



EMPLOYMENT TRIBUNALS

Claimant: Mr J Williams
Respondent: North Wales Fire and Rescue Service
Heard at: Cardiff **On:** 20 May 2021
Before: Employment Judge C Sharp (sitting alone)

Representation:
Claimant: Miss Owusu-Agyei (Counsel)
Respondent: Mr Fergus Currie (Counsel)

RESERVED JUDGMENT

1. It is found that the Claimant was not disabled as at 26 March 2020 and the disability claim is dismissed. The remaining claims will proceed.
2. The parties are directed within 7 days of receipt of this written reasons to write to the Tribunal office, after attempting to reach an agreement, to confirm the number of days they consider is required for the Final Merits Hearing and if any further directions are required.

REASONS

1. The issue that the Tribunal has been asked to determine today is whether the Claimant was disabled for the purposes of the Equality Act 2010 (“the Act”). The Claimant has brought a claim for discrimination arising from disability under Section 15 of the Act (together with a claim of unfair dismissal and breach of contract) against the Respondent. The unfavourable treatment of which the Claimant complains was his dismissal which took effect on 26 March 2020. While the decision to dismiss was made on or around 20 March 2020, the actual alleged unfavourable

treatment did not occur until 26 March 2020 as submitted by Miss Owusu-Agyei, who appeared on behalf of the Claimant.

2. The Claimant was employed by the North Wales Fire and Rescue Service, the Respondent, as a Retained Fire Fighter from 28 March 2005 to 26 March 2020 when he was dismissed on the grounds of capability. The Claimant's case is that on 15 January 2019 while undertaking a ladder drill at Blaenau Ffestiniog Fire Station and erecting a ladder, he felt a twinge in the left side of his neck causing pain. This was the beginning of his physical impairment which he asserts is a disability.
3. The Claimant's case is that he suffers from a neck impairment, or pain in the neck (the medical term for which is cervicalgia). It has also been described as a muscle spasm or strain. All accept there is no need for the Claimant to have a formal medical diagnosis - he simply has to indicate the nature of his impairment, which he has done. The Respondent though does not concede the Claimant is disabled.
4. I have had the benefit of hearing oral evidence from the Claimant regarding the alleged substantial adverse effect on his ability to carry out normal day to day activities caused by his impairment, together with his written disability impact statement and a copy of his GP medical records, Occupational Health Reports, letters from the Spinal Clinic Unit at Glan Clwyd Hospital, and reports from the Pen Y Lon Physiotherapy Service. The Claimant was subjected to cross-examination. I had the benefit of hearing the submissions of Miss Owusu-Agyei who appeared on behalf of the Claimant, and Mr Currie, on behalf of the Respondent, both of whom are Counsel.

The Law

5. There was no dispute between the parties as to the relevant legal principles. I was referred to a number of authorities. Miss Owusu-Agyei referred me to the case of ***Aderemi -v- London and South Eastern Railway Limited [2013] ICR 591***. Mr Currie referred me principally to the cases of ***Leonard -v- Southern Derbyshire Chamber and Commerce [2021] IRLR 19*** and ***Abadeh -v- British Telecommunications PLC [2001] IRLR 23*** (he also referred me to a third case of ***MOD -v- Hay [2008] IRLR 227***, but its assistance was on reflection very limited). All the authorities were from the Employment Appeal Tribunal.
6. The starting point is the definition of disability under Section 6 of the Equality Act 2010:

“Disability:

(1) a person (P) has a disability if –

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

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

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

(6) Schedule 1 (disability: supplementary provision) has effect".

7. Schedule 1 of the Act contains a number of relevant provisions. Paragraph 2 deals with the issue of "long term" and says:

"2 (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 treated as continuing to have that effect if that effect is likely to reoccur."

Paragraph 5 of Schedule 1 says:

"5(1) An impairment is treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if –

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "measures" includes, in particular, medical treatment and the use of a prosthesis or other aid."

8. An Employment Tribunal should consider the guidance issued by the Secretary of State regarding matters to be taken into account when determining questions relating to the definition of disability and the Employment Statutory Code of Practice by the Equality and Human Rights Commission.
9. Section 212(1) of the Act states that the word "substantial" means more than minor or trivial. The case of **Aderemi** confirms at paragraph 14 of the Judgment of Mr Justice Langstaff (then President) that: *"...the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provide for a bifurcation: unless a matter can be classified within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."*
10. The parties agree that the Tribunal must consider the adverse effect on the normal day to day activities carried out by the Claimant as if no correcting measures or treatment were in place, but if the impairment is cured or improved following the conclusion of treatment, this is a relevant factor in analysing the effects of the impairment on the Claimant (**Abadeh** -

paragraphs 30 and 31 of the Judgment of Mr Justice Nelson). The focus must be on what the Claimant cannot do or can only do with difficulty (**Leonard**). It is important to step back and look at the overall picture (confirmed recently in the EAT case of **Elliott -v- Dorset County Council** UKEAT/0197/20/LA). The disability does not need to be permanent and the appropriate comparison is to compare what the Claimant could do normally when not impaired to the impact of him due to the impairment (**Paterson v The Commissioner of Police of the Metropolis** UKEAT/0635/06). The onus is on the Claimant to satisfy the burden of proof that he is disabled for the purposes of the Equality Act.

11. At the outset of this hearing, I went through the four questions set out in the case of **Goodwin -v- Patent Office [1999] ICR 302** set out by Mr Justice Morison (then President) in order to ascertain what issues were disputed and needed to be resolved by the Tribunal today:

(1) Did the Claimant have a physical impairment? The Respondent accepts that the Claimant had a neck impairment or pain in the neck from 15 January 2019 onwards.

(2) Did the impairment affect the Claimant's ability to carry out normal day to day activities? The Respondent concedes that the injury suffered on 15 January 2019 giving rise to the impairment has affected the Claimant's ability to carry out normal day to day activities.

(3) Was the adverse effect substantial? The Respondent disputes this and says that the adverse effect, taking the Claimant's case at its highest, is nothing more than minor or trivial. The Respondent also in its submissions (and during cross-examination) submitted that the Claimant's account was not credible and he was exaggerating the adverse effect the impairment was having on his ability to carry out normal day to day activities.

(4) Is the adverse effect (upon the Claimant's ability to carry out normal day to day activities) long term? The Respondent disputes that the adverse effect was long term. It is worth pausing to note that the requirement of long term in the Judgment of the Tribunal applies to the adverse effect, and not necessarily to the condition or impairment. The reason that the Tribunal makes this observation is that during the submissions of Miss Owusu-Agyei, she submitted that suffering from pain itself, whether or not it affected the ability to carry out day to day activities, was in itself an adverse effect justifying a finding of disability. The Tribunal was not persuaded by this submission and considers it a requirement of the Act that the long-term requirement applies to the adverse effect on normal day to day activities. This does not mean that pain is irrelevant as clearly if an individual suffers pain when carrying out their normal day to day activities, this may render the activity something that the individual either cannot do or can only do with difficulty.

Submissions

12. Given that there was no dispute between the representatives about the law, the Tribunal considers it sufficient for the purposes of these written reasons to summarise briefly the parties' submissions.
13. Mr Currie submitted that the adverse effects of which the Claimant complained were not substantial and that the Claimant was not credible and had exaggerated his suffering. Mr Currie highlighted a number of documents which he said demonstrated that the Claimant was inconsistent in his account. For example, the evidence showed that the Claimant told the Pen Y Lon physiotherapists when he was discharged on 8 May 2019 that he had experienced a 60-70% improvement in his symptoms, but then told the Occupational Health doctor on 15 July 2019 that his neck problems had not really changed since he had first injured himself. Mr Currie also submitted that the impact of the impairment had not been long-term and the medical evidence supported his contentions in that regard.
14. Miss Owusu-Agyei submitted that much of the Claimant's evidence was unchallenged and that if the Tribunal merely considered this evidence, it should conclude that he had suffered a substantial adverse effect due to the suffering of pain (paragraphs 20(a) and 20(h) of his witness statement), the need to be careful and cautious when undertaking activities (paragraph 20(c)), the difficulties he outlined regarding his sleep (paragraph 20(d)) and the pain he suffers when driving (which merely for work purposes was at least three times a week during the relevant period). Miss Owusu-Agyei said that the Claimant's account was credible and that it was hardly surprising or uncommon for people having physiotherapy to have an improvement in symptoms but then worsen. She submitted that the Claimant simply was answering questions to the best of his ability when asked, but the nature of his condition was that things changed on a day to day basis. She submitted that the Claimant's treatment was continuing for a longer period than the Respondent had submitted, as shown by his visit to see the Specialist in March 2020, and that the timeline alone demonstrated the long term nature of his condition.

Findings

15. Given that the existence of the impairment is conceded, as is the adverse effect on normal day to day activities, the principal issue that the Tribunal must determine is whether the Claimant has suffered a substantial adverse effect on his ability to carry out such activities. The Respondent was not precise as to exactly which activities it considered to be normal day to day, but the Claimant in his disability impact statement spoke of suffering pain that stops him undertaking an activity when it occurs. He specifically referred to having to be "*careful when reading, doing chores in the house*

such as cleaning/DIY, any activity that would mean raising the arms above shoulder height and doing things like cleaning my teeth and when getting washed in the shower". He also referred to having to be "very careful in relation to turning my head and neck because of this... I turn from my waist." The Claimant said he suffered from sleeping difficulties which means that he often wakes up in the night (up to 3 times a night) with a sharp pain in the left side of his neck and having to readjust his sleeping position. The Claimant described having difficulties getting back to sleep and feeling tired during the day. The Claimant went on to say that he had difficulty looking to the left when driving and approaching junctions and roundabouts and his full movement is restricted when playing golf making it a frustrating and sometimes painful experience (though I am given to understand by those who play golf, finding it frustrating is not an uncommon experience). As explained above, the Tribunal is not satisfied that merely suffering pain is sufficient to meet the statutory definition of disability and that the adverse effect must relate to normal day to day activities.

16. The Claimant in his oral evidence was laudably clear that his impairment does not stop him doing any activity. His point was that some activities were more difficult than others and he had had to make adaptations. When asked by the Tribunal, the Claimant said that the adverse effects as set out in his witness statement applied for the whole period from the date of the injury to today. The Tribunal was troubled by this as the Claimant's evidence was that his condition could be very different on a day to day basis ranging from feeling no pain to feeling a sharp stabbing pain which is quite intense and very painful. In addition, the medical evidence before the Tribunal demonstrated that the Claimant's difficulties were not of the same level every day (a point that shall be returned to later in this Judgment).
17. The Claimant's oral evidence was confused and at points could not be fully relied upon. At a number of points, the Judge had to ask the Claimant to answer the question which he had been asked. No adverse inference was drawn because the Claimant was in an unfamiliar position attending a Tribunal hearing and trying to give evidence through a video platform. While all involved were careful to ensure that if there was any difficulty in hearing the witness or Counsel was asked to repeat what they had said, the Tribunal took into account when assessing the Claimant's oral evidence, the undoubted additional challenges this posed for him. Despite this, the Claimant at points did not appear to the Tribunal to be giving his evidence in a straightforward way, particularly when he was challenged about the medical evidence and the inconsistencies between his evidence and that recorded in the medical records.
18. One of the most difficult aspects of the Claimant's evidence was his lack of precision. For example, he was asked about the impact on his ability to clean or carry out DIY and for more information than set out within his

- witness statement. However, all that the Claimant could say was that if he started to feel a twinge, he would stop doing an activity but he also said there was no activity he could no longer do. The Claimant said that he had not attempted much DIY in the twelve months before dismissal, but this was not said to be due to the impairment. The Claimant's evidence appeared to be focussed on his difficulties today. While his evidence was that lifting his arm was a problematic area for him, the Claimant during his oral evidence at one point did raise his arm to demonstrate a point, which was pointed out to him by Mr Currie and observed by the Tribunal. The Claimant's difficulties seemed to fluctuate, so it is unlikely the adverse effects could apply with full force at all times as the Claimant alleged.
19. The Claimant's oral evidence was that he had to take more breaks than he used to take when working from home (which was something he did before his injury) due to the recommendation from the Physiotherapist that he should move at least once an hour. The Claimant said he would take the opportunity to walk over to the kettle or perhaps into the garden. The Claimant's evidence was that he was able to carry out his primary job in a similar way as he did before the injury (his workload had in fact reduced due to a reduction of the number of people he was managing but this was not relevant to the injury) and that his employer had provided him with a slightly higher desk due to his neck difficulties. The details of this was not within his written disability impact statement.
 20. The Claimant gave oral evidence that the issue with reading was that he would not hold a book for 30 minutes in his hand but would instead place it on the table, so that the weight was taken by the table, rather than by the Claimant.
 21. The medical evidence insofar as it assisted the Tribunal in finding what the adverse effects were on the Claimant in the 12 months preceding his dismissal (or indeed the 12 months after the injury suffered in January 2019) confirmed the fluctuation of the Claimant's symptoms, which he himself accepted. The Claimant first visited the GP on 18 January 2019 in relation to the injury and was prescribed Ibuprofen 5% gel to apply 3 times daily to the affected area. There was a history of the Claimant having neck difficulties; in particular in 2007 he had neck pain and was treated using manipulation in October 2007 by a GP. The Claimant said that he had effectively forgotten all about this incident which was why he had not told Occupational Health when asked, but during cross-examination he said he did remember the doctor doing some kind of head exercise and dealing with the problem. The Occupational Health records show the Claimant had told the Occupational Health doctors that he could not really remember the details as far back as that in relation to any previous history with his neck, though he did discuss an injury suffered when playing golf 30 years ago.

22. The GP record says that on 21 February 2019 the Claimant's neck pain had begun to improve in the last few weeks as he was seeing a physiotherapist and doing exercise. It is not entirely clear what physiotherapist he was seeing as he was not referred to one until 24 April 2019 at the expense of the Respondent. On 21 February 2019, the GP also recorded that the Claimant had suffered an aggravating event when he moved quickly to look up at a cat, but he had a good range of movements and was told to continue to take Ibuprofen.
23. By 7 March 2019, the GP records that the Claimant had ongoing stiffness and no pain in the neck. Again, there was a good range of movements and no obvious spasm or muscle problem. On 4 April 2019, the GP record the Claimant suffered ongoing discomfort in his left neck and was awaiting a physio review.
24. Separately, the contemporaneous evidence shows that the Claimant saw the Pen Y Lon physiotherapists between 24 April 2019 and 8 May 2019. The physiotherapy was described as being a "hands on" form of physiotherapy and had led to a 60-70% improvement in the symptoms. The Claimant's evidence is that a few weeks later in or around June 2019 he then was referred to the NHS physiotherapists who did not carry out hands on physiotherapy but taught him exercises for him to carry out to improve his situation. The next relevant entry in the GP notes is on 8 October 2019 where the GP seems to have changed the way of recording entries in their medical records by choosing the most likely medical condition (cervicalgia) to start the entry and then records "*long history now of neck spasm and stiffness*" and a referral to the acute neck physio team.
25. The medical records show that a spinal clinical specialist physiotherapist saw the Claimant on 7 February 2020 and that he said he suffered from "*intermittent catching pain on left rotation only, it can set off a mini spasm which is very short lasting... he has had numerous physiotherapy as you have noted in your letter and overall this has made a great difference to his symptoms although they have not completely resolved them... neck range of movement is normal... I am pretty sure this will clear up his symptoms in a few weeks.*"
26. The next relevant entry in the GP notes is 17 and 21 July 2020 where the GP records the Claimant suffering from myofascial pain (muscle pain), that he performed manual therapy postisometric relaxation and discussed exercises with the Claimant. The Claimant's oral evidence was that he discussed whether a referral to an Orthopaedic Surgeon would be appropriate, but due to the potential risks of surgery this was not progressed. The Claimant's oral evidence was also that this was the time of COVID and nothing was moving in the Health Service, a point that I found persuasive in the circumstances.

27. The Occupational Health entries record that on 8 April 2019, the Claimant told the Occupational Health Doctor that he had no previous history with his neck and was not experiencing any pain down his arms but he was experiencing crunching with his neck and some restriction in the movement. On 15 July 2019 the Claimant reported that following the end of his physiotherapy with Pen Y Lon, his neck problems had not really changed since he had first injured himself and that the massage physiotherapist simply gave him short term relief. The Claimant told the Occupational Health Doctor that there were no neck problems prior to his injury (the GP notes indicate that there were a number of neck problems in 2007 and on two earlier occasions). The report shows that the Occupational Health Doctor was concerned that the situation had been going on for 6 months with no proper improvement.
28. At the request of the Respondent, the Occupational Health doctor on 17 July 2019 commented that the Claimant was unlikely to be disabled, though quite properly she pointed out that this was not a medical decision. The next report was 25 September 2019 where the Occupational Health Doctor records that the Claimant had an issue with his shoulder 30 years ago playing golf and he did not believe that he had had neck problems bad enough to see the GP, but he could not absolutely remember. The report added that *“he certainly knows that there have been no significant episodes which has meant he has had to have any time off work or with his neck being bad enough to see his GP...”*.
29. Following receipt of information from the Claimant’s GP, on 9 December 2019 the Occupational Health doctor summarised the evidence provided by the GP in a report to the Respondent.
30. The purpose of the medical evidence set out above is to gain a better understanding using contemporaneous evidence as to whether the Claimant suffered serious adverse effects affecting his ability to carry out normal day to day activities in the 12 months preceding his dismissal, or suffered an impairment which at times had a substantial adverse effect on his ability to carry out normal day to day activities and should be treated as continuing to have that effect because the effect is in the view of the Tribunal likely to reoccur. Medical evidence that postdates the date of dismissal can assist in deciding whether the Claimant meets the threshold of “substantial”.
31. Turning to the GP records, I am not persuaded that the incidence of headaches or neck pain from 2002 and 2007 are particularly relevant. Given the elapse of time, one could have sympathy with the Claimant for not remembering, particularly as the Claimant had a number of visits with the GP over the course of the years. It is credible that he simply did not remember, despite the Claimant’s memory of the manipulation he received

during his oral evidence (the Occupational Health doctor recorded expressly that the Claimant was not wholly confident in his memory).

32. It is evident from the GP notes that the Claimant's neck pain had begun to improve fairly soon after the injury on 15 January 2019 to the point whereby on 7 March 2019 he reported no pain. Most of the subsequent entries refer to discomfort and spasms rather than pain, with the exception of the entry of 7 January 2020 and the two entries in July 2020. Within those GP entries, there is nothing of any substance about the Claimant not being able to carry out normal day to day activities, with the exception of not being fit for work as a firefighter.
33. The Tribunal asked the Claimant about what he was unable to do in his role as a firefighter. The reason for such questioning is that while being a firefighter is not a normal day to day activity, it is possible for normal day to day activities to be carried out within the work context. The Claimant talked about struggling to look up which affected his ability to carry out a ladder drill, it being painful to carry large weights, that lifting his arm could cause him difficulties and he had a blind spot on his left-hand side due to his difficulty in turning his neck. I considered that looking up and turning his head to the left were in essence matters already addressed within his impact statement, while carrying out a ladder drill was not a normal day to day activity, being an activity only carried out by firefighters. It being painful to carry a large weight in my Judgment did not reach the threshold of normal day to day activity as it was unclear how large a weight the Claimant meant. For example, there is a difference between carrying a person while rescuing them from a burning building (not a normal day to day activity) to picking up a large parcel that has been left outside your doorstep.
34. The physiotherapist reports from the Pen Y Lon Physiotherapists record at the initial consultation that symptoms had improved but not resolved, and that the Claimant was suffering a sharp pain in the left neck on quick movements of the head. The Claimant accepts that he reported a 60-70% improvement in the symptoms. The Physiotherapist recorded that he had a much improved range of movement and decreased stiffness at the joints of the neck and upper back and decreased tightness in the musculature of the neck and upper back. This is consistent with his GP notes and I place weight on these records, as I do with the Occupational Health Doctors records. They were written at the time of events by healthcare professionals in the course of their work, and are more likely to be accurate than something that the Claimant recalls during the course of Tribunal proceedings.
35. Bearing in mind the principles of assessing evidence as highlighted in ***Gestmin v Credit Suisse (UK) Limited*** [2013] EWHC 3560, more weight should be put on contemporaneous documents, while oral evidence should be used to gauge the personality and where relevant the working practices

of the witness, rather than being a memory test. I consider it more likely than not that a professional Occupational Health doctor would accurately record what they are told by a patient. The Occupational Health reports starting from 8 April 2019 record that the Claimant was experiencing some neck pain, particularly if he looked to the left quickly. There is no record of him being unable substantially to carry out any normal day to day activities, something I consider is more likely than not to be recorded. The thrust of the Occupational Health Reports in 2019 is that they expected the Claimant to make a prompt recovery, though they become concerned by 15 July 2019 as to why 6 months have passed and the Claimant remained unfit for work. A similar tone was adopted by a wholly independent Medical Practitioner, Miss Bethan Lynn Owen the Spinal Clinic Specialist in her letter of 7 February 2020. She recorded that the Claimant suffered intermittent pain on left rotation which set off a mini spasm that was very short lasting. Ms Owen recorded that the Claimant still enjoyed playing golf and there was no record of any inability to carry out normal day to day activities. Given the mention of golf, I consider it unlikely Ms Owen would have omitted any substantial difficulties the Claimant reported to her. Her letter ended confidently with *"I am pretty sure this will clear up in a few weeks"*. The Claimant's account of that appointment was that a similar message was given to him orally.

36. Stepping back, I am not satisfied on the balance of probability that the Claimant has suffered a substantial adverse effect at the time outlined in his impact statement between the date of his injury in January 2019 to the date of his dismissal in March 2020. The independent medical evidence shows that as early on as February 2019 the Claimant was recovering well from the injury, though there was an aggravating incident involving a cat, but by 7 March 2019 there was no pain in his neck generally, except when he turned sharply to the left. I find that the GP notes, the Physiotherapist evidence and the Occupational Health evidence demonstrate that the Claimant was suffering from an impairment that he did suffer a sharp pain if he turned quickly to the left and that there was some stiffness in his neck but this was not of a nature that was substantial. Where the Claimant's account to the Tribunal differed to the medical evidence, I prefer the medical evidence as I could not rely on the Claimant's account due to the inconsistencies and contradictory assertions. The medical records that the Claimant's symptoms were of a minor or trivial nature by 8 May 2019 and unquestionably by 7 February 2020, albeit he was not able to work as a firefighter. By 7 February 2020, the Claimant's range of neck movements were normal, a great difference had been made regarding his symptoms, though he still suffered from minor stiffness and very short lasting spasms.
37. The Claimant's description of having to read a book on a table is nothing but minor or trivial in my view and the same applies to being careful or cautious when carrying out activities. The Claimant remained able to play

- golf and the only long-term restriction he speaks of is he says he can only take a half-swing rather than a full-swing in my view is a minor adverse effect. His evidence was that after the injury, he changed from a nine hole golf course to a 18 hour course; I do not consider this evidence of a substantial adverse effect on his ability to play golf (in fairness, the Claimant was clear that the change of course was not due to his injury, but it demonstrates his golf game was not substantially adversely affected).
38. The Claimant's description of his difficulties in driving and having to be careful when looking at the left when approaching junctions, I regard as minor or trivial, particularly as the Claimant should not be driving if unsafe. The Claimant's oral evidence of having to stop on two more occasions than he used to do when travelling to Cardiff was a matter that I consider should have been in his original disability impact statement. Notwithstanding this, I did not consider the difficulty he outlined to be anything more than minor or trivial, particularly as he rarely makes the journey due to the combination of reduction of workload and COVID 19. There was no evidence before me that his day to day job with Morrison Data Services saw him suffering an adverse substantial effect. His evidence about having to take a break and walk over to the kettle was nothing more than the standard advice given to anybody working in front of a computer. I observed that the Claimant was able to sit and give evidence for a long time and only at my invitation after he had been giving evidence for 90 minutes did he manoeuvre himself around to relieve any discomfort. Suffering a pain if turning sharply to the left side I accept is uncomfortable, but again there is no evidence on which I could make a finding that this had more than minor or trivial adverse effect.
39. The Claimant's strongest point was in relation to sleep. However, this difficulty was never mentioned to the GP, the Physiotherapist or the Occupational Health doctor. The Claimant's claim that this was something that he experienced due to his injury and to date was one that I considered to be exaggerated and something on which I was not inclined to prefer his account. Given the Claimant's oral evidence, which I viewed as at times not straightforward, I draw the inference from the contemporaneous evidence that he did not suffer a substantial adverse effect in relation to sleeping. I observed from the GP notes that the Claimant had seen his GP for a number of minor ailments and consider it more likely than not if he was as affected as he described, he would have sought assistance, particularly given the alleged effect on him the next day after a poor night's sleep. I accept that the Claimant at some points may be disturbed while sleeping due to his muscle strain in his neck, but I am not persuaded that it is anything more than minor or trivial and something within the normal experience.
40. I did not consider that I needed to make any assessment as to the effect of Ibuprofen as the Claimant's evidence was that he stopped taking it. The Claimant's evidence was that physiotherapy was only of assistance when

he was actually receiving “hands on” physiotherapy and from his account of the NHS exercise and his discussion with Ms Owens, it did not appear they had any beneficial effect in the view of the Claimant. It appeared in the view of the Tribunal there was no beneficial effect to be ignored when considering the alleged adverse effect.

41. I also had regard to the guidance and statutory codes to which I have previously referred to in considering the issue of “*substantial adverse effect*”. I bore in mind that it is possible for minor or trivial adverse effects to cumulatively become substantial. When I reviewed my findings regarding the Claimant, I was not satisfied that, even considering the matters cumulatively, he was suffering from anything more than minor or trivial.
42. I conclude that the Claimant has not demonstrated that he was suffering from a substantial adverse effect on his ability to carry out normal day to day activities. The Claimant is not disabled for the purposes of these proceedings.

Long-term

43. It is not necessary for the Tribunal to determine whether or not the Claimant suffered from the adverse effect on a long-term basis, given the findings of the Tribunal. However, if the Tribunal is incorrect in its assessment about substantial adverse effect, and was asked to consider this issue, the Tribunal would accept that the Claimant suffered from stiffness and a sharp pain when looking quickly to the left well for more than 12 months prior to dismissal. This is based on the entries in the medical records and the Occupational Health Reports. However, the letter of 7 February 2020 refers to the pain as intermittent and setting off a mini spasm that is very short lasting and confirms that the neck range of movement is normal, though the healthcare professional was confident that the symptoms would resolve themselves shortly. The GP records show that this was not the case. As Miss Owusu-Agyei submitted, the timeline speaks for itself.

Directions

44. The listing of the Final Merits Hearing for 13 to 20 August 2021 (6 days) is likely to be excessive. given that only unfair dismissal and a breach of contract claim is left to be determined. The parties are directed within 7 days of receipt of this written reasons to write to the Tribunal office, after speaking to each other to attempt to agree, the number of days they consider is required for the Final Merits Hearing. The Tribunal considers that 2 days is likely to be appropriate for the Final Merits Hearing, but it is open to the parties to disagree. It would also assist that the parties confirm if any further Case Management Orders would assist.

Employment Judge C Sharp
Dated: 28 May 2021

JUDGMENT SENT TO THE PARTIES ON 1 June 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche