mf

EMPLOYMENT TRIBUNALS

Claimant: **Miss L Hayward**

Respondent: **Medivet Group Ltd**

Heard at: **East London Hearing Centre**

On: **7 September 2018**

Before: **Employment Judge Prichard**

Representation

Claimant: In person, and also Mr S Gardner stepfather attending

Respondent: Ms L Millin, counsel instructed by Lyons Davidson Ltd, Bristol. Also in attendance Ms E Telfer and Ms R Fretwell HR

JUDGMENT

It is the judgment of the Employment Tribunal that the claimant was a person with a disability under section 6 of the Equality Act 2010. The case is already listed and remains listed for a final hearing on Tuesday to Friday 15 to 18 January 2019.

REASONS

1 The respondent today has prepared a special bundle for this issue to be decided. The case was originally before the tribunal on 2 July 2018 when Judge Russell made an order that there would be a separate preliminary hearing if the respondent did not agree that the claimant was a disabled person. In the event they have not agreed, and I can see why.

2 In 2013 when she was 27 the claimant suffered 2 serious and rather mysterious attacks leading eventually to a diagnosis of functional neurological disorder or FND originally diagnosed as Bell's palsy with functional disorder. It is a rare condition. She suffered from stroke like symptoms - paralysis of her left side. She did not return to work until 2017 when an occupational health report dated 25 July recommended

phased return but with considerable caution.

3 She is employed as a veterinary nurse. She is obviously fond of animals, has a horse herself. She used to show jump before this condition and she now no longer does that.

4 The effect on her left side affected the arms and the leg, and still affects the leg and the foot to an extent. She has lost sensation particularly below the knee and to the foot which means that she can find balancing difficult when she is standing for long periods. She currently struggles with housework and making beds. She finds hanging washing difficult because her arm does not stay above shoulder or head level for long without going back down again. These are normal day-to-day activities.

5 She drives a car that she acquired from Motability. It is a Vauxhall Mokka where the driver's seat is higher compared to the normal model. It has also got a large boot to accommodate either a scooter or a wheelchair. She has an electric mobility scooter as well as a wheelchair. She does not use them at present. She walks with a stick on bad days; it seems, from her description it, the condition fluctuates.

6 I always find it difficult doing these hearings on disability status because there is always a tension in this sort of litigation. People tend to talk up their disabilities at this hearing and then, at the main hearing, if there is an allegation of failure to make reasonable adjustments, they talk the disability back down again. I have allowed a margin of appreciation for that inevitable dynamic.

7 I find that the claimant still has residual symptoms that affect everyday activities in a way that is more than *de minimis*. She is forbidden to do ironing because of the risk of standing for a long period with a hot instrument like an iron; she could fall and do damage. She has adaptations in her flat. It is a ground floor flat. It still needs to be on the ground floor apparently. She has a call alarm in case of falls which is linked, by speaker to the phone in her flat. She used it recently when she fell down the side of a sofa while dealing with her cat. She was unable to get up even to fetch her mobile phone to call her mother who lives about 5 minutes down the road. She had to get the call centre people to alert her mother to the fact that she needed picking up off the floor.

8 When she rises from a chair or when she gets out of bed balance can be an issue. She has a bed leaver fitted to her bed to help her out and into bed. She gets her backside on to the bed and then can swing her legs up afterwards using the leaver to get a purchase. She still has residual weakness on the left side. At her worst she is completely unable to chop vegetables. She probably could do it normally but does not usually take the risk. She buys cut prepared vegetables from the supermarket to cook. She is not entirely living on microwave meals and can work with both hands most days.

9 The respondent understandably completely concedes that she had a disability up until 2017 when the occupational health report said that she was fit to return. At the time they considered that the report was too cautious in its terms and they would only offer her the only job they had available. There was a part-time (0.6) receptionist job which would inevitably have meant less money, but also the claimant actually wanted to get back into nursing, but I can see why they were reluctant to let her do so, given

the cautious terms of the occupational health report of 25 July 2017.

10 Misleadingly, in my view, that report says: "she does shopping, cooking and other routine household chores without any restriction". It is not even true today so I very much doubt if it was true then. Where the doctor has got this from I do not know unless the claimant talked her disability down to the doctor, attempting to get the report she needed, to get back to work.

11 Once more the employer made a referral to Essex occupational health and there was another report on 30 November. This report, it must be said, is extremely upbeat:

> "Miss Hayward has very much improved has no residual disability. Functionally she has already made a remarkable recovery. She is able to mobilise well and her coordination is good. The power in both upper limbs are normal. The heavy grip and pinch grip are satisfactory. There is no restriction in daily activities."

It is not what I have been told today by the claimant.

12 The claimant clearly wanted an upbeat report because she wanted to go back to nursing, but this has not worked out well. Subsequent to the report Ms Fretwell attempted a proper return to work. She made a plan for the return on a phased introduction of duties. The claimant did not attend. Eventually Ms Fretwell gave her an ultimatum, a final return to work date, after which the claimant was told it would be deemed to be unauthorised absence.

13 On that date, the 13 February 2018, the claimant submitted a Med 3 with a diagnosis of anxiety and stress, and she has remained continually off work since. She is in receipt of Employment and Support Allowance which again tends to support her case. She has a blue disabled badge for parking but that does not necessarily mean a lot. They are issued for a 4-year duration. Hers was issued in January 2015 when there is no doubt at all she would have qualified for a blue disc.

14 In the Atos occupational health report, the doctor says:

> "There is no need to consider any reasonable adjustments other than the phased return to work plan described above".

It is clear that the phased return was mainly because the claimant was out of practice. She had not been working as a veterinary nurse for 5 years almost.

15 At this hearing the claimant says that the upbeat nature of the report might be because it discounts the many adaptations she has to make life work for her to live a normal life safely. She used to go swimming often. She was an active person. She does not do this anymore. It is deemed to be too serious a risk without always being accompanied and having floats.

16 I can understand the respondent's concerns about the claimant's abilities and those concerns will be no less after hearing her evidence at today's hearing. As Ms Fretwell says, the restraining of a large dog is no mean feat and I am sure that is right. The lifting of a large dog would be beyond the claimant.

17 The has been a reference from Southend Hospital to Queens Square Neurological Hospital. The claimant was under the care of Queens Square Neurological Hospital. She was looking for a new specialist because her old one left; a new specialist consultant to give her an updated prognosis based on her current state. Unfortunately, this has not happened. Southend made the reference in circumstances where the claimant is in an advance state of pregnancy now. Her due date is in October but there is a very live concern that she may need caesarean section given the problems of the past.

18 Ms Millin referred me correctly to paragraph 22 of schedule 1 to the Equality Act 2010 which reads: "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". Ms Millin said there is no evidence to suggest it is likely to recur.

19 In my view there is evidence that it may be likely to recur not least because the claimant keeps an emergency stash of medication in case of this occurring. At the height of her unwellness she had major doses of 2 major antidepressants - Amitriptyline and Citalopram. She has an emergency stash at home of both those in case she feels an attack coming on before she can seek medical advice. She would not have those if there was no likelihood of a recurrence. She is prescribed paracetamol because she gets migraines. Migraines can be associated with this condition. Paracetamol can quieten the hyperactivity in the brain that cause her neurological problems. She was also prescribed Cerelle which, as I understand, is an anticonvulsant.

20 Quite how the impasse is going to be broken over the claimant's employment situation I have no idea but I am not being asked to decide that today. It is a matter for the tribunal at the final hearing to decide.

21 The claimant gave a very detailed impact assessment of her disability. In parts she overstates it. She describes her Amitriptyline, Cerelle and Citalopram as continuing; they are not. She has not been taking those for about 18 months.

22 Her physiotherapy at Basildon Southend Hospital is not ongoing. Her file has now been closed until further notice. She has been given some physio exercises to perform at home particular with her feet and legs. She says she does on bad days. People are given these sorts of little drawings by physio for the exercises they have to do. She does not have CBT either.

23 I accept her evidence that it is currently frustrating that Queens Square will not give her an appointment; but I find it credible that they are busy and they will give priority to more acute cases. As the claimant has not had an attack for years her case is not considered urgent but I hope she gets seen soon. The chances of her being seen before the birth of her son are zero but she may be seen before the January final hearing.

24 Just for completeness I was referred to an authority, *Richmond Adult Community College v McDougall* [2008], IRLR 227, CA. The case has not been particularly helpful to me. It is just an example of a tribunal using the paragraph 22 of schedule 1 just quoted.

25 On the evidence I have heard I do consider there is an actual probability of a recurrence. I also consider that there are sufficient disabling residual symptoms for the claimant to quality as a currently disabled person for the purposes of section 6 of the Equality Act 2010.

Employment Judge Prichard

14 November 2018