



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss M Morris

**Respondent:** Natural Resources Wales

**Heard at:** Cardiff, by video                      **On:** 14 November 2023

**Before:** Employment Judge S Jenkins

## **Representation**

Claimant: In person

Respondent: Mr J Lewis-Bale (Counsel)

# RESERVED JUDGMENT

The Claimant was not disabled, at the relevant times, for the purposes of section 6 of the Equality Act 2010. Her claims are therefore dismissed.

# REASONS

## **Background**

1. The hearing had been listed to consider three matters; (i) whether to allow the Claimant to amend her claim, (ii) whether the claims had been brought within the specified time limits, and (iii) whether the Claimant was disabled for the purposes of section 6 of the Equality Act 2010 (“Act”).
2. I decided the first two matters in the Claimant’s favour, and gave oral reasons during the hearing. Written reasons in respect of those two matters will not therefore be provided unless and until there is a request for written reasons to be produced, which must be made within 14 days of the date of the despatch of this Judgment to the parties.
3. I then considered the issue of disability. In that regard I considered the Claimant’s written witness evidence, and her answers to questions from Mr Lewis-Bale and from me. I also considered the documents in the preliminary hearing bundle to which my attention was drawn. There was insufficient time for me to deliver judgment on the issue, and therefore this reserved judgment was produced.

Law

4. Section 6 of the Act, which deals with the definition of “disability”, provides as follows:

*“6 Disability*

*(1) A person (P) has a disability if—*

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

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

5. With regard to the constituent elements of that definition, Part 1 of Schedule 1 of the Act provides as follows in relation to “long-term effects”:

*“2 Long-term effects*

*(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 at 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.”*

6. Section 212 of the Act provides that, “*“substantial” means more than minor or trivial*”.

7. Paragraph 12 of Schedule 1 of the Act notes that, “*In determining whether a person is a disabled person, [a Tribunal] must take account of such guidance as it thinks relevant*”. In that regard, the Government has issued ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) (“the Guidance”) under S.6(5) of the Act.

8. Sections B4 and B6 of the Guidance note that the cumulative effects of an impairment, and of more than one impairment, are to be considered. They provide as follows:

*“B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.”*

*“B6. A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be*

*taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities. For example, a minor impairment which affects physical co-ordination and an irreversible but minor injury to a leg which affects mobility, when taken together, might have a substantial effect on the person's ability to carry out certain normal day-to-day activities. The cumulative effect of more than one impairment should also be taken into account when determining whether the effect is long-term, see Section C."*

9. Sections C3 and C4 of the Guidance discuss the meaning of "likely". They provide as follows:

*"C3. The meaning of 'likely' is relevant when determining:*

- *whether an impairment has a long-term effect*
- *whether an impairment has a recurring effect*

...

*In these contexts, 'likely', should be interpreted as meaning that it could well happen.*

*C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)."*

10. In that regard, the Guidance echoed both the House of Lords decision in SCA Packaging -v- Boyle [2009] ICR 1056, which noted that "likely" should be interpreted as meaning that it could well happen rather than something which is probable or more likely than not, and the Court of Appeal decision in Richmond Adult Community College -v- McDougall [2008] ICR 431, which noted that account should only be taken of the circumstances at the time the alleged discrimination took place, and that anything which occurs after that time will not be relevant.
11. The Appendix to the Guidance sets out illustrative and non-exhaustive lists of factors which, if experienced by a person, it would be reasonable and not reasonable to regard as having a substantial adverse effect on normal day-to-day activities. The list of factors which might point to a substantial adverse effect includes the following:
- *"persistent general low motivation or loss of interest in everyday activities" and*
  - *"persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder"*
12. The EAT said, in Goodwin v Patent Office [1999] ICR 302, that the words used to define disability (in what was then section 1(1) of the Disability

Discrimination Act 1995, which is now section 6(1) of the Act) require tribunals to look at the evidence by reference to four different questions (or “conditions”, as the EAT termed them):

- Did the claimant have a mental and/or physical impairment? (the ‘impairment condition’)
- Did the impairment affect the claimant’s ability to carry out normal day-to-day activities? (the ‘adverse effect condition’)
- Was the adverse condition substantial? (the ‘substantial condition’), and
- Was the adverse condition long term? (the ‘long-term condition’).

These four questions should be posed sequentially and not together.

13. The burden of proof in establishing disability lies on a claimant, but there is no onus on a claimant to adduce medical evidence to establish each of the four conditions comprising the test set out in Goodwin.
14. The time at which to assess the disability, i.e. whether there is an impairment that has a substantial adverse effect on normal day-to-day activities, is the date of the alleged discriminatory act — Cruickshank v VAW Motorcast Ltd [2002] ICR 729. This is also the material time when determining whether the impairment has a long-term effect.
15. The Court of Appeal held, in All Answers Ltd v W [2021] IRLR 612, that, following McDougall, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so a tribunal is not entitled to have regard to events occurring subsequently.
16. In Ministry of Defence v Hay [2008] ICR 1247, the EAT held that an “impairment” could be an illness or the result of an illness, and that it was not necessary to determine its precise medical cause. The statutory approach, said the EAT, “*is self-evidently a functional one directed towards what a claimant cannot, or can no longer, do at a practical level*”. The EAT further confirmed, in J v DLA Piper UK LLP [2010] ICR 1052, that it is not always essential to identify a specific “impairment”, if the existence of one can be established from the evidence of an adverse effect on the claimant’s abilities.
17. In Royal Borough of Greenwich v Syed (UKEAT/0244/14), Mr Justice Wilkie observed: “[T]he question which the tribunal has to ask itself is not whether the mental health impairment was likely to last at least 12 months but whether the substantial adverse effect of the impairment was likely to last more than 12 months. That is a different question.”

## **Findings**

18. I set out my findings relevant to the issue of disability, reached on the balance of probability, below. Whilst I make some reference to events in

the workplace, which form the basis of the Claimant's claims, I do so purely as background to my deliberations in relation to the issue I had to decide. Any reference to those matters should not be taken as a formal finding.

### Background

19. The Claimant had provided a statement, following earlier directions I had issued, confirming the impairments on which she was relying, and noting the impact those impairments had had on her ability to carry out day-to-day activities.
20. The Claimant's statement referenced a number of conditions. She referred to ME (also known as post-viral fatigue and chronic fatigue syndrome), Covid 19, and an undiagnosed head and ear issue (in relation to which the Claimant has been referred to a neurologist) and PTSD. The Respondent had indicated, in correspondence to the Tribunal prior to the hearing, that it was not clear from the statement as to which conditions the Claimant was relying on, but it maintained that none amounted to disabilities.
21. At the start of the Claimant's oral evidence, she confirmed that she was not solely relying on ME as the qualifying condition, but was also relying on the head and ear issues, Covid 19, and PTSD. She noted that there was an overlap of symptoms between those conditions.
22. By way of example, the Claimant noted that she had suffered from ME for many years, and that had carried with it a sensitivity to ear, nose and throat infections in the past three to four years. She had then suffered from specific head and ear issues, which are currently undiagnosed, which are under investigation and in relation to which she had recently been referred to a neurologist.
23. I explored with the Claimant whether it would be appropriate to adjourn the assessment of disability, pending further clarification of the conditions under consideration, whether from a neurologist or her GP. However, the Claimant confirmed that she felt that her medical records "spoke for themselves", and that all her conditions contributed to impact overall on her day-to-day activities, principally in relation to concentration, sound sensitivity and fatigue.
24. We therefore proceeded to consider the issue by reference to the Claimant's witness evidence and the documentary evidence in the bundle. That was principally the Claimant's GP records, but also included a number of Fit Notes and an Occupational Health report produced following an assessment on 29 November 2022.

### The Claimant's conditions

25. The Claimant's GP notes, under a main heading of "*Problems*", separated the Claimant's conditions under three headings, "*Active*", "*Significant Past*" and "*Minor Past*".
26. Under "*Active*" were recorded two matters, "*Acute reaction to stress*" with a date of 24 February 2023, and "*Fatigue*", with a date of 25 November 2008.

I took it that the latter reference was what the Claimant was referring to as ME, as she referred to having suffered from ME since 2008.

27. Under "*Significant Past*" was recorded "*Disease caused by 2019-nCoV*", and under "*Minor Past*" were a number of items going back to January 2008. These included ear conditions on several occasions, such as labyrinthitis, eustachian tube dysfunction, wax in ear, and ear symptoms. Acute reaction to stress was also noted under this heading.
28. The GP notes then recorded the specific consultations underpinning the "problems". In relation to the period in question, the Claimant consulted her GP in September 2021 for an unconnected issue, and then did not seek the assistance of her GP until 27 May 2022. That was in relation to ear symptoms, with her ears being blocked with wax. A further consultation took place in relation to that on 1 June 2022.
29. The record of that consultation noted that both the Claimant's ears were blocked, with the GP suspecting a "*respiratory viral illness superimposed on ongoing ENT symptoms*". A blood test was then ordered, with the results of that, on 6 June 2022 recording the outcome as, "*Normal, no action*".
30. A further consultation took place in relation to the ear issue on 13 June 2022. It was recorded that the Claimant was convinced that she had an ongoing infection and felt that she needed to see a specialist. That referral was then made on 20 June 2022. The referral explained that the Claimant had been troubled by upper airways and ear symptoms since mid-May 2022, that initially she was describing blocked ears and a decrease in hearing, but more recently she had also been experiencing sinus and ear congestion, a heaviness of her head, and that head movements could be painful in the ears.
31. The referral noted that part of the Claimant's concern was that an episode of labyrinthitis had been the trigger for chronic fatigue syndrome that she had experienced in the past. The GP noted that the Claimant had been examined at the surgery and that, other than a significant amount of wax in both ears, there were no significant findings. The normal blood test was recorded, and the referral concluded by saying that the Claimant was nevertheless concerned that she had an underlying infection, which may become chronic, and was therefore requesting a referral.
32. The Claimant subsequently attended the surgery on 4 August 2022 to have the wax removed from both ears.
33. Prior to that, on 19 July 2022, a telephone consultation took place between the Claimant and her GP regarding Covid 19, with a Fit Note being issued covering the period from 16 July 2022 to 1 August 2022. A further Fit Note, recording the Claimant as unfit for work due to Covid 19 was issued on 2 August 2022, covering the period 1 August 2022 to 15 August 2022.
34. The next consultation recorded in the GP records was on 28 September 2022, where a telephone consultation took place, with the problem being recorded as "*Acute reaction to stress*". It was recorded that there had been recent work stress set against a background of illnesses, fatigue and

dizziness symptoms. A Fit Note was issued on that day, recording the Claimant as being unfit for work because of "*Acute reaction to stress, Post viral fatigue and Dizziness*", covering a four week period.

35. A further telephone consultation in relation to acute reaction to stress took place on 26 October 2022, with the Claimant being recorded as "*Much the same, and has union now involved and formal procedures now imminent, is aware, things will get worse before they get better*". A further Fit Note was issued recording "*Acute reaction to stress*" for a further four weeks.
36. The GP notes made no reference to a diagnosis of PTSD, although there were references to "*anxiety*", "*acute stress reaction*" and "*stress related problem*" in August 2016, July 2017, February 2018 and July 2021, in addition to the references to acute reaction to stress from 28 September 2022 onwards. I presumed that one or more of these conditions were what the Claimant was referring to as PTSD. In particular, consultations between July 2017 and February 2018 referred to acute stress reaction, and recorded a serious accident suffered by the Claimant's partner at the start, and in relation to which Fit Notes were produced covering the entirety of that period.
37. In addition to the Fit Notes I have recorded, in 2022 the Claimant also self-certified as being absent due to Covid 19 in February 2022.
38. The Claimant was referred to Occupational Health in November 2022, following her absence from work which commenced on 21 September 2022. Although that was shortly after the period of time at issue, I considered that it related back to the Claimant's initial absence from work in September 2022, and was therefore proximate enough to the period under consideration to inform my decision.
39. The report noted that the Claimant was absent from work due to stress and anxiety, which was perceived as being triggered by work-related issues. It referred to a grievance the Claimant had submitted.
40. The report recorded that, from a health perspective, the Claimant had experienced what appeared to be "*an acute stress reaction as a direct result of the perceived issues at work*". It further recorded that the Claimant felt overwhelmed by the work-related issues, and that she felt that her self-confidence and self-esteem had significantly declined.
41. It was recorded that the Claimant's sleep pattern was sporadic, that her appetite had been impacted by the stress and anxiety, and that social interaction had declined and she had a degree of social anxiety. The report noted that the Adviser understood that, prior to the absence, the Claimant was in the process of returning to work after a period of absence related to Covid 19. It was also noted that the Claimant had felt unsupported during the return to work process.
42. The Adviser reported that the Claimant was able to describe, in a logical and coherent fashion, the sequence of events which she felt had led her to suffering from work-related stress. She observed that, from the information provided it seemed that the symptoms could best be described as "*an acute*

*stress reaction because of issues perceived in the workplace*". No reference was made to any issue impacting on the Claimant other than the acute stress reaction.

43. The report also recorded that the Claimant was unfit to attend any meetings in relation to a formal grievance process, whether face-to-face or on video. It went on to say that the Claimant felt that doing so would be a detriment to her mental health, which was impacted by the perceived stress and anxiety caused by work. It was suggested that correspondence be undertaken via email until an improvement in the Claimant's mental health was noted.
44. The report, in answer to a question as to whether there was an underlying medical condition affecting the Claimant's attendance at work, indicated that the Claimant was "*experiencing a stress reaction as a direct result of issues perceived in the workplace environment*".
45. In response to a question as to whether there were any underlying ill health or disability issues which may need to be considered, the Adviser noted that, based on the medical information available, she was unable to identify any underlying health or disability issues. In response to a question as to whether the health problem was likely to recur or affect future attendance, the Adviser noted that, once a return to work date had been established and the perceived work-related issues had been fully resolved, she did not foresee that there would be any significant impact on future attendance.
46. The focus of the Claimant's witness evidence was on the impact of ME and the undiagnosed head/ear condition upon her. She referenced PTSD in her impact statement, but only indirectly, noting that she had been off work due to that between July 2017 and March 2018. She said that that was relevant to note due to three matters. The first was the fact that stress exacerbated her ME symptoms. The second was that she had been required to undertake an assignment for six months from October 2021, which placed excessive demands on her, which led to a spike in her ME symptoms resulting in a weakened immune system and the contraction of flu-like viruses between February and August 2022. The third was that she felt that during her phased return from those illnesses her manager had failed to make reasonable adjustments.

#### Impact on day-to-day activities

47. In terms of the impact of the Claimant's conditions on her day-to-day activities, her evidence, whilst limited, was largely unchallenged. She recorded that she was suffering with post Covid viral fatigue, which had led to a spike in her ME symptoms, which meant that everything was an effort for her and she had to rely upon her partner to carry out most domestic activities, including the weekly shop. She also recorded that she struggled to carry out her duties as a mother of two young children, found it very hard to concentrate upon anything or think straight due to "*brain fog and a wonkiness in her head*". That meant that talking to people, watching television or listening to radio became very difficult. Work-related tasks, including reading from a computer screen, talking to people and managing her workload were also difficult.



48. The Claimant confirmed that the severity of the impact of ME on her varied from time to time, and, at the relevant times, she was having what she described as a "*real spike*". In between her absences due to Covid 19 in February, July and August 2022, the Claimant was in work with phased returns after her absences. No medication was prescribed for her between October 2019 and October 2022.
49. The Claimant confirmed that the impact on her health was ongoing. Indeed, she described it as "*worse than ever*", noting that the impact of ME appeared to have been eclipsed by her acute reaction to stress.
50. The Claimant was absent on annual leave for the last two weeks of August 2022, and struggled on her return. She sent an email to her manager on 13 September 2022, noting that she was having to pace herself, had attempted to attend a team meeting but had found it "*too much for [her] head and concentration*". The team leader had insisted that the Claimant should attend the team meeting the following day which she could do remotely, which the Claimant noted that she had found difficult.
51. On 20 September 2022, a meeting took place by video between the Claimant and her manager. The substance of that meeting forms the basis of much of the Claimant's claims, in that she contended that she was verbally "attacked" by her manager, who extensively criticised her performance and confirmed that he was going to implement a performance improvement plan. The Claimant immediately commenced a period of sickness absence and, on the following day, 21 September 2022, sent a lengthy email to her manager, raising a grievance about the meeting on 20 September.
52. In that email, the Claimant reported that she was, "*writing to you with deep sadness after our meeting yesterday. I've been in a state of extreme stress ever since, and have not stopped crying since leaving that call. I've been awake since 5am this morning feeling stressed and churning over it all over*". She referred to the discussion during the meeting, which she referred to as coming as a shock to her, "*given that I am struggling with my recovery from covid and trying to get back to normal functionality. I had told you that my energy levels were still an issue and that I've got on-going head and ear issues, for which I am awaiting to see a specialist*". She referred to her attempts to attend a meeting, but having had to leave due to sound sensitivity and difficulty concentrating on lots of voices, but that that had not seemed to register with the manager. She went on to say that she felt that her manager had "*launched into a full-blown attack on me at a time when I am very vulnerable and fragile. I thought that I was doing well on my phased return and pushing boundaries that I wasn't comfortable with. But now I feel choked with stress, anxiety, shock and complete distress*".
53. The Claimant also noted that, "*to not feel supported in this fragile and vulnerable time when I'm struggling to recover from Covid is one thing, but to feel completely and utterly "attacked" by my own team leader, and indirectly my team, is something else altogether. I feel shocked and numb*".
54. As I have noted, the Claimant's sickness absence continued thereafter, and the Claimant remains absent to the present time, with all her absence

certified as being due to "*Acute reaction to stress*".

## Conclusions

55. Applying my findings and the applicable legal principles to the issues I had to decide, my conclusions were as follows. I considered the four questions suggested by the Court of Appeal in Goodwin in turn.

### The Impairment Condition

56. It was clear that the Claimant had suffered from time to time with a number of impairments. She has suffered from ME since 2008, although that was not something in relation to which she had sought medical assistance from her GP for some time. She has suffered from an undiagnosed head and ear condition since April 2021. She has also suffered from a stress condition since approximately 2017 July, described in her GP notes as "*acute stress reaction*", but which the Claimant has referred to as PTSD. She was treated by her GP for that condition through 2017 and into 2018, and again from 28 September 2022 onwards. In addition, she suffered from Covid 19 in February 2022, and in July and August 2022.

### The Adverse Effect Condition

57. The Claimant's impact statement, although not materially challenged, did not go into a great deal of detail on the effects of her impairment on her ability to carry out day-to-day activities at the relevant times. It did however note a number of activities that the Claimant could not do, or could do less well. These included domestic activities such as shopping, watching television and listening to radio, and socialising. She was also less able to do work-related tasks which could generally be described as day-to-day activities, e.g. reading from a computer screen and attending meetings.

### The Substantial Condition

58. In the sense, as outlined in section 212 of the Equality Act 2010, of being more than minor or trivial, it was clear that the effect of the Claimant's conditions on her at the relevant time was substantial.

### The Long-term Condition

59. As noted in Judge Sharp's preliminary hearing summary, the focus was on the Claimant's health in the period between February 2022 and August 2022, although my assessment of the time limit point indicated that the period could be viewed as extending up to the end of October 2022. However, that still left a period of comfortably less than 12 months at that time. My focus therefore was on paragraph 2(1)(b) of Part 1 of Schedule 1 of the Act, i.e. on whether the impairment was likely to last for at least 12 months. In that regard, I noted the focus required by the Supreme Court in Boyle, that assessing whether the impairment was likely to last for at least 12 months involved assessing whether it "could well happen."
60. I was conscious that I could only examine that from evidence available at the time, and not evidence covering subsequent periods. That made the

assessment difficult. The Claimant has clearly been unwell since October 2022, and remains absent from work, with her GP having issued a succession of Fit Notes, all of which record the reason for absence as being "*Acute stress reaction*". None of them have mentioned ME, or a head or ear condition, or indeed Covid 19. They have also not referenced PTSD. It seemed to me however, that the reference in the Fit Notes to acute stress reaction could potentially be viewed as referring to PTSD, as acute stress reaction was the description used by the GP in 2017 and 2018, when the Claimant described herself as having had PTSD.

61. As noted at paragraph 46 above, the focus of the Claimant's evidence was on the impact of ME and the undiagnosed head/ear condition upon her. Whilst she referenced PTSD in her impact statement, she did so only indirectly, noting that that that was relevant to note due to three particular matters.
62. In the section of her impact statement dealing specifically with the impact of her conditions on her day-to-day activities, the Claimant recorded that she was suffering with "*post-covid viral fatigue and therefore a spike in her ME symptoms*". She did not, in relation to that, refer to PTSD or acute stress. I also noted that Judge Sharp's summary of the Claimant's claim following the preliminary hearing on 18 August 2023, which she noted she put together from what the Claimant told her during that hearing, refers to the Claimant's impairment being "*ME/chronic fatigue syndrome*", with the Claimant contending that the flu and Covid she had suffered were worsened by her ME. Judge Sharp did however note, when recording the Claimant's impairments, that possibly other impairments were to be confirmed.
63. Looking at the Claimant's state of health up to the Autumn of 2022, and whether any impairments caused by her conditions were likely to last for 12 months, I noted that she was in work at the start of the year, and had then been absent due to Covid in February. She was absent again in June due to "*flu symptoms*" and "*viral illness*", and again in July and August due to Covid. On her return to work in September, 2022, following a two-week period of annual leave at the end of August, she referred, in an email to her manager as, "*still having to pace herself*", and that she had struggled with joining team meetings due to that being "*too much for my head and concentration*". It seemed clear therefore that, at that stage, a combination of the Claimant's undiagnosed head and ear condition, and Covid, potentially impacting on her ME, had a clear impact on her ability to undertake day-to-day activities. At that time, whilst she was at work, she was unable to attend meetings with more than one person.
64. We then have the meeting on the 20 September 2022, which the Claimant described as a verbal "attack" on her. She then submitted her grievance email to her line manager the following day, and has not been in work since. In that email the Claimant took issue with what she perceived as criticisms of her by her line manager. She referred to those criticisms having come as a shock to her, given that she was struggling with her recovery from Covid and was trying to get back to normal functionality. She noted that she had told the manager that her energy levels were still an issue, and that she had ongoing head and ear issues for which she was waiting to see a specialist. She also recorded that she had told her manager that she had attempted to

attend a team meeting but had had to leave due to sound sensitivity and a difficulty in concentrating on a number of voices. She voiced her concern that the manager was insisting that she attend team meetings.

65. As noted at paragraph 53 above, the Claimant then moved on to describe herself as feeling "*not only unsupported but attacked*". She referred to feeling that she was being "*kicked while she was down*", and that she thought that she had been doing well on her phased return, but now felt "*choked with stress, anxiety, shock and complete distress*". She also noted that, "*to not feel supported in this fragile and vulnerable time when I'm struggling to recover from Covid is one thing, but to feel completely and utterly "attacked" by my own team leader, and indirectly my team, is something else altogether. I feel shocked and numb*".
66. The Claimant's assessment of her state of health at that time seemed very much to be focused on a stress condition, whether described as an acute stress reaction or PTSD. Whilst there were references to her underlying ME and to the head and ear condition, in my view they very much formed the background to the meeting. The focus of the Claimant in that email was that she had been stressed, indeed distressed, by what she perceived as the "attack" from her manager.
67. The other evidence from the time, and indeed shortly afterwards, affirms that the condition impacting on the Claimant's absence was the stress condition. That is clear from the Fit Notes and the Occupational Health report, produced in 29 November 2022, which, whilst referring to the fact that the Claimant was in the process of returning to work after a period of sickness absence related to Covid 19, focuses on stress and anxiety. The adviser records that the Claimant was, "*currently absent from work due to stress and anxiety that is perceived as being triggered by work-related issues*". She went on to say that, "*feelings of being overwhelmed by the work-related issues were reported, and she feels her self-confidence and self-esteem have significantly declined. Ms Morris informs me that her sleep pattern is sporadic, and her appetite has been impacted by the stress and anxiety that is affecting her daily social interaction has declined, and she has a degree of social anxiety*". She went on to say further that the Claimant's symptoms, "*could best be described as an acute stress reaction because of issues perceived in the workplace*".
68. As I have noted, the answer from the Occupational Health Adviser to the question as to whether there was any underlying medical condition affecting the Claimant's performance or attending work, was that the Claimant was currently experiencing a stress reaction as a direct result of issues perceived in the workplace environment. Also, in response to a question of whether the health problem was likely to occur or affect future attendance, the Adviser recorded that, once the return to work date was established and the perceived work-related issues fully resolved, she did not foresee there being any significant impact on future attendance.
69. It seemed to me therefore that, whilst the Claimant was suffering with the after-effects of viral conditions, and an underlying head/ear condition, which would seem likely to have impacted on her underlying ME, the evidence did not support a conclusion that that condition, or all those conditions taken

together, would have been likely to last 12 months at that time. Whilst the Claimant is still undergoing referrals in relation to the underlying head/ear issue, the last Fit Note which references anything other than acute reaction to stress was that produced on 28 September 2022, where, in addition to that, it recorded "*Post viral fatigue*" and "*Dizziness*". All Fit Notes produced from 16 October 2022 onwards have referred to "*Acute reaction to stress*" only.

70. It seemed to me, from the evidence I read and heard, that the issues arising from the after-effects of Covid, ME and the undiagnosed head/ear condition would not have been likely to have impacted on the Claimant beyond a few weeks from that point. At that time, mid-September 2022, she had returned to work on a phased basis, and she did not report any ongoing issues, such as sound sensitivity or inability to concentrate, to the Occupational Health Adviser in November 2022.
71. It seemed instead to me that the ongoing impact from the 20 September 2022 meeting on the Claimant was one of stress and anxiety, whether described as that or described as PTSD. I again therefore needed to consider whether it was likely that, at the relevant times, i.e. September and October 2022, the Claimant's condition would last for at least 12 months.
72. I noted the Occupational Health Adviser's view that, once the perceived work-related issues had been fully resolved, she did not foresee there being any significant impact on future attendance. Those matters clearly still have not been resolved and, viewed from the perspective of November 2023, it may be that the Claimant has been disabled by reference to a stress condition over the preceding 12 months. However, I did not consider that, when looking at the position at the time, taking into account the evidence available at the time, it could be said that the Claimant's conditions would have been likely to have substantially adversely impacted her day-to-day activities for a 12-month period overall. The Occupational Health report does not support that view, other than in circumstances where the workplace issues remained unresolved. Whilst, viewed with hindsight, those issues have not been resolved, I did not consider that, viewed in the light of the evidence at the time, it could be said that that was "likely" to happen, applying the Boyle guidance.
73. Consequently, I did not consider that the Claimant was disabled for the purposes of these claims. As all the Claimant's claims are predicated on disability, that meant that all her claims fell to be dismissed.

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Employment Judge S Jenkins  
Date: 5 December 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON 6 December 2023

FOR THE TRIBUNAL OFFICE Mr N Roche

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Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

**Recording and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>