



Reserved judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Ms S Higgins

Bureau Veritas UK Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON A PRELIMINARY HEARING

HELD AT Birmingham

ON 22nd September 2017

EMPLOYMENT JUDGE Coaster

Representation

For the Claimant: Mr B Norman, Counsel

For the Respondent: Mr N Cooksey, Counsel

JUDGMENT

The judgment of the Tribunal is that:

On 3rd January 2017 that claimant satisfied the S6 Equality Act 2010 definition of disability.

REASONS

Background and Issues

1. The claimant commenced employment as a business development manager with the respondent on 1st September 2015. She resigned on 3rd January 2017 in response to alleged discriminatory act(s), the protected characteristic being the claimant's disability. The claimant claims direct discrimination (section 13 Equality Act 2010) and discrimination arising from disability, (section 15). In the context of the termination of her employment by her resignation, the claimant relies on section 39(2)(c) Equality Act 2010.

2. The index event giving rise to the claimant's claim to having a disability, is a gastrocnemius muscle tear in the left leg whilst playing netball which occurred on 7th June 2016. The claimant alleges that the muscle tear has had and continues to have a substantial adverse impact on her day to day activities and is

a disability which has lasted more than 12 months. The respondent does not accept that the claimant is disabled and in event it was unaware of the extent of her symptoms and their effect upon her at the relevant time.

3. The issue before the tribunal is whether at the date of resignation the claimant was disabled for the purposes of section 6 Equality Act 2010. Did the injury she had sustained have a substantial adverse effect on her day to day activities and was it likely to last at least 12 months.

Evidence

4. I was provided with an agreed bundle exhibited as R1. The claimant prepared an impact statement in May 2017 and a further witness statement in response to the respondent's points disputing that the claimant's impairment qualified as a disability. I have also been provided by the respondent with a chronology, a synopsis of relevant law, the claimant's skeleton argument on disability and a copy of the Equality Act 2010 Guidance. I heard testimony from the claimant and submissions from both parties.

Findings of fact

5. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of the claimant at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witness and the consistency of her evidence with surrounding facts. In my conclusions I have taken into account the parties' submissions.

6. My findings of fact relevant to the issues which have been determined are as follows:

Chronology of the injury and medical treatment

6.1 The claimant was playing netball on 7th June 2016. She turned suddenly and felt a "pop". She fell unconscious with pain and was taken by ambulance to A&E – the Urgent Care Centre at Trafford General Hospital, an NHS Foundation Trust hospital (UCC).

6.2 The discharge letter dated the following day, 8th June 2016, addressed to the claimant's GP, shows the doctor on duty and in charge of the claimant's care at the time in UCC was an A&E Staff Grade doctor. The claimant had remained in hospital overnight as a precaution due to the possible complications in association with another health condition. The doctor discharged the appellant to the care of her GP on 8th June 2016. The discharge letter of 8th June 2016 shows states that the management summary is:

"ICE:

Other investigations

No investigations undertaken

Diagnosis

Ill defined condition, :-gastrocnemius (sic) tear

Treatment

Crutches”

6.3 The GP is informed in the UCC discharge letter that the patient's destination was “Home” and that she was discharged to “care of GP”.

6.4 The claimant was informed by the doctor in charge at UCC that she had torn her gastrocnemius muscle and that she would need to use crutches to walk for some time.

6.4.1 The claimant was also informed by the UCC doctor that there was a 9 – 36 month recovery time for a gastrocnemius tear to return to normal activities depending on the degree of severity of the injury and a 20% risk that the injury she had suffered could be permanent and/or require surgery. I find that this information was not a diagnosis of the severity of the claimant's injury, but was general information regarding a strain or tear of the gastrocnemius muscle.

6.5 On return home, the claimant telephoned her employer, speaking to her manager's PA, to advise of her injury, her absence from work and confirmed that she would keep her employer informed when the claimant knew more.

6.6 The claimant had been issued with tramadol by the UCC as the pain was severe and her left calf was bruised and swollen.

6.7 On 9th June 2016 the claimant made a telephone appointment with her GP with whom she had a telephone consultation on 10th June 2017. Her GP's recorded notes show:

“Been to Trafford A&E. Was in garden and turned suddenly playing with children and injured calf. Told she has tore (sic) the medial head of gastrocnemius, currently non wt bearing and using crutches and there is considerable bruising. Issued 2 weeks.”

6.8 The GP provided a two week sick note.

6.9 On 24th June 2016 the claimant had a further telephone consultation with her GP. His notes record:

“Telephone encounter – still hardly wt bearing – is having physio. Issued another 2 weeks. Can actually stand briefly.”

6.10 The claimant commenced physiotherapy about three weeks after the index event. There was no documentary evidence to confirm the physiotherapy appointments or to provide any other instruction to the physiotherapy on treatment for the claimant's injury.

6.11 The GP's medical notes show that there was a 'failed encounter' with the claimant on 8th and 29th July 2016 but the GP nevertheless provided the same sick note as before "as requested".

6.12 The rest of the entries in the GP's notes are to 27th April 2017 not relevant to the claimant's calf injury. On a separate page in the GP records, the notes show that on 29th July 2016 the claimant's GP wrote a fit note recommending a "4 week phased return on crutches. (3 days)".

6.13 The fit note states: "*Attending regular physiotherapy but would be able to undertake home and office duties as agreed with employer.*"

6.14 This fit note was repeated on 22nd September, 21st October, and 23rd November 2016. On 22nd September 2016 the fit note stated: "*attending regular physiotherapy and awaiting reassessment at hospital. Fit for home and office duties as agreed with employer.*" It is the claimant's case that whilst at the surgery the GP booked a referral for the claimant on line to the hospital and received a date of 7th December for an appointment with an orthopaedic consultant.

6.15 The fit note of 21st October 2016 for four weeks was in identical format as the September fit note.

6.16 During this period 29th July – 21st November 2016 the claimant was working from home. She was able to drive an automatic car and to attend the office for meetings. The claimant reported to her employer that her GP was concerned about the claimant attending customer sites alone in case of a fall.

6.17 The claimant did not receive a confirmation of an appointment for an assessment at the hospital with an orthopaedic consultant on 7th December 2016. Apart from the claimant's assertions that she had chased an appointment, there was no documentary evidence that she had been given an appointment any appointment at this stage, or that when no confirmation had arrived she followed up – she continued to inform her employer and the Occupational Health Advisor that she had an appointment on 7th December 2016 for an assessment and a CT scan.

6.18 On 9th November 2016 the claimant attended an occupational health assessment conducted by an Occupational Health Advisor appointed by the respondent. The report to the respondent is dated 16th November 2016. The OH

report gives a fuller picture of the impact of the claimant's calf muscle injury on her day to day activities. The OH Advisor reports what the claimant told her:

“She sustained an injury to her left gastrocnemius muscle; this runs from the back of the ankle to the back of the knee. She was playing netball with her daughter. She needed no operation at the time and the treatment was pain relief, rest and physiotherapy. Whilst she was off work for five weeks she had no mobility and was bed-ridden for the whole time. She returned to work at the end of July however this was home working and she went back on a phased return. Now in November 2016 Mrs Higgins tells me she is on amended duties including attending physiotherapy and waiting for a CT scan on her leg scheduled for 7th December 2016 and a re-assessment at the hospital. The GP has said she is fit for home and office duties as agreed with the employer and this amendment on the fit note lasts until the 21st November 2016.

Today to bring this consultation up to date she tells me she is fairly mobile, she uses one crutch all of the time which she has on her left hand side. She gets occasional lower back pain which is more uncomfortable than anything else which her GP has said is over-compensating for using the crutch. She is working full time 37 hours a week however she is not driving the company car because that is a manual, she can only drive her own automatic car so she is home-based full time. I asked her if she had pain today and she said she only gets it first thing in the morning. She is using one crutch and she has physiotherapy three times a week for 45 minutes at a time and she is also doing her own exercises which she tells me she is doing constantly as she wants to get better.....

From a functional point of view Mrs Higgins is driving and has been since the end of July 2016, generally pain free and on one crutch. She has helpful children living at home, she is taking diet and fluids and her sleeping is compromised as she gets cramps quite badly in her left leg at night. The GP has advised that she takes tonic water as the quinine will help break up the cramps and alleviate her pain. We looked at the impact of these symptoms on her role as a Business Development Manager and Mrs Higgins tells me she has got no flexion in her foot at the moment at all, that is why she has to use the automatic car. Surgery has not been ruled out at this point and she continues to do daily exercise all the time. She tells me that she does have a sore leg following on from the gruelling physiotherapy schedule.”

6.19 In response to the respondent's HR manager asking the OH Advisor supplemental questions on 25th November 2016 by email, namely whether the claimant's condition would improve with time and if so, in what timescale, the OH advisor repeated the information given to the claimant by the doctor in the UCC which was “9 – 36 months with a 95% recovery rate.” The OH advisor added, “this depends on the further need for surgery and it depends on how the scar

tissue is healing, it is a muscle and it is unpredictable. No further information is known until the scan on the 7th December 2016.”

6.20 The OH advisor also repeated the information provided by the claimant about her then capabilities in terms of the distance she could walk. With one crutch the claimant said she could walk short distances only. She can just about manage the stairs and struggles on uneven surfaces. The claimant had not tried to push her mobility long distances as she fell once since the injury and this had caused her to lose confidence. The OH Advisor confirmed that the claimant did not know what her capabilities were in terms of distance but she could walk short distances.

6.21 The OH advisor advised that with regard to when the claimant would be able to resume full normal duties, what the long term diagnosis is for the injury and whether there was a need for surgery would depend on the outcome the referral and scan on 7th December 2016.

6.22 On 6th December 2016 the OH Advisor again emailed the HR manager to obtain a response to an earlier question - whether the OH Advisor would consider the claimant 'disabled'. The OH Advisor replied: *“in answer, no I do not believe this condition would be classed as a disability as it is not expected to last for longer than 12 months, hopefully”*.

6.23 On 7th December 2016 the claimant attended her GP's surgery. She did not attend an assessment at the hospital or undergo a CT scan on her calf muscle as she had not received any appointment confirmation from the hospital. The GP notes made no reference to a referral on 7th December 2016.

6.24 On 19th December 2016 the respondent's HR manager emailed the claimant requesting a report on the outcome of her appointment for a CT scan and reassessment that was due on 7th December 2017.

6.25 On 21st December 2016 the respondent's HR manager emailed the claimant the outcome of the 7th December CT Scan and assessment.

6.26 On 21st December 2016 the claimant emailed a reply to the respondent's HR manager. Inter alia she refers to the appointment on 7th December. She informed the HR Manager as follows:

“My appointment on 7th shown critical damage and I am waiting confirmation for surgery. If surgery is performed my recovery would be 12 – 24 months.”

This was an untrue and misleading statement for which the claimant when challenged in cross examination gave no explanation. The claimant's email is misleading in that, on the natural meaning of the words, it gives an impression to the HR manager that the claimant had received a consultant's diagnosis on 7th

December 2016 and was waiting confirmation for surgery from the consultant. That was untrue.

6.27 However, I accept that the claimant's GP had attempted to arrange a referral for the claimant. This is evidenced by a letter from the claimant's GP written on 16th September 2017 for the purposes of this hearing that an initial referral was made by the GP to the hospital in September 2016 on the claimant's behalf. It could be seen from the screen shot incorporated into the GP's letter of 16th September 2017, that the hospital had acknowledged the referral from the GP on 23rd September 2016 but no appointment of 7th December 2016 is listed next to the referral on the screen shot. The GP confirmed that on 21st October 2016 the GP's surgery had chased up the hospital for an appointment. On 23rd November 2016 the claimant's GP again chased the appointment which was then described as "*priority escalated to urgent*".

6.28 In fact the claimant did not get a referral to an orthopaedic consultant until May 2017, four months after her resignation; eleven months after the index event.

Impact statement

6.29 The claimant's impact statement of May 2017 confirms that the claimant was initially bedbound after the injury was incurred on 7th June 2016; she could not get around at all and was in pain with a swollen and bruised calf muscle.

6.30 The claimant states that she was unable to weight bear for 20 weeks from 7th June 2016.

6.31 The impact statement covers the period of 7th June 2016 onwards. The physical difficulties affecting the claimant's day to day activities are listed at paragraph 9 of her statement. Referring to a few of the 13 sub paragraphs, they include difficulty carrying out day to day tasks due to the constant pain and reduced mobility which results in the claimant taking longer to do certain activities.

6.32 The claimant originally could not go shopping. She currently is able to shop for some items but has to lean on the shopping trolley for support. She cannot walk around the supermarket without feeling tired and pain. Instead she now orders shopping on line.

6.33 The claimant experienced difficulties in bathing, getting in and out of the shower or bath without assistance and difficulties in washing her hair in the shower whilst standing on her right leg only.

6.34 The pain in her calf disturbed her sleep at night, impacting on her concentration levels the next day.

6.35 The claimant states she has been unable to return to her routine at the gym or take part in most fitness activities which she enjoyed doing before. She also avoids socialising as she is afraid that someone will knock into her or that her leg might give way and she will fall over.

6.36 The claimant needs support with her luggage at the airport when travelling to visit her mother in Spain.

6.37 I accept that the claimant's description of the difficulties and pain she experienced in movement, sleeping well, enjoying life's usual amenities are more likely than not to be an accurate reflection of the effect of her injury after it occurred and for some time afterwards. However her impact statement does not pinpoint the status (degree) of her injuries and the impact on day to day tasks which she was experiencing at the date of her resignation.

Facebook entries

6.38 The claimant was during the period June – December 2016 posting entries on her open Facebook account which show her socialising, which suggest that she is going out walking in Dunham Country Park with her partner, enjoying a holiday in Spain with her family, enjoying Christmas shopping and undertaking physical activities/training in the gym. In none of the photographs posted does it show the claimant with a crutch or in a wheel chair.

Humana Press – Curr Rev Musculoskelet Med (2009)2:74 – 77 Gastrocnemius vs. soleus strain: how to differentiate and deal with calf muscle injuries

6.39 This document – an article from a professional medical journal - was relied upon and referred to by both parties. It usefully describes various types of strain and how calf injuries are graded 1 – 3 based on disability, physical finding, and pathologic correlation.

6.40 The claimant was taken to page 158 of R1 and although she was unsure whether muscle strain would include a muscle tear, she readily confirmed that the description for Grade 3, 3rd degree severe calf injury was an accurate description of her calf injury when it occurred. The symptoms for a Grade 3, 3rd degree severe calf injury were "immediate severe pain, disability". The signs are "complete loss of muscle function, palpable defect or mass...." The pathologic correlation was "50-100% disruption of muscle fibers[sic]" and the radiology correlation was described as "complete disruption of discontinuity of muscle. Extensive edema [sic] and hemorrhage [sic]. Wavy tendon morphology and retraction".

6.41 The article sets out the treatment for calf strains:

“Accurate diagnosis and early appropriate treatment can significantly affect duration and amount of disability. Complete recovery of strength and flexibility should be achieved prior to return to pre-injury activity. Premature return may result in a prolonged recovery or incomplete return to pre-injury baseline. Acute treatment is aimed at limiting hemorrhage and pain as well as preventing complications. Over the first 3 – 5 days muscle rest by limit stretch and contraction, cryotherapy, compressive wrap or tape and elevation of the leg are generally commenced. Simple application of an ACE wrap, heel wedge and crutch –assisted walking would accomplish these goals.....

Surgical consultation should be considered for grade III strains (50 – 100% disruption of muscle) and for cases of prolonged 4 – 6 months pain with evidence of contracture.

Contractures suggest the presence of painful and restrictive adhesions that may be amendable to surgical intervention.”

6.42 The treatment given to the claimant at UCC on 7th June 2017 to the claimant is comparable to the recommended ‘first aid’ treatment set out in this medical article at 6.42 above.

6.43 The claimant accepted in cross examination that at the date of her resignation on 3rd January 2017 the claimant had not had a diagnosis of her calf injury and had had no diagnosis of contracture.

Medical evidence post 3rd January 2017

6.44 I was provided with two orthopaedic consultant’s reports establishing the claimant’s current medical condition relating to her left calf and foot. The reports, the second of which was by a consultant in the ‘foot clinic’ identified in September 2017 the condition post anterior tibialis which had developed as a result of the original muscle tear.

Submissions

6.45 I heard oral submissions from both parties. I have retained a full note of those submissions on file. I have read my notes of the parties’ submissions and have also read the claimant’s skeleton argument on disability. Both counsel were clear about the date on which my assessment must be made of whether the claimant met the S6(1) Equality Act 2010 definition of disability. The key issue is whether the claimant’s physical impairment and the adverse impact that it had on her day to day activities were likely to last 12 months from June 2011. At 3rd January 2017, seven months had passed since the index event.

6.46 The respondent challenged the claimant's credibility in cross examination and pointed to contradictions in her evidence, both oral and documentary, the failure to readily provide full medical disclosure and the lack of medical diagnosis.

6.47 It was submitted that the claimant's evidence of the degree of severity of her calf muscle injury was no more than a repetition of what she was told by the doctor in the Urgent Care Unit at Trafford Hospital on 7th/8th June 2016 as a general statement about gastrocnemius muscle injuries and was not an opinion on the claimant's injury specifically. There was no medical diagnosis at 3rd January 2017 apart from what was stated in the UCC discharge letter; no scans, no surgery recommended or having taken place, no contracture diagnosed. The evidence points to ongoing improvement in the claimant's condition over the period 8th June 2016 – 3rd January 2017.

6.48 The claimant's submissions pointed out that there is clear evidence of a tear of the gastrocnemius which on discharge was bad enough to be provided with crutches. The claimant met the most serious, Grade 3 calf muscle strain in the medical article; there is medical evidence which postdates 3rd January 2017 by 15 months which clearly shows that the claimant is not faking or exaggerating the injury she received. The claimant had gone through grades 1 and 2 and is in the territory where the injury has not repaired itself quickly.

6.49 If the claimant is still using a crutch 7 months after the injury incurred it suggests that it is not the type of injury resolving in a short space of time. It suggests that the injury is likely to fall within the higher end of the UCC doctor's advice that a gastrocnemius tear can take 9 – 36 months to recover.

6.50 Mr Norman highlighted points to take into account in the evidence. Both counsel agreed that for the purposes of assessing the claimant's credibility, I could look at the medical opinions beyond 3rd January 2017 but not for factual medical information which must not be taken into account where it post dates 3rd January 2017.

The law

6.51 The burden of proof is on the claimant to the civil standard, on the balance of probabilities, to demonstrate that she meets the definition of disability in S6(1) Equality Act 2010.

6.52 Section 6 states:

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.”

6.53 I have had regard to the Equality Act 2010 Guidance in particular on the meaning of long term effects at Section C of the Guidance and the meaning of 'likely'. At C3 'likely' should be interpreted as meaning that ***it could well happen***.

Conclusions

7 The task before me is to determine whether on 3rd January 2017, the effect of the claimant's calf muscle injury had a substantial adverse effect on her day to day activities and whether it was likely to last at least 12 months. I am aware that the claimant has developed a further complication which was finally diagnosed some months after her resignation. However the date of determination is the date of the alleged discrimination, the claimant's dismissal by reason of her resignation on 3rd January 2017.

Medical evidence at 3rd January 2017

UCC discharge letter:

8 I start in my assessment with the available professional medical evidence at 3rd January 2017. There is very little had medical evidence. The doctor on duty at the Trafford Hospital Urgent Care Centre on 7th / 8th June identified "an ill defined condition, :- gastrocnemius tear in her left leg. The claim was treated with ice and provided with crutches. No other investigations were undertaken.

OH report:

9 The Occupational Health Advisor's report of 16th November 2016 following an assessment on 9th November 2016 makes no diagnosis and does not provide medical opinion until a follow up email exchange. The OH Advisor repeated the information given to her by the claimant at the assessment. The OH Advisor described the claimant as an informative historian with whom she established a good rapport. The claimant had made good eye contact with the OH Advisor and had open body language. She provided the OH Advisor with all the information required to carry out a successful and in depth referral. The OH Advisor records the following information provided by the claimant:

- (a) the claimant was taking no medication; she might take pain relief as and when prior to a physiotherapy appointment;
- (b) the claimant's GP certified the claimant as fit for home and office duties as agreed with the employer;
- (c) the claimant stated she is fairly mobile, using one crutch all of the time which she has on her left hand side;

- (d) The claimant gets occasional lower back pain which is more uncomfortable than anything else; he GP has said this is over-compensating for using the crutch;
- (e) The claimant cannot drive a manual car but drives an automatic;
- (f) The claimant only gets pain first thing in the morning;
- (g) She uses one crutch and has physiotherapy three times a week for 45 minutes at a time;
- (h) The claimant is doing her own exercises constantly as she wants to get better;
- (i) The claimant is taking diet and fluids and her sleeping is compromised as she gets cramp quite badly in her left leg at night;
- (j) On GP's advice the claimant is drinking tonic water as the quinine will help break up the cramps and alleviate her pain;
- (k) The claimant has no flexion in her foot at all which is why she has to use the automatic car;
- (l) Surgery has not been ruled out at this point;
- (m) The claimant continues to do daily exercises all the time;
- (n) The claimant has a sore leg following on from the gruelling physiotherapy schedule.

9.1 Further, the OH Advisor was informed by the claimant:

- (a) that her GP has given her strict instructions that she is not to drive any long distances and to avoid motorway driving and not do no site visits;
- (b) the claimant is capable of short distances only with an automatic car;
- (c) the claimant can walk short distances only; can just about manage the stairs and perceives that she struggles on uneven surfaces;
- (d) the claimant has not tried to push her mobility long distances as she fell once since the injury and this has lost her confidence;
- (e) the UCC consultant had told the claimant that the injury can take from 9 months – 36 months to recover with a 95% recovery rate. This depends on the further need for surgery and it depends on how the scar tissue is healing, it is a muscle and it is unpredictable;
- (f) the claimant feels unsafe using a shoulder bag as it is unevenly weighted on her right shoulder using a left crush. She can lose balance easily;

9.2 In response to additional questions from the respondent by email, the OH Advisor stated in respect of driving that she did not think the GP would want the claimant driving for more than 2 hours at most.

9.3 In respect of walking, the OH advisor replied *“the lady is improving all the time but as far as her limitation allow, I would not be able to define a measured distance as this would be dependent on different factors, such as energy levels, effectiveness of pain relief and progress of rehabilitation.”*

9.4 In respect of whether the claimant was disabled at 9th November 2016, the OH Advisor stated: *"no I do not believe this condition would be classed as a disability as it is not expected to last for longer than 12 months hopefully"*.

Fit notes:

9.5 The GP's fit notes did not provide any diagnosis and merely repeated what the claimant had been told by the UCC

Physiotherapy:

9.6 There was no physiotherapy department notes from the hospital. I accept that the claimant was undergoing physiotherapy – she reported that she was to her GP and to the OH Advisor. She was undergoing three 45 minute sessions per week for a period of five months from about three weeks after the index event in June until November after the appointment with the OH on 9th November.

The claimant's credibility

- 10 Much like the assessment of the OH Advisor, the claimant came across as an open and direct witness. She conceded points in cross examination and clearly there was no question of rehearsed evidence. However there were serious flaws in her evidence. The first being the lack of physiotherapy records. The claimant said there was none. The only evidence of what the physiotherapist said is reported by the claimant who described the physio as 'gruelling' and that it was only to ensure blood flow to the calf muscle. The physio had enabled the claimant to stand but otherwise had not helped. The claimant states that the physiotherapist stopped the sessions after 5 months because they were not bringing about sufficient improvement. The claimant reports that the physiotherapist said that the claimant needed an MRI scan and orthotics.
- 11 It is highly surprising that there is no documentary evidence to corroborate the claimant's claim to attending physio three times a week for five months and the progress in improvement or otherwise of the damage to the claimant's gastrocnemius muscles: no references or correspondence with the claimant's GP; no instructions from the hospital's UCC department to physio; no physio notes of appointment dates, treatment, diagnosis, prognosis and why the treatment stopped.
- 12 I do not accept the claimant's statement in cross examination that an NHS Trust hospital's physiotherapy department would not keep any notes of appointments and records of treatment of patients. It would be contrary to good hospital management, departmental accountability for staff budgets, legal risk management and above all, good practice by chartered

physiotherapists who are a regulated health care profession. The claim that the Trafford Hospital physio department did not keep notes of the claimant's treatment over some 60 appointments is not credible.

- 13 The respondent submitted that the failure to provide copies of physio therapy treatment is because the notes would show improvement in the claimant's condition. That is one explanation. Another is that the claimant has poorly managed her injury and recovery not only in respect of keeping documentary evidence but generally in the period of time it has taken to obtain a diagnosis of her condition which only occurred 15 months after the index event.
- 14 At November 2016, the claimant, her GP, the physiotherapist and the OH Advisor, did not know the extent of damage to the claimant's calf muscle. The claimant needed the information which would be provided by an MRI scan. Only then would she know whether she needed surgery and only then would she have any idea of the how long her recovery period would be after surgery, or if no surgery was required, how long the recovery period would be. Until a scan had been taken the claimant was speculating about the severity of her injury and her recovery.
- 15 The claimant has throughout the period 8th June 2016 to her resignation on 3rd January 2017 repeated the initial general comments on recovery time by the UCC doctor on duty about a tear to the gastrocnemius muscle, giving the impression to her employer that her recovery could take up to 36 months or may be permanent. Without a factual, medical assessment, diagnosis and prognosis, the claimant had no idea how long her injury would take to heal.
- 16 The Facebook posts were relied upon by the respondent to show that the claimant was being untruthful. None of the photographs show that the claimant is either in a wheelchair, or on crutches. There is no hint in the photographs or the texts posted that the claimant is suffering any incapacity caused by an injury. The claimant gave an explanation for each photograph and the circumstances it was taken in which was in each case plausible. The burden of proof is the civil standard. If the evidence is evenly balance, the standard of proof is not discharged. I do not find that the Facebook posts are probative either way.
- 17 The impact statement of May 2017 paints a significantly bleaker picture than the information willingly provided by the claimant to the OH Advisor on 9th November 2016. In November 2016 the claimant was pain free except first thing in the morning. She was taking no pain killer's except when she was pain free except first thing in the morning and was not taking pain killers except if required following physiotherapy. She was however impacted in her mobility and was experiencing disturbed sleep.

- 18 The OH Adviser clearly did not believe at the 5 month mark on 9th November 2016 that given the improvement in the claimant's condition indicated that it would continue for another 5 months but then added the word "hopefully" to her opinion. The OH Advisor did not give any rationale for her opinion which is at odds with her statement that no further information about the claimant's condition would be known and a long term diagnosis for the injury would also not be known until the appointment with a consultant and CT scan on 7th December 2016 had taken place which, as we know did not take place.
- 19 There is therefore an inherent flaw in the OH report in stating that the claimant's condition was likely to last at least 12 months when in the same report she confirms that there was not enough information to reach that assessment.
- 20 The claimant's credibility has been undermined in aspects of her evidence. The impact statement is exaggerated in some respects although I accept that the impact statement was likely to have been an accurate description of the claimant's condition and situation in the period immediately after the index event. But with regard to the claimant's condition on 3rd January 2017, it is exaggerated. By November there had been significant improvements in the claimant's condition.
- 21 Nevertheless the standard of proof of "*could well happen*" is lower than the civil standard. I have looked at the practicalities of the claimant's situation on 3rd January 2017. Her damaged credibility does not contradict or neutralise the entirety of her evidence on the impact of her condition although her impact statement does not differentiate between the effect of the original gastrocnemius muscle tear on her and the consequential condition in her left foot.
- 22 There was clearly an indication in November 2017 that the claimant had a problem with her left foot. No further medical treatment of physiotherapy took place before 3rd January 2017 and therefore I do not believe that the condition of the claimant's left calf muscle and left foot would have improved substantially by 3rd January. I find that the claimant's mobility was still substantially impacted on 3rd January 2017 and that this would inevitably have an effect on her ability to perform some day to day tasks such as housework and shopping which was more than trivial as she has described. She could not walk unaided apart from short distances. She used a crutch. She could not walk on uneven ground. She could not flex her left foot. This must have had an adverse effect on what shoes she was able to wear on her feet and her ability to take exercise whether in the gym or otherwise. It must have affected her movement which was more than trivial. The claimant could not drive a manual car. She was still not back at work taking on full duties which included travelling to customer sites. The GP's letter of 15th September 2017 indicates that the need for a referral for the claimant's injury

was escalated to priority in November 2016 in order that she could obtain a diagnosis.

- 23 Given the low standard of proof of “could well happen” I reach the conclusion on the evidence that an assessment of the claimant’s physical condition on 3rd January 2017 would have been that it could well happen that her recovery would last more than another 5 months given the absence of a diagnosis and even if (had a diagnosis been obtained) surgery were to take place within that period and with the associated recovery period after surgery. I find therefore that on 3rd January 2017 the claimant was disabled.

Signed by Employment Judge Coaster on 9th October 2017

Judgment sent to Parties on 17 October 2017