



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs Fakhura Nissa

v **Waverley Education Foundation
Ltd (1)
Jacqueline Newsome (2)**

PRELIMINARY HEARING

Heard at: Birmingham

On: 25 June 2019

Reserved Decision: 1 August 2019

Before: Employment Judge Dean

Appearance:

For the Claimant: Mr Islam Choudry, Counsel

For the Respondent: Mr P. Keith, Counsel

PRELIMINARY JUDGMENT

The Claimant was disabled within the meaning of Section 6 of the Equality Act 2010 during the material period namely 1 December 2015 to 31 August 2016 by reason of the disabling conditions of stress, anxiety and depression and muscular skeletal pain.

REASONS

Background

1. This is a case in which the Claimant Mrs Fakhura Nissa was employed by the First Respondent Waverley Education Foundation Ltd as a Science Teacher from the 1 September 2015 until 31 August 2016.
2. At a Preliminary Hearing held on the 5 April 2017, it was determined that the Claimant's complaint of unfair dismissal was not presented within time. A further Open Preliminary Hearing determined the question of whether or not the Claimant was a disabled person and that issue was determined by Employment

Judge Gaskell at a Hearing on the 26 May 2017, found that the Claimant was not disabled. The Judgment was reserved and issued on the 5 September 2017.

3. The Tribunal's Judgment that the Claimant was not a disabled person, was appealed to the Employment Appeal Tribunal and, by a Judgment on the 19 November 2018, issued on the 19 February 2019, the Employment Tribunal's Judgment on the question of disability was overturned and remitted to the Tribunal for a re-Hearing before a fresh Tribunal.
4. It is the Claimant's case that, since December 2015, she had suffered from a physical impairment, ultimately diagnosed as Fibromyalgia, together with mental distress. She claims that the impairments caused her to suffer a substantial and adverse long-term effect on her ability to carry out normal day-to-day activities. The Respondents accepted that the Claimant was suffering from these physical and mental impairments, however they do not accept that any adverse effect on her ability to carry out normal day-to-day activities existed in the case of mental distress or was substantial as far as Fibromyalgia was concerned. The Respondent disputes that judged at the relevant time, between the 1 December 2015 and 31 August 2016, the effects of the Claimant's physical and/or mental conditions were substantial and that neither impairments were long term.

Issues

5. The Open Preliminary Hearing before me is to determine: -

Whether or not the Claimant was disabled within the meaning of Section 6 of the Equality Act 2010, during the material time namely 1 December 2015 to 31 August 2016 and specifically whether during that period: -

- i. The Claimant had a physical and mental impairment.
- ii. Did the impairment have an adverse effect on her ability to carry out normal day-to-day activities.
- iii. Was the effect substantial?
- iv. Was the effect long-term?

The Law

6. By section 6 of the Equality Act 2010 ("**EqA**") it is relevantly provided that:

"(1) A person (P) has a disability if -

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability."

7. What is an impairment is not defined in the EqA however according to the Guidance para A3 it must be given its ordinary and natural meaning. The legislation pints to a functional approach not to a medical one. The cause of the impairment is not the focus but it is the fact and the effect of the impairment A3 and A4. It is not always necessary to categorise a condition as either physical or mental impairment and it is not necessary to show how the condition has been caused.

8. By Schedule 1 of the **EqA**, supplementary provision is made for the determination of the question whether a person is disabled for these purposes. Specifically, it is provided by Part 1 - Determination of Disability:
"2. Long-term effects
(1) 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, ..."
9. Paragraph 2(2) Sched 1 EqA provides that an impairment is treated as continuing to have a substantial adverse effect if that effect is likely to reoccur.
10. Paragraph 5)1) EqA 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.
11. In **Walker v Sita Information Networking Computing Ltd** [2013] UKEAT/0097/12, the EAT, Langstaff P presiding, emphasised that when considering whether or not an individual is disabled the ET must concentrate on the question whether he or she has a physical or mental impairment; the *cause* of the impairment, or absence of apparent cause, will not be without significance, but its significance will be evidential rather than legal - if there is no recognised cause of the disability in a particular case, it will be open to the ET to conclude that the Claimant does not genuinely suffer from it. In **Walker**, the EAT was concerned with the case of a Claimant who was obese. Although not accepting that obesity itself rendered a person disabled, the EAT agreed that it might make it more likely that was the case. Specifically, it could be evidentially relevant to ask whether obesity might impact upon the length of time of which any impairment was to be suffered. The ET had to have regard to the effect of the impairments suffered by the Claimant, not their cause, although the absence because might have evidential significance in an appropriate case if the genuineness of the symptoms was in issue.
12. As for those cases where it is necessary to project forward to determine whether an impairment is long-term (see paragraph 1(b) under the relevant Part of Schedule 1), in **SCA Packaging Ltd v Boyle** [\[2009\] ICR 1056](#) HL Baroness Hale (with whom the other Justices of the Supreme Court agreed) clarified that in considering whether something was likely, it must be asked whether it *could well happen*.
13. The Guidance on Matters to be taken into Account in Determining Questions relating to the Definition of Disability ("the Guidance"), accordingly now states (see paragraph C3) that "*likely*' should be interpreted as meaning that it *could well happen*" rather than it is more probable than not that it will happen.
14. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material time, see **Cruickshank v VAW Motorcast Ltd** [\[2002\] ICR 729](#) EAT.

15. Turning to the question, what is a substantial adverse effect, it has been observed in the case law that this sets a relatively low standard. As paragraph B1 of the Guidance states, a substantial effect is one that is "*more than minor or trivial*" and ought to be understood as applying where a limitation goes "*beyond the normal differences in ability which may exist among people*"; the focus should be on what an employee cannot do or can only do with difficulty, and not on what they can do easily. In this regard, the ET is required to look at the whole picture but it is not simply a question of balancing what an employee can do against what they cannot: if the employee is substantially impaired in carrying out any normal day-to-day activity, then they are disabled notwithstanding their ability in a range of other activities. Where there is unchallenged medical evidence as to the state of the employee's health, that should generally be accepted.
16. The fact that the employee is able to mitigate the effects of an impairment does not prevent there being a disability. Specifically, per Schedule 1 paragraph 5 of the **EqA**, the ET is required to consider the deduced effects of an impairment: that is what the effect would be absent any medical treatment or aid; see the guidance provided in cases such as **Goodwin v Patent Office** [1999] ICR 302 EAT; **Vicary v BT plc** [1999] IRLR 680 EAT; **Kapadia v London Borough of Lambeth** [2000] IRLR 699 CA; **Leonard v Southern Derbyshire Chamber of Commerce** [2001] IRLR 19 EAT; **Ahmed v Metroline Travel Ltd** [2011] EqLR 464 EAT; **Aderemi v London and South Eastern Railway Ltd** [2012] UAEAT/0316/12.
17. Having considered both terms - long-term and substantial - separately the terms qualify each other and go hand in hand; they qualify each other. The substantial effects must also be long-term; see **Cruikshank** at page 739F-G.

Evidence

18. The parties have presented an agreed bundle of documents to be considered at this Preliminary Hearing that extends over some 223 pages as identified in the bundle index. In addition, I have heard evidence from the Claimant and have considered submissions made by the Counsel on the parties' behalf. I have considered the Claimant's two witness statements, a first statement dated 1 March 2017 with the attached documentation and the Claimant's supplementary witness statement dated 16 May 2019.
19. Having considered all the evidence before me, I make the following Findings of Fact.

Findings of Fact

20. The Claimant was employed as a Teacher from the 1 September 2013. The Claimant began working for the First Respondent as a Science Teacher with effect from 1 September 2015 and her employment with them continued until 31 August 2016, when her resignation, tendered on the 26 May 2016 became effective.

21. The Respondents in this case accept that the Claimant has been suffering with a physical condition (Fibromyalgia) and mental stress impairments during the material period. At issue is whether or not and from when, during the period, the impairments were apparent, whether they individually or together had a substantial adverse effect on the Claimant's ability to undertake normal day-to-day activities and whether the effect was substantial and whether it was long term, having either lasted for 12 months or more, or was likely to do so.
22. In considering complaints of disability discrimination and determining whether or not a person has a disability, whether a person is disabled by one or more conditions, the Tribunal may have regard to a diagnosed label of a condition. However, with limited exceptions that are provided under the Act, in particular at Section 1, paragraph 6, only the conditions, Cancer, HIV infection and Multiple Sclerosis are deemed disabilities under the act from the point of diagnosis. A lack of a diagnosed label attached to an impairment, does not prevent an impairment amounting to a disability, nor vice versa. Although in 2019 I have the benefit of a number of documents which reflect upon the situation as it stood at the relevant time between December 2015 and the 31 August 2016, the evidence is viewed at the relevant time. I am required to consider whether or not the condition was one that had lasted or was likely to last for at least 12 months or for the rest of the affected person's life, the evidence, if viewed at the time projecting forward, would have enabled a person answering the question to consider whether it could well happen that the Claimant's impairments would last for at least 12 months.
23. I have been referred to a significant amount of evidence prepared by the Claimant of the impairments that she suffered over the relevant period. The most substantial evidence of the effect of the Claimant's various conditions has been produced to me being from the Claimant herself. Her Doctor's notes, whether they are from the GP or her Consultants, reflect in the main the history as described to the practitioner by the patient, in this case, the Claimant. The Claimant has produced two witness statements. The Claimant confirms that during the material time, from December 2015 to 31 August 2016, she suffered from Fibromyalgia and mental distress. Not unusually, the Claimant's medical records [59-93] identified for the first time on the 1 December 2015 that the Claimant attended upon her GP and reported being stressed at work, to the Claimant being emotional and anxious and reporting a low mood and loss of appetite, concentration and being tearful although not having any suicidal ideation. The Claimant was certified unfit for work because of "stress at work" and recommended for self-referral to Healthy Minds.
24. The Claimant in her witness statement para 7 describes that during the relevant period, she found that she struggled to deal with many daily chores which were extremely difficult, painful and exhausting, those included amongst other things:-

"7.1 preparing or cooking food

7.2 going shopping

7.3 washing and bathing

7.4 getting dressed

7.5 using the toilet, as at times I have difficulty in moving into a sitting position and cleaning myself".

The Claimant goes on to describe that her pain, restricted movement and lack of sleep resulted in great difficulty in both her home and work-life and life in general. The Claimant describes how, with very little sleep she encountered difficulty getting out of bed in the morning with muscle stiffness and limited movement that had developed over night.

25. In her witness statement, the Claimant refers to how her condition affected her whilst she was at work. The description of being at work and undertaking normal day-to-day tasks while in work, the Claimant describes the effect of the impairment in her witness statement as follows: -

“10. My role as a teacher included standing, which became extremely difficult, especially when I had one lesson after another without a break in between. At times I was unable to pick up or move small items or equipment such a tray of pens.

11. On occasions, my pain was so severe by the end of the day, that I could not move. I would end up going home late as a result, having to wait until I could again muster the strength to move. Members of staff sometimes had to help me down to and into my car, even strapping my seatbelt on for me as I could not rotate my arms. Whilst working, I could not take my Amitriptyline medication to relax my muscles due to its side-effects”.

Although the description is of the impact of the impairment on the claimant whilst at work, the examples themselves are of normal day to day tasks done at work and are not extraordinary work place tasks that are beyond the normal or out of the ordinary.

26. The Claimant has amplified her witness statement account explaining that when she was at work and found difficulties moving, once she had been assisted to her car and was sat down and strapped in, the supportive nature of the car seat enabled her to drive, albeit in pain, the distance to be able to drive home. The Claimant describes that although the medication prescribed to her was not always taken by her as it affected her ability to teach, she was at various times prescribed various medications including: -

“13. I have been prescribed various mediations, including Lyrica, Naproxen, Amitriptyline, Lansoprazole and paracetamol”.

The Claimant describes that because of the overwhelming physical and psychological pain and distress that she suffered and also due to the side-effects of certain medication, her family members would be required to support her and prompt her and remind her to take her medication itself. Her normal day-to-day activity that was adversely affected.

27. Due to the emotional and mental stress that the Claimant had in and around December 2015, when it began, the Claimant in addition to pharmaceutical treatments underwent psychotherapy treatment from December 2015 [130-143] as well as physiotherapy [144-145]. The Claimant's account as evidenced by her receipts, is that she saw a Psychotherapist from the 7 December 2015 and has continued to do so on a weekly basis since.
28. Consistent with her report to her GP in December, which records that she was tearful, the Claimant describes [paragraph 20, witness statement] that at work, on the 8 January 2016 she became distraught and was consoled by colleagues

in her room and by her School NUT Representative Mrs Tate. The Claimant had another period of sickness absence from the 15 December 2015 – 9 January 2016.

29. The Claimant's medical records document that she attended her GP again on the 1 February 2016 [61] when she was certified unfit for work for a period from the 1 – 29 February 2016, although in his previous history in her December attendance, the GP did not record the Claimant's pain, the history on the 1 February records that the Claimant was:

“still struggling at times at school due to ongoing right-side body pain and fatigue/lethargy. She has private physiotherapy currently, seen on a regular basis for this. Had to come home from work today due to pain/unable to cope.”

The GP issued a fit-note to suggest that the Claimant may be fit for work subject to amendment to duties altered/alter work hours.

30. At the end of February, following consultation relating to stress at work, the history here recalls that the Claimant referred also to her neck, shoulders, upper back, lower back pain and her inability to raise her arms [62]. On the 26 February, the Claimant was certified unfit for work for the period 26 February – 4 March 2016 and following consultation with her GP on 11 March, she was certified unfit for work for the period 3-20 March 2016 because of stress of work. The history continues to record that the Claimant was tearful and that she did not feel that she could do more than 2 hours at work because she could not cope and that her muscular skeletal pains continued. The GP records objectively that the Claimant was seen to be in pain when she stood up from sitting [64] The Claimant was referred to a Rheumatologist on the 4 March and the history confirms that the Claimant was seeing a Physiotherapist privately and also a Psychotherapist due to the emotional/stress related issues. A fit-note signed on the 11 March certified the Claimant unfit for the period 3-20 March and confirmed that the Claimant's pain continued and was objectively observed when she stood up from sitting. The history reports that the Claimant:

“finds it difficult to raise her arms at times due to pains. No numbness/alter sensation. She finds that she was walking more slowly due to the pain. She finds it getting her down and wants to know what can be done to help.”

The GP comment records: -

*“For a referral to Rheumatology for further assessment?
Fibromyalgia. In the meantime, Lyrica increased.”*

31. On the expiry of the March fit-note, the Claimant returned to work on a phased return which phased working continued to May.
32. The Claimant in between 1 December 2015 and 20 March 2016 had some 11 weeks sickness absence followed by an extended period of phased return to accommodate her inability to undertake a full range of normal day-to-day activities.
33. The Claimant returned to full-time work on the 16 May 2016, however, had to be assisted to her car by a work colleague at the end of the day. The Claimant who

was in work on the 17 May had to be assisted by a technician who carried her things for her and she did not attend on the 18 and 19 May 2016 and subsequently the Claimant resigned giving notice to expire on the 31 August 2016 and having intermittent days of absence during the remaining period of her employment. In her initial witness statement she describes:

“10. My role as a teacher included standing, which became extremely difficult especially when I had one lesson after another without a break in between. At times I was unable to pick up or move small items or equipment such as a tray of pens. 11. On occasions my pain was so severe by the end of the day that I could not move. I would end up going home late as a result, having to wait until I could regain enough strength to move. Members of staff sometimes had to help me down to and into my car, even strapping my seatbelt on for me as I could not rotate my arms. Whilst working I could not take my amitriptyline medicine to relax my muscles due to its side effects. ...

28. On 16 May 2016 I had my first full day back at work including lessons without a break in between. By the end of the day I was in tears. Although I was due to finish work at 3.10pm, I was physically incapable of leaving. I was in extreme pain and unable to walk. Eventually, at about 3.45pm, one of the teachers, helped me down and into my car, including carrying my bag for me. When I finally made it home my husband had to help me out of the car and up the stairs into bed.

29. On 17 May 2016 I arrived late for work, just after 9am, because I was in pain most of the night and very stiff in the morning. Although my day was relatively light, with only 3 lessons to teach, by the end of it I was exhausted and in so much pain that again I had to be helped out of the building, this time by a technician who carried my things for me.”

34. The Claimant has provided a supplemental witness statement in which in significant detail at paragraph 37, she identifies in greater detail that her pain had reached a peak by the end of January 2016.

35. The Claimant's supplementary witness statement signed by her on the 16 May 2019 provides a more detailed account of how the Claimant's ability to undertake normal day-to-day activities was affected at the relevant time.

36. Paragraph 37 (a)-(x) sets out the claimant's evidence which provides extensive details of the adverse impact. Although written in greater detail in the supplemental statement than the more basic framework of the first statement I find that the claimant was an honest witness whose more detailed account provides credible detail of the impact that the impairments had upon her day to day activities at that time. The witness evidence which I find persuasive is that: -

“By the end of January 2016, I had reached the peak of my pain and rotating my arms or raising them high up was too painful and I was unable to do this. I was also experiencing muscle pain in my lower back (around my hips and just above my glutes). I was walking much slower and had difficulty moving into sitting and standing positions.

- a) *Attending my toilet needs was difficult as I was unable to rotate my arms to clean and it would take me much longer to go to the toilet and to move into a sitting position and vice versa.*
- b) *Using the disabled toilets at work was also difficult as the tissue roll was further back and I could not rotate my arms to reach it. I would have to put my tissue roll on the stool in front of me. I would take much longer to use the facilities.*
- c) *Washing up and brushing my teeth was difficult as I could not hold my arm up to brush my teeth and concentrate, I would have to sit and lean resting my arms on the sink basin to do so. Showering and washing my hair was extremely difficult as I could not raise my hands to wash my hair and as a result would not do so until someone was able to help me. I could not dry my hair either.*
- d) *I was walking at a very slow pace, it was taking me twice as long to walk to my classroom and I would walk limping due to the pain I would feel. The pupils noticed I was not my normal self and could see the pain and anxiety in me and they would ask me what they can do to help. This made me feel worse and inadequate and I felt embarrassed of my illness.*
- e) *Rather than walking around the classroom and being actively involved in the pupils work I would call the pupils out to me if they needed support. I would get the pupils to make notes in the books of the verbal feedback I would give them and stamp their book instead of writing in it because writing was very difficult for me. If I had to write more than 2 to 3 words it would aggravate my pain further. I would select pupils to go down and pick up photocopying for me and give out the relevant equipment in class and collect it back in at the end as I was unable to do this due to the restricted movement.*
- f) *At the material time, I was unable to hold a mobile phone to my ear for more than approximately 30 second before I felt considerable pain.*
- g) *I could see that not only was I suffering but so was my teaching and my life at home. Previously, my lessons would be very active and lively, and now they were dull and required the pupils doing more work from the books and task work.*
- h) *At times while moving, the pain would be so sharp and painful that the pupils and my colleagues could hear me react unpleasantly to the pain.*
- i) *Previously, I would always go down at lunch and have lunch with the pupils in the dinner hall. I was no longer able to do this due to the stress and pain it would take in getting downstairs to the dinner hall and waiting in the queue. Also, because I was not able to eat the way I would normally eat due to my limited movement and pain made me feel anxious and conscious of being judged and stared at.*
- j) *Although, I used the lift to get to the second floor, waiting for the lift was difficult if it took time to come, I would have to lean against the wall and radiator whilst waiting for it.*

- k) *I would borrow the technicians trolley on a daily basis to put my equipment, bag etc... on. However, I had difficulty in pushing this trolley as the trolley handle was higher up which meant raising my upper arms that would exacerbate my pain further. The technician would put all my stuff on the trolley for me, leave it in my room and help me at the end of day.*
- l) *I was unable to tilt my head back to drink and would drink from a straw.*
- m) *It would take me much longer to get dressed as I needed help as I could not raise my arms without support high enough to dress or undress my upper body. When at home I would remain in my pyjamas all the time.*
- n) *Dressing my lower body although I managed mostly on my own I would need to sit down to do so which would give me much discomfort and take much longer. I had to start wearing loose clothing and elasticated trousers to help with this adjustment in my life.*
- o) *Moving into sitting and standing positions meant using my arms to support me, lift myself up or sit myself down, which would in turn aggravate my pain in my neck, shoulders and arms.*
- p) *Going up and down the stairs was an extremely difficult movement which caused me muscular pain and distress in my upper and lower body. On many occasions, I would crawl up the stairs and sit down and come down the stairs slowly. I would feel very fatigued in pain and distress after such an activity. This would prevent me from going up and down in my home and I mainly stayed upstairs.*
- q) *Sleeping at night was extremely uncomfortable and I was very restless and had to try to remain in a comfortable position as it was difficult to move around. I also had to use 2 small raised cushions on either side of my pillow to rest my hands/arms on as I could not fully rest my arms flat to the side. I use a specific pillow to support my shoulders under the pillow to try and avoid any pressure on them or my neck. I use another cushion to place my arm around as I could not support my arm on its own.*
- r) *I went from being able to swim 20 plus laps to not being able to swim $\frac{1}{4}$ of a lap in a matter of months. I could not rotate my arms in the water; I could only manage to swim very light breast-strokes using the edge of the pool as support as I had lost the ability to push myself through the water.*
- s) *I had great difficulty in preparing meals. I was unable to use a can opener as the twisting motion would cause me much pain in my upper arm muscles, shoulder cuff and neck. I could not chop or stir the curry pot. I was unable to lift objects free-hand like plates, cups, glasses, etc... I could not lift a jug to pour water. When I tried to eat this would be resting my elbows on the table and using plastic cutlery as it was lighter and much easier. I would use a straw to drink from. I could not lift the kettle to make tea or pour milk from the bottle. I was unable to carry books and equipment at work and found it difficult to open doors so would ask pupils to wedge open the door or use my body to push it open.*

However, I was not able to pull a door open. I was unable to carry my normal handbag to work or when I went out. I could not stand and wash dishes, when I attempted to do so, within 30 seconds I would feel muscle pain in my back and arms and would be exhausted. I could not stand in one position for more than 30 seconds without support.

t) Concentrating on regular activities, for example whilst eating, reading, watching TV would cause me to become very upset resulting in me crying and entering into a complete daze and/or become very emotional which was difficult, I would lose concentration, become emotional and forgetful.

u) I was advised to continue taking paracetamol and ibuprofen, but these would only take my pain down a notch or two for the best part of an hour. I was very forgetful due to the depression I was suffering, and family members had to constantly remind me to take medicine and provide it for me and prompt me to take it.

v) My mental impairment combined with my physical impairment made me miserable, feeling fatigued, in pain and afraid to go out and undertake normal social outings like go out with family and friends, and undertaking other activities like shopping for groceries and necessities for my children. I could not wait in a shop queue due to not being able to stand still for more than 30 seconds without feeling pain and distress. I was always conscious and anxious thinking of how everyone would look at me which secluded me further, especially after an incident when I went out by myself and my pain became too much that I sat on a bench and started crying. A family member had to come and get me.

w) Previously being a highly motivated individual, I had lost all interest in my normal everyday activities and no longer felt the motivation or desire to do anything.

x) Reading and marking books was extremely difficult. I would take me much longer to focus and to mark due to the pain and distress I was under."

37. The adverse effect that has been detailed by the Claimant of her ability to carry out normal day-to-day activities is extensive and whilst I appreciate that the Claimant has provided more specific examples in detail of how those impairments affected her in her supplemental statement, I do not doubt the veracity of her evidence which is compelling. I find that the effect of the impairments was undoubtedly substantial. The Claimant was from time to time on a cocktail of potent pain and nerve medication and it is self-evident that without the benefit of that medication, some of which the Claimant says she did not always take because she would not have been fit to teach had she done so, I conclude that the Claimant's level of pain and mental health would have been significantly worse and the adverse effect on her ability to do those limited things that she was able to do, would have been great.

38. I have considered also the contemporaneous report written by the Claimant's GP Doctor Alcock [94-95] which includes the following passages.

"It is suspected that Mrs Nissa maybe suffering from fibromyalgia and we have referred her to the NHS specialist rheumatologist department where she is currently undergoing tests for further diagnosis.

She tells me that: her muscular problems are affecting movement in the upper and lower body. In the upper body these include neck, shoulders, upper arms and upper back resulting in restricted rotation in arms and pain; the pain extends to the upper back from the neck and shoulders. In the lower body the pain radiates from her buttocks and extends to her legs restricting her leg movement. Her muscular pain is making it more and more difficult for her to walk. Working and carrying out normal daily tasks is becoming extremely difficult for her due to overwhelming pain and distress that is both physical and psychological.

Due to the muscular pain in her upper body she is unable to carry out many of her daily chores. She is unable to prepare and cook food independently. Shopping for necessities is extremely difficult. She also requires support in washing hair and upper body as is unable to lift her arms up high due to having restricted rotation in arms. Dressing and getting ready on a daily basis is very exhausting and overwhelming for her.

The combination of lower body and upper body muscular pain results in her having difficulty in attending toilet needs as she has difficulty in moving into a sitting position and difficulty in rotating her arms to clean herself. This combination of lower body and upper body muscular pain also results in her having difficulty in her work life, causing her further pain and distress. Mrs Nissa works as a teacher and finds it very painful and distressful to continue with her normal everyday tasks and duties in her work life, such as delivering lessons, reading, planning, marking and carrying out other duties.

She has difficulty in sleeping and waking up in the mornings due to her muscular pains and requires support in getting out of bed due to stiffness of muscles and limited movement that is exacerbated throughout the night. Mrs Nissa is on various medications, these are listed below. However, she requires support from family members in the form of prompting her and reminding her to take her medication due to overwhelming physical and psychological pain and distress she is suffering and due to the side effects she encounters from taking these medications."

39. I have no hesitation in finding that without the benefit of the effects of her medication the adverse effect of her impairments both in respect of the pain from the subsequently diagnosed Fibromyalgia, and her mental health condition of stress, anxiety and depression would have been substantially worse.

40. In light of the facts as I have found them to be, having had regard to the Claimant's GP Report of the 2 June 2016 [94-95] I conclude that the Claimant was debilitated by the physical impairment of muscular skeletal pain (in May 2016 suspected to be and subsequently diagnosed in August 2016 as Fibromyalgia) that began in December 2015 and continued and worsened reaching its most severe level of pain which unfortunately continued throughout the relevant period from 1 December 2015 to 31 August 2016. With the benefit of hindsight, there was a clear diagnosis of fibromyalgia confirmed by attendance at the Metrology Clinic at Solihull Hospital on the 12 August 2016.

41. All medical evidence from her GP Doctor Alcock and from Dr. Ghouma, Specialist Registrar in Rheumatology in his letter of the 21 May 2016 [81-82] and of the 11 October 2016 from Dr. Asad Khan [102-104] gives a consistent report of the Claimant's physical and mental condition. In addition have been referred to the letter from Ms. Hussain's sports injury therapist dated 2 March 2016 [78] which confirms that the Claimant whilst receiving treatment for a condition that was inhibiting her movements and restricting many of her daily activities throughout the relevant period.
42. Moreover, the Respondents were aware that the Claimant had taken significant time off work due to her impairments and the Respondents have not suggested in this case that the Claimant, through her prolonged absence and her rehabilitative return to work, was an account of malingering or exaggerated ill-health.

Conclusions

Substantial Adverse Effect

43. Having considered all of the evidence before me and the findings of fact that I have made, I reach the conclusion that the Claimant has shown that from the 1 December 2015 – 31 August 2016, throughout the relevant period and in the event beyond, she had a physical and mental health impairment.
44. The effect of each of those impairments and the two together lead me to conclude that the Claimant suffered a substantial, that is more than a minor or trivial adverse effect on her ability to perform normal day-to-day activities. The Claimant's day-to-day activities included those of personal care that a person might expect to be able to do.
45. Whilst the cause of the Claimant's impairment namely a diagnosis of Fibromyalgia is not without significance, it is the core evidence that leads me to conclude that the Claimant's muscular skeletal pain had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities.
46. I conclude without doubt that the Claimant also suffered from fragile mental health in relation to stress, anxiety and depression, that condition too and combined with the muscular skeletal pain had a substantial adverse effect on the claimants ability to carry out normal day to day activities both at work and at home. The two conditions existed and affected the Claimant in separate ways and no doubt the pain caused by what was subsequently diagnosed as Fibromyalgia and/or osteoarthritis no doubt exacerbated and had an adverse impact upon the Claimant in relation to her mental health conditions.
47. I have no hesitation in concluding that there is an overlap between the Claimant's physical and mental impairments and that the way in which those conditions affected her ability to carry out her normal day-to-day activities was substantial and cannot in any way be described as trivial.
48. I conclude that the Claimant's own evidence and that of her sickness absence from work was corroborated by the objective medical evidence contained in Dr. Alcock's report, as well as that which was recorded in her record of the medicine prescribed to moderate the Claimant's varying conditions confirms that the various impairments that affected the claimant had a substantial adverse effect on her ability to undertake normal day to day activities.

49. Having identified these substantial adverse effects on the Claimant's ability to carry out normal day-to-day activities, I am required to consider whether or not those impairments were long term.

Long Term

50. I have been assisted by the guidance of Baroness Hale in SCA Packaging Limited -v- Boyle [2009] ICR1056 House of Lords as well as the Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability ("the Guidance") para 3C which identifies that "*likely should be interpreted as meaning that it could well happen*" rather than it is more probable than not that it will happen. Given the frequency and extent of the Claimant's sickness notes and her demeanour at work, the facts and the evidence all clearly point to the fact that such significant absence in the continuing presence of physical, muscular, skeletal pain and stress would leave any reasonable person asking the question whether the impairment was long term, to answer, as do I, that it "could well happen" and that it was likely that the impairment was one that might last long term.

51. Returning as I must to the issues that I am asked to resolve, I conclude that during the material period namely the 1 December 2015 – 31 August 2016, viewed as at that time, the Claimant was disabled within the meaning of Section 6 of the Equality Act 2010. The Claimant had a physical and mental impairment, namely muscular skeletal pain [subsequently diagnosed as Fibromyalgia] and stress, anxiety and depression. Those physical and mental impairments whether alone or taken together I find have an adverse effect on the Claimants ability to carry out normal day-to-day activities both at home, in her personal care and at work. The adverse effect of the impairment was substantial.

52. I find that during the material period the adverse effect of the claimant's impairment was substantial and was long term being "likely to last for at least 12 months" viewed at the relevant time, rather than with the benefit of hindsight. The claimant is a disabled person within the meaning of s6 of the Equality Act at the material time.

Employment Judge Dean

09 August 2019