



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122408/2018

5
Held via Cloud Video Platform (CVP) on 18 & 19 January; 1 & 3 February
2021

Employment Judge L Doherty

10
Mrs H Morrison

Claimant
Represented by:
Mr D Hay -
Counsel

15
Inverclyde Council

Respondent
Represented by:
Ms F Ross -
Solicitor

JUDGMENT

25
The Judgment of the Employment Tribunal is that the claimant is not disabled at
the relevant time under Section 6 of the Equality Act 2010.

REASONS

- 30
1. This was Preliminary Hearing fixed to determine the issue of the claimant's disability status in terms of the Equality Act 2010 (the EQA). The hearing took place virtually; Mr Hay, counsel appeared for the claimant, and Ms Ross, solicitor for the respondents.
 2. It is accepted by the respondents that the claimant has an impairment, bilateral hallux valgus, commonly known as Bunions. What is in issue between the parties is whether there is a significant adverse effect as a result of that impairment on the claimant's ability to carry out day-to-day activities, and
35 whether that effect is long term.

3. There is an issue between the parties as to the period of the alleged disability discrimination. The respondents contended that the relevant date is 4 June 2018, which was the date upon which the claimant resigned. The claimant's position is that the relevant period runs from the 31 May until 4 June 2018 on the basis that they could have been decisions made about adjustments. Ultimately, for the reasons given below nothing turned on this issue.
4. The claimant gave evidence on her behalf, and evidence was given on her behalf by Dr Reed, an Accredited Specialist in Occupational Medicine. For the respondents, evidence was given by Mr Martin Graig Deputy Head teacher at St John's Primary school (the School), and Mr Coyle Head Teacher, at the School where the claimant worked.
5. The parties lodged a joint bundle of documents.

Findings in Fact

6. The claimant, whose date of birth is 19 November 1956, has been employed as a Primary School teacher by the respondents from 1966 until her retirement from full time employment in August 2018. She has been employed in the School from 1991.
7. The claimant generally taught the in the upper stages of the School, and her classroom was therefore usually on the second floor of the school building. As part of her duties the claimant collected her class of around 30 children and escorted them upstairs at the start of the school day; she escorted them up and down stairs for the first school break, and at lunchtime, and also escorted them downstairs, before returning to her classroom at the end of the school day. The claimant also regularly escorted her class to School Assemblies in the gym hall which took place once a week, and involved her going up and down stairs. She also regularly escorted her class to gym practice, which also involved going up and down stairs.
8. The claimant took class for her PE lesson once a week. This involved her escorting her class to the gym hall, where she supervised physical activities.

The claimant stood for the duration of this lesson, which lasted around an hour.

9. Once a month the claimant escorted her class to a Mass service. The walk from school to church was of around 15 minutes duration each way.
- 5 10. On Fridays claimant took part in a walk round the school grounds of around 1 mile. While this was not mandatory, there was an expectation that teachers took part in this and the claimant did so. The walk generally lasted 15 to 20 minutes.
- 10 11. The School encouraged teachers to take their class and for a daily walk around the school grounds, referred to as the daily mile, which was part of a Scottish Government initiative to encourage fitness. Participation in the daily mile was not mandatory, but the claimant did from time to time take part in it, generally in the better weather.
- 15 12. The claimant's teaching duties in the classroom involved her in standing to teach lessons. The School encouraged active participation by teachers with their class and actively discouraged teachers sitting at their desk in order to check or correct pupils' work.
- 20 13. The claimant managed to discharge her duties as a Primary school teacher throughout the period from 2005 up until the end of her employment, other than during periods of absence.
- 25 14. Other than in June 2018, shortly before she decided to resign from her employment, when she indicated she considered she would have difficulty in taking additional PE classes, the claimant did not bring to the attention of the Schools senior management that she was experiencing any difficulty in the discharge of any aspect of her duties.
- 30 15. At some point in around 2005 the claimant began to experience general aches in her feet, particularly towards the big on both feet. She was diagnosed with bilateral Hallux Valgus (commonly referred to as bunions) with her left foot worse than her right foot. It was also suggested she had planter fasciitis. She also was diagnosed with the beginning of hammer toe. She was referred to

the orthotics clinic, and prescribed painkillers. At some point she discussed with her GP the possibility of having an operation, but it was decided that it was better to try to manage the situation with orthotics and painkilling medication. Initially, the claimant's left foot was worse than her right foot.

- 5 16. It was recommended that she wear wide fitting shoes. This helped the claimant's problems to some degree, but over the course of 2006/2007 the claimant felt that her feet were becoming more misshapen. She was also diagnosed as having fallen arches (pes planus) at some point during this period and she was diagnosed with arthritis in her feet and her ankle. The claimant's left foot was becoming increasingly painful, and on occasion this caused her to wake up at night.
- 10
17. The claimant's difficulties affected her ability to walk to the extent that she experienced some pain if she walked for more than 30 minutes. She could walk more easily on the flat than on a gradient, which she found more painful.
- 15 18. Standing for particularly long periods of time aggravated the claimant's left foot, in that it caused her pain, and her foot could become swollen. When this occurred, the claimant coped with this by raising her foot and resting it when she returned from work in the evenings.
19. The claimant could drive for around 15 minutes with no difficulty, but if she had to drive for longer distances then she could find this caused her left foot to be a bit sore, and she coped with this by doing stretching exercises.
- 20
20. The claimant regularly attended the gym, where she did upper body exercises, cycling, and walking on a treadmill. She found walking on the treadmill easier than walking outdoors.
- 25 21. The claimant's grandson was born in 2005 she helped look after him once or twice a week. This involved her going to her daughter's house, which had a number of stairs, and involved her in carrying her grandson up and down the stairs. The claimant found navigating stairs carrying her grandson to be a bit challenging. She had to hold onto the hand rail going up and down stairs and walked more slowly.
- 30

22. In February 2010 the claimant's symptoms were such that she decided to go for surgery on her left foot. She asked her doctor to be referred for surgery on her left foot, and a referral was made in the following terms;
23. Mrs Morrison has noticed progressive reflection of her left second toe over the last year. It is becoming worse and she now has a blister at the dorsum from rubbing against her footwear. She has a similar problem in her right second toe but not to the same degree. On examination, she seems to have her left second toe in partial flexion at the PIP joint, although it can be extended passively. Her right second toe is not as bad.
24. I suspect she has hammer toes. I would be grateful for your opinion on this management. She has tried wearing wide box shoes but to no avail.
25. The claimant was seen by a consultant orthopaedic surgeon in April 2010, Dr Ghani, who diagnosed her as having three conditions. That was hammering of both second toes, left worse than right; bilateral pes planus; and bilateral hallux valgus left worse than right (page 90). Dr Ghani recorded that the claimant was complaining of callosity over the dorsal aspect of the proximal interphalangeal joint of the left two toes. He stated that:
- 'This deformity is fully correctable as is the hallux valgus.'*
26. The claimant was advised to wear wide fitting shoes with a large toe box, and she was referred to the orthotist for bilateral arch supports and metatarsal pads.
27. The claimant underwent corrective surgery on her left foot on 7 February 2011, which was successful. This was a first metatarsal scarf osteotomy with soft tissue release of left 2nd toe. This surgery addressed both the problem of right foot hallux valgus, and right foot hammer toe. Following a period of recovery, she experienced much less pain in her left foot.
28. In terms of her recovery claimant was unable to move for about a week. Thereafter for six weeks she required a special shoe, and she avoided walking outside. After that she bought shoes with a bigger toe-box, and gradually built

up her walking. The claimant walked with a limp until around the end of April 2011.

29. The claimant returned to work at the school on 20 May 2011, resuming her full duties. She was still wearing bigger shoes and changing into open toed sandals when she got to work, and she was still experiencing some swelling in her left foot if she had spent a long time on her feet.
30. By around Christmas 2011 the claimant felt she had made a full recovery from her operation.
31. The claimant also experienced issues with her right foot from 2011. Her symptoms in her right foot increased over time.

Right Foot

32. By August 2017 the bunion on her right foot was causing the claimant pain. Between her operation in 2011 and August 2017 she had other foot issues. She felt she was experiencing the same sort of issue in her right foot which to those she had experienced in her left foot.
33. She wore big shoes to spread her toes apart. By August she was experiencing the same type of problems with her right foot as she had with her left foot prior to the surgery on her left foot. She experienced increasing pain as a result of weight bearing and walking. She could walk for around 30 minutes before experiencing discomfort. She experienced some discomfort in negotiating stairs and had to use the handrail.
34. The claimants foot could become swollen after standing for a prolonged period. The claimant had to stand to teach her class, but she sat down regularly during the course of the day. The claimant had a box under her desk at school which she used to rest her foot when she sat down.
35. The claimant rested her foot after work on a regular basis to alleviate the pain and swelling.
36. The claimant consulted her GP about issues arising from the bunion in her right foot until September 2017 when she asked her GP for a referral for

surgery on her right foot. The claimant had not consulted her GP about this issue prior to that date. The GP referral was made in September 2017 (page 94). The referral letter stated:

5 *'Mrs Morrison is 60 years old. She has a history of bilateral hallux valgus which was worse on her left foot compared to her right foot. She was referred to you and had a left first metatarsal osteotomy in 2011. She has derived great benefits from this operation and has been pain free in her left foot since.*

10 *Unfortunately, the bunion in right foot has increased in size over time and is now painful. On examination, there was a prominent protrusion of the head of the first metatarsal with some localised tenderness.*

She has expressed an interest in having an operation on her right foot. I would be grateful if she could be seen.'

15 37. The claimant's operation which was for the right hallux valgus, and second toe correction on her right foot was carried out on 3 April 2018. The claimant was discharged the same day, with follow up 6 September arrangements in two weeks.

20 38. The claimant attended for the review on 17 May, when it was noted that she had residual swelling on her right foot. It was also noted that she was able to weight bear comfortably and it was hoped swelling would produce six weeks. The claimant was seen for review on 6 September 2018 when it was noted that the claimant was finding her mobility was improving but she was still finding she fatigues due to her foot fairly quickly.

25 39. The claimant's recovery from this operation was slower than it had been for her left foot. She was restricted in walking for a period of around 6 weeks until around the end of April, and had to use two walking sticks until then. She continued to walk with the aid of one walking stick until the end of May, beginning of June 2018.

30 40. The claimant was in severe pain for a few weeks after her operation, with swelling in her foot. This severe pain diminished after a few weeks but she still experienced some pain, particularly if she was standing for any significant

period of time. If the claimant had to stand for any length of time her right foot became swollen, she experienced pain associated with that.

41. The claimant was in contact with her GP on a number of occasions between the date of the operation until 16 July 2018 in connection with issues arising from the operation on her right foot. Some of this contact amounted to requests for fitness to work notes. The GP notes record that on 14 March 2018, the claimant requested painkilling medication; on 4 May they record that the claimant was continuing to have swelling on the operation site, and it was painful for her to walk but not to rest. The GP notes record from 11 June 2018 the claimant was having difficulty at work with her head teacher who was asking her to do PE three times a week. A Fit Note was issued stating that the claimant was not fit to do extra physical activities such as PE as she was still in pain from her foot operation. There is an entry relating to the claimant's right foot on 21 June, when it was noted that the claimant was considering constructive dismissal. It was also noted she was still struggling with foot pain. The last entry is on 16 July which recorded the claimant needed repeated sick line and, she continued to have pain and some swelling.
42. The claimant attended for a medical examination at the instigation of her solicitor with Dr Reed on the 10 August 2018. At that stage she was still experiencing pain in her right foot, and was limping when she walked. These symptoms caused her to walk slowly. The claimant's symptoms gradually subsided.
43. The claimant was referred for a course of physiotherapy as a result of the operation on her right foot. The discharge letter from this treatment is dated 3 October 2018 (page 74). It states that the claimant was a much more confident to walk, was improving gait, and there were no concerns. The discharge, stated;
44. The patient completed a course of treatment and the symptoms are now up resolved. The patient has an exercise program to continue with self-management. The patient's condition was improving, they were advised to contact us if further help required and have not.

45. The claimant's GP records indicate that she attended on 27 September 2018 complaining of leg pain. It was noted that she *'was a difficult historian. Behind need to nkel comes/goes. Recentish ostetomy. Degtee of liming etc though now using gym equipment et cetera. No injury. No back or hip pain.'*
- 5 46. The GP records contain a further entry on 5 November 2018 where the problem of osteoarthritis of the right knee was diagnosed. It was noted that the claimant attends the gym three times per week and walks on the treadmill.
47. In a series of emails of emails between the claimant and Mr Coyle, relating to the claimants teaching arrangements for the new term commencing in August
10 2018, the claimant expressed on occasions the opinion that she was making a recovery and she hoped to return to school.
48. On 24 April 2018 she indicated to Mr Coyle that her foot seemed to be healing well and that if she rested she had hardly any pain at all but that if she tries to walk about, even in special shoes, it hurt after a while. She stated that she
15 was definitely 'on the mend'.
49. On 9 May she stated to Mr Coyle that she was continuing to improve slowly but surely, and that she was trying to walk a bit each day.
50. On 17 May however the claimant emailed Mr Coyle to say that her healing seemed to have come to a standstill and that her foot was painful and very
20 swollen for.
51. The claimant was still experiencing swelling in her right foot and some slowness in walking by August 2018, when she saw Dr Reed.
52. The claimant decided to resign from her employment as of 15 August 2018. She emailed Mr Coyle intimating her decision on 4 June 2018. She also
25 indicated in a separate email of the same date that she hoped to return to school by the last week of term.
53. The claimant did not in fact return to work at school. The only occasion when she visited the school was on 11 June 2018 when she drove to school to collect some personal belongings. On that occasion she experienced some

difficulty navigating the stairs in that she had to put both feet on the stair at the same time when descending the stairs.

54. The claimant considered she would have been fit to return to work by August 2018. She considered she had completely recovered by December /January 2019.
55. Throughout the period when the claimant was working at the school she did not bring to the attention of the senior school management team that she required any adjustment of her working arrangements, or that she was experiencing any particular difficulty in carrying out her duties as a schoolteacher, other than in connection with teaching additional PE in 2018.
56. In his report dated 13 August 2018 Dr Reed expressed an opinion on a number of questions asked of him. His opinion was based on information provided to him by the claimant at consultation, and his consideration of some of her medical records.
57. Dr Reed expressed the opinion that the claimant's impairment had an adverse effect on her ability to walk, to climb stairs, to engage in weight bearing effort or exercise, and to drive during the relevant period, that period being from March 2018 until 4 June 2080.
58. Dr Reed expressed the opinion that the effect on the claimant's normal day-to-day activities was substantial in that her capacity to walk was limited to less than 30 minutes, she could not drive safely, she found stair claiming painful limiting, and would be unable to engage in weight bearing exercise.
59. Dr Reed's gave the opinion:
- 'The impact was more exaggerated during the relevant period, even before the relevant period, Mrs Morrison's impairment in the areas of walking, running, weight breathing exercise and prolonged standing would have been impaired to a substantial degree in my opinion. This is because all of these activities were limited by pain and limp, progressively worsened over time, and were likely to continue to progress without treatment.'*

5 *It is likely that the adverse effects suffered by Mrs Morrison became substantial during the evolution of her right sided hallux valgus condition when her walking tolerance was becoming more seriously limited. Although it is not possible to put an exact date of this I believe it was likely to have been early*

10 *2017 at the latest, when she started to realise that surgery was becoming an inevitable treatment requirement. Because it is a progressive condition it is likely that once developed substantial impairment of day-to-day activities will progressively materialise over time. Indeed, if her condition in the round is considered as one problem, it could be argued that Mrs Morrison had been*

15 *substantially impaired by hallux valgus from before 2011 when her left foot became affected, requiring surgery. Without treatment, this initial condition would have led to very severe restriction to ability long term basis.'*

60. The claimant raised tribunal proceedings on 6 November 2018.

15 61. On 2 September 2019, on a joint referral from her own solicitors and from the respondent, the claimant attended for a consultation with Dr Stuart Moir, consultant orthopaedic surgeon (report produced pages 105 to 211). His report was prepared on the basis the letters of instruction, of a history taken from the claimant, his examination of her medical records, and an examination of the claimant herself.

20 62. His report records that all the claimant reported her right foot felt pretty good, and that she reports no current restrictions activities but that she has to wear slightly wider fitting shoes and cannot wear high heels. She said that her foot did not feel the satisfactory until the end of 2018 some nine months and so after her operation.

25 63. Dr Moir also expressed an opinion in response to questions asked of him. In response to the question (3) - does that impairment (halus valgus) have, or at least had an adverse effect upon her ability to carry out normal day to day activities and, if so, from what point in time, he responded as follows;

30 *'Currently Mrs Morrison has no difficulty carrying out normal day-to-day activities. Prior to the surgery in March 2018 it could be accepted that she had mild to moderate difficulty in carrying out day-to-day activities. She would*

have experienced discomfort, if not pain in from her affected foot, some restriction in shoe wear, and also limitation of walking distance and prolonged weight bearing. However, it is apparent that she was working as a primary school teacher, albeit with mild restriction, up to the date of the surgery. For the first of six months or so after surgery in March 2018 she experienced restricted mobility and difficulty carrying out day-to-day activities as would be expected following such foot surgery and could be considered disabled during this period.

64. Dr Moir goes on to state:

'There was substantial effect on Mrs Morrison's ability to carry out day-to-day activities for the first 5 to 6 months after surgery in March 2018, and minor restriction in her ability to carry out normal day-to-day activities form this period until the end of the year. However, Mrs Morrison felt that she would have been able to get back to work as a primary school teacher in her previous position as of August 2018.'

There was substantial adverse effect on Mrs Morrison's ability to carry out normal day-to-day activities following her surgery in March 2018 as noted above. I would state that any substantial adverse effect on Mrs Morrison's ability to carry out normal day's activities was not long term in that she felt the foot has substantially recovered by the end of the year.'

65. Dr Moir was asked for his professional opinion on the prognosis for the claimant's recovery following her surgery in March 2018. He expressed the opinion that there would be a period of up to 6 months after surgery when there would be a substantial effect on the claimant's ability to carry out day to day activities, and a further three months or so when they would be a moderate affect her ability to carry out day-to-day activities, and that there is usually full recovery from such foot surgery by a year. He stated:

'I would expect Mrs Morrison to have significant restriction of mobility and day-to-day activities for the first three months, followed by gradual improvement, so that it would be about six months after her surgery before she would feel

sufficiently recovered to be able to return to work. Indeed, she felt she would have been able to get back to her previous position by August 2018. It

Note on Evidence

- 5 66. There is a significant issue as to the credibility and reliability of the claimant's evidence in relation to the effects of her impairment. In order to resolve this the Tribunal considered all the relevant evidence before it.
67. The Tribunal's conclusions on the claimant's evidence are so integral to its determination of the legal question before it, that the Tribunal has dealt with this below in the Consideration part of its reasons.
- 10 68. The tribunal considered the credibility and reliability of the evidence of the other witnesses from whom it had heard.

Mr Craig and Mr Coyle

- 15 69. The Tribunal found Mr Craig and Mr Coyle generally to be a credible and reliable witness insofar as their evidence was relevant to the issues which it had to determine. Both made appropriate concessions in cross examination, and did not seek in the tribunal's view to exaggerate or embellish their evidence.
- 20 70. Both witnesses gave evidence as to the extent of the claimant's duties as a primary school teacher. The tribunal accepted their evidence as to the extent to which the claimant was required to walk about the school, and to climb up the stairs in the supervision of her class. While the claimant suggested that her requirement to use the stairs was more limited, in reality the Tribunal formed the impression there was not much between them in terms of this evidence, the claimant accepting that she had to bring her class up and down
- 25 stairs the beginning and end of the day, for a morning and lunch break, and for Assemblies, in practice, and PE lessons. For reasons which are gone into more fully below where there was a conflict, the Tribunal on balance preferred the evidence of Mr Craig and Mr Coyle over that of the claimant.

71. Clearly neither witness was in a position to observe the claimant at all times during her working day, but the tribunal was satisfied that on the occasions when Mr Craig or Mr Coyle did observe the claimant, neither saw anything to alert them to the fact that the claimant may have been experiencing any difficulty in walking, standing, or climbing stairs.
72. The Tribunal appreciates that that is not conclusive evidence of the fact that the claimant did not experience any difficulties, but that does not detract from their evidence to the effect that to the extent they did observe the claimant in the conduct of her duties at work, did not see any difficulty with her walking, standing, or stair climbing.
73. The Tribunal accepted the evidence of Mr Coyle, and Mr Craig to the effect they adopted an active approach to the supervision of the school, and that this involved them visiting the claimant's classroom not only on two or three occasions a year to observe a lesson given by the teacher, but also their practice of regularly going into classrooms or in a more informal basis. Mr Coyle explained that these visits could last from a few minutes to around 10 minutes, and occurred on average once a week. The claimant sought to minimise the extent to which there was such interaction, however the tribunal found that evidence on this to be convincing in that the supported by an explanation of why this approach was adopted. Having said that the Tribunal the tribunal did not consider this evidence to be in any way definitive of the degree to which the claimants stood or sat down while she was giving lessons, and it was only an adminicle of evidence in the overall picture which the Tribunal has to draw.
74. There can be no doubt that neither witness saw the claimant throughout the duration of her working day, however the Tribunal was prepared to accept the evidence that in addition to the culture within the school of Senior management regularly visiting classrooms, and there was also a culture of discouraging teachers from sitting at their desks while teaching. This evidence was convincing in that both witnesses spoke to the benefits to teaching practice of having the teacher stand as opposed to sit while delivering lessons. This rendered credible their evidence that it was likely they would

have noticed the claimant sitting down to deliver lessons had she done so on a regular basis. Support for this is found in that Mr Craig give evidence to the effect that, at one point in 2017/18, it was noted that the claimant had pupils waiting at her desk to have their work marked, and this was addressed.

5 75. The Tribunal did not find this piece of evidence one to which a huge amount of weight could be attached in determining to what degree the claimant had to sit down while delivering lessons, but again it was an adminicle of evidence on which the Tribunal could draw in determining the overall picture.

10 76. The Tribunal accepted their evidence that the claimant walked her class to church on the first Friday of every month, which was approximately 15 minutes each way; regularly took part in the Friday walk of around 1 mile; and that from time to time she took part in the daily mile walk.

15 77. The claimant accepted that she walked to church with her class, however she strongly denied taking any part in the daily mile. She subsequently said she took part in the odd walk around the schoolyard on a Friday after Assembly, but that she never did the daily mile.

20 78. The Tribunal was satisfied that the Friday walk was not an irregular occurrence, as was suggested in the claimant's evidence. The impression particularly from Mr Coyle's evidence was that this was regarded as a fairly important part of the school day on Friday because it allowed social interaction between classes and between staff. On this basis the Tribunal was satisfied that the claimant did take part on a regular basis on the Friday walk. The fact that she was not prepared to accept that she did so as a regular feature, cast some doubt on her denial that she ever took part in the daily mile, and the
25 Tribunal accepted the evidence of Mr Coyle and Mr Craig that she did so on some occasions. Their credibility was enhanced on this point in that they did not suggest that she always took part in it; their evidence was that they only saw her undertake it on some occasions, and both accepted that the claimant did not always undertake the daily mile and that it was not mandatory.

Dr Reed

- 5 79. The Tribunal heard before it conflicting evidence from experts. On the one hand, Dr Reed assess the claimant as being disabled in terms of the Equality Act, and Dr Moir opinion is the claimant is not disabled under the same legislation.
80. The Tribunal is clearly aware that it is not the function of the medical expert to determine disability status under the Equality Act, and that that is the job of the Tribunal.
- 10 81. Dr Reed accepted that his report was based on the history provided by the claimant. He also had before him her medical records, but was unable to confirm for the tribunal what exactly those consisted of.
- 15 82. Dr Reed's reliance on the claimant's history limited the reliance the Tribunal was able to place upon this. The value of his evidence was to very great extent dependent upon the information which has been supplied to him by the claimant. This, it appeared to the tribunal was apparent for his answer to the question -when did he considered that the adverse effects became substantial? In answer, Dr Reed stated that the impairment became substantial during the evolution of the right-sided hallux valgus condition when her walking tolerance became more seriously limited. He stated that it was not always possible to put an exact date on, he believed it was likely to have been early 2017 at the latest when she started to realise that the surgery was inevitable.
- 20 83. It was however unexplained as to what was meant by the claimant's walking tolerance being severely limited.
- 25 84. The evidence the Tribunal heard about the claimants walking tolerance was that at some point prior to operation on her left foot she could walk for up to half an hour without experiencing pain and that at some point prior to the surgery on her right food she experienced the symptoms to those which she had connection with her left foot.

85. In cross examination Dr Reed accepted that the identification of early 2017 effectively was a guesswork on his part.

86. These deficiencies meant that the tribunal ultimately could attach little weight to Dr Reed's evidence as to the physical effects of the claimant's impairment.

5 87. His evidence to the effect that it was plausible that the claimant was suffering a material substantial effect from her impairment because she requested surgery, was insufficient to allow Tribunal to conclude with out more, that the claimant was suffering a substantial adverse effect from her impairment, or what that effect was.

10 *Dr Moir*

88. Dr Moir's report was agreed to the extent that it was agreed he had produced a report in those terms.

89. The Tribunal did not hear from Dr Moir. Disagreeing with Dr Reed statement to the effect that without treatment the claimant's initial condition could have led to very severe restriction on a long-term basis, he express the opinion in
15 his report that following his experience patients with apparently severe hallux valgus can continue to carry out normal day-to-day activities.

90. Dr Moir is a consultant orthopaedic surgeon, the Tribunals was more inclined to accept his opinion on that point, rather than a Dr Reed. That however did
20 not assist a great deal in resolving the apparent conflict between the two experts.

91. The crux of Dr Moir's report is his answer to question (3) and (9) set out above in the findings in fact. Mr Hay submits that Dr Moir appears to set up categories of impairment such as 'substantial limitation', 'mild to moderate
25 difficulty', 'mild restriction', 'minor restriction' but that it is not clear precisely what he means to convey with these terms, and they all appear to be more than trivial. Further, Mr Hay submits that there was no conspicuous consideration by Dr Moir of the Guidance to assist him in understanding the provision of salient input to the Tribunal.

92. The tribunal consider there is some weight in that submission. Albeit, as submitted by Ms Ross, Dr Moir was provided with a copy of the Guidance in the joint letter of instruction, it is not clear what he means by limitation of walking, prolonged weight bearing, or for how long this would have been the case prior to March 2018, and the weight which the tribunal can attach to Dr Moir's report is limited by these factors.

List of Authorities

93. The Tribunal had the following authorities ‘

1. *Abadeh v BT* [2001] IRLR 23
2. *Mowat-Brown v University of Surrey* [2002] IRLR 235
3. *Grimley v Turner & Jarvis Co Ltd* UKEAT/0967/03
4. *Woodrup v London Borough of Southwark* [2003] IRLR 111
5. *Swift v Chief Constable of Wiltshire Constabulary* [2004] IRLR 540
6. *Patrick Carden v Pickerings Europe Limited* [2005] IRLR 720
7. *Commissioner of Police for the Metropolis v Viridi* UKEAT/0338/06/RN
8. *Richmond Adult Community College v McDougall* [2008] IRLR 227
9. *Anwar v Tower Hamlets College* UKEAT/0091/10
10. *J v DLA Piper UK LLP* [2010] ICR 1052
11. *Aderemi v London and South Eastern Railway Ltd* UKEAT/0316/12
12. *London Luton Airport Operations Limited v Ms R Daubney* UKEAT/0270/18/LA
13. *Sullivan v Bury Street Capital Limited* UKEAT/0317/19
14. *Arderemi v London and South East Railway Company Ltd* UKEAT /316/12
15. *Boyle v SCA Packaging Ltd* (2009)UKHL37

16 *Equality Act 2010 Guidance - Guidance***Submissions**

94. Both parties very helpfully produced written submissions.

Claimant's submissions

5 95. Mr Hay confirmed that impairment upon which the claimant relied is the physical impairment in connection with her right foot, arising from hallux valgus (bunion) in that foot.

10 96. Mr Hay began with observations on the evidence, submitting that the claimant's evidence should be accepted as a credible and reliable. He submitted there was little by way of direct evidence to contradict what the claimant said. He submitted the claimant did not already occur testimony. Mr Hay submitted that there was something of a mystery with a contradiction in the claimant's evidence as to when she returned to work after her first operation, her position being that that was in June 2011, and the respondent records which record her retirement in May 2011, but that was not taint overall to the credibility of her evidence.

15

20 97. Mr Hay urged the Tribunal to accept the evidence of Dr Reed as credible and reliable, and not to consider there was some medical hierarchy which meant his evidence was less valuable than that of Dr Moir. In relation to Dr Moir's evidence Hay submitted that the content of the report is not in dispute, but his opinion was more influenced by his general experience and by the claimant's particular condition. Furthermore, he was all clear what Dr Maureen intended in some sections of this report where he was describing the effects of the claimant's impairment.

25 98. Mr Hay urged the tribunal to treat Mr Coyle and Mr Craig's evidence with some caution. He submitted that much of their evidence was very general in nature, and to that extent was not evidence to which particular weight could be attached.

99. Mr Hay made submissions on the facts he invited the tribunal to find as to the effect of the claimant's impairment. These included a number of fights as to the fate of impairment arising from her hallux valgus in her left foot. He submitted that while the claimant was not relying on this impairment there was an evidential value to this in that it proved a useful insight on her right foot during the period of time with which this claim is concerned.
100. Mr Hay submitted that the claimant experienced severe post-operative pain, followed by a slow recovery, and that the claimant did not make a full recovery until December/January 2019.
101. Mr Hay then addressed the tribunal the relevant law, and how that should be applied to the facts.
102. He submitted that the evidence supported the conclusion that the claimant met all of the statutory tests and satisfied the definition of disabled in terms of the EQA.

15 *Respondent's submissions*

103. Ms Ross also addressed the tribunal on the relevant law, and made submissions on the facts which the tribunal should conclude, together with observations on the evidence. Which briefly these wear to the effect that the tribunal should accept as credible and reliable the evidence of Mr Coyle and Mr Craig who were well placed to observe the claimant at school. Ms Ross acknowledged that the tribunal's focus has to be on what the claimant cannot do, rather than what she can do evidence of what she could do was relevant to this assessment.
104. Ms Ross also submitted that the tribunal should not find the claimant to be a credible or reliable witness on a number of instances, of which she gave examples in her submissions.
105. Ms Ross submitted that Dr Reeds evidence should not be preferred to Dr Moir's, not least because it was apparent he had a copy pf the Guidance in front of him while giving evidence. Dr Moir was in any event better qualified in consequence of his specialism to comment on matters.

106. Ultimately, Ms Ross submitted that the claimant had failed to discharge the burden of proof which rested with her
107. Ms Ross addressed the question of the claimant's impairment.
108. She submitted that the claimant has had the condition of hallux valgus, known colloquially as bunions. That, she submitted is the only impairment which has
5 been pled and therefore the only impairment which the Tribunal could, consider for the purposes of this Hearing.
109. She submitted that it was important not to confuse any adverse effects of any of the other conditions such as pes planus (flat feet), hammer toes, plantar
10 fasciitis, anterior tendonitis or arthritis with any adverse effects of the hallux valgus. The claimant highlighted these further conditions in her evidence for the first time. They are not mentioned in the ET1, nor were they flagged during the case management of these proceedings.
110. The claimant suggested late in her evidence that some of these conditions
15 may be linked. There is no medical evidence from which the Tribunal could conclude that the conditions are linked to the hallux valgus and neither of the medical experts were asked to comment on this as part of the remit of their reports. That is because there is nothing in the Claimant's pleadings about any linked conditions and therefore the Respondent had no indication of any
20 suggestion of linked conditions. It should be remembered that the letter of instruction to Mr Moir was agreed between the parties with a view to obtaining a report to assist the Respondent in deciding whether it accepted whether the claimant was disabled. Mr Moir in fact would have been well placed to comment on any link; indeed, he does comment on the fact that, contrary to
25 the claimant's assertion that the arthritis in her knee is in some way linked to her hallux valgus, the knee pain was unrelated.
111. The Claimant has been represented from August 2018 when she obtained Dr Reed's report and therefore has had ample opportunity to obtain any evidence to support her assertion as to any other condition being linked to the hallux
30 valgus.

112. Mr Ross referred the Tribunal is referred to the decision of the EAT in *London Luton Airport Operations Ltd v Levick* [2019] UKEAT/0270/18 [p132 of PDF paras 20-23]. In that case, the Claimant had only pleaded disability based on an impairment of Atrial Fibrillation. During case management, a list of issues was agreed, including "does the Claimant have a physical impairment, namely Atrial Fibrillation ("AF")?" The Claimant produced an impact statement and mentioned that the AF had worsened his depression. At a Hearing, the Claimant argued that his depression amounted to a disability. The Tribunal found that he was disabled on the basis of depression. The EAT overturned this decision on the ground that the Tribunal was not entitled to find disability on the basis of an impairment of depression as the Claimant's case was not pleaded on this basis and there had been no application to amend claim.
113. In the immediate case, the ET1 says that the impairment is solely hallux valgus [p14]. This was also recorded in the Tribunal's Note of the Preliminary Hearing on 9 Jan 2019 (para 2). It is not therefore open to the Tribunal today to find the Claimant disabled on the basis of any impairment other hallux valgus and it is solely the impact of that impairment which may be taken into account in assessing whether it constitutes a disability.
114. Ms Ross submitted the Tribunal must consider that the questions it has to answer have to be in the context of the condition of hallux valgus only.
115. Mr Ross then addressed the question of an adverse effect on day-to-day activities, or submitted it was not possible for the Tribunal to identify with the required clarity what the impact of the hallux valgus been, as opposed to the impact of other conditions. Crucially, neither medical reports produced addressed this issue, and there was no medical evidence to guide the tribunal. Further, the claimant said late in her evidence was only to consider the condition of hallux valgus. This statement was made after she had given the best part of these evidence, it seemed not appreciating that her evidence should have been limited to that condition.
116. Further to that, the claimant's first operation was intended to address the condition in addition to the hallux valgus and therefore it was impossible for

the tribunal to see what part of the impact on the claimant of that population was intervention required regarding hallux valgus and what part was the impact of the intervention required for the second condition.

5 117. Ms Ross addressed the tribunal on the meaning of normal day-to-day activities with reference to *Ardeemi V London and South Eastern Railway Co Ltd.*, and *J v DAL Piper*.

10 118. Ms Ross accepted that the claimant may have some discomfort at times but not to the extent she described. If she had experienced such discomfort it was unlikely she would have been able to carry out her duties in school, or that this would have been reflected in her medical records.

15 119. In relation to the question whether the effect was a substantial, Ms Ross submitted that different periods have to be addressed, and she made submissions on that. Ultimately however she submitted that it had not been established that the claimant had suffered a long term adverse effect, and the claim should fail.

Consideration

120. The Tribunal began by considering the relevant legislation.

121. Section 6 of the Equality Act 2010 provides:

(1) *A person (P) is disabled if –*

20 (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.*

122. Schedule 1 provides:

PART 1

25 *DETERMINATION OF DISABILITY*

...

2. Long-term effects

(1) *The effect of an impairment is long-term if –*

(a) *it has lasted at least 12 months*

(b) *it is likely to last for at least 12 months, or*

5 (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 persons ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if it is likely to recur.*

...

10 *PART 2*

The Guidance

Impairment

An impairment can be physical or mental (A.3)

15 *It is to be determined by reference to the effect that an impairment has on that person' abilities to carry out normal day-to-day activities (A.4, with original emphasis)*

Substantial Adverse effect

- *More than minor or trivial (B.1)*
 - *Includes the time taken for, and way in which, an activity is carried out (B.2 & B.3)*
 - *The cumulative effect of impairments should be considered (B.4)*
 - *Account should be taken of how far a person can reasonably be expected to modify his behaviour – such as coping or avoiding strategies (B.7, with original emphasis)*
- 20

123. It is important to consider the things a person cannot do, or only with difficulty (B.9 - see also *Aderemi v London & South Eastern Railway Co* [2013] ICR 591 at paragraph [14] per Langstaff P2).

Long term

- 5
- *Last or likely to last 12 months having regard to the cumulative effect (See C.2)*
 - *A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period (See C.7)*
 - *A person even if recovered to no longer be adversely affected may*
- 10
- *qualify as having been a disabled person for a relevant period of time if the effects lasted 12 months or more after the first occurrence, or if a recurrence happened or continued until more than 12 months after the first occurrence (A.16 and C.12)*

Normal Day to Day Activities

- 15
- *Includes shopping, walking, driving and taking part in social activities (D.3)*
 - *Also includes standing up in the workplace, lifting, carrying everyday objects such as a vacuum cleaner (D.10)*
 - *Includes indirect effects of pain or fatigue restricting the way that it is*
- 20
- *carried out because of experiencing pain in doing so (D22)*
 - *Difficulty going up or down steps, stairs or gradients because movements are painful, fatiguing or restricted in some way (see Appendix to Guidance).*

124. There is no issue in this case that the impairment which the Tribunal is
25 concerned is the claimant's right foot hallux valgus. It is the effects of that impairment which the tribunal has to consider.

125. The claimant's evidence in chief as to the effects of that impairment was that her right foot had been an issue since the time of the surgery in February 2011

on her left foot, and that it steadily got worse. She said that she was in no rush to go for surgery because of the recovery time, and personal family circumstances, but that in August 2017, she was experiencing pain in her right foot which she thought was getting worse, and she asked for surgery. She said that the symptoms were the same or perhaps worse as those she has suffered in her left foot.

5
126. The claimant in her evidence in chief did not however explain in any detail how, or when those symptoms (other than saying she experienced pain in her right foot which she thought was getting worse in August 2017) manifested itself or how or when her symptoms impacted on her ability to walk, stand, or climb stairs.

10
127. The tribunal take into account Mr Hay's submission that there was a evidential value in the claimant's evidence about the consequences and effects of the hallux valgus in her left foot. The claimant did indeed give evidence as to the consequences of that impairment in her left foot (which is set out in the findings of fact.) The tribunal however considered that that evidence lacked focus, not least in that it was difficult to determine what condition gave rise to problems which she said she experienced.

15
20
25
128. The claimant said that in 2005 she had general aches and pains particularly towards the big toe on both feet. She said it was suggested to her that she had plantar fasciitis, and it was suggested that she went down the road of orthotics. She said this orthotics were made at the hospital and she was prescribed painkillers. She said she had a discussion with her GP about an operation to help the bunions but it was decided it was better to manage with painkillers and orthotics.

129. The claimant's evidence was that her left foot was worse at the early stages and her bunion was quite pronounced. She said she had the beginning of hammer toe. She said the treatment was orthotics and that she started to buy wider fitting shoes.

30
130. The claimant's evidence was that by 2006/2007 the pain was getting worse and her left foot was becoming more misshapen. She said that in addition to

bunions she was diagnosed with had fallen arches and arthritis in her foot and ankle.

131. The claimant was asked about the time between 2005 and her first operation (February 2011) how the symptoms of her bunion progressing?

5 132. In response he claimant's evidence was that between 2005 and the time of her first operation which was in 2011 her bunion was becoming increasingly painful. She said she frequently woke up at night with the pain but did not go for surgery because of family circumstances. The claimant's evidence was it was hard to say for definite when she started to wake up with the pain but it
10 was for a few years and it was more nights.

133. The claimant was asked how her mobility was affected. She responded that she could not walk for long distances, and the main thing was that she had to ensure that she was wearing sensible footwear. She said she could still go to the gym as she could walk on the treadmill which she found it easier than
15 walking outdoors. She said she could walk for maybe half an hour before her foot became painful. She was asked about walking on a hill up the stairs and said that was more painful.

134. Asked about stairs, the claimant said that she had to use the hand rail and take her time going up and down stairs. She also said that she was looking
20 after her grandson by 2005 in her daughter's house which contained a number of stairs. She described navigating the stairs holding her grandson as 'a bit tricky.'

135. The claimant was asked about standing, and said that was beginning to become an issue and that she began to move from foot to foot when standing.
25 Her evidence was that when standing for a prolonged period this could aggravate her left foot by causing it to swell, and when she came for work she had to rest her foot.

136. The claimants evidence therefore made little attempt by the to identify during the period from 2005 to 2011 if, or when, any of the symptoms she spoke of
30 experiencing intensified, or when (other than in 2005 when she said climbing

stairs holding her grandson was a 'bit tricky') she began to experience the particular effects of the symptoms on her day-to-day activities in the period.

137. The Tribunal was not assisted in determining this issue by the contents of the claimant's medical report produced for the purposes of this hearing. There is
5 no reference in the of any discussion about issues with the claimant's left foot prior to her referral for her operation in March 2011. The notes are basically confined to the referral and follow up from the operation, and a note from 2 February 2011, very shortly before the operation, which recorded among other things that the claimant was exercising three days per week.
- 10 138. The claimant's evidence to the effect that the symptoms in her right foot were the same or worse than those in her left foot, did not shed any significant light on when during the period between 2011 to 2018, the claimant began to suffer the adverse effects of which she complained in walking, standing, and stair claiming, or to what extent that effect worsened over that period as a result of
15 her right foot hallux valgus.
139. In his submissions Mr Hay submitted that the claimant considered that the matter had become sufficiently difficult for her by 2016 when she attended and Orthotics Clinic and required to leave school slightly early on Fridays where she had four appointments in total over 2016 and 2017. That in
20 addition, the claimant attended a physiotherapist at that time and she required to continue to take anti-inflammatories and painkilling medication which she had taken since 2005, increasing the dose when necessary.
140. There was however no medical evidence before the tribunal to support the conclusion that the claimant attended and Orthotics clinic because of the
25 problem with her bunion on her right foot, or that that was the reason for the physiotherapy, or taking painkillers. The tribunal was not assisted in this regard by the medical records produced by the claimant for the purposes of this hearing. The claimant's GP records do not record her having attended her GP in connection with issues arising from her right foot in the period from
30 9th May 2011 until after operation for the right foot in March 2018, other than

the referral letter for the operation, the terms of which is set out in the findings in fact.

141. In cross examination the claimant sought to suggests that the medical records were incomplete and that she had attended her GP in connection with issues with her right foot, and that she was being prescribed anti-inflammatory medication. She said that she was still attending the orthotics department and that she was on the waiting list for surgery.
142. There was however no medical evidence before the tribunal to support the conclusion that the claimant attended and Orthotics clinic because of the problem with her bunion on her right foot, or that that was the reason for the physiotherapy, or that she was prescribed painkillers for that reason.
143. Mr Hay submitted that the absence of medical evidence was not evidence of absence, and that there could be occasions when medical records were not complete or reflected all of the matters raised by a patient. He submitted that the claimant's evidence as to her attendance at the orthotics clinic over four appointments was not extravagant, and should be accepted.
144. The tribunal however did not find the claimant's evidence about a referral some point in 2016/ 17 to the orthotics clinic, and continued prescription of anti-inflammatory medication because of problems arising from bunion on her right foot, to be convincing. In cross examination the claimant sought to suggests that the medical records were incomplete and that she had attended more than one occasion about problems with her right foot, saying that she had a number of different GPs in her Practice. Her evidence was evidence was that she was being prescribed anti-inflammatory medication; she said that she was still attending the orthotics department; and that she was on the waiting list for surgery. The claimant could not say how many times she attended her GP, who she saw or what was discussed, which undermined the suggestion that she had had consultations with her GP as she suggested. Ultimately it appeared from the claimant's evidence on further questioning that she departed from her original position and in fact accepted that she did not

consult her GP about issues with her bunions other than for a referral for surgery.

145. In relation to visits to the orthotics clinic, the lack of medical evidence linking any such attendance to the hallux Valgus in her right foot undermined the credibility of the claimant's assertion that that was the reason for attendance, particularly in light of her evidence that she suffered from other conditions, including fallen arches.
146. The claimant was on the waiting list for surgery, but that that was only have been for around the time the referral was made in August 2017 and the Tribunal was satisfied that the claimant had not contacted her GP about any issues arising from her right foot hallux Valgus in the period from May 2011 until September 2017 when she asked for a referral for surgery.
147. For the purposes of the determination of the issue before it, it is relevant for the Tribunal to consider the effects of the impairment of hallux valgus in the claimant's right foot both prior to her operation in March 2018 and post operatively.
148. In considering the effects of that impairment in the period prior to her operation in March 2018, the Tribunal take into account Mr Hay's submission that bunions are condition which worsen, and it is difficult for claimants to identify when they begin to suffer a particular effect over a period of time. However, the claimant's evidence as to the effects of her condition covered a period of 7 years and comprised of very general statements, by referring to symptoms she had experienced in a period between 2005 and 2011.
149. This in the Tribunal view this made it difficult to determine what the effects of the claimant's impairment in her right foot were, and when and to what extent she experienced those symptoms. Further, even allowing for the difficulties which Mr Hay alluded to in his submission in the Tribunal's view the fact that the claimant was unable to give more specific evidence about the effects of her hallux valgus impairment on her right food in the period from 2011 up until her operation in 2018, also to a degree adversely impacted adversely on the credibility and particularly the reliability of the claimant's evidence as to the

effects of that impairment on her ability to carry out the day to day activities of walking, standing and stair climbing.

150. Even taking the claimant's evidence at its highest, she accepted that she could walk for half an hour before experiencing noticeable pain. The claimant regularly walked around one mile a week, and sometimes more often than that, in the conduct of her duties which took her 15 to 20 minutes.
151. In considering substantial adverse effect on mobility The Guidance gives an example in the Appendix of where there would be no substantial adverse effect on mobility, to include where a person experiences some tiredness or minor discomfort as a result of walking unaided for a distance of about 1.5 km or 1 mile.
152. In relation to weight bearing or standing, again the claimants made little attempt to identify over a period of 7 years when she suffered the substantial adverse claimed of experiencing pain and swelling if she stood for prolonged periods, or what the trigger was for her experiencing those symptoms. It was only in answer to questions from the Tribunal after her evidence in chief and cross examination had been completed, that the claimant hazarded that she could stand for around 20 minutes before she experienced pain. The Tribunal formed the view that although it might be explained by the claimant feeling she had to answer the question asked, this was an entirely arbitrary assessment on the claimant's part, rather than one which reflected the reality of the situation. While the tribunal was satisfied that it was likely that the claimant sat down from time to time in the delivery of lessons, it was unable to reach a conclusion on the basis of the evidence before it as to how often the claimant would have done this, or at what point standing would have caused her noticeable discomfort.
153. In relation to stair climbing, Mr Hay submitted that the claimant required to use the hand rail and take time, and that it was 'pretty painful'. He submitted this would develop further into a coping strategy of walking down stairs like a toddler, having both feet on each step before moving to the next step. He submitted there were issues of balance if the claimant was carrying objects

and required to use the stairs and problems will be encountered both at work which was over three levels.

154. The only evidence of the coping strategy to which Mr Hay alluded was in 11 June 2018 after the operation on her right foot, when the claimant said she saw Mr Coyle at school and she was walking in the manner described by Mr Hay. There was no evidence to support the conclusion that claimant adopting this strategy at any time before that. Nor was there any evidence of the claimant having difficulty in walking and down stairs at school at any time prior to her operation in March 2018. Albeit she said that she had to rest her feet on occasions after work because of pain and swelling (a matter which is dealt with below) there was no evidence upon which the tribunal could conclude that the speed or way in which the claimant negotiated the stairs which she had to climb up and down on a frequent basis at school was impacted by her impairment.
155. In reaching its conclusion on this the Tribunal drew to an extent on the evidence of Mr Coyle, and Mr Craig neither of whom witnessed the claimant experiencing any noticeable difficulty negotiating stairs, and on the fact that the claimant elected not to use the lift in the school which would have been available to her after the school refurbishment.
156. In relation to the balance point, the principle thrust of the evidence was that the claimant found carrying her grandson up and down stairs in 2005 in her daughter's house a bit tricky. This was not a basis upon which the Tribunal could reach a conclusion as to what extent there were issues of balance with the claimant carrying objects up and down stairs.
157. While there was some evidence of compromise the claimant's ability to drive prior to 2011, there was no evidence upon which the Tribunal could conclude that the claimant's ability to drive was substantially adversely affected thereafter in that her evidence was that by 2018 she did not drive more than short distances (for reasons unconnected her foot), which she could manage.
158. In relation to the claimant evidence about prolonged standing, walking, or stair climbing causing her foot to swell and become painful, which caused her to

rest her food when she returned from work, there again was little in the claimant's evidence by way of identification as to when this became the case in the period between 2011 to 2018. Furthermore, the picture is considerably complicated in that in addition to hallux valgus in her right foot, the claimant's own evidence was she suffering from a range of afflictions in her right foot. This was corroborated by the medical evidence in particular Dr Gandhi's letter in 2010, which stated that in addition to hallux valgus she was suffering from hammering of both 2nd toes, and bilateral pes planus. In addition to this, the claimant gave evidence to the effect that that she was diagnosed with arthritis. The claimant's evidence conveyed a fairly strong impression that she suffered from a range of difficulties with her feet, and indeed she referenced this on more than one occasion in the course of cross-examination. As pointed out by Ms Ross in submission, the claimant said cross-examination that she thought that all issues she had with her foot were under consideration.

15 159. Against this background the claimant's evidence as to the extent to which the pain and swelling in her right foot was caused by hallux valgus, and the extent to which she had to rest her foot because of this, was not reliable. It possible was not possible for the tribunal to conclude that to the extent the claimant suffered pain and swelling in her right foot, or required to rest this, that this could be attributed solely to the impairment or hallux valgus in her right foot.

20 160. Mr Hay suggested that the claimant's conditions were linked, and therefore the circumstances of this case could be distinguished from those in *Luton Airport v Action*. He also submitted that if there was a pleading deficiency the tribunal could adopt a more flexible approach than might be taken in other forums.

25 161. The issue however is that the tribunal has to consider the effects of the impairment which was pleaded, and of which the respondent had fair notice. It was this impairment, and not any other impairment, that the respondents accepted the claimant had in advance of this Preliminary Hearing. It was on the basis of that impairment that medical reports were instructed. There was no medical evidence before the tribunal to suggest that the three conditions

30

identified by Dr Gandhi were linked, or that they arthritis the claimant complained of was linked to her impairment of hallux valgus

162. It is relevant for the tribunal to consider the effects of the impairment of hallux valgus. Given the other problems which affected claimant's right foot, the tribunal could not be satisfied as to what extent the pain, swelling and the need to rest her foot about which the claimant gave evidence, could be attributed to the impairment of hallux valgus.
163. The claimant's evidence about her post-operative recovery was to some degree uncontroversial, and there was no dispute that for a period after her operation the claimant's mobility was severely restricted. There is an issue as to how long that remained the case.
164. Mr Hay's primary position is that the claimant made a full recovery, but was significantly compromised as to her mobility until late December 2018/early January 2019. He submitted that the claimant considers herself it to return to work by October 2018, and his *esto* position was that she had made a recovery by then.
165. As with Mr Hay's submission to the effect that the tribunal should conclude that the claimant began to suffer a substantial adverse effect from her right foot hallux valgus from 1 January 2016, or some other date in 2016, this underlined the difficulties determining to what degree and for how long the claimant was affected by her impairment.
166. As pointed out by Ms Ross it was likely there was a period prior to full recovery when the claimant did not suffer a substantial adverse effect on her mobility. The Tribunal did not accept as reliable the claimant's evidence, which was given after much hesitation, to the effect that she continued to limp until December/January, as that was also the date upon which she stated she had made a full recovery.
167. In reaching this conclusion the tribunal take into account its conclusion that the claimant considered she was fit to return to work, with all that involved, in August 2018.

168. Although the claimant stated that she would have been fit to return in October evidence, Mr Moir's report records that she indicated she could have returned in August. The tribunal accepted that this was more likely to reflect the reality of the situation, in particular, as the claimant's GP records indicated that she was fit to return (WHEN??) subject to limitation on teaching PE.
169. In considering the question of disability status, the reminded itself that is focus is not on the things which the claimant could do, but rather on the things which she could not.
170. Against these conclusions as set out above, on analysis of the evidence before it, the tribunal considered whether the claimant had established that as a result of impairment of right hallux valgus, there was a substantial adverse long-term effect on her ability to carry out day-to-day activities.
171. It also reminded itself as to the meaning of substantial, which is more than trivial or minor, and that the cumulative effects of the impairment should be taken into account.
172. The Tribunal also reminded itself of the meaning of day-to-day activities, which include walking, standing, stair climbing and driving.
173. Lastly reminded itself of the meaning of long term, as set out above, which includes the person may still satisfy long-term element or the definition even if the effect is not seen throughout the period.
174. The tribunal also reminded itself that the burden of proof rests with the claimant to establish disability status. For the reasons set out above quality of the evidence before the tribunal was such that, while it was satisfied there was a period post operatively where the claimant suffered a substantial adverse effect as a result of her impairment, it was unable to conclude that effect was long term.
175. The result of that conclusion is that the claimant failed to established disability status under Section 6 of the EQA.

176. There are other elements to this claim, which should now proceed to the final hearing. If either party wishes to make an application for a Preliminary Hearing to consider case management issues, it will be open to them to do so.

5

10

15

20

Employment Judge: Laura Doherty
Date of Judgment: 27th February 2021
Entered into Register: 27th February 2021
Copied to parties

25