



EMPLOYMENT TRIBUNALS

Claimant Ms Joanne Farrow

Respondent The Chief Constable of Avon and Somerset Constabulary

Heard at: Exeter (remote hearing)

On: 15 May 2024

Before:
Employment Judge Goraj

Representation

The Claimant: in person.

The Respondent: Mr O Lawrence, Counsel

RESERVED JUDGMENT FOLLOWING A PRELIMINARY HEARING

THE JUDGMENT OF THE TRIBUNAL is that :-

1. The claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 by reason of Long Covid between 24 July 2022 and the end of January 2023.
2. The claimant was not however a disabled person for the purposes of section 6 of the Equality Act 2010 by reason of ligament injuries to her thoracic spine at any relevant time, and this element of her disability discrimination claim is therefore dismissed.
3. The determination of whether the claimant's partner (Mr Wheller) was a disabled person at any relevant time (for the purposes of the claimant's claim of disability discrimination by association with Mr Wheller) will be determined at the Final Hearing unless otherwise directed.

REASONS

BACKGROUND

1. By a claim form which was presented to the Tribunals on 5 June 2023, the claimant brought complaints of unfair dismissal (constructive) and discrimination because of disability and/or sex and /or pregnancy or maternity. The claimant's claim form and particulars of claim are at pages 2 –23 of the agreed hearing bundle ("the bundle").
2. The claimant's ACAS Early Conciliation certificate records that the claimant's Early Conciliation notification was received on 25 March 2023 and that the certificate was issued on 6 May 2023.
3. The claimant was employed by the respondent between 13 September 2010 and 23 March 2023. At all relevant times the claimant was employed by the respondent as an Operational Trainer.
4. The claimant's disability discrimination claims as confirmed at the hearing, are of :- (a) direct discrimination (section 13 of the Equality Act 2010 ("the 2010 Act") and (b) harassment (section 26 of the 2010 Act).
5. The claimant's claims include disability discrimination by association with her partner, Dan Wheller, whom the claimant contends had dyslexia/ ADHD at the relevant time (section 13 of the 2010 Act).
6. The impairments upon which the claimant relies for the purposes of her complaints of disability discrimination are :- (a) ligament injuries in her thoracic spine and/or (b) long covid and /or (c) (postural orthostatic tachycardia syndrome (POTS).
7. The dates of the alleged acts of disability discrimination are as follows :-
 - (1) The claimant's ligament injuries in her thoracic spine (car accident on 19 January 2022) -first alleged act of disability discrimination related to such impairment on 24 January 2022.
 - (2) Long Covid / POTS - claimant contracted Covid in March 2022 (claimant formally diagnosed with post Covid- 19 Syndrome on 9 November 2022). – First alleged act of disability discrimination related to Covid on 24 July 2022 (and continuing until end of January 2023)

(3) In respect of the claimant's partner's (Mr Wheller's) alleged dyslexia/ ADHD – Mr Wheller was formally diagnosed with dyslexia on 10 May 2019. Mr Wheller was also diagnosed with ADHD by a letter dated 3 April 2023. The first alleged act of disability discrimination by association with Mr Wheller was on 18 July 2022 (and continuing until, the claimant says, 13 April 2023).

8. The respondent's position :-

(1) In respect of the claimant's impairment of ligament injuries in her thoracic spine – the respondent accepts that the claimant had a car accident on or around 19 January 2022 at which time she injured her back but otherwise denies that the claimant meets the remaining requirements of section 6 of the 2010 Act and/or that it had the requisite (actual or constructive) knowledge of such alleged disability.

(2) Long Covid/ POTS – the respondent accepts that the claimant had Covid/ Long Covid (but not POTS in respect of which it says that the claimant has no formal diagnosis) but otherwise denies that the claimant meets the remaining requirement of section 6 of the 2010 Act and/or that it had the requisite (actual or constructive) knowledge of such alleged disability/ disabilities.

(3) In respect of Mr Wheller – the respondent accepts that Mr Wheller had dyslexia from at least 10 May 2019 but denies (in the absence of any further information concerning the alleged effects thereof on his day-to-day activities) that he was at the relevant times (18 July 2022 – 13 April 2023) a disabled person for the purposes of section 6 of the 2010 Act. The respondent further denies that Mr Wheller was a disabled person at the above-mentioned relevant times for the purposes of section 6 of the 2010 Act by reason of ADHD (including that he had such an impairment on the basis of the provided medical information – the letter of 3 April 2023 which contains no information to support the diagnosis).

9. By a letter dated 13 September 2023 (page 44 of the bundle), the claimant was directed to provide documentation relating to her disability discrimination claim together with an impact statement. Further information was provided by the claimant by way of the email exchange with the respondent's representative at pages 62- 69 of the bundle and in which the claimant made reference to her claim of alleged disability of discrimination by association with her partner with associated information.

The Case Management Hearing on 29 November 2023 and conduct of the case

10. The matter was subject to a case management hearing on 29 November 2023 (“the Order dated 29 November 2023”). The Order dated 29 November 2023 is at pages 70 – 78 of the bundle. It is recorded in the Order dated 29 November 2023 that the purpose of this Hearing is (subject to the Employment Judge who was allocated the case being able to decide that such matters were not suitable for determination at this preliminary hearing) to determine the following matters: -

- (1) Whether the claimant was a disabled person for the purposes of section 6 of the 2010 Act at the relevant time by reason of all or any of the conditions referred to above.
- (2) Whether the claimant’s partner (Mr D Wheller) was a disabled person for the purposes of section 6 of the 2010 Act at the relevant time by reason of dyslexia and /or ADHD.
- (3) To confirm the list of issues and consider consequential case management directions (including the final listing of the matter for hearing). It was recognised at the case management hearing on 29 November 2023 that the claimant’s lengthy list of allegations required further clarification.
- (4) No orders were made in the Order dated 29 November 2023 for the provision of any further medical evidence or for a disability impact statement from Mr Wheller regarding his alleged disabilities of dyslexia and/or ADHD.

11. At the commencement of this Hearing, it was noted that no disability impact statement (above and beyond what had been provided in the exchange of emails referred to at paragraph 9 and pages 62 – 69 above) had been provided or requested /ordered including from Mr Wheller explaining the effects of his disabilities on his normal day to day activities. Further, Mr Wheller was not in attendance at the hearing as the claimant stated that she had not appreciated that it was necessary for him to attend the hearing to give evidence regarding his alleged disabilities.

12. Having discussed the matter further with the parties it was agreed that :-

- (1) The Tribunal would determine at this Hearing whether the claimant was a disabled person at the time of the alleged acts of disability discrimination, for the purposes of section 6 of the 2010 Act, in respect of the alleged disabilities identified at paragraph

6 above (including that it would treat the information concerning such conditions contained in the emails at pages 62- 69 of the bundle as the claimant's witness statement for such purposes).

- (2) The Tribunal was not however in a position, in the absence of Mr Wheller/ any disability impact statement for him, to determine whether he was a disabled person for the purposes of section 6 of the 2010 Act (for the purposes of the claimant's claim for disability discrimination by way of association with Mr Wheller).
- (3) The issue of whether Mr Weller was a disabled person at the time of the alleged acts of disability discrimination by association would be determined at the Final hearing. When deciding to list this issue for determination at the final Hearing rather than at a further preliminary Hearing, the Tribunal took into account into account in particular that, the respondent (who opposed a further preliminary hearing to determine this issue) accepted that Mr Wheller had dyslexia from at least May 2019 in the light of the report dated 13 May 2019 at pages 125 -128 of the bundle (and may well therefore concede disability following the service of a formal impact statement by Mr Wheller), that the Tribunal will in any event, have to consider the factual issues relating to the reasons for the assistance provided by the claimant to Mr Wheller as part of her constructive dismissal claim and also the additional costs and time of a further preliminary Hearing.
- (4) After hearing the claimant's oral evidence regarding the disability issue and the closing submissions of the parties, the Tribunal would reserve its Judgment on this issue and use the remaining time to seek to clarify the claimant's claims and give directions for the future conduct of the case.

FINDINGS OF FACT

13. The following findings of fact are made for the purposes only of determining the preliminary issues relating to disability.
14. The claimant was employed by the respondent between 13 September 2010 and 23 March 2023. The claimant's partner, Mr Dan Wheller, was a police officer with the respondent at the relevant times. The claimant was employed at all relevant times as an Operational Trainer. The claimant's duties included the training of police officers on operational techniques which required a high level of fitness on the part of the claimant including the completion of work related JRFT and treadmill fitness tests. Prior to the events in

question the claimant was physically very active and participated in activities such as roller-skating marathons at a competitive level.

Evidence relating to the claimant's ligament injuries in her thoracic spine.

15. On 19 January 2022, the claimant was involved in a car accident when another car user drove into the back of her vehicle. The claimant contended that she had sustained a similar injury 8/9 years ago and that it had taken 2 years before she had got her feeling back in her arm. The claimant has not however provided the Tribunal with any documentary evidence or further details of such previous accident to substantiate such contentions.

The discharge letter dated 19 January 2022

16. In the patient discharge letter from the Somerset Partnership NHS Foundation Trust, which is at page 129 of the bundle, it was reported that the claimant had attended the minor injury unit on 19 February 2022 following a road traffic accident during which the claimant had been rear ended at low speed. The letter stated that the claimant reported midline T3/T4 tenderness and that she was unable to abduct her shoulders above 70 degrees without pain. The letter also reported reduced ROM in the claimant's neck with tingling in her right hand and forearm and that she was also tender on palpitation of mid line over T3/T4. The letter further stated that the claimant was sent to A&E for further assessment but advised that there was low likelihood of spinal injury. The claimant was given a suspected diagnosis of sprain/ ligament injury- thoracic spine.

The Occupational Health report dated 31 January 2022

17. The claimant was assessed by the respondent's occupational health providers on 31 January 2022. The associated occupational health (physiotherapist) assessment report is at pages 130-132 of the bundle. In summary, the report recorded that the claimant was experiencing pain in the upper back/ thoracic spine following a car accident on the way to work and that the claimant was unfit for full operational duties but was able to undertake restricted duties. The report recommended a proposed treatment plan of five sessions of physiotherapy over five weeks and other adjustments to the claimant's work including the allocation of light duties in the office on a temporary basis.

The occupational health discharge report dated 14 March 2022

18. The occupational health(physiotherapist) discharge report dated 14th March 2022 is at pages 133-135 of the bundle. In summary, the report recorded that the claimant had attended six sessions including the initial assessment. The report also advised that although the

claimant had improved with treatment she was still experiencing a stiff right shoulder blade after long periods of work and was not fit to perform the job related JRFT or treadmill fitness tests.

The letter from the chiropractor dated 24 June 2022

19. The claimant also consulted a chiropractor regarding her ligament injuries. A letter from the chiropractor dated 24 June 2022 is at page 136 of the bundle. In summary, the report recorded that the claimant had first attended the practice on 1 February 2022. The report also recorded that the claimant had continued issues with pain, was experiencing dead hands when lying in bed, and recently had been unable to run without pain shooting into her shoulders neck and base of her skull. The report concluded by recommending further investigation into the source of the pain and possible request for imaging of her thoracic and cervical spine. The claimant had seven appointments with the chiropractor between beginning of February 2022 and 18 August 2022.
20. The claimant subsequently underwent a scan however the Tribunal has not been provided with any further information regarding the outcome of the scan or any further treatment. The claimant has an appointment with an orthopaedic specialist on 18 August 2024 however, this is for the purposes of the claimant's personal injury claim in respect of the car accident on 19 January 2022.
21. The claimant had a week off after the accident in January 2022 following which she returned to work on restricted duties before resuming full operational duties on 14 February 2022. The claimant experienced pain and stiffness for approximately 6/8 weeks during which time she took painkillers. After approximately 8 weeks the claimant's movements started to return and the pain became less. The claimant continued on operational duties until on or around 21 July 2022 at which time the claimant was absent due to Covid and work related stress.
22. The claimant's range of movements have now returned however they are not back to her pre accident level of hypermobility. The claimant continues to experience difficulties picking up her daughter on her right hand side, is unable to sit for long periods of time during her working day without getting up and moving around, and experiences tingling and discomfort when driving and numbness in her right hand during the night.
23. The claimant enjoys roller skating and previously engaged in it at a competitive level. The claimant returned to roller skating on a social, non-competitive level in July 2022. The claimant however only goes

rolling skating every 4 to 6 weeks as she is too tired to attend on a regular basis.

Long Covid/ POTS

24. The claimant first contracted Covid in August 2021 when she experienced symptoms for around 12 weeks. The claimant contracted Covid again in March 2022 at which time the claimant was absent from work. The claimant returned to work approximately a week later and successfully completed the JRFT (bleep test) in or around April/ May 2022 which was required for her to perform her duties as an operational trainer but felt during the test that she was going to vomit.

25. The claimant was absent from work again from 22 July 2022. There are 2 statements of fitness for work in the bundle dated 29 July 2022 (page 137 of the bundle) and 5 October 2022 (page 139 of the bundle) in which it is stated that the claimant was unfit for work because of work related stress and ongoing fatigue. In the note dated 5 October 2022 it was stated that the claimant had an appointment with the Long Covid clinic pending.

The report of the Somerset Post Covid Assessment Service

26. The claimant was assessed via a telephone consultation by the Somerset Post Covid Assessment Service on 9 November 2022. The associated report dated 10 November 2022 is at pages 140 – 145 of the bundle.

27. In summary the report recorded in particular that :-

- (1) The claimant had been absent from her duties as a full time police trainer since the end of July (2022) with fatigue and work related stress and that the claimant had been exceptionally fit and active prior to becoming unwell. The claimant was also experiencing back and shoulder pain, following a car accident earlier that year, which could wake her from her sleep and in respect of which she was awaiting a further referral.
- (2) Covid history - the claimant initially contracted Covid in August 2021 when she experienced in particular breathing problems which took about 12 weeks to resolve. The claimant contracted Covid again in March 2022 when she experienced problems with fatigue and shortness of breath. The claimant returned to work after a week but struggled with her fitness as assessed by the bleep test which represented a significant reduction in the claimant's physical activity, The claimant continued to feel nauseated with exertion and very short of breath.

- (3) There is a summary (at pages 141 – 142 of the bundle) of the claimant's reported symptoms/ effects on her day to day activities (which were recorded/ scored on the Covid – 19 Yorkshire Rehabilitation Score) including as follows :- (a) fatigue – struggling with caring for 2 year old daughter and reduced activity - score of 9 (b) breathless – mostly on exertion such as walking upstairs and worse when fatigued- score of 3 (c) heart palpitations - heart rate running very fast for about 5 minutes once a week or so (d) brain fog which caused problems at work with word finding and loss of trail of thought, but less noticeable at home – score of 3 and (d) anxiety- the claimant stated that she was unsure whether stress at work was the predominant trigger as thoughts of work induced a sense of panic- score of 4.
- (4) The report also records that:- (a) the claimant was experiencing problems with sleep which were attributed to interruption by daughter and also waking with pain and stress/ anxiety and (b) that the claimant had been a skater at high/ competitive level and that she had started again on a Monday night but that “it takes it out on her”.
- (5) The claimant had been advised that she had post COVID-19 syndrome.
- (6) The report contained a Management action plan including ways to improve symptoms relating to fatigue, breathless, mental health and Postural Orthostatic Syndrome (POTS).

The letter from the Somerset Post Covid Assessment Service dated 22 February 2023

28. There is a further letter from the Somerset Post COVID Assessment Service, which is dated 22nd February 2023, at pages 146- 147 of the bundle. This letter records a consultation with the claimant during which she reported increasing problems with low blood pressure which were particularly troublesome when she was on her feet for prolonged periods of time or when she was undertaking activities where her arms were above her head for prolonged periods. The report also recorded that the claimant had noticed when fatigued that her heart ran very fast/ felt irregular and that this was most notable at the end of the day when she lay down in bed. The report recorded that there had been further discussion regarding the diagnosis of postural hypotension and also possible postural orthostatic tachycardia syndrome. The report further recorded that it was understood that a referral had been made for further advice however the claimant was unsure as to the nature of any further investigations. The claimant was provided with further information to pass on to her GP regarding prescribing for POTS following Long

Covid together with advice regarding adjustments to reduce the severity/ frequency of her symptoms including relating to her hydration status and salt intake together with the use of support stockings and certain forms of exercise programmes. The claimant was also advised that there was a useful leaflet on the POTS UK website which might assist her in her communications with the respondent regarding the reasonable adjustments which could reasonably be expected to be made to reduce her symptoms.

The claimant's GP records

29. The claimant has not provided any further documentary evidence regarding her Covid related conditions save for a brief excerpt from her GP notes (page 149 of the bundle) which record on 9 November 2022 and 9 January 2023 that the claimant had a problem with Post COVID – 19 syndrome.

The claimant's return to work

30. The claimant returned to work in January 2023, initially on administrative duties as her sick pay was coming to an end and she could not afford to remain off work.

The effects of Covid on the claimant

31. The Tribunal is satisfied in the light of the documentary and oral evidence, that the claimant experienced Covid related symptoms from March 2022 and thereafter, throughout/ during the identified relevant period (24 July 2022 to the end of January 2023), including fatigue, breathlessness, brain fog, heart palpitations/ irregular heart rhythm and low blood pressure. When reaching such conclusions the Tribunal has taken into account in particular the claimant's oral evidence together with the report dated 10 November 2022 (paragraphs 26 – 27 above).

32. The Tribunal is further satisfied in the light of the oral and documentary evidence referred to above, that such conditions affected the claimant's day to day activities on a regular/ daily basis during/ throughout the identified relevant period (24 July 2022 and the end of January 2023) including that the fatigue/ breathlessness impeded the claimant's ability to :- (a) care for/ play with her young daughter (date of birth -23 May 2020) including to play with her in a play centre (b) undertake housework such as cleaning the house/ changing the beds (as it was exhausting for the claimant to lift the bed/ the bed clothes) (c) exert herself, such as when walking up stairs and (d) to engage in social activities such as roller skating (as the Monday sessions frequently made the claimant exhausted). The Tribunal is further satisfied that that the brain fog/ fatigue impeded the claimant's ability to concentrate/ "find words" particularly when at work and (d) that, in particular towards the end of the identified

relevant period the claimant's low blood pressure caused the claimant to feel dizzy when she was tired/ on her feet for prolonged periods of time or when engaging in activities which involved her arms being above her head for prolonged periods.

SUBMISSIONS

33. The Tribunal has had regard to the oral closing submissions of the parties which are referred to further as part of the Conclusions of the Tribunal.
34. The Tribunal has had regard in particular, to the following statutory and associated provisions: -
- 34.1 Sections 6, 13, 15, 39 of, and Schedule 1 to the 2010 Act.
- 34.2 The Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) ("the Guidance") (including the list of factors contained in the Guidance which it would be reasonable/ not reasonable to regard as having a substantial adverse effect on normal day to day activities).
- 34.3 The Tribunal also drew the attention of the parties in particular the authority of **Goodwin v the Patent Office [1999] IRLR 4 EAT.**
35. In summary, the Tribunal has reminded itself in particular of the following: -
- 35.1 It is for a claimant to establish that they were at the relevant time a disabled person for the purposes of section 6 of the 2010 Act. The relevant time is the date of the relevant alleged acts of disability discrimination and the evidence should be considered accordingly.
- 35.2 Where disability is in dispute the Tribunal should adopt a structured approach to the issue namely: - (a) did the claimant have a physical or mental impairment at the relevant time (b) did the impairment affect the claimant's ability to carry out normal day to day activities (which may include the claimant's activities at work). If a person is receiving treatment or corrective measures for an impairment the effect of the impairment on day-to-day activities is to be taken as that which the person would experience without the ameliorating effect of such treatment or measures (c) is the adverse effect substantial. Substantial for such purposes means more than minor or trivial (c) is the effect long term (as defined in section 6 and paragraph 2 of Schedule 1 to the 2010 Act). If the effect of an impairment has not lasted for 12 months as at the date of the alleged act of disability

discrimination it will nevertheless be considered as long term if at such time it is likely to last for at least 12 months. Likely for such purposes means could well happen.

THE CONCLUSIONS OF THE TRIBUNAL

36. When considering the issue of disability, the Tribunal has reminded itself that the relevant date for determination is the date of the alleged act/ acts of disability discrimination.

37. The Tribunal has considered the matter in accordance with the approach advocated in **Goodwin** and the principles referred to above.

The ligament injuries in the claimant's thoracic spine

38. The Tribunal has considered first the claimant's ligament injuries in her thoracic spine. The first (and only specific) alleged act of disability discrimination identified by the claimant in relation to this alleged impairment is the allegation at Paragraph 9 of Appendix A (page 113 of the bundle) which the claimant contends occurred during week commencing 24 January 2022. For the purposes of the determination of the disability issue the Tribunal has however, for the avoidance of doubt, also considered the relevant period as extending to 7 January 2023 which is in line with the end of the relevant period identified by the claimant in Appendix A in respect of the alleged impairment/s of Long Covid/ POTS.

The respondent's submissions

39. The respondent accepts that the claimant sustained ligament injuries in her thoracic spine during a car accident on or around 19 January 2022 but otherwise denies that the claimant meets the requirements of section 6 of the 2010 Act. In brief summary, the respondent contended during its closing submissions that the impairment did not meet the requirements of section 6 of the 2010 Act as it did not have a substantial and adverse long-term effect on the claimant's normal day to day activities.

40. In support of such contentions the respondent relied in particular on the following:-

40.1 The matter should be determined in the context of the claimant's normal day to day activities rather than the claimant's specialised activities as an operational trainer.

40.2 The claimant did not experience any regular pain after the initial 6 week period following the accident.

40.3 The claimant resumed normal operational duties on 14 February 2022.

40.4 The claimant did not receive any physiotherapy or chiropractor treatment after July 2022 and returned to roller skating in July 2022.

The claimant's submissions

41. In summary, the claimant contended that she met the requirements of section 6 of the 2010 Act and relied in particular on the following:-

41.1 She continued to receive treatment from her chiropractor until 18 August 2022.

41.2 The condition continues to have a substantial and adverse effect on her normal day to day activities. Although the effects of the injury are now less, she continues to experience symptoms including, numbness in her hands (including as a result, disturbed sleep), difficulties lifting weights on her right-hand side (including picking up her daughter), is unable to sit for long periods during her working day without getting up and moving about and is unable to lift her arms over her head.

41.3 She had a similar accident 8/9 years ago which caused similar problems with her arm and it took 2 years to get her feeling back.

The conclusions of the Tribunal relating to the claimant's ligament injuries in her thoracic spine

42. The Tribunal has considered first the position with regard to the abovementioned injuries. As indicated above, the Tribunal has considered (for the avoidance of doubt) the issue in respect of both (a) the week commencing 24 January 2022 (paragraph 9 of Appendix A) and (b) the period between week commencing 24 January 2022 and the end of January 2023.

Did the claimant have the impairment at the relevant time(s)?

43. The Tribunal is satisfied in the light of its findings of fact (and as accepted by the respondent), that the claimant sustained the alleged impairment of ligament injuries in her thoracic spine as a result of a car accident on 19 January 2022 (paragraphs 15 and 16 above).

44. The Tribunal is further satisfied that the claimant continued to have such impairment on (a) 24 January 2022 and also (b) throughout the subsequent period up to and including the end of January 2023. When reaching such conclusions the Tribunal has had regard in particular to its findings at paragraphs 15 – 22 above.

Did the impairment have an adverse effect on the claimant's normal day to day activities

The position as at 24 January 2022

45. The Tribunal has considered first the position as at 24 January 2022. The Tribunal is satisfied on the facts, that the claimant's ligament injuries sustained in her thoracic spine on 19 January 2022 caused the symptoms identified in the discharge letter also dated 19 January 2022 (paragraph 16 above) and as subsequently confirmed in the occupational health report dated 31 January 2022 (paragraph 17 above) and in the letter from the chiropractor dated 24 June 2022 (paragraph 19 above).

46. The Tribunal is further satisfied on the facts, that the injuries had an adverse effect on the claimant's normal day to day activities as at 24 January 2022/ week commencing 24 January 2022 by reason of the consequential pain in the right side of the claimant's neck and upper back together with the associated restricted movements in her shoulders/ neck and tingling/ numbness in the claimant's right arm and hands which effected activities such as the claimant's ability to drive and lift her daughter (paragraphs 16 and 19 above).

47. The Tribunal is further satisfied that the injuries continued to have an adverse effect, albeit on a diminishing level, on the claimant's day to day activities for the remainder of the relevant period up to January 2023. When reaching this conclusion, the Tribunal has had regard in particular to its findings at paragraphs 21 – 23 above.

Was the adverse effect substantial ?

48. The Tribunal has reminded itself that for such purposes "substantial" means more than minor or trivial. The Tribunal has further reminded itself that where an impairment is subject to treatment it is to be treated as having a substantial adverse effect if but for the treatment the impairment is likely to have had that effect.

The position as at 24 January 2022

49. The Tribunal has considered the position first as at 24 January 2022. The Tribunal is satisfied that for the reasons previously explained above, the injuries had a substantial adverse effect on the claimant's normal day to day activities as at 24 January 2022.

50. The Tribunal is further satisfied that the injuries continued to have a substantial adverse effect on the claimant's normal day to day activities until the end of August 2022.

51. When reaching this conclusion, the Tribunal recognises that the claimant returned to full duties as an operational trainer on 14 February 2022, that the claimant's movements started to return / the pain became less approximately 8 weeks after the accident and that the claimant resumed rolling skating in July 2022 (paragraphs 21 and 23 above). The Tribunal has however, balanced against the above that the claimant continued to receive "treatment" from her chiropractor until 18 August 2022 and that continuing problems were identified in the chiropractor's letter dated 24 June 2022 (paragraph 19 above).

The position after the end of August 2022

52. The Tribunal is not however satisfied that the injuries had a substantial adverse effect on the claimant's normal day to day activities after the end of August 2022.

53. When reaching this conclusion, the Tribunal has taken into account its findings at paragraph 22 above regarding the ongoing problems experienced by the claimant. The Tribunal has also taken into account that it is recorded in the report (relating to the claimant's Covid) dated 9 November 2022 (paragraph 27 (1) above) that the claimant was experiencing back and shoulder pain following an accident earlier that year which could wake her from her sleep and in respect of which the claimant was awaiting a further referral.

54. The Tribunal has however balanced against such findings its further findings at paragraph 22 above regarding the return of the claimant's range of movements, the claimant's return to roller skating in July 2022 (paragraph 23 above) and that the Tribunal has not received any medical other documentary/oral evidence of any further investigations or treatment after 18 August 2022 (other than in respect of an appointment with an orthopaedic specialist on 18 August 2024 for the purposes of the claimant's personal injury claim in respect of the car accident on 19 January 2022).

55. Having balanced all of the above, the Tribunal is not satisfied that the claimant's ligament injuries had a substantial, that is more than minor or trivial effect on the claimant's day to day activities after the end of August 2022.

Was any substantial adverse effect of the the ligament injuries on the claimant's thoracic spine of a long term nature

56. Finally, the Tribunal has considered whether the substantial adverse effect of the claimant's ligament injuries on the claimant's normal day to day activities was, in any event, long term as at :- (a) 24 January 2022/ the week commencing 24 January 2022 (the date of the first alleged act of disability discrimination in respect of such impairment – paragraph 9 of the Appendix) and/or (b) at any time up to the end of August 2022, for the purposes of section 6 and paragraph 2 of Schedule 1 of the 2010 Act. The Tribunal has reminded itself that the position has to be considered at the date/ dates of the alleged discriminatory acts and further that if the substantial adverse effect on the claimant's normal day to day activities had not lasted for 12 months at the relevant date(s), that it would nevertheless, be considered as long term if at such time it was likely (which means could well happen) to last for at least 12 months.

The position as at 24 January 2022/ the week commencing 24 January 2022

57. The ligament injuries occurred on 19 January 2022 and the substantial adverse effect of such injuries had therefore clearly not lasted for at least 12 months as at 24 January 2022. The Tribunal has therefore considered whether judged on the information available as at 24 January 2022 it could well happen that the substantial adverse effect could last for at least 12 months. The Tribunal has had regard for such purposes to the guidance contained at C2 – C3 of the 2011 Guidance.

58. Having given the matter careful consideration, the Tribunal is not satisfied that it was likely (namely could well happen) as at 24 January 2022 / the week commencing 24 January 2022 , that the substantial adverse effect of the ligament injuries would last for at least 12 months.

59. When reaching such conclusion, the Tribunal has had regard in particular to the claimant's contentions concerning the claimant's previous ligament injuries including that she contended that such injuries had continued to have a substantial adverse effect on her day to day activities for 2 years. The claimant has however failed to provide any information to substantiate such contentions. The Tribunal has also taken into account that the limited available information as at 24 January 2022, and in particular the discharge letter of 19 January 2022 (paragraph 16 above), gave a suspected diagnosis of sprain/ ligament injury – thoracic spine and advised that there was a low likelihood of spinal injury. Further although the

discharge letter also states that the claimant was sent to A&E for further assessment the Tribunal has not been provided with any information regarding such assessment / any information to indicate that any further follow up was required at that time.

60. In all the circumstances the Tribunal is not satisfied that the claimant has established on the evidence that the ligament injuries in her thoracic spine were of a long-term nature (had lasted or were likely to last at least 12 months as at 24 January 2022/ the week commencing 24 January 2022.

The period between 24 January 2022 and the end of August 2022

61. For the reasons explained previously above, the Tribunal has, for the avoidance of doubt, gone on to consider, whether in respect of the period between 24 January 2022 and the end of August 2022 the claimant has established that the ligament injuries to her thoracic spine were of a long-term nature that is, that they were likely to last for at least 12 months.

62. Having given the matter careful consideration the Tribunal is not satisfied on the facts of this case that the claimant has established, in respect of the period between 24 January 2022 and the end of August 2022 that such ligament injuries were likely to have a substantial adverse effect on the claimant's normal day to day activities for at least 12 months (namely that it could well happen) during such period.

63. When reaching this conclusion, the Tribunal has taken into account in particular its findings of fact at paragraphs 19-22 above including that the claimant reported experiencing continuing difficulties in respect of such injuries during such period.

64. The Tribunal has however balanced against such matters the following findings namely, that:- (a) the claimant returned to full duties as an operational trainer on 14 February 2022 and continued with such duties until 20 July 2022 when she became absent from work because of Long Covid/ work related stress (paragraph 21 above) (b) the claimant's pain and stiffness were reported as reducing by approximately 8 weeks after the accident (paragraph 21 above) (c) the claimant's physiotherapy treatment was limited to a period of 5 weeks (paragraph 17 above) and further that the claimant did not have any recorded treatment sessions with a chiropractor after 18 August 2022 (paragraph 19 above). Moreover, the Tribunal has not been provided with any information regarding any further investigations or further treatment in respect of the claimant's ligament injuries to her thoracic spine for the period after

18 August 2022 and the claimant returned to roller skating with effect from 22 July 2022 (paragraph 23 above).

65. In all the circumstances the Tribunal is not satisfied that the claimant has established that any adverse effect of the ligament injuries to her thoracic spine were of a long-term nature during the period between 24 January 2022 and the end of August 2022.

66. In all the circumstances, the Tribunal is accordingly not satisfied that the claimant was a disabled person for the purposes of section 6 of the 2010 Act at any relevant time in respect of the ligament injuries to her thoracic spine. This element of her disability discrimination claim is therefore dismissed.

The position relating to Long Covid / POTS

67. The Tribunal has therefore gone on to consider whether the claimant was a disabled person for the purposes of section 6 of the 2010 Act at any relevant time by reason of Long Covid (post COVID- 19 syndrome) and/or POTS (Postural Orthostatic Tachycardia Syndrome).

68. The relevant period for determining whether the claimant was a disabled person for the purposes of Long Covid and/or POTS is between 24 July 2022 and continuing to 7 January 2023 (paragraph 7 (2) above and boxes 22 – 26 and 28 of Appendix A).

The respondent's submissions

69. In summary, the respondent accepted that the claimant had Covid/ Long Covid (but not POTS – in respect of which it says that there was no formal diagnosis) but otherwise denied that the claimant met the remaining requirements of section 6 of the 2010 Act.

The claimant's submissions

70. In summary, the claimant contended in particular as follows:-

- (1) The long-term prognosis for people with Long Covid is still unknown and there is no treatment for it.
- (2) With Long Covid you have to strip yourself down to nothing and then build yourself up again.
- (3) She continues to experience the symptoms of POTS including that her blood pressure drops when she is in the shower/ she is tired / raises her hands above her head causing dizziness .
- (4) She continues to experience fatigue / breathlessness and brain fog with the consequential adverse effects on her day to day (including on her work and social) activities such as caring for her daughter, cleaning and social activities such as roller skating.

The conclusions of the Tribunal relating to Long Covid/ POTS

Did the claimant have the above impairments (or either of them at the relevant time

71. The Tribunal is satisfied in the light of its findings of fact, that the claimant had (what the claimant describes as) Long Covid (post COVID 19 Syndrome) during the relevant period relating to the associated discrimination claims namely from 24 July 2022 until the end of January 2023 (paragraph 7.2 above).

72. When reaching this conclusion, the Tribunal recognises that the claimant did not receive a formal diagnosis of Long Covid (post COVID – 19 syndrome) until the report dated 10 November 2022 (paragraph 27 and pages 140 – 145 of the bundle). The Tribunal has however, also taken into account that the claimant contracted Covid (for a second time) in March 2022 and continued to experience associated symptoms such as fatigue and shortness of breath, culminating in her absence from work because of fatigue (together with work related stress) with effect from 22 July 2022 (paragraphs 24 and 25 above) and further that her absence (including for such reasons) continued until January 2023.

73. Further, although the claimant does not appear to have received a formal diagnosis of POTS (or Postural hypotension) (the subsequent report dated 22 February 2023 at page 146 of the bundle), the Tribunal is nevertheless satisfied, having regard to the contents of such report (for the purposes and to the extent only that it helps to shed light on the position during the relevant period) together with the findings at paragraph 32 above, that the claimant also experienced, during the latter part of the relevant period increasing problems with heart palpitations/ low blood pressure / associated effects including dizziness.

Did the above impairments have an adverse effect on the claimant's normal day to day activities between 24 July 2022 and the end of January 2023.

74. The Tribunal is satisfied in the light of its findings of fact that the Covid related impairments identified above had an adverse effect on the claimant's normal day to day activities between 24 July 2022 and the end of January 2023.

75. When reaching this conclusion, the Tribunal recognises that the claimant was also reported as experiencing work related stress during this period (including in the sick notes at pages 137 and 139). The Tribunal also recognises that the claimant had undertaken

physically demanding duties as an operational trainer/ had previously passed the JRFT (bleep test) in April/ May 2022.

76. The Tribunal is however satisfied, having regard to the contents of the report dated 10 November 2022 together with its findings in particular at paragraphs 31 and 32 above concerning the effect of the claimant's Covid symptoms that, viewed together, they had an adverse effect on the claimant's normal day to day activities throughout the relevant period.

Were such adverse effects substantial ?

77. The Tribunal has gone on to consider whether such effects were also substantial during the relevant period. The Tribunal has reminded itself for such purposes that "substantial" means more than "minor or trivial".

78. Having given the matter careful consideration including having regard to the examples contained in the 2011 Guidance of factors which it would be reasonable to regard as having a substantial adverse effect on normal day to day activities (such as in relation to the use of steps because of fatigue, difficulty concentrating), the Tribunal is satisfied that considered together the effects identified, in particular at paragraph 32 above, had a substantial adverse effect on the claimant's normal day to day activities including with regard to child care, undertaking housework /administrative duties , climbing stairs and engaging in social activities throughout the relevant period.

Was the substantial adverse effect on the claimant's normal day to day activities long term?

79. Finally, the Tribunal has considered whether the identified substantial adverse effects on the claimant's normal day to day activities were of a long-term nature namely whether they had lasted or (as is the situation in this case) were likely to last for at least 12 months judged at the time of the alleged discriminatory acts (24 July 2022 to the end of January 2023). The Tribunal has reminded itself for such purposes that "likely means "could well happen".

80. Having given the matter careful thought the Tribunal is satisfied that although the Covid related day to day effects identified above had not lasted for 12 months as at the relevant period (24 July 2022 to the end of January 2023), viewed objectively at that time it was likely (could well happen) that they would last for the relevant 12 month period.

81. When reaching this conclusion, the Tribunal has taken into account in particular, that the claimant had contracted Covid in March 2022 and had continued to experience Covid related symptoms/ effects from that time including going off sick on 20/21 July 2022 (with Covid and work-related stress) until January 2023 (paragraphs 25 and 31 – 32 above). The Tribunal has also taken into account the contents of the report dated 22 November 2022 relating to the claimant's symptoms, the ongoing effects on the claimant's day to day activities together with the formal diagnosis of Long Covid (post Covid 19 Syndrome) (paragraph 27) (pages 140 – 145) together with the proposed management plan going forward. There is no suggestion in this report of any improvements in the claimant's condition/ likely improvement in the foreseeable future
82. In all the circumstances, the Tribunal is satisfied that claimant was a disabled person for the purposes of section 6 of the 2010 Act by reason of Long Covid (post Covid 19 syndrome) / Covid related conditions throughout the relevant period (24 July 2022 to the end of January 2023).

Employment Judge Goraj
Date: 7 June 2024

REASONS SENT TO THE PARTIES ON
01 July 2024 By Mr J McCormick

FOR THE OFFICE OF THE TRIBUNALS

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