



EMPLOYMENT TRIBUNALS

Claimant
Ms L Ulyyott

-v-

Respondent
Yorkshire Tiger Limited

PRELIMINARY HEARING

Heard at: Leeds (by cloud video platform) **On:** 15 December 2020

Before: Employment Judge Evans (sitting alone)

Representation

For the Claimant: in person
For the Respondent: Ms Royle (in-house solicitor for Arriva)

JUDGMENT

1. The Claimant was a person with a disability from mid-September 2019 until 20 January 2020.
2. I have made case management orders separately so that her claim may now proceed to a final hearing.

REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was video (by cloud video platform (“CVP”)). A face-to-face hearing was not held because all issues could be determined in a remote hearing.

Background

2. The Claimant was dismissed from her job as a bus driver with the Respondent on 20 January 2020. On 1 April 2020 she presented claims of unfair dismissal, disability discrimination and for arrears of pay to the Employment Tribunal.
3. At a Preliminary Hearing for case management purposes before Employment Judge Davies on 10 June 2020, the Claimant withdrew her claim of unfair dismissal (because she had not completed the necessary two years’ service).

Case No: 1801863/2020 (V)

In the Case Management Summary prepared following that hearing Employment Judge Davies set out the issue arising in the Claimant's claims of disability discrimination. These were claims of discrimination arising from disability (in relation to her dismissal), of a failure to make reasonable adjustments/indirect discrimination (in respect of an alleged PCP of requiring the Claimant do the 319-bus route), and of harassment (in respect of certain comments allegedly made by Ms Devine on 20 January 2020).

4. There was then a further Preliminary Hearing for case management purposes on 20 July 2020 before Employment Judge Cox. She ordered that there would be a public Preliminary Hearing by CVP to decide whether the Claimant met the definition of a disabled person during all or part of the relevant period, which is 14 January 2019 to 20 January 2019.
5. The Preliminary Hearing to decide the issue of disability was listed before me on 15 December 2020. The Claimant represented herself and gave evidence on her own behalf. The Respondent was represented by Ms Royle. The Respondent called no witnesses. Before the Hearing, the parties had agreed a bundle running to 231 pages. The Claimant had produced three documents containing her evidence in relation to the issue of disability: her letter to the Tribunal dated 18 May 2020 (page 36), a document prepared in respect of case management orders made on 10 June 2020 (page 46), and her witness statement (page 77). She confirmed that the contents of these were accurate after affirming at the beginning of her oral evidence.
6. The Claimant gave oral evidence and was cross-examined. Each of the parties then made submissions. I reserved my decision because I had insufficient time to consider all the evidence and reach a decision on the day.

The issue of disability

7. Employment Judge Davies set out the issues that it would be necessary for me to determine in order to decide whether the Claimant had a disability as follows in her case management order of 10 June 2020:
 - 25.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
 - 25.1.1 Did she have a mental impairment (anxiety/depression) and/or did she have a physical impairment (arthritis in her neck)?
 - 25.1.2 Did anxiety/depression or arthritis have a substantial adverse effect on her ability to carry out day-to-day activities?
 - 25.1.3 If not, did the claimant have medical treatment for anxiety/depression or arthritis?
 - 25.1.4 Would anxiety/depression or arthritis have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment?
 - 25.1.5 Were the effects of the anxiety/depression or arthritis long-term? The Tribunal will decide:
 - 25.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
 - 25.1.5.2 if not, were they likely to come back?

The Law relating to the issue of disability

8. Section 6 of the Equality Act 2010 (“the 2010 Act”) provides that 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.*
9. An effect is “substantial” if it is “more than minor or trivial” (section 212 of the 2010 Act).
10. There are supplementary provisions in part 1 of Schedule 1 to the 2010 Act which deals with matters including the following:

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, or*
 - (c) it is likely to last for the rest of the life of the person affected.*
- (2) 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.*
- (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.*
- (4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.*

5. Effect of medical treatment

- (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.*

11. The meaning of “likely to” in these circumstances is “could well happen” (SCA Packaging Ltd v Boyle [2009] UKHL 37).
12. “Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)” (“the Guidance”) was issued by the Secretary of State pursuant to section 6(5) of the 2010 Act. The Guidance does not impose any legal obligations in itself and is not an authoritative statement of the law. However the Tribunal must take into account any aspect of the Guidance which appears to it to be relevant.
13. The burden is on the Claimant to show that she had a disability at the material time(s).

14. The question of whether the Claimant had a disability at the material time is a matter for the Tribunal rather than for any medical expert.

Findings of fact in relation to the issue of disability

15. These are my findings in relation to matters relevant to my assessment of whether the Claimant was a person who had a disability as that term is defined by the 2010 Act during the relevant period. I have taken account of all the evidence before me and all of the submissions of the parties in making these findings.

The overall chronology

16. The Claimant had first worked for the Respondent between February 2018 and 26 November 2018 when she was dismissed. However she was subsequently re-employed by the Respondent on 14 January 2019. She was employed on both occasions to work as a bus driver.
17. On 4 September 2019 the Claimant was involved in a road traffic accident in the course of her employment whilst driving a bus. She was hit by a drunk driver and, following the accident, an unpleasant scene ensued when the drunk driver boarded her bus and remonstrated with her. He was subsequently arrested and charged.
18. The Claimant's last day at work was 28 November 2019. She rang in sick on 2 December 2019 and thereafter presented sick notes covering the rest of her employment which stated that she was not fit for work because she was suffering from "anxiety and depression".
19. The Respondent held medical review meetings with the Claimant on 19 December 2019 and 6 January 2020. The Respondent then dismissed the Claimant by letter dated 20 January 2020 stating that it had "formed the reasonable belief based on the medical prognosis of your current condition, that you are unable to return to work in the reasonable near future, and therefore unable to fulfil your contract of employment as a PCV driver, or any alternative role". (Page 204)

The evidence

20. The Claimant contends that she has two impairments: arthritis in the neck and anxiety/depression. The bundle contained three different documents prepared by the Claimant in relation to the impairments and, also, a number of medical reports. It is convenient to identify the main evidential points arising from these various documents and, also, the Claimant's oral evidence.

The Claimant's letter of 18 May 2020

21. In the Claimant's letter of 18 May 2020 (page 36), she noted, referring to a medical report by Dr Dann (which I consider below) "... I was not permanently unfit to undertake my current role and due to the present time and short duration of the illness, I believe you were too hasty in terminating my employment". In the same letter she said that the arthritis in her neck had begun four years before "but I could manage the pain and still do daily tasks". She went on to

state "after the accident, my neck pain seem to get worse but I still managed to do my role as a PCV Driver and rested when I was not on duty". She went on to state "up to this date, I do suffer from slight pain but it can be managed and I can confirm that I never phoned in sick to my employment regarding my neck".

22. Overall, as of May 2020, the Claimant did not emphasize anxiety and depression but instead the arthritis in her neck, which she suggested was manageable. She said "the anxiety and depression does not fall into the disability category".

The document prepared following the case managements orders of 10 June 2020

23. In the document which the Claimant prepared following the case management orders of 10 June 2020, she dealt with both anxiety/depression and also the arthritis in her neck. In relation to anxiety/depression she referred to a previous bout of this in 2018/2019 but stated "I had never suffered with anxiety and depression so I was having to come to terms with this and try to overcome it". She went on to say "I felt better in myself the following year and was taken off the medication prescribed". She then refers to suffering again with anxiety and depression in late 2019.

24. So far as the arthritis in her neck is concerned, she notes that she first suffered from it four year previously and then, following an MRI scan (page 114) in November 2019, she was told that she had arthritis in her neck/spine. However she notes that at the time "I was informed by my GP that this condition is very common and it shouldn't affect my lifestyle and employment and it shouldn't interfere with my driving a bus".

25. In the same document the Claimant sought to address the effect of each claimed impairment on her ability to carry out normal day-to-day activities. In fact she provided very little relevant information. In relation to anxiety and depression she stated (page 47) "when I'm doing day-to-day activities and also keeping to my routine regarding going to work, I felt good in myself, but after the RTA I feel that the incident knocked my confidence and I felt anxious towards my work but I didn't want it to overcome me so I tried to carry on as normal".

26. In relation to the arthritis in her neck, she stated "this condition has never stopped me from doing day-to-day activities". She suggested that being away from work aggravated her condition because it made her less mobile: "on my visit to the company GP, Dr Dann, I did suffer with stiffness in my neck and this was due to been [sic] at home for four weeks and not doing my normal routine" (page 47).

The Claimant's witness statement

27. In the Claimant's witness statement, that is to say the last of the documents which she prepared concerning the issue of disability, she noted that she had not previously commented significantly in relation to the effect of her impairments on her ability to carry on normal day-to-day activities. She speculated that her anxiety and depression might go back to the birth of her daughter (now aged 12) or to incidents which had occurred when she herself was just 14. She stated in relation to the effect of her impairments "I had no

lifestyle in between working, I was in constant pain and low moods and since speaking to my psychologist I have come to this realisation” (page 78). She said that since beginning her second period of employment with the Respondent “On my days off I would stay at home and find excuses not to leave the house, I felt exhausted, mentally drained and didn’t feel I wanted to go anywhere as I always felt I was going to be confronted or abused as I was starting to believe that it was normal to go out or go to work and receive this kind of treatment and also my neck pain was at its worst on my days off, I would not get changed into my day clothes, I would stay in my nightwear due to my low mood and pain and stiffness”(page 79 of the bundle).

28. The Claimant went on to say “... I am still in the same situation I have always been in, I attend work on a full-time basis and on my days off or time off, I am still not living what I call a normal lifestyle, I don’t venture out, I stay at home recovering from pain in my neck and daily tasks such as washing and cleaning can take me up to a week to catch up with, whereas before I started with my neck pain I could have all this done in one day, which left me more time with my family” (page 100).

The Claimant’s oral evidence

29. In her oral evidence when asked about the effect of her impairments on her ability to carry out normal day-to-day activities in the relevant period the claimant’s evidence was as follows. In relation to the arthritis in her neck, the claimant stated that she had good days and bad days but that on bad days she would not be able to do housework or even sit and watch the television for a significant period of time because remaining immobile became uncomfortable. She felt unable to drive to see a best friend because it was uncomfortable to do so. Equally, she would not go shopping or swimming because of the discomfort these activities caused. Further, getting dressed was difficult if it involved putting on T-shirts (button up shirts were easier).
30. She said that the “mental side” came in more after the accident in September 2019 but that the effect on her activities of the arthritis in her neck was really as described throughout the relevant period.
31. The Claimant further stated that she would choose to prepare food which could be done quickly because she could not sit or stand for a prolonged period in her kitchen. She could do household tasks such as washing and tidying but they took longer than they would normally take. The Claimant stated that there had been little change since the end of the relevant period and the date of the preliminary hearing, although she had returned to work in July 2020.

Medical evidence

32. In addition to the Claimant’s witness evidence, I also had a variety of medical evidence before me.
- 32.1. **Dr Dann’s report** (6 January 2020): although the Respondent relied on this report to dismiss the Claimant, Dr Dan thought that the Claimant should not be considered permanently unfit for her role and that to date her condition was of “relatively short duration”.

32.2. **Mr Kay's reports** (23 January 2020 & 13 May 2020): these reports were prepared for the purposes of the personal injury claim which the Claimant is pursuing following the accident in September 2019. In his first report Mr Kay comments as follows in relation to the Claimant's past medical history:

PAST HISTORY:

- 16) Prior to the index accident she had no mental health symptoms whatsoever.
- 17) She did have a previous minor accident in 2018 and for about 2 months after this she had aching discomfort in her neck but this settled spontaneously and she never sought medical advice and was never off work.
- 18) Prior to the index accident she would go swimming fairly regularly but since the accident has not been able to do so.

32.3. His conclusion in relation to the arthritis in her neck in the supplementary report (prepared following a review of her medical records) is as follows:

- 10) With regard to the mechanical effects of the accident therefore, I have little difficulty with a view that for some 6, perhaps as long as 8 weeks after the accident she would have intrusive pain, stiffness and discomfort in her neck with perhaps occasional radicular symptoms down the arm and thereafter there would be a period of fluctuating but progressively diminishing discomfort but some 18 months after the index accident, I think the effects of trauma to this vulnerable spine would effectively have worn off.

32.4. **Dr Singleton's report** (30 March 2020): this report was also prepared for the purpose of the Claimant's personal injury claim.

32.5. He notes as follows in relation to previous medical history:

Miss Ulyott had a brief episode of anxiety and depression in late 2018. This was managed by her GP and resolved over four months. There is no other mental health history and there is no psychiatric history for herself or her family; Miss Ulyott has not previously met a mental health professional. Miss Ulyott continues to take prescribed Sertraline, antidepressant medication at the current time.

32.6. The report contains significant evidence on the effect of the anxiety and depression suffered by the Claimant on her ability to carry out day-to-day activities. First, in relation to the day-to-day activity of sleep, it states:

In respect of sleep, prior to the index accident, Miss Ullyott typically worked a 9.00 am to 8.00 pm shift, retiring to bed around 10.00 pm and arising around 7.30 am. Miss Ullyott considered she regularly achieved eight hours sleep and her sleep quality was good, one hundred percent in terms of quality.

Miss Ullyott described marked change in her sleep quality following the index accident. Miss Ullyott had difficulty getting off to sleep for a combination of physical reasons, and accident-related thoughts. Miss Ullyott has described that over six months she has frequently awoken, sometimes at 4.00 am and has had more difficulty getting back to sleep. Early morning waking has been a feature.

And also

At the current time, Miss Ullyott estimates she gains about four/five hours sleep a night and this has been typically the pattern over six months; sleep quality is estimated around sixty percent of normal quality. Miss Ullyott described daytime tiredness and in response further added, "I feel rotten."

32.7. In relation to the day-to-day activity of driving, Dr Singleton comments:

Regarding car travel, Miss Ullyott, over a three-month period, drove to work ten miles each way. Miss Ullyott also undertook local driving to her mother, six/seven miles and other local journeys, typically to shops. On many occasions she preferred her partner, Mr Simon Horn to drive. Since the index accident, Miss Ullyott has markedly restricted her car driving to journeys out of necessity and has also experienced physiological symptoms of anxiety as outlined above.

In my opinion, situational anxiety with vehicle travel is an ongoing feature in this case and is characterised by physiological symptoms of anxiety and very notable restriction. The avoidance of bus driving is also acknowledged. In my opinion this feature warrants psychological intervention.

32.8. In relation to other day-to-day activities, Dr Singleton comments:

In respect of lifestyle, Miss Ullyott, prior to the index accident, enjoyed lane swimming three or four times a week. This activity has not been undertaken since the index accident.

Prior to the index accident, Miss Ullyott enjoyed attending the gym approximately five times a week, this activity has not been undertaken since the index accident.

32.9. He also states:

Prior to the index accident, Miss Ullyott enjoyed socialising, taking her daughter out and/or going out with her boyfriend. Since the index accident, this type of activity has been undertaken much less. Since the index accident her sister takes her daughter out. This restriction is secondary to situational anxiety with car travel. In general, Miss Ullyott is much less inclined to go out and about, again a feature confirmed by her boyfriend, Mr Simon Horn.

32.10. And finally:

in my opinion notable restriction of lifestyle is a feature in this case, reflecting primarily the feature of situational anxiety with car travel. Clearly also restriction is reflective of physical discomfort in respect of swimming and gym; also to some degree loss of confidence. Miss Ullyott experiences frustration at restriction rather than diminished interest.

32.11. When dealing with prognosis, he states:

In my opinion Miss Ullyott is experiencing lower mood over six months and is ongoing. Mild features of both depression and anxiety are a feature in this case and warrant psychological intervention. I note an early episode of anxiety and depression in late 2018, early 2019 was both brief and had been resolved for six months prior to the index accident. The current mood state is in my opinion entirely attributable to the index accident.

In my opinion Miss Ullyott would qualify for a diagnosis of Adjustment Disorder, DSM-V 309.28 (F43.23) with Mixed Anxiety and Depressed Mood.

32.12. He goes on to state:

(4) CONCLUSIONS

(4.1) SUMMARY OF DIAGNOSIS

Some features of Post Traumatic Stress Disorder are in evidence in this case. However, in my opinion the symptom profile does not reach diagnosis criteria under DSM-V. In my opinion the diagnosis of Adjustment Disorder DSM-V 309.28 (F43.23) with Mixed Anxiety and Depressed Mood has been valid since late November and is ongoing.

And then:

(4.3) PROGNOSIS

The prognosis is positive in this case. Following an episode of psychological therapy, I would anticipate that Miss Ullyott could regain her confidence as a bus driver some four to six months from the commencement of that therapy. Other psychological features regarding sleep and mood and general confidence should also in the process of therapy markedly improve over a similar time period of four to six months.

32.13. **Medico legal rehab report** (20 August 2020): this is the most recent piece of medical evidence. It follows the conclusion of 8 sessions of cognitive behavioural therapy and states:

OUTCOME OF TREATMENT:

Actual Recovery Rating: Excellent recovery achieved.

CLIENT'S TREATMENT SUMMARY:

I feel so much better in myself. I feel like a huge weight has been lifted from me. I feel calmer, more relaxed and confident.

THERAPIST DISCHARGE SUMMARY:

Laura engaged really well with the therapy process and processed her distressing memories very quickly using the EMDR protocol. She has now been able to return to her job as a Bus Driver. She no longer feels anxious about being in another accident and feels much more confident and that her normal level of functioning has been resumed. A very successful therapy outcome.

Factual conclusions in relation to matters relevant to the issue of disability

33. Analysing the evidence is not an easy task. The Claimant is unrepresented and her written evidence was confused. Further, none of the medical reports included in the bundle was prepared for the purpose of considering whether the Claimant was at the relevant time a person with a disability as defined by the 2010 Act. In particular, the reports of Mr Kay and Mr Singleton were prepared for the purpose of the Claimant's personal injury claim.
34. The Claimant's evidence has also varied over time. For example, her oral evidence in relation to the effect of her claimed impairments on her ability to carry out day-to-day activities was clearly inconsistent with what she had told Dr Singleton (because it suggested that the effects had been greater from an earlier date than Dr Singleton's report suggested). Equally, in the document prepared in response to the case management orders the Claimant said that she had "never suffered from anxiety and depression" (before the incident in 2018) but in her witness statement she speculated that in fact she had suffered from it since the birth of her child some twelve years ago or from an even earlier date in her adolescence. Further, in the document prepared in response to the case management orders, she stated in relation to the arthritis in her neck "this condition has never stopped me from doing day-to-day activities" but in her oral evidence she suggested that it had in fact had a very great impact on her ability to carry out day-to-day activities.
35. Ms Royle urged me to conclude that the Claimant was tailoring her evidence to reflect varying litigation needs. So, for the purposes of the personal injury claim, she wished to argue that it was the accident in September 2019 that had caused her impairments. On the other hand, for the purposes of the present claim, it suited her to suggest that the impairments were more long-standing. Ms Royle in effect submitted that the Claimant was not a credible witness and so I should give little weight to her evidence.
36. Taking matters in the round, I find that in fact the Claimant has never understood the legal issues sufficiently (and in particular the meaning of "day-to-day activities") to tailor her evidence in this way. I find that variations in her evidence primarily reflect her evolving understanding of what is relevant for the purposes of assessing whether she had a disability as defined by the 2010 Act.

However the inconsistent nature of her evidence does inevitably reduce the weight to be given to it and my conclusions below depend primarily on the evidence contained in the various medical reports.

Did the Claimant have a mental impairment (anxiety/depression) and/or did she have a physical impairment (arthritis in her neck)?

37. I find that the Claimant had a mental impairment (anxiety/depression) from late 2018 to early 2019 and then again from after the accident in September 2019 until at least 20 January 2020 (in light of the conclusion by Dr Singleton quoted above). I do not find, however, that she suffered from anxiety and depression prior to late 2018 or between early 2019 and late 2019 (in light of what Dr Singleton says about her medical history at paragraph 32.5 above). Nor, in light of Dr Singleton's report as quoted at 32.11 above, do I find that the anxiety/depression that she suffered from late 2018 to early 2019 was likely to recur.

38. I also find the Claimant had a physical impairment of arthritis in her neck from some time in 2018 until at least 20 January 2020. The Respondent did not seek to persuade me with any significant energy that the Claimant did not suffer such an impairment and certainly there is medical evidence relating to it dating back to April 2018 (page 150) and then there is the MRI scan dating back to November 2019 (page 114).

39. Overall, therefore, so far as the relevant period is concerned, I find that the Claimant had a mental impairment (anxiety/depression) from around September 2019 and a physical impairment (arthritis in her neck) for the whole of the relevant period.

Did anxiety/depression or arthritis have a substantial adverse effect on her ability to carry out day-to-day activities during the relevant period?

40. I find that neither anxiety/depression nor the arthritis in her neck had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities until after the accident which the Claimant had on 4 September 2019. I have taken the view that the best evidence I have about this issue is that contained in the medical report of Dr Singleton. That evidence suggests strongly that the Claimant's ability to carry out day-to-day activities was not significantly affected prior to the accident in September 2019. The report prepared by Mr Kay also supports this conclusion, in particular what he recorded under the heading "past history" (see paragraph 32.2 above).

41. However I find that the combination of the anxiety/depression and the arthritis in her neck did have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities from around mid-September 2019, shortly after the accident on 4 September 2019, until at least the end of the relevant period (20 January 2020). Again, this is in light primarily of the evidence contained in Dr Singleton's report in relation to the day-to-day activities of sleeping, swimming, driving, taking her daughter out, socializing and going to the gym.

42. I find that during this period, the combined effect of the anxiety/depression and the arthritis was such that the Claimant's ability to carry out normal day-to-day activities was adversely affected in a way that was more than minor or trivial in

that her sleep was reduced to just 4 or 5 hours a night, she avoided driving when she was not at work, she was unable to exercise regularly (whether by swimming or by going to the gym) and she reduced her socializing.

43. I have considered whether it is possible to separate out the extent to which the adverse effects came from (a) the impairment of arthritis in the neck and (b) the impairment of anxiety/depression. I find that it is not. The Claimant was clear that they fed off one another: pain caused by arthritis in the neck would lower her mood and, for example, make it less likely that she would socialize. This was also the view of Dr Singleton (see paragraph 32.10 above).

Were the effects of the anxiety/depression or arthritis long-term? The Tribunal will decide:

1. *Did they last at least 12 months, or were they likely to last at least 12 months?*
2. *If not, were they likely to come back?*

44. The relevant period ended on 20 January 2020. The substantial adverse effects of the anxiety/depression and the arthritis in her neck had not by then lasted 12 months. They had at most lasted just over 4 months at that point. The first issue, therefore, is whether the substantial adverse effects were from mid-September 2019 (i.e. the point at which the effects began to be substantial) *likely* to last at least 12 months. *Likely* in this context means “could well happen”. The test is an objective one and paragraph C4 of the Guidance comments as follows:

In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).

45. Consequently the facts that the Claimant began to look for further work in February 2020 and found further work in July 2020 are not relevant (and, of course, in any event, the Claimant’s evidence is that the impairments continue to have a substantial adverse effect on her ability to carry out normal day-to-day activities even when she attends work).

46. The most contemporaneous evidence was that of Dr Dann (page 121). She noted that the MRI scan had shown degenerative change in the middle of the Claimant’s neck. She had been instructed to prepare a report by the Respondent in relation largely to the Claimant’s ability to work but did not put a date on the Claimant’s likely date of return. She commented that she would have expected an increase in the range of movement of the Claimant within the first couple of weeks of physiotherapy. She did not consider the Claimant to be permanently unfit but, when asked about the effect of the Claimant’s existing medical condition on her ability to undertake her contractual duties in the future, did not give a very clear-cut answer, commenting (page 122):

It is difficult to be certain, particularly given the degenerative changes on her MRI. It is possible [the Claimant] will have problems again in the future,

the severity and longevity being difficult to predict. The anxiety is likely to continue to be an issue as it relates to concerns about abuse from the general public, which unfortunately is unlikely to be alleviated fully in her current role. Medication can be helpful with symptoms alongside counselling but may not fully resolve the problem.

47. It is important to bear in mind that Dr Dann and the Respondent were considering the Claimant's ability to resume her duties as a bus driver, not her ability to carry out normal day-to-day activities. However, it is still worthy of note that Dr Dann recognised that problems caused by arthritis in the neck might well recur and that the anxiety might well simply continue. Equally, it is of course the case that the Respondent took the view that the Claimant should be dismissed because she would be unable to resume her duties in the "reasonable [sic] near future".
48. The most significant other evidence which I have available to assess the likelihood of the substantial adverse effects of the impairments lasting at least 12 months are the medical reports prepared by Mr Kay (who met the Claimant on 23 January 2020 and 13 May 2020) and Dr Singleton (who met the Claimant on 17 March 2020).
49. Mr Kay suggested that the initial "intrusive pain, stiffness and discomfort" would last for 6 to 8 weeks from the date of the accident and "thereafter there would be a period of fluctuating but progressively diminishing discomfort but some 18 months after the index accident, I think the effects of trauma to this vulnerable spine would effectively have worn off".
50. Dr Singleton thought that the Claimant would regain her confidence and that other psychological features would "markedly improve" over a period of four to six months from the commencement of psychological therapy.
51. There is nothing in the reports of Dr Dann, Mr Kay or Dr Singleton which suggests that their contents would have been materially different in relation to the relevant issue if they had prepared them at any other date after mid-September 2019. They are therefore relevant evidence in assessing the likelihood of the effects of the Claimant's impairments being "long-term".
52. In light of the evidence available to me, I have concluded that from the point at which the adverse effects of the Claimant's two impairments became substantial (i.e. mid-September 2019), it was likely that they would continue to be substantial until mid-September 2020, and that consequently they were "long-term". My reasons for reaching this conclusion are as follows:
 - 52.1. Although the medical evidence suggests that the pain suffered by the Claimant as a result of the arthritis in her neck was likely to reduce over the following twelve months, it does not suggest that it was likely to disappear. Rather it suggests that it could well (i.e. was likely) to continue. There were, of course "degenerative changes" within the mid-cervical spine;
 - 52.2. Turning to the Claimant's anxiety/depression, I conclude that the effect of possible medical treatment ("psychological therapy") should be disregarded when assessing whether it was likely that the effects of the impairment would be "long-term" because the final outcome of any such treatment could not be determined (indeed it had not even begun – it

subsequently began in June 2020). If the effect of possible medical treatment is discounted, the medical evidence in relation to the Claimant's anxiety/depression suggest this was likely to last for at least 12 months;

52.3. Further, and separately, even if such medical therapy were not to be discounted, given that the possibility of such treatment was no more than speculative, and its start date completely unknown, I find that it was likely that the effects of the impairment would have lasted until at least mid-September 2020;

52.4. The evidence when taken in the round shows that it was likely that, despite the likely improvement in the symptoms caused by the arthritis in the Claimant's neck, the ongoing anxiety/depression when combined with the remaining neck pain (albeit reduced) would have a more than minor or trivial effect on the Claimant's ability to carry out normally day-to-day activities, in particular to sleep, to swim, to drive, to go to the gym, to socialize, to cook, and to watch television for at least twelve months from mid-September 2019.

Conclusion

53. In light of the findings and conclusions set out above, I conclude that the Claimant was a person with a disability from mid-September 2019 until 20 January 2020.

Employment Judge Evans

Date: 30 December 2020

JUDGMENT & REASONS SENT TO THE PARTIES
ON

31 December 2020

FOR EMPLOYMENT TRIBUNALS