EMPLOYMENT TRIBUNALS

Claimant
Miss M Brereton

Respondent
Jane Ward and Mairi Campbell-Block
t/a Stems Florist

v

Heard at: Norwich **On**: 28 July 2022

Before: Employment Judge Warren

Appearances

For the Claimant: In person assisted by McKenzie Friend Ms A Sutton
For the Respondent: Mr Kennedy - Counsel

JUDGMENT

1. It was not reasonably practicable for the Claimant's claim in breach of contract for notice pay, for unpaid wages and for unpaid holiday pay to have been issued in time and they have been issued within such further period as is reasonable.

2. It is just and equitable to extend time in respect of the Claimant's complaint of disability discrimination, but the question of whether there has been a continuing act of discrimination is reserved to the final hearing.

3. The Claimant was a disabled person as defined in the Equality Act 2010 during the period of her employment 9 April to 19 June 2019, (the material time).

REASONS

The Issues

1. I identified the issues for me today at a Closed Preliminary Hearing before me on 17 February 2022 as follows:

    1.1 Was it reasonably practicable for the breach of contract, holiday pay and wages claims to have been brought in time and if not, were they brought within such further time as is reasonable?

1.2 The discrimination claim was clearly issued out of time, is it just and equitable to extend time?

1.3 If the claim of disability discrimination is not struck out for having been made out of time, the tribunal will then decide whether the claimant was a disabled person between 9 April and 19 June 2019.

1.4 If any of the claims are not struck out, the tribunal will finalise the list of issues.

1.5 Finally, the tribunal will have to deal with any outstanding applications.

Time – Reasons given orally to the parties

Evidence

2. What I have had before me today is a bundle prepared by the respondent's solicitors. Within that there is a witness statement on the issue of time from Miss Brereton which she signed this morning. Miss Brereton gave evidence under oath and was cross-examined by Mr Kennedy.

The Law

3. Anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the Employment Tribunals Act 1996). In doing so, time stops running for the purposes of calculating time limits within which proceedings must be issued, from, (and including) the date the matter is referred to ACAS to, (and including) the date of a certificate issued by ACAS to the effect that settlement was not possible was received, (or was deemed to have been received) by the Claimant. Further, if the certificate is received within one month of the time limit expiring, time expires one month after the date the Claimant receives, (or is deemed to receive) the certificate. See s207B of the Employment Rights Act 1996 and Luton Borough Council v Haque [2018] UKEAT/0180/17.

The Reasonably Practicable Test

4. Section 23 of the Employment Rights Act 1996 in respect of unpaid wages, Regulation 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1996 in respect of breach of contract claims and 30(2) of the Working Time Regulations 1998 in respect of claims for holiday pay, each provide that a claim shall not be considered unless it is presented within 3 months of the event potentially giving rise to liability, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

5. For wages claims, if there has been a series of deductions, time runs from last of such deductions.

6. The question of whether it was reasonably practicable to bring a claim in time is a question of fact for the Tribunal. The onus is on the Claimant to show that it was not reasonably practicable, (Porter v Bandridge Ltd [1978] ICR 943 CA).

7. The expression, "reasonably practicable" has been held to mean, "reasonably feasible" applying common sense. See Palmer v Southend Borough Council 1984 IRLR 119 CA.

8. In Wall's Meat Co. Ltd v Khan [1979] ICR 52 Brandon LJ said:

> *"The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of a complainant …"*

9. As to whether the time between expiry of the time limit and the issue of the claim is a reasonable period calls for an objective consideration of the factors causing the delay, viewed against the background of the expiry of the primary limitation period and strong public interest in claims being brought promptly. See Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10.

10. In Schultz v Esso Petroleum Co Ltd [1999] ICR 1202 CA, the claimant was ill with depression. The tribunal found that he was capable of instructing solicitors during the first 8 weeks of the limitation period, but not thereafter. It held that it was reasonably practicable for the claim to have been issued in time, because it could have been done in those first 8 weeks. The Court of Appeal held that the tribunal had erred. Potter LJ said,

> *"Thus, while I accept Mr Wynter's general proposition that, in all cases where illness is relied on, the tribunal must bear in mind and assess its effects in relation to the overall limitation period of three months, I do not accept the thrust of his third submission, that a period of disabling illness should be given similar weight in whatever part the period of limitation it falls. Plainly the approach should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation."*

The Just and Equitable Test

11. Section 123 of the Equality Act requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

12. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal clarified that there was no requirement to apply the Limitation Act checklist or any other check list under the wide discretion afforded tribunals by s123(1), although it was often useful to do so. The only requirement is not to leave a significant factor out of account, (paragraph 18). Further, there is no requirement that the tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account, (paragraph 25).

13. Considering the relative prejudice to the parties and having regard to the overriding objective will always be considerations in exercising judicial discretion.

14. In the case of Robertson v Bexley Community Services [2003] IRLR 434 the Court of Appeal stated that time limits are exercised strictly in Employment Law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

15. That has to be tempered with the comments of the Court of Appeal in Chief Constable of Lincolnshire v Caston [2010] IRLR 327 where it was observed that although Lord Justice Auld in Robertson had noted that time limits are to be enforced strictly, his judgment had also emphasised the wide discretion afforded to Employment Tribunals. Lord Justice Sedley had noted that in certain fields such as the lodging of notices of appeal in the EAT, policy has led to a consistently sparing use of the power to extend time limits. However, this has not happened and ought not to happen in relation to the discretion to extend time in which to bring Tribunal proceedings which had remained a question of fact and judgment for the individual Tribunals.

16. Section 123(3) reads:

> *"For the purposes of this section –*
>
> *(a) conduct extending over a period is to be treated as being done at the end of the period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it".*

The Facts

17. In respect of Miss Brereton's notice pay, holiday pay and wages claims, time runs from the date her employment ended or when those final payments should have been made. Her employment came to an end on 19 June 2019. So, the three month time period would have been up on 18 September 2019.

18. Early conciliation was between the 19 June and 1 August 2019, which is 43 days. 1 August was not within a month of the expiry of the time limit, so all we can add is the 43 days. That takes the time limit to 31 October 2019.

19. Proceedings were issued on the 20 February 2021 which is a year, 3 months and 21 days late. That is a significant delay.

20. The last discrimination allegation relied upon, which I had overlooked when I prepared the list of issues at my preliminary hearing, is the alleged post-termination victimisation in the giving of a bad reference on 17 December 2020.

21. So, it is possible that if there is a link between earlier acts of discrimination and that last act, they could all be brought in time by the act of victimisation. That of course all depends upon the Tribunal finding that there was discrimination in the first place, that the bad reference was an act of discrimination and that there is a link between them.

22. If the Tribunal were to find that what happened during Miss Brereton's employment was not discrimination, but that the bad reference was, the problem Miss Brereton will then face (I simply flag up now) is that she did not go to ACAS for early conciliation in relation to that later victimisation claim.

23. Aside from the reference, the last act of discrimination relied upon is the act of dismissal and so the time frame for notice pay, holiday pay and unpaid wages, would be the same as it is for the discrimination claim.

24. I quote from paragraph 4 of Miss Brereton's witness statement

> "… by August 2019 I was suffering significantly from serious anxiety and depression, as well as chronic neuro-musculoskeletal pain and fatigue associated with hypermobility, and bilateral knee and lower back problems. As a consequence, I was overwhelmed, distressed, disorientated and confused. I experienced dissociation and lacked the ability to concentrate and communicate effectively. I was overcome by extreme fear and panic, as well as being plagued by feelings of helplessness, hopeless isolation, despair and suicidal ideation, which were exacerbated by the loss of employment with Stems. The extreme prolonged stress caused weight loss and culminated in my suffering complete physical and mental breakdown, during which time I was unable to physically care for myself. I needed a course of Lorazepam in July 2019 due to a worsening of my mental health."

I note in passing, that coincides with the timing of Ms Brereton going to court with her former partner in respect of the sale of her home, (see below). It also covers the period of the ACAS early conciliation. Continuing with the quote from the witness stament:

> "A&E attendance and treatment in January and December 2020 due to extreme anxiety symptoms. In reality I was suffering from post-traumatic stress disorder (PTSD) although I did not receive a formal diagnosis of that until September 2021. All of this meant that come August 2019 I was simply incapable of taking physical care of myself, thinking straight or logically, making rational decisions and certainly incapable of completing an ET1 form."

25. At paragraph 5 of her statement, Miss Brereton said:

> "I was unable and in no fit state to seek advice from my employment (and its termination) with Stems and what I might do about it. Towards the end of 2020 and into early 2021, my physical and mental health began to improve such that by February 2021 I felt well enough to draft and submit an ET1 claim. I did so without the benefit of any professional advice or assistance because I knew my claims were being made late and I did not want there to be any further delay."

26. Miss Brereton's GP Dr Oyawa wrote in a letter of the 21 September 2021 addressed, "to whom it may concern":

> "She was seen several times between May 2019 and July 2021 initially managed with medication in the surgery. She required a review of her medication and changes due to no effect and side effects on high doses. She was referred to the Mental Health Team and had further input in her management from them. As a result of this she was unable to submit a discrimination claim to an Employment Tribunal between 1 August 2019 and 20 February 2021."

It is fairly unusual for a doctor to make such a categorical statement.

27. Next, I refer to a letter from the same doctor dated 22 April 2022. From the penultimate paragraph I quote:

> "Between January 2019 and February 2022 she received counselling through Catalyst Counselling. She has a diagnosis of post-traumatic stress disorder from a previous abusive relationship."

28. The final piece of medical evidence I refer to is a letter from Dr Oyawa dated 24 May 2022. The doctor refers to:

    28.1 Miss Brereton being seen in surgery in September 2018 due to worsening mental health problems;

    28.2 Problems with hallucinations and receiving therapy from February 2019 to March 2022, during which time she had 44 sessions;

    28.3 A course Lorazepam in July 2019 due to worsening of these symptoms;

    28.4 An A&E attendance in January 2022 due to worsening anxiety symptoms, and

    28.5 A history of anxiety and depression and that she was subsequently diagnosed with post-traumatic stress disorder in September 2021.

    28.6 During this period, the doctor writes,

> "She was very distressed and was unable to physically care for herself".

29. In contrast to that, it is true to say that Miss Brereton was able to engage with ACAS between June and July 2019 and that she confirmed to me in her evidence that they told her about the 3 month time limit. She also explained to me how it is that she came to consult ACAS, which ironically

was on the advice of the respondent's accountant, with whom she was on good terms.

30. Miss Brereton was also involved in a court hearing with a former partner over the sale of her house in July 2019. We don't know how she faired in that process.

31. Miss Brereton applied for a job on 1 December 2020 or thereabouts. That application led in due course to the post-employment victimisation claim; the alleged poor reference from 17 December 2020. Miss Brereton issued these proceedings 2 months after she learnt that the respondent had given her prospective new employer a poor reference.

My conclusions

32. I note that the prescriptions of lorazepam coincide with the period of ACAS conciliation. I note that the diagnosis of PTSD was in September 2021, corroborating that there was a serious on-going mental health issue to that point.

33. Recovery from mental illness, or improvement, is unlikely to be instantaneous. It is likely to be a gradual process. I have to say I accept Miss Brereton's evidence, corroborated by letters from her GP and in particular, the straightforward statement by her GP on 21 September that she was unable to submit a discrimination claim to the Employment Tribunal between August 2019 and 20 September 2020. It is her mental illness in that period that is the reason for her delay.

34. There is of course prejudice to both sides whatever I do. The prejudice to the respondent is not only the usual one that they will be deprived of the benefit of the time limit parliament saw fit to put in place, but also the passage of time will have had an effect on cogency of evidence and possibly on the availability of witnesses. This is a case where there are instances of*, "he said, she said, she did this, she did that"* not apparently backed up by documentation.

35. The prejudice to Miss Brereton, if I find that the claims are out of time, is that if the tribunal does not uphold her victimisation claim and/or decide that there is no continuing act, she will be deprived of the opportunity of seeking adjudication on her allegations about the way she says she was treated by her former employers. Which, if such allegations are true, would likely to amounted to discrimination.

36. The reason Miss Brereton has not been able to comply with the very important time limits is her mental ill health. She will be denied justice because she was ill. These, it seems to me, are precisely the sort of circumstances parliament is likely to have had in mind when stipulating the reasonably practicable and the just and equitable tests.

37. In respect of the claims for notice pay, holiday pay and unpaid wages, I find that it was not reasonably practicable for those claims to have been issued

in time. I considered whether the delay to the 20 February 2021 is too long a delay. Having regard to Miss Brereton's mental health and the nature of a likely gradual recovery, I find that these claims are issued within a reasonable further period.

38. I find that it is just and equitable to extend time in relation to the discrimination claims, insofar as that may be necessary, leaving to the final hearing, the question of whether there was a continuing act included the post-termination victimisation claim if in due course, I were to find that she was disabled.

39. The claimant's claims were issued in time.

40. Having given my decision, Mr Kennedy sought clarification on two points:

    40.1 Was my finding of a diagnosis of PTSD in September 2021 based on the doctor's letter? I confirmed that it was. The letter corroborated Miss Brereton's witness statement.

    40.2 In terms my reference to a gradual recovery, he asked whether my finding was that Miss Brereton was not capable of issuing an ET1 as of June 2019 and how do I reconcile my findings with the claimant being able to make a job application on 1 December 2020? I confirmed that my finding was it was not reasonably practicable for her to have issued her claim in the initial period of 3 months and 43 days and that it is just and equitable to extend time in respect of the discrimination claim. It is not a case of one being required to make a finding that as at the date of dismissal, on 19 June 2019, she was not capable of issuing an ET1. It is a question of whether it was reasonably practicable for her to have done so over the period of 3 months and 43 days. I also reminded him that I had noted prescriptions lorazepam in July 2019 during that primary limitation period and during the time which the early conciliation was running. Also, I commented that there is a difference between making a phone call to ACAS in the circumstances I explained, or submitting a job application, as opposed to composing a legal claim and filling in an ET1 on-line.

Disability – Reserved Decision

41. Having run out of time, I had to give a Reserved Decision on the issue of disability.

The Evidence

42. In the bundle provided I had an impact statement from Miss Brereton, letters from her doctor, dated as quoted above, a statement from a psychodynamic counsellor/psychotherapist, Ms Sara Vass dated 14 April 2022 and some graphs prepared by Miss Brereton herself entitled "BMI and Weight Tracker".

43. When Miss Brereton gave her oral evidence, after she had confirmed that the content of her impact statement was true, but before she was cross-examined, I asked her a series of questions in relation to the list of impairments she gave at paragraph 1.2.2 of that statement. She listed day-to-day activities which she said were affected for example, "standing" but did not explain in what way. I sought expansion from her. Mr Kennedy objected. Strenuously, to use his word. He said that this was evidence the respondent had not had an opportunity to deal with, which amounted to a huge amplification of the claimant's evidence and that she was a litigant in person was not a sufficient excuse. He referred me to my preliminary hearing summary from 17 February 2022 in which I spell out that I had explained to Miss Brereton what was required in an impact statement. See paragraph 29. Asked in cross-examination why she had not provided this information in her witness statement, she said she thought that she had.

44. My answer to Mr Kennedy was and is that Miss Brereton is a litigant in person. In accordance with the overriding objective, I have an obligation to ensure that there is a fair hearing and a level playing field, that the parties are on an equal footing.

45. There are many references to the Employment Judge's obligations in this regard, but the latest I am aware of is the words of Griffiths J in Cole v Elders Voice UKEAT/0251/19:

> 59. However, Mrs Cole was a litigant in person with no legal qualifications. This meant that particular care had to be taken to make sure that what she was saying was heard and understood, and acted upon.
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> 60. Peter Gibson LJ said in Mensah v East Herfordshire NHS Trust [1998] IRLR 531 "I would strongly encourage Industrial Tribunals to be as helpful as possible to litigant in formulating and presenting their cases"; a comment of particular importance when the litigant appears "in person or without professional representation". Sir Christopher Slade, in the same case, agreed: "I too would strongly encourage industrial tribunals to be as helpful as possible to litigants in formulating and presenting their cases, particularly if appearing in person."
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> 61. The principles have been summarised from the authorities by the Court of Appeal in Drysdale v Department of Transport [2014] EWCA Civ 1083 [2014] IRLR 892, at para 49, as follows:-
>
> "(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.
>
> (2) What level of assistance or intervention is "appropriate" depends upon the circumstances of each particular case.
>
> (3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.
>
> (4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.

(5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.

The Issues

46. The question for me is whether or not Miss Brereton was a disabled person as defined in the Equality Act 2010 during the period of her employment from 9 April to 19 June 2019.

The Law

47. For the purposes of the Equality Act 2010 (EqA) a person is said, at section 6, to have a disability if they meet the following definition:

"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.

48. The burden of proof lies with the Claimant to prove that he is a disabled person in accordance with that definition.

49. The expression 'substantial' is defined at Section 212 as, *'more than minor or trivial'*.

50. Further assistance is provided at Schedule 1, which explains at paragraph 2:

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

(a) it has lasted for at least 12 months,
(b) it is likely to last for least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur".

51. As to the effect of medical treatment, paragraph 5 provides:

"(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.

(2) 'Measures' includes, in particular medical treatment …"

52. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled, 'Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability'. Although I acknowledge that the guidance is not to be taken too literally and used as a check list, (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19) much of what is there is reflected in the authorities, (or vice versa).

53. As Sections A3 through to A6 of that guide make clear, in assessing whether a particular condition is an "impairment" one does not have to establish that the impairment is as a result of an illness, one must look at the effect that impairment has on a person's ability to carry out normal day-to-day activities. A disability can arise from impairments which include mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, unshared perceptions, eating disorders, bipolar affective disorders, obsessive compulsive disorders, personality disorders, post traumatic stress disorder, (see A5) and can also include mental illnesses such as depression. It is not necessary and will often not be possible to categorise a condition as a particular physical or mental impairment.

54. As to the meaning of 'substantial adverse effects', paragraph B1 assists as follows:

> *"The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect".*

55. Also relevant in assessing substantial effect is for example the time taken to carry out normal day to day activities and the way such an activity is carried out compared to a none disabled person, (the Guidance B2 and B3).

56. The Guidance at B4 and B5 points out that one should have regard to the cumulative effect of an impairment. There may not be a substantial adverse effect in respect of one particular activity in isolation, but when taken together with the effect on other activities, (which might also not be, "substantial") they may together amount to an overall substantial adverse effect.

57. Paragraph B12 explains that where the impairment is subject to treatment, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or the correction, the impairment is likely to have this effect. The word 'likely' should be interpreted as meaning, 'could well happen', (see SCA Packaging below). In other words, one looks at the effect of the impairment if there was no treatment. A tribunal needs reliable evidence as to what the effect of an impairment would be but for the

treatment, see Woodrup v London Borough of Soutwark [2003] IRLR 111 CA.

58. As for what amounts to normal day-to-day activities, the guidance explains that these are the sort of things that people do on a regular or daily basis including, for example, things like shopping, reading, writing, holding conversations, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, taking part in social activities, (paragraph D3). The expression should be given its ordinary and natural meaning, (paragraph D4).

59. A claimant must meet the definition of disability as at the date of the alleged discrimination. That means for example, if the impairment has not lasted 12 months as at the date of the alleged discrimination, it must be expected to last 12 months as at that time, (not the date of the hearing). The same applies in assessing the likelihood of reoccurrence. (See Richmond Adult Community College v McDougall [2008] ICR 431 CA, Tesco Stores Ltd v Tennant UKEAT0167/19 and All Answers Ltd v W [2021] EWCA Civ 606).

60. The indirect effects of an impairment must also be taken into account, (the Guidance at D22). For example, where the impairment causes pain or fatigue, that pain or fatigue may impact on the ability to carry out day to day activities to a degree that it becomes substantial and long term.

61. In Goodwin v Patent Office [1999] ICR 302 the EAT identified that there were four questions to ask in determining whether a person was disabled:

    1. Did the Claimant have a mental and/or physical impairment?
    2. Did the impairment effect the Claimant's ability to carry out normal day-to-day activities?
    3. Was the adverse condition substantial? and
    4. Was the adverse condition long term?

Findings

62. I identified at the preliminary hearing that the disabilities relied upon by Miss Brereton were hypermobility connected tissue disorder, PTSD, depression and anxiety. In the statement attached to her claim form she referred to chronic bilateral knee pain, herniated discs in her lower back, clinical depression, extreme anxiety and stress.

63. Miss Brereton has not provided copies of her medical records, something about which the respondent makes great issue. However, she was not ordered to disclose her medical records, she was simply ordered to disclose such evidence as she intended to rely upon on the issue of disability. I was not made aware of any specific request by the respondent of Miss Brereton for disclosure of her medical records and no application for such disclosure appears on the Tribunal file.

64. In her impact statement at paragraph 1.2.2 Miss Brereton lists the effect of her impairments on her normal day-to-day activities as including:

> "standing, walking, using public transport, driving; lifting and carrying; washing, getting dressed, doing housework, cooking; eating and drinking; toileting; reading, writing, concentrating, problem solving, using a computer; communicating, going shopping, employment, education, socialising, recreational activities and playing sports; obtaining health care and preventive services."

65. In evidence, in answer to questions from me and with repeated assurances from her that her evidence related to the period of her employment, she expanded further on the foregoing as follows:

    65.1 Standing: prolonged standing caused pain and instability, she could stand without lots of pain for maybe an hour but would still make her bend her back forward or to one side so as not to put weight on the medial side of her right knee which would then cause a lot of problems with her left knee, so she had to do a lot of shifting about. Standing still would set off sciatic pain shooting down her leg and into her foot and when that happened, she could not do anything. She said that at the start of her employment she was not too bad but by the end of it there was not a time when her knee did not hurt, her back did not hurt and she was walking with a limp.

    65.2 Walking: She said her gait was abnormal, there was a limit on how far she could walk, although she would not put a figure on that, she said it was variable.

    65.3 Using public transport: She said that having to stand and sitting and standing can cause instability in her joints. She said she stopped using public transport in 2008 when she first had a breakdown. She said at the time she was working for the respondent she physically would have been able to use public transport, but mentally she was unable to do so.

    65.4 Driving: She said that driving could cause her partial dislocation of her hips, as could sitting on the toilet, and it was very painful.

    65.5 Lifting and carrying: She said she could not carry things that were too heavy, a full shopping bag she said would tire her arm very quickly and would ache or might cause her shoulder to pop.

    65.6 Washing and dressing: She explained the physical action of putting on a top or trousers or the actions involved in washing could sometimes cause a joint to pop.

    65.7 Cooking, eating and drinking: She said she has problems swallowing water because of its viscosity which meant she can be loud when drinking and it can cause her to cough. Eating causes similar problems and she can have problems with her jaw which might misalign or become frozen.

65.8 Reading, writing, concentrating and using a computer: These all require concentration which she finds difficult because of her mental health issues. Using a computer can also be difficult because of pain in the joints of her hands.

65.9 Communicating: She said that because of her anxiety and depression, she would be very anxious around people and speaking to them, she would find she could not get her words out. She said that working at Stems triggered things easily and sometimes caused her to cry. She did not always understand what people were meaning and that this was a barrier to communicating effectively. In cross-examination, Mr Kennedy suggested that this was not credible, given that she did not exhibit those symptoms at work for the respondents. She explained she was good at her job and could run on a script, people came in to buy flowers either because they were happy or sad and she knew where she stood. She knew what people were going to ask for and what the right answers were. She said dealing with customers was a one-to-one where it was a small shop and there were never many people there.

65.10 Shopping: She said she did not go shopping as there would be lots of people in a confined space with unpredictable noises and she could be triggered by people asking her questions she did not know the answer to. She did not like that it was bright and noisy in shops. She said that at the time she was working at Stems, her parents were doing her shopping for her. The same applies with regard to socialising and recreational activities.

65.11 Sport: She said that she used to tap dance and used to do ballet and take her dog for a walk. The first two activities had long since stopped. She stopped dog walking after the operation on her knees. Swimming is something that she can sometimes do and sometimes cannot.

65.12 Obtaining health care: She said that because of her anxiety she had trouble obtaining care. In particular because of her difficulties in communicating and socialising.

66. Elsewhere in her impact statement, Miss Brereton said at 1.2.3 that sometimes she could only carry out everyday tasks slowly and awkwardly, with pain and extreme fatigue. At 1.2.4 she spoke of poor proprioception and coordination. She also gave some evidence at 1.2.4 about difficulties with concentrating and swallowing which supported her oral evidence. She said that pain in her hands could make writing and using a computer, slow and awkward.

67. In terms of duration, Miss Brereton deals with this at 1.3 of her impact statement. She says that:

67.1 She has had a diagnosis of hypermobility since birth;

67.2 Problems with her knees were diagnosed in 2016 and 2017;

67.3 Her bulging discs to her spine were diagnosed at an MRI scan in 2018.

67.4 Her anxiety and depression had been diagnosed and treated in 2008, she has received further treatment for her mental health conditions since 2017 and that she had been diagnosed with PTSD in 2021.

68. I have already quoted extensively from her doctor's letters, but less though from the doctor's letter of 6 April 2022 which includes the following:

> "She has a diagnosis of hypermobility since birth which has culminated in problems in her mobility and chronic joint problems. There is associated chronic neuromuscular symptoms. These affect her overall mobility and joint stability. She has had bilateral medial meniscal tears, the right one since 2016 and the left since 2017, both diagnosed on MRI of her knees. This continues to add onto her underlying mobility problems and chronic knee pain. ….she also needed an MRI scan of her lumbar and sacral spine in 2018 which identified bulging discs in her lower spine. All these contribute to chronic lower back pain and lower limb joint pain with poor mobility and balance….
>
> She is under the mental health service and awaiting allocation of a worker following which she's been told she might have a referral for an assessment for autistic spectrum disorder. She is however, trying to pursue this privately. As a result of these symptoms she is taking Pregabalin 25mg twice daily for pain and anxiety, and Naproxen 500mg twice daily for chronic pain with Lansoprazole 15mg once a day to protect the lining of her stomach…..For her mental health problems she has had various anti-depressants and has had side effects on them. Between January 2019 and February 2022, she received counselling through Catalyst Counselling. She has a diagnosis of post traumatic stress disorder from a previous abusive relationship."

69. One of the difficulties with this letter which the respondents highlight, is the absence of precise information as to what medication was prescribed and when. However, it is clear from the letter Miss Brereton's physical and mental health difficulties date back a number of years.

70. The report from Ms Vass dated 14 April 2022 refers to weekly counselling sessions between 5 February 2019 and 17 March 2020, a total of 44 sessions. She said this began with the breakdown of her relationship with her ex-partner in August 2018. Ms Vass states that she is not in a position to comment on any medical diagnosis nor to evidence the extent to which Miss Brereton's impairments impact on the challenges of day-to-day living, stating that such information would be provided by a GP or consultant. The respondent makes great issue of this, submitting that if what Miss Brereton says about the effect of her mental health on her day-to-day activities was true, Ms Vass would know about it and would feel able to comment. It is a point to bear in mind, but not one that is such a strong point as the respondent would have me believe. Ms Vass indicates that she does not

consider it her position to comment on the effect on day-to-day activities, that this was something for the medical professionals.

Conclusions on disability

71. Mr Kennedy submits that Miss Brereton is misremembering. He suggests that it is in July 2019 that Miss Brereton's mental health deteriorated to the degree that she describes as the effect of impairments in her evidence. It is an ironic submission, bearing in mind the submissions which he made earlier in the day about Miss Brereton's ability to issue these proceedings during the limitation period and thereafter. Be that as it may, it is a submission which, on balance, I do not accept.

72. I accept Miss Brereton's evidence that she thought she had complied with the Tribunal's requirements in what she had set out in her impact statement.

73. I accept the evidence Miss Brereton gave by way of more detail in respect of each of the listed activities and how they were affected during the period of her employment.

74. It is clear to me on the evidence of the doctor's letters, corroborating what Miss Brereton has said, that she has experienced physical difficulties since birth, more particular difficulties relating to her knees since 2016 and 2017 and in relation to her back since 2018. The degree of physical impairment described by Miss Brereton, subject to her acknowledgement that in some respects it became worse during her employment, dated back to at least 2018, although frankly very probably, to 2016 when her knee problems began to manifest themselves.

75. The mental health issues as described by Miss Brereton at the time of her employment (I am not conflating these with more extreme manifestations after July 2019 when, as I have already found, she was not able to issue these proceedings) date back at least to 2018 when her relationship broke down, when she saw her GP in September 2018 because of worsening mental health problems as described in the GP's letter of 24 May 2002.

76. For these reasons I find that at the material times Miss Brereton was a disabled person by reason of mental and physical impairments as described above.

Further telephone closed preliminary hearing

77. I explained to the parties that if I were to find that Miss Brereton were a disabled person, it would be necessary to hold a further telephone closed preliminary hearing in order to finalise the list of issues, (a draft of which I had set out in my case management summary of 17 February 2022) and to make case management orders to ensure the case is properly prepared for its final hearing in January 2023.

78. For the avoidance of doubt and in case that hearing is not before me, (it is not appropriate to reserve it to myself) I record here that in my draft list of

issues from February 2022, I failed to record the claimant's complaint of post-termination victimisation in respect to the reference provided in December 2020. There may be other points that the claimant or respondent wish to make about my draft, we did not have time to discuss it.

79. I have arranged with the listing team for this case to be listed for a further telephone closed preliminary hearing commencing at **10am** on **21 October 2022**. The purpose of the preliminary hearing will be to finalise the list of issues and make any necessary case management orders.

Delay

80. Delay in producing this decision for the parties has been as a result of a shortage of typing facilities in the tribunal service.

_____
Employment Judge Warren

Date: 20 September 2022

03.10.2022
Sent to the parties on: .....
J Moossavi
.....
For the Tribunal Office