



EMPLOYMENT TRIBUNALS at a Preliminary Hearing

Claimant: Mrs H Adams
Respondent : Alliance Healthcare Management Services Ltd
Heard at: Midlands (East) Region as a hybrid hearing
On: Wednesday 24 November 2021
Before: Employment Judge R Broughton (sitting alone)

Representation

Claimant: Mr A Adams, Husband
Respondent : Mr A Graham, Solicitor

RESERVED JUDGMENT ON A HEARING A PRELIMINARY ISSUE

The Claimant's claim that she is a disabled person for the purposes of section 6 of the Equality Act 2010 is well founded and **succeeds**.

RESERVED REASONS

Background

1. The Claimant presented a claim on the 15 April 2021 for unfair dismissal and disability discrimination following a period of Acas early conciliation from 19 March 2021 and ended on 13 April 2021.
2. The Claimant was employed by the Respondent as a healthcare provider from either 22 May 2017 or 5 June 2017.
3. Following a preliminary hearing before Employment Judge Brewer on 9 July 2021 the claim was listed before me today to determine the issue of disability. That is the only issue to be determined today.

The Issues.

4. The Claimant is a litigant in person represented today by her husband.
5. I discussed with the parties at the outset of the hearing, the issues to be determined today and what is in dispute between the parties.
6. It was agreed that the matters to be determined are;

11.1 Did the Claimant have a physical impairment, namely Meniere's Disease.

11.2 Did the impairment/s have a substantial adverse effect on her ability to carry out day to day activities?

11.4 Did the Claimant have medical treatment or take other measures to treat or correct the impairment?

11.5 Would the impairment have had a substantial adverse effect on her ability to carry out normal day to day activities without the treatment or other measures?

11.5.1 Were the effects of the impairment long term? Did they last for 12 months or were they likely to last 12 months and if not, where they likely to recur?

Relevant Period

7. There was some discussion at the outset of the hearing with the parties about what the relevant period is and it was agreed that the relevant period, (the period during which it is alleged the discrimination took place) is the period **4 January 2021 to 24 February 2021**.
8. There is reference in the claim form (p.14) to the "*Company not treating me with a duty of care and respect in March 2020...*". However the Claimant confirmed that her claim does not relate to any acts of alleged discrimination in March 2020, only to events from 4 January 2021 until her employment ended on 24 February 2021.

Evidence

9. The Respondent had prepared a bundle of documents which had been provided to the Claimant a couple of days prior to today's hearing. The Claimant produced further documents which she wanted to rely upon during this hearing but which had not been provided in advance to the Respondent. The documents consisted of; what the Claimant alleged to be a repeat prescription for Betahistine and the information leaflet from the prescription box explaining what the medication is for.
10. The Claimant made an application to admit those documents and I heard representations from both parties. It was opposed by the Respondent on the grounds that the Order of Employment Judge Brewer at the preliminary hearing in July had been that the Claimant must send to the Respondent by 27 August 2021, copies of her GP and other medical records that she is relying upon and these documents should have been disclosed in compliance with that order.
11. The prejudice which the Respondent alleged it would suffer by allowing the documents to be admitted, was that potentially it would have incurred the wasted costs of attending today's hearing, if the additional documents persuade it that the Claimant is disabled.

12. The documents appeared relevant to the issue of disability and relate to medication which is already mentioned in the medical evidence which has been disclosed. The documents consisted of only a few pages.
13. After considering the representations of the parties and taking into account the overriding objective in Rule 2, the application was granted to admit the documents into evidence. Full reasons were given orally at the hearing. The documents were paginated 71 to 74 and added into the bundle.

Witnesses

14. The parties did not request any adjustments to the hearing.
15. Reference in this judgment to numbers in brackets are to pages in the joint bundle.
16. I heard evidence from the Claimant who affirmed that her evidence was the truth. The Claimant produced a disability impact statement (p.43 -45). I heard from no other witnesses from either party.

Findings of fact

17. I made the following findings of fact on a balance of probabilities.
18. The findings set out are not intended to be a complete record of all the evidence I heard during the hearing. I took all the evidence into account unless otherwise noted however, these findings are those material to my conclusions.

Impairment

19. The Claimant asserts that she has and had at the relevant time, a physical impairment which has been diagnosed as Meniere's Disease.
20. The undisputed evidence of the Claimant is that Meniere's Disease commonly has the following symptoms, information she had taken from the NHS website;

"... a condition of the inner ear that causes sudden attacks of:

Feeling like the room is spinning around you (vertigo)

A ringing noise inside the ear (Tinnitus)

Pressure felt deep inside the ear

Hearing loss"

...

Known triggers are stress, anxiety, hypoventilation, fatigue, emotional distress, migraines, some foods and others."

Prior to 2018

21. The claimant gave evidence that she began to experience attacks of vertigo in 2012 after the death of her late husband. After a while the attacks stopped and between some point in 2012 and 2018 she had no attacks or very few.
22. The Claimant's undisputed evidence is that in 2012 she was prescribed medication called Stugeron. This is not a controlling drug to be taken daily, she took it only when she was having attack. She stopped this medication when she started taking

Betahistine daily, from 3 September 2018 .

September 2018

23. The Claimant's evidence is that the vertigo attacks started again in 2018 and became worse. She was then referred to ENT following a referral from her GP. In 2018 she had time off work due to the attacks.
24. There is disclosed by the Respondent, a review meeting with the Claimant (p. 64/65) on 8 January 2018 which refers to medication that the Claimant was taking and also refers to vertigo and a plan for what would happen if there was a vertigo episode at work.
25. I am satisfied on the evidence that there were instances and absences from work that led to the Respondent involving occupational health (OH) in 2018. The review notes refer to the Claimant having had an "episode" in the afternoon the day before, which had lasted the evening. They refer to underlying medical conditions of vertigo and migraines and a diagnosis back in 2012.
26. There is then an Occupational Health (OH) report obtained from the Respondent dated 11 September 2018 (p.46) which referred to four occasions of absence in a 12 month period and the majority being due to symptoms related to underlying medical conditions of vertigo and migraine. It reports that the Claimant had been diagnosed with vertigo in 2012 and the symptoms are intermittent and vary in intensity but that the;
- " frequency has increased recently"*
27. The September 2018 OH also states that;
- "However, she is often able to continue to work through them and carry out normal day to day activities **but on other occasions her symptoms can be very severe and she struggles with her balance**" (p.46) Tribunal stress*
28. The above report is supportive of the Claimant's evidence that her condition become worse in 2018.
29. There is a letter from Mrs Peddireddy, Speciality in Doctor ENT (p. 51) from early **September 2018**, which refers to the Claimant having had episodes of vertigo for many years and left sided Tinnitus ongoing since 2012 and states;
- " She is taking Betahistine and Cinnarizine on whenever required basis. Sometimes she feels nauseous. She also has intermittent left sided earache with no nasal symptoms.*
- And;*
- "It seems to be Meniere's Disease and I have suggest [sic] Betahistine 16mg three times per day for the next six weeks, We are also referring her to out Audiology Department for vestibular function tests, vestibular rehabilitation and Tinnitus management. We will review her again in two to three months..."** Tribunal Stress*
30. The Claimant confirmed under cross examination that this was the first time she was

aware that her condition was Meniere's Disease.

October 2018

31. Following a clinic date of **8 October 2018**, Mrs Peddireddy in a letter (p. 52) refers to seeing the Claimant in ENT clinic and of the Claimant having vestibular tests which show canal paresis of 47% . It notes that the Claimant is a little better with regards to the dizziness and **has come off the Betahistine** and suggested she takes "*Cinnarizine whenever required*".

32. On **24 October 2018**, only a couple of weeks after the Claimant had come off Betahistine, her GP reports that she has attended "*today in a distressed state*" and writes (p.49);

*"She obviously has a diagnosis of really **quite chronic vertigo** which is intermittent and is certainly preventing her working at the moment...it seems unlikely that her condition will improve, given its chronic nature thus far. It is unlikely there will ever be any significant treatment for this"*.

33. Between 8 and 24 October 2018, there appears therefore to have been a deterioration in her condition after coming off the medication and in February 2019 Mr Osiname, Lucum in ENT from the Sherwood Forest NHS Hospital in his report dictated on **25 February 2019** (p. 54) now advises an increase her medication, Betahistine back to 16mg three times a day (p.54);

"Diagnosis"

"1, Probably meniere's Disease on the left side".

*"Her history fits Meniere's Disease. **She has been taking 16mg of Betahistine, which seems to be controlling, but was advised to cut down to 8mg TDS, I have now told her to step up the Betahistine back to 16 MG three times a day and to cut out [sic] cheese, chocolate, citrus and caffeine...**"*

September 2019

34. There is a report from a consultation in 20 September 2019 with Miss Malick, Speciality Doctor in ENT to the Claimant's GP (p.56) which advises as follows;

"Diagnosis/Problems

Probably left Meniere's Disease"; and

*"I reviewed this pleasant 56 year old lady in clinic who had **not had any vertigo attacks since June 2019.**"*

*"She has ongoing left sided unilateral Tinnitus and aural fullness and is coping with her symptoms. She has increased **Betahistine dose to 16mg 3 times a day**".*

January 2020.

35. The last report the Claimant has disclosed is dated January 2020, and Miss Ladan, Speciality Doctor in ENT writes (p.58);

*"She has not had bad vertigo for some time now. **She is still on her Betahistine 3 times a day.** An MRI scan has revealed no lesions in the IAM or CP angle.*

*I ask you kindly step down her Betashtine to 16 mg DB and observe **if her symptoms are still controlled** then after 3 months to step it down to once a day. ..."*

36. The above reports are supportive of the Claimant's oral evidence of the symptoms she suffered of vertigo since 2012 and a worsening of those symptoms from 2018 .
37. The Claimant's evidence is that she still has Meniere's Disease, that it is not cured but managed with medication.
38. There are no reports after January 2020, 12 months prior to the relevant period.
39. The Claimant gave evidence that she received approximately 200 to 300 pages of documents from her GP; she did not understand them and she disclosed only the ones that she did understand.
40. The Claimant has however produced a copy of a prescription with a start date of **27 October 2021 and an end date of 27 April 2022** (p .74) in her name and for;

*" **Betahistine 8mg tablets, 56 tablets, take ONE tablet two times a day**" Tribunal Stress*

41. The prescription does not state that it is a repeat prescription however the Claimant's oral evidence is that it is and the Tribunal note that it is for a period of 6 months, which would indicate long term use.
42. The Claimant has also produced the information leaflet from the medication which explains about Betahistine (p.72 – 71)

"Used for: To ease the symptoms of Meniere's Disease in adults.

Meiners Disease is a condition of the inner ear. It typically causes attacks of vertigo (a feeling of spinning) , loss of hearing and Tinnitus (noises in the ear).The attacks can vary in severity and in how often they occur. Treatment and help to ease and prevent symptoms"

43. The information goes on about to how to take the medication;

*" Take Betahistine exactly as your doctor tells you to. It is usual to take one (16mg) tablet three times daily at first. **Once your symptoms are under control**, your doctor may then reduce you does to one (8mg) tablet three times daily. ..."*

" If you take Betahistine every day it is unlike to stop all attacks, but it may reduce the number and/or severity of your attacks.." Tribunal stress

2020 - 2021

44. The Claimant confirmed that from March 2020 up to her dismissal, she had only a few days off days off work (3 days in October 2020 according to the return to work interview notes at page 69) but this related not to her ill health but her husbands.

45. The Claimant gave evidence that she is a registered carer for her husband and on some days she is required to do everything for him including cleaning, shopping, cooking, dressing and grooming.
46. The Claimant under cross examination gave evidence that she had an attack on 14 January 2021 and a couple just after that date because of the stress at work however, she did not see her GP because she managed it herself by increasing her medication. She gave evidence that she has not seen her GP for over a year because she manages her condition with the ongoing medication. During these attacks she gave evidence that she experienced "*spinning*", she became more deaf in her left ear and was unable to stand up and felt nauseous, she had to sit or lie down during the attack. She cannot recall how long those specific attacks lasted but she gave evidence that attacks usually last from ½ hour to 5 hours.
47. The claimant gave evidence that she drives and is able to do so because of the medication.
48. The Claimant's evidence, is that since 2019 she has continued to take the same medication for Meniere's Disease and she can work through the symptoms with the medication. Albeit the dosage has changed, her evidence is that she has never stopped taking it. That is consistent with the medical report in January 2020 which confirms that the Claimant was stilling taking Betahistine three times a day, the reference to "*controlling*" the symptoms and not curing the condition and the prescription in October 2021 (p74).
49. The Claimant's oral evidence is that even with the medication she still has symptoms of Tinnitus. The Claimant describes the effects as a feeling like someone has inserted a finger in her ear. Those effects, the Tinnitus and the fullness are consistent with the medical reports in 2018 and 2019 which refer to Tinnitus and also to a left-sided hearing issue and "*fullness*".
50. The Claimant's undisputed evidence is that the Tinnitus is constant and that she finds it difficult to concentrate, that she needs noise all the time whether she is typing or whether she is doing everyday things around the house. She needs noise to help her to manage the distraction of the Tinnitus and that it impacts upon sleep and occasionally makes it difficult and prevents her to sleeping altogether, although she believes eight times out of ten she is able to sleep.
51. Her evidence is that the effect of the Tinnitus is also that she struggles to hear people speaking. She can hear really low or high noises but it is the middle range she struggles with. She misses words and tries to compensate to a degree, by trying to lip read, however people talking in face coverings makes it much more difficult for her.
52. I am satisfied on her oral evidence that these are the effects that she constantly suffers from in her left ear and which she believes have got worse over time.

Attacks

53. The Claimant's evidence is that she had a panic attack in January 2021 which had been triggered by events at work but she had not had one in the last 12 months prior to that because of the medication. However, her evidence is that when she does have an attack, the effects are as follows;

- she cannot stand and has to hold on to things to get her balance;
- she experiences extreme dizziness
- she has a sensation of spinning
- increased deafness in the left ear.
- she needs to sit or lay down until the attack passes, which may be for 30 minutes up to 5 hours;
- she cannot drive because
- she cannot see clearly
- she cannot cook
- she cannot work during these attacks
- she feels nauseous.

54. I find on the evidence including the Claimant's oral evidence and the medical reports, that as a fact, those are the adverse effects she experiences when she has a vertigo attack.

55. Regardless of the medication, the Claimant also suffers constantly with the effects of Tinnitus and hearing loss in her left ear.

56. In terms of the triggers that cause these vertigo attacks, the Claimant's evidence is that the attacks, are triggered by stress, anxiety, migraines and hyperventilation. Again, I take into account her oral evidence, the NHS general guidelines and the medical reports and find on a balance of probabilities, that those are the triggers for an attack.

Without the medication

57. There is no medical report disclosed about what the impact would be of not taking Betahistine. However, the Claimant's evidence under oath is that she would experience vertigo all the time, she would not be able to walk in a straight line, she would have to hold on to furniture to keep her balance, her head would be spinning badly and she would feel nauseous, she could not stand for long and would not be able to drive, cook or work; "*vertigo takes over your life*". She gave evidence that without medication she does not believe that she would be able to function.

Long Term

58. I find on a balance of probabilities, that vertigo was diagnosed in 2012 and Meniere's as the probable cause was mentioned in September and October 2018 and the Claimant has been taking medication to control the condition since early 2018 uninterrupted, up to the date of the hearing, other than a short period when she had come off Betahistine in early October 2018 but then presented in a distressed state and started taking it again and a few months later in February 2019 she was advised to increase the medication further (p. 52)

59. On a balance of probabilities, I find from that from February 2019 the Claimant has continued to take the medication Betahistine to manage her impairment without interruption and that the effects as described above regarding Tinnitus have been continuous since no later than late September 2019 when Tinnitus is reported in the medical records (p. 51).

Submissions

Respondent

60. The respondent provided written submissions and expanded upon those with oral submissions. I have considered those submissions carefully. I have not set them out in full but in summary they are as follows;

Impairment

61. Respondent submits that the burden of proof rests with the Claimant. That the medical evidence is lacking and does not exist for the relevant period of time that we are focussing on .
62. The Claimant made a subject access request for her medical records and receives 200 to 300 pages and only disclosed a few albeit it is appreciated the Respondent accepts, that medics write in their 'own language' . However it is submitted that the Claimant is relying really on the diagnosis of Meniere's Disease but the Claimant has not disclosed any medical evidence that has actually diagnosed Meniere's Disease.
63. However the Respondent accepted, when asked by the Tribunal, that "*probably*" would meet the likelihood test as set out in Guidance and **SCP v Boyle** (see below in the legal principles section) and thus Mr Graham accepted would satisfy the burden of proof with regards to the diagnosis of Meniere's Disease.

Effects

64. The Respondent refers to the Claimants ability to care for her husband day to day and that OH had mentioned her ability to work through the symptoms (p. 46). However, the Tribunal pointed out that Mr Graham had only quoted from part of the report, he had neglected to refer to rest of the paragraph which when on to state: "*but on other occasions her symptoms can be severe...*"
65. The Respondent refers to the Claimant's ability to drive and that DVLA have not prevented her from doing so and he reference that from March 2020 the Claimant had not had time off work for the condition.
66. The Respondent referred to the authorities of **Kapadia v London Borough of Lambeth 2000 IRLR 14 EAT** and **Goodwin v Patent Office 1991 ICR 302 EAT**

Claimants submissions

67. The Claimant submits that she takes the medication because she has to . That as the Claimant takes medication for her condition, she had been cleared to drive by DVLA.
68. The prescription is a repeated prescription and without out she would not be able to function.
69. The Claimant submits that the Respondent made adjustments for her condition namely reducing her hours on the advice of OH advised for her to work 3 days per week and this adjustment and her medication has helped to reduce stress and the number of vertigo attacks and without the medication she could not carry out day normal day to day activities.

The Law

Disability

70. The definition in section 6(1) Equality Act 2010 (EqA) is the starting point for establishing the meaning of 'disability'. The supplementary provisions for determining whether a person has a disability are set out in Part 1 of Schedule 1 to the EqA.
71. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') under S.6(5) EqA. The Guidance does not impose any legal obligations in itself but courts and tribunals must take account of it where they consider it to be relevant para 12, Sch 1, EqA and **Goodwin v Patent Office 1999 ICR 302, EAT**.
72. The Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) ('the EHRC Employment Code'), which provides some guidance on the meaning of 'disability' under the EqA and this also does not impose legal obligations but must be taken into account where it appears relevant to any questions arising in proceedings.
73. The Equality Act 2010 contains the definition of disability and provides:

Section 6. 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.*
- (2) *A reference to a disabled person is a reference to a person who has a disability.*
- (3) *In relation to the protected characteristic of disability—*
- (a) *a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
 - (b) *a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*
- (4) *This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*
- (a) *a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*
 - (b) *a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*

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

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

Schedule 1 sets out supplementary provisions including:

Part 1: Determination of disability

Impairment

Long-term effects

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.

(7) 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.

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

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

Effect of medical treatment

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

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

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

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

PART 2 GUIDANCE

Preliminary

10 This Part of this Schedule applies in relation to guidance referred to in section 6(5).

Examples

11 *The guidance may give examples of—*

(a) effects which it would, or would not, be reasonable, in relation to particular activities, to regard as substantial adverse effects;

(b) substantial adverse effects which it would, or would not, be reasonable to regard as long-term.

Adjudicating bodies

12(1) In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant.

The ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011)

74. Relevant provisions which I have considered include the following and I have emboldened certain parts which I consider to be particularly pertinent;

*A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. **It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness.***

A4. Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person’s ability to carry out normal day-to-day activities....

*A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa. A7. **It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded.***

Section B Meaning of ‘substantial adverse effect’

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1).

Cumulative effects of an impairment B4.

An impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

Effects of treatment B12.

The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, **the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'**. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs.

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

B16. Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement

B17. However, if a person receives treatment which cures a condition that would otherwise meet the definition of a disability, the person would be protected by the Act as a person who had a disability in the past.

Section C: Long-term

The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person. The substantial adverse effect of an impairment which has developed from, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected.

Meaning of 'likely' C3.

The meaning of 'likely' is relevant when determining: whether an impairment has a long-term effect (Sch1, Para 2(1), see also paragraph C1); whether an impairment has a recurring effect (Sch1, Para 2(2), see also paragraphs C5 to C11); whether adverse effects of a progressive condition will become substantial (Sch1, Para 8, see also paragraphs B18 to B23); or how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour (Sch1, Para 5(1), see also paragraphs B7 to B17).

In these contexts, 'likely', should be interpreted as meaning that **it could well happen**.

Recurring or fluctuating effects C5.

The Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing **if it is likely to recur**. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in

fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).

The guidance sets out the following examples:

C6. ...If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. **Other impairments with effects which can recur beyond 12 months, or where effects can be sporadic, include Menières Disease and epilepsy as well as mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant.**

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met.

A person has Menières Disease. This results in his experiencing mild Tinnitus at times, which does not adversely affect his ability to carry out normal day-to-day activities. However, it also causes temporary periods of significant hearing loss every few months. The hearing loss substantially and adversely affects his ability to conduct conversations or listen to the radio or television. Although his condition does not continually have this adverse effect, it satisfies the long-term requirement because it has substantial adverse effects that are likely to recur beyond 12 months after he developed the impairment.

Meaning of 'normal day-to-day activities' D2.

The Act does not define what is to be regarded as a 'normal day to-day activity'.

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

Adverse effects on the ability to carry out normal day-to-day activities D11.

D12. In the Appendix, examples are given of circumstances where it would be reasonable to regard the adverse effect on the ability to carry out a normal day-to-day activity as substantial.

Appendix

An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on

normal day-to-day activities.

Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the substantial adverse effect of the impairment on normal day to-day activities is long term. In the following examples, the effect described should be thought of as if it were the only effect of the impairment.

Difficulty in getting dressed, for example, because of physical restrictions, a lack of understanding of the concept, or low motivation;

• Difficulty preparing a meal, for example, because of restricted ability to do things like open cans or packages, or because of an inability to understand and follow a simple recipe;

• Difficulty eating; for example, because of an inability to co-ordinate the use of a knife and fork, a need for assistance, or the effect of an eating disorder;

• Difficulty going out of doors unaccompanied, for example, because the person has a phobia, a physical restriction, or a learning disability; • Difficulty waiting or queuing, for example, because of a lack of understanding of the concept, or because of pain or fatigue when standing for prolonged periods;

• Difficulty using transport; for example, because of physical restrictions, pain or fatigue, a frequent need for a lavatory or as a result of a mental impairment or learning disability;

• Difficulty in going up or down steps, stairs or gradients; for example, because movements are painful, fatiguing or restricted in some way;

• A total inability to walk, or an ability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue;

Case Authorities

75. The time at which to assess the disability is the date of the alleged discriminatory act: **Cruickshank v VAW Motorcast Limited 2002 ICR 729 EAT.**

76. **Goodwin v Patent Office 1999 ICR 302 EAT**; The EAT set out guidance on how to approach such cases;

“Section 1(1) defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a tribunal to look at the evidence by reference to four different conditions.

(1) The impairment condition

Does the applicant have an impairment which is either mental or physical?

(2) The adverse effect condition.

Does the impairment affect the applicant’s ability to carry’ out normal day to day activities in one of the respects set out in paragraph 4(1) of Schedule 1 to the Act, and does it have an adverse effect?

(3) The substantial condition

Is the adverse effect (upon the applicant’s ability) substantial?

(4) The long-term condition

Is the adverse effect (upon the applicant's ability) long-term?

Frequently, there will be a complete overlap between conditions (3) and (4) but it will be as well to bear all four of them in mind. Tribunals may find it helpful to address each of the questions but at the same time be aware of the risk that dis-aggregation should not take one's eye off the whole picture.

77. The Guidance stipulates that an event is likely to happen if it 'could well happen' (see para C3). This definition of the word 'likely' reflects the House of Lords' decision in **Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL**.

- In **All Answers Ltd v W 2021 IRLR 612, CA**, and **McDougall v Richmond Adult Community College 2008 ICR 431, CA**, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently.

78. The impairments do not need to be related or interact with each other for their combined effect to be considered: **Ginn v Tesco Stores Ltd EAT 0197/05**. In **Brown v Beth Johnson Foundation ET Case No.1304755/15**

Conclusions

79. The burden of proof is on the Claimant to establish that she meets the requirement of section 6 on a balance of probabilities and I shall address each requirement in turn;

The impairment condition - 4 January 2021 to 24 February 2021.

80. The Respondent argues that there is no clear diagnosis and that this suggests therefore that there is no impairment.

81. The Tribunal is not persuaded that there is merit in the argument that there is no diagnosis. The medical reports may use the words "seems" to be Meniere's Disease (p. 51) and "probably" (p. 54) rather than more definite language, however the Tribunal finds that the wording is sufficient to make a findings of fact that there was a diagnosis and further, the use of the term "probably", the Tribunal considers (and Mr Graham accepted, would meet the likelihood test as set out in the Guidance and SCP v Boyle). "Probably" is the Tribunal consider at least equivalent to the meaning of "likely" or 'could well' be.

82. In any event, and regardless of whether the actual medical diagnosis is sufficiently definitive (which the Tribunal in any event find that it is), the Guidance makes it abundantly clear that it is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. Having a diagnosis or establishing the cause of the impairment does not mean that the impairment condition has not been met. That has to be considered in light of what the effects are on the individual.

83. We have, as the Respondent rightly submits, 'slim' medical evidence however, I conclude that although there is no requirement for a diagnosis, nonetheless there is medical evidence to support a finding that a diagnosis of Meniere's Disease was made

in 2018 and late 2019 and for which the Claimant was prescribed medication in an effort to 'control' the symptoms.

84. There are no reports after January 2020, 12 months prior to the relevant period . However, I accept on the evidence from the above reports, that the medication Betahistine was prescribed to assist the Claimant cope with the symptom of Meniere's Disease and although the Claimant has only produced a copy of a prescription for the period 27 October 2021 and an end date of 27 April 2022 (i.e. some months after the relevant period), on a balance of probabilities, considering her oral evidence and the content of the various medical reports, including the reference from her GP on 24 October 2018 that the condition is chronic in nature and there is unlikely to ever be any significant treatment, that her condition has continued.
85. I accept on a balance of probabilities, taking into account the Claimant's oral evidence and the evidence presented that she is still being prescribed the same medication, Betahistine, that there has been no change to the diagnosis and that she has not been 'cured'. Further, I am satisfied that on the evidence including her oral evidence and the length of time the medication was prescribed for (i.e. 6 months) that on a balance of probabilities, the prescription is a repeat prescription.
86. I find that the Claimant has established on the balance of probabilities that she has an impairment and that impairment is Meniere's Disease and that she continued to have that impairment during the relevant period.

Adverse effects condition - 4 January 2021 to 24 February 2021.

87. Did the impairment have an adverse effect on the Claimant's ability to carry out *normal day to day activities* ?
88. The occupational health report from September 2018 (p.46) refers to symptoms being intermittent and varying in intensity.
89. The Equality Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing **if it is likely to recur**. Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act and the Guidance specifically cites Meniere's Disease as the sort of condition to which this sort of situation would apply (para C6).
90. It is not a requirement that the effects remain consistent.
91. What I have been presented with is a credible and thoughtful witness, who I accept was giving her honest account of her condition and its effects.
92. The Claimant describes the effects of the Tinnitus and a feeling of fullness in her ears and the need for noise to concentrate and sleep. I take into consideration that the Guidance at paragraph B11 provides that what should be taken into account when considering the effects include environmental factors and that must include I consider, how noisy or quiet an environment is.
93. It is not disputed by the Respondent that the problem with the Claimant's left ear is connected with the Vertigo/Meniere's Disease and I find on a balance of probabilities, that it is, based on the medical reports and the NHS guidance. The cumulative effect

of related conditions should be taken into account. The Claimant's evidence is that she needs noise to concentrate and to sleep, she struggles with concentration and sleep in a quiet environment. I am persuaded that the effects of the problems with her left ear which include making it difficult for her to hear when people speak more quietly than normal, such that she compensates by lip reading along with the need for noise to enable her to concentrate, is more than minor or trivial. Communication verbally with people and concentrating on tasks including normal household tasks such as cooking, are normal day to day activities. I accept the Claimant's evidence that this has not changed since the reports in 2018 and 2019 and if anything, has worsened and she continued to have the effects during the relevant period.

94. However, regardless of whether the Tinnitus alone had a substantial adverse effect on her normal day to day activities during the relevant period, I am satisfied on the evidence and on a balance of probabilities that the effects of the vertigo attacks on their own (and combined with the Tinnitus), had a substantial adverse effect during the relevant period on her normal day to day activities. The effects the Claimant describes as set out in the findings above, are substantial and affect her normal day to day activities. The ability to stand, drive, cook for example are all normal day to day activities.
95. The Guidance makes it clear that what is important is to focus, not on what the individual can do, but to look at what the individual cannot do. I am not persuaded by the Respondent's submission that the ability to care for her husband or drive or indeed cope at work undermines her evidence on the effects. The Claimant's evidence is that she had a vertigo attack in January 2021 which had been triggered by events at work but she had not had one in the last 12 months prior to that. However, her evidence is that when she does have a panic attack, that the effects of that are very significant, certainly as she describes them they are much more than minor or trivial. The Claimant does not allege however, that she suffers regularly with vertigo attacks because her condition is controlled I am satisfied, but the medication she takes.
96. The EqA provides that where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, **but for** the treatment or correction, the impairment is likely to have that effect.
97. In this context, 'likely' should be interpreted as meaning 'could well happen'
98. But for that medication, I am persuaded on the evidence, that the attacks are likely to be more regular and debilitating and that but for the medication the impairment would have had a substantial adverse effect on her day to day activities during the relevant period.
99. The Claimant's description of the attacks of vertigo that she alleges that she would suffer but for the medication, is consistent with continued need for medication to control her symptoms at 16mg per day and consistent with the medical evidence which has described her condition as "*chronic*".
100. I have also taken into consideration the guidance that the Claimant has produced from the NHS website, which sets out the common symptoms or effects of this condition and while I appreciate that it is not specific to the Claimant, it is consistent and supportive of the Claimant's description of her symptoms, consistent with the medical evidence and the need for ongoing medication.
101. I am satisfied that the impairments had a substantial and adverse effect on the

Claimant's normal day to day activities during the relevant period and regardless of a diagnosis, she therefore had a physical impairment.

Were the effects substantial and long term ?

102. As set out in my findings, I have heard and accepted the Claimant's own evidence about what the impact of stopping the medication would and but for the medication the likely effects of the impairment .
103. I am satisfied on a balance of probabilities, that the Claimant's condition worsened in 2018 and that she continued to have the condition and that but for the medication it is likely that she would have experienced the substantial adverse effects on her normal day to day activities, throughout 2019, 2020 and 2021, and that therefore the substantial adverse effects had lasted for 12 months as at the start of the relevant date.
104. On a balance of probabilities I find that it is likely that but for the medication the Claimant would have continued to suffer with the attacks that she describes more regularly and of greater severity throughout the 12 month period prior to the start of the relevant period , albeit on a fluctuating basis. The Guidance make clear, even if the effects fluctuate or they recur and are *likely* , which I am satisfied they were likely to, hence the need for ongoing medication. The definition of long-term has been met.
105. In summary, taking into account all of the evidence, my findings are that the Claimant has satisfied the requirements of section 6 EqA. She had a disability, during the relevant period as defined by section 6, namely Meniere's Disease.

The Claimant's claim that she is a disabled person for the purposes of section 6 of the Equality Act 2010 is well founded and succeeds.

Employment Judge R Broughton

Date: 15 February 2022

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