



## EMPLOYMENT TRIBUNALS

Claimant  
Dr Isabella Camburn

v

Respondent  
Celtic Equine Veterinary Practice  
Limited

### Judgment

Heard at: Southampton On: 17 March 2022

Before: Employment Judge Rayner

### Appearances

For the Claimant: In Person  
For the Respondent: Mr T Woodward, Solicitor

## JUDGMENT

1. The claimant is not a disabled person within the meaning of the Equality Act 2010.
2. The claimants claims of disability discrimination are dismissed.
3. The claimants claim in respect of contractual notice pay will now be listed for a 1 hour hearing and notice of hearing will be sent to the parties.

### REASONS

4. The reasons were given verbally in brief at the hearing. The claimant requested written reasons at the end of the hearing.
5. The Claimant alleges disability discrimination for a reason arising from her disability in that a probationary period had been extended and in that she was dismissed. the Claimant states that the disability she relies upon is **vestibular oscillopsia**.
6. The Respondent denies that the Claimant was disabled at the material times, and further denies that it knew or could reasonably have been expected to know that the Claimant was disabled at the material times.

7. The Claimant has a second claim in respect of notice pay which is linked to the extension of her probationary. She says that she was entitled to three months' notice after the end of her probationary period, rather than the one weeks' notice pay which she in fact received.
8. A one-day preliminary hearing in person was listed to determine whether or not the Claimant was a disabled person at the material times within the meaning of the Equality Act 2010.
9. Prior to hearing the parties had produced a bundle of documents which had been emailed to the tribunal in eight separate parts.
10. in addition, the Claimant had produced a disability impact statement and Dr Hough, whose veterinary practice it is and who was responsible for the decision to extend the probationary period and to dismiss the Claimant, had produced a statement. both the Claimant and Dr Hough gave sworn evidence to the Employment Tribunal.
11. The Respondent was represented by Mr. T Woodward and the Claimant appeared before me in person.
12. The hearing took place over VHS and all parties confirmed that they were not recording any of the proceedings.

### **Background Facts and Matters**

13. The Claimant was employed by the Respondent from 1 February 2020 until her termination of contract with one week notice on 21 December 2020, following a capability hearing. In fact, the Claimant did not start actual work until 1 June 2020 because she was on furlough before that date.
14. The material times for the purposes of this claim are the date on which the decision was made to postpone or extend the Claimant's probationary period, which was 7 August 2020 and the date of the decision to terminate employment which was the 21 December 2020.
15. The Claimant set out in the narrative paragraphs attached to her claim to the Employment Tribunal, that she first started to suffer with symptoms in early July 2020. The Respondent accepts that she was signed off work, then returned to work for a few days and was then signed of work on a rolling basis until her dismissal.
16. The Claimant has provided a disability impact statement for the purposes of this hearing.
17. The Claimant states that her symptoms first developed on July 1st 2020.
18. She describes her symptoms from then on as follows: She states that she felt *spaced out and disorientated* and that she had to try to *stay present in conversations or tasks when she was working* or when she was out. She says that

she *felt impossibly fatigued* but that once rested and at home she felt her symptoms were a lot better.

19. She states that she realised that her environment was moving as she moved and as she walked towards the doorway for example, the doorway would sway with her movement , but when she stood still, the doorway stood still.
20. She considered this was an illusion of an unstable visual world associated with poor visual acuity and formed the opinion herself that this may be a disabling condition called **oscillopsia**.
21. The Claimant saw her GP and was referred for a neurology review, for blood tests and also to an ophthalmologist.
22. The Claimant states that she had no difficulty driving, and that when she was still, so was her vision.
23. The Claimant underwent a variety of tests and in January 2021 she attended for further testing at the Queen Alexandra Hospital, Portsmouth. She states that computer technology allowed the testing of her involuntary eye movement and analysis of the function of her vestibular system.
24. The Claimant describes her impairment as a sensation that someone gets from looking at an optical illusion pattern or from watching a video in which the recorder was moving a lot. She describes *things that are still, appear to be moving and you cannot make sense of it. It feels overwhelmingly uncomfortable and difficult to bear*. The Claimant says that before she started rehabilitation, she would avoid this feeling by staying in an environment she knew such as home or where she keeps her horses. She says *I navigate my way around without much visual need. I would avoid walking and if I did I would look at the ground. If I had to look at my environment such as being in a supermarket, I found it really troubling*.
25. She went on to state that *I have now rehabilitated myself back to being able to partake in almost all activities I did before, but I have to manage my schedule carefully not to exceed my threshold*. The Claimant says if she exceeds her thresholds, then she gets a vestibular hangover when she finds it difficult to get out of bed.
26. Neither in her claim to the ET nor in her written disability impact statement, has she specifically described the impact on her during the period July 2020 until December 2020.
27. Her descriptions of the impact on her are in put in terms of how she is impacted now (at the time she wrote the statement) and with hindsight.
28. She states that the daily impact on her, in 2021/2022 includes the following
  - a. she has to limit the activities in her schedule on a daily basis instead of doing two or three things a day she can only do one or two things a day the Claimant

- has to allow herself recovery time and have a slower pace of life and take more breaks in the day to break to rest and block out quiet times after busy times
- b. she cannot confidently balance in the dark she cannot walk in the dark and keep the torch with her so that she can go to the toilet at night
29. During the course of her employment and whilst she was absent on sick leave, signed off by her doctor, she was asked, by her employer to explain her symptoms and to provide medical records on several occasions. She did not do this at the time.
30. Her fit notes have been provided for this hearing, and were provided to her employer, but only after several requests had been made by her employer.
31. The Claimant was off sick during the period from July to August 2020 on a series of fit notes, and her probation was extended during this period. The Claimant says it was communicated to her in August 2020. She alleges that this was both discrimination and a breach of contract.
32. I find that at that point, the Claimant's symptoms had lasted 2 months at most, and there was no diagnosis at all, and no prognosis as to how the Claimant may or may not be affected in the future.
33. The Claimant remained absent on sick leave, and I have been referred to her sick notes and various other correspondence between the parties.
34. For example on 9 December 2020 in a letter from doctor Jay Bozeman, the GP states that the Claimant has set out three symptoms including oscillopsia, fatigue and militating state symptoms; that she is feeling not at all with the surroundings and that she feels as if she's having to work really hard to do normal things such as holding a conversation; she feels as if she has been drunk or high or tries really hard to act normally.
35. Dr Hamid Shalesh confirmed that the Claimant has troubling symptoms of oscillopsia. He made various recommendations for future referrals.
36. I find that there was nothing in any of the letters or sick notes or otherwise, that set out any form of clear diagnosis or any prognosis at that time.
37. The Claimant attended at a capability review meeting on the 4th December 2020. The meeting was to determine whether or not she would be able to return to work. She had been told prior to the meeting that one outcome might be termination of her employment.
38. I have been referred to the notes from that meeting.
39. I find that the Claimant was asked whether it was likely she would return to work and the Claimant stated she would be seeking a new fit Note and that she was still feeling unwell. She also stated she did not have any diagnosis at that point.

40. At that meeting a discussion took place as to whether or not the Claimant would be able to return to normal duties in the near future and the Claimant said she was unable to answer. She stated that she was able to drive to local destinations.
41. The Claimant did state that she was still suffering from vestibular symptoms but she did not think this was related to being deaf in one ear
42. She then stated that whilst she still has no medical diagnosis both she and her GP are of the opinion that her symptoms were not indicative of a long term illness.
43. At that meeting the Claimant is recorded as stating (at paragraph 5), *IC ( the Claimant) asked AH to consider the fact that as there is nothing to indicate long term incapacity to work and if she was in a position to have gone through private she would have, which would have reduced the delay she's received on referrals.*
44. The notes also record, regarding the next sick note *IC advised it was unlikely that she would be back to work after the current sick note finishes and is unsure how long the next sick note will be for. She wanted an opportunity to have a diagnosis before any decision was made about her employment.*
45. It is unclear from the notes and from what was said at the time, whether the reference to the likelihood that the illness or absence would not be long term was a reference to a temporary impairment or to the temporary nature of the impact of any existing impairment.
46. I find that at that point it was not clear when the Claimant would be returning to work or how long her illness and its symptoms were likely to last, if they lasted at all. The Claimant did say that she continued to feel unwell.
47. Following that meeting the Respondent contacted the Claimant's GP, with her permission, to ask four questions as follows:
- a. do you have a diagnosis for Isabella at this time?
  - b. do you have a prognosis which would indicate when Isabella is likely to return to work?
  - c. are there any reasonable adjustments the practise could make?
  - d. is Isabella fit to drive at the moment with her current symptoms?
48. I find out that none of these questions addressed the question of what the Claimant's impairment is, or how it impacts on her on a day to day basis, or whether that impact on her is substantial and whether it is likely to be long term.
49. The response from the Claimant's GP, dated 14 December 2021 says, *unfortunately we don't have clear answers at this present time.... we do not have a definite diagnosis for Isabella (the Claimant) and she is still awaiting results of an MRI of her cervical spine and an appointment with ENT. Not having a definitive diagnosis makes a prognosis very difficult to ascertain. Isabella is currently driving*

*but I do not know of any particular adjustments or adaptations that could be made to help her with her ongoing problems.*

50. The Claimant attached this letter to an email she sent to the Respondent on the 17 December 2021 in which she referred to an unconfirmed diagnosis of bilateral vestibular defect which she said had been made on the 16 December 2020.
51. I find that the Claimant's correspondence of 17 December 2020 does set out a possible diagnosis and explains the tests the Claimant has undergone. She states that she will be referred for further tests but does not set out any information about how long her symptoms will last, or whether the condition itself is a long term one, or a short term one.
52. I have no other evidence before me, which gives any information at all about any prognosis of the condition, or any explanation about what sort of condition it is. In particular I have no evidence before me to support a finding that, at this point in time in December 2020, it was likely to last, with the same symptoms or impact on the Claimant, for a further period of at least 6 months.
53. Dr Hough states that this was not in fact a correct diagnosis and that the actual diagnosis which was made subsequently was unilateral vestibular defect. He also noted in his evidence before me that this was a presumptive diagnosis which was not confirmed until the 26 January 2021.
54. On 21 December 2020 the Respondent wrote to the Claimant giving her one weeks notice of termination of her contract stating that her contract would terminate on the 28th of December 2020. The decision to terminate was therefore made on the 21 December 2020.
55. In that letter the Respondent sets out the history and background and records that at that point there is no certainty as to when a clear diagnosis would be made if at all; that they had requested access to medical notes but this had been refused. The Respondent also notes that the NT consultant had found that the Claimant had a bilateral vestibular defect which is causing Oscillopsia.
56. I find that this letter sets out a fair and accurate summary of the events to that date.
57. In her disability impact statement the Claimant states that following referral to a neurologist and MRIs of both her neck and head it was an enormous relief when no structural pathologies were found to account for her symptoms. She states that on the 16 December 2020 she saw an audio vestibular specialist who performed a multitude of physical tests during the appointment and diagnosed vestibular hypofunction the specialist ordered further testing at the Queen Alexandra hospital Portsmouth which took place on the 26 January 2021 it was at that point that they were able to accurately measure involuntary eye movement and analyse the function of the Claimant's vestibular system.

58. At that point the Claimant says she had a further consultation with the junior doctors who performed the test and with the audio vestibular consultant. At that point, in January 2021, the Claimant says it was explained to her that the parisis was permanent and that she would never regain full function and that the oscillopsia would also be a constant symptom that she would have to learn to live with.
59. The defect to her vestibular system meant that there was a defect deficit in the coordination of movement, balance and vision which her brain was having to compensate for, and that the compensation is demanding and would be the source of the fatigue that she was experiencing. It would also explain why she found it hard to concentrate on tasks when out and about and why her symptoms worsened when she was exhausted or in a busy environment.
60. On 21 July 2021 a letter is written by her medical advisers about the Claimant stating that she was undergoing vestibular rehabilitation for her vestibular symptoms it states that she was managing her symptoms around horse riding but finds when there are other riders around her she struggles with dizziness. It also states there are other visual Vertigo symptoms and that some other strategies will be incorporated in her rehab regime.
61. It was not until 20 December **2021** that Dr Victor Osei-Lah, from the Department of audio vestibular medicine at Queen Alexander Hospital, Portsmouth, wrote in a *to whom it may concern* letter that *the clinical diagnosis is Oscillopsia of uncertain cause; visual Vertigo, left mild-to-profound high frequency sensorineural hearing loss which was sudden in onset as a 15 year old, visual Vertigo and a background history of coarctation of the aorta which was operated on at the age of 14. She has undergone detailed objective vestibular function tests which confirmed a significant 52% weakness in the right horizontal semi circular canal from the caloric test. This is contributing to the imbalance.*
62. The letter goes on to say that due to the oscillopsia and the visual Vertigo she finds it challenging in visually stimulating environments. The vestibular dysfunction can be quite taxing cognitively and mentally which means that she is prone to tiredness and as such her activities of daily living and work have to take these into consideration.

### **The Applicable Legal Principles**

63. The Equality Act 2010 says that a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
64. Schedule 1 of the Act contains further guidance in relation to the definition. I have taken into account the 'Guidance on the Definition of Disability' as I am required to do under Schedule 1, Part 1, paragraph 12.

65. I have reminded myself of the principle legal tests and approaches to those tests as explained by the higher courts.

66. In *Goodwin-v-Patent Office* [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken. I am reminded that I must bear in mind that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a substantial impairment. My focus ought to be on what the Claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment. (*Leonard-v-Southern Derbyshire Chamber of Commerce* [2000] All ER (D) 1327)

67. I remind myself that medication in this context includes pharmaceutical and other assistive remedies such as cognitive behavioural therapy.

68. Section 212(2) of the EqA 2010 which sets out general interpretation provisions, specifies that 'substantial'—wherever it is used in the EqA 2010—means 'more than minor or trivial'.

69. Nevertheless, it is not always possible or necessary to label a condition, or collection of conditions. The statutory language always had to be borne in mind; if the condition caused an impairment which was more than minor or trivial, however it had been labelled, that would ordinarily suffice.

70. In *Paterson v Comr of Police of the Metropolis* [2007] IRLR 763, [2007] ICR 1522, EAT Elias J said:

"... when assessing the effect, the comparison is not with the population at large. As paragraphs A2 and A3 [of the then Guidance] make clear, what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired.' (at [27])'

71. In *Elliott v Dorset County Council* [2021] IRLR 880, EAT, Judge Tayler identified that there are differences in ability amongst people who are not disabled that are much more than minor or trivial. He recognised the great assistance that the Code and Guidance often provide but said that they are not to be followed without thought, or to be construed as if statutes, and must always give way to the statutory provisions if, on a proper construction, they differ from the Code or Guidance. Where consideration of the statutory provision provides a simple answer, it is erroneous to find additional complexity by considering the Code or Guidance. On the right approach to 'substantial adverse effect', he said:

"There is a potential internal inconsistency between an adverse effect being something that is "more than minor or trivial" and looking for a "limitation going beyond the normal differences in ability which might exist among people". [...] The starting point is to remember that the statutory definition of the word "substantial" is "more than minor or trivial". If the adverse effect has a more than minor or trivial effect on the ability of a person to carry out day-to-day activities the definition is met; no consideration of the



abilities of some group of people, or section of the population, can alter that determination.' (at [38])

'The ... adverse effect of an impairment on a person is to be compared with the position of the same person, absent the impairment. If the impairment has a more than minor or trivial effect on the abilities of the person compared to those s/he would have absent the impairment, then the substantial condition is made out. (at [43])'

72. It is to be noted that there is nothing wrong as a matter of law to consider an impairment to be more than trivial, and yet still minor rather than substantial (*Anwar v Tower Hamlets College* UKEAT/0091/10, [2011] All ER (D) 101 (Nov)).

73. I remind myself that the cumulative effects of an impairment are to be taken into account in assessing its seriousness, and also, in para B7, that the ability of a person to modify her behaviour to cope with an impairment may be of relevance in deciding whether it is 'substantial'. It is to be noted that an impairment may exist notwithstanding a continuing ability to carry out tasks. In deciding how substantial an adverse effect is, examination should be made of what someone cannot do, rather than what they can. This was emphasised by Morison J in *Goodwin v Patent Office* [1999] IRLR 4, and his view was endorsed in *Epke v Metropolitan Police Comr* [2001] IRLR 605, and also approved by the Court of Appeal in *Lewisham v Malcolm* [2007] EWCA Civ 763, [2008] Ch 129, [2008] 2 WLR 369.

74. Whether an adverse effect is 'substantial' or not may vary according to the time at which the assessment is made and the period over which it is considered.

75. I remind myself that the time to assess whether a person has a disability is at the time of alleged acts of discrimination, and not at the point of the ET hearing. In *Cruickshank v VAW Motorcast Ltd* [2002] IRLR 24, *EAT*, an employment tribunal erred by considering the issue of disability with reference to the effect of the impairment at the time of the tribunal hearing. The *EAT* held that the time at which to assess disability was when the alleged discriminatory act took place.

76. In *McDougall v Richmond Adult Community College* [2008] IRLR 227, [2008] ICR 431 the question was whether, in determining if the adverse effect of a person's impairment was 'likely to recur', regard should be had to events subsequent to the alleged act of discrimination. The Court of Appeal were clear that it should not, because 'whether an employer has committed a wrong ... must be judged on the basis of the evidence available at the time of the decision complained of' (para 24; Pill LJ). The Court of Appeal relied on *McDougall* to hold that this assessment must be made as at the date of the alleged discrimination and must not take into account anything only known or occurring after that time. Therefore, whether the issue under consideration is if a condition is 'recurring' or 'long term', or if there is a substantial adverse effect, the approach must be the same, namely to assess what would have been the position as understood at the date of the alleged discrimination.

## Discussion and conclusions

### Substantial adverse impact

77. The Claimant has described how she now has to consider everything she does. Her disability impact statement describes her symptoms at the point of writing it, and not during the period that she was off sick from July 2020 until December 2020.
78. I have taken into account that some of the symptoms that the Claimant was experiencing prior to the diagnosis she received at the end of 2020 were caused by a very stressful situation of having an impairment which caused symptoms for which the cause was unknown. The Claimant considered there was a possibility that she had a brain tumour and inevitably that caused her significant stress.
79. However from the evidence before me I am satisfied that the symptoms which the Claimant has described, had and have continued to have an impact upon her ability to do day to day activities, such as walking, sleeping, shopping for example, and that the impact upon her is that whilst she is able to carry out normal activities she is not able to do so without becoming increasingly fatigued and without having to adjust the way that she does them, in order to compensate for her particular impairment.
80. I have taken into account that her fatigue is something which arises from her particular impairment and that whilst some of the therapies she has had assist her on a day to day basis, she continues and will continue to have difficulties because the condition which will last for her life.
81. Taking into account the definition of *substantial* as meaning more than minor or trivial, I find that even taking out the significant stress that the Claimant was under, the underlying impairment itself did have a substantial and adverse impact upon the Claimant during the period that she was employed by the Respondent. That was the reason for her being signed off work.
82. I accept that from the Respondent's point of view, the Claimant did not describe her symptoms or their impact upon her on a daily basis in any particular detail, despite being asked to do so. Nor did she provide access to her medical records and nor was her GP particularly forthcoming in the description of her symptoms.
83. These are all factors which might have been relevant to the question of the Respondent's knowledge of disability, but that is not a question before me and I make no findings of fact in that respect.

### Long term Impact

84. When is an impairment Long term? The Equality Act provides that the substantial impact must have lasted or be likely to last for 12 months or the rest of the Claimant's life.
85. In this case I have therefore considered what if any the Claimant's impairments were, how they impacted upon her ability to carry out day to day tasks, and how long they lasted or had lasted at the date of the acts of alleged discrimination, and, based on those dates, whether there was any evidence that the substantial impact on the claimant was likely to last 12 months.
86. I remind myself that that is for the Claimant to prove disability on the balance of probabilities.
87. The key question for me in determining whether or not the Claimant was disabled at the point that the Respondent made the decision to extend her probationary period and then to terminate her employment, is whether or not, looking at the information available at that time, the Claimant was suffering with an impairment which had a substantial adverse impact on her ability to do day to day activities, which was *long term*.
88. I remind myself as I reminded the parties that the question for the tribunal is not whether or not the Claimant is able to demonstrate at some point after she has been dismissed that her impairment is indeed long term, but whether, at the point of the alleged acts of discrimination, there is evidence either that her impairment was long term, or that it was likely to last 12 months or for the rest of her life.
89. I find on the basis of the evidence before me that there was no evidence from the Claimant or from any of those advising her, that the condition or its effects upon her, would either remain the same for any particular length of time, or that they would continue at all.
90. The earliest indication that the Claimant had the named impairment, was following her appointment on 16 December 2020. At that point there was no clear description of the impact of the condition on the claimant, or of its longer prognosis either in the short term or the long term.
91. When the Claimant wrote to her employer, following the capability hearing but before the decision to dismiss her was made on the 21 December 2020, she reported that she had been told that she was suffering with vestibular hypofunction and had been referred for further tests.
92. At that point neither the severity of the impact upon the Claimant going forward, nor the length of any impact upon the Claimant was known either by the Claimant or by her medical advisors.
93. The Respondent was told by the Claimant's GP, following his request for further information.

94. I have not been referred by the Claimant to any contemporaneous evidence which predates her dismissal, which suggests that she had a diagnosis of a life-long condition which would have a substantial adverse impact on her ability to do day to day activities for a further period of at least 6 months.
95. I conclude that no one could say, at that point, either what the definite diagnosis was, or how long it would last, or how long the symptoms would last.
96. Whilst the label or diagnosis is not relevant to the question of substantial adverse impact, the lack of the diagnosis and the lack of any prognosis of the future effect or impact of any impairment is a relevant factor which I have taken into account.
97. In December 2020, there was no evidence that the Claimant would or would not recover completely, stay the same or deteriorate either within weeks; months or years.
98. There was no prognosis at all, and those who were asked about it, said they could not give any advice or any opinion.
99. On that basis, I conclude that, at the point when the decision to extend the probationary period was made, it was not likely that the substantial adverse impact would last 12 months, because there was no evidence of it being likely.
100. I conclude that, on 21 December 2020, when the decision was made to terminate the Claimant's employment, it has not been proved on balance of probabilities that the impairments would have a substantial adverse effect for a period of 12 months, that is a further period of 6 months. There is no evidence that this was likely to happen.

**Employment Judge Rayner**

Date: 6 April 2022

Judgment sent to parties: 21 April 2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.