



DISCRIMINATION LAW ASSOCIATION

Briefings

Fatigue not considered a disability in circumstances where it was not substantial or long-term

Navarro v Eurostar International Ltd [2022] EAT 7; January 21, 2022

Facts

Ms D Navarro (DN) worked for Eurostar International Ltd (EI) in their customer service team. She underwent a double mastectomy in June 2018. Following the surgery DN suffered right breast pain and discomfort and pain in her right arm. This pain (the physical impairment) caused her to have likely permanent functional issues around her scars. DN also reported suffering from fatigue and depression (the mental impairments).

In January 2019 DN requested a reasonable adjustment of 48-hour rest periods between shifts to prevent extreme fatigue caused by her disability. When the request was rejected in June 2019 for business reasons, DN went off sick and attended her GP who diagnosed severe depression.

DN lodged a grievance in April 2019 with a second request to change her shifts due to fatigue.

Employment Tribunal

DN lodged a claim for her employer's failure to make reasonable adjustments and a claim for discrimination arising from disability related to a warning for sickness absence.

DN claimed her physical and mental impairments amounted to disabilities under the Equality Act 2010 (EA). DN also reported suffering from several other medical conditions and menopausal symptoms, which were not claimed as disabilities.

The ET held a preliminary hearing to determine whether the physical and mental impairments amounted to a disability.

The ET found that following her return to work after surgery, DN found it increasingly difficult to cope with her shift without sufficient rest periods between shifts. In October 2018, DN visited an occupational health adviser who recommended adjustments to assist her with her physical impairment.

The ET found that DN attended a further occupational health consultation in January 2019. The occupational health adviser undertook a mental health assessment and noted that she suffered mild depression and moderate anxiety symptoms. The ET found that DN's depression was not so severe at this time and the advisor didn't recommend any further treatment. There was no mention of tiredness or fatigue during this consultation.

DN was absent from work in May 2019 due to flu and menopausal symptoms. DN attended her GP in June 2019, where it was noted she had suffered an episode of depression three years previously.

The ET found that during a further occupational health consultation in late June 2019, the doctor reported a deterioration in DN's mental health. The ET found that DN first mentioned fatigue at this consultation and only after her absence in May 2019 for flu and menopausal symptoms.

In her witness statement and during cross examination, DN stated she often fell asleep unexpectedly as a result of her anti-depressants and that her fatigue was due to her menopausal symptoms and mild anaemia.

The ET found that DN's mental impairments (with or without fatigue) were not substantial until around June 2019. There was no evidence of DN's fatigue being related to her physical impairment although it may have been related to DN's depression and menopausal symptoms.

The ET found DN's mental impairments (including fatigue) were not substantial and so did not amount to disabilities. It stated there was no evidence that DN's depression was an underlying condition despite her previous episode and that in June 2019 it could not have been said to be likely to be a long-term condition.

The ET found that DN's physical impairments were substantial and long-term and so amounted to disabilities.

Reconsideration by the ET

DN submitted an out-of-time application for reconsideration to the ET. In requesting reconsideration, DN relied on a previously overlooked note of a meeting with her manager in January 2019 in which it was mentioned that she felt '*... easily tired/overwhelmed*' (the note).

The ET granted an extension for the application on the grounds it could avoid the expense and delay of an appeal to the EAT. However, the ET concluded there was no prospect of a successful reconsideration of the finding that fatigue was not substantial and long-term at the relevant time.

The ET found DN's comment about being easily tired and overwhelmed was noted down between her complaints of physical impairments, and against a background of several consultations with occupational health and her GP in 2018 and 2019 during which there was no record of DN complaining about fatigue. The ET considered the note but it was discounted by a finding that fatigue had not been present at a substantial level before June 2019.

Employment Appeal Tribunal

DN appealed the decision on 3 grounds:

1. the ET did not apply the correct legal test when determining if fatigue was a disability on its own right or part of another impairment
2. the issue of causation was not a relevant consideration and the ET erred in law in addressing the matter, and
3. the finding of causation was perverse.

DN argued in respect of grounds 1 and 2 that the ET set out the correct legal test in its judgment but failed to apply it correctly.

Addressing grounds 1 and 2 together, the EAT found that on a generous construction of the ET's judgment, the tribunal had essentially found that fatigue was not a severable impairment but part and parcel of the physical impairment, which the EAT considered an entirely appropriate conclusion. The EAT found it permissible that the ET could use causation as a determination of whether the fatigue was actually a part of the physical impairment and could not be treated separately.

The EAT stated that when the ET used the word 'cause', it was really considering which symptoms are linked, related to or part of the physical impairment.

Ensuring medical and other records accurately record all impairments and symptoms is essential.

The EAT stated the ET was clear in its findings that DN's fatigue was neither substantial nor long-term at the relevant time. This finding itself was not the subject of the appeal and grounds 1 and 2 were dismissed.

Regarding ground 3, the EAT found there was nothing perverse in the ET's findings and it was open to the ET to find that fatigue had not been mentioned in any substantive way by DN before June 2019. Ground 3 was accordingly dismissed.

Comment

Claimants should be mindful of the evidentiary burden in demonstrating an impairment is substantial and long-term. Ensuring medical and other records accurately record all impairments and symptoms is essential. Legal advisers need to ensure they give due care and attention to accurately particularising a claimant's disabilities.

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