



# EMPLOYMENT TRIBUNALS

**Claimant**

Miss Laura Crew

v

**Respondent**

Newsquest Media Group Limited

**Heard at:** Bury St Edmunds (by CVP)

**On:** 07 July 2021

**Before:** Employment Judge Laidler

**Appearances**

**For the Claimant:** Mr T Crew (Father)

**For the Respondent:** Ms L Quigley (Counsel)

## RESERVED JUDGMENT

**The claimant was not disabled within the meaning of section 6 Equality Act 2010 at the relevant time and her claims of disability discrimination are therefore dismissed.**

## REASONS

1. This was an Open Preliminary Hearing which had been listed by Employment Judge Tynan at a preliminary hearing on 6 January 2021. It was expressly listed to determine the issue of disability at the relevant time. The Full Merits Hearing has also been listed for 5 days starting on 1 November 2021 in the Cambridge Employment Tribunal.
2. The Tribunal had a bundle of approximately 200 pages prepared by the respondent. The claimant's representative had also lodged a bundle of 67 pages and there was an issue about some of the documents in it which occupied the Tribunal at the outset of this hearing. Counsel for the respondent dealt with the first objection which was the documents at pages 6-8. These were medical letters:-
  - (i) 16 January 2020 from Buckinghamshire Healthcare NHS Trust to the claimant's GP.

- (ii) 9 June 2020 from Buckinghamshire Healthcare NHS Trust to claimant's GP.
  - (iii) 4 January 2021 from Buckinghamshire Healthcare NHS Trust to claimant.
- 3. Counsel submitted that these documents post-date the relevant period and the symptoms that the claimant was by then experiencing are not relevant to the considerations of this Tribunal which must conduct its analysis as at the relevant time. The respondent therefore submits that these documents are irrelevant.
- 4. For the claimant it was argued that they were keen that these documents were included as they refer back to events prior to the claimant's dismissal.
- 5. The second category of documents objected to by the respondent was the document at pages 9 and 10 of the claimant's bundle being a report from Dr Mark Weatherall dated 29 June 2021 addressed "to whom It may concern". The respondent had sought permission at the preliminary hearing to obtain a medical report by the 14 May 2021. It subsequently notified the claimant in March 2021 that it would not be seeking such a report and then confirmed the position again in June by way of a letter dated the 22 June 2021 in which it was emphasised that the burden of proof being on the claimant it would be for the claimant to satisfy the Tribunal. It was made clear in that letter that there was no direction for any further medical reports to be obtained and the solicitors therefore put the claimant on notice that they would resist the inclusion of any further medical reports that the claimant's representative proposed to include in the bundle. They objected again to the report on 2 July 2021. Of particular relevance submitted Counsel was that they had no input into the instructions to Dr Weatherall and they had no opportunity to put questions to him. It is again a retrospective analysis and does not address the issues in the staged way that the Tribunal needs it to do. To allow the report to be before the Tribunal would be prejudicial to the respondent and outweighs any probative value.
- 6. On behalf of the claimant, it was submitted that the respondent asked for leave to get a medical report to which the claimant agreed and they had expected one to be obtained which they believe would have assisted the Tribunal greatly. Despite that they were not told until 14 May that the respondent was not going to get a report. The claimant then commissioned the report from Dr Weatherall but due to his commitments and no doubt the pandemic the report was delayed and not disclosed until the end of June. It was submitted there was no order actually forbidding the claimant obtaining a report and it would be unfair to prevent the claimant talking to her own medic and asking for his report.

**The Tribunal's conclusions on the additional documents**

7. With regard to the first tranche of documents at pages 6, 7 and 8 of the claimant's bundle, the Judge has now seen them. Taking into account that the claimant is represented by her father and not a legal representative the Tribunal will not exclude the documents and the respondent can make further submissions as to why they do not assist the Tribunal.
8. With regard to the report of Dr Weatherall of 29 June 2021, there is no specific rule in the Employment Tribunal with regard to experts reports though leave is required in the civil courts and that is the stance often taken before the Tribunal. The respondent was entitled to state that even though it had been given leave to obtain a report it had decided not to do so for the reason given namely that the burden of proof was on the claimant to establish that she satisfied the definition of disabled.
9. The claimant decided to commission her own report. The Tribunal takes the same position as in relation to the additional documents. The Judge has now seen it and the respondent can make submissions as to why it does not assist the Tribunal and why consideration should not be given to it. Again, taking into account that the claimant is a litigant in person with her father acting for her he would not necessarily have been aware or considered making an application to the Tribunal for leave. Had he done so however there might have been further delays whilst perhaps this preliminary hearing was used to decide whether the claimant should have such leave. To have had that delay would have been a disadvantage to both parties. The report will be allowed in and the parties can make submissions in relation to it.
10. Witness statements had been produced by not only the claimant but her parents and her sister. Her sister was not present to be cross-examined and Mr Crew understood that the Tribunal could therefore only give limited weight to her statement.
11. Counsel for the respondent indicated that she had no questions in cross-examination for Mr or Mrs Crew as the issues they raise are not really for this Tribunal.
12. It was confirmed that this Tribunal would solely be dealing with the issue of whether the claimant satisfied the definition of disability at the material times and not dealing with the issue of knowledge.
13. The Tribunal therefore heard from the claimant and from Caroline Winterbourne for the respondent.
14. Mr Crew had provided a skeleton argument and in the second paragraph of that he stated: -

“At the relevant times the claimant had a physical or mental impairment (partial deafness, difficulty speaking, migraines, photophobia/light sensitivity, extreme

fatigue, flushes and palpitations, anxiety and depression) that had a substantial and long-term adverse effect on her ability to carry out normal day to day activities and that the claimant therefore meets the requirements for disabled status as defined by the Equality Act 2010 Section 6.”

15. Before hearing the evidence, the Judge asked for confirmation as to what was relied upon and the claimant’s position is that cumulatively all of these conditions should be considered as amounting to a disability. It is the claimant’s case that they are all connected.
16. From the evidence heard the Tribunal finds the following facts.

### **The Facts**

17. The claimant joined the respondent on 14 May 2018 and the recruitment department as a Recruitment Solutions Executive on 14 February 2019. Her role involved the selling of recruitment advertising primarily by way of telesales.
18. From the claimant’s General Practitioner’s notes, it can be seen that on 23 January 2019 she reported “buzzing in ear” namely her left ear. There is no note of any prescription or other action taken at that point.
19. On 30 January 2019 the claimant had a telephone consultation again describing buzzing in her ear and stated that it was no better, she felt dizzy as if drunk and that the room spins. There is reference to medication being prescribed following that consultation of 15 tablets.
20. The claimant described to this Tribunal that she was suffering from deafness. It must be noted there is no mention of deafness in the GP records. The claimant did however accept in cross-examination that she was not diagnosed with any condition at this point and not put on any antibiotics for any infection.
21. The claimant confirmed that her witness statement for this hearing was an updated version of the disability impact statement she had previously prepared. She had understood the importance of including everything and had time to reflect on the content and amend it as she saw fit.
22. In the claimant’s witness statement, she that her manager “realised that I was finding it difficult to hear ...”. The claimant now states that she told Caroline Winterbourne face to face that she had a hearing problem.
23. Caroline Winterbourne who was the claimant’s line manager did not interview the claimant for the move to become a Recruitment Solutions Executive. The interview was conducted by Barbara Bezani. The Tribunal has not heard from her, but Miss Winterbourne gave evidence that she had spoken to her and she had confirmed that the claimant never disclosed any issues with her hearing when she was interviewed. Miss Winterbourne was not aware of the claimant disclosing any hearing

issues to anyone else at the respondent either. The Tribunal heard from Miss Winterbourne and found her evidence convincing. At times it found the claimant's evidence to be inconsistent. The claimant does not state in her witness statement that she told Miss Winterbourne rather she alleges that she "realised". In cross-examination Miss Winterbourne made it clear that not only was she not told but as part of her role she would listen in to the claimant conducting her telephone calls. When she did that there was no indication whatsoever of any issues. Whilst the claimant says that she was using the head piece on her good (right) ear there was nothing to suggest to Miss Winterbourne that the claimant was having issues with hearing the other person on the line or in dealing with the call generally.

24. Whilst the respondent has accepted for the purposes of these proceedings that the claimant did suffer a hearing impairment for those first 3 months it does not accept that it came within the definition of disability.
25. The claimant was absent for two days, the 11-13 March 2019 with a viral infection. She met with Caroline Winterbourne for a back to work interview on her return the notes of which appeared in the bundle and which the claimant accepted were accurate. These noted that there was not a likelihood of re-occurrence.
26. The claimant was eventually referred to an ENT Specialist about her hearing although no documentation is available. The appointment was to be the 4 April 2019. The claimant did not obtain the paperwork as it had been sent to a previous address but then did not need to attend the appointment in any event as her hearing returned to normal without any intervention.
27. In the claimant's witness statement following the section in which she dealt with her deafness she had a section headed "exhaustion". She described that:

"Over this period I found I was becoming increasingly tired from concentrating and listening all day, struggling to walk with my balance off and I even had to stop attending body pump classes with my colleague as I noticed I could not keep up and I was feeling very tired and dizzy and then collapsed at a friends house on 20<sup>th</sup> May 2019 where I felt very weak."
28. The claimant attempted to explain in cross-examination that even though her hearing loss had returned she continued to experience symptoms as described in this statement. However, after the question had been put to her a number of times, she accepted that once her hearing had returned then she was not having the problems with concentrating and listening. She also accepted that any balance issues ended about the 4 April but maintained that the dizziness and exhaustion continued.
29. The claimant accepted however that she did not take time off and had continued to drive to work. She had not notified the DVLA that she was a risk as she did not know that she was at the time.

30. In the bundle the claimant had disclosed some text messages with family members in which she described some of her symptoms. She acknowledged in cross-examination that she had not disclosed all the text messages as “some were confusing so I felt to submit the ones that were less confusing”. She accepted that she chose the ones she wished to put in the bundle but had not disclosed all. These included: -
- (i) 12 March 2019 – headache.  
The claimant accepted that there were no text messages about her hearing loss or fatigue although she stated that she did also speak to her mother on the phone.
  - (ii) 17 May 2019 – headache.  
In the claimant’s medical records for the 25 June 2019 is an entry to changes being noticed in the claimant’s facial features. She had developed a droop to the left side of her face and was struggling to close her eye, to pronounce words although eating was ok. She had also had a severe headache that day. Her left eye was not moving as much. She was referred to hospital. She was not retained in hospital and given a piece of paper with facial exercises, eye dressing, eye drops and an eye patch. There was nothing followed up. She was told that because it was 5 days after it had occurred it was too late to be given steroids and she just had to wait for it to get better.
31. After this the claimant went back to work for 2 days before she was admitted to hospital on 3 July 2019. In a discharge summary of the 15 July 2019 it was recorded that the claimant had probably had viral meningitis.
32. It noted that she may continue to feel unwell as she had had a significant viral illness. She had been recommended to ensure adequate hydration and nutrition particularly in the warmer weather. Gentle exercise for reconditioning and regular analgesia as required. She was to seek her GP’s advice if there was no improvement after a week.
33. Dr Mark Weatherall, Consultant Neurologist prepared a letter dated 13 August 2019 and the claimant confirmed this had been requested by her for her employer. He had seen her that day and although she was making a good recovery, he advised that she did not return to work until after the August Bank Holiday. At that stage it would be necessary for her to have a 2 week phased return to work. Rather than her expected 2.5 hours of “pool time” per day it would be reasonable for her to be expected to deliver 1 hour a day for the first week then 2 hours a day for the second week before she then returned to full expectations. This therefore meant that at that time he considered she would have resumed full duties by the early part of September 2019.

34. In a letter of the same date to the claimant's General Practitioner Dr Weatherall stated that the claimant was "recovering very well" from her recent admission. She had also recovered almost full power on the left side of her face. She was still headachy and had been given a prescription. They had not found a clear underlying cause for her meningitis, hearing loss and facial palsy. He would be keen for the ENT Surgeon to have a proper look at her "post nasal space" to ensure there was no evidence of granulomatosis or other inflammation. The claimant was also due to have a hearing test the following week and he was going to write to the ENT to ask if they would perform a nasoendoscopy after that. He would review the claimant in 6-8 weeks.
35. The GP submitted a fit note dated 30 August 2019 stating the claimant was not fit to work until 6 September 2019 due to viral meningitis.
36. He then submitted a further fit note on that date to cover the period to the 20 September 2019.
37. The next fit note was dated the 19 September covering the period to the 4 October 2019.
38. The claimant had a telephone call with her General Practitioner on 4 October 2019 and reported she had had a hearing test which was normal. There was discussion about her return to work and discussing this with Dr Weatherall when she saw him the following week.
39. By letter of 10 October 2019 Mr James Snelling FRCS Consultant ENT Surgeon wrote to the claimant's General Practitioner following an examination of the claimant. Examining her that day the "nasal mucosa appeared entirely normal". He had re-assured the claimant there was no evidence of any vasculitic cause for her symptoms and she had been discharged that day.
40. By letter of 17 October 2019 Dr Weatherall reported back to the claimant's General Practitioner having seen the claimant on 14 October. The claimant continued to struggle with headaches and light sensitivity. She was having episodes of flushing and sweating. Some of her medication had been increased. He felt "it most likely that she had a viral meningitis and has just been left with a particularly run of migraines following this". He reconsidered that the claimant remained too unwell to be at work "though the ultimate prognosis remains I think good".
41. The claimant had a telephone consultation with her GP on 12 November 2019 when it was noted she did not feel ready to go back to work yet. She was seeing the consultant on 18 November and he would advise her as to the possibility of a phased return to work.
42. The claimant returned to work on 21 November 2019 on a 3 week phased hours after which she would return to her full time hours.

43. On 25 November 2019 the respondent's Managing Director made an announcement to the staff of the proposed restructure of the team at High Wycombe. The respondent proposed and carried out a 2 week consultation period with all affected staff. The whole of the respondent's sales team in High Wycombe were placed at risk of redundancy including the claimant. It is not necessary for the purposes of this decision to go into the details of what then took place other than that the claimant was one of those selected for redundancy and her employment ended on 6 December 2019.

### Relevant Law

44. The tribunal must apply the following provisions of the Equality Act 2010:

#### Section 6

- (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...

45. Schedule 1

#### 2 Long - term effects

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

- (a) it has lasted for at least 12 months,
- (b) it is likely to last for at least 12 months, or
- (c) it is likely to last for the rest of the life of the person affected.

- (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

- (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

- (4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

46. The Guidance on the definition of disability (2011) at Section C assists with the meaning of 'long-term'. It makes it clear at section C4 that in assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything that occurs after that time will not be relevant in assessing this likelihood. The same is the case in relation to assessing whether a



condition is 'likely to recur' as was confirmed in McDougall v Richmond Adult Community College [2008] EWCA Civ 4.

47. This was most recently considered in All Answers Ltd v W and another [2021] EWCA Civ 606 when it was stated:

The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in *McDougall v Richmond Adult Community College*: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".

48. The House of Lords in Boyle v SCA Packaging Ltd [2009] UKHL 37 found that on its true construction the word 'likely' meant 'could well happen' rather than 'probably' or 'more likely than not'. More recently in Nissa v Waverly Education Foundation Ltd & another UKEAT/0135/18 the EAT held that a 'broad view' is to be taken of the symptoms and consequences of the disability as they appeared during the material time.
49. Section 212(1) of the Equality Act 2010 defines "substantial" as meaning "more than minor or trivial." The Guidance deals with this area in Section B. That it be 'substantial' reflects the general understanding of disability as 'a limitation going beyond the normal differences in ability which may exist among people' (B1)
50. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour by example using coping or avoidance strategies to prevent or reduce the effect on normal day to day activities. (Guidance B7)

## Conclusions

51. As has been set out in the relevant law above the Tribunal must make its assessment on the issue of disability at the relevant time which is when the alleged discriminatory acts were said to have been committed. From the List of Issues, the dates of the alleged acts can be seen. The Tribunal accepts that the classification by the respondent's Counsel in her closing submissions of the different periods that the Tribunal needs to consider.

### January 2019 to 4 April 2019 - hearing loss

52. The Tribunal accepts the respondent's position that there is nothing in the evidence before it that supports the contention that there was a substantial adverse effect during this time. No doubt there was an impact for the claimant, but she was able to work during this time and Caroline Winterbourne, who was monitoring her work, did not see any issues with the claimant's work when she was listening into her work at this time. The claimant continued to drive to work and believed she was safe to do so. She did not have a fall during the time that she had the hearing loss. Evidence which post-dates this period does not assist the Tribunal to assess the impact at the time.
53. It is a matter of fact not disputed by the claimant that the hearing loss lasted 10 weeks. The question therefore regarding long term must be judged at the relevant time and there is nothing to indicate that the hearing loss would in anyway be connected to viral meningitis or that the deafness could well last for 12 months or more. In fact, the deafness did not last more than 10 weeks. Even though the claimant was referred to an ENT appointment at the time of the deafness that did not take place as the hearing had returned. At the time the issue was resolved.
54. The claimant now seeks to allege that this was all connected to the meningitis and that all the conditions should be taken as cumulative and lead to a recognition that she does satisfy the definition of disabled under the Equality Act. However, again the Tribunal must look at what was known at the time. The claimant has produced documents that do not have evidential value for example, from websites. Even what Dr Weatherall says in reports submitted after the event do not assist the Tribunal in determining what was likely to occur at the date of the acts complained of. There is no evidence to suggest a hearing loss itself was likely to last 12 months.

### 4 April to 21 June 2019

55. The claimant had full hearing and had no absences from work. The claimant does refer to collapsing on 20 May but on her own evidence was not suffering from hearing loss or migraines at this time. There were

therefore no impairments be they physical or mental during that period having a substantial adverse effect on the claimant's ability to carry out normal day to day activities.

21 June to 2 July 2019

56. The respondent accepts that the claimant experienced symptoms on 21 July as explained in her witness statement and referred to by her GP and which were believed to be Bell's Palsy. The respondent also accepts that the impacts would be classified as having a substantial adverse effect on day to day activities. The remaining issue therefore under the Equality Act is whether they were likely to be long term. The claimant returned to work after 2 days, was not signed off as unfit to work and at the time it was not understood that this was a long term condition. There was nothing at that point in time to suggest the likelihood of any long term effects.

3 July to November 2019

57. The respondent accepts that at varying points during this period the claimant suffered from migraines, photophobia and fatigue and the Tribunal accepts that from the evidence it has heard. There is no contemporaneous record of anxiety and/or depression, hearing loss or difficulty speaking during this period. In the discharge summary of the 15 July 2019 it was noted that the claimant may continue to feel unwell but by the 13 August Dr Weatherall was stating that she was making a good recovery and it was anticipated she would be able to return to full duties by mid-September. It was not envisaged there would be long term complications. That was confirmed in his letter to the GP of the same date again stating the claimant was recovering well.
58. In the GP's report of 11 October three months post diagnosis, it was still anticipated the claimant would make a full recovery. Dr Weatherall in his letter of the 17 October 2019 continued to state that the ultimate prognosis remained good. There was nothing from the physician or the GP suggesting the claimant was going to suffer from long term substantial adverse effects. Indeed, the position is made clear by the fact that the claimant returned to work as fit to return albeit on a phased return to work in November.

20 November to 6 December 2019 (the date of termination)

59. The medical position did not change. The claimant had returned to work and there was no evidence before the Tribunal of a worsening of her symptoms or change in position during this time.

60. It follows therefore that there was no likelihood of the claimant suffering substantial adverse effects on her normal day to day activities for 12 months and the Tribunal must conclude that the claimant did not satisfy the statutory definition of disabled during the course of her employment.

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Employment Judge Laidler

Date: 9 August 2021

Sent to the parties on: .8 Sept 2021  
THY

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For the Tribunal Office