EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000232/2023

Preliminary Hearing held at Glasgow remotely by Cloud Video Platform on 27 February 2024

Employment Judge A Kemp

Ms L De Matos	**Claimant** **Represented by:** **Ms R Cox,** **Solicitor**
Caledonian MacBrayne Crewing (Guernsey) Ltd	**Respondent** **Represented by:** **Ms G Todd,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was a disabled person under section 6 of the Equality Act 2010, from 4 October 2016 to the time of her dismissal by the respondent on 23 January 2023.

REASONS

Introduction

1. This was a Preliminary Hearing held remotely, and had been fixed to determine whether or not the claimant was a disabled person as defined by section 6 of the Equality Act 2010 ("the Act").

2. There had been earlier Preliminary Hearings on 18 July and 12 October 2023 and 24 January 2024. On the last of those the present hearing was

fixed. A Final Hearing has also been fixed for the period 15 – 18 April 2024. The claim before the Tribunal is of discrimination arising out of disability under section 15 of the Act.

Issue

3. The issue to determine was whether or not the claimant was a disabled person at the relevant time in terms of section 6 of the Equality Act 2010. If the decision is that the claimant is not the Claim would require to be dismissed.

Evidence

4. I heard evidence only from the claimant. There were documents that the parties had prepared in a single bundle, most but not all of which were spoken to. A matter addressed at the preliminary stage of the hearing was the date of dismissal, referred to below, and a letter dated 23 January 2023 was produced by the respondent without objection.

Facts

5. I found the following facts, material to the issue, to have been established:

Parties

6. The claimant is Ms Lina dos Santos de Matos. She is Portuguese, but has been resident in Scotland for a substantial period. She has had a career at work at sea for a total of over 30 years. She has a good, but not perfect, command of English.

7. The respondent is Caledonian MacBrayne Crewing (Guernsey) Ltd.

8. The claimant was employed by the respondent from 14 January 2010 to 20 January 2023 as a Senior Catering Rating. She worked on vessels operating as ferries.

Accident

9. On 4 October 2014 the claimant was in Flensburg, Germany as a part of her work duties in relation to a new vessel which had been built there. She tripped over a sewer cover in the street and fell, striking the left side of her head. She lost consciousness for a short period. She sustained three facial fractures to the area of her left cheekbone beneath her left eye, being her left maxillary sinus and left infraorbital zygoma, she suffered damage to nerves in the left side of her face, or neuropathy, damage in the area of her sinus on the left hand side, and her upper and lower teeth became misaligned. She was taken to hospital in Germany. She then travelled to the UK on the respondent's vessel, and attended hospital.

Medical conditions

10. She has suffered from continuing facial pain, and intermittent headaches or migraines, following the accident. The left side of her cheek feels numb, but is painful to the touch. She consulted her General Practitioner, Dr I Kennedy. She was referred to a consultant maxillofacial surgeon, Mr I Holland, who offered her an operation but as that would lead to increased scarring she decided against undertaking it. She was referred to an Ear, Nose and Throat (ENT) surgeon. She was referred to a Specialist Orthodontist Dr I Shafi.

11. Since the accident occurred she has been prescribed at various times following the accident with Duloxetine, Co-Codamol, Gabapentin, Amitriptyline and Ibuprofen, all of which are analgesics. She also took paracetamol, another analgesic.

12. The claimant was off work following the accident for a few months into 2015, on a specific date not given in evidence. On 1 June 2015 she was diagnosed by her GP with depression. She was prescribed with anti-depressant medication including Nortriptyline first prescribed from 11 June 2020 and Citalopram first prescribed from 1 June 2015. On 4 April 2016 she was diagnosed with anxiety.

13. She has continued to take analgesia and anti-depressant medication since at least April 2016. On 14 September 2022 and 22 December 2022 she was prescribed with Zopiclone, an anti-depressant.

14. A side effect of the medication she has taken has been bowel problems including blood in her stools, for which she was investigated for cancer. She has had dental treatment as a result of the injuries to seek to correct the misalignment of her teeth. She has had talking therapy.

15. If she does not take the medication prescribed, which she did on occasion, she has feelings of intense pain, the pain she suffers is debilitating, and requires her to remain still in a darkened room. The left side of her face is particularly painful, and she tries to avoid people touching it wherever possible. If she moves onto that side when asleep the pain regularly wakes her up.

16. She has had extensive consultations with her General Practitioner set out in her medical records. Letters were issued to confirm that she suffered from neuropathic pain, for example on 11 July 2017 and 27 October 2017, 12 March 2018 and 5 September 2019. The claimant sent those letters to the respondent at the time.

17. Her symptoms, which have been present since at least April 2016, are of low mood, low self-esteem, lack of motivation and of energy, disturbed sleep and appetite, fatigue, difficulty in concentration, anxiety, a lesser ability to leave the house such as for GP appointments, and a struggle to interact with the public. She sleeps intermittently and for relatively short periods, she has some sleep during the day and has periods without sleep at night. The lack of sleep affects her level of concentration. She finds difficulty in getting out of bed and dressing. She finds difficulty in personal care. She has persistent feelings of sadness. She frequently becomes tearful in meetings. She finds difficulty in leaving the house, and has done so relatively rarely in the period leading to her dismissal. She used to go out for walks, such as to a beach or forest, and for shopping regularly prior to the accident, but has done so rarely. She frequently has anxiety when attending meetings. She suffers from occasional migraines. She has divorced. She lives on her own most of the time, and has a sense of isolation from other people. She often does not get dressed, but stays in bed. She eats limited food, and often has meals consisting of a cup of tea and biscuits, or tinned food. She feels that she has nothing to live for.

18. Her symptoms affected her whilst at work. Her anxiety made her concerned when carrying trays of hot food, descending stairs carrying bags of rubbish, or walking on the deck or other surface of the vessel whilst at sea and the vessel was moving. She on occasion did not undertake such tasks as a result of anxiety that she would injure someone else, or herself. She was not able to take analgesia when required at work because of her duties, and felt intense pain as a result. She found working increasingly difficult.

Absences from work

19. Fit notes were issued to the respondent in relation to the claimant. After she was off work following the accident for a few months after the accident she was off work again from about January to October 2016 with depression which also included from April to October 2016 anxiety. The claimant was issued with a series of fit notes by her GP which are set out in her medical records for the period generally between January to October 2016 (albeit with certain relatively short gaps in time). She then returned to work. The claimant was off work ill from 24 September 2021 to 20 April 2022, with the reason given for that absence being anxiety and depression. The claimant returned to work but went off ill again for the same reason on 20 July 2022, which continued until the termination of her employment. A fit note dated 20 July 2022 referred to anxiety and low mood. That on 11 August 2022 referred to anxiety and depression as did that on 14 September 2022.

20. An Occupational Health ("OH") Report was issued to the respondent on 30 November 2021 concluding that the claimant was not fit for wok, having been absent from work since 24 September 2021. It stated the opinion that the claimant was likely to be a disabled person under the Equality Act 2010. A further OH Report was issued on 4 March 2022 and again on 12 December 2022. Each noted little if any improvement in her health, and repeated the advice as to her likely disability status. The report on 12 December 2022 stated the opinion that it was highly unlikely that the claimant would "ever be able to return to work with [the respondent] and in the same environment due to her perceptions of the workplace and her feelings with regards to the ongoing court case."

Dismissal

21. The respondent terminated the claimant's employment by letter sent to her by email on 23 January 2023 "on the ground of capability due to your long term incapacity". That followed a meeting on 20 January 2023 and receipt of the last Occupational Health Report. The letter stated that no reasonable adjustments that could be made for the claimant had been identified.

Other matters

22. Fit notes were issued by the claimant's General Practitioner after the dismissal stating that she was not fit for work.

23. The claimant has travelled to Portugal to visit family about once every six months on average within the last two years or thereby, and far less than she did prior to the said accident. Her father is 90 years of age and in a care home. When leaving the house to travel the claimant usually takes a taxi because of her anxiety.

24. In 2016 the claimant commenced a claim which led to an action at Greenock Sheriff Court against the respondent under case reference GRE-A64-19. After debate the Sheriff dismissed the action by interlocutor dated 16 May 2023. The action was in the claimant's married name of Herrington. After divorce she revered to her present name.

Claimant's submission

25. In very brief summary Ms Cox argued that the claimant met the definition within section 6 and Schedule 1 to the Act. She argued that the claimant had a physical impairment of a facial injury which included fractures to her cheek and neuropathic pain, as well as dental injury as her teeth had become misaligned. She argued also that the claimant suffered mental impairments of depression and anxiety. She had been taking medication for the facial injury since 2014 and for the depression and anxiety since 2015. She referred to the medical records, fit notes and occupational health reports. She referred to ***Power v Panasonic [2003] IRLR 151***, and ***J v DLA Piper [2010] IRLR 936*** . She argued that the effect was adverse, substantial and long term. She referred to ***Ekpe v Commissioner of the Metropolis [2001] IRLR 605, SCA Packaging v Boyle [2009] IRLR 746*** and ***Kapadia v London Borough of Lambeth [2001] EmLR 170.***

Respondent's submission

26. Again in very brief summary Ms Todd argued that the claimant did not meet the statutory definition (for this summary and that of the respondent the citations given are the full ones where available). The issue was to be determined as at the date of the discriminatory act – ***All Answers Ltd v W [2021] IRLR 612*** and ***Tesco Stores Ltd v Tennant UKEAT0617/19.*** Medical evidence was needed not simply the claimant's assertion – ***Woodrup v London Borough of Southwark [2003] IRLR 111***. Symptoms arising from a life event are not an impairment – ***J v DLA Piper [2010] IRLR 936***. Medical certificates by the GP may not be sufficient to establish disability – ***Morgan v Staffordshire University [2002] IRLR 190***. She argued that the claimant's evidence was subjective, and not suitably detailed. There was no other witness evidence. The GP letter dated 23 September 2023 was not credible. It was unclear which symptoms related to which impairment. The Occupational Health reports did not mention facial pain. The claimant had been in employment and discharging duties. She had travelled to Portugal. Depression and anxiety were connected to the 2014 accident and court case that arose from it. They were not capable of amounting to an impairment. She referred to ***Herry v Dudley Metropolitan Council 2017] ICR 610.*** There had been no clear diagnosis of anxiety. Anxiety felt in fact is not always anxiety as diagnosed. ***Morgan*** is authority for the principle that fit notes alone are not sufficient. It was difficult for the claimant to discharge the burden of proof when she did not separate depression from anxiety. There was insufficient evidence to find that she was a disabled person. There was no evidence to establish what ceasing to take medication would lead to. The claimant had not discharged the burden of proof.

Law

27. Disability is one of the protected characteristics provided for by section 4 of the Equality Act 2010 ("the Act"). Section 6 of the Act defines disability as follows:

"(1) A person (P) has a disability if-

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability."

28. "Substantial" means more than minor or trivial under Section 212(1) of the Act.

29. Further provisions are set out at Schedule 1 of the Act, which includes that

"**2. Long term effects**

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

(a) It has lasted for at least 12 months…..

5. Effect of medical treatment

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

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

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

30. The Act implements a number of EU Directives and is to be construed purposively, an obligation which remained as retained law under sections 2 – 4 of the European Union (Withdrawal) Act 2018, and later as assimilated law under the Retained EU Law (Revocation and Reform) Act 2023. The European Framework Directive (2000/78/EC), Article 1 states:

> "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

31. Disability is not defined in that Directive. It was held by the European Court of Justice in ***Chacón Navas v Eurest Colectividades SA: C-13/05, [2006] IRLR 706*** that the word "disability" was to cover those who have a

> "limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".

32. In 2009 the European Union approved the UN Convention on the Rights of Persons with Disabilities. The Convention provides, in recital (e), that

> "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".

33. The Directive must be interpreted in a manner consistent with the Convention: ***H K Danmark acting on behalf of Ring v Dansk almennyttight Boligselskab C-335/11 [2013] IRLR 571***, ***Z v A Department*****: C-363/12,** ***[2014] IRLR 563***, and ***Milkova v Izpalnitelen director na Agentsiata za privatizatsai I sledprivatizatsioen control*****: C-406/15, ECLI:EU:C:2017:198*****,** ***[2017] IRLR 566*****).**

34. The Equality Act 2010 may be interpreted taking into effect the Convention indirectly, but the Convention does not have direct effect – ***Britliff v Birmingham City Council [2020] ICR 653***.

35. In ***Goodwin v Patent Office [1999] IRLR 4*** the Employment Appeal Tribunal held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

    a. Does the person have a physical or mental impairment?

    b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

    c. Is that effect substantial?

    d. Is that effect long-term?

36. The burden of proof is on a claimant to show that she satisfies the statutory definition of disability.

37. The term “impairment” is not defined in the Act. In ***Rugamer v Sony Music Entertainment UK Ltd and another 2002 [ICR] 381*** the EAT referred to “some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition.” In ***McNicol v Balfour Beatty Rail Maintenance Ltd [2002] ICR 1498*** the Court of Appeal held that the term bears its ordinary and natural meaning.

38. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material period, ***Cruickshank v VAW Motorcast Ltd [2002] IRLR 24*** which also held that the Tribunal must determine disability status as at the date of the act.

39. What are normal day to day activities has also been considered in authority. The Court of Appeal in ***Chief Constable of Norfolk v Coffey [2019] IRLR 805*** approved the approach of the EAT in that case, that “the phrase ‘normal day to day activities’ should be given an interpretation which encompasses the activities which are relevant to participation in professional life”. Underhill LJ preferred the term ‘working life’ rather than 'professional life'. Three cases illustrate that approach.

40. The first is ***Banaszczyk v Booker Ltd [2016] IRLR 273***. The employee had a back condition which was ‘long term’. He could lift and move items weighing up to 25kgs in the warehouse in which he worked; however, he could not meet the ‘pick rate’ of 210 cases per hour. The Employment Tribunal did not consider him to be ‘disabled’. The EAT held that the day-to-day activity in question was lifting and moving objects up to 25 kgs and that the claimant suffered a substantial adverse effect because his back condition meant he was significantly slower than non-disabled comparators, such that he could not achieve the necessary “pick rate”. The employer's submission that achieving the pick rate was not a 'normal day to day activity' was rejected as confusing the relevant activity with the speed at which it is required to carry it out. The claimant's back condition in rendering his work rate slower hindered his full participation in his working life, and the EAT substituted a finding that he was disabled within the 2010 Act.

41. The second is ***Igweike v TSB Bank Plc [2020] IRLR 267***, where it was held that an effect on normal day-to-day activities may be established if there is a requisite effect on normal day-to-day or professional or work activities, even if there is none on activities outside work or the particular job. The EAT commented that "in many, perhaps most successful cases, disabled status is established because the requisite effects are found on normal day to day activities outside work, or both outside and in work".

42. In ***Coffey*** reference was made to ***Chief Constable of Lothian and Borders Police v Cumming [2010] IRLR 109***. The claimant was a civilian police employee who was also a special constable. She suffered from amblyopia in one eye, resulting in mildly impaired vision. She applied to become a police officer and was rejected because her eyesight did not meet the prescribed standard. She brought a claim for direct disability discrimination. The Tribunal found that her impairment had a substantial adverse effect, on two alternative bases – (a) that her rejection as a police constable recruitment itself constituted a substantial adverse effect and (b) that in any event the effect of the amblyopia on her vision was substantial. The EAT allowed the Chief Constable's appeal. Lady Smith stated in respect of (a)

> "The status of disability for the purposes of the [then 1995 Act] cannot be dependent on the decision of the employer as to how to react to the employee's impairment yet that is, in essence, the argument that the claimant seeks to advance."

43. In ***Ahmed v Metroline Travel Ltd UKEAT/0400/10*** the EAT cautioned against carrying out a balancing exercise between what a person can and cannot do. It quoted from ***Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19***, in which the EAT stated:

> "Whilst it is essential that a Tribunal considers matters in the round and makes an overall assessment of whether the adverse effect of an impairment on an activity or a capacity is substantial, it has to bear in mind that it must concentrate on what the Applicant cannot do or can only do with difficulty rather than on the things that they can do. This focus of the Act avoids the danger of a Tribunal concluding that as

> there are still many things that an applicant can do the adverse effect cannot be substantial."

44. The assessment required is to determine what the person cannot do, or only do with difficulty, then assess that against the statutory test. That was also the finding of the EAT in ***Aderemi v London and South Eastern Railway Ltd [2013] ICR 591***, in which it stated the following as to the meaning of "substantial":

> "It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."

45. In ***Rooney v Leicester City Council EA-2021-00256*** the claimant argued that she was a disabled person, and suffered from symptoms from the menopause. A list of symptoms was given that included losing personal possessions, forgetting to put the handbrake on, forgetting to lock her car, leaving the cooker or iron on, leaving the house without locking it, and spending prolonged periods in bed due to fatigue. The EAT held that such a person might be a disabled person under the Act, that there had been an error of law by the Tribunal when determining that the claimant was not a disabled person which it had done partly by considering what she could do, and remitted the determination of that issue to the Tribunal.

46. ***Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011***) provides guidance on the matters which are to be taken into account (account of which may be taken under Schedule 1 to the Act, paragraph 12) and ***The Equality and Human Rights Commission Code of Practice: Employment*** which also has guidance on the question of disability status, at paragraphs 2.8 – 2.20 and Appendix 1. Account may be taken of it where it appears to be relevant under section 15(4) of the Equality Act 2006).

Discussion

47. I consider that the claimant was a credible and reliable witness. She answered questions candidly where she could, and said where she could not, either as she did not remember a detail or did not know the answer (such as when asked about the contents of letters from her doctor and why matters were not included). I considered that her position was generally consistent with the documentation before me, including the medical records which were reasonably full. She was upset on a number of occasions when giving evidence. Breaks were given to seek to assist her with that. I considered that her upset was entirely genuine, and was not in any sense an exaggeration or similar. She was upset in recollecting the matters that were raised with her, in a manner I considered likely to be consistent with someone who was depressed and anxious.

48. It is true that there was no corroborating witness, nor was there a skilled witness giving evidence before me, and I was informed that Dr Kennedy the GP was currently absent ill and had not been able to reply to a letter from the respondent's solicitors. There is however no need for a corroborating witness and I was satisfied that I should accept the claimant's evidence to me when it was supported by a substantial amount of written material in her medical records. The respondent had not asked the claimant to attend a skilled witness for an opinion. There was no need to do so, but it appeared to me that I required to address the issue on the basis of the evidence that was before me.

49. I was satisfied that the claimant has established that she met the definition of a disabled person under the Act as at the date of dismissal, indeed both before and after that date. To take each of the questions raised in ***Goodwin:***

50. ***Does the person have a physical or mental impairment?*** She does, and did so as at the date of dismissal and period leading up to that. That is a mixture of physical and mental impairments. The physical impairment was fractures to her left cheekbone, misalignment of her teeth, and nerve damage or neuropathy on the left side of her face, all of which caused continuing pain and intermittent headaches and migraine, and related to, but not solely caused by that, the mental impairment of depression and anxiety. The physical impairment was suffered from the accident on

3 October 2014 onwards. The mental impairment was suffered from around June 2015 onwards as to depression, and April 2016 as to anxiety.

51. Ms Todd argued that there could not be disability status on the basis of the ***DLA Piper*** case. I consider that that was a misreading of what that authority stated. Stress through reaction to adverse circumstances is not in itself a mental impairment. It can become so, but lengthy absence from work is not, on its own, evidence of that – as also held in ***Herry***. Similarly in ***Igweike*** it was held that a natural reaction to adverse life events such as grief at a bereavement does not necessarily involve an impairment.

52. But firstly this is not an absolute rule that matters such as anxiety cannot be an impairment. There requires to be evidence of the impairment beyond simply being stressed or suffering grief or having periods of time off work. Secondly, the decision on whether or not there has been an impairment is made on the basis of evidence, and the facts and circumstances of the cases cited and the present one are very different. Here there was an accident. That is not in my opinion the same life event as, for example, grief from a loved one's death. It did cause physical injury – not only fractures, but also damage to nerves, sinus, teeth and continuing pain. She had a period of unconsciousness. There was later the development of conditions of depression that from the GP records was diagnosed on 1 June 2015, and anxiety on 4 April 2016. They followed the occurrence of the accident, but were not solely caused by that. The claimant was also concerned at how she had been treated by the respondent. In 2016 she had material absences from work. The claimant has been referred to specialists being maxillofacial and ENT consultants. She has had a series of different medications for analgesia and for anti-depressant purposes, as well as to assist with her sleeping difficulties. There were later absences in September 2021 to April 2022, and from July 2022 to dismissal. The picture from all of the evidence before me is of both physical and mental impairments which had been suffered for substantial periods prior to the date of dismissal (addressed further below).

53. Thirdly it is relevant in my opinion that cases such as ***Morgan*** were decided under the predecessor Act, which had a requirement that the mental impairment had to be a clinically well-recognised illness, not a feature of the

2010 Act, and in ***DLA Piper*** it was held that reference to the ***Goodwin*** line of authority was appropriate in preference to ***Morgan***.

54. Ms Todd also referred to the fact that evidence only came from the claimant, and argued that that was not sufficient. But where that evidence is accepted it can be, as the EAT made clear in ***City Facilities Management (UK) Ltd v Ling UKEAT/0396/13.*** There, it was said that following the guidance in ***DLA Piper***

> "the approach the Employment Judge might have been expected to adopt would have been to hear from the Claimant as to the impact of the impairment from which she said she suffered on her normal day-to-day activities. That is not a matter that should normally require expert evidence, albeit that an expert may comment on such issues in her report and that may be of assistance to the ET. In most cases, however, this will generally be something that the Claimant is best qualified to attest to. Of course, there can be issues of credibility and Employment Tribunals might not simply accept that evidence of the Claimant. As a starting point, however, the evidence of impact on normal day-to-day activities is likely to be evidence of fact."

55. ***Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?*** It does, and did for the period leading up to the dismissal. Ms Todd argued that it was not clear when the claimant alleges discriminatory acts, but it is clear that they include what is said to be an unlawful dismissal in contravention of section 39 of the Act. There may be said to be detriments in the period up to then, but what exactly they are said to be and when is not entirely clear. In any event it appeared to me that it was appropriate to consider matters as at the date of the dismissal.

56. The date of dismissal was not entirely clear. The claimant in her Claim Form gave the date of 20 February 2023. That was also the date given by the respondent in its Response Form. Ms Todd for the respondent stated at the commencement of the hearing that she wished to clarify its position on the date of dismissal and argued that it should be 20 January 2023. The claimant did not accept that, and it was a matter on which evidence was heard.

57. The claimant was asked about a meeting on that date in her cross examination, and it was suggested that she had been told that she had been dismissed at that meeting, but she did not accept that and said that various options were discussed. She thought that the dismissal was on a date, unspecified in her evidence, in February 2023. The letter sent to her on 23 January 2023 did not state in terms that she had been dismissed at the meeting, but confirmed that she had been dismissed, and in my opinion the meaning of that letter is that the dismissal was on 23 January 2023. There was no basis in the evidence before me on which the date of 20 February 2023 could be the date of dismissal save from the pleadings.

58. Ms Todd said that minutes of that meeting existed, but they had not been provided in the Bundle nor was the claimant asked about their existence or what they might contain (albeit that that question might well have been objected to). From the evidence before me, the date that I considered was the date of termination was 23 January 2023.

59. I considered that as at that date the impairments did have the adverse effect that this issue addresses. It includes a difficulty in the sense of a materially reduced ability to leave the house, to interact with others, and to carry out normal day to day activities such as dressing, washing, cleaning, sleeping, and interacting with others, including for example meetings with her GP. To take an example of sleeping, the claimant's evidence was that she slept intermittently at night, woke for a few hours, slept for a few hours, and that she had periods of sleeping in the day. She explained that the pain she felt on the left side of her face could wake her up. It appeared to me clear that her poor sleeping pattern was caused by the facial injury. Sleep is a day to day activity, and when not enjoyed regularly and sufficiently can lead to other issues, a matter that is I consider within judicial knowledge. The claimant's evidence included that she had difficulties in maintaining concentration, and I consider that that was also indicative of the adverse effect referred to in the statutory provision.

60. The impairments also affected her working life. She had material periods of absence in late 2014 into early 2015, during much of 2016, and in two periods later from September 2021 to April 2022, and from July 2022 to the dismissal on 23 January 2023. That meant that for the last 16 months or so

of her employment, she was at work for only about three of them. Not only did the impairments hinder her participation in working life, it ended it both at the time of the dismissal and subsequently. The claimant has become something towards being a recluse, particularly in the period from July 2022 onwards. Her time outwith the flat she lives in is very limited.

61. Ms Todd argued that each impairment required to be considered separately, as if each was in a silo of its own, and each should be assessed for the effect separately. I did not accept that argument. It appeared to me that that was not what the Act required, nor was it consistent with ***Goodwin.*** If there is more than one impairment, they are to be considered together at the stage of assessing the adverse effect issue, in my opinion.

62. Separately the 2011 Guidance at paragraph A6 stated that "it may not always be possible, nor is it necessary, to categorise a condition as either a physical or mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa." It appeared to me that that guidance strongly supported the opinion set out above.

63. ***Is that effect substantial?*** It is, and was as at the dismissal. The statutory test is that it is more than minor or trivial, and that is clearly met, and in my opinion the more colloquial meaning of the word is also met. That is on the basis of her condition during the period leading up to the dismissal as it was in fact including with the medication she was receiving. Ms Todd argued by reference to ***Woodrup*** that the claimant required medical evidence and not simply to make an assertion, but that was in an entirely different context. That case concerned someone who was not on the basis of the evidence a disabled person unless the effect of medication was removed, and had not offered to prove the detail of that. Very little medical evidence was submitted in that case. In the present case there were detailed and lengthy medical records.

64. There was also the three Occupational Health Reports commissioned by the respondent, all of which expressed the opinion that the claimant was

likely to be a disabled person. That is not determinative, but it supports the conclusions reached above and below in my opinion. I also noted that the letter of dismissal dated 23 January 2023 stated that no reasonable adjustments had been identified, which is at least consistent with a consideration of whether the claimant was a disabled person and does not appear to me consistent with the respondent's position before me.

65. It also appeared to me, from the ***Coffey*** line of authority in particular, that the fact that the respondent had terminated the claimant's employment as a result of her absence from work and the belief that it was unlikely that she would return to it was also very strong evidence indeed of the claimant meeting the statutory test. Working life can be a part of day to day activities. For the claimant, it ceased when the respondent terminated her employment by letter of 23 January 2023.

66. It did not appear to me to be necessary for the claimant to argue that her condition would be worse without the medication as the fact of her condition when taking it was within the statutory test, but separately she gave evidence that I accepted of when she had stopped taking medication, and the level of pain became intolerable. She had to go to a room, and sit quietly in darkness. That appeared to me to be sufficient evidence if it were needed, but as stated it was not.

67. Ms Todd referred to some aspects of what the claimant could do, such as the travel to Portugal, and comments in the occupational health reports to the effect that if the court case ended, the claimant's condition might improve. She also referred to the fact that the claimant was at work for periods, including prior to September 2021 and in the period between April and July 2022. In my view those arguments are not ones that can be made. The focus is not on what a person can do – as the authorities above make clear. The possibility of improvement, if ever there was that, is also not to the point. It is the condition at the date of dismissal which in my view the focus is upon. The claimant had been at work, but I accepted her evidence that she did so with difficulty.

68. So far as the court case is concerned it appeared to me that the cause of depression and anxiety was not the point. Cause is only relevant if it is an

excluded condition under Schedule 1. As a point of detail although the claimant's evidence was that the case had been ongoing from 2016 the case reference number does not support that, as the case appears to have commenced in 2019, and was determined after debate after the dismissal in May 2023.

69. Ms Todd also noted that the Occupational Health reports did not refer to facial pain, and that some fit notes referred to depression and others to depression and anxiety. I did not consider that those matters affected my conclusions. These were not letters written by the claimant. English is for her a second language, and she is not perfect in it.

70. It was it appeared to me clear that the claimant did suffer from facial pain following the injury, which included fractures, and an offer of surgery she did not wish to take up for understandable reasons due to scarring. Taking consideration of all of the terms of the claimant's medical records, the medications she was prescribed with, the involvement of consultants in part, and her own evidence, I was entirely satisfied that she did have the impairments she referred to and that they were substantial in effect.

71. ***Is that effect long-term?*** It is, and was as at the date of dismissal. It has been on-going since the accident itself in relation to the physical impairment, from at the latest April 2016 for the mental impairment, continued to dismissal and continues. It had been suffered by the claimant for over 6 years by the time of the dismissal. She had had material periods of time off work in the period of around 16 months prior to the dismissal, during which she worked for only around 3 months.

Conclusion

72. I have therefore held that the claimant was a disabled person under the Act at the date of her dismissal, and had been so prior to that. It appears to me that she had been so from 4 October 2016, being two years after the accident and after a lengthy period during 2016 when the claimant had been off work through a combination of facial pain, depression and anxiety (for

different periods in respect of each). I consider that the statutory test was met from that date onwards on the basis of the evidence before me.

73. Some of the authorities referred to above were not cited in submission. I did not consider it necessary under the overriding objective to refer them to the parties' solicitors for comment prior to issuing the Judgment, but if either of them considers that they have not had an opportunity to make submissions on such authorities they may seek a reconsideration of the Judgment under Rule 71, referring to those authorities and making submissions with regard to them.

74. The case will proceed to the Final Hearing already fixed. Standard case management orders will be issued separately. If either party wishes to seek any particular case management order in that regard, beyond those that are standard, it should intimate that to the other party and the Tribunal within 14 days of today's date.

Employment Judge A Kemp

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Employment Judge

05 March 2024

Date of judgment

Date sent to parties **05 March 2024**