



4. The claimant's stated impairment, as recorded in the list of issues is "unspecified back pain leading her being unable to sit or stand".

### **The hearing**

5. The hearing was conducted in person. The claimant represented herself but was accompanied by her husband. The claimant's first language is Polish so the tribunal had the helpful assistance of an interpreter, Ms Waszkiewicz-Hambly, for whose assistance I am most grateful.
6. The claimant exhibited symptoms of discomfort throughout the hearing so that she felt it necessary to sit on the floor on occasion or stand up as necessary. This was permitted as a reasonable adjustment.
7. I was provided with a file of documents produced by the respondent but containing relevant parts of the claimant's medical records, other relevant documents and a statement from the claimant in response to the orders of EJ Lancaster made in preparation for this hearing. I was also helpfully referred, by Mr Caiden, to two other documents in the file that the claimant had produced which included further details of what she said the impact of her impairments were and I took those three documents together as the claimant's evidence in chief.
8. The respondent was represented by Mr N Caiden of counsel and I am grateful for his assistance. Mr Caiden produced, in addition to the file of documents a skeleton argument which I have also considered. This was produced on the morning of the hearing and was written in English. I asked the claimant if she needed any time or assistance from the interpreter to understand it but the claimant said that she did not need to read it. She said she believed it would just include untruths. I explained that Mr Caiden's skeleton argument did not contain evidence and it was important that she be given the opportunity to read and understand it but the claimant said "I understand but it would not make any difference".
9. I therefore proceeded on the basis that the claimant was happy to do so without taking time to read Mr Caiden's skeleton argument.

### **Findings**

10. I make only such findings of fact as are necessary to decide the narrow issue of whether the claimant was disabled and, if so, from what date.
11. The claimant said that her back problems started in September 2018 following an accident at work on 21 September 2018. I do not need to make any findings about the alleged accident. However, the claimant attended her doctor on 24 September 2018 about back pain. She described pain in her lower back and some other symptoms.
12. The claimant continued to complain of back pain thereafter and she was referred to a musculoskeletal (MSK) clinic which the claimant first attended on 14 February 2019. Dr Jackson, who was the doctor who had seen the claimant at the MSK clinic, wrote a letter about that appointment on 14 February 2019. He said

*“In summary this lady has mechanical low back pain, but has developed significant disability due to an anxious premorbid personality and fear avoidance. It is important we try and break this cycle and the only option open to us is some gentle manual therapy through our osteopaths with a view to building her confidence in moving. I am arranging this with them and I do think she will make progress in this way. If she develops chronic disability then unfortunately due to her limited English her options for treatment such as the Wellness Service are reduced. I have made no plans to see her again at this time but the osteopathic team will keep me up to date. She was worried about a disc issue but there is no evidence for this and no indication for MRI scanning”.*

13. I find that the claimant was, at this time, reporting that she was experiencing low back pain at that point and, whether the cause was wholly physical or a combination of physical and psychological, I accept that she was experiencing pain.
14. The claimant was unhappy with Dr Jackson’s report and after a complaint she was given an MRI scan. The claimant asserts that Dr Jackson was conspiring in some way with the respondent to underreport her problems. The claimant produced no evidence of this beyond her assertions and at this stage I reject those assertions. If the claimant wishes to continue to make that assertion at the final hearing, she must produce very compelling evidence to support it.
15. The claimant then had an MRI scan and on 23 July 2019. Dr Jackson wrote to the claimant to confirm that the scan showed no significant problems with important structures and that the claimant’s pain was derived from the soft tissues and muscles around the back.
16. The MRI scan reported that “at L4/L5 a posterior disc bulge with bilateral facetar degeneration. The disc abuts both descending L5 nerve roots, there is mild irritation of the left exiting L4 nerve root”.
17. I do not know what this means, and I am prepared to accept Dr Jackson’s opinion set out in a letter dated 23 July 2019 that the claimant’s pain was derived from soft tissues and muscles around her back.
18. The claimant was off sick at this time, from 21 September 2018 until 14 May 2019 when she returned to work on light duties. Her fit notes record as follows

<b>Date of fit note</b>	<b>Condition</b>
3/10/18	Sciatica
11/10/18	Sciatica
23/10/18	Sciatica under investigation
21/11/18	Back pain
17/12/18	Back pain

18/1/19	Chronic non-specific back pain
14/2/19	Back pain
14/3/19	Back pain
13/5/19	Chronic back pain

19. The claimant then returned to full time work from October 2019. In around October 2019, the claimant had also had further treatment for her back in Poland comprising of some steroid injections.
20. The claimant had suffered with sciatica prior to 2018, but says that the pain starting from September 2018 was different. I find, on the basis of the evidence set out above including the variable references in the claimant's sick notes that the claimant was experiencing ongoing back pain from September 2018. However, it appears that the precise clinical cause of the pain was not sufficiently clear for the claimant's doctors to provide a consistent statement on her fit notes of the condition causing her pain.
21. The claimant then worked until January 2020 when she had a further two weeks off with back pain and was then furloughed from March - June 2020.
22. In January 2020, the claimant was referred to the MSK clinic again. It is clear from the medical records that this is part of an ongoing problem from the claimant's perspective. The notes of a consultation the claimant had at her GP practice 17 January 2020 set out the history from the claimant's perspective. I find that in that consultation the claimant was describing continuous symptoms of back pain for 6 months. Except for a short period of improvement arising from the steroid injections in Poland, the claimant had been experiencing discomfort more or less continuously. This included limping, pain and stiffness in shoulder and specifically says that the claimant has difficulty turning a tap.
23. It is unclear what happened with that referral. It may be that it did not happen or was delayed by the onset of the Covid -19 pandemic because the claimant was then furloughed from March 2020 and returned to work in July 2020. The claimant said that furlough was helpful for her as she was not required to work or be off sick. The claimant said that during those three months she had a number of GP and hospital attendances. The claimant's medical records do record numerous contacts during that period, although it is unclear for what reason. However, on her return to work in July 2020, the claimant was then absent from 3 July 2020 with back pain. This was a fit note issued by a hospital.
24. I find that the claimant continued to experience back pain throughout the first half of 2020. The fit note on 3 July 2020 is wholly consistent with the claimant's evidence that she was continuing to be in pain while on furlough.
25. It then appears that the claimant did not have any further periods of absence until January 2021. There do appear to be further contacts with the claimant's

GP surgery in this period but it is unclear, except for two contacts in December 2020 and January 2021 relating to another condition in which back pain is not mentioned at all, why.

26. On 27 January 2021 the claimant reported worsening sciatica to her GP. She says that the pain has been getting gradually worse since August 2020 and additional symptoms are also reported. The claimant was referred urgently to A & E to exclude the possibility of a serious condition. The claimant had a further MRI scan on 28 January 2021 and the outcome of this is recorded in the claimant’s notes. It says the claimant had a 2 year history of lumbar back pain which had been worse since Christmas (2020). There is a reference to the technical/clinical findings of the MRI scan – and particularly disc herniation at L4/L5 which had “increased in size slightly compare with the previous MRI” and concludes “Appearances have progressed slightly compared with previous MRI”. Referral to the MSK clinic for epidural injections is suggested as a way forward.
27. Following that consultation, the claimant was again referred to the MSK clinic. It is unclear whether that referral went ahead or when. As at 8 April 2021 the claimant was still waiting for an appointment (107).
28. From 17 February 2021, the claimant was absent from work and did not return. Her fit notes for this period record as follows:

<b>Date of fit note</b>	<b>Condition</b>
2/2/21	Back pain
19/2/21	Back pain
11/3/21	Back injury
26/3/21	Back pain
16/4/21	Back pain
28/4/21	Chronic back pain and sciatica under investigation
13/5/21	Chronic back pain
30/5/21	Chronic back pain and sciatica, under investigation
28/7/21	Chronic back and leg pain, awaiting assessment and [unreadable] pain clinic

29. The claimant also attended with the respondent’s occupational health provider on 22 June 2021. In that reports, the occupational health consultant summarises the claimant’s history as follows:

*“To give you a snap shot of the last 2 years : -*

*Jan 19 - May 19 sick - back problems, May 19— June 19 returned to work in a different role on 3.75 hours per day.*

*June - Dec 19 hours increased to 5.5 per day. Jan 20 - March 20 Full time 7.5 per day, March 20 - July 20 Furlough, July 20 - Feb 21 Full time. Feb 21 to date sick, back pain”.*

30. The occupational health consultation also records “She had an MRI scan in 2019 which showed disc protrusion and disc bulge. She had an epidural injection in Poland, the effect of which was short lived”. It is unclear what part of this reflects what the claimant reported and what is the OH consultant’s assessment/opinion.
31. On the basis of the history set out above, I find that the claimant was experiencing symptoms of back pain on an ongoing basis, subject to periods in which there was some slight improvement because of treatment or rest (namely when the claimant was not at work), from 24 September 2018. There has been no definitive conclusion about the physiological cause of the claimant’s problems.
32. I do not accept the respondent’s assertions that there were in fact two separate periods resulting in two separate impairments (and I will address the law and my conclusions below). Having regard to the various medical records and letters, it appears to me, and I find, that to all intents and purposes the claimant experienced one continual episode of back pain that was subject to ongoing investigations.
33. The underlying physiological cause is unclear and appears to be subject to continuing investigations and attempts at treatment. However, for reasons which I set out below, that does not impact on the claimant’s assertion that she was at the material time disabled.
34. I consider now the impact on the claimant of her back pain. In her disability impact statement the claimant said:

*“8.2 My life has changed dramatically since September 2018. Due to constant pain; daily tasks at home such as cleaning, preparing meals and gardening have been a struggle and are difficult to this day. Personal hygiene scenarios such as brushing my teeth were done and still are in a squatting position, I can only take baths never showers due to me being unable to stand for long. When at work in Fiberline Ltd I had to adjust my workplace station to my comfort by purchasing a corrective pillow. Often the pain would be so unbearable I would squat at work to stretch my back, this would happen a handful of times on one shift. I did not get any additional breaks so felt constantly under pressure. After work I would often spend time laying down to ease the pain, however the pain also impacted my sleeping cycle as it would often be very difficult for me to fall asleep. Currently after my epidural injections I am unable to drive a car.*

*8.3 The effects of the impairment were sudden, but got progressively worse with time and physical activity. Currently they have not stopped and I am being treated with epidural injections to aid the pain, I cannot say how long they are expected to last”.*

35. In the additional information the claimant provided to the tribunal she said:

*“As I mentioned before, from 09/21/2018 my life has changed dramatically since then I have been struggling with constant pain, today it is as extreme as vegetation. I cannot do many activities and if it were not for my family, I would not be able to function normally.*

*1. After the epidural injection, on February 22, 2022, I gave up driving due to increased pain.*

*2. I can't sit upright - I'm usually leaning to the right.*

*3. Even after physiological activities and bathing, I have to return to a lying position again.*

*4. I am unable to walk normally, I have to lean forward, which allows me to cover short distances and however I become very tired quicker.*

*5. My passion is the garden which today looks very bad.*

*6. I am unable to go shopping or for walks with my daughters.*

*7. I fall asleep only on the right side with pillows between my legs, because this is the only way I do not feel severe pain and often wake up with various discomforts - neck pain which is associated with a headache as well as tense muscles, which excludes me from my life for a few days.*

*8. My family is shopping and doing housework.*

*9. In Poland, on August 1, 2022, I visited a physiotherapist who said that I had severe muscle atrophy”.*

36. In the GP notes of 24 September 2018 the claimant described the pain as like a nail stabbing into her and being unable to stand straight due to the pain.

37. In the occupational health report of 22 June 2021, the OH consultant says:

*“This condition affects her mobility, ability to set and manage one flight of stairs and driving.*

*She reports difficulty going shopping alone and carrying out house work and is unable to carry out her hobby which involves knitting.*

*She also developed anxiety due to back pain and she sought help from GP. She is on appropriate medication for this condition.*

*She reports no significant impact on sleep. appetite and did not give any history of panic attacks.*

*An assessment of back pain showed significant difficulty sitting for no more than five minutes, changing positions frequently, following which she needed to stand up and walk around the room.*

*For the fear of worsening her back pain, clinical examination had been avoided.*

*An assessment of her current mental health showed moderate depression and mild anxiety”.*

38. In oral evidence, the claimant said that the problems she described with her daily tasks started on 21 September 2018 (when she says she had an accident at work). The claimant described the problem as:

*“A kind of pain clenching my back. And it causes the pain all over and my body to tremble and I am unable to be steady on my feet. And it feels like my hands are, not heavy, but unable to do any actions. I feel tightness in back starting from shoulders on to the very end of my spine”.*

39. She said that everything was an issue for her, even toileting.
40. I prefer the claimant’s evidence about the impact of her back pain on her activities. There is evidence of the claimant reporting difficulties right from the outset. I agree with the respondent that it is likely that at times this has not been as bad as the claimant now recounts, but I find that that claimant has since September 2018 had difficulties with, amongst other things, walking, sitting, climbing stairs, driving and brushing her teeth.
41. These activities are unlikely to present difficulties consistently *every day*. The claimant has had periods of respite. However, I find that overall in the period from 21 September 2018 the claimant has had more than minor or trivial difficulties with these activities for a substantial amount of the time.
42. I have borne in mind the respondent’s submissions that it is difficult to remember how things were previously when experiencing symptoms there and then the claimant certainly appeared to be in substantial discomfort at the hearing – but the claimant’s reported difficulties are consistent with the contemporaneous documentary evidence throughout the period.
43. I find also, however, that initially the prevailing medical opinion appeared to be that the claimant problems were likely to be relatively short lived. That appears to be the initial opinion of Dr Jackson in February 2019 and he is optimistic initially that the claimant would respond to treatment. In my view, therefore, it was not at that stage *likely* that the claimant’s problems would last for as long as a year. In my judgment, it was only in January 2020 when the claimant returned to the doctor for further investigation that it became *likely* that this was a long term condition. However, by that time the claimant had in fact been having the difficulties she has described for a year, albeit with some short periods of respite.

## Law

44. Section 6 of the equality act 2010 says, as far as is relevant for today’s purposes,
- (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.

45. This question comprises of four separate tests as set out by the employment appeal Tribunal in the case of *Goodwin v the Patent Office* [1999] IRLR 4, EAT

(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....., 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?

46. Paragraph 2 of schedule 1 of the Equality Act 2010 says

(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.

47. The burden of proving that they are, or were, disabled is on the claimant.

48. In considering whether something is likely to last at least 12 months, I must consider the evidence available at the relevant time (*McDougall v Richmond Adult Community College* [2008] ICR 431. The relevant question is whether the effect of the impairment has lasted or is likely to last for at least 12 months, not whether the underlying impairment continues to exist.

49. I have also had regard to the relevant provisions of Appendix 1 of The Equality and Human Rights Commission Code of Practice on Employment - The Meaning of Disability.

50. This says that a substantial adverse effect is something which is more than minor or trivial. In determining whether something has a substantial adverse effect, account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of the loss of energy and motivation.

51. The code says that normal day-to-day activities are those activities which are carried out by most men or women on a fairly regular and frequent basis. Day-to-day activities include activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing, going to the toilet, talking, listening to conversations of music, reading, taking part in normal social interaction or forming social relationships, nourishing and care for oneself. This is not an exhaustive list.
52. Where someone receives treatment, that should be ignored and the impairment should be taken to have the effect it would have had without such treatment.
53. The respondent referred to *Veitch v Red Sky Group Ltd* [2010] NICA 39. Mr Caiden appeared to be relying on it as authority for the proposition that “in light of the burden of proof being on a Claimant, the state of medical evidence may mean that a Tribunal cannot properly draw the conclusion on essential ingredients of the EqA definition in the Claimant’s favour, or may draw an inference of no disability from what has been provided, and so the claim fails”.
54. I agree that the presence or absence of medical evidence is relevant. However, in that case the Northern Ireland Court of Appel also cited *J v DLA Piper UK LLP* UK EWAT-0263-09-RM in which Underhill J said:

*“(1) It remains good practice in every case for a Tribunal to state conclusions separately on the questions of impairment and of adverse effect (and in the case of adverse effect the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.*

*(2) However, in reaching those conclusions the Tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day to day activities is adversely affected on a long-term basis and to consider the question of impairment in the light of those findings.”*

55. This case and the principle is most commonly referred to in cases of mental impairment where the symptoms can determine the impairment so that the question could otherwise become circular. However, in my view, the same principles can be applied to an ostensibly physical impairment, the underlying cause of which is unclear or as yet undetermined. The question for the tribunal is whether there is a physical or mental basis to the impact on the day to day activities of the claimant. Provided the tribunal is satisfied that there is, it is not necessary, or indeed possible of appropriate, to then go on to attempt a detailed diagnosis.

56. The respondent also referred to *Dias da Silva Primaz v Carl Room Restaurants Ltd t/a Mcdonald's Restaurants Ltd* [2022] IRLR 194. In that case, the EAT agreed that, as in *DLA Piper*, an impairment can be inferred from the effects, but held that

*“the test [whether an impairment caused the relevant effect] is objective, as it is one of causation. The impairment has to be found by the tribunal to, in fact, have had the requisite effect. In many cases, the answer will be*

*straightforward and uncontroversial. But where there is a dispute about it, then whether the impairment does or not does not have the claimed effect must be determined by the tribunal on the evidence before it. It is not enough that the claimant truly believes that it does. The tribunal must decide for itself”.*

57. In my view, the meaning of these cases is that there must be an impairment but the existence of an impairment can be inferred from the adverse effect. However, the absence of any medical evidence to support the existence of an impairment is likely to make it harder for the claimant to be able to prove that she has a disabling impairment.
58. Finally, when considering whether the claimant is disabled, I must consider whether she was disabled at the relevant time which is the date of the alleged discriminatory act or acts (*Cruickshank v Vaw Motorcast Ltd* [2002] IRLR 24)

### **Conclusions**

59. I consider the 4 stages of the test of disability set out in *Goodwin*.
60. (1)The impairment condition. Does the applicant have an impairment which is either mental or physical?
61. In my judgment the claimant has, and has had since 21 September 2018, the impairment of back pain. I have found that this was the same impairment throughout the period up to the termination of the claimant’s employment. The respondent submitted that in fact the claimant had two different impairments – the first being soft tissue damage and the second being related to the claimant’s nerves/spine.
62. I do not accept that it is necessary or possible on the evidence I have before me to draw this distinction. There is clear evidence that the claimant has had ongoing back problems since September 2018. This has caused her pain and difficulties with her day to day life.
63. Applying the principles set out above, I infer, therefore, that these problems are cause by the impairment of back pain. This is not a case, like *Dias Da Silva Primaz* where there is no medical evidence to support a link between back pain and the claimant’s difficulties. There is medical evidence and I have made the findings about this that I set out above.
64. I accept the respondent’s submission that two completely different impairments which happened to span a year would not be sufficient to amount to a long term impairment. However, the respondent’s attempts to separate out the different medical views at different stages of the claimant’s back problems (in so far as they are different) into two different impairments is artificial and undermines the purpose of disability discrimination legislation.
65. This view is confirmed by the broad position taken by the OH consultant in setting out their history. I do not say that this was a detailed, conclusive medical assessment but clearly reflects the reality of the situation both for the claimant and when considered objectively.

66. (2) The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day to day activities...., and does it have an adverse effect?
67. I have found that it does. The claimant has difficulties with walking, sitting, climbing stairs, driving and brushing her teeth. These are all day to day activities and the claimant was having the problems throughout 2019 (even if not continuously without a break at all) and from 21 September 2018.
68. (3) The substantial condition. Is the adverse effect (upon the applicant's ability) substantial?
69. This simply means more than minor or trivial. The affects, as described by the claimant were certainly more than minor or trivial. They were significant.
70. (4) The long-term condition. Is the adverse effect (upon the applicant's ability) long-term?
71. In my view, the condition did not become long term until the claimant had had the problems for a year. The medical evidence through 2019 appeared to be that this was likely to be a relatively transient problem capable of resolution. However, the problems persisted throughout 2019 and by 21 September 2019 the clamant had had her problems for 12 months.
72. For these reasons, the claimant was disabled by reason of the impairment of back pain from 21 September 2019 and this continued until the end of her employment with the respondent.

Employment Judge Miller

Dated: 2 December 2022