



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs U Pearson

**Respondent:** Voyage 1 Limited

**Heard at:** Newcastle (by Cloud Video Platform (CVP))

**On:** 8 October 2021  
11 November 2021  
7 January 2022 (in Chambers)

**Before:** Employment Judge Shulman

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr N Brockley, Counsel

## PRELIMINARY HEARING (OPEN) RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The proper title of the respondent is Voyage 1 Limited.
2. The claimant does not have a disability in respect of either her eye impairment or her spine impairment (as defined below) within the meaning of section 6(1) Equality Act 2010 ("EA") and accordingly her substantive claims for direct discrimination – disability and discrimination arising from disability are dismissed.

## REASONS

### 1. Claims

- 1.1 Direct discrimination – disability.
- 1.2 Discrimination arising from disability.

2. The Issues as defined in a preliminary hearing dated 25 June 2021 are as follows:

2.1 In respect of the eye impairment (which is admitted by the respondent):

2.1.1 Did that impairment have more than minor or trivial effects on the claimant's ability to carry out day-to-day activities?

2.1.2 Were those effects at the time of the acts of alleged discrimination long-term?

2.2 In respect of the neck and lower back (known together as the spine) impairment:

did that impairment have more than minor or trivial effects on the claimant's ability to carry out normal day-to-day activities? (It is accepted by the respondent that those effects, if proved to be more than minor or trivial, satisfy the long-term requirement in section 6(1) EA).

3. It follows that, from the above defined issues, if the Tribunal decides the issues are made out, that will amount to a finding that the claimant has a disability or disabilities within the meaning of section 6(1) EA. It could also happen that the issues in relation to only one of the impairments is made out, and in relation to that impairment that will amount to a finding of a disability but not in relation to the other. It follows that if no issues are made out, neither impairment shall amount to a disability.

4. In reaching its conclusions the Tribunal has also considered evidence not directly on the issues if such evidence assisted in substantiating that the issues are made out or otherwise.

## **5. The Law**

The Tribunal has to have regard to the following provisions of the law and/or the Guidance (hereinafter defined). Where necessary the narrative of the legal provisions is set out in paragraphs 8.20-8.23 below, but for the sake of completeness reference is made in this paragraph 5. to relevant provisions.

5.1 Section 6(1) EA.

5.2 Section 212(1) EA.

5.3 Schedule 1 EA, paragraphs 2(1) and 2(2).

5.4 Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) ("Guidance").

5.4.1 Paragraph C4.

5.5 The Employment Appeal Tribunal case of Elliott v Dorset County Council UKEAT/0197/20/ LA(V) ("Elliott").

## 6. Matters occurring during the hearing

- 6.1 The claimant was not represented at the hearing and understandably gave the Tribunal the impression that she was passionate about her case. That in itself is not unusual. What was unusual was the claimant's conduct before the Tribunal, which showed a lack of poise and on occasions instances of excitable behaviour, bordering, at times, on the uncontrollable. There were, over the two days of open hearing, at least 14 occasions when the Tribunal had to encourage the claimant to understand the nature and purpose of the proceedings. The Tribunal naturally lost time through this exercise, but managed to get through the evidence in two days. The hearing was originally listed for one day.
- 6.2 The Tribunal explained to the claimant that she was, on occasions when her conduct was challenging, doing little to help her case. However, the Tribunal, in coming to its decision, has disregarded the claimant's conduct before the Tribunal described above, but not the evidence.

## 7. Facts

The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it, finds the following facts (proved on the balance of probability):

- 7.1 The claimant was employed by the respondent as a Support Worker from 22 July 2019 until 29 January 2021. The respondent is a provider of residential care activities for those with learning difficulties, mental health and substance abuse and a provider of social work activities, without accommodation, for the elderly and disabled.
- 7.2 Eye impairment effects on the claimant's ability to carry out day-to-day activities:
- 7.2.1 From the date of the injury to the claimant's right eye on 2 January 2021, the claimant says she suffered a loss of sleep. She found it hard to deal with screens, going on her phone and computer due to bright lights and not able to face natural day sunlight. She told us that she had to wear sunglasses some of the time in her house and sometimes wore an eye patch.
- 7.2.2 When the claimant went to work she asked to be taken off sleeping duty. She says that her reading and typing skills were affected.
- 7.3 Spine impairment effects on the claimant's ability to carry out day-to-day activities:
- 7.3.1 The claimant told the Tribunal that she experienced pain from walking. If the claimant walked in the street a distance of 100 metres it was a struggle. Coming downstairs the claimant had to lean and bend lower to go up. On the other hand, the claimant does not walk with a stick or frame. The claimant says that when she is in mobility she is in pain, as she is when she

carries a shopping bag. She says she can only carry a bag (by which the Tribunal understands her to mean a handbag). When she cleans the house the claimant says she cannot bend down and has to sit on the floor. The claimant says she cannot do little jobs nor stand for long periods. The claimant says she cannot have a hot shower nor shop nor socialise nor walk in the countryside. The says her cooking is limited and takes her longer and she cannot drive.

7.3.2 On the claimant's return to work following a period of sickness, at an interview on 11 September 2020 the claimant asked not to use heavy goods at work, the hoover nor drive company vehicles, but the claimant said holding residents would not be a problem.

7.4 Eye impairment effects long-term:

7.4.1 No direct evidence was called on this. The accident to the claimant's eye occurred, as we have said, on 2 January 2021. The claimant's contract terminated, as we have equally explained, on 29 January 2021. Therefore, at 29 January 2021 is the Tribunal able to make findings of fact about the eye impairment being likely to last for at least 12 months? For that the Tribunal will consider the medical and other evidence.

7.5 Eye impairment medicals:

7.5.1 The claimant says a hard moulded snowball hit her in her right eye and as a result she sustained serious eye injuries with reduced vision and blurry. She was prescribed reading glasses.

7.5.2 On 2 January 2021 the claimant attended South Tees Hospitals, when she was diagnosed with corneal abrasion. The history described a watering eye and blurred vision since with gritty feeling. The report finds a white eye and not obviously watering, small abrasions (very light) to lower cornea. Ointment appears to have been prescribed. When the claimant was discharged treatment was described as "complete". There was no follow-up but the claimant could return if there were problems. However, in evidence the claimant said this medical note (page 148 in the bundle) was not true and that the injury was the destruction of her life. The Tribunal finds as a matter of fact that the medical record is correct.

7.5.3 On 6 January 2021 the claimant attended South Tees Hospitals. The suspected diagnosis was dry eye syndrome, with a comment of normal ophthalmic examination. A communication for the GP was to consider other causes for pain in view of the normal ophthalmic examination. Treatment was complete.

7.5.4 On 15 February 2021 there was a telephone consultation between the claimant and Dr Greenaway of Eaglescliffe Medical

Centre, the health centre used by the claimant. Dr Greenaway comments that he is unsure if this (the eye impairment) is a disability but that if the claimant has constant pain and takes regular medication for it then it may well be. However, it does not sound like this is the case and a reading glasses prescription was suggested.

- 7.5.5 On 16 February 2021 the claimant saw Mr H Soeldner, Consultant Ophthalmologist. The diagnosis was right eye recurrent corneal erosion after recent blunt trauma. The examination revealed that both eyes were white. The right eye had a small area of central corneal epitheliopathy with mild subepithelial corneal haze. There was no keratitis and no intraocular inflammation. Both eyes had clear lenses and fundoscopy revealed optic discs and maculae. Treatment was Viscotears and Xailin night.
- 7.5.6 On 23 February 2021 Dr Kirk, a GP, described the claimant's "problem" as "corneal abrasion (first)". She identified that the claimant saw ophthalmology on 15 February 2021 and the options were contact lenses or antibiotic ointment and eye drops. The claimant's optician issued reading glasses due to a change of vision since the injury, which was affecting the claimant's sleep. The corneal abrasion was healing as per the ophthalmologist, drops were issued and the claimant said she was told there was a risk it could reoccur. The searing pain started to ease.
- 7.5.7 On 26 February 2021 Dr Durrani, a GP, described the problem of the claimant as "pain in face (first)". The claimant was still having pains due to the right eye injury, shooting and burning pain radiating to the side of the head and some numbness constantly present. The claimant was struggling to sleep at night, being concerned about damage to nerves at the side of the face and wanted a scan. Dr Durrani commented that the claimant was adamant that she wanted a scan. Dr Durrani advised an increase in analgesia and monitor.
- 7.5.8 On 2 March 2021 Dr Durrani spoke to the claimant again with the problem "pain in face (review)". The examination described very mild sided facial swelling, very mild tenderness over zygoma process and no areas of extreme tenderness and no bony injury palpable. Dr Durrani commented there was no indication for a scan and the increased analgesia had been issued. (The claimant mentioned the spine impairment and Dr Durrani suggested this be dealt with at another time).
- 7.5.9 On 24 March 2021 Dr Kirk, GP, spoke to the claimant on the telephone concerning the problem of "pain in face (review)". Dr Kirk suggested trying a nasal spray and antihistamine.

- 7.5.10 On 15 April 2021 Dr Kirk spoke to the claimant on the telephone, the problem “pain in face (review)”. The claimant said that her eye and face continued to give pain. The claimant wanted to have it noted that she felt disfigured from the blunt trauma of the snowball. At the hearing the claimant disputed that she asked for this to be put on her records and failed to answer a question that noting the records was for the purpose of litigation.
- 7.5.11 The GP’s notes at the top of the bundle, page 138, are thought to be in April/May 2021 with no GP identification, but the claimant was offered and turned down psychology.
- 7.5.12 Mr Soeldner diagnosed recent blunt trauma to right eye and face on 10 June 2021. The right eye had recurrent corneal erosions with a mild ptosis. There was bilateral blepharitis. The examination showed, amongst other things, mild blepharitis and both eyes healthy, with no facial swelling. Mr Soeldner consulted Mr Patel, a corneal specialist, who recommended lid massage and hygiene to treat the blepharitis. Mr Soldner’s treatment was to continue with guttae Viscotears, QDS (drops) to right eye and Oc Chioramphenicol nocte (antibiotic).
- 7.5.13 Mr Bridle, Consultant Oral and Maxillofacial Surgeon, wrote to Mr Soeldner on 22 June 2021 in which he said clinical examination showed no gross facial asymmetry. There was no evidence of any palpable bony steps or defects. There was no evidence of any hypoglobus or enophthalmos. A good range of eye movements was noted with no evidence of diplopia. The right side of the face appeared tender to palpation all over. There was no limitation of mouth opening and the claimant achieves a good intercuspal occlusion. CT scans previously ordered show no sign of any previous fracture of the zygomatic complex, media orbital floor on the right side. The orbital volume appears equal on both sides. From clinical and radiographical examination the conclusion was that the claimant had not sustained bony injury to the zygomatic complex or the orbital cavity. Her symptoms most likely represent soft tissue and possibly nerve injury. There is no surgical management for this, and the consultant understood that the claimant was already on polypharmacy for pre-existing pain issues. The consultant stated that he would be extremely grateful if the claimant’s General Medical Practitioner would titrate her analgesic regime to hopefully reduce her facial symptoms. The consultant organised to see her again in three months’ time but was of the impression that they would not be able to do much in the way of surgical treatment and therefore it is likely that the claimant would be discharged from their care.

- 7.6 Spine impairment medicals (bearing in mind the relevant incidents took place on 6 January 2020, 15 January 2020 and 19 June 2020):
- 7.6.1 17 January 2020 – in the GP notes Dr Kirk records low back strain. History – now struggling with normal activities, bowels/bladder normal, no radiation of pain to legs or arms but does feel tightness when going up or downstairs. Examination: very tight paraspinals, limited flexion and extension. Comment: refer to musculoskeletal clinic.
- 7.6.2 GP's notes 24 February 2020 with Dr Kirk in the surgery. Back pain persists. On examination moves well in consultation room. Able to get on and off couch without difficulty. Advised to contact musculoskeletal.
- 7.6.3 4 May 2020 MRI scan spine cervical. Reporting radiologist, Dr Ganeshan. Findings: normal alignment of cervical spine. No vertebral height loss or dislocation. Normal bone marrow signal. Normal appearances of the edge brain stem, cerebellum and spinal cord. All but one disc – no significant posterior bulges or protrusions. At C6/C7 early degenerative disc but no significant spinal canal stenosis. Conclusion - minor degenerative changes. No significant spinal canal or neural foraminal compromise. Recommencing clinical correlation. More findings - normal appearance of the cauda equina. In relation to L level, L1/L2, L2/L3, L3/L4, no significant posterior disc bulge or protrusion. L4/L5 early degenerative disc resulting in minor indentation of the thecal sac. L5/S1 degenerative diffuse disc bulge with facet arthropathy, resulting in mild lateral recess calibre stenosis bilaterally, more marked on the left side. Conclusion - minor degenerative changes. No critical spinal canal or neural foraminal compromise. Recommendation as above.
- 7.6.4 Doctor's notes 17 July 2020, Dr Scott (GP), on the telephone with the claimant. Neck pain. History: no loss of power or sensation of arms, no trauma, no red flags. No incontinence of bladder/bowels, no disuria that morning, one incident the previous night of slight pain, no haematuria. On examination slight pain on movement to right. Able to flex and extend neck. Comment - ? neck sprain. Recommendation: gentle movement, no lifting/bending, claimant wants to continue Naproxen with Omeprazole, declines physio referral.
- 7.6.5 21 August 2020 MRI scan of the cervical spine. Dr Saha, consultant radiologist. Findings: normal alignment of the cervical vertebral bodies. Disc heights preserved. No disc dessication. Normal appearances of the craniocervical junction. No focal bone marrow abnormality. Discs either mild bulge or none. Conclusion: mild degenerative changes in cervical spine. No evidence of significant nerve route impingement. More findings: Some mild diffuse posterior disc bulge. No central canal

stenosis. Intact existing foramina bilaterally. No other prevertebral soft tissue abnormality. Conclusion: no demonstrable focal abnormality in the lumbar spine to explain the patient's symptoms.

- 7.6.6 30 November 2020 Dr Smith, GP, to MSK Services recording having received some physiotherapy and that no surgical intervention will help. The claimant is in a great deal of pain. Asking for acupuncture treatment.
- 7.6.7 18 December 2020 Dr Smith, GP, to pain clinic. Back and neck pain. Pain not improving. Records acupuncture not available, therefore, request for pain management.
- 7.6.8 4 February 2021 telephone consultation with Dr Kirk, GP, to clarify medical records, about two incidents at work, the notes say in January and February 2020, but the Tribunal finds these were on 6 January 2020 (strained back) and 15 January 2020 (strained neck). This request for clarification came over one year after the incidents. The claimant told the Tribunal that the reason for the call was that she realised the surgery did not have a record of the incident on 15 January 2020 and that the call took her case forward following her dismissal on 29 January 2021.
- 7.6.9 24 June 2021 Dr Aslam, Consultant in pain management, North Tees and Hartlepool NHS Foundation Trust. Main complaint neck pain. Also complains of pain in the lower back. MRI scans show minor wear and tear changes which are non-compressive. Dr Aslam records that the claimant challenged the conclusions of the radiologist. The changes in the cervical and lumbar spine do not indicate a serious pathology. The claimant had a few inappropriate signs, including pain on light touch. There is no neurological deficit. Dr Aslam says that he feels her symptoms are disproportionate to the injury sustained. The claimant challenged this opinion by writing on it and in her evidence stating that Dr Aslam did not understand her injury and she insisted her symptoms existed and were not exaggerated.
- 7.6.10 3 August 2021 Dr P Woolfall, Consultant Radiologist and Clinical Director of Radiology, North Tees and Hartlepool NHS Foundation Trust. Summary: MRI scans not able to detect all causes of spinal pain. Surgery not appropriate for pain due to conditions not visible on MRI scans. These are generally better managed with physiotherapy and other non-invasive methods.

7.7 Medicals dealing jointly with eye and spine impairments:

- 7.7.1 23 February 2021 – the claimant consulted Dr Kirk on the telephone, firstly, about what Dr Kirk describes as a corneal abrasion, for which the claimant was issued with ointment and the searing pain was starting to ease. Dr Kirk evidently



examined the claimant's neck and/or back pain and noted the claimant was walking unaided and able to get on and off the consultation couch. The abdomen was soft with no masses felt. In relation to the eye, right cheek tender, not swollen. (The claimant says swelling was intermittent). The eye was referred to maxillofacial. No referral was recorded for the back or the neck.

- 7.7.2 On 12 July 2021 there was an unaddressed letter from Dr Kirk, which the claimant told us was requested by her for the purposes of this preliminary hearing. So far as the back and neck were concerned, the claimant's main presentation was said to be pain, saying that the claimant can stand for 15-20 minutes and walk for 20 minutes. Dr Kirk says that the claimant will require ongoing support for pain management. With regard to the claimant's eye, Dr Kirk recites recurrent corneal erosions causing significant swelling, pain and sensitivity to the eye and soft tissues around the cheek area. The claimant is sensitive to light and wind, when she needs an eye patch and darkened glasses. After an MRI scan a maxillofacial team confirmed soft tissue around the eye and the need for ongoing pain management. Despite the medical evidence of specialists, Dr Kirk describes the claimant's condition as chronic and the effect on the claimant's day-to-day life as more than trivial. The claimant accepted in cross examination that her medical records were accurate, but later said that both radiologists, the pain consultant and Dr Greenaway were all wrong.

7.8 Other facts

- 7.8.1 In an employment supervision record dated 9 June 2020, there was no mention of the claimant's neck/back, although the claimant declined to drive but the record does not say why.
- 7.8.2 The claimant had been off work from 10 August 2020 to 11 September 2020 because of neck and shoulder pain. At a meeting on 11 September 2020 it was agreed that she would not use heavy goods at work nor the hoover nor drive vehicles. The claimant told her manager that the claimant could do duties with residents and do long days (from 8.00am to 10.00pm) but not sleep during shifts.
- 7.8.3 There was produced to the Tribunal a photograph of the claimant with another person in a bouncy castle on 16 November 2020. This was within 14 days (30 November 2020) of the claimant complaining to Dr Smith, GP, that the claimant was in a great deal of pain. The claimant admitted she was in the bouncy castle, being there to steady the other person in there. She conceded that the activity of being in the bouncy castle was not very wise.
- 7.8.4 On 23 November 2020 the claimant wrote an email to a recipient whose name is redacted. The Tribunal finds that this email

came to the notice of Kimberley Pearson, who gave evidence to the Tribunal. The email refers to the claimant doing all jobs in the house, might be cleaning upstairs, then cleaning downstairs, doing the laundry, antibac upstairs and downstairs, cleaning the bathrooms, staff telling the claimant that the claimant is always cleaning, cleaning the downstairs toilet, shopping for the house at a big supermarket, and another member of staff saying the claimant was always cleaning and doing all the housekeeping tasks. This time was within seven days of the claimant complaining to Dr Smith, GP, that the claimant was in a great deal of pain.

- 7.8.5 On 9 February 2021 the claimant told Dr Smith, GP, on the telephone that the ongoing pain in her eye was so severe it was wrecking her life.
- 7.8.6 The claimant told the Tribunal that she wore dark glasses for her eye at home, but not at work. She told the Tribunal that she wore an eye patch, which she did on the second day of the hearing but not on the first. At the beginning of the second day of the hearing the claimant asked permission for her husband to read documents for her, because of her eye. The claimant had not done that on day one and in fact never asked her husband to read documents on day two, despite the claimant having to read documents herself.
- 7.8.7 It was put to the claimant in cross examination that the claimant was exaggerating the severity of her impairments, which the claimant denied but which the Tribunal finds as a fact.

## 8. Determination of the issues

(After listening to the factual and legal submissions made by and on behalf of the respective parties):

- 8.1 The eye impairment and the spine impairment share the issue as to whether such impairments have more than minor or trivial effects on the claimant's ability to carry out day-to-day activities. The eye impairment alone also has the consideration as to whether those effects at the time of the acts of alleged discrimination were long-term.
- 8.2 The effects on day-to-day activities are set out at paragraph 7.2 and 7.3 of these Reasons. The question is whether such impairments have minor or trivial effects on the claimant's ability to carry out day-to-day activities. The Tribunal will deal with the question of long-term eye impairment issue later.
- 8.3 So far as the medical evidence is concerned, the Tribunal has set this out in detail up to and beyond 29 January 2021, when the claimant's contract was terminated. The most relevant evidence will be up to and including that date.

- 8.4 Taking that into account, the medical evidence in relation to the eye impairment is limited. The hospital visit on 2 January 2021 is recorded at paragraph 7.5.2 of this decision. Principally that record shows small abrasions (very light) to the lower cornea. Ointment was prescribed and the claimant was given a complete discharge with no follow-up. There was another hospital visit on 6 January 2021 (see paragraph 7.5.3 of these Reasons). The ophthalmic examination was normal, treatment complete and a communication to the GP to consider causes of pain. There was no other medical evidence prior to the claimant's termination of employment relating to the eye impairment.
- 8.5 All the medical evidence to the eye after termination can be found at paragraphs 7.5.4, 7.5.5, 7.5.6, 7.5.7, 7.5.8, 7.5.9, 7.5.10, 7.5.11, 7.5.12 and 7.5.13 of these Reasons, insofar as they may be relevant to something more than minor or trivial effects.
- 8.6 There is rather more timely medical evidence in relation to the spine impairment, there being three relevant incidents experienced by the claimant (see paragraph 7.6 of these Reasons). The first and second incidents occurred on 6 and 15 January 2020 and the first time they were medically recorded (in GP's notes) was on 17 January 2020 (see paragraph 7.6.1 of these Reasons). The claimant was referred to the musculoskeletal clinic. The record showed that the claimant moved well and was able to get on and off the couch without difficulty.
- 8.7 On 24 February 2020 there was more medical evidence (see paragraph 7.6.2 of these Reasons).
- 8.8 On 4 May 2020 after an MRI scan a reporting radiologist found normal adjustment of the cervical spine (see paragraph 7.6.3 of these Reasons for the remainder of the detail) and generally mild findings.
- 8.9 After the final spine incident, on 17 July 2020 a GP (see paragraph 7.6.4 of these Reasons) again reported a slight condition and the claimant declined a physio referral at the time.
- 8.10 There was another MRI scan on 21 August 2021 (see paragraph 7.6.5 of these Reasons), again with mild findings.
- 8.11 On 30 November 2020 and 18 December 2020 GP notes record a great deal of pain to the back and neck but there was no apparent diagnosis (see paragraphs 7.6.6 and 7.6.7 of these Reasons).
- 8.12 All the medical evidence to the spine after termination can be found at paragraph 7.6.8 of these Reasons (when a year after the incidents the claimant asked for clarification), 7.6.9 (when the consultant feels the claimant's symptoms are disproportionate to the injury sustained) and paragraph 7.6.10.
- 8.13 As to the other facts, in an employment supervision record dated 9 June 2020, the claimant did not mention to her employers her neck and back impairments (see paragraph 7.8.1 of these Reasons), and after sickness

absence whilst the claimant would not engage in heavy goods at work nor hoovering nor driving, she could still do duties with residents and work long days (see paragraph 7.8.2 of these Reasons).

- 8.14 On 16 November 2020 the claimant was photographed in the bouncy castle (see paragraph 7.8.3 of these Reasons), 14 days before complaining about pain to the GP (see paragraphs 8.11 and 7.6.6 of these Reasons).
- 8.15 On 23 November 2020 the claimant was identified doing all jobs at work (see paragraph 7.8.4 of these Reasons) within seven days of complaining to a GP about pain (see paragraphs 8.11 and 7.6.6 of these Reasons).
- 8.16 After the claimant's termination the claimant complained that the pain in her eye was so severe it was wrecking her life (see paragraph 7.8.5 of these Reasons).
- 8.17 The claimant's inconsistencies as to when she wore dark glasses, wearing an eye patch and asking her husband to read documents (see paragraph 7.8.5 of these Reasons) are apparent.
- 8.18 The Tribunal's finding that the claimant exaggerated the severity of her impairments is also relevant (see paragraph 7.8.7 of these Reasons).
- 8.19 So far as the effects at the time of the acts of alleged discrimination being long-term are concerned, there was a short period (27 days) between the eye injury and termination. The claimant gave evidence that she had been told that the injury could reoccur, but there is no direct medical evidence to substantiate this.
- 8.20 We turn now to the relevant provisions of the law. Section 6 EA contains the definition 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."
- 8.21 Subsection (1)(a) is not in issue here, nor is the expression "long-term" in relation to the spine impairment.
- 8.21.1 In Section (1)(b) the word "substantial" is defined by section 212(1) EA, meaning "more than minor or trivial", and those words appear in the issues.
- 8.21.2 There is no doubt that the claimant's evidence was that there was an adverse effect on her ability to carry out day-to-day activities, but for the impairments to amount to disabilities within the meaning of section 6(1) EA, the impairments must have a substantial adverse effect that is more than minor or trivial.

8.21.3 Whether the adverse effect is more than minor or trivial is the question in this case (leaving aside the long-term issue).

8.22 The recent case of **Elliott**, although not referred to at the hearing, offers useful guidance on cases involving day-to-day activities and what may be a substantial adverse effect. The learned Judge, Judge Tayler, stressed, amongst other things, that Tribunals must consider the statutory definition of disability itself, identify sufficiently the day-to-day activities and analyse the medicals. The Tribunal has had regard to the guidance in **Elliott** and accordingly takes into account the words in section 6(1) EA, having highlighted the day-to-day activities, which are relevant in this case, and analysed the medicals and in particular the pre-termination medicals.

8.23 We also have regard to Schedule 1 Part 1 EA. Paragraph 2(1) provides guidance on the long-term issue. It states as follows:

“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.”

Paragraph (2) of Part 1 of Schedule 1 EA is also relevant and provides that:

“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.”

Also relevant is paragraph C4 of Guidance which says that:

“In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood...”

8.24 The medical evidence does not show that the eye impairment is or was substantial. If one has regard to the hospital visits on 2 and 6 January 2021, these show the injury to the claimant's eye to be minor. All other medical evidence relating to the eye impairment thereafter is post termination and the Tribunal finds having regard to all the circumstances that the impairment is more than minor or trivial.

8.25 There is, therefore, no real need to consider the long-term nature of the eye impairment, but for the record account should be taken of the circumstances at the time of the alleged discrimination. Anything which occurred after that time will not be relevant in assessing likelihood. As at the termination of the claimant's employment, the impairment had not lasted for 12 months. The evidence occurring outside the circumstances of the alleged discrimination is not relevant in assessing likelihood and

therefore there is insufficient evidence that the eye impairment was likely to last for at least 12 months or for the life of the claimant. There is no direct medical evidence that the eye impairment was likely to reoccur.

- 8.26 Moving to the spine impairment, the early medical evidence (17 January/24 February 2020) does not have the look of anything more than minor or trivial about it. Furthermore, the MRI results are mild (4 May and 24 August 2020), although there was evidence of pain, but the evidence of the claimant's behaviour around that pain is not consistent.
- 8.27 At best the impairments (spine and eye) are no more than minor or trivial. At worst the claimant's evidence, even if she was in pain, in the view of the Tribunal, was calculated to try to build up her case following termination of her employment, to try and collect evidence and exaggerate her symptoms. The claimant is someone who has even felt if appropriate to criticise the findings of medical professionals, even though she has no medical qualifications to do so, has called no challenging expert evidence and her conduct, for example, taking on tasks at work, including very long days, was inconsistent with there being substantial impairments and they show the true light of her position.
- 8.28 In the circumstances the Tribunal finds that neither impairment (eye nor spine) amounts to a disability, having regard to the guidance in Elliott, within the meaning of section 6(1) EA, and having regard, in particular, to the medical evidence but also other relevant evidence.
- 8.29 For the record in relation to the eye impairment the Tribunal finds that it does not have a long-term adverse effect on her ability to carry out normal day-to-day activities for the reasons given above..

## 9. Conclusion

- 9.1 That being the case, the only claims being disability claims, they fall accordingly.

J Shulman

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Employment Judge Shulman

Date: 18 January 2022

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