



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Bouklieva

Respondent: (1) Imperial College Healthcare NHS Trust
(2) Ms S Robinson
(3) Ms N Manning
(4) Ms M Denison

RECORD OF A PRELIMINARY HEARING

Heard at: London Central **On:** 17 March 2023

Before: Employment Judge Joffe

Appearances

For the claimant: In person

For the respondents: Mr A Shellum, counsel

RESERVED JUDGMENT

1. The claimant had disabilities within the meaning of the Equality Act 2010 between April and 31 October 2021 in respect of the following impairments:
 - a. Left shoulder impairment;
 - b. Lower back impairment;
 - c. The left wrist impairment taken together with the other impairments.

2. The claimant's following conditions were not disabilities within the meaning of the Equality Act 2010 between April and 31 October 2021:
 - a. Headaches;
 - b. Neck condition;
 - c. Right wrist condition;
 - d. Heart symptoms;
 - e. Leg conditions.

REASONS

Claims and issues

1. The claimant is pursuing a variety of causes of action including claims for disability discrimination. A list of issues had been agreed at a case management hearing in front of Employment Judge Grewal, who also listed this open preliminary hearing to consider, amongst other matters: whether the claimant was disabled at the material time by reason of soft tissue problems and premature menopause. I have made case management orders which are contained in a separate document.

Findings of fact

Hearing

2. For the purposes of the decision on disability, I had the claimant's impact statement and a bundle running to 348 pages of which over 200 pages were medical records. The claimant gave oral evidence and was cross examined by Mr Shellum. Both parties made oral submissions. I then had to reserve my decision as it was already the end of the Tribunal day.
3. It is convenient to set out each impairment relied on by the claimant, the evidence which she herself gave about that impairment and the available medical evidence. It is not practicable to set out every item of evidence about each impairment but I have taken the totality of the evidence into account when reaching my judgment.
4. The claimant said more generally about herself that she tried to bear pain from her various impairments and would only go to a doctor if the pain was 6/10 or worse on the pain scale. She tried not to take time off work unless she had to and would try to manage her pain with painkillers. Because she had a number of issues at the relevant time she was only seeking help for whichever was the worst. She made the point that it was difficult to get GP appointments during parts of the pandemic, particularly during lockdowns. When questioned about why, at times, she had not attended her GP for a particular impairment she said that treating professionals would say that they needed to deal with one issue at a time.
5. Part of the claimant's case is that she had to reduce her shifts from fourteen to eight per month in June 2021 due to pain.
6. The claimant gave some evidence about her jobs; my understanding is that her jobs have included working as a nurse, a carer, a stunt person, a masseuse and an artist model.
7. The relevant time is the time period when the claimant brings claims of disability discrimination, between April 2021 and 31 October 2021.

Headaches

8. The claimant said that she was beaten around the head and neck in 1997 by three drunk men. She felt she had to keep working and does not appear to have had medical attention at the time. She was nauseous. Two months after the incident she sought medical attention because she was vomiting a lot.
9. The ongoing effect of this incident was that the claimant had headaches which were made worse by geomagnetic storms. These headaches, if untreated with painkillers, could continue for 48 to 80 hours and were accompanied by nausea. The headaches could occur for two to three consecutive days per month or up to seven days a month at times of high solar activity. She said that she suffered from headaches whilst working for the first respondent but would keep working. The lights and sounds in the ICU provoked symptoms.
10. When she had the headaches, the claimant was not able to look at light or screens. Talking caused pain. She took strong painkillers and practiced meditation. She would stay in a dark room or wear dark glasses when she was out. She could not eat or drink and the dehydration made her feel worse.
11. I noted various references in the medical notes to the claimant having migraines. There was a report of an MRI of the head which was done on 6 January 2021. The clinical indications were 'History of significant head injury recurrent migraines. ? Post traumatic structural cause'. There were reported to be no significant abnormal findings.

Neck injury

12. The claimant said that she had had two accidents involving her neck in 2012 and 2015. The pain in her neck recurred when she was 'overloaded'. She said that she had suffered from a recurrence of this issue for eight months in 2018 and from July 2022 to the present day.
13. The claimant did not give evidence that she had neck issues in the time period covered by her claims.
14. There were no medical records before me relating to the claimant's neck which post-dated 2018.
15. There was no medical evidence which suggested that the claimant's neck problems from the past accidents and the episode in 2018 were linked in way which meant that they were likely to recur in 2021 at a point when she was not suffering from any symptoms.

Left shoulder

16. The claimant first injured her left shoulder in a paragliding accident in 1993. She said that it later recovered but that symptoms recurred on occasions when she lifted something heavy.
17. The claimant said that she had injured her left shoulder again in the 2015 accident in which she injured her neck. The shoulder was painful for a year and she took diclofenac. She had physiotherapy. She could not sleep on her left side. She had some steroid injections in 2015 and says she declined an operation.
18. In March 2020, she said the shoulder became painful again and she once again had physiotherapy and a steroid injection. She described the problems as cyclical; she would have a minor improvement for a few months and then the shoulder would deteriorate again. She had pain when taking off or putting on upper garments, cleaning walls, lifting a medium sized shopping bag. Washing heavy dishes was a problem and she had given up her sporting activities. That year working in the ICU ward caused her some manageable pain.
19. In 2021 she said that she had chronic pain throughout the year, getting worse as she felt she was overloaded at work. She could not do her hobby of fishing often as it would cause the pain in her shoulder to become unbearable. She was taking diclofenac for the pain. There were occasions when she could not sleep properly because of the pain. The claimant said that in 2022 she had reduced the amount of work she was doing due to pain. She had recently attended a clinic in Spain with a view to further treatment.

Records

20. There is a letter from a physiotherapist dated 8 July 2010 which says that the claimant was referred for physiotherapy after a traumatic fall in January 2010 causing neck and shoulder pain. She had had difficulties walking and running. After treatment she was 90% improved and able to work as a carer and walk and run with little problem.
21. The claimant had an ultrasound on the left shoulder on 26 January 2015. There is a physiotherapy referral dated 19 February 2020. The notes record that the claimant had previously been seen for adhesive capsulitis. The claimant had reported that she felt that the pain had started 'years ago'. She felt she had to stop doing her stunt job due to pain. There was stiffness and ache on abduction past 90 degrees.
22. An ultrasound was carried out on the shoulder on 27 March 2020. The history records that the claimant had pain on and off for years which had returned in the last three months. There is an email from a physiotherapist setting shoulder exercises for the claimant on 16 June 2020 after a physiotherapy assessment that day which records a twenty-year history of problems and intermittent pain and flare ups over the years, with physiotherapy on and off over that time. The claimant had had two or three years without pain after a

steroid injection five years previously. The pain had recommenced in November 2019 after the claimant was reaching to retrieve a rucksack from the rear of her car. The notes say that an ultrasound in March 2020 showed that she had calcific supraspinatus tendinopathy. She had had a steroid injection in the shoulder.

23. The claimant continued to have monthly physiotherapy sessions for the shoulder until November 2020.
24. In April 2021 the claimant had advice from a physiotherapist to restart rehabilitation of the shoulder. The notes say, 'confirmed calcific tendinopathy'. 'chronic, flare up after heavy lifting in ITU in Jan 2021'. It appears from notes that the claimant had desisted from her physiotherapy exercises for her shoulder due to the wrist problem.
25. It is relevant to note that the history recorded by a physiotherapist on 5 October 2022 describes shoulder problems going back 23 years. Looking at the notes over the years there is a consistent pattern of the claimant reporting the problem as a recurrent one which sometimes improved for a period of months or even years. When symptomatic, it appears the claimant was able to work but with pain and by taking sometimes very strong painkillers.
26. I mention that notes of an ultrasound and MRI scan in August 2022 recorded findings consistent with a variety of possible diagnoses on the left shoulder but I bear in mind that these postdate the period of claim and that in assessing whether the impairment meets the test for disability, I am required to consider what was known at the relevant time and not subsequently.

Both wrists

27. The claimant's evidence about her wrists was that she had significant problems in both wrists in 2002 after injuring her wrists at work. She had had to stop working as a masseuse for a period. She said that the symptoms had recurred ever since when her wrists were overloaded at work, The left wrist was worst affected. The right wrist was perhaps 1 or 2 on the pain scale and she described it as manageable.
28. The left wrist would become swollen. She had a new injury in February 2021 at work in a different area of the left wrist, near the radio carpal joint. This had caused very sharp pain for 1.5 months. That pain continued to the present day when there was pressure on the left wrist. She said that she had lost her grip, could not pinch items properly, unscrew a jar lid or open a bottle of water. She said that she could not cook or clean properly at home or carry bags with her left hand and the wrist was very weak. She described in oral evidence that the left wrist was 'hurting like hell' in February to April 2021 and it was hard to work one-handed.

29. In terms of activities affected by the original injury, the claimant said that she could not support her body in bed with her left hand or rise from the bed using her left arm. She could not do sports. She said that the weakness and constant pain when she moved or lifted things or twisted her wrist 'drives me crazy'.

Records

30. A physiotherapy referral document dated 12 March 2021 recorded that after an accident three weeks previously the claimant had experienced wrist pain. There was no swelling but there was weakness in power grip and pincer grip. The claimant was dropping plates at home. There was weakness in thumb abduction and the claimant was unable to open jars and had difficulty managing patients at work.
31. There is an email dated 3 April 2021 from a senior sister attaching a referral form for the claimant to occupational health, this records that the claimant has symptoms of pain in her left wrist and a reduced range of movement in her left thumb and lower back pain on the right side.
32. The resultant report dated 14 April 2021 from a back care adviser records that the claimant was being referred for hand care due to her left hand and wrist pain. The low back pain, which was an exacerbation of a longstanding condition, was the subject of a GP referral for physiotherapy. The referral form recorded that the claimant had moderate symptoms and difficulties with work and that she was reducing her work hours due to pain. She was said to have chronic pain in the left wrist for 22 years, which started when she was working as a masseuse; she was able to tolerate this pain until her injury in February.
33. An occupational therapy report from 23 April 2021 records that after an incident at work at the end of February 2021, the wrist had swollen, mostly around the base of the thumb. Symptoms had been improving especially after resting but there was what appears to have been moderate pain when gripping objects such as water bottles. The claimant reported that she had pain and swelling in the dorsal aspect of the left wrist from her chronic problem when she overused the wrist. That happened regularly, almost every two weeks.
34. On 27 April 2021 there is a physiotherapy record which describes a chronic problem with the left dorsal wrist for 21 years and a problem with the radial aspect of the wrist from January 2021.
35. An occupational therapy record from 30 April 2021 records that the therapist was able to help with the newer injury to the left wrist but, for the chronic problem, the claimant would need to ask her GP to make a referral to an orthopaedic surgeon.

36. On 1 June 2021 there is a report from an occupational therapist which records that the claimant was referred on 14 April for a left wrist injury at work. The reason for the referral was 'difficulty with tasks requiring fine hand movements and pincer grip'. The claimant had been doing exercises prescribed and overall pain in the dorsal aspect of the thumb base was improving. Further exercises were prescribed and a date set for review.
37. An occupational therapy report from 5 July 2021 records that over all the base of the thumb was better, the claimant only occasional mild pain when using the thumb for lateral grip or pinching with thumb and index fingers. The claimant was discharged from hand therapy.
38. Cross examined about this record the claimant said that she still could not squeeze properly at this point and could not open mineral water or pickles. There was an improvement as she could hold things, which she had not been able to do in March. She accepted that at this point there was only 'light' pain from the second left wrist injury but she still had the underlying wrist problem. She had an ongoing difficulty from the second injury in terms of lack of strength in relation to squeezing things which affected her jobs.
39. On 21 September 2021, there is a record of a GP appointment about the left wrist. This records the accident on February 2021. The claimant is said to have had pain, stiffness and weak hand grip which had improved by 50% after physiotherapy. She had been discharged from physiotherapy but had discontinued the exercises as they were too painful. She could do her jobs but could not lift heavy objects such as casserole dishes. She was concerned about worsening symptoms as the weather got colder. She said that the chronic issue in the wrist had been tolerable until the wrist injury in February. She was asking for a referral to a specialist.
40. There are a significant number of records in relation to the wrist in 2022. It is relevant to note that that they describe the wrist pain on the dorsum aspect of the wrist as 'longstanding' or chronic and the pain on the radial aspect as new 'since trauma last year'. Documents from 2022 show that by this stage a ganglion has been identified in the left wrist by an MRI scan but these are outside the period of the claim.

Heart

41. The claimant's evidence was that she had felt irregularities in her heart beats since August 2021. This was occasional at first and she thought it might be caused by caffeine. She said that things got worse in September and October 2021 when she began to feel breathless as well. Her muscles felt weak like she was 'made of cheese'. She reduced her home cleaning. She attended her GP in November 2021. She was very weak and breathless. She was only able to work a few bank shifts. She attended A & E and had an ECG. In December 2021 and January 2022 she was struggling to climb stairs and had to walk

very slowly. Her husband was doing all of the housework. In April 2022, after she stopped her HRT pills, her heart started to feel better.

Records

42. A referral form from the claimant's GP dated 23 November 2021 records that the claimant was seen by her GP three weeks earlier with palpitations. The claimant felt like her heart was jumping in her throat. She had shortness of breath on exertion and felt very fatigued. She was very stressed at work. She did not have energy to do much, had not washed for three days and was not doing housework.
43. A text from the claimant's GP on 24 March 2022 reports that her echocardiogram was reported as normal as was a CT scan of her chest, heart and lungs. She had fairly frequent ectopic beats which were common in the population and were not serious. They had not found any pathology to explain her shortness of breath.
44. In cross examination the claimant felt that her GP had been wrong about her heart symptoms. She said that she believed that the heart symptoms had been a side effect of her HRT. They stopped almost as soon as she stopped taking the HRT.

Lower back

45. The claimant said that she had injured her lower back doing the high jump in 1987 and it had never recovered properly. She could only bend backwards to a limited extent and said that she had pain in her back every day since, at an intensity of between 2 and 9 on the pain scale.
46. Over the years she had had five or six incidents which she described as 'leaving me on the floor and not being able to move even in 5 cm, for 30 min, and hurting me even when I was trying to breath very shallow'. When cross examined about those incidents, she unsurprisingly did not have a good recollection of exactly when they occurred, although she said the last time was after the incident in February 2021 when she also injured her wrist. She was unable to recall whether she had had such an episode during a period of exacerbation reflected in her medical records in 2018. Her sex life was affected by the issue and she had stiffness every morning which would take some minutes to resolve
47. There had been a significant exacerbation after difficulties in lifting a heavy patient in 2010. The claimant had had to give up work for a period as she was unable to bend for five or six months and even walking and sitting for long periods were painful.

48. In February 2021, she had a further significant exacerbation after lifting a patient. She said that it hurt her a lot up to the present day. She was taking painkillers. She could not do sports any more, even light jogging.

Records

49. On 23 January 2018 there is a GP record for an appointment for low back pain. This recorded pain since the end of September 2017 which seemed to come on after horse riding. She could not do any sport and had put on weight. The pain was worse when bending or twisting; the claimant was using ibuprofen gel.
50. There is a physiotherapy referral in February 2018 which records that the claimant had had back pain since the end of September but had never had any consultation or previously seen a physiotherapist for this issue. There is a reference to falls as a teenager. Aggravating features are recorded as bending, hoovering, sitting or standing for over 15 minutes and 'sit to stand'.
51. An MRI in February 2018 concluded that the claimant had minor degenerative changes. Physiotherapy records showed that the claimant was still doing exercises for lower back pain in July 2018 and the pain was improving.
52. A physiotherapy record from 25 September 2020 records that the claimant had damaged her lower back with ITU work.
53. When the claimant attended physiotherapy in April 2021 she reported that she had chronic back pain which had been exacerbated after heavy lifting in January 2021. She was prescribed exercises. The back care adviser who reported the claimant's wrist issue reported that the accident had also exacerbated the claimant's lower back pain, which was a long term condition. The claimant had been referred for physiotherapy for her back by her GP.
54. There are physiotherapy notes in 2022 which make reference to the claimant as having a long history of lower back pain after falling on a bar as a child.

Legs

55. The claimant's evidence was that she had a deep laceration in April 2015 to her left knee. She had sharp pain on bending and an effusion around the knee cap. This went on for over a year and interfered with most of the claimant's sports.
56. The claimant had an injury to her right knee from jumping over a ditch in February 2021. She had sharp pain for five months which continued until the present date. She was unable to bend the knee or kneel. She limped slightly between February and April 2021. Walking was painful and she had to do some duties by bending her left leg only and extending her right leg out to one side.

57. It was put to the claimant in cross examination that this knee issue had recovered well within a year. She said that she still got a little pain in the knee, maybe 1 or 2 on the pain scale, for example if she jumped or did fast movements.
58. She also injured her right foot in an ocean-diving accident in 2015. This had resolved after three years.

Records

59. An MRI of the claimant's left knee in October 2015 was largely normal although there was a small joint effusion. There are further records of physiotherapy in 2015 and into 2016.
60. On 12 March 2021, a musculoskeletal service referral form records ongoing pain in the right knee, pain worse on standing from the floor and difficulty in bending and lifting objects due to pain.
61. Physiotherapy records from April 2021 refer to the claimant's right knee pain which was described as 'improving'. As at 9 April 2021, she had experienced 70 – 75% improvement in the knee symptoms and was able to sit on the knee.

Premature menopause

60. The claimant said that she had gone through premature menopause in 2015 at the age of 42. This caused her to have a lack of energy; she would get tired after a couple of hours of work. Her physical activities were slowed down - lifting shopping bags, housework, climbing stairs. She had to stop her sports. She had a lack of libido and often intercourse was very painful. She had been prescribed HRT but found it caused weight gain, water retention and other symptoms.

Records

61. A letter from a gynaecologist at a menopause clinic dated 30 September 2020 reported that intercourse was excruciatingly painful.
62. A letter from the claimant's gynaecologist dated 19 May 2021 said that the claimant had had significant superficial dyspareunia (pain and dryness) for at least six years. She had tried HRT and pessaries without success. Intercourse was very painful.
63. A pelvic pain impact questionnaire dated 9 August 2021 recorded that the claimant's pelvic pain had affected her energy levels 'a little bit', her mood

'somewhat', her sleep 'not at all', her ability to undertake physical activity 'quite a bit' and her sexual life 'a great deal'.

64. A menopause clinic note from 24 November 2021 reported ongoing dyspareunia, palpitations and low energy.
65. The claimant was cross examined to the effect that her symptoms from premature menopause were limited to lack of libido and a painful vulva, both of which had an effect on her sex life only.
66. She said that was not the case; her lower energy levels meant she had to give up the eight sports she had had to do for her stunt work. That include cycling. The swelling of her vulva also caused pain when she was walking and working.

Law

Definition of disability

67. Section 6(2) of the Equality Act 2010 provides that a person has a disability if that person:
 - Has a physical or mental impairment
 - The impairment has a substantial adverse effect on that person's ability to carry out normal day-to-day activities;
 - That effect is 'long-term'.
68. 'Substantial' is defined in S.212(1) EqA as meaning 'more than minor or trivial'. In considering whether there is a substantial adverse effect on normal day-to-day activities, the focus should be on what the person cannot do and not what he or she can do: Goodwin v Patent Office [1999] ICR 302, EAT.
69. Schedule 1, paragraph 2(1) provides that the effect of an impairment is long-term if it has lasted for at least 12 months, or is likely to last for at least 12 months, or is likely to last for the rest of the person's life. When looking at whether an effect is 'likely' to last for at least 12 months, a tribunal should consider whether 'it could well happen': Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL.
70. Schedule 1, paragraph 2(2) 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 it is likely to recur.
71. The assessment of whether a condition is 'recurring' or 'long term', or whether there is a substantial adverse effect 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: All Answers Ltd v W [2021] EWCA Civ 606, [2021] IRLR 612.

72. A tribunal may, in a case where there is a dispute about the existence of an impairment, 'start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and consider the question of impairment in the light of those findings': J v DLA Piper UK LLP [2010] ICR 1052. It is good practice for a tribunal to state conclusions separately on the question of impairment and adverse effect, but the tribunal should not proceed to those conclusions in rigid consecutive stages.

73. An impairment must be treated as having a substantial adverse effect if measures are being taken to treat or correct it and but for those measures, it would be likely to have that effect: para 5(1), Schedule 1 Equality Act 2010.

74. The requisite effect on day-to-day activities may be established if there is an effect on normal day-to-day work activities even if there is none on activities outside of the job: Igweike v TSB Bank Plc [2020] IRLR 267, EAT

75. In Paterson v Commissioner 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 statutory Guidance then in force] 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.'

76. Where there is more than one impairment, a tribunal must 'add up the component parts and see whether it amounts to more than individual parts taken separately': Ginn v Tesco Stores Ltd EAT 0197/05.

77. I must have regard to the Statutory Guidance on Disability where relevant. I have considered in particular the following paragraphs:

B9.

Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty.

...

C2.

The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person. The substantial adverse effect of an impairment which has developed from, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected.

'A man experienced an anxiety disorder. This had a substantial adverse effect on his ability to make social contacts and to visit particular places. The disorder lasted for eight months and then developed into depression, which had the effect that he was no longer able to leave his home or go to work. The depression continued for five months. As the total period over which the adverse effects lasted was in excess of 12 months, the long-term element of the definition of disability was met.

A person experiences, over a long period, adverse effects arising from two separate and unrelated conditions, for example a lung infection and a leg injury. These effects should not be aggregated.'

D4

The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning

D5

A normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as breast-feeding or applying make-up, and cannot therefore be said to be normal for most people. They would nevertheless be considered to be normal day-to-day activities.

D6.

Also, whether an activity is a normal day-to-day activity should not be determined by whether it is more normal for it to be carried out at a particular time of day. For example, getting out of bed and getting dressed are activities that are normally associated with the morning. They may be carried out much

later in the day by workers who work night shifts, but they would still be considered to be normal day-to-day activities.

D22.

An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse effect on how the person carries out those activities. For example:

'• pain or fatigue: where an impairment causes pain or fatigue, the person may have the ability to carry out a normal day-to-day activity, but may be restricted in the way that it is carried out because of experiencing pain in doing so. Or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time. (See also paragraphs B7 to B10 (effects of behaviour));

A man with osteoarthritis experiences significant pain in his hands undertaking tasks such as using a keyboard at home or work, peeling vegetables, opening jars and writing.

The impairment substantially adversely affects the man's ability to carry out normal day-to-day activities.

A man has had chronic fatigue syndrome for several years. Although he has the physical capability to walk and to stand, he finds these very difficult to sustain for any length of time because he experiences overwhelming fatigue. As a consequence, he is restricted in his ability to take part in normal day-to-day activities such as travelling, so he avoids going out socially, and works from home several days a week.

Therefore there is a substantial adverse effect on normal day-to-day activities.

Submissions

78. I have considered the parties' submissions carefully but refer to them below only insofar as is necessary to explain my conclusions.

Conclusions

General

79. One argument put forward by the respondents was that the claimant had exaggerated symptoms and that the level of impairment she claimed was not borne out by her medical records. For example there was an appointment in 2016 where the claimant was reported as being 'generally well', which was said to be inconsistent with the various ongoing issues. It was submitted that

she suggested that she had a heart condition when the medical evidence showed none and that she reported impairments for periods when there were no or few medical records. It was put to her that when she had investigations, the results of scans often did not show causes for the symptoms she said she had. It was also put to her that she was the type of person who attended medical professionals a lot. The fact that she attributed her headaches to solar events was also relied on by the respondents.

80. I did not conclude that the claimant was someone who exaggerated or invented symptoms:
- I had no evidence that the claimant was a person who attended medical appointments more than was necessary. She is a woman now in middle age who has done jobs which are likely to have caused a fair amount of wear and tear;
 - I bear in mind that some conditions causing chronic pain are not detectable on scans;
 - Given the difficulty of remembering symptoms and restrictions over a very long period of time, I was not persuaded the claimant had exaggerated her symptoms at any particular time. She very frankly agreed that at times particularly symptoms were not severe and that pain was light. She said she had lower back pain every day but sometimes it was very much at the lower end of the spectrum;
 - Bearing in mind that the period 2020 /2021 was the height of the pandemic, it was unsurprising the claimant was not attending her general practitioner for some of her issues or that she was concentrating on those that were most acute at the time;
 - The fact that the claimant had unconventional explanations for her headache / migraine triggers did not seem to me to be any evidence that she did not suffer from headaches / migraines.
81. I consider the various conditions in turn. I compared the claimant with her impairments with what she would be like without those impairments. She was someone who clearly had enjoyed a high level of sporting activity and at the relevant times was unable to participate even in cycling or light jogging.

Headaches

82. I was satisfied on her own evidence and the limited evidence contained in the medical notes that the claimant's headaches were a long term condition.
83. The claimant did not give evidence of day to day activities she could not do at all when she had headaches but the gist of her evidence was that her working life was more difficult when suffering from headaches.
84. Mr Shellum had argued that the headaches were neurological rather than a soft tissue impairment. The claimant said by soft tissue, she had understood everything which was not connected with the bones. Ultimately, I concluded this semantic distinction was of no importance since the claimant had clearly referred to the headaches in her claim form.

85. Bearing in mind that the burden was on the claimant to establish that her impairments were disabilities, I was not satisfied that I had enough evidence to conclude that the headaches were a disability at the relevant time. I had no good evidence as to their frequency and duration during this period and only the broadest account of their effect on activities.
86. I did not find that the claimant's headaches were a disability within the meaning of the Equality Act 2010 at the relevant time.

Neck

87. There was no evidence that the neck problem was causing the claimant any symptoms in 2021 or was likely to recur. It therefore did not satisfy the requirement that it be long term.
88. I did not find that the claimant was disabled by reason of a neck impairment at the relevant time.

Left shoulder

89. The claimant's evidence and the medical evidence showed that the claimant had a chronic issue with her left shoulder over many years. The symptoms waxed and waned particularly as a result of treatment. I assume that the symptoms would have been more persistent had the claimant not had physiotherapy and steroid injections.
90. It is clear to me, given the history, that the claimant's left shoulder symptoms, although not continuous, were likely to recur. Were they symptoms which at their highest had a substantial adverse effect on the claimant's day to day activity and was that an effect which was likely to recur at the relevant time?
91. I concluded that looking in the round at the types of activities the claimant could not do or could only do with pain, as described above and bearing in mind her use of strong painkillers, there was a more than minor or trivial effect on the claimant's day-to-day activities both during the exacerbation in 2021 and at earlier times when she had experienced exacerbation and that the history as at 2021 means that those effects were likely to recur.
92. The name given to the claimant's impairment in the notes is calcific supraspinatus tendinopathy but in any event it seems to me appropriate to deduce that she had a left shoulder impairment from its effects.
93. I concluded that the claimant's left shoulder impairment was a disability within the meaning of the Equality Act 2010 at the material times in 2021.

Both wrists

94. It did not seem to me that the right wrist satisfied the test at the relevant time. The claimant reported only occasional mild pain. There was no evidence before me that any more serious symptoms from an earlier period were likely to recur.
95. The picture in relation to the left wrist was more complicated because of the two separate injuries / impairments. The injury which occurred in February 2021 seems to have resolved to state where it was only causing light pain within a few months.
96. I did not consider that the evidence which I had was sufficient to conclude that the underlying condition of the left wrist had a substantial adverse effect on day to day activities on its own, but I considered that it obviously worsened the effects of the claimant's other musculo skeletal issues, in particular her left shoulder and her lower back. My conclusions in respect of the cumulative effect of the claimant's impairments are set out below.

Heart

97. The symptoms described by the claimant did not carry on for twelve months and I have no evidence to suggest that they were likely to carry on for twelve months at the relevant time in 2021 or were likely to improve and then recur.
98. I do not find that the claimant had a disability in relation to her heart at the material times in 2021.

Lower back

99. I was satisfied that the claimant had a long term lower back impairment. This condition did not have a substantial adverse effect on the claimant's day-to-day activities at times when the pain was only 1 or 2 on the pain scale.
100. The history showed that there were a number of exacerbations over the years. It seemed to me that the effect on the claimant's day to day activities at these times was more than minor or trivial. The claimant had difficulties getting out of bed and substantial pain walking, sitting for long periods and standing for long periods as well as lifting medium sized objects.
101. It seemed to me that the history of the claimant's lower back problems demonstrated that these more severe symptoms were likely to recur as at the relevant period in 2021. Taken together, the effects and their history amounted to an impairment.
102. I concluded that the claimant had a disability in respect of her lower back impairment at the material time in 2021.

Legs

103. I did not find the claimant had a disability in relation to her legs. The left knee injury had long recovered by 2021 and there was no evidence that the effects were likely to recur. The right knee injury had ceased to have a substantial adverse effect on the claimant's activities within twelve months. The right foot injury had recovered significantly before the events of this claim.

Premature menopause

104. Ongoing effects of the claimant's premature menopause had been continuing for over twelve months at the material time.
105. What was more difficult to decide was whether the impairment had a substantial adverse effect on the claimant's day-to-day activities. I was not persuaded that I had sufficient evidence that the effects on the claimant's energy levels or ability to walk and run caused by discomfort were substantial. She appeared to have had to give up sports due to the various musculo skeletal injuries so it was not clear that this was connected with low energy levels due to premature menopause. The effect on the claimant's sexual life was clearly profound.
106. The Statutory Guidance makes no reference to effects on sexual life as an aspect of day-to-day activities. I canvassed the issue with the parties, but Mr Shellum was not aware of any helpful authority on the issue, in particular as to whether the effect on activities had to be one which could conceivably have an impact on working life. Subsequent to the hearing, I considered that some European cases might bear on the question, such as HK Danmark v Dansk almennyttigt Boligselskab and another case [2013] ICR 851, ECJ and Z v A Department C-363/12 [2014] IRLR 563,. The parties had not had the opportunity to address me on these authorities.
107. Given that a further open preliminary hearing has been listed to consider time issues and strike out applications, I concluded the most appropriate course was to permit any further representations the parties wish to make on the issue of whether the claimant's premature menopause is a disability on its own or taken in conjunction with other impairments, to be made at the further open preliminary hearing.

Cumulative effects

108. Looking in the round at the different impairments relied on by the claimant, I concluded that the left wrist impairment clearly contributed to the problems with day to day activities caused by the two impairments I identified as amounting to disabilities on their own. I was unable to reach a similar conclusion in respect of the other impairments. The right wrist at the relevant time was causing only trivial symptoms. The neck and leg problems were not active to any relevant degree at the relevant time. I had no evidence to suggest a cumulative effect from the headaches, taken with the other impairments. As to the heart, I could not conclude without medical evidence

that the breathlessness and other symptoms the claimant experienced in addition to the palpitations were related to any heart impairment and in any event the duration of these symptoms was not long term within the meaning of the Equality Act 2010.

Employment Judge Joffe
London Central Region
27/03/2023

Sent to the parties on:

27/03/2023

For the Tribunal Office: