



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms C Matthew-Ellis

V R1 Brook Street UK Ltd

R2 Secretary of State for Justice

PRELIMINARY HEARING

Heard at: Birmingham by CVP

On: 16 & 17 March 2023

Before: Employment Judge Dean Appearance:

For the Claimant: in person, accompanied by Ms C Hanna, support worker

For the First Respondent: Alice Beech , of counsel

For the Second Respondent: Miss Lena Amartey of counsel

PRELIMINARY JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was disabled for the purposes of the Equality Act 2010 at all material times by the following health conditions which amounted to a disability from the following dates:
 - a. Meralgia paresthetica from 19 October 2017
 - b. Sleep apnoea from 4 July 2013
 - c. Severe anxiety and depression from 1 July 2019.
2. The claimant's applications to amend her complaints before the tribunal succeeds only in respect of the addition of a claim for discrimination arising from disability under section 15 of the Equality Act 2010 in respect of the issues referred to at paragraph 10.2 of the list of issues to be determined at the final hearing.

REASONS

Background

1. The claimant was employed by the first respondent, an employment business, from 11 October 2017 until 6 December 2019. The claimant was assigned to work for the second respondent as an Administrative Officer. The claimant initially worked at the Leicestershire National Compliance and Enforcement Service (NCES) Warrants Team. However, following the closure of that unit she was moved to the Nuneaton NCES Team, which was based at Warwickshire Justice Centre.
2. On 24 October 2019 the claimant was arrested on suspicion of a threat to kill her line manager, Robert Sugrue. The claimant's assignment with the second respondent was terminated on 25 October 2019, and she was dismissed as an employee of the first respondent with effect from 6 December 2019.
3. Early conciliation relating to the first respondent started on 24 January 2020 and ended on 18 February 2020. Early conciliation relating to the second respondent started on 24 January 2020 and ended on 24 February 2020. The claim form was presented on 18 March 2020. At the time when the claimant presented her complaint she was legally represented.
4. In July 2021 the claimant was detained under section 3 of the Mental Health Act 1983, and she became an in-patient at The Caludon Centre in Coventry on 11 July 2021. The claimant was a resident at the Caludon Centre until 6 May 2022. The claimant's has confirmed that today her health allows her to participate in this hearing.
5. The case was stayed for six months on 6 August 2021 because of the claimant's mental health issues. On 15 February 2022 the claimant wrote to the Tribunal to say that she was still being detained under section 3 of the Mental Health Act, and requested a further postponement.
6. However, the claimant's health has since significantly improved and she was discharged from The Caludon Centre on 6 May 2022. The claimant is taking medication for her mental health issues, and has regular appointments with the crisis team. The claimant is now living independently, although she has daily visits from a Support Worker from a charity called People In Action. The Support Worker ensures

the claimant takes her medication, and helps her to participate in her daily activities. The claimant was accompanied at today's hearing by Charmayne Hannah, who is a Support Worker.

7. The claimant has confirmed that she understood what the purpose of today's hearing was and she was well enough to participate. The claimant expects to be well enough to attend the final hearing which is listed for four days 5,6,7 & 8 September 2023.

Issues

8. The purpose of the preliminary hearing is to determine the issues outlined by Employment Judge Tegerdine at the case management preliminary hearing on 2 September 2022 as being to:

“2.1 Consider the claimant's application to amend her claim which is referred to at paragraph 10 of the order as being:

“ 10.1 The claimant wishes to add the following disabilities to her disability discrimination claim – severe anxiety and depression, bipolar disorder, EUPD, and ADHT.

10.2 The claimant believes the reason for the termination of her assignment with the second respondent, and her dismissal by the first respondent, was because the respondents were unhappy about the claimant taking time off to attend medical appointments.

10.3 The claimant wishes to add a claim for discrimination arising from disability under section 15 of the Equality Act 2010 in respect of the issues referred to at paragraph 10.2.

“

2.2 Determine whether the claimant was disabled for the purposes of the Equality Act 2010 at the material times, and if so, which of the health issues relied on by the claimant amounted to disabilities;

The claimant identifies the following as her disabling impairments:

- i. Meralgia paresthetica;
- ii. Achilles tendonitis;
- iii. Bulging discs; iv. Mild scoliosis;

v. Severe anxiety and depression;* vi. Attention deficit hyperactivity disorder (ADHD);* vii. Emotionally unstable personality disorder (EUPD);

*

viii. Bipolar disorder.*

The claimant wishes to add the following disabilities to her disability discrimination claim – severe anxiety and depression, bipolar disorder, EUPD, and ADHT.

2.3 Make further case management orders to get the case ready for the final hearing.”

Applicable law

Amendments

9. The law to which I have had regard in consideration of the claimant’s application to amend requires me in exercising my general case management powers I have had regard to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 (“the Rules”) and the Guidance Note 1 of the Presidential Guidance on General Case Management.

10. The guidance given by Mummery J in the case of Selkent Bus Company v Moore [1996] ICR 836 sets out the non-exhaustive list of factors relevant to the exercise of discretion when considering amendment applications to consider that I should have regard to :

- a. The nature of the amendment
- b. The applicability of time limits
- c. The timing and manner of the application
- d. The overarching principle is stated to be :

i. “Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship around the amendment against the injustice and hardship of refusing it.” [para4@843]

11. *“The claim as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond ...” (Chandhok v Turkey [2014] UKEAT/0190/14, [2015] ICR 527, [2015] IRLR 195).*

12. In exercising my discretion I have had regard to the overriding objective under the Rules to enable me to deal with a case fairly and justly which

includes as far as practicable ensuring that the parties are on an equal footing;

- a. dealing with cases in ways that are proportionate to the complexity and importance of the issues
- b. avoiding unnecessary formality in seeking flexibility proceedings
- c. avoiding delay, so far as compatible with proper consideration of the issues and
- d. saving expense.

13. To the extent that I consider in determining the timing of the application and the issue of the tribunals exercise of judicial discretion in relation to complaints that may be presented out of time having regard to s123 of the Equality Act 2010 I have regard to the guidance provided by the statute and authorities.

14. In deciding whether to grant the Claimant's application, I should consider all the circumstances, in particular comparing the injustice and hardship of allowing the amendment, with the injustice and hardship of refusing it. That test derives from the well-known case of *Selkent* and subsequent case law has confirmed that that test is the key consideration for me to have in my mind.

15. I also think it is important to take into account that one of the subsequent leading cases (*Abercrombie & Others v Aga Rangemaster Limited* 2013 EWCA civ 1148) has confirmed that what is really relevant is the degree of additional factual enquiry needed to deal with the claim in its amended form. That factor may be the key consideration when applying the balance of injustice/hardship test.

16. It is also established that the Tribunal may take into account the underlying merits of the proposed amendments. Essentially, the issue in relation to that part of the exercise is that the weaker the allegation, the less disadvantage there will be to the Claimant in refusing to allow the application to amend. The claim under consideration here is a claim disability discrimination and I am of course aware of the difficulties in assessing such a claim at a preliminary stage where no evidence has been heard. I take into account that difficulty.

Disability

17. An individual is disabled for the purposes of the Equality Act if:

- a. "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 18. In considering the statutory meaning substantial means more than minor or trivial. Long terms means that the adverse effects have lasted

or are likely to last 12 months or more or the rest of a person's life, meaning that the circumstances to be likely are such that they could well happen.

19. The Guidance on the definition of disability 2011 and the Code of Practice on Employment 2011 are helpful sources of information to assist my consideration of disability and the effect of an impairment. In particular I have had regard to Appendix 1 of the Code of Practice and the Guidance B12 – 17 – Effects of Treatment; C1-2 – Long-term effect; C3-4 Meaning of 'likely'; C5 – 8 Recurring or fluctuating effects; C9-10 Likelihood of recurrence; D2-7 'normal day-to-day activities.

20. The statutory test is augmented by Sch 1 EqA 2010 and statutory Guidance ('Guidance')¹ which provide (insofar as it is material):

- a. sch 1, para 2(2) EqA 2010: "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"

21. s 212(1) EqA 2010: defines "substantial" as "more than minor or trivial". An impairment will only amount to a disability if it has an adverse effect on the individuals ability to carry out normal day-to-day activities. The Employment Tribunal should focus on what the employees cannot do rather than what they can do despite their disability.

22. para B4, Guidance: the cumulative effects of an impairment must be considered, specifically, "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".

23. para A5, Guidance: an impairment may include conditions which are "eg • mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some

selfharming behaviour; mental illnesses, such as depression and schizophrenia;

24. para D3, Guidance: Normal day-to-day activities are “are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone ... 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” (emphasis added).
25. Para D4. The term ‘normal day-to-day activities’ is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, ‘normal’ should be given its ordinary, everyday meaning.
26. Para D5. A normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as breast-feeding or applying makeup, and cannot therefore be said to be normal for most people. They would nevertheless be considered to be normal day-to-day activities.
27. In considering the effect on day-to-day activities, regard should be had to the time taken and manner in which activities are carried out (para B2 – 3, Guidance) and coping strategies developed to avoid or reduce the impact of the impairment (B7 – 9, Guidance) Particularly:
 - a. *“B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities ... even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities ...*
 - b. *B9. ... It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the*

definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty.”

28. The Appendix to the Guidance provides a non-exhaustive list of factors that would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, which are of particular significance to the Claimant's case.

29. Of particular further assistance is the recent decision of HHJ Tayler in Elliott v Dorset County Council UKEAT/0197/20/LA (V) where His Honour stated:

- a. *“18. ... Often the components can only properly be analysed by seeing them in the context of the provision, and statute, as a whole. This can be particularly important if some of the components are conceded, or not significantly disputed. It is necessary to consider the basis of any concession to be able to properly analyse the components that are in dispute ...*
- b. *22. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. The focus of the test is on the things that the applicant either cannot do, or can only do with difficulty, rather than on the things that the person can do...*
- c. *32. There is a statutory definition of the word "substantial" as "more than minor or trivial". The answer to the question of whether an impairment has a more than minor or trivial effect on a person's ability to carry out day-to-day activities will often be straightforward. The application of this statutory definition must always be the starting point. We all know what the words "minor" and "trivial" mean. If the answer to the question of whether an impairment has a more than minor or trivial adverse effect on a person's ability to perform day-to-day activities is "yes", that is likely to be the end of the matter ...*
- d. *59. [On the relevance of the Guidance] On an overview of that part of the Guidance, it is clear that where a person has an impairment that substantially affects her/his ability to undertake normal day-to-day activities the person is unlikely to fall outside the definition of disability because they have a coping strategy that involves avoiding that day-to-day activity ...”*

30. In considering whether the disability has a substantial effect the tribunal should focus on what the claimant cannot do and not what they can do. In considering the question of whether the effects are at a certain point in time 437132” the tribunal must interpret “*likely*” as meaning “*could well happen*”. SCA Packaging Ltd v Boyle [2009] ICR 1056. The question needs to be asked at the date of the discriminatory act and not the date of the hearing of the tribunal. All Answers v W [2021] IRLR 612 at para 26
31. In determining whether the impact on day to day activities is “substantial” it is necessary to compare the difference in how the individual carries out those activities because of the conditions relied on, using his coping mechanisms albeit without any medication or aids.
32. Whether the respondent has knowledge of disability is not relevant to the question of whether a person is disabled Lawson v Virgin Atlantic Airways Ltd UKEAT/0192/19.
33. I am reminded by Miss Beech counsel for the first respondent of her helpful reference to the guidance to which I might have regard in
- a. Igweike v TSB Bank plc [2020] IRLR 267 EAT in respect of the consideration of conditions such as anxiety and depression considering the effect rather than the cause of an impairment.
 - b. Sobhi v Commissioner of the Police of the Metropolis [2103]UKEAT/0518/12/BA in respect of day to day activities.
 - c. Anwar v Tower Hamlets College EAT 0091/10 d. McDougall v Richmond Adult Community College [2008] IRLR 227 Evidence
34. The papers within the agreed bundle extend over 531 pages. I have read only the pleadings and Case Management Orders and the claimant’s impact statement [525-529] and the documents to which the claimant has referred me in her statement. I have reminded myself throughout the course of the claimant evidence that the consideration of the evidence is to be at the relevant time, in this case the claimant period of employment between 16 October 2017 and 31 December 2019

Findings of fact

35. The first respondent was contracted to supply temporary administrative and clerical workers to the second respondent. The second respondent was at all material times an end user client of the first respondent. The claimant at the relevant time was placed on assignment with the second respondent to whom she provided clerical and administrative work.

36. When recruited by R1 the claimant did not declare on her application records that she had any disability nor that she was registered disabled. In or about November 2018 the claimant having been informed by Mr Sugrue her line manager while working for R2 that she might be eligible to have a work place assessment through Access to Work. The claimant made such an application and adjustments were recommended , with available contribution to funding from Access to Work on 28 December 2018 [164-165] in respect of
- a. Adapt 650 Ergonomic Chair
 - b. Double Leg Support
 - c. Height adjustable desk
 - d. Plantronics CS540 Cordless Headset
37. Although the adjustments recommended were provided to the claimant she did not permit either respondent to have access to the full report and neither respondent were aware of the detail of any impairments the claimant had which caused her a substantial adverse impact on her abilities to undertake day to day activities. The adjustments were made to ease her working arrangements.
38. Although the claimant did not declare any conditions or impairments to be disabilities whilst in the respondents employment workplace adjustments were put in place to enable her to work as effectively as possible And as evidenced that the respondent were aware of the claimants physical discomfort but she otherwise had in the workplace.
39. The claimant in giving her evidence enhanced questions in cross examination and in my clarification has found it difficult to focus on the effects of her various impairments on her at the relevant time that is whilst in the employment of the first respondent working for the second respondent. I have been referred to the objective evidence contained within the claimants GP records and other medical records and I have sought to focus the claimants account of how she suggests the various impairments affected her on a day-to-day basis during her employment.
40. The claimant has a long and detailed record of visits to her GP [248415] and the record summarises her significant conditions to include relevant conditions:
- lateral cutaneous nerve of thigh (diagnosed 3 April 2017)
 - attention deficit hyperactivity disorder (diagnosed 28 Jan 2020)
 - emotionally unstable personality disorder (diagnosed 28 Jan 2020)
 - Meralgia Paraesthetica (diagnosed 19 October 2017)
 - Obstructed sleep apnoea (diagnosed 4 July 2013)
41. It is evident the account given by the claimant in her impact statement [525-529] and her oral evidence that she has experienced very significant neuropathic pain caused by the condition of Meralgia

Paraesthetica ("MP") and the lateral cutaneous nerve of thigh and is recorded in the history given to her physiotherapist on referral as taking pain medications including tramadol, gabapentin, ibuprofen and had steroid injections into the spine it was also using a TENs machine and had been referred to the pain clinic. The claimants account is that the pain wasn't her back and her legs And her pain what's so significant that she was had been referred to the pain clinic since January 2018 [299]. The claimant's GP record confirm that she had been moved to a higher dose of Mardol when the claimant had been so concerned by the severity of discomfort that she may have had a slipped disc and pain was affecting her sleep.

42. Although the claimant refers to bulging discs and mild scoliosis in context she has explain that she had thought that to be the case in respective spinal discs before a diagnosis of MP was made. The most significant reference to the claimants GP has throughout been to leg pain and reference to back pain she accepts has been fluctuating. Although the claimant is refer to mild scoliosis it was not evidence before February 2021 om her GP notes [375].
43. The claimant was diagnosed with the condition of sleep apnoea on 4 July 2013 and her GP records make frequent reference to insomnia and had difficulty sleeping. There is no specific diagnosis off insomnia however I accept the account given by the claimant as recorded in her GP notes at that as a result of sleep apnoea she often woke with pain had difficulty sleeping and often slept for only three or four hours a night as was recorded by assessment in a sleep clinic.
44. Her account of how the impairments in relation to MP and leg and back pain and sleep apnoea affected her on a day-to-day basis. The claimant has explained that whilst cohabiting with her then partner she had been assisted in her housework in the home and domestic life. The claimant is explained that she is able to walk without any aids although she finds standing for any length of time uncomfortable. At the relevant time the claimant usually walk to work but sometimes if in discomfort was not able to walk home. The claimant is able to complete light housework duties but was not able to make a bed there she could put laundry in the washing machine the bending down was uncomfortable. The claimant describes it she's able to undertake light shopping herself but it's not able to carry home a large supermarket shop and she described to me one occasion when walking around a large superstore she had to rest for a short while sitting on a pallet of stock in the aisle.
45. The claimant is able to wash and dress herself albeit she says she is slow doing so and has difficulty putting on her socks.

46. I conclude that the claimant makes reasonable adjustments to her domestic and personal life to accommodate her physical impairments and that the effect of the impairments caused by her pain is not at all trivial. The neuropathic pain felt by the claimant which has been long term and her sleep apnoea causes her to be fatigued and the cumulative effect of those conditions has for a significant period of time at least since 2017 had a significant impact on her ability to undertake her normal day to day activities. While the claimant was able to work I have no doubt that disturbed sleep and constant nerve pain has an emotional as well as physical drain upon her well being.
47. The claimant has stated that she has Achilles tendonitis and there is a record in her GPs notes from October 2015 [320] which confirmed that the claimant at that time was prescribed to use naproxen to manage the pain. There is no further reference to Achilles tendonitis until 17th December 2015 [319] which simply records that the claimant could not do much exercise and that her ankle was tender on examination, and she wanted to be referred for physiotherapy. The GP record again refers
the claimant too physiotherapy for treatment of Achilles tendonitis following a consultation on the 4th of December 2017 [304]. Although the claimant says that when she met with her GP she prioritised concerns that she had in relation to the management of her MP she accepts that there was no ongoing reference about pain or swelling in relation to Achilles tendonitis other than to the two reports if the occasions to which I have been referred. I have not been referred to the assessment made by Access to Work and there is no reason to suppose that the equipment provided to the claimant was to relieve the effects of MP.
48. In her impact statement the claimant describes that Since childhood and in her teenage years she suffered with anxiety and depression which has become more severe in her adulthood she says that she has had traits of emotional unstable personality disorder throughout her life and that was diagnosed only in 2020. Likewise the claimant says that she has bipolar disorder having shown traits throughout her life but was not given a diagnosis until leaving hospital in 2020. Clement says she will sue had childhood ADHD and was diagnosed with adult ADHD in 2020.
49. It is apparent from the account given to me but the claimant lived with significant and chronic neuropathic pain from MP and that, exacerbated by poor sleep caused by sleep apnoea no doubt meant that she may have low mood could be easily distracted irritable and stressed. However, the account given by the claimant is one informed by diagnosis made in 2020 after the claimants employment with the first respondent working for the second respondent had come to an end.

50. The claimant GP record shows no evidence of any major depressive episodes other than in 2012 when the claimant had a relatively short period of 'stress at work' which is not properly described as a major depressive event. Other than the reactive episode in response to work life events there is no evidence that the claimant had any depressive illness until March 2019 when the claimant referred herself to counselling support from ROSA. In 13 May 2019 [219] it became apparent that the claimant was struggling with a variety of conditions and her mental health. The GP entry notes:

"Symptom: Back pain without radiation NOS, Very difficult conversation covering multiple aspects all at once. flipping from subject to subject. has had MRI spine. Advised nerve impingement discovered. Discussed getting advice from a specialist about this. suggest increase in nortriptyline in the short term but patient wanted to increase tramadol. advised not help to do that. patient's main concern is that she feels suicidal and says has done for some time and no one is helping her. Is currently working as a mental health support worker. Tried to discuss her triggers and covered previous abuse and rape and advises me has had an appointment today with ROSA and has been advised they can offer some support. Discussed suicidal thoughts and says has tried self harm cutting wrists superficially with a pair of scissors. Relationship ending has had problems caring for her mother. Discussed referral to crisis team or A&E and declined. says is fit to work as that's the only thing that helps her. Then became very verbally aggressive towards me personally stating I'm not interested in helping her. Advised that is not the case. Personal insult that I am disinterested and "why will you not just book me another appointment with Dr Mshonga, why wont you do anything? You dont want to help." wants to increase dose fo tramadol for back pain but already on max dose. Says MY previous promised to contact pain team about this. Abusive language occurred at the end of the consultation and I asked her to leave as I felt personally threatened. PRIORITY=3

51. On 1 July 2019 [289] the notes refer:

*"01 Jul 2019 - Yemurai Mshonga (General Medical Practitioner)
Diagnosis: Anxiety with depression, very tearful today. long chat. longstanding h/o low mood and anxiety. Finds actually not as bad at work as occupied. has poor relationship with family. also separating from [UNSPECIFIED] .h/o sexual abuse but currently under rosa who has starting cbt/counselling. no suicidal thoughts .or dsh but previous h/o dsh. h/o adhd never been seen by adult services agreed low dose setraline r/v 2 weeks continue with rosa after which consider referal to adult neurodevelopment r/ vpm 2 weeks / red flags -a&e PRIORITY=3
Acute Issue(s): Sertraline 50mg tablets - HALF A TABLET*

EVERY DAY, 14 tablet"

52. It is evident with the benefit of hindsight that this period marked the beginning of the decline in the claimant's mental health albeit unknown to the respondent at the time.
53. My attention has been drawn to a letter sent by the mental health service is supporting the claimant on 22nd November 2022 to the second respondents legal representatives [417] although written retrospectively it provides a helpful insight into the claimants condition as it was affecting her whilst working for the respondent. It confirms:

"Cheyenne currently receives support from The Early Intervention Team and myself as care coordinator. Cheyenne has been working with Mental Health Services since late 2019 to the present day.

Physical conditions include: Meralgia Paresthetica (MP) affects legs like they are burning and heavy and painful, sensitive to touch and sensitive to heat and sharp shooting pains. Meralgia Paresthetica results from the compression of the lateral femoral cutaneous nerve (LFCN). The LFCN is a large sensory nerve. It travels from your spinal cord through your pelvic region and down the outside of your thigh.

Merelgia Paresthetica occurs when the LFCN is compressed (squeezed), which affects the ability to walk or move normally. Sleep insomnia/obstructed sleep apnoea, mild scoliosis, essential hypertension, lumber spine issues, spondylosis of the L4, L5 and disc intrusion and profusion.

Cheyenne has a diagnosis of, Bipolar (Bipolar Disorder is a mental health condition that causes extreme mood swings. The high and low phases of bipolar disorder are often so extreme that they interfere with everyday life and the main symptoms of bipolar disorder are episodes of extreme highs and lows, which can last for several weeks. Emotionally Unstable Personality Disorder, Childhood ADHD, severe anxiety and depression."

54. Undoubtedly the history was an accurate one detailing the objective and clinical description of MP and the impact it had on the claimant. I am mindful however that the reference to the diagnosis of Bipolar was not one made until after the claimants work for the respondent had come to an end. Similarly the reference to EUPD, childhood ADHD and severe anxiety and depression are not evidenced before the GP record in March 2019 and 1 July 2019 [289].

55. The respondent at the hearing has conceded that from 1 July 2019 the claimant was disabled by depression and anxiety.

Arguments and submissions

56. I am grateful to Ms Beech counsel for the first respondent who has prepared a note of the law in relation to the prim ratios that I am to determine. The claimant has also provided me with a written submission to which I have had full regard. All parties have made oral representations to me which I have considered carefully in reaching the conclusions which I have. I deal first with the preliminary issue in relation to the determination whether the claimant was disabled for the purposes of the Equality Act 2010 at all material times and if so by which health issues. I will turn then to the issue of the amendment application informed by the background to the evidence that I have heard from the claimant in respect of her various health issues and disabilities.

Disability

57. At the hearing the respondent has conceded that from the 1st of July 2019 the claimant was disabled by the condition of depression and anxiety.

58. The respondent accepts also that the claimant is disabled by meralgia paresthetica it is said from the 1 March 2019. It is clear from the findings of fact that I have made that in fact the claimant was diagnosed with MP from October 2017 and that the condition is one which by itself and in combination with the claimant's poor sleep and sleep apnoea had a very substantial adverse effect on the claimants ability to undertake normal day-to-day activities. Based on the findings of fact there is objective evidence of the claimant's diagnosis and of the chronic nature of the condition and the impact that it had on the quality of the claimant's life in her ability to manage chronic pain on the impact it had on her quality and duration of sleep. The chronic condition was long term and its impact well substantial notwithstanding the claimant's coping strategies which she employed with varying degrees of success.

59. The respondent contests that the claimant 's conditions identified as Achilles tendonitis, bulging discs and mild scoliosis are disabling conditions. In considering whether each of those conditions identified is itself a disabling condition I have heard representations from all the parties and I take each one in turn.

60. **Achilles tendonitis** - there is reference to an episode in March 2019 and to an earlier episode in 2015 and it is a condition which the claimant confirmed had cease to be painful in 2016. On the findings of fact that I have made the claimant has confirmed that the discomfort

from tendonitis was peripheral And there is new evidence to lead me to conclude that other than occasional episodes the effect of that condition was not long term and there is never no evidence either from the claimants GP nor from physiotherapist suggesting that it was a substantial impairment that add anything other than a trivial effect on the claimants ability to undertake normal day-to-day activities.

61. **Bulging discs and mild scoliosis** - in answer to questions in cross examination of the claimant's explained that before the diagnosis of MP she had thought that the pain that she suffered was from bulging discs. Based upon the findings of fact that I have made the reference to back pain was peripheral to the chronic neuropathic pain caused by MP. Such mentions to specific back pain as are contained in the GP records are limited to one instance on 13 May 2019 [291] and there was no evidence to suggest it was likely to last more than 12 months. Although the claimant refers to having had injections for Spondylosis examination of the records of her GP identify Spondylosis and scoliosis following an MRI scan in February 2021 that was not evident during he relevant time in this case.
62. **Anxiety and depression** – that respondent concedes that in light of evidence before them it is plain in retrospect that the claimant has been disabled by Anxiety and depression since 1 July 2019 as evidenced by the GP notes from May 2019 onwards. However the respondent denies that they had knowledge of that diagnosis and that until that evident change in the claimants mood there was noting to suggest the claimants earlier episodes of stress where likely to last long term.
63. Based upon my findings of fact I conclude that the claimant was not disabled by Severe anxiety and depression until July 2019 and there after the condition was a disabling one.
64. **Sleep apnoea and insomnia** – the claimant has a confirmed diagnosis of sleep apnoea since 4 July 2013. Throughout the GP notes as I have found evidence in her GP notes the claimant refers to sleep apnoea as well as to poor sleep and insomnia. The claimant suggests that the impact on the claimant's day to day activities of poor sleep are no more than minor and are trivial in their nature. While the claimant confirmed in evidence that she only occasionally overslept and was rarely late for work I conclude that poor quality sleep caused by sleep apnoea and poor sleep duration has an a not insignificant effect on the claimants ability to concentrate and to have energy – which taken together with her persistent and chronic pain was a significant detrimental effect on the claimants ability to do normal say to day activities. The claimant gives an honest explanation that when she completed a working day she has too fatigued to do other things that might be expected.

65. I conclude that the claimant's sleep apnoea and insomnia are together with her MP sufficient to amount to a disability under the Equality Act.
66. **ADHD** - the claimant has referred to her childhood diagnosis of ADHD in 2005 and that in childhood as she was prescribed Ritalin. In adulthood the claimant in consultations with her GP discussing her poor sleep patterns ask to be prescribed Ritalin as she suggested that her poor sleep was because of ADHD. The claimant's GP records show that the GP declined to prescribe the Ritalin in the absence of an adult diagnosis of ADHD add more alpha that such a prescription would be at odds with management of the claimants diagnosed sleep apnoea condition. There has been no evidence before me as to how the claimant says she was affected by ADHD in adulthood other than that the claimant says that she is able to use coping strategies such that it does not cause substantial adverse impact on her ability to organise her life and work. On the evidence before me I conclude there is insufficient evidence to support a finding that at the material time the claimant was diagnosed with the condition or that it was a disabling condition at the relevant time.
67. The claimant seeks to rely on subsequently diagnosed mental health conditions of Bipolar disorder and emotionally unstable personality disorder ("EUPD"). It is not disputed by the respondent that subsequent to the claimant ceasing to be employed by the first respondent to work for the second respondent the claimant has suffered a very significant deterioration in her mental health. The respondent does not contest that the claimant may now be disabled by these conditions. There is no evidence before me to enable me to conclude that those conditions were evident at the relevant time whether as referred to in the medical records or in the oral evidence before me. I am unable to assess on the evidence that at the relevant time the claimant was disabled by those conditions that they were diagnosed and had or were expected then to be long term and to have a substantial adverse impact on the claimant's ability to undertake normal day to day activities.
68. I conclude that the claimant was disabled for the purposes of the Equality Act 2010 at all material times by the following health conditions which amounted to a disability from the following dates:
- a. Meralgia paresthetica from 19 October 2017
 - b. Sleep apnoea from 4 July 2013
 - c. Severe anxiety and depression from 1 July 2019.

Application to amend

69. The claimant in her application recorded by Employment Judge Tegerdine wishes to make three amendments to her complaints before

the tribunal. I deal with each in turn but make the overriding observation that the claimant when she presented her complaint to the Tribunal on 18 March 2020 did so with the assistance of legal advice. I am mindful that the claim form was submitted immediately after the claimant had spent time as a patient in day Oakwood hospital from 12 December 2019 to 17 March 2020 in connection with the management of her then poor mental health.

70. The application to amend the complaint is brought some long time after the claim was originally presented on the 18 March 2020 And was presented with legal advice. Sadly the claimant's mental health deteriorated and she was a patient under section 3 Mental Health Act 1983 for the period from 14th July 2021 until 15 May 2022 and in no period either before her hospitalisation or thereafter until the case management hearing before EJ Tegerdine was the application made. A long period of time had therefore elapsed after the claimant presented her complaint and the responses were filed by the respondents before the claimant's mental health severely deteriorated and she then recovered and when the application was made.
71. The respondents are concerned that the new claims that the claimant seeks to bring are only brought to their attention in September 2022 almost three years after her relationship with the respondents had come to an end.
72. The respondents acknowledge that for a significant period of time the claimant was not able to deal with the complaints before the tribunal because of her poor mental health concern. The respondents express concern however about the fact that the claimant has not provided an account as to why, knowing of all of the matters about which she might have complained, she now seeks to raise them by way of amendment however she does not explain why those matters were not originally included in her claim form.
73. The respondents are no longer able to take instructions from the relevant witnesses in particular the claimants line manager at the second respondent Mr Sugrue who has in the intervening time died. The respondents stand at a considerable disadvantage being unable to take instructions from the line manager who might have been able to give an account in respect of the claimants mental health hand behaviours at the time.
74. To the extent that the claimant now seeks to amend her application to include disabilities of severe anxiety and depression, bipolar disorder, EUPD and ADHD the Respondents refer to the fact that also for the

severe anxiety and depression are conditions that were diagnosed after the complaints were presented to the tribunal.

75. Ms Amarty counsel for the second respondent presents a compelling argument in relation to the balance of convenience and hardship in this case and reminds me that the respondent put forward cogent and objective evidence for the reasons why the claimant's contract to work at the second respondent's workplace was brought to an end. The respondent reasons are detailed in the response form, in short because on 24 October 2019 the claimant was arrested on suspicion of a threat to kill her line manager, Robert Sugrue and her assignment to work for the second respondent was terminated on 25 October and subsequently her contract with the first respondent was terminated for some other substantial reasons on 6 December 2019.
76. The claimant seeks in her amendment application seeks to say that the reason for termination of her assignment with the second respondent and her dismissal by the first respondent was because the respondents were unhappy about the claimant taking time off to attend medical appointments. In their submissions the respondent remind me that in considering the application to amend I might consider the likely merits of it and there is prima facie clear objective evidence of the reasons why the respondent say that decision was taken for reasons not related to absences.
77. Furthermore I am reminded that the claimant herself acknowledges in her claim form that on 24 October she was allowed time to attend a medical appointment.
78. I have had regard to the contemporaneous documents within the bundle to which I have been referred giving force to the respondents objective reasons for the termination of the claimants contract.
79. In the claimant's originating application she identified a number of conditions which she says were disabilities namely Meralgia paresthetica, Achilles tendonitis, Bulging discs, mild scoliosis sleep apnoea and insomnia. The claimant makes an application to her disabilities in her disability discrimination claim - severe anxiety and depression, bipolar disorder, EUPD and ADHD.
80. In the determination I have made above in respect of the claimant's various conditions I have found that the claimant was disabled by Meralgia paresthetica and by sleep apnoea and by severe anxiety and depression.
81. I am mindful that the claimant has existing complaints before the tribunal in relation to MP and sleep apnoea. Although I have found the

claimant was at the relevant time disabled by severe anxiety and depression that was not before the tribunal and the respondents until September 2022. The key witness who might be able to give an account of whether any of the acts about which the claimant complains were related to the mental health impairment is Mr Sugrue who is no longer able to give evidence.

82. Taking each of the applications to amend in turn I conclude that the application:

10.1 The claimant wishes to add the following disabilities to her disability discrimination claim – severe anxiety and depression, bipolar disorder, EUPD, and ADHT.

is a new complaint not previously included within the original complaint. The amendment is a substantial complaint and is one which is presented a considerable time out of time. Considering whether it is appropriate to allow the amendment I have taken into account all of the circumstances of this case. The respondents are subject to a huge injustice and hardship in being able to present evidence in relation to the single disability namely severe anxiety and depression which was a disabling condition at the relevant time. The claimant is in the event still able to present her complaint in relation to the conditions which are pleaded in her original complaint as impairments upon which she relied as disabling. On balance the injustice and hardship of the amendment outweighs the injustice and hardship of refusing it and the amendment application is refused.

83. Turning to the second amendment application:

10.2 The claimant believes the reason for the termination of her assignment with the second respondent, and her dismissal by the first respondent, was because the respondents were unhappy about the claimant taking time off to attend medical appointments.

84. I have analysed above that the respondent has produced cogent contemporaneous evidence of the reasons why each of them terminated their relationship with the claimant. Having had regard to the nature of the amendment that is sought the claimant seeks to add a wholly new complaint to the factual matrix and it was a complaint that the claimant might have brought when presenting her original complaint. There is no reason given or the failure to make the application sooner than it was.

85. I have taken into account the balance the injustice and hardship of the amendment outweighs the injustice and hardship of refusing it and the amendment application is refused.

86. Finally turning to the third amendment the claimant seeks to make:

10.3 The claimant wishes to add a claim for discrimination arising from disability under section 15 of the Equality Act 2010 in respect of the issues referred to at paragraph 10.2. “

87. The claimant in effect seeks to attach a new statutory label to the complaint already before the tribunal. The issues at 10.2 [83] are:

“10.2 Did the respondents do the following things between March – September 2019:

10.2.1 Did the claimant’s line manager, Robert Sugrue, who was employed by the second respondent, and/or Isabella Majewska, who worked for the first respondent, tell the claimant that she couldn’t have time off or take holidays in order to attend medical appointments;

10.2.2 Did the first respondent tell the claimant she was “taking the piss” when she asked about taking holidays in order to attend medical appointments;

10.2.3 Did Mr Sugrue and/or Ms Mejewaska inform the claimant that she would be sacked if she took any more time off to attend medical appointments. “

88. Having considered the submission made to me I consider this amendment, in contrast to the previous amendment applications, is in fact a Selkent type amendment. In so far as the claimant seeks to place a different label to the factual matrix already before the tribunal the application to amend is allowed.

Signed by Employment Judge Dean

on 8 August 2023

Judgment sent to Parties on
