



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs T L Richardson  
**Respondent:** Ministry of Defence  
**On:** 14 December 2022  
**Before:** Employment Judge McAvoy Newns  
**At:** Watford Employment Tribunal

## Appearances:

**For the Claimant:** In person  
**For the Respondent:** Mr A Line, Counsel

## WRITTEN REASONS

### Form of hearing

1. This was a remote hearing which was not objected to by the parties. The hearing took place via CVP, the Tribunal's video conferencing platform.

### Background

2. During the hearing on 14 December 2022, I gave oral judgment as follows:

“At the material time, namely between 8 September 2020 and 17 March 2021, the Claimant was not a disabled person as defined in section 6 of the Equality Act 2010 (the “EA”) by reference to her injury/pain to the left shoulder and arm and depressive disorder. Accordingly, her claims were not well founded and were dismissed”.

3. On 3 May 2023, I received an email from the Watford Tribunal stating that, on 7 February 2023, the Claimant had written to the Tribunal and stated:

“Further to my previous telephone conversations. I am still waiting for the Written reasons to my case above. I still have not received the letter for which I have been advised would be sent to me. Can I please ask again for the documentation to be sent. So I can file as necessary”.

4. I expressed concern about the delay in this email being sent to me and, on 4 May 2023, I instructed that a response to the Claimant be provided, stating as follows:

“The Claimant states that she is waiting for written reasons to be provided to her. However, considering the correspondence which has been sent to her, she is not aware that the Claimant has made a request for written reasons. No such request was made orally at the hearing either.

As the Judgment was sent to the parties on 20 December 2022, the Claimant should have made her request for written reasons prior to 3 January 2023.

The Claimant is directed to confirm, by email, within the next 7 days:

- whether she made a written request for written reasons prior to 3 January 2023. If she has, she should attach a copy of that request to her email for EJ McAvoy News to consider; or
- if the Claimant did not make the request prior to 7 February 2023, why she delayed in doing so”.

5. I understand this was sent to the Claimant the following day.
6. On 31 May 2023, I was provided with a response from the Claimant an extract of which I have quoted below.
7. On 2 June 2023, I instructed that a response to the Claimant be provided, stating as follows:

“In the Claimant’s email dated 28 December 2022, it was stated:

‘I also confirm, to date, I have not received the Judgment sent by the Tribunal on 20 December’.

In the Claimant’s email of the following day, it was then stated:

‘In addition may I also ask for a written copy of the Judgement for the 14th December 2022 to be posted to me’.

Therefore, the Claimant was not making a request for written reasons, she was making a request for the written judgment which she says she had not, at that point, received. The Claimant did not make a request for written reasons during the hearing either.

Rule 62(3) of Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states

‘Where reasons have been given orally, the Employment Judge shall announce that written reasons will not be provided unless they are asked for by any party at the hearing itself or by a written request presented by any party within 14 days of the sending of the written record of the decision. The written record of the decision shall repeat that information. If no such request is received, the Tribunal shall provide written reasons only if requested to do so by the Employment Appeal Tribunal or a court’.

Notwithstanding this, EJ McAvoy Newns understands that the Claimant has now made a request for written reasons and, bearing in mind the fact that the Claimant is a litigant in person, who may have been confused about the terminology used by the Tribunal, he is exercising his discretion to provide written reasons for his decision. They will be provided as soon as practicable’.

8. These written reasons have been provided as soon as practicable following this direction, bearing in mind my other judicial and non-judicial commitments.

#### Issues

9. It was agreed at the outset of the hearing that the issues to be determined were: was the Claimant a disabled person with reference to her two medical conditions, namely: (1) injury/pain to the left shoulder and arm and (2) depressive disorder.
10. The Respondent’s position, at the outset of the hearing, was that the relevant time for assessing whether these conditions qualified as disabilities was from 8 September 2020 (when the Claimant had an accident at work) and 17 March 2021 when the Claimant commenced her long term sickness absence. She did not return to work after this date.
11. The Claimant said that she believed that the relevant time period should be after 17 March 2021. This was because she was still receiving correspondence from the individuals named in her formal complaint after this date. She said that the relevant time should be up to May / June 2021, when her new line manager took over.
12. The Respondent’s representative disagreed, noting that the Claimant’s claim, as clarified during the case management hearing (considered later), does not include these allegations. He said that the latest point I am permitted to consider is 13 July 2021, when the Claimant presented her claim.
13. In respect to the first condition, the Respondent confirmed that it accepted that the Claimant had a physical impairment which was sustained on 8 September 2020 and was reported to the Respondent on 26 October 2020. The Respondent challenged that the impairment was a disability on the basis that it

did not have a substantial and long term adverse effect on the Claimant's ability to undertake normal day to day activities.

14. In respect to the second condition, the Respondent confirmed that it challenged this on the whole statutory test. In particular, the Claimant alleged that the condition was caused by the Respondent's conduct and it arose only in March 2021.

#### Evidence

15. The Claimant served a witness statement and was cross examined on that statement. Some aspects of the Claimant's witness statement are relevant to her substantive claims, namely that the Respondent allegedly failed to make reasonable adjustments.
16. I have read the Claimant's witness statement in full but focused on the evidence relevant to the issue that I have had to determine today, namely whether the Claimant was disabled as defined in the EA at the material time.
17. The Claimant also served a witness statement for Sue Blondell. She was not cross examined and the weight I have applied to this statement has reflected that.
18. The Respondent served a witness statement for Major Philip High MBE. The Claimant cross examined Major High extensively, largely on points that were wholly irrelevant to today's hearing. I interjected on several occasions, reminding the Claimant of the issues I had to determine today, encouraging her to focus her questions accordingly and sought to assist her in doing so.
19. I also had sight of a small bundle of documents. I informed the parties that I would only be reading those documents that were specifically brought to my attention during the evidence, which the parties acknowledged.

#### Attendance of the Respondent's witness

20. In EJ Frazer's notes of the case management preliminary hearing, considered later, it is recorded:

"The Claimant indicated that she did not want to have to see the individuals previously named as R2 and R3. The Respondent stated that this would be unlikely as it would most likely just be the representative present at the disability hearing. We went on to discuss the Claimant's objections to having to see these individuals at the final hearing and she said that it was on account of her mental ill health. I explained to her that if she wanted some restriction on the hearing to reflect this then she would need to write into the Tribunal to make an application. I raised with her the possibility that she would need to cross-examine these individuals as witnesses unless she had representation".

21. In a letter dated 24 June 2022 from the Claimant to the Tribunal, it is stated:

“I hereby respectfully apply to the Tribunal for their agreement to my request that measures are put in place which mean I am not required to be in the same room as the Respondent’s witnesses, or any other close proximity, and that arrangements are also put in place so as to prevent or limit my view of the Respondent’s witnesses”.

22. In a letter dated 24 November 2022 from the Claimant’s doctor, it is stated:

“[The Claimant] is currently suffering from significant mental health issues, much of which is due to the issues surrounding the employment tribunal. She is very anxious about being in the same room as the alleged perpetrator. I agree that this situation may exacerbate her illness and I would recommend that she is not required to be present at the same time as her alleged bully”.

23. I considered this correspondence and further representations from the parties during the hearing. In this regard, I had to initially consider whether adjustments should be made for today’s hearing. If the Claimant was found to be a disabled person at the relevant time, and the case proceeded to the final hearing, I would have then gone on to consider adjustments for the final hearing. As the claim was dismissed during today’s hearing, there was no requirement for me to do so.

24. As to the question of adjustments for today’s hearing, one of the individuals that the Claimant was specifically concerned about was Major High. I noted that the hearing was taking place via CVP therefore there was no requirement for the Claimant and Major High to be physically in the same room or to cross paths in the Tribunal’s corridors. However, I appreciated that if the Claimant had to physically see Major High when she was giving evidence herself, this could result in her not being on an equal footing with the Respondent. Consequently, as the Respondent did not object to this proposal, I directed that Major High should turn off his camera so that the Claimant could not physically see him when she was giving her evidence. It would not have been fair to refuse Major High’s attendance at the hearing, given that he was giving evidence and therefore the Respondent may not be on an equal footing if he wasn’t given the opportunity to hear the Claimant’s own evidence and provide any necessary instructions to the Respondent’s representative.

25. I informed the Claimant that if she wished to cross examine Major High, he would need to be visible on the screen so that I could see him whilst he was giving his evidence. As the Claimant was not represented, there was no one who could cross examine him on her behalf. This is standard Tribunal procedure. Further, although I am not suggesting he would, I needed to make sure that he was not conferring with anyone and the integrity of the evidence he gave was preserved. If I could not see him giving his evidence, I could not ensure this. Given the issues in today’s hearing, the Claimant should not have had to cross examine Major High for long. However, for the reasons explained earlier, she did so, notwithstanding my numerous prompts and requests for her questions to be more focused (and the assistance that I provided in doing so).

Background to today’s hearing

26. On 13 July 2021, the Claimant commenced proceedings against the Respondent for disability discrimination. At the time of doing so, her employment was continuing and had been since 4 April 2016.
27. In her claim, she complained about an injury which she suffered at work on 8 September 2020. As a result of such injury, she had periods of absence from work and her duties required adjustment. She complained about the treatment that she was subjected to by the Respondent which, she said, led to her having a mental breakdown on 17 March 2021. Her mental health has subsequently been impacted, her sleep has been disturbed and she has been taking antidepressants. She said that her disabilities were caused by the Respondent and them ignoring the medical advice from the Claimant's GP.
28. In its response, the Respondent defended the claim, in particular that the Claimant's assertion that she was a disabled person.
29. On 3 December 2021, the Claimant was ordered to confirm which physical or mental impairments she relied upon. She was required to provide certain information about those impairments and a list of the information that she was required to provide was included. This stated:
- "If possible, the examples should be from the time of the events the claim is about. The Tribunal will usually be deciding whether the claimant had a disability at that time".
30. In a letter to the Tribunal dated 28 January 2022, the Respondent observed that the relevant time period for the Claimant's claim appeared to be from 8 September 2020 until 17 March 2021.
31. A case management preliminary hearing took place on 26 May 2022 before EJ Frazer. The claims were refined as complaints of disability related harassment, direct disability discrimination and failure to make reasonable adjustments.
32. In summary, EJ Frazer recorded that the Claimant's complaint concerned how the Respondent treated her after she sustained an injury to her left shoulder / arm at work. This included her new manager, allocated to this role in January 2021, deliberately moving her to Normandy Company to work on de-kits which was a manual job. She asked for this manager to be kept away from her but this did not happen which created a negative environment for her. She also complained about the fact that she was required to work in the Virtus storeroom which she considered to be degrading. She believed that she ought to have been allocated non manual duties.
33. For the purposes of the direct discrimination claim, the acts of less favourable treatment were clarified as being the requirement to carry out de-kit tasks and work in the Virtus storeroom. The former was also the PCP for the purposes of the adjustments claim with the sought adjustment being to place her on non-manual duties. The harassment claims concerned moving the Claimant to

Normandy Company to work on de-kits, requiring her to undertake de-kit work from January 2021 onwards, the appointment of the new line manager from January 2021 and the failure to keep the new manager away from the Claimant from 26 October 2020.

34. There was no application to amend the claim either before or during today's hearing. Therefore, the claim that I was required to consider concerned events up to 13 July 2021, namely the allegations summarised above, when the claim was presented to the Tribunal. Although it was evident that matters had progressed following 13 July 2021, there was no claim before the Tribunal in respect to such matters and therefore, absent a successful application for permission to amend (which was not made or even instigated) I was not permitted to consider them.

### Findings of fact

35. Having considered the evidence, both oral and documentary, I made the following findings of fact on the balance of probabilities.

#### *8 September 2020 accident*

36. On this date, the Claimant's evidence was that she was sorting equipment when the tipper trolley flipped and the container that she was removing fell off when her left arm was still attached, causing her arm to jerk. The Claimant said that the container was full of empty brass shells causing it to contain a considerable weight. This resulted in the Claimant suffering pain in this arm and, at the time, she believed she had pulled muscles.

37. The Claimant accepted in cross examination that she was working as normal between 8 and 30 September 2020. She said:

"I still had twing in my arm, I just thought it would get better. I was a gymnast for 13 years. Women, when injured, just tend to carry on. I didn't expect it to be anything more and I carried on allocated duties".

38. The Claimant was absent from work between 30 September and 26 October 2020 for a reason unrelated to the injury. During her absence she reported her pain to her GP who recommended physiotherapy. On her return to work, she completed an accident report form.

39. The accident report form, dated 26 October 2020, described the injury as affecting the Claimant's left shoulder. It recorded:

"Whilst [the Claimant] was during the course of her duties picking up an ammunition container off the tipper trolley, the lid unexpectedly opened, unexpectedly revealing that it was full of empty brass shells from the recent training. The container fell towards the floor with [the Claimant's] arm still attached, jerking her left arm and shoulder. Although there was an initial sharp pain to that area, nevertheless [the Claimant] did not deem it necessary at the time to obtain first aid, nor to seek medical attention. It went on to record that

the pain became more noticeable over the proceeding weeks leading to the Claimant seeking medical advice from her GP and then being referred to physiotherapy.

40. As part of this hearing, I am not required to form any assessment of whether this incident occurred as the Claimant described nor would it be appropriate for me to do so.

#### *Changes to duties*

41. The Claimant accepts that she was working between 26 October 2020 and 3 February 2021. However, her evidence was that she wasn't doing a significant amount of manual handling during this time.

42. The Claimant says that plans were put in place to help her find alternative work. She was offered a new position in the Gymnasium which was supposed to allow her to avoid manual work. It was due to commence in January 2021 but never materialised. Instead, she was transferred to the Normandy Company and had to undertake de-kits. Although she says she was told that she only needed to do this once per week, in reality, she was doing it every day.

43. The Claimant clarified the term de-kits. She said that when people are recruited into the army they are required to undertake a period of basic training. To this end they are issued with two holdalls and a rucksack that contains all of the clothing and equipment that they will need during this period. This includes several sets of clothing, boots and respiratory equipment, each of which were heavy. Undertaking de-kits therefore involved going through these holdalls and rucksacks and checking that all items had been received back.

44. There is a dispute between the parties as to whether the Claimant was required to undertake the manual handling aspect of the de-kit work. As part of this hearing, I am not required to resolve this dispute nor would it be appropriate for me to do so. This would however be relevant to the Claimant's substantive claims, including her failure to make reasonable adjustments claim, should that have proceeded to hearing.

45. It is relevant however that Major High's evidence was that he saw the Claimant, between January and 17 March 2021, carrying out the manual handling aspect of this role. He said:

"I saw nothing to make me think that she was struggling to do the manual handling of equipment. On one occasion, I also found her playing a game with the recruits whereby she was encouraging them to throw the items into the receptacles".

46. In cross examination the Claimant accepted that she was doing manual handling work during this time however she insisted that she did so solely with her right arm. She said Major High only saw her on three occasions during this time.



*Sickness absence*

47. On 3 February 2021, the Claimant was provided with a fit note until 24 February 2021 which recorded pain in her upper arm. A further fit note was provided on 1 March 2021. The Claimant accepted in cross examination that this was the first time that she was signed off because of her arm.

*Occupational health assessment – 5 March 2021*

48. The Claimant attended an occupational health assessment on 5 March 2021. The report that followed that assessment records the following:

1. The Claimant had said she struggled to carry out some of her day to day activities at home and struggled to sleep due to the pain;
2. The Claimant had said that the pain score ranged from 4 to 10 at times, with 10 being the worst pain;
3. The Claimant was fit to work although it was recommended that she do not carry out repetitive tasks or heavy lifting for six weeks;
4. The long term outlook was unknown as her recovery was not as expected; and
5. The injury/pain to the left shoulder and arm was unlikely to qualify as a disability because it had not lasted longer than 12 months and was not likely to last longer than 12 months.

49. On 10 March 2021, the Claimant's doctor requested that the Claimant be given an x-ray because the shoulder was not responding to physiotherapy and there was a concern about AC separation. It is recorded in the Claimant's doctor's letter dated 29 March 2021 (considered below) that on 24 March 2021, the Claimant and her doctor spoke about the x-ray which had signs suspicious for impingement injury.

*Stress related absence*

50. On 17 March 2021, the Claimant says she had a mental breakdown at work. She was taken to the office to calm down. She was then signed off until 31 March 2021 with stress at work. She was not fit to undertake any work.

51. This was renewed on 24 March 2021 and the Claimant was signed off for a further month. However, the recorded condition was 'pain in upper arm'. This was repeated on 19 April 2021 when the Claimant was signed off for a further month. The fit note dated 12 May 2021 recorded the arm injury and work related stress as dual reasons for absence. On 26 July 2021, she was signed off for 3 months with depressive disorder.

52. The Claimant did not return to work after 17 March 2021. She accepted in cross examination that the requirement for her to do de-kits and Virtus stopped on this date because she did not return to work.

*Doctor's report – 29 March 2021*

53. On 29 March 2021, a doctor's report was produced summarising the doctor's interactions with the Claimant from 5 October 2020 onwards. It explained that the injury was initially considered to be a tendon strain or possible impingement. She was referred for physiotherapy and advised to avoid heavy lifting. After being given a role that involved heavy lifting, she was signed off work. The reference in this letter to the x-ray is considered earlier.

54. The Respondent put to the Claimant that this report doesn't say that she was experiencing depression in a clinically recognised sense. The Claimant's response was: "What would you class distress as? When an individual is crying at work, pleading to be listened to?" The Respondent's representative put to the Claimant that she could have been distressed regarding an isolated incident, but that doesn't mean she was clinically depressed. The Claimant said that she felt suicidal but acknowledged that the medical letters of this period of time did not record these feelings and that she may not have discussed this with her doctor at this point in time.

*Hospital discharge letter and prescription*

55. On 30 March 2021, the Claimant was discharged and prescribed 500mg of flucloxacillin. This concerned left sided chest pain and cellulitis in the right arm from a COVID injection. There is reference to the fact that the Claimant was taking Naproxen for her left arm injury. It noted that inflammatory markers were normal. Ibuprofen gel and regular paracetamol were recommended.

*Occupational health assessment – 20 April 2021*

56. The Claimant attended an occupational health assessment on 20 April 2021. The report that followed that assessment records the following:

1. Following an assessment using a standardised tool for measuring anxiety and depression, the Claimant scored moderately for depression and mildly for anxiety;
2. The Claimant was struggling with her sleep pattern and concentration;
3. An x-ray showed some damage to her shoulder. Referrals for an ultrasound and then to orthopaedics had been made; and
4. The injury/pain to the left shoulder and arm was unlikely to qualify as a disability because it had not lasted longer than 12 months and was not likely to last longer than 12 months.

*Consultant Orthopaedic Surgeon's report – 18 June 2021*

57. This report noted that, during examination, the Claimant was able to do active flexion and abduction of the shoulder to 90 degrees and beyond this she had pain at the back of the shoulder and over the AC joint. She had good external and internal rotation of the shoulder. Scarf test was positive for pain in the ACJ. She had good power of the cuff muscles and very mild impingement. The x-ray mentioned earlier showed degeneration in the AC joint.

*Occupational health assessment – 2 August 2021*

58. The Claimant attended an occupational health assessment on 2 August 2021. The report that followed that assessment records the following:

1. Following a PHQ9 and GAD7 assessment the Claimant scored 21 for PHQ9 indicating severe depression and 18 for GAD7 indicating severe anxiety; and
2. The Claimant's musculoskeletal, stress and anxiety conditions were, at this point in time, likely to qualify as disabilities because they are likely to last longer than 12 months, they were having a significant impact upon her ability to undertake normal day to day activities and were likely to recur. This assessment was repeated in subsequent occupational health assessments.

*Doctor's report – 1 March 2022*

59. On 1 March 2022, a doctor recorded the Claimant's deteriorating mental health since June 2021. A recent ultrasound had also shown moderate tendinopathy, a partial thickness cuff tear and AC joint arthropathy. An operation was recommended for which the anticipated recovery time was 6-9 months. It was observed that, as a result of the COVID backlog, there may be a delay in the operation taking place.

*Doctor's report – 28 June 2022*

60. On 28 June 2022, a doctor recorded that the Claimant suffered severe pain and reduced function in her left shoulder due to a rotator cuff tear. Surgery was awaited. An assessment had been undertaken which found severe restriction of movement and pain. This report recorded that the Claimant's mental health had continued to deteriorate and there had been a report that the Claimant had had suicidal thoughts brought on by the stress of the situation.

61. In her witness statement dated 20 June 2022, the Claimant's evidence was: "I am no longer able to do the everyday things like washing and dressing myself because the ability to use one arm is so limited and the second is failing". It did not record the impact of the Claimant's condition on her ability to undertake normal day to day activities specifically between October 2020 and March 2021.

The Law

62. Pursuant to section 6 of the EA a person (P) has a disability if P has:
- (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.
63. Section 212(1) of the EA defines “substantial” as “more than minor or trivial”.
64. Schedule 1 of the EA states that the effect of an impairment is long term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.
65. The word ‘likely’ means ‘could well happen’ — *Boyle v SCA Packaging Ltd* (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL.
66. In *Goodwin v Patent Office* 1999 ICR 302, the EAT said that the words used to define disability require tribunals to look at the evidence by reference to four different questions (or ‘conditions’):
- 1. did the claimant have a mental and/or physical impairment? (the ‘impairment condition’);
  - 2. did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the ‘adverse effect condition’);
  - 3. was the adverse condition substantial? (the ‘substantial condition’); and
  - 4. was the adverse condition long term? (the ‘long-term condition’).
67. In *Sullivan v Bury Street Capital Ltd* 2022 IRLR 159, the Court of Appeal stressed that it does not amount to an error of law for a tribunal to omit to set out in its judgment the four conditions identified in *Goodwin* and deal with each methodically in turn, so long as, in substance, all relevant matters are addressed when determining whether the particular claimant was disabled.
68. The material time at which to assess the disability (i.e. whether there is an impairment that has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act — *Cruickshank v VAW Motorcast Ltd* 2002 ICR 729, EAT.
69. In *All Answers Limited v W* [2021] IRLR 612 the Court of Appeal held that following *McDougall v Richmond Adult Community College* 2008 ICR 431, a 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 a tribunal is not entitled to have regard to events occurring subsequently.
70. Appendix 1 to the EHRC Employment Code states that ‘normal day-to-day activities’ are activities that are carried out by most men or women on a fairly

regular and frequent basis, and gives examples such as walking, driving, typing and forming social relationships. The Guidance gives examples including 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 also 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.

71. The indirect effects of an impairment must also be taken into account when considering its adverse effects on normal day-to-day activities. In *Leonard v Southern Derbyshire Chamber of Commerce* 2001 IRLR 19, EAT, for example, L's clinical depression caused tiredness, which in turn affected her mobility in terms of the distances she could walk and drive, as well as her manual dexterity, because, when she was tired, her physical coordination went. Her vision also tended to blur and she could not maintain concentration and suffered memory loss.

### Submissions

72. Both parties provided oral submissions and the Respondent provided me with a skeleton argument. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made, even where no specific reference is made to them.

### Conclusions

#### *Background*

73. The first purpose of today's hearing was to determine whether the Claimant was disabled with reference to either her injury/pain to her left shoulder and arm and/or her depressive disorder. As it happened, that became the sole purpose because the second purpose (to consider adjustments for the final hearing), became unnecessary.

#### *Relevant period*

74. It is well established law that the time at which to assess the disability is the date of the alleged discriminatory act. Further, a crucial point in the Claimant's claim is whether her conditions were sufficiently long term to qualify as disabilities. It is also established law that when assessing whether a condition is likely to last 12 months or longer, the Tribunal must consider the position at the time of the acts of discrimination relied upon. When the alleged discriminatory acts occurred is, therefore, the first point I needed to consider as part of determining the issues in this case.

75. The Respondent originally said that this was during the period 8 September 2020 and 17 March 2021. The reason for this submission was that the Claimant

sustained the injury to her left shoulder on 8 September 2020 and started her sickness absence on 17 March 2021 and did not return to work after this date. The Respondent said none of the acts or omissions of discrimination relied upon could have post-dated 17 March 2021 because the Claimant was not in work. The Respondent later confirmed, after hearing evidence from the Claimant, that the start date could be later, perhaps early in 2021.

76. The Claimant disagreed and said the acts of discrimination continued to June/July 2021 when her new line manager was appointed.
77. During the case management hearing, the Claimant explained to EJ Frazer that her direct disability discrimination complaints related to the Respondent's alleged requirement for her to carry out de-kit tasks and work in the Virtus storeroom. In response to a question from me today, the Claimant said that this requirement ceased upon the commencement of her sickness absence, namely 17 March 2021. The same applied to her reasonable adjustments claim, as the sole PCP relied upon was the requirement for her to carry out de-kit tasks. The same also applied to some of her harassment claims, namely those at 6.1.1, 6.1.4 and 6.1.5 of the list of issues appended to the case management summary at page 50 of the hearing file. As a result, for all of these allegations, I agree with the Respondent that the relevant time period is up to 17 March 2021.
78. The allegations at 6.1.2 and 6.1.3 of the list of issues can be interpreted in a slightly different way. At 6.1.2, the Claimant alleges that the Respondent appointed her new line manager from January 2021 without prior communication or discussion. At 6.1.3, the Claimant alleges that from 26 October 2020, the Respondent failed to take any action to keep this manager away from the Claimant after the Claimant had cried at work and sent numerous emails to Captain High. No end date is specified in the list of issues.
79. The Claimant explained to me today that these acts continued after 17 March 2021 because this individual was required to be her line manager up to June/July 2021 and she was in contact with her during this period, although she could not be clear about the specific dates. However, this position is different to what the Claimant says in her claim form. Here she says that this manager's conduct led to her mental breakdown on 17 March 2021 suggesting that it is the conduct pre dating 17 March 2021 that she relies upon. She does not clearly refer in her claim to any subsequent treatment of this manager, post-dating 17 March 2021, which she considers to be discriminatory. She certainly does not clearly allege that the contact this manager had with her after this date was harassing or otherwise discriminatory.
80. There has been no application for permission to amend her claim to include allegations after 17 March 2021. Therefore, for these allegations as well, I agree with the Respondent that the relevant time period is up to 17 March 2021.

### *Disability*

81. I now turn to the definition of a disability itself. Under the EA, this is a physical or mental impairment which has a substantial and long term adverse effect on

a person's ability to undertake normal day to day activities. The burden of proving that they are a disabled person as so defined is on the Claimant.

82. When considering whether the impairment had a substantial adverse effect on a person's ability to carry out normal day to day activities, I need to decide whether it had a 'more than minor or trivial' affect. The threshold is therefore relatively low.
83. 'Normal day-to-day activities' are activities that are carried out by most men or women on a fairly regular and frequent basis, and includes examples such as walking, driving, typing and forming social relationships. A more detailed list of activities, which I have considered, is included in the law section of these Reasons (above).
84. Neither condition had lasted 12 months by 17 March 2021. It was not submitted that either condition would likely last for the rest of the Claimant's life. Therefore, when assessing long term effect, the relevant question was whether the substantial adverse effect of either condition was likely to last 12 months.
85. As mentioned above, when assessing this, 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. The above mentioned cases stress that this 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. Although I have evidence before me of the impact of the Claimant's conditions after 17 March 2021 (including recommendations from OH that she is likely to be considered disabled after this date), it would be an error of law for me to consider them when deciding the issues for this hearing.
86. The question of whether the effects of the impairment are likely to last for more than 12 months is an objective test based on all the contemporaneous evidence. The Guidance stipulates that an event is likely to happen if it 'could well happen'. Therefore, again, the threshold is relatively low.

#### *Left shoulder and arm injury*

87. In respect to the Claimant's injury/pain to her left shoulder and arm, the Respondent accepts that this is a physical impairment but challenges the Claimant's assertion that it had a substantial and long term adverse effect on her ability to undertake normal day to day activities.
88. The Claimant's evidence on this point has been that, following her injury, she experienced pain in her arm, but carried on working, assuming that she had pulled a muscle. She worked for substantial periods of time, namely between 8 September 2020 and 30 September 2020 and then between 26 October 2020 and 3 February 2021. Her absence between 30 September and 26 October 2020 was unrelated to her shoulder and arm injury. Although she had weekly physio treatment, and her evidence is that the pain became progressively worse, she was not signed off as a result of this condition until 3 February 2021.

89. The documentary, including medical evidence before me, states that, on 26 October 2021, when the accident incident report was prepared, it was anticipated that the Claimant would be restricted to light duties for at least 7 days.
90. When she consulted her GP, on 3 February 2021, she was signed off until 24 February 2021. Then, on 1 March 2021, she was placed on restricted duties for a further 3 months.
91. On 5 March 2021, the Respondent's OH team recommended that the Claimant should not carry out repetitive tasks or heavy manual handling and should be reassessed in 6 weeks' time. It was assessed that the Claimant's pain ranged from 4-10 at times (with 10 being the most painful), she was unable to carry out some of her day to day activities at home and she was unable to sleep due to the pain. OH considered the long term outlook to be unknown because her recovery was not as expected.
92. OH considered it unlikely that the Claimant would be disabled because her impairment had not lasted nor was it, at that point, likely to last longer than 12 months.
93. On 12 March 2021 the Claimant had an ex-ray. There were concerns that her injuries were not responding to physiotherapy. This ex-ray showed damage to the left shoulder.
94. I have no doubt that the Claimant's shoulder caused her pain during the latter part of the relevant period, i.e. in particular between February and March 2021. This is clear from the medical evidence and the Claimant's own account. However, this does not mean that the condition qualifies as a disability.
95. The Claimant had the burden of proving to me that this condition had, at this point in time, a substantial and long term adverse effect on her ability to carry out normal day to day activities. The only activities she has referred to herself are work related activities and she has accepted that she continued to undertake these with her right arm, albeit she says she was forced to do so. Major High's evidence was that he saw her undertake these activities without issue. Her witness statement doesn't focus on the impact specifically between September 2020 and March 2021 and no further evidence on this point was given by the Claimant during this hearing. This is despite the Claimant being aware that she was required to focus on this period of time and the Respondent had given her advance notice that it considered this to be the relevant period of time.
96. Some of the medical evidence mentioned above briefly refers to the impact on her day to day activities at home but doesn't say what this impact was or how severe it was. The medical evidence briefly says she was unable to sleep due to the pain but doesn't say for how long or how severe this was.
97. There is nothing in the medical evidence, or the Claimant's own witness evidence, that allows me to reasonably conclude that on or before 17 March 2021 any effect of the Claimant's injury/pain to her left shoulder and arm could



well last 12 months or more. Any substantial adverse impact appears to be limited to the period of February to March 2021 and it cannot reasonably be inferred that, because there may have been a substantial adverse impact during these two months, it could well be the case that such a substantial adverse impact would have lasted for a further 10 or more months.

98. The case law cited earlier makes it clear that I cannot allow the medical evidence concerning the Claimant's condition after the relevant period to shape my decision making and therefore I have not done so. I do note however that this evidence does support the Claimant's assertions that this particular condition did get progressively worse and the substantial adverse impact does appear to have lasted longer than 12 months.

99. On the balance of probabilities, I did not conclude that the Claimant's injury/pain to her left shoulder and arm qualified as a disability.

#### *Depressive disorder*

100. As for the Claimant's depressive disorder, the Claimant accepts there is no clear medical evidence of her suffering from this specific condition prior to 17 March 2021. This was the day that she says she had a breakdown and the medical evidence of such depressive disorder came a few months later.

101. The Claimant saw her GP on several occasions prior to 17 March 2021 and soon afterwards yet she was not signed off work because of this condition until July 2021.

102. There are references to the Claimant being stressed and/or distressed during the relevant period, and the Respondent's evidence today was that some of the Claimant's absences during this period were stress related. However, I am not here to determine whether the Claimant's stress condition qualified as a disability: I am here to determine whether her depressive disorder did.

103. As there is no evidence of the Claimant having a depressive disorder at the relevant time, I do not conclude that the Claimant's depressive disorder qualifies as a disability. The Claimant's claim in this regard fails at the first hurdle: she did not, at the relevant time, have the mental impairment which she relies upon.

104. If I am wrong about this, then it is plain from the medical evidence and the Claimant's own account that, prior to 17 March 2021, any depressive disorder had no adverse effect on her ability to carry out day to day activities and certainly not a substantial adverse effect. There is nothing before me that persuades me that, as of 17 March 2021, it was likely (namely it could well happen) that any depressive disorder would last 12 months or more.

105. As the Claimant was not a disabled person at the relevant time, her disability discrimination claims were dismissed and the final hearing was vacated.

106. On a final note, I pointed out to the Claimant when giving oral judgment (and I point it out again here for completeness) that she should be aware that I have been required to assess whether she was disabled at the relevant time, over 18 months prior to the hearing. It may well be that she is disabled with reference to either or both conditions as of now. This is not something that I was permitted to comment further on.

**Employment Judge McAvoy News**

**18 August 2023**

**Sent to the parties on:**

**31 August 2023**

**For the Tribunal:**