EMPLOYMENT TRIBUNALS

Claimant: Miss D Thomas

Respondent: Ash House Nursery Limited

Heard at: Liverpool **On:** 14 September 2018

Before: Employment Judge Wardle

Representation
Claimant: Mr Millet - Solicitor
Respondents: Mr Flood - Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant is disabled for the purposes of section 6 of the Equality Act 2010.

REASONS

1. This case was listed for an open preliminary hearing in order to determine the issue as to whether the claimant was at all material times a person with a disability within the meaning of the Equality Act 2010.

2. In relation to the issue at hand as to whether the claimant satisfies the definition of disability to be found at section 6 of the Equality Act 2010 the Tribunal received evidence from the claimant in the form of a disability impact statement and a supplementary statement and also had before it a written statement from Mr Darren May, her partner, which the respondent elected not to subject to cross-examination. The claimant's evidence was though supplemented by oral responses to questions posed. The Tribunal also had before it a bundle of documents, included amongst which were the claimant's relevant medical records.

3. At the conclusion of the hearing the Tribunal informed the parties that judgment would be reserved. Subsequently having regard to the evidence, the

submissions and the applicable law it has been able to reach conclusions on the matters requiring determination by it.

4. Having heard and considered the evidence it found the following facts.

Facts

5. The claimant, who was employed by the respondent as a Level 3 Nursery Practitioner from 24 October 2016 until 24 November 2017 when her employment terminated by reason of her resignation, relies on a physical impairment of Idiopathic Intracranial Hypertension (IIH) as her disabling condition, which according to her particulars of claim is a condition characterised by increased intracranial pressure without a detectable cause. Its main symptoms are said to be headaches, long-term vision problems, ringing in the ears, temporary vision loss and shoulder pain.

6. According to her medical records the claimant had a two month history of headaches, which she described as migraines at the end of 2016 before on 1 January 2017 suffering an episode of transient monocular visual loss lasting 30 seconds and waking the next day with blurred vision. She was referred to Ophthalmology by her GP and was then referred to the neurological team at the Royal Liverpool Hospital, where she remained an inpatient with effect from 6 January 2017 and underwent multiple tests including CT scans, blood tests, eye field tests and a lumbar puncture, which established that she had abnormally high levels of pressure around her brain. On the fourth day of being in hospital she was diagnosed with IIH before being discharged on 13 January 2017 with follow up appointments arranged for both ophthalmology and neurology and treatment with Acetazolamide, a diuretic, with gradual increase in the dose as advised by the neurology team.

7. The claimant was generally signed off from work from January to mid June 2017 by reason of IIH, although she did make a return to work on or around 6 February 2017 on reduced hours and duties working 20 hours per week as compared with her contractual hours of 40. This arrangement lasted for five weeks until 9 March 2017 when she rang in sick complaining of a headache, which saw her saw her remaining unfit until 20 March 2017, when she unsuccessfully attempted to return but was still unwell and had to leave mid-morning.

8. In relation to her follow up appointments, as referred to above, she was reviewed in St Paul's Eye Unit on 26 January 2017 when she presented with visual obscurations and on examination it was recorded that there was gross papilloedema (optic disc swelling) in both eyes associated with mild blurred vision but that she was having few headaches and there was no pulsatile tinnitus. In relation to her condition of IIH it was noted that the claimant had a BMI of 32.24 and that she realised that she had to get that down to normal.

9. In relation to her neurology follow up she was seen in clinic on 3 February 2017. The notes of this examination from her consultant record that her symptoms seemed to have improved regarding her headaches but that she

continued to have blurred vision, which was a particular problem when reading and that she had troublesome postural hypertension which was put down to her taking the diuretic, Acetazolamide. It was also recorded that she had bilateral papilloedema with bilaterally enlarged blind spots and that her consultant wished her to be followed up by the ophthalmologists more closely at this initial stage given that she was at risk of further visual deterioration until her condition became more stable.

10. She was next seen in the neurology clinic on 3 March 2017, in respect of which attendance it is noted that she was losing weight; her headaches had completely resolved but that she was continuing to get visual difficulties in particular in relation to her ability to focus in the evenings. On examination it was noted that her visual fields were grossly abnormal with enlarged blind spots bilaterally; that her peripheral fields were also restricted and that on fundoscopy she had gross papilloedema with possible micro-haemorrhages. In response to these findings the claimant was asked to increase her dosage of Acetazolamide from 500mgs to 750mgs.

11. She had a further appointment with a consultant ophthalmologist on 8 March 2017, which showed following diagnostic tests persisting bilateral papilloedema and enlarged blind spots in both eyes with some general desensitivity. The following day she was admitted to hospital as a day case for a planned lumbar puncture. Her consultant's notes record the opening pressure was 36cms of water and a closing pressure of 16cms and that the fluid was clear and colourless and its contents were normal. In a letter to the claimant's GP authorised by the neurology consultant on 15 March 2017 it was stated that given the high Cerebrospinal Fluid pressure and the abnormal visual fields it had been explained to the claimant that there were two options; either to continue with repeated lumbar punctures until the pressure was brought down and maintained at a reasonable level or to go for a venoplasty, where a balloon is inserted and the stenosed segment is opened.

12. The claimant attended at clinic next on 17 March 2017, at which time it was noted that there had been definite progression and increase in the blind spot size bilaterally, which was worse on the right and that she continued to present with bilateral florid papilloedema. At this time a plan was agreed with the claimant involving a repeat lumbar puncture; her starting on Topiramate as she could not tolerate higher doses of Acetazolamide due to paraesthesia and a venoplasty on 6 April 2017. She underwent the further lumber puncture on 24 March 2017, which revealed an opening pressure of 28cm of water and a closing pressure of 16cm and showed that the pressure had come down. The venoplasty scheduled for 6 April 2017 was not carried out as the claimant was unable to tolerate the procedure. The neurology consultant's letter to her GP authorised on 11 April 2017 following this advised that the claimant continued to lose weight and that there was continued bilateral papilloedema and enlarged blind spots bilaterally and that she was due to be seen by the consultant ophthalmologist. This consultation took place on 13 April 2017 and the tests on this date showed an improvement in the claimant's visual field albeit with some decreased sensitivity and a marked reduction in the swelling of the optic nerve.

13. She next saw a Specialist Registrar in Neurology on 20 April 2017, who reported in a letter to her GP authorised on 26 April 2017 that the claimant's vision was stable albeit that there were still fluctuations during the day with poor nighttime vision and that the impression given was one of slight improvement. He also reported that a repeat lumbar puncture had been booked for 27 April 2017 and that she remained on Acetazolamide and Topiramate. Following the lumbar puncture the Registrar wrote further in a letter authorised on 12 May 2017 to advise that this showed an opening pressure of 43cms of water, which was brought down by draining 12mls of CSF to 16cms of water. He also advised that the claimant had experienced a migrainous headache four days ago (post lumbar) but had otherwise been stable with stable vision and no tinnitus and that her optic discs showed mild papilloedema, which he thought was slightly better than when he had seen her last as was the case with the blind spots which were smaller, although her visual acuity on the right was marginally worse. Mention was also made of the claimant being asked to increase her dosage of Topiramate to 125mgs twice daily and that she was booked in for another lumbar puncture in one week's time.

14. On 4 May 2017 the claimant attended at St Paul's Eye Unit and in a letter to her Consultant Neurologist from the examining physician it was reported that on examination she had grade 1 swelling of both discs with no spontaneous venous pulsation which looking at her notes showed an improvement compared to previous assessments. It was also stated that she had lost one and a half stones over four months and was having very few headaches at present.

15. The claimant attended for a further lumbar puncture on 3 May 2017, at which her opening pressure was 18cms of water as compared to 43cms at her previous one on 27 April 2017.

16. On 10 May 2017 the claimant was seen by a Consultant Neurosurgeon, who in a letter to her Consultant Neurologist authorised on12 June 2017 advised that she was not now suffering from headaches and that in fact her main symptom was low pressure headaches after her lumbar punctures are performed before adding that her vision had been stable for some time and that having been seen by Ophthalmology at the end of April there was marked improvement in her visual field and marked reduction in the swelling of the optic nerve, albeit that she was to be kept under review. Also remarked upon was that the claimant had lost two stones since January and continues to lose weight and that she had told her that she was fine other than her back pain and her struggle to see in the dark. She concluded by saying that given that the claimant had lost so much weight; was responding to and tolerating the medication well and currently had significantly improved vision she did not think that she needed any surgical management at the present time adding that she had explained to the claimant that IIH can burn out and certainly with weight loss this is the main way of treatment.

17. The claimant next attended clinic with her Consultant Neurologist on 17 May

2017, following which she wrote to the claimant's GP on 20 May 2017 to advise that she was now completely headache free and had not noted any change in her visual symptoms before advising of the results of her last lumbar puncture showing an opening pressure of 18cms and commenting that she had explained to her that the most recent findings in respect of her visual symptoms were very reassuring such that she had not organised for her to have any further lumbar punctures, although she was to be seen by Ophthalmology in July.

18. Subsequently the claimant's symptoms deteriorated and she was admitted to hospital as a day case on 26 May 2017 for a repeat lumbar puncture, which showed an opening pressure at 18cms of water which was within normal limit. In a letter from her Consultant Neurologist on 7 June 2017 to the claimant's GP she advised following the claimant having contacted her secretary to enquire about her symptoms that patients with IIH can continue to have headaches and visual disturbances adding that in particular knowing that the claimant has a significant visual field defect she is likely to continue to have visual disturbance, which can vary from day to day, in particular when she is tired or stressed. She concluded by saying that with treatment there is a possibility that some of the symptoms will resolve over time but that she may be left with some residual deficit.

19. On 14 June 2017 the claimant was referred by her GP for cognitive behavioural therapy (CBT) having consulted him with low mood. Her medical notes state that she reported feeling low but with no suicidal thoughts; that she has a frequent feeling of being watched/chased; that she feels hopeless at times but feels that when she is back to work she will feel better and that her appetite and sleep were ok but that she was suffering from poor concentration. On 19 June 2017 she was contacted by Inclusion Matters to be told that her initial telephone screening appointment would take place on 5 July 2017, which was later rescheduled to 19 July 2017.

20. Also on 19 June 2017 the claimant attended a clinic with her Consultant Neurologist. In a letter from her to the claimant's GP dated 28 June 2017 she advised that she was, overall, happy with the progress that the claimant had made and that there had been improvement in her vision and her CSF pressures. She also mentioned that the claimant was planning to start driving and that she had been told that she needed to inform the DVLA but that there was no reason why she could not begin to drive. She concluded by saying that the claimant was due to see the Consultant Ophthalmologist within the next few weeks and that thereafter management plans could be decided upon.

21. Further on this date the claimant met with her manager, Ms Christine Taylor and agreement was reached that she could return to work with effect from 21 June 2017 but that because of ongoing health issues she would only do three days per week, which would be in the pre-school room rather than the toddler room as she had been advised not to lift the children. On her case the claimant claims that this reduction in hours amounted to an act of discrimination arising from disability.

22. On 19 July 2017 the claimant had her initial assessment with Inclusion Matters, following which the Psychological Wellbeing Practitioner on 20 July 2017 wrote to the claimant's GP to advise that the difficulties described at assessment appeared consistent with a provisional diagnosis of generalised anxiety disorder and that by way of therapy it had been agreed that step 2 Computerised Cognitive Behavioural Therapy (CCBT) would be most appropriate and that the claimant would be offered an appointment to begin treatment as soon as possible, which was subsequently arranged for 31 July 2017.

23. On 24 July 2017 the claimant attended clinic with her Consultant Neurologist, who subsequently wrote to her GP on 2 August 2017 to say that her symptoms had improved greatly and that she was very happy with her improvement before adding that if the awaited ophthalmology review confirms the findings, on examination, of her vision they would think about reducing her dosage of Acetazolamide from 750 mgs to 500mgs twice daily and that she had arranged a follow up in two months time.

24. On 30 August 2017 the claimant met with her Consultant Neurosurgeon, who by a letter authorised by her on 25 September 2017 advised the claimant's Consultant Neurologist that on review the claimant had described no deterioration or any problems with her vision, it having been stable from January and that though she still has headaches they are much improved. On examination she reported that she did have some mild swelling behind her eyes but there were no haemorrhages and her fields other than a temporal upper quadrant loss in the left eye appeared stable before adding that she had explained to the claimant that surgical intervention is only required when there is concern that the vision is deteriorating but that with her weight loss and the medical management she seemed to have treated herself, such that she was discharging her back to neurology.

25. An ophthalmology review followed on 1 September 2017, which saw the consultant advising neurology that the swelling had now completely gone from the optic nerves and that there had been some improvement from her visual fields from earlier in the year such that she would now be reviewed on an annual basis or sooner if there is a problem.

26. On the claimant's case, which is denied by the respondent, in respect of these two appointments on 30 August and 1 September 2017 she was required to take holiday in order to attend them and claims that by having to do so she was directly discriminated against as a comparable non-disabled person would have been entitled to attend medical appointments by request without taking holidays as this was standard practice. It is further her case that when she enquired of the respondent on 15 September 2017 about her coming back full-time she was told that it did not have any hours for her, which she claims amounted to a further act of direct discrimination

27. On 2 October 2017 the claimant attended a clinic with her Consultant Neurologist, who by a letter to her GP authorised for sending on 25 October

2017 advised that she was glad to hear that she had remained asymptomatic with no headaches or visual symptoms; that she had been discharged by her Neurosurgeon and that her Ophthalmology follow up was reassuringly next year as her vision had remained stable and if anything there had been significant improvement. She concluded by saying that by way of a plan the claimant had been asked to reduce her Acetazolamide to 500 mgs twice daily and then by 250mgs every two weeks until she has completely stopped taking it subject to her not starting to get symptoms and that if she managed to come off it successfully they could consider reducing and stopping the Topiramate as well. Her next follow up was stated to be in three months. In point of fact the records suggest that this took place on 5 March 2018, when the claimant attended her Neurology Consultant's headache clinic. In a letter dated 12 March 2018 the Consultant advised the claimant's GP that she was glad to hear that the claimant had remained completely well with no headaches or visual symptoms and that following her visual assessment a couple of months ago she had been given the all clear before adding that she had managed to stop the Acetazolamide without any difficulties and that she had recommended that the claimant begin to reduce the Topiramate by 25 mgs every two weeks until she had come off it altogether. Her next follow-up was stated to be in a couple of months.

28. There were no medical records beyond the letter of 12 March 2018 but in her supplementary statement the claimant stated she had attended hospital with a pressure headache on 23 August 2018, when she required an urgent CT scan and lumbar puncture and had a period of absence from work by reason of IIH and that on 4 September 2018 she was admitted to hospital, where she had an urgent ophthalmology appointment and CT scan and was again signed off work due to IIH symptoms and has been re-prescribed Topiramate.

29. On 24 October 2017 the claimant submitted a notice of leaving letter with a termination date of 21 November 2017, which was accepted as her resignation. Prior to its taking effect the respondent on 3 November 2017 offered the claimant a full-time position because according to its response it had obtained planning permission on a new premise adjacent to the nursery, which meant that it could increase its offer to include before and after school provision, which would require an increase in staffing hours. However, such offer was refused as the claimant had secured alternative employment elsewhere.

30. In relation to the claimant's computerised CBT her GP was informed by letter dated 21 November 2017 that the intervention had ended with a successful outcome as evidenced by her first and last questionnaire scores and that she was being discharged back into their care.

Law

31. The relevant law for the purposes of determining this issue is to be found in the Equality Act 2010 (the 2010 Act). Section 4 lists ‘disability’ as one of the protected characteristics. Section 6(2) defines a ‘disabled person’ as a person who has a disability and by section 6(1) a person has a disability if he or she

has ‘a physical or mental impairment’ which has ‘a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities’.

32. Such definition is added to by paragraph 2(1) of Schedule 1 to the 2010 Act in which it is stated that 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 and by paragraph 2(2) in which it is stated 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.

33. It is further supplemented by paragraph 5(1) which provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if - (a) measures are being taken to treat or correct it and (b) but for that, it would be likely to have that effect and paragraph 5(2) which provides that "measures" includes, in particular, medical treatment and the use of a prosthesis or other aid. However, sub-paragraph (1) is by paragraph 5(3) stated not to apply (a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed.

34. In addition guidance entitled 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) (the 'Guidance') has been issued under section 6(5) of the 2010 Act, which under paragraph 12 of Schedule 1 to the 2010 Act an adjudicating body must take account of as it thinks relevant.

Submissions

35. Mr Flood in submissions on behalf of the respondent referred the Tribunal to the case of McDougall v Richmond Adult Community College [2008] EWCA Civ 4, in which the Court of Appeal held that whether an employer had committed an act of discrimination under the Disability Discrimination Act 1995 had to be judged on the basis of evidence available at the time of the act alleged to constitute discrimination and that, therefore in determining whether the adverse effect of a person's impairment was likely to recur within the meaning of paragraph 2(2) of Schedule 1 to the 2010 Act, an employment tribunal should not have regard to subsequent events. In the light of this authority he submitted that the material time for assessing disability is the time of the alleged discrimination, which in the present case is 15 September 2017, and that any subsequent occurrences, which may be before the tribunal but unknown to the alleged discriminator must be discounted. He further submitted that per paragraph 5(3) of Schedule 1 to the 2010 Act the blurred vision and blind spots that the claimant suffered initially as corrected by her wearing spectacles cannot be said to have an ongoing effect. In terms of the provision made by paragraph (2) of Schedule 1 relating to the determination of the question of whether an impairment producing a substantial adverse effect was 'likely' to last for 12 months he pointed the Tribunal to an extract

from Harvey on Industrial Relations and Employment Law [165.01] referring to the case of SCA Packaging v Boyle [2009] IRLR 227 in which Baroness Hale sitting in the House of Lords, as agreed by the other Law Lords, stated that probability denotes a degree of likelihood greater than 50% (but) that likelihood, on the other hand, is a much more variable concept in holding that in considering whether something is 'likely' to happen, it must be asked whether 'it could well happen'.

36. Turning to the definition of disability at section 6 of the 2010 Act he submitted that the term 'impairment' is very important legally stating that it was inserted to increase the scope of matters that can fall within it and that it does not require a diagnosis but that if there are accepted symptoms that would be enough, the logical extension of which is that tribunals are encouraged to look at the effect(s) of the impairment. He further submitted that the claimant's diagnosis of Idiopathic Intracranial Hypotension (IIH) was not an impairment as there were periods when there were no symptoms and he invited the Tribunal to focus on the effects. Moving on to the second part of the definition at sub-section 6(1)(b) requiring the impairment to have a substantial and long term adverse effect on a person's ability to carry out normal day to day activities in order to amount to a disability he stated that it was conceded by the respondent that initially for a period the claimant's condition did have such an effect by way of her blurred vision and headaches requiring lumbar punctures enough to prevent her working but that it is in respect of the need for her to show that the adverse effect was long-term that the respondent says that her case fails, because as at 15 September 2017 the effect of the impairment had not lasted 12 months, unless she is able to satisfy the tribunal that per paragraph 2 of Schedule 1 the effect of the impairment falls within sub-paragraphs (b) or (c) namely that it is likely to last for at least 12 months or it is likely to last for the rest of the life of the person affected.

37. He submitted that in determining whether 'it could well happen' that either of these scenarios were met it is necessary to look at the position as would have appeared to the respondent mid September 2017 and as appears in the claimant's medical notes, in which respect he referred to the letter authorised for sending by the claimant's Consultant Neurosurgeon on 12 June 2017 at pages 122-3, in which she stated that she had explained to her that IIH can burn out and that certainly with weight loss this is the mainstay of treatment. He further submitted that the respondent's contention is that as of September 2017 this is precisely what had happened. In support of this contention he pointed to the two clinics attended by the claimant on 30 August 2017 with her Consultant Neurosurgeon at page 146 and on 1 September 2017 with her Consultant Ophthalmologist at page 147. In respect of the earlier of these attendances he suggested that the telling paragraph was the third one, in which the Consultant states 'From my point of view I have explained to (the claimant) that surgical intervention is only required when we are concerned that the vision is deteriorating. With the weight loss and the medical management she seems to have treated herself.' He further suggested that by the end of September 2017 the claimant had effectively been discharged and that when one looks at the symptoms suffered by her namely blurred vision, papilloedema and headaches these had all but been resolved before adding

that ironically the strongest evidence that she had recovered from these symptoms was that she asked at this time to go back full-time.

38. Turning to the claimant's disability impact statement at page 57 he submitted that in respect of the claimed debilitating effect on her mobility caused by her several lumbar punctures was confined to the period between January and June 2017 when she had undergone them and that the effect was not present in September 2017; that in respect of the anxiety that the claimant developed that the first reference to this is in June 2017 when she consulted her GP with low mood and that this symptom had been successfully treated by November 2017; that in respect of the claimed effect of loss of short-term memory there was no reference to this effect in any of the letters from her medical practitioners and that she was happy to accept in cross-examination that she would need to retain a certain level of knowledge about the children in her care both in her old and new jobs and that in respect of the claimed effect of pressure headaches these had all but gone by September 2017. In summary he submitted that the symptoms of her condition and their effects were not extant for 12 months and that she could not fall into either of sub- paragraphs (b) or (c) and finally suggested that the evidence in the bundle relating to the claimant's social media accounts showed from September 2017 a clear shift in emphasis with her beginning to participate in normal social events.

39. In submissions on behalf of the claimant Mr Millet began by referring to her section 6 disability impact statement and her supplementary statement, which set out the effects that her diagnosis of IIH and its symptoms have had on her ability to carry out normal day to day activities in terms of her mobility, anxiousness, vision and short-term memory and pointing to paragraphs B4 and B5 of the 'Guidance', the former of which provides that 'an impairment might not have a substantial adverse effect on a person's ability to undertake a particular day to day activity in isolation; however, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial effect.' and the latter 'for example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport; but taken together, the cumulative result would amount to a substantial adverse effect on his ability to carry out these normal day-to-day activities. In qualification of which he submitted that whilst the claimant's primary case is that the effects described in her impact statement stand up in isolation as affecting her in a substantial adverse manner then if the tribunal is against her on this then her secondary position is that the effects taken together fall to be considered in line with paragraphs B4 and 5.

40. In response to Mr Flood's submission that the claimant's blurred vision and blind spots as corrected by her wearing spectacles could not be said to have an ongoing effect Mr Millet submitted that it was not her evidence that spectacles corrected the visual problems that were an effect of her impairment pointing to her impact statement and her describing how she could only read large text and had to use a bright light to be able to see it clearly even with her glasses on and that she could not watch TV for more

than an hour without getting headaches. Such effects he suggested went beyond correction of sight by spectacles.

41. He further submitted that she had experienced effects in respect of her ability to go shopping because of short-term memory loss and her struggle to carry heavy bags as a result of back pain associated with the lumbar punctures that she had undergone, which had also impacted on her ability to do housework involving bending for a prolonged period of time and that this was not a case of her saying I have IIH so I have got a disability but rather that her condition affected her ability to carry out a number of day-to-day activities more than trivially, which had been covered in her evidence, in respect of which there was no suggestion that it had been fabricated or exaggerated and he invited the Tribunal to accept it.

42. Returning to the 'Guidance' he suggested that there were other helpful sections pointing to paragraph B2 which provides that 'the time taken by a person with an impairment to carry out normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial; it should be compared with the time it might take a person who did not have the impairment to complete an activity'. He submitted that the claimant's struggles to move the hoover round the house should be viewed in this context.

43. Turning to paragraph 5(1) of Schedule 1 to the 2010 Act which provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect, he pointed to the fact that the claimant was on two types of medication namely Acetazolamide and Topirimate for treatment of her condition through to the material date of 15 September 2017 as evidenced by her Consultant Neurosurgeon's letter at page 146 authorised for signature on 25 September 2017 following her clinic attendance on 30 August 2017. He next referred to paragraph C5 of the 'Guidance' dealing with paragraph 2(2) of Schedule 1 to the 2010 Act and recurring or fluctuating effects, which provides, inter alia, that conditions with effects which occur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' and submitted that the claimant's condition of IIH was a fluctuating one with fluctuating effects pointing to the search result under Intracranial hypertension-NHS at pages 679-684, which states that 'IIH isn't usually life threatening but can be a lifelong problem. While many people find their symptoms are relieved with treatment, the symptoms can recur and can have significant impact on your life' before adding that there are also indications in the medical evidence of the nature of the condition as for example at page 147 in the letter from her Neurology Consultant authorised for sending on 7 June 2017 where she states that 'patients with IIH can continue to have headaches and visual disturbances. In particular knowing that (the claimant) has a significant field defect she is likely to continue to have visual disturbance. This can vary from day to day, in particular when she is tired or stressed. With treatment there is a possibility that some of the symptoms will resolve over time. However, she may be left

with some residual defect', which he submitted began to touch upon what could well happen with her condition and was telling in respect of the exercise to be undertaken. At which point he cross-referred back to paragraph C5 of the 'Guidance', which in reference to paragraph 2(2) of Schedule 1 to the 2010 Act provides that if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur and pointed to the examples given in paragraph C6 of impairments with effects which can recur beyond 12 months or where the effects can be sporadic, included among which is epilepsy, which he stated was covered by IIH. He also suggested that paragraph C7 added a little in that it explains that it is not necessary for the effect to be the same throughout the period which is being considered in order to determine whether the long-term element of the definition is met and that the effect might even disappear temporarily.

44. Finally Mr Millet submitted that the letter at pages 148-149 from the claimant's Consultant Neurologist authorised for sending on 25 October 2017 following her attendance at clinic on 2 October 2017, in which she advised that she was glad to hear that the claimant had remained asymptomatic with no headaches or visual symptoms should be disregarded as it was not known to the parties at the material time and ventured to suggest that if it was to be considered the question is begged as to where the line is drawn. He further submitted that the letter at page 146 from the Consultant Neurosurgeon, in which she commented that the claimant with her weight loss and the medical management seems to have treated herself was easy to misread as her having cured herself, which he submitted was not the case and that the claimant did meet the definition at section 6 of the 2010 Act to be regarded as a disabled person.

45. In response Mr Flood submitted in relation to the claimant's medication that there was no medical evidence as to what it did for the claimant adding that Acetazolamide was a water tablet and in relation to the letter at pages 148-149, which Mr Millet had argued should be disregarded he submitted that as it related to what the claimant had told her Neurology Consultant of her symptoms during September 2017 it could to that extent be relevant without offending against the cut-off date of 15 September 2017 before pointing out in conclusion that the improvement in the claimant's condition coincided with her saying that she was ready to go back to work full-time.

Conclusions

46. In order to satisfy the definition of disability to be found in section 6 of the 2010 Act it is for the claimant to show that (i) he/she has an impairment that is either physical or mental (ii) the impairment affects his/her ability to carry out normal day-to-day activities (iii) the adverse condition is substantial and (iv) the adverse condition is long-term. In addressing these questions tribunals are directed that the questions should be posed sequentially. Furthermore it is established law that the time at which to assess the disability i.e. whether there is an impairment which has a substantial adverse effect on normal day to day activities is the date of the alleged discriminatory act and that this is

also the material time when determining whether the impairment has a long-term effect. In the present case it was common ground that the date of the last alleged discriminatory act was 15 September 2017 when the claimant was told by the respondent that it did not have any hours for her over and above the 24 hours that she had reduced to from 21 June 2017.

47. Turning to the requirements in order to satisfy the definition of disability as set out above the Tribunal was firstly satisfied that at the material time of 15 September 2017 the claimant was suffering from a physical impairment in the form of Idiopathic Intracranial Hypertension (IIH), which it noted was a serious neurological condition causing high pressure in the fluid around the brain, the cause of which is unfound. It was so satisfied because she still had an active diagnosis of the condition at this time and was still receiving treatment for it in the form of the medication she continued to have prescribed namely Acetazolamide and Topiramate, the former a diuretic drug taken to reduce the production of Cerebrospinal Fluid (CSF) and the latter a drug to prevent and control seizures and to prevent and decrease migraine headaches. Whilst there was no evidence what these drugs did for the claimant the fact of the matter was that they were considered necessary for the claimant to take to manage her condition.

48. Secondly it was satisfied that this physical impairment did affect the claimant's ability to carry out normal day-to-day activities finding her to be a credible witness and accepting her evidence that despite her condition having stabilised in terms of her vision and her having fewer headaches she was as at the material time still suffering residual effects of the condition and its treatment in particular the many lumbar punctures that she had undergone most recently on 26 May 2017, which affected her mobility and her ability to lift and bend which impacted on her in respect of those everyday activities such as shopping in that she was unable to carry heavy bags and housework in that she struggled to clean the floor and bath and to manoeuvre the hoover around the house. Additionally the deterioration in her vision, even allowing for the correction provided by glasses left her with difficulties in terms of reading anything other than large text and only then with the benefit of a bright light and has impacted on her ability to watch television for more than an hour without getting headaches. On her evidence she further suffered from short-term memory loss, which according to the extract from the IIHUK website in the bundle is a symptom that is reported by sufferers of the condition, which by her impact statement she says caused her difficulties in respect of forgetting basic day to day tasks such as failing to remember to re-order her prescriptions and whether she has fed her pets and meant that she could not go shopping without having made a list and from anxiety, in respect of which she consulted her GP on 14 June 2017 as she was feeling low; experiencing delusions of being watched and/or chased and suffering with poor concentration, which saw her being psychologically assessed on 19 July 2017 and being provisionally diagnosed with Generalised Anxiety Disorder before commencing treatment in the form of step2 Computerised Cognitive Behavioural Therapy, which was ongoing as at 15 September 2017.

49. Thirdly having regard to the Appendix to the 'Guidance' containing an

illustrative and non-exhaustive list of factors, which if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day to day activities it was satisfied that cumulatively at least these adverse effects on normal day-to-day activities were substantial as being more than trivial or minor.

50. Fourthly and finally it was satisfied that the effect of the claimant's impairment was long term in that it did not accept that she had cured herself as at 15 September 2017 having regard to her Neurology Consultant's comments at page 127 in a letter authorised for sending to her GP on 7 June 2017 to the effect that the claimant 'was likely to continue to have visual disturbance (and) with treatment there is a possibility that some of the symptoms will resolve over time; however she may be left with some residual deficit'. In its view the impairment was one that on the evidence up to and including the time of the alleged discrimination was likely i.e. could well happen to last for a period of at least 12 months from the time of the first onset and that paragraph 2(1)(b) of Schedule 1 to the 2010 Act providing that the effect of an impairment is long-term if it is likely to last for at least 12 months was met.

51. The Tribunal accordingly found that the claimant had discharged the burden on her to show that she satisfied the definition of disability to be found in section 6 of the 2010 Act in that she has a physical impairment which has a substantial and long-term effect on her ability to carry out normal day-to-day activities.

Employment Judge Wardle
8 October 2018

JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON

11 October 2018

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS