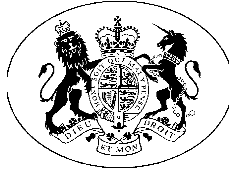

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Ghumra**

Respondent: **Leicester City Council**

Heard at: **Leicester**

On: **Friday 13 March 2020**

Before: **Employment Judge Faulkner (sitting alone)**

Representation: **Claimant – Mr D Gray-Jones (Counsel)**
Respondent - Mr S Butler (Counsel)

PRELIMINARY HEARING

JUDGMENT

1. The Claimant was not at the relevant times a disabled person within the meaning of section 6 of the Equality Act 2010.

2. His complaints of direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments are therefore dismissed.

3. The Claimant's remaining complaint is of unfair dismissal. Case Management Orders will be issued separately.

REASONS

Complaints

1. By a Claim Form submitted on 6 August 2019, the Claimant complains of direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments. He also complains of unfair dismissal.

Issue

2. The single issue before me at this Preliminary Hearing was whether the Claimant was at the relevant times a disabled person within the meaning of section 6 of the Equality Act 2010 ("the Act"). That required me to determine whether at the relevant times:

2.1. The Claimant had a physical or mental impairment;

2.2. If so, whether the impairment had a substantial adverse effect on his ability to carry out normal day-to-day activities; and

2.3. If so, whether that effect was long term, namely in this case that it had lasted for at least 12 months or was likely to last for at least 12 months.

As will become clear, it was necessary for me to decide those issues in relation to three claimed disabilities and in relation to two relevant times for each.

Procedural matters

3. It is necessary to refer first to a procedural issue that took up the first part of this Hearing.

4. By way of brief background, the Claimant's case is that the impairments on which he relies arose from a serious car accident in September 2018. Mr Gray-Jones made clear that the single factual matter which formed the basis for the complaints of discrimination in the Claim Form was the Claimant's dismissal, which took effect on 21 May 2019. For reasons unknown to me, his appeal against that dismissal was not determined until 6 January 2020. The appeal was unsuccessful. Mr Gray-Jones argued that the relevant times for the purposes of assessing disability should include the date of the unsuccessful appeal on the basis that an appeal is an integral part of a dismissal process (he referred to **West Midlands Co-operative Society v Tipton [1986] ICR 192**). On reflection however he appeared to accept that just because a dismissal is discriminatory it does not follow that an appeal decision is also discriminatory. Accordingly, it was necessary for him to make an application to amend the Claim. Particularly given that, as Mr Butler accepted, there were no time limit or ACAS Early Conciliation issues in doing so, an amendment was allowed by consent.

5. The agreed amendment was as follows, to be added at the end of the existing Particulars of Claim:

> "My appeal was not heard until 6 January 2020 by a panel of four councillors. The appeal panel dismissed my appeal on the same day.
>
> At the dates of my dismissal and my appeal hearing I was, and had been since 23 September 2018, a disabled person under section 6 of the Equality Act 2010. The appeal panel knew or should reasonably have known that this was the case.
>
> In dismissing my appeal, the appeal panel discriminated against me as follows:
>
> a. directly, as defined by section 13 of the Act;

b. as defined by section 15 of the Act, because of something arising from my disability, namely my sickness absence; and

c. by failing to make a reasonable adjustment, the provision, criterion or practice ("PCP") being the requirement to attend work and the reasonable adjustment being allowing my appeal against dismissal.

The Respondent was responsible for the panel's decision, under section 108 of the Equality Act.
Further or in the alternative, the panel was liable under section 112 of the Act, in that it knowingly assisted the Respondent to discriminate against me by dismissing my appeal".

6. As I made clear at the end of the Hearing, it is for the Claimant to determine whether to add anything arising out of the appeal to his pleaded complaint of unfair dismissal and, if he does not do so, for the Respondent to consider whether anything turns on that. As I indicated, it seems to me a Tribunal would be bound to consider the fairness of the appeal process in dealing with an unfair dismissal complaint in any event.

Facts

7. After minor disputes about its contents at start of the Hearing, the parties agreed a bundle of documents consisting of 224 pages. Page references below are of course references to that bundle, which included an impact statement prepared by the Claimant, who also gave oral evidence. I made clear that it was not for me to search for relevant evidence within the bundle but for the parties to draw my attention to anything they wished me to consider. I therefore carried out some reading at their request prior to hearing evidence. As submissions did not conclude until around 4.15 pm and given the number of issues to be determined, Judgment was reserved. I make the following findings of fact based on the material just summarised.

8. The Claimant was employed by the Respondent from 5 July 2010 until 21 May 2019 as a customer support officer within its Finance Service. It is agreed he was dismissed because of his sickness absence.

9. He had been absent from 29 May 2018 until 10 September 2018 because of a bulging disc and gout. That absence and the reasons for it are not relevant to the issues before me. Whilst undergoing a phased return to work thereafter, on 23 September 2018 the Claimant was involved in a very serious car accident apparently involving a drunk driver. The Claimant was a passenger in the other car. After providing an initial fit note for two weeks, he remained absent from work thereafter until his dismissal.

10. The Claimant refers in his Claim Form to various potential impairments, including severe anxiety and moderate depression. He also refers to requiring operations on both knees, as well as injuries to his teeth. In the record of the Case Management Hearing conducted by Employment Judge Batten on 13 December 2019 (page 39), Mr Gray-Jones is recorded as describing the Claimant "as having two disabling conditions, namely musculoskeletal issues and depression and anxiety". In his impact statement, at page 43, the Claimant begins by stating that he has prepared it to "establish if possible whether or not my conditions of severe

anxiety, depression, post-traumatic stress disorder ("PTSD") and musculoskeletal issues following a car accident constitute that of (sic) a disability in accordance with section 6 of the Equality Act". That was the list he also gave in oral evidence, although he was unsure of the distinction, if any, between depression and anxiety on the one hand and PTSD on the other, saying that he is not familiar with medical terms. It was also the list Mr Gray-Jones set out in his skeleton argument. In his closing submissions, Mr. Gray-Jones said that the alleged mental impairments were "predominant".

Musculoskeletal issues

11. The Claimant's musculoskeletal issues started in September 2018, in the aftermath of his serious accident. When I asked him to describe those issues, he referred to a shooting, intermittent pain which causes a burning sensation from his hips to his ankles. He also referred to pain in his neck, which a medical consultant has informed him seems to be because of something pressing on a nerve. In January 2020, and at the date of this Hearing, the burning sensation occurs three or four times a week. It occurred more frequently in May 2019, although that was an improvement from the time of the accident. According to his doctor, the pain occurs because the Claimant tenses up due to the trauma of the accident. Each instance of pain lasts between 30 seconds and a couple of minutes; the neck pain is more constant. The duration of the burning sensation reduced gradually from the time of the accident to May 2019, improved further from January 2020, and improved again from January 2020 onwards.

12. At page 51 there are GP notes for October and November 2018. That for 5 October, shortly after the accident, refers to the Claimant's left lower leg being in a boot and to the Claimant being on crutches. The note of 22 October refers to leg pains and that for 2 November refers to kneeling being painful, as a result of the Claimant's knee problem. A radiology report dated 12 February 2019 at page 178 and a referral document dated 14 February 2019 at pages 100 to 106 related to the Claimant's knee issues. The Claimant accepted that on the basis of an assessment of this documentation, and indeed much of the other documentation in the bundle, he was not at this time recorded by his GP or other medical professionals as reporting, nor being treated for, what he describes as his musculoskeletal problems, whether a burning sensation in his legs or neck pain, though he insists he was suffering from both of those issues.

13. At pages 211 to 215 is a report written by an Occupational Health Physician, Dr Ilias Macheridis, dated 8 April 2019, dealing with the Claimant's application for ill-health early retirement. The Claimant's application was not successful, against the criteria of being "permanently incapable of discharging efficiently the duties of the employment he was engaged in" and not being "immediately capable of undertaking gainful employment". In relation to physical matters, the report stated that the physiotherapy the Claimant received for a few months after his accident did not lead to significant improvements with regard to his symptoms, including pain and discomfort. It went on to report that various investigations indicated knee problems and that the Claimant was waiting for a knee operation, meanwhile managing the symptoms with over-the-counter painkillers and anti-inflammatory medication. The Claimant apparently told the doctor that "his musculoskeletal symptoms … affect his entire body [and make] him slower … [so that] he is struggling with activities that involve kneeling and other strenuous tasks". Notwithstanding the conclusion regarding eligibility for ill-health early retirement, the doctor expressed the view that, overall, the Claimant's "musculoskeletal as well

as psychological difficulties are likely to be longstanding", bring him within the remit of the Act.

14. The Claimant's oral evidence was that he did not say to the doctor that he that was struggling with only strenuous tasks. He accepted however that, as set out in his impact statement at paragraph 6, he was able to continue with daily tasks in May 2019 (and since) even though the pain from his hips to his ankles slowed him down somewhat.

15. The Claimant wrote to his GP surgery on 28 May 2019 (page 71), explaining that he had been dismissed and asking a number of questions relevant to the issue of whether he was a disabled person. The reply to that letter, from a Dr D'Souza, is at page 165. It refers to traumatic injuries, PTSD, post-concussion syndrome and a ligament tear in his knee, describing them all as "genuine medical conditions that have prevented his return to work". The Claimant wrote a further letter on 7 June 2019, page 75, asking the doctor to say that "in your opinion, my medical condition falls under the Equality Act 2010". The reply dated 3 July 2019 is at page 54 and is in identical terms to that at page 165. The Claimant agreed that there was no reason that Dr D'Souza could not list in these letters all of the Claimant's then relevant conditions, acknowledging that the only physical issue mentioned in the doctor's letters was the Claimant's knee injury.

16. In relation to his knees, the Claimant had surgery in June 2019, which he says produced an improvement though not a solution. No further operation is envisaged, though he has been undergoing physiotherapy. He says that kneeling is difficult and will remain so. This is a significant issue for the Claimant because it means he is unable to kneel during public prayer at the mosque and has to sit instead, which he finds difficult from the perspective of what others may think of him having seen him walk into the mosque. He is also unable to kneel to dress his youngest son and to carry out DIY, or can only do so with difficulty. This is expressly a difficulty created by the problem with his knee, not the burning pain attributable to a musculoskeletal condition. He has no issues walking or going upstairs. The Claimant says that his physical conditioning has improved significantly over the months since the accident, but in paragraph 5 of his statement he describes the damage to both of his knees (which he said in oral evidence is a cartilage issue) as permanent. He says this is what his consultant told him after his operation, though there is nothing in the bundle to that effect.

17. At pages 86 to 87 there is a letter from for a clinical specialist physiotherapist, Mrs Rebecca Shillcock, dated 8 November 2019. It does not use the phrase "musculoskeletal issues", but as the Claimant points out it describes the presenting complaint as "bilateral burning pain from hips down to ankles which occurs at night-time". The report says that the symptoms were not reproduced on examination and were overall improving. The report concludes that there is no lumbar spine or pelvis abnormality. It refers to his knee issues which the Claimant reported had "somewhat reduced" his activity levels between September 2018 and June 2019, but says the Claimant had reported that physiotherapy was helping his strength and lower limb symptoms and that he "[did] not have any pain during activity". The Claimant's oral evidence was that he still has those issues.

18. The report describes various activities undertaken during the Claimant's appointment with Mrs Shillcock, including in relation to his knees and hips. She concluded "[The Claimant's] examination today was essentially normal and I do not feel this warrants any further investigations from this clinic… I have

encouraged him to him continue with his physiotherapy and graded return to football". The Claimant says this report described what had been a gradually improving situation from September 2018. He says that he has still not returned to competitive football, and although he plays with a plastic ball with his sons in the house, he is still unable to kick a more substantial football in the local park.

19. In paragraph 10 of his impact statement (page 45), the Claimant refers to consistently disturbed sleep. This is partly attributed by him to his mental impairments, as to which see below, but he also says that he randomly gets shooting pains in both his legs which wakes him up. The statement says that his disturbed sleep makes him worry how he will get through the next day, which he describes as a debilitating cycle. He accepted in oral evidence however that this was an exaggeration, acknowledging the notes of a referral in respect of back pain dated 3 September 2019, at pages 66 to 68, in which it was recorded that the Claimant said that his sleep was not disturbed. He nevertheless says that he struggles with sleep a few nights each week and that this was worse in 2019 than in 2020.

20. As to medication, the Claimant could not remember what painkillers he was taking in May 2019, but says that in January 2020 he was taking a painkiller less than once per week. He accepted that the claim in paragraph 4 of his impact statement (page 44) that the medication allows him to function, and that he would be unable to carry out his day to day activities without it, was an exaggeration; he agreed that he is, and was in January 2020, mostly able to carry out his daily activities without painkillers. He says that in May 2019 the position was somewhat different because his symptoms were worse. His Claim Form referred to an appointment with a pain management consultant on 26 June 2019 but I was not taken in evidence to any details about that.

Anxiety and depression

21.The Claimant says that he has been advised by his doctor that at least some of his pain is due to his mind. He also says he is not the person he used to be because he thinks about the events of the accident. He says that he was first diagnosed with depression and anxiety during a telephone consultation in January 2019. The consultation referred to is mentioned in a letter to him from Jordan Hird who is a Psychological Wellbeing Practitioner with the Let's Talk Wellbeing Service. The letter was dated 28 January 2019 and is at pages 144 to 145. The Claimant referred himself to the Service (which is the standard process) after describing his thoughts and feelings about the accident to his GP.

22. Mr Hird's letter did not diagnose "anxiety and depression", though it did refer to questionnaire scores, presumably completed during the consultation, namely 18 for PHQ-9 (Depression) and 17 for GAD-7 (Anxiety) (neither party sought to refer to or explain those scores, either in evidence or in submissions, though see further below). The Claimant therefore agreed that the consultation raised the possibility of him having anxiety and depression, so that "diagnosis" was the wrong word. There was no other evidence the Claimant could point to as constituting a diagnosis, and he therefore said in evidence that he did not know whether he had been diagnosed with anxiety and depression or not. He also accepted that he had not been told that anxiety and depression would last an especially long time, or indeed more than a year. As he put it, no one gave him a timeframe.

23. The Claimant was referred for an appointment on 19 April 2019 with an organisation called Moving Minds. A Psychological Assessment Report for Treatment prepared by Dr Manda Holmshaw, a Consultant Clinical Psychologist, was prepared as a result and is at pages 216 to 223. The report refers to the Claimant having "symptoms of depression and anxiety due to chronic pain and loss of quality of life/reduction in activity" (page 217). It indicated the results of psychometric tests (which I take to be the PHQ-9 and GAD-7 tests referred to above) to be "severe" anxiety and "moderate" depression.

24. The Claimant accepts that the report did not deal with how long his symptoms might last. Neither of the letters from his GP dated 31 May 2019 (page 165) and 3 July 2019 (page 54), responding to the Claimant's requests for an opinion on whether he was a disabled person under the Act, make any reference to anxiety or depression at all. The Claimant's oral evidence was that when his GP told him he needed counselling for PTSD and depression, and he then had a telephone assessment, that is what he thought it was. He had never had it before, and so could not say himself.

25. The Claimant accepts that the referral form on pages 66 to 68, dated 3 September 2019, for which he indicated that his sleep was not disturbed, suggests that anxiety and depression was not affecting his sleep, again in contradiction to his impact statement at paragraph 10 (page 45). His impact statement also refers to a change in his personality – paragraph 8 at page 45. The statement refers to "mood swings", reduced social interaction (which was also attributed to not being able to play football), his confidence being "dented" and a lack of energy. Paragraph 6 of his statement (page 44) refers to struggling to wake and get out of bed in the morning; he says this was more of an issue in May 2019 than since, but attributed this to the pain in his legs.

26. As to medication, the Claimant was prescribed antidepressants but has not taken them because he wanted, and indeed was advised, to see how counselling might assist.

PTSD

27. The Claimant says that he was first diagnosed with PTSD on 15 November 2018. The relevant record, of a GP consultation, is at page 174. It recounted some details of the accident, including that two of the Claimant's companions on the car at the time of the accident were in a coma. It refers to problems for the Claimant with kneeling, and also dizziness and headache. It then simply states, "Diagnosis: Post-traumatic stress disorder". Perhaps unsurprisingly, the note says nothing about how severe the impact on the Claimant was at that point nor how long it was expected to last. During his counselling he was told that it could go away, last 12 months or last three years.

28. The Claimant was unable to say during the course of oral evidence whether he was now sure that PTSD had been responsible for disturbing his sleep. He questioned whether disturbed sleep was related to the accident or because he thought about it all the time. When asked to describe the impact of all the impairments on which he relies taken overall, the Claimant referred first of all to issues engaging with other people. He says that previously his confidence was a little bit better; he has always been shy but did not have issues with conversation. He now feels more reserved, describing it as having "gone into his shell", to the

extent that he barely engages even with extended family. This, he says, prevents him from building relationships as he chooses to be on his own if he has to be.

29. His job with the Respondent involved answering calls, speaking with customers to deal with their enquiries and complaints. He said in oral evidence that he was able to envisage carrying out the role again both in May 2019 and in January 2020, if given the opportunity and if the Respondent had awaited the outcome of his knee operation in June 2019. He says he would have gone back to work as soon as his doctor gave the go ahead with regard to his knee and his psychological state.

30. The second matter the Claimant referred to in describing the impact of his impairments overall is that he has found driving more difficult because he thinks about what happened, over-evaluating everything. Thirdly there has also been an impact on his ability to play sport. He walks a lot and does the exercise given to him through his physiotherapy sessions, but does not do any competitive sport. He is hoping to return to football in the summer of 2020. He also mentioned that he has lost motivation to work on a new property he and his wife have purchased, whereas before the accident it had been his goal to do so.

31. The Claimant had twelve counselling sessions, which he thinks took place before he saw Let's Talk in January 2019. He has had three sessions with Let's Talk since January 2020. He described the counselling as helpful, saying that as time goes by, he has been addressing issues and dealing with them. He says that his improvement would have been delayed and his goals not met without it.

32. The report of Dr Macheridis (pages 211 to 214) referred to the Claimant reporting his "psychological difficulties" as the "main barrier" with regards to a return to work. It reported his symptoms as including "flashbacks, difficulties with sleep, tiredness, low mood, anxiety and headaches and generally feeling unwell".

33. I refer finally to an Occupational Health report dated 30 January 2019 (pages 208 to 210). The report determined that the Claimant was "not fit to return to work in any capacity at the present time", basically until further interventions for his physical and psychological injuries. It described damage to his teeth and knees (saying "movement is limited") and mentioned the Claimant's reports of flashbacks and his diagnosis of PTSD. It referred to the Claimant driving but only short distances as required. It recommended a further referral once a return to work date was identified and concluded, without reasons, that "at the present time the Equality Act 2010 is not likely to apply". By contrast, Dr Macheridis' report of 8 April 2019 concluded, "Overall, I am of the view that both his musculoskeletal as well as his psychological difficulties are likely to be long-standing hence, I am of the view that he is likely to fall under the remit of the Equality Act".

Law

34. Section 6 of the Act provides (so far as relevant) 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.*

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

35. Schedule 1 to the Act provides at paragraph 2 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*". Paragraph 2 goes on to say 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*".

36. Schedule 1 also provides at paragraph 5 that "*(1) 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. (2) Measures includes in particular medical treatment …*".

37. Section 212 of the Act provides that "*substantial*" means "*more than minor or trivial*".

38. In **Kapadia v London Borough of Lambeth [2000] EWCA Civ**,at paragraphs 20 and 21, the Court of Appeal accepted a submission that it was for the Claimant to prove that the impairment had a substantial adverse effect on his/her ability to carry out normal day-to-day activities or to prove that the impairment would have had such an effect but for the fact that measures were being taken to treat or correct the condition. Having in mind that burden, the Tribunal's task is to look at the evidence presented to it and decide the question on the balance of probabilities.

39. **Goodwin v Patent Office [1999] ICR 302** is well-established and well-regarded Employment Appeal Tribunal authority for the questions to be asked by Tribunals in determining disability, encouraging Tribunals to take an inquisitorial approach to the issue. The EAT stated that the legislation requires a tribunal to look at the evidence by reference to four different conditions. Taking account of amendments to the legislation since the decision, the questions are stated by the EAT as follows: "*(1) The impairment condition. Does the applicant have an impairment which is either mental or physical? (2) The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day-to-day activities ... and does it have an adverse effect? (3) The substantial condition. Is the adverse effect (upon the applicant's ability) substantial? (4) The long-term condition. Is the adverse effect (upon the applicant's ability) long-term?*". The EAT stated that it would be useful for tribunals to consider these questions in sequence, though it remains necessary to make an overall assessment and not "*take one's eye off the whole picture*". The EAT went on to give guidance in respect of each question. In respect of the adverse effect condition, it stated (page 309) that "*the focus of attention ... is on the things that the applicant cannot do or can only do with difficulty, rather than on the things that the person can do*". As to the substantial condition, the EAT confirmed that the word "substantial" means "*more than minor or trivial*", wording which is now enshrined in section 212 of the Act.

40. Mr Gray-Jones made several references in his skeleton argument to the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011). On the question of impairment, he referred to paragraph A6, which states that it may not always be possible, nor is it necessary, to categorise a condition as either a physical or mental impairment; paragraph A7 goes on to say that what is important is to consider the effect of an impairment, not its cause. This reflects the approach taken by the EAT in **J v DLA Piper UK LLP**

[2010] ICR 1052, to the effect that where identifying an impairment involved resolving difficult medical questions, it would often make sense to start with the other questions set out in **Goodwin** and consider the impairment question in the light of that analysis.

41. In respect of the meaning of "normal day-to-day activities", Mr Gray-Jones drew attention to paragraph D3 which makes clear that this can include "general work-related activities".

42. The Appendix to the Guidance gives an illustrative and non-exhaustive list of factors, which if experienced it would be reasonable to regard as having the required substantial adverse effect, and conversely a list of factors which it would not be reasonable so to regard. Mr Gray-Jones referred in his skeleton argument to the following factors mentioned in the former category: persistent general low motivation or loss of interest in everyday activities; persistent distractibility or difficulty concentrating; persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder.

43. As the Guidance makes clear it is also necessary to consider multiple impairments together when assessing substantial adverse impact. At paragraph B6, it states that "account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day to day activities". Similarly, it may also be necessary to assess the cumulative effects of an impairment (paragraphs B4 and B5).

44. As indicated above, Schedule 1 paragraph 5 of the Act requires consideration of how an impairment would affect day to day activities if medical treatment ceased. According to the House of Lords decision in **SCA Packaging v Boyle [2009] ICR 1056**, what must be asked is what the effect of the impairment would be if treatment stopped. Whether it is likely that the impairment would have the required effect in that situation means it "could well happen" – see also paragraph C3 of the Guidance. Mr Gray-Jones referred to the decision of the EAT in **Lamb v The Garrard Academy UKEAT/0042/18**. That case was concerned with an employer's knowledge of disability and in that context, it was held that when determining whether the required effects of the impairment were "likely" to last 12 months, the EAT said this was a "low threshold" for Claimants.

45. Mr Gray-Jones cited the decision of the EAT in **Fathers v Pets At Home Ltd and another [2013] UKEAT/0424/13** as authority for the proposition that "relatively little evidence may be needed to come to the conclusion that a Claimant would be likely to be suffering from [the adverse effects of] an impairment, but for the treatment". What the EAT in fact said was that "relatively little evidence may in fact be required to raise this issue", in other words to require a tribunal to consider and address the point of the effects in the absence of medical treatment. Of course, what a tribunal makes of the evidence before it on this issue very much depends on the individual case.

46. As to whether the required effects of an impairment were long term, again the **SCA Packaging** judgment makes clear that where a tribunal is required to assess whether those effects are "likely" to last for at least 12 months, this means that it "could well happen". As paragraph 2 of Schedule 1 to the Act says, and paragraph C7 of the Guidance confirms, it is not necessary for the effect to be the same throughout the period being considered. What has to be considered is whether the

effects were "likely" to recur, that word again meaning "could well happen". Paragraph C2 of the Guidance states that the cumulative effects of related impairments should be taken into account in determining whether the required effects are long-term.

47. The long-term question has to be assessed as at the time of the alleged discriminatory treatment, in this case May 2019 and January 2020. The Court of Appeal said in **McDougall v Richmond Adult Community College [2008] ICR 431** that in assessing likelihood in both respects, tribunals should only consider the evidence available at the time of the discriminatory acts. The assessment thus requires a prophecy of future events at those points, rather than recourse to actual evidence of subsequent events. This is reflected in paragraph C4 of the Guidance. In similar vein, on the question of whether the required effect had lasted 12 months, the EAT in **Tesco Stores Limited v Tennant [2019] UKEAT/0167/19**, cited by Mr Butler, held that it is the date of the alleged discriminatory act(s) at which this must be assessed, with the question being whether at that point there has been "12 months of effect".

48. Finally, I refer to a case cited at some length by Mr Butler, **Royal Bank of Scotland PLC v Morris [2012] UKEAT/0436/10**, on the question of the quality of the evidence before me. The EAT upheld an appeal against the tribunal's decision in that case that the Claimant was a disabled person. On the question of the effect of medication (what is sometimes known as "deduced effects"), the EAT found there was no explicit evidence and stated, "This is just the kind of question on which a tribunal is very unlikely to be able to make safe findings without the benefit of medical evidence". Similarly, "it would be difficult for the Tribunal to assess the likelihood of [the risk of recurrence of the required effects under paragraph 2(2) of Schedule 1] or the severity of the effect if it eventuated, without expert evidence". The EAT concluded, "The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted".

Analysis

49. I am satisfied that, as both Counsel agreed, I have to consider the question of disability in respect of two dates, namely the date of dismissal, 21 May 2019 and the date of the Claimant's unsuccessful appeal, 6 January 2020. The correctness of this approach is exemplified by Mr Gray-Jones' submission that in relation to the date of dismissal what has to be considered is whether the substantial adverse effects on the Claimant's ability to carry out day-to-day activities was likely to last for at least 12 months, whereas at the date of the unsuccessful appeal, there is the additional question of whether it had lasted for at least 12 months, an argument which is not available to the Claimant in respect of the dismissal date. I also have to consider each of the three alleged disabilities separately, and then step back and assess them cumulatively, particularly as to their effects taken together on the Claimant's ability to carry out normal day-to-day activities.

50. The first question for me to consider is which impairments I am required to assess. The Claimant has been represented from the outset of this case by solicitors, and was represented by Mr Gray-Jones at the Telephone Preliminary Hearing on 13 December 2019 and at this Preliminary Hearing. The Claim Form is not entirely clear which alleged disabilities the Claimant relies upon, but in the Telephone Preliminary Hearing, in his impact statement, in his oral evidence and in Mr Gray-Jones' skeleton argument, three impairments were identified: musculoskeletal issues, depression and anxiety and PTSD. The first of these was very specifically described by the Claimant in his oral evidence as a burning sensation from his hips to his ankles; he made passing reference to neck pain but did not address that at all in the remainder of his evidence. The medical documentation describes the musculoskeletal issues in the same way, namely as a burning sensation from hips to ankles, as is evident from my findings of fact.

51. What the Claimant did not refer to as an impairment for these purposes, whether at the Telephone Preliminary Hearing, in his impact statement, in his oral evidence or in Mr Gray-Jones' skeleton argument, was any problem with his knees, which as I have noted he ascribed to cartilage issues and which the medical documents indicate may have been due to a ligament tear. Knee problems were referred to in the Claim Form and in the impact statement, as well of course as in the contemporaneous medical documents, but in my assessment of the evidence it was not part of what the Claimant was relying on in advancing his case before me. I therefore accept Mr Butler's submission that in assessing whether musculoskeletal issues were a disability for the purposes of the Act, I am not to have regard to such evidence as exists about the Claimant's problems with his knees, including any difficulty this created with kneeling; as Mr Butler put it, the Claimant's evidence made no connection between a cartilage problem with his knees and a broader musculoskeletal condition. Whilst it is right that I am to take an inquisitorial approach, that does not extend to deciding a case that was not put to me by a party who has been professionally represented throughout and where it cannot be said to be obvious that I should do so in the light of the documentary and witness evidence.

52. I therefore turn to assess each of the three alleged impairments in turn, bearing in mind that the burden is on the Claimant to establish disability in respect of one or more of them. He also bears the burden of proof in matters such as establishing what the effects of the alleged impairments would have been in the absence of medical treatment.

Musculoskeletal issues

53. Taking the musculoskeletal issues first, what the Claimant describes is a burning sensation from his hips to his ankles. As highlighted in my findings of fact, there is no reference to this issue in the Claimant's GP records, at least not by May 2019 when he was dismissed, and it is not included in the lists of the Claimant's medical concerns produced by his GP on 31 May and 3 July 2019 respectively. There is however a reference to musculoskeletal issues in the report produced in April 2019 by Dr Macheridis and in the occupational health report produced by Mrs Shillcock in November 2019, a couple of months before his unsuccessful appeal. Although it must be said that the evidence is sparse, I am prepared on the basis of this medical evidence to give the Claimant the benefit of the doubt in this regard, bearing in mind the caution in the case law not to over-focus on identifying an impairment. He reported musculoskeletal issues to two medical professionals, during the assessments in April and November 2019 respectively, albeit in fairly

general terms, and therefore on balance I conclude that at both relevant dates, May 2019 and January 2020, the Claimant had the musculoskeletal impairment he relies upon.

54. The next two questions are whether, at either date, the evidence demonstrates that this impairment had an adverse effect on his ability to carry out normal day-to-day activities and if so whether that adverse effect was more than minor or trivial. The Claimant says that in May 2019 he experienced the burning sensation three or four times a week, lasting for up to two minutes. The frequency was similar, he says, in January 2020, but the sensation lasted for generally somewhat shorter periods of time. Beyond that however is where the evidence, it must be said, is very scant in support of the Claimant's case. Acknowledging that the claimed effects do not have to be consistent, and indeed may disappear altogether but still meet the statutory test if they are likely to recur, it is telling that the Claimant was not reporting the symptoms to his GP, at least not in the medical records I was taken to during evidence, either during or before either of May 2019 and January 2020. It is similarly telling that the GP letters in May and July 2019 made no mention of musculoskeletal issues at all, which is consistent with what the GP records apparently fail to show. All of this does tend to suggest that the impairment had a limited impact.

55. Taking the dismissal date in May 2019 first, as I have said, the musculoskeletal complaint is referred to in the April 2019 report produced by Dr Macheridis, but the information in the report regarding its impact on the Claimant's day-to-day activities is ambiguous at best. I ignore completely of course the fact that the Claimant was not able to satisfy the much more stringent test required to establish entitlement for ill-health early retirement. I also note that Dr Macheridis concluded that the Claimant was a disabled person within the meaning of the Act, though it must be said – without any criticism of him – that there was no meaningful analysis of the statutory test. What we have in the report is a reference to the Claimant being slower generally, and his having difficulty with kneeling and other strenuous tasks. It is not necessary for the Claimant to establish that he could not do a particular activity at all, in order to show adverse effects; he need only show that he could only do normal day-to-day activities with difficulty. Nevertheless, the Claimant agreed he was able to continue with his daily tasks at this point, and there is no more detail for me to go on. The simple record of what the Claimant stated to Dr Macheridis is insufficient for me to make the required assessment.

56. As for the appeal date in January 2020, again I note the silence in the GP record and correspondence. Moreover, two months before the unsuccessful appeal, the Claimant attended his occupational health review with Mrs Shillcock. Her report of 8 November 2019 is not supportive of the Claimant's case at all. On the contrary, she describes the outcome of her review of the Claimant and the various tests he carried out as essentially normal, stating that no more intervention was required. This was the case even in relation to the Claimant's knees, as to which she said that he had "somewhat reduced" activity levels and no pain.

57. Although I accept that kneeling for prayer is a daily activity for the Claimant, and indeed for millions of others of various religions, as is dressing a child and, taking a broad view, undertaking work on one's house, what affected the Claimant in respect of those activities was the difficulty with his knees, not the musculoskeletal impairment. I would have been reluctant in the light of Mrs Shillcock's report to conclude in relation to the Claimant's knee problems that the effect was more than minor or trivial, certainly by November 2019. In relation to

the impact of his musculoskeletal impairment however, there is no evidence of an adverse effect at all in my judgment, let alone a substantial adverse effect, that is one which was more than minor or trivial, whether in May 2019 or January 2020.

58. I accept that the burning sensation he describes would have been unpleasant and painful, but on the Claimant's own evidence it appears to have been very transient. There was no further evidence as to its impact, apart from the effects he said it had on his sleep and thus on subsequent daytime activities, which I am bound to discount because the Claimant accepted this was not reliable evidence. The Claimant is unable therefore to surmount even the relatively modest hurdle of section 212 of the Act in demonstrating that there was an adverse effect on his ability to carry out normal day-to-day activities that was more than minor or trivial.

59. I must of course take into account what the position would have been had the Claimant not been taking painkillers. In my judgment however that does not change the analysis. He took painkillers less than once per week and certainly in January 2020 accepted that he could generally carry out his daily activities without them. He was unable to say what the position would have been in May 2019 had he not been taking painkillers then. It is very difficult for me to fill in that gap, and indeed I should be very cautious about doing so, as the judgment in **Morris** makes clear.

60. In the light of my conclusion that the Claimant has not satisfied the burden that is on him in this regard, it is unnecessary for me to go on to consider whether any substantial adverse effect was long term as defined by the Act. Had I done so, I would not have been satisfied that in May 2019 it "could well have happened" that any substantial adverse effect of his musculoskeletal condition would have lasted for 12 months or more, given the absence of complaint to the Claimant's GP and the very limited evidence the Claimant was able to supply. In respect of January 2020, I would have found that the required effect had not lasted for 12 months, given in particular the contents of Mrs Shillcock's report in November 2019 and again given the absence of other evidence on the point, nor that it was likely to do so.

Anxiety and depression

61. As the Claimant agreed, there was no diagnosis of anxiety and depression as such recorded within the medical documentation. Mr Hird's letter in January 2019 merely raised the possibility of anxiety and depression and the GP letters in May and July 2019 did not refer to it at all. Dr Holmshaw, who reviewed the Claimant in April 2019 and was clearly qualified to assess these matters, concluded that the Claimant was exhibiting symptoms of "severe anxiety" and "moderate depression". Again therefore, I am prepared to accept that the Claimant has established that, certainly as at May 2019, he had a mental impairment of anxiety and depression, though in line with **J v DLA Piper** – and particularly given the absence of any further medical evidence of note around the time of his appeal hearing in January 2020 – the more important focus is whether the Claimant has established that he was experiencing, at either time, a substantial adverse effect on normal day to day activities.

62. An assessment of severe anxiety and moderate depression would on first glance suggest that he was, at least in April 2019. Whilst not unimportant of course, that very general and bare assessment is however in my judgment insufficient to establish the required effect. What is needed is evidence of what

day-to-day activities were affected, in what way, and whether that effect was more than minor or trivial.

63. There is no further medical evidence in this regard in respect of May 2019; the only further medical guidance after that date is the referral form in September 2019 which indicated that the Claimant's sleep was not being affected, contrary to his impact statement. The Claimant's oral evidence, reflecting in general terms what was in his impact statement, was that he experienced mood swings and reduced social interaction, and that his confidence was dented (as I have noted, any struggle to get out of bed was due to leg pain and not anxiety and depression). All of these matters are, it seems to me, capable in principle of having a substantial adverse effect on the daily activity of social interaction. Once again however the problem with the Claimant's case is that although I gave him ample opportunity to spell out the impact he experienced because of anxiety and depression, his responses essentially consisted of the assertion of such difficulties with no specificity.

64. In isolation therefore, I am not satisfied that the contents of Dr Holmshaw's report are sufficient to meet the burden of proof on the Claimant in this respect. That remains the case even when I seek to assess the position disregarding medical intervention. The Claimant did not take any medication. He did undertake counselling but there was no evidence before me at all as to what position he would have been in without it, other than his own statement (in the context of PTSD) that his improvements would have been delayed. Taking into account the guidance in **Morris**, it would be far too speculative for me to try to assess what the situation would have been without the assistance of a counsellor. My conclusion in relation to substantial adverse effect therefore remains unchanged.

65. Even if the Claimant had been able to establish substantial adverse effect, again particularly taking into account the guidance in **Morris**, there was in my judgment no basis on which I could have had concluded that it was long term. The Claimant himself said that he had not been told it would last an especially long time; he had not been given a timeframe. The reality is, neither was I, whether from Dr Holmshaw's report or otherwise. As Mr Butler put it, there is no contemporaneous evidence regarding the duration of the effects of the impairments. I am unable to conclude therefore that as at May 2019 it could well have been that any adverse effect on the Claimant would last for at least 12 months, nor that in January 2020 it had so lasted (or, again, was likely so to last).

PTSD

66. As is clear from my findings of fact, the reference to PTSD within the medical documentation is of the briefest kind. It appears, without any detail, only in the GP record of November 2018 at page 174. Taking again the approach enjoined by the EAT in **J v DLA Piper**, I therefore focus on the question of adverse impact and whether it was substantial, and indeed long term. Furthermore, although I have separately analysed the effects of anxiety and depression above, in this section I take the alleged effects of both the alleged mental impairments together, accepting the Claimant's case that it is difficult for him to disaggregate them.

67. For the reasons already explained, I discount the effects on the Claimant's sleep (he did not say that PTSD had affected his sleep in any event). He otherwise referred to issues engaging with other people, including extended family, which although broad as a concept, I would of course accept as being a normal day-to-

day activity. The Claimant's evidence led me to conclude however that there was no substantial adverse effect upon him this regard, for two reasons. First, he said that his social interaction was "a little bit better" before the onset of the alleged mental impairments, accepting that his natural temperament tends towards shyness. Secondly, he accepted that in both May 2019 and January 2020 he would have been able to engage with customers of the Respondent had he been carrying out his role (essentially, he was not able to be at work because he was awaiting a knee operation). Although I accept that engaging with customers by telephone is not social interaction in quite the same way as engaging with people face to face, it is nevertheless considerable and no doubt at times demanding, interaction and is indicative of the Claimant's capabilities in this regard at that time.

68. The Claimant also referred to the impact on driving. The occupational health report of January 2019 said that the Claimant was driving short distances, which is of course a normal day-to-day activity. The Claimant was clearly able to do it. What he said was that he over-evaluated some situations. That may have created marginal difficulty for the Claimant, but without for one moment minimising the seriousness of the accident in September 2018, I cannot conclude that the over-evaluation was more than a minor or trivial impact on the Claimant's short-distance driving, either in May 2019 or January 2020.

69. The Claimant referred to competitive sport. I would hesitate to conclude that this was (or generally is) a normal day-to-day activity, but in any event the evidence of the impact of either mental impairment on his participation in such activity was extremely limited, as it was in relation to his motivation to work on his property.

70. The April 2019 report produced by Dr Macheridis referred to other impacts on the Claimant, but he did not himself refer to those matters either in his impact statement or oral evidence and therefore what Dr Macheridis wrote is just a list. Acknowledging again that the substantial adverse effect does not have been constant in order to satisfy the statutory test, I am not satisfied that the Claimant has led sufficient evidence to satisfy the burden of proof which rests on him in this respect. The examples in the Appendix to the statutory Guidance refers to "persistent" or "significant" issues with social interaction and similar daily activities. There is no adequate evidence of this within the Claimant's case. The only evidence on the question of what the Claimant's position would have been without counselling is his statement that his improvement would have been delayed and his goals not met. On the basis of **Morris**, and in any event, that is not a sound basis to assess the deduced effects on his ability to carry out normal day-to-day activities.

71. Again therefore it is unnecessary for me to consider whether any effects were long-term. Had I done so, even accepting the low threshold of whether it could well happen in May 2019 that the effects would last for at least 12 months, I would have concluded that the threshold had not been met. The evidence of the Claimant was that he was told the effects of his mental impairment could go away, last 12 months or could last three years. With no other medical information, other than Dr Macheridis' very broad comment in April 2019 that the Claimant's "psychological difficulties" were "likely to be long-standing", it is impossible for me to reach an informed conclusion.

Summary

72. Overall, even taking all of the impairments together, the Claimant has not established that cumulatively they had a substantial adverse effect on his ability to carry out normal day-to-day activities. There is very limited evidence as to the effects of any of the impairments, much of the Claimant's case in this regard being little more than generalised assertion. He was more specific when describing the overall effects of the impairments, consistently with Mr Gray-Jones' submissions focussing on the mental impairments. As I have outlined however, those effects – such as in respect of social interaction and driving – were minor in nature in themselves and seem to me to have been so when aggregated and when discounting the effects of medical intervention such as counselling. As it happens, even if I had taken into account the effects of the Claimant's knee condition, my conclusion would have been the same. Whilst I believe the Claimant did his best in his oral testimony before me, I cannot ignore the significant inconsistencies in his evidence that I have highlighted in my findings of fact. I would therefore have been cautious about taking at face value his statements regarding his difficulties kneeling, particularly (as I have said) in the light of Dr Shillcock's report.

73. The Claimant has not established that he was a disabled person within the meaning of the Act at the relevant times. His complaints of disability discrimination are therefore dismissed. I apologise to the parties for the delay in issuing Judgment and Reasons in this case. I will arrange for Case Management Orders to be issued separately in relation to the remaining complaint of unfair dismissal which is unaffected by this outcome.

Employment Judge Faulkner

Date: 5 May 2020

JUDGMENT SENT TO THE PARTIES ON

06/05/2020...

....
FOR THE TRIBUNAL OFFICE