as "*safe and effective*".

43. On 30 May 2019 the claimant submitted a job application to Sanctuary Care with a view to securing employment at Pitcairn Lodge Nursing Home (255-258). This appeared to follow on from an interview on 29 May 2019 (259-263). The claimant also completed a Pre-Employment Health Questionnaire (264-274). In this questionnaire, at the night working section, the claimant ticked the box to confirm that she was "*currently in good health".* She disclosed the medication prescribed for her fibromyalgia but did not mention her anti-depressant medication. She disclosed her osteo-arthritis and her bilateral knee replacements. The claimant asserted that she had been "*very ill"* when she completed the questionnaire and that her answers were inaccurate.

Ms Thomson's research

44. Ms Thomson said that she knew what fibromyalgia was and had done some research into it after her return to work interview with the claimant at the start of February 2018. She said that she was aware fibromyalgia could be a serious condition but that when she researched it "*the claimant was not displaying any of the symptoms".* Ms Thomson said that she understood fibromyalgia could affect people differently. She said that her research was sufficient for a "*general overview"* of the condition.

45. Ms Thomson did not consider that she needed to take any action in February 2018 as the claimant indicated she had no limitations and her GP backed that up (which I understood to be a reference to the claimant's statements of fitness for work – see paragraph 25 above). She did not agree that she

should have contacted the claimant's GP because she had "*no need to do it".* She did not accept that she should have referred the claimant to Occupational Health as there was "*no reason to do so".* She added that the claimant's standard of work was very high and that the claimant had been "*fully fit to return".* Ms Thomson said that she would have investigated if she had *"witnessed any change to the claimant's standard of practice".*

46. Ms Thomson agreed that in 2017 she and the claimant had discussed Chinese cupping (an alternative therapy) when the claimant had shown her some bruises that she (the claimant) had sustained while having this treatment. The claimant had referred to issues with her neck and shoulders. Ms Thomson had undergone the same treatment to relax muscles. It was not specific to fibromyalgia.

Comments on evidence

47. It is not the function of the Tribunal to record all of the evidence presented to it and I have not attempted to do so. I have sought to focus on the evidence which I considered most relevant to the issues I had to decide.

48. My sub-division of my findings in fact into sections dealing with *"Claimant at home"* and "*Claimant at work"* reflected the sharp contrast between (a) the evidence of the claimant and her daughter about what the claimant was unable to do at home and (b) the evidence of the respondent's witnesses about what the claimant was able to do at work.

49. There were some inconsistencies within the evidence of both the claimant and Ms Thomson. In the claimant's case, see paragraph 30 above. In the case of Ms Thomson, see paragraph 40 above. The claimant's statement in February 2018 that she was "*living with"* her fibromyalgia had a particular ring of truth to it. For the claimant a *"good day"* was one when her pain was controlled by her medication and I formed the impression that good days (thus defined) outnumbered bad days.

50. Notwithstanding these observations I found that all of the witnesses were basically truthful and credible.

Submissions for claimant

51. Ms McGrady invited me to find that the claimant and her daughter had been credible and reliable witnesses.

52. The claimant (and her GP) had disclosed her fibromyalgia to the respondent. Ms Thomson confirmed that she researched fibromyalgia after the claimant disclosed it and found it to be a debilitating and serious condition which affected different people in different ways. Treatment could involve anti-depressants and opiods. Ms Thomson said it would have sounded alarm bells if the claimant was taking opiods. There was, Ms McGrady submitted, a clear basis for further investigation. If Ms Thomson had contacted the claimant's GP or Occupational Health, she would have obtained the necessary information.

53. Ms Thomson said that if the claimant had the symptoms she described in evidence there would have been a huge risk to residents. That placed a greater responsibility on the respondent due to the nature of the services they provided.

54. Referring to the respondent's witnesses, Ms McGrady said that only Mr Alagia had spent time at work with the claimant. Ms Thomson had suggested that the claimant exaggerated when reporting her symptoms to her GP. That provided an insight into Ms Thomson's disregard for the claimant's health condition.

55. Turning to disability status, Ms McGrady said that the claimant's fibromyalgia was both a physical and mental impairment. The physical aspects of pain, muscle stiffness and fatigue were borne out in the claimant's GP records. The mental aspects of stress, anxiety, brain fog and depression were also confirmed in the GP records and in Dr Paterson's letter (47-48). This all accorded with the claimant's evidence. The physical and mental impacts were interconnected.

56. Ms McGrady submitted that the claimant's evidence confirmed the adverse effect of her fibromyalgia on her ability to carry out normal day-to-day activities. She was unable to do daily tasks like getting up and dressing when her symptoms flared up. This was confirmed by her daughter's evidence. The effects were clearly more than trivial.

57. The effects were also long-term. The formal diagnosis was made on 23 August 2018 but the claimant had suffered symptoms for years before that. She had been told by her osteopath that she might be suffering from fibromyalgia. She displayed symptoms consistent with fibromyalgia from 2013.

58. Ms McGrady invited me to find that the claimant had suffered from the effects of her fibromyalgia for more than 12 months before the alleged discriminatory

acts in April/May 2019. If I did not agree, I should find that those effects were likely to last for more than 12 months. This was supported by Dr Paterson's letter where he described fibromyalgia as a "*chronic enduring condition".*

59. Ms McGrady submitted that the respondent was aware of the claimant's impairment. She disclosed it to Ms Thomson. It was stated as the reason for absence in her statements of fitness for work. The respondent knew she might suffer exacerbations.

60. Referring to section 15(2) EqA Ms McGrady said the onus was on the respondent. She referred to paragraph 5 of the decision of the Employment Appeal Tribunal in ***Donelien v Liberata UK Ltd UKEAT/0297/14*** –

"*….it is for the employer to show that it was unreasonable to be expected to know, first that a person suffered (a) an impairment which was physical or mental, (b) that that impairment had a substantial and (c) long-term effect…"*

I observe that the case went to the Court of Appeal (***[2018] EWCA Civ 129***) but not on this point.

61. Ms McGrady referred to paragraphs 5.14 and 5.15 of the Equality and Human Rights Commission: Code of Practice on Employment (2011) (the "Code"). These provide as follows –
"*5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person".*

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

62. Ms McGrady accepted that it was not for the employer to make every enquiry where there was little or no basis for doing so. She referred to paragraph 22 of the decision of the EAT in ***Secretary of State v Alam [2010] ICR 665***. While the proposition is correct I did not see that the cited case supported it.

63. Ms McGrady referred to paragraph 41 of the decision of the EAT in ***A Ltd v Z UKEAT/0273/18*** –

"*Section 15(2) EqA is directed at the question of the employer's knowledge: where the employer does not have actual knowledge, what might it reasonably have been expected to have known? In the present case the ET sought to answer that question in terms of what the Respondent might reasonably have been expected to do: that is, to have understood that mental health problems often carry a stigma, which discourages people from disclosing such matters and, therefore, to have made enquiries into the Claimant's mental wellbeing. That, however, does not answer the question as to what the Respondent might reasonably have been expected to know, after having made those enquiries."*

64. Ms McGrady submitted that it had been reasonable for the respondent to make further enquiries to find out if the claimant was disabled. Her GP had certified her as unfit for work five times by reason of her fibromyalgia. The respondent knew it was a medical condition. The claimant disclosed at her return to work interview in February 2018 that she might suffer exacerbations. The respondent as a healthcare provider (and in particular Ms Thomson as an experienced healthcare professional) should have known that the claimant's fibromyalgia could amount to a disability.

65. Writing to the claimant's GP would have been a simple step to take. If the respondent had done so, they would have provided with the same information as was contained in Dr Paterson's letter (47-48). They would have been aware that the claimant was likely to be disabled. If the respondent had referred the claimant to Occupational Health they would likely have been made aware of the substantial adverse long-term effects of the claimant's fibromyalgia.

66. Accordingly, Ms McGrady argued, the claimant was disabled and the respondent either knew or ought to have known that she was disabled.

Submissions for respondent

67. Mr Morris reminded me of the scope of the preliminary hearing, by reference to EJ Kemp's Note following the case management preliminary hearing on20 November 2019. At paragraph 7, the issue was "*Did the claimant have a physical impairment caused by fibromyalgia which had a substantial adverse effect on her ability to carry out day to day activities?"* At paragraph 13 the issues for this preliminary hearing were expressed in terms similar to paragraph 1 above. Neither party had sought to amend the list of issues.

68. In ***A Ltd v Z*** the employee had concealed the impairment. The Employment Tribunal found that it had been incumbent on the employer to make enquiries. The absence of such enquiries meant the employer could not argue that it could not reasonably have been expected to know of the employee's disability. The EAT had held that this was an error – the issue was what the employer might reasonably have been expected to know. In the present case, Mr Morris submitted, the respondent could not reasonably have been expected to know of the claimant's disability.

69. Under reference to ***Ministry of Defence v Hay UKEAT/0571/07*** Mr Morris reminded me that the burden of establishing disability was on the claimant. He also reminded me that the Tribunal should stick to the agreed list of issues – ***London Luton Airport Operations Ltd and another v Levick UKEAT/0270/18***.

70. Mr Morris referred to paragraphs 5.14 and 5.15 of the Code. He reminded me that the test was objective. Dignity and privacy were relevant but there had to be mutual trust and confidence. In the present case there had been regular health discussions with the claimant, not least due to her knee replacements. The claimant had asked for support, and changes to her days and hours of work were agreed by the respondent (238-239). There was also regular support at supervision and appraisal meetings.

71. When the claimant's employment started in 2014 she did not disclose fibromyalgia or any other disability. There had been regular discussion between the respondent and the claimant about her health, but no disclosure of her fibromyalgia nor that it was a disability. The first mention made by the claimant of her fibromyalgia was at her return to work meeting at the start of February 2018, when the claimant told Ms Thomson that she was fit to return for her contracted hours. Ms Thomson had noted at this time (76) that the claimant had "*No concerns with returning to work".*

72. Mr Morris argued that the respondent, as a matter of trust and confidence, had taken the claimant at face value. It was not unreasonable to accept what she said. There was no basis upon which to find that the respondent did not do all that it was reasonably expected to do. The claimant said that it was not work related. There were no issues with the claimant's work. It was the claimant's responsibility to disclose if her fibromyalgia impacted on her at work.

73. Mr Morris argued that the claimant had exaggerated her symptoms and referred to her medical records as indicating that she had not sought pain relief medication when she alleged she was suffering those symptoms.

74. Mr Morris observed that the diagnosis of the claimant's fibromyalgia was described as "*tentative".* She had not shared this with the respondent. Her statement of fitness for work (68) provided no information beyond the reason for absence.

75. When the claimant completed the Night Time Workers Health Questionnaire on 14 January 2019 (129-130) she declared that she did not suffer from any condition which caused her difficulty sleeping, nor any medical condition requiring medication to a strict timetable nor (despite having recently returned from her second period of absence due to fibromyalgia) having any other health factors which might affect fitness at work.

76. Not long after this the claimant had a supervision meeting on 25 March 2019 (350-351). The record of this meeting stated that the claimant would be "*fully supported in her role if she needs extra support or time off".* The respondent was entitled to expect trust and confidence from the claimant. She gave the respondent no indication of concern about her ability to work. The respondent did not have constructive knowledge of the claimant's disability and should not be liable.

77. Mr Morris said that the respondent had challenged the claimant's evidence of disability. Her account of the pain she suffered was not supported by her GP records. There was no discussion of pain relief with her GP and this contradicted her own evidence. I observe that this might overlook the fact that some of the claimant's medications were stated in her GP records to be on repeat prescription (97).

78. There was no expert evidence. The GP's letter did not state conclusively that the claimant had fibromyalgia. The GP was not aware of the claimant's ability to complete her day-to-day activities and his letter undermined the claimant's evidence that she had discussed this with him.

79. Mr Morris highlighted conflicts in the claimant's evidence. He referred to the good days/bad days point (see paragraph 49 above) and her evidence about NMC revalidation and the Pitcairn Lodge medical questionnaire (see paragraphs 39 and 43 above). There was a pattern, he submitted, of the claimant not disclosing matters to her employers and her regulator. This was relevant to the issue of what the respondent knew or reasonably ought to have known. It was not reasonable to expect the respondent to dig for information when the claimant was not honestly disclosing it.

80. The information which the claimant did disclose was clear. She had fibromyalgia and was living with it. It did not impact on her ability to work. No further information was provided. There was nothing on the basis of which the respondent could reasonably have known that the claimant was disabled.

Discussion

81. The claimant is disabled within the meaning of section 6(1) EqA because of her bilateral knee replacements. These are prostheses without which she would be either (a) still adversely affected by osteo-arthritis or (b) unable to walk. That was not however relevant to the issues I had to decide.

Disability status

82. The first of those issues was whether the claimant had a physical impairment caused by fibromyalgia which had a substantial and adverse long-term adverse effect on her ability to carry out normal day-to-day activities.

83. I did not believe that much significance should be attached to Dr Paterson's reference in the claimant's GP notes to her diagnosis being "*tentative"*, for the following reasons –

    (a) The reason stated by Dr Paterson in the claimant's statement of fitness for work issued on the same date (23 August 2019) as the "*tentative"* diagnosis simply said "*Fibromyalgia".* That was the reason notified to the respondent as employer. The same applied to the subsequent statements of fitness for work.

    (b) There was a previous reference to "*fibromyalgia"* in the claimant's GP records on 15 August 2017, by a different GP, which was unqualified.

    (c) While Dr Paterson's statement in his letter of 20 March 2020 (47-48) that the claimant *"does appear to suffer from fibromyalgia"* could be said to be less than 100% positive, it was affirmative of the diagnosis rather than contradicting it.

84. I was satisfied that the claimant's fibromyalgia was a physical impairment. The Guidance (at A3) states that this term "*should be given its ordinary meaning".* "*Impairment"* connotes diminished, weakened or damaged. "*Physical"* means relating to the body (as opposed to the mind). Dr Paterson's letter confirmed that the symptoms described by the claimant in her disability impact statement (43-46) were "*consistent with fibromyalgia".* Those symptoms included exhaustion, pain, muscle weakness, difficulty in

concentrating/remembering things and low mood. These were broadly the same symptoms as described by the claimant when at she was at home (see paragraph 29 above).

85. I was satisfied that the claimant's fibromyalgia had a *"substantial adverse effect"* on her. The Guidance (at B1) states that "*substantial"* means more than *"minor or trivial". "Adverse"* means harmful or unfavourable. The effects described by the claimant when she was at home were substantial and adverse.

86. I was satisfied that the substantial adverse effect of the claimant's fibromyalgia was *"long-term".* On the balance of probability I believed that at the relevant time, ie April/May 2019, the substantial adverse effect of the claimant's fibromyalgia had already lasted for 12 months, indicated by the reference to fibromyalgia in her GP records on 15 August 2017. Dr Paterson's reference to fibromyalgia as a *"chronic enduring condition"* supported my view that the claimant's impairment was likely to last at least 12 months, judged as at April/May 2019.

87. I was satisfied that the claimant's fibromyalgia had a substantial adverse effect on her ability to carry out normal day-to-day activities. I accepted her evidence about how her fibromyalgia affected her. I formed the view that for the claimant a "*good day"* was one when her fibromyalgia was controlled by her medication. I reminded myself that the effect on the claimant of her impairment had to be judged on the basis of "*but for"* her medication.

88. I did not consider that the respondent's witnesses were being untruthful in their descriptions of the claimant when she was at work. What they observed was the claimant "*living with"* her fibromyalgia. They did not see the claimant exhausted when her pain had kept her awake at night or when she woke up extremely stiff needing to take her medication before she could move around. I did not believe that the credibility of the respondent's witnesses about the claimant at work indicated that the claimant was being untruthful in her description of how her fibromyalgia affected her when not at work. The respondent's witnesses were not in a position to judge to what extent the claimant was able to function at work because of her medication.

89. I was accordingly satisfied that the claimant did have a physical impairment which had a substantial and adverse long-term effect on her ability to carry out normal day-to-day activities.

Knowledge

90. The second issue which I had to decide was the one which arose under section 15(2) EqA. Had the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability? There were two stages to this – (a) did the respondent know that the claimant had the disability and (b) if not, ought the respondent to have known?

91. I considered the question of the respondent's knowledge. It was clear that, no later than 2 February 2018, Ms Thomson knew that the claimant had fibromyalgia. That was disclosed by the claimant at her return to work interview (134). Ms Thomson also knew from the claimant's statement of fitness for work dated 23 August 2018 (68) that the claimant's fibromyalgia was capable of rendering her unfit for work. That was not the same, however, as knowing that the claimant had a disability.

92. The onus here was on the respondent – see paragraph 60 above. Had they shown that they did not know that the claimant had a disability? In my view, the answer to that question was "*yes".* I found that the respondent's witnesses were truthful and credible. They had not seen the claimant displaying while at work the symptoms she described when at home. This reflected the claimant "*living with*" her fibromyalgia.

93. At the return to work interview on 2 February 2018 the claimant had answered the question "*Do you feel fully fit to return to work?"* by writing *"Yes, for my contracted hours 22hrs/week. If I was not fit to return my GP would sign me off work".* Ms Thomson had noted (135) –"*Sheila feels fully fit to return to work".*

94. Notwithstanding this, Ms Thomson had undertaken some research about fibromyalgia. Her evidence was that she had done this after the return to work interview in February 2018. She was aware that fibromyalgia was a "*serious condition"* but said that "*the claimant was not displaying any of the symptoms*". If matters had to be judged as at February 2018 I might have been persuaded that the respondent could not reasonably have been expected to know that the claimant had a disability (in relation to her fibromyalgia).

95. However, matters did not rest there. In August 2018 the claimant was absent from work for two weeks and submitted a statement of fitness for work which gave the reason for absence as "*fibromyalgia".* From her earlier research Ms Thomson was aware of the symptoms of fibromyalgia because she was able to say that the claimant was not displaying those symptoms. The claimant being unfit for work by reason of fibromyalgia should have been the catalyst

for Ms Thomson, as an experienced healthcare professional, to do something more to satisfy herself that the claimant remained able to do her job safely and without endangering herself or the residents in her care.

96. I reminded myself of paragraphs 5.14 and 5.15 of the Code (see paragraph 61 above). In my view, the steps suggested by Ms McGrady were ones which it would have been reasonable for the respondent to take. I did not believe that the absence of any indication on the claimant's statements of fitness for work that "*a phased return to work "* et cetera (see paragraph 25 above) would benefit the claimant altered that view. Ms Thomson should have sought the claimant's consent to obtain a report from her GP or made a referral to occupational health.

97. I considered what the EAT said in ***A Ltd v Z*** (see paragraph 63 above). I agreed with Ms McGrady that if the respondent had written to Dr Paterson they would, on the balance of probability, have been provided with the similar information to that contained in Dr Paterson's letter (47-48). I say "*similar*" rather than *"the same"* because it was apparent from the terms of his letter that Dr Paterson had seen a copy of the claimant's disability impact statement which would not have been available if the respondent had sought a report from him in August/September 2018.

98. Dr Paterson's letter was in reply to an email from Ms McGrady of 20 March 2020 and any report he might have provided to the respondent would inevitably have reflected the terms in which that report was requested. Nonetheless, it was in my view more likely than not that it would have contained references to "*pain, muscle stiffness and fatigue"* and would have stated that fibromyalgia was a *"chronic enduring condition".*

99. Given Ms Thomson's awareness of the nature of the work undertaken by the claimant and her description of the claimant's role as "*a demanding job, both mentally and physically"* it would have been reasonable to expect her (Ms Thomson) to make further enquiries. It was not a sufficient answer to say that the claimant was expected to bring "*any concerns about her ability to work"* to Ms Thomson and her colleagues were subject to a similar expectation, and no such concerns were brought. Paragraph 5.15 of the Code states that the employer "*must do all they can reasonably be expected to do to find out if a worker has a disability".*

100. I considered that if the respondent had done what they could reasonably have been expected to do, they would have known about the claimant's disability. Accordingly, they failed to discharge the onus on them under

section 15(2) EqA and had constructive knowledge of the claimant's disability.

Decision

101. My decision is therefore as set out in my Judgment above.

Employment Judge **Alexander Meiklejohn**

Date of Judgement **23 November 2020**

Date sent to parties **24 November 2020**