# EMPLOYMENT TRIBUNALS

**SITTING AT:** **LONDON CENTRAL by video**

**BEFORE:** **EMPLOYMENT JUDGE F SPENCER**

**CLAIMANT** **CS**

**RESPONDENT** **KPMG (UK) Limited**

**ON:** **25-27 May 2022**

**Appearances:**

**For the Claimant: Mr R Robison, FRU**
**For the Respondent: Ms L Prince, counsel**

## JUDGMENT

The Judgment of the Tribunal is that:

a. The Claimant was a disabled person at all material times by reason of somatic stress disorder which caused real and substantial physical effects as described by the Claimant.

b. The Claimant was not disabled by reference to the following physical impairments
   i. ganglions after July 2016;
   ii. muscoskeletal problems in her wrists at any time;
   iii. a compacted disc in her neck.

*c.* The Claimant was disabled by stress and anxiety and complex PTSD from November 2018 as diagnosed by Dr Hallstrom.

*d.* A further preliminary hearing for case management has been listed to take place by CVP on 30th June 2022 at 2 p.m. with a time allocation of three hours.

# REASONS

Introduction and reasons for the hearing.

1. This Open Preliminary Hearing was listed by Employment Judge Stout "to determine whether the Claimant had a disability (and, if so, what disability/ies) within the meaning of section 6 of the Equality Act 2010 at the relevant time.

2. The Claimant was employed by the Respondent from 5th October 2009. She began a period of long-term sick absence on 5 November 2018 and presented claim to the Tribunal on 26 March 2019.

3. She remained off work on long term sick leave until she resigned, having accepted a job offer from a new employer in September 2021. The Claimant began a new job in January 2022, but that job has now also come to an end.

4. When first presented, the claim was unparticularized. At that time the Claimant was unwell. Her particulars of claim were not provided until October 2019 and the issues were agreed in December 2019. The Claimant claims direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, harassment relating to disability, and victimisation.

5. At, paragraph 110 of her particulars of claim the Claimant claims that she was, at the relevant times, disabled by virtue of the following impairments

    a. the physical impairment of ganglions/work-related upper limb disorder/musculoskeletal problems in her wrists, from 2015 at the latest;
    b. the additional physical impairment of a compacted disc in her neck from February 2017
    c. the mental impairment of depression and/or anxiety from November 2018; and
    d. Post Traumatic Stress Disorder from November 2018

6. As part of the preparation for case the parties had jointly instructed two experts. Dr Hallstrom is a consultant general adult psychiatrist who has been a consultant since 1982. Dr Perez is a consultant orthopedic surgeon. He has fellowships in hand wrist elbow and shoulder surgery and is currently the lead clinician for hand and elbow surgery at North West London Hospitals Trust and his clinical practice has been exclusively as an upper limb surgeon since 2002.The experts were asked to opine (i) on the issue of disability but also (i) on the question of causation in relation to the

Claimant's claim for damages for personal injury. I am not concerned in this hearing with causation.

7. Following the issue of the experts' reports, both parties put questions to each of those experts. Their respective questions and replies were contained in the bundle.

8. Following the receipt of those reports the Respondent does not accept that any of the above impairments amounted to disabilities within the meaning of the Equality Act 2010 at the dates alleged by Claimant. In particular: -

    a. It does not accept that the Claimant was suffering from <u>any</u> physical impairment amounting to a disability within the meaning of the Equality Act.

    b. It accepts that the Claimant was suffering from the mental impairment of depression/anxiety amounting to a disability from March 2019 but not from November 2018 (as at that point it was not 'long term').

    c. It does not accept that the Claimant was suffering from PTSD.

9. The Claimant takes issue with those reports and, in evidence during this hearing, has explained why she does not accept them. At a hearing before Employment Judge Khan, the Claimant was given permission to obtain and rely on a jointly instructed chronic pain management expert. Judge Khan gave permission for the Claimant to provide a singly instructed report from an additional expert psychiatrist to challenge the evidence of Dr Hallstrom.

*10.* I was initially troubled by the fact that this hearing had been listed to be heard prior to the receipt of that additional expert evidence. I understood that the expert evidence was required to address a lacuna in the expert evidence as to pain and psychiatric expert evidence and that a neurological expert or a chronic pain expert might be able to explain the Claimant's description of pain in excess of what could be explained by the organic/muscoskeletal picture.

*11.* However, Employment Judge's Stout had recorded in her subsequent order that "*the Claimant has confirmed it [the new report] is not required for the purposes of determining the question of whether she was disabled at the relevant time. The evidence goes solely to remedy. The Respondent was concerned that the evidence concerns an alleged disability that the Claimant is not relying on for the purposes of these proceedings, but that is irrelevant: a claimant is not limited to claiming, by way of damages for discrimination, exacerbation of a disability that she was suffering at the time of the discrimination. The claim is that the alleged discrimination has caused personal injury. There is no limit in principle on the personal injury that may have been caused by the alleged discrimination. It may be an exacerbation of the previous disability, or it may be an entirely new injury.*

*The expert evidence (both from the pain management expert and the psychiatric expert) is intended to identify the Claimant's current medical condition, the causes of that and the prognosis for the future."*

*12.* Both parties had agreed to this hearing in the absence of the additional experts report and I proceeded on the basis of the evidence which I had.

Evidence

13. I heard evidence from the Claimant by reading her disability impact statement and a supplemental impact statement dated February and April 2022 respectively, and her written answers to questions in cross examination. She was also asked and was able to answer questions put to her in oral cross examination. I also heard, briefly, from her friend Ms Quesnel, who had witnessed some of the effects of her disability. I had a bundle of 1,068 pages, including extensive medical notes and records as well as the expert reports, and the follow up questions.

14. The Claimant is a vulnerable person, and a number of adjustments were made to the hearing, as agreed at an earlier case management discussion before Employment Judge Stout. The Claimant had been permitted to answer some of her questions in cross examination by way of written question and answers and I had those before me. Despite her difficulties, the Claimant was able to give clear and articulate evidence. Although the hearing was by video, as agreed before the hearing the Claimant and Mr Robison attended at the Tribunal office to use the link provided by the Tribunal.

Claimant's evidence.

15. In the Claimant's particulars of claim she notes that she had been diagnosed with chronic fatigue syndrome at age 13 as well as irritable bowel syndrome but had been able to manage those conditions with her work and was not unduly troubled by them. At the start of her employment with the Respondent, occupational health reported that the Claimant had a 9 ½ year history of chronic fatigue (825) but that she was coping and was fit for work provided that she monitored her energy levels.

16. The Claimant's evidence was that she began to experience pain in her wrists and hands when typing from May 2015 and had difficulty in supporting her weight on her wrists. She was diagnosed with ganglions in both wrists. By January 2016 she had developed a burning pain in her wrists and hands which was so intense that it felt like they were on fire. She describes very substantial restrictions on her ability to carry out her day-to-day activities, such as dressing, using zips, washing and drying her hair. She said she could not turn her wrists to pour, use her hands to push herself up from a sitting position, hold a tray or push open a heavy door. Typing would cause pain. In February 2016 she had surgery to remove a ganglion on her right wrist, leaving her with a scar which has been hypersensitive ever since. After the surgery there was some improvement

to June 2016, but after that she continued to have very limited mobility and she could not weight bear, pour water or tilt her hand.

17. The Claimant reports that by April 2016 she was experiencing pain in her right forearm proximal to her elbow.

18. The Claimant's case is that having to work at an inappropriate workstation at client site caused the issues with her wrists and also to her neck. In 2017 following an MRI scan of her elbow and neck the Claimant was diagnosed with a bulging disc in her neck. The Claimant says that this was very painful and from June or July 2017 stopped her from running, as the pressure from striking the pavement was jolting her neck and causing pain by 2017. The bulging disc in turn caused myofascial pain syndrome. She also had tendonitis (golfers' elbow) and the pain continued. She was then referred to Dr Nikolic, a consultant in spinal and pain medicine and who referred her on again to Dr Leschziner who opined that there was no neurological cause – and diagnosed Complex Regional Pain Syndrome. She continues to have pain in her forearms, wrists and hands. Dr Ragoowansi did however advise that her pain might be nerve related while ruling out surgery.

19. The Claimant also refers to neuropathic pain – nerve pain across her arms and wrists.

20. Ms Quesnel knew the Claimant through volunteering for the First Aid Nursing Yeomanry. Her evidence (which I accept) was that in 2017, when they were both taking part in weekend exercises, the Claimant was unable to assist with moving some barrels out of the pen and that she could not use her wrists or lower arms in any way which involved significant effort on her part.

21. Psychological conditions. The Claimant reports that by November she was becoming tearful at work, struggling to concentrate and juggle tasks, and her sleep was disturbed with nightmares. She reached breaking point in November 2018 when she was contemplating taking her own life. She obtained a GP fit note signing her not fit for work because of stress and depression from 5 November 2018. An OH report dated 22 November 2018 noted that the Claimant now had symptoms of depression. A 2nd OH report dated 13th December stated that the Claimant was "struggling with low mood, poor sleep, emotional distress, and high levels of anxiety and was "clearly too psychologically symptomatic to work in any capacity."

22. On 31st January 2019 she obtained a fit note signing her off work for 3 months from 1 December 2018. On 20th March 2019 a consultant psychiatrist at the Priory Hospital in Roehampton diagnosed her with PTSD with secondary depression and anxiety and recommended that she be treated as an inpatient. However, after 2 days in The Priory she became ill, was taken to Kingston Hospital and discharged to her parents. In April 2019 she had a panic attack during an appointment with Professor

Kochhar. In September 2019 she was diagnosed with Complex Regional Pain Syndrome.

23. Dr Hallstrom's report. The joint instructions to Dr Hallstrom asked him for an opinion on whether the Claimant had a mental impairment at the relevant time, her prognosis and about causation.

24. In preparation for his report Dr Hallstrom had seen extensive medical records. He had seen medical records from

    a. the claimant's GP,
    b. Dr Kochhar, Consultant Shoulder and Upper limb Surgeon
    c. Dr Leshziner, consultant neurologist and reader in neurology
    d. Dr Nikolic, Consultant in Spinal and Pain Medicine
    e. Dr Hakeem, Consultant psychiatrist
    f. Dr Burns consultant psychiatrist and
    g. Dr Klemperer Consultant psychiatrist
    h. occupational Health Record; and
    i. Hospital medical records.

    He had a copy of the Claimant's disability impact statement and interviewed the Claimant on 17 March 2020. I note that that interview only lasted 1 ½ hours but the report is comprehensive, and Dr Hallstrom goes through the Claimant's medical records in a detailed and thorough way.

25. In short, Dr Hallstrom is of the opinion that the Claimant has Generalised Anxiety Disorder with associated depressive symptoms and panic symptoms, which is associated with Somatic Symptom Disorder, (also described as Chronic Adjustment Disorder and or Chronic Pain syndrome). He considered that that this impairment evolved over time crossing the threshold into having a substantial impact on day-to-day activities by mid-2016 and her condition had gradually involved and become progressive over the years.

26. In his opinion (see paragraph 5 of his report 858) her Somatic Symptom Disorder is a disorder *"where her complaints of pain and disability are out of proportion to the objective evidence of any physical disease and in which there would appear to be a significant psychological component to explain its concurrence. The condition is substantially stress-related and psychosomatic. It would appear that most of her symptoms have little basic in organic pathology, as becomes increasingly apparent in the opinions of the more recent physical experts."*

27. At paragraph 11 of his report he states that the Claimant "clearly does not have Post Traumatic Stress Disorder" but that she might be considered to have *"a complex post-traumatic stress disorder, which is really an Adjustment Disorder".* Either way he says that there is little doubt that the Claimant has a significant mental impairment.

28. Dr Perez report. Dr Perez was asked to opine on whether the Claimant had a physical impairment and whether she was a disabled person by reference to such an impairment. He was also asked to opine on treatment, prognosis and causation. Dr Perez had access to the extensive medical records. He saw the Claimant in February 2021 who was accompanied by her father. (His interview with the Claimant was delayed because of covid and so took place nearly a year after the Claimant had seen Dr Hallstrom). He had access to all the Claimant's medical records.

29. His opinion is as follows.

Wrist ganglions. *"The claimant developed bilateral wrist ganglia that began to manifest clinically and impede her function on or around January 2015.…*

*(i)* *On the right wrist, pain with reduced range of motion and diminished grip strength persisted despite surgical excision in February 2016 until approximately July 2016 when recorded grip strength measurement had normalized, but with minor loss of wrist movement and minimal pain at the operative scar that have continued, up until the present time"*.
"M*ore than trivial impairment to the Claimant's normal day-to-day activities would only have arisen in the workplace while scribing, typing or utilising a computer mouse for prolonged periods of time.*

In answers to follow-up questions Dr Perez says that the Claimant's problems in the right wrist only caused more than trivial impairment to her ability to do such activities between January 2015 and July 2016.

*(ii)* On the left wrist, which had not been excised, Dr Perez opined that it still gave rise to symptoms and limitations but that "*in my assessment these comprise of minimal pain, minor loss of wrist motion and reduced grip strength*. *These will only cause limitations when attempting to repeatedly carry heavy objects or exercise when in the press up position but would not in my opinion interfere with activities of daily living or the Claimant's prior job role with the Respondent."*

*30.* Work-related upper limb disorder. Dr Perez notes that the Claimant had described ongoing "spurious symptoms in the upper limbs. In his opinion "*on the basis of the available evidence the Claimant developed minor symptoms of tennis elbow in April 2016 that had essentially resolved by July of that year."* He also refers to tendinopathy and opined that *"as a worst-case scenario the Claimant experienced intermittent short-lived episodes of elbow tendinopathy "*and that "*on the balance of probability these exacerbations lasted no more than a few days and at worst a few weeks".* In follow up questions sent on behalf of the Claimant Dr Perez was asked what he meant by spurious, and he responded that "*I mean that the symptoms have no recognizable anatomical distribution or physical pathological cause."*

*31.* Neck pain and neurology. Dr Perez records that the neck MRI taken in May 2019 confirmed "*slight dehydration of the C5/6 with no evidence of neuro (nerve) compression. These changes would be considered normal for the general population in the Claimant age group. There was a slight loss of curvature in the circle cervical spine with mild spondylolisthesis (misalignment between two vertebrae) that could potentially explain some of her pain. Neuro physical studies excluded significant abnormality and very suggestive of mild irritation of the C5 to C7 nerve root bilaterally.".*

*32.* In short, the opinion of Dr Perez was that "*on the basis of the available evidence the claimant has very mild degenerative changes within the cervical spine consistent with her age."*

33. He records that when he had assessed the Claimant, she had described pain and burning at the mid level of the neck but that "*clinical examination confirmed full active range of pain-free motion of the cervical father spine with no visible deformity, with mild tenderness in the central midline."* Dr Perez referred to the Claimant's various bouts of recorded neck and upper limb pain but nonetheless opined that "*muscoskeletal neck symptoms specifically arising from said cervical spine degeneration are trivial and according to my understanding of the Act do not constitute disability*".

*34.* Chronic upper limb pain and psychological factors. Dr Perez noted that he was not a chronic pain expert and had no expert in psychiatry. However, from a musculoskeletal orthopedic perspective his clinical examination confirmed that there were no symptoms or signs to support a diagnosis of CRPS or other ongoing chronic pain systems.

*35.* In short, he opined that his findings were "*consistent with a psychological diagnosis and/or illness behaviour that may or may not be conscious"* and that the was a genuine complex interplay between chronic pain and psychiatric factors.

36. In assessing her condition and prognosis

a. In answer to follow up questions Dr Perez considered that the Claimant's neck and elbow symptoms were minor and therefore trivial as per the Equality Act definition (1008),
b. He records that the Claimant's problems in the right wrist caused more than trivial impairment between January 2015 and July 2016 while scribing typing or using a computer mouse for prolonged periods of time, but not otherwise.
c. He opines that the impairment to the Claimant's left wrist caused minimal pain, minor loss of wrist motion and reduced grip strength but only cause limitations when attempting repeatedly to carry heavy objects or to do press ups. It was not sufficient to interfere with normal day-to-day activities.
d. He records a Psychiatric diagnosis for her upper limb symptoms and neck pain. He noted that he was not qualified to assess causation for those symptoms.

37. Both experts are clear that the Claimant is experiencing genuine pain and functional limitations in her arms and hands. However, they both assess that the difficulties stem from a psychiatric condition with physical manifestations, which in turn have a substantial adverse effect on her ability to carry out day-to-day activities. Dr Hallstrom opined that the Claimant was a disabled person from mid 2017 by reference to a psychological disorder.

38. The Claimant's case. The C**l**aimant was adamant in her rejection of the diagnosis by both doctors. She challenges Dr Perez's report and says that he had only done a brief physical examination, and at the time of that assessment, she had been unusually rested so her hands were more than usually rested. She says that he had been sent Dr Hallstrom's report before doing his, and would have been influenced by it.

39. The Claimant also does not agree with Dr Hallstrom's diagnosis. She says that when she read up about somatic symptom disorder it became apparent that she did not meet the diagnostic criteria, and referred back to the reports of Dr Kochhar and Dr Nikolic and the other doctors who had treated her over the years. I was also referred to a letter (which I allowed the Claimant to provide during the hearing) dated 3 July 2020 from Dr Nikolic, a consultant in spinal and pain medicine (written following Dr Hallstrom's report) which states "

> *"This is to confirm that I did not suggest (in my previous letters, in particular letter dated 14/05/2019) that her overall pain and suffering stem from "psychiatric issues". I stated that her pain and suffering are in keeping with significant peripheral neural sensitisation syndrome on the background of previous wrist problems and surgery as well as presence of bilateral cervical non-compressive radiculopathy.*
> *The mental health issues that she does have are additional problems that have an understandable adverse effect on her pain, function and overall quality of life."*

The law.

40. The definition of a person with a disability as set out in section 6 of the Equality Act 2010 and is well-known. "A person (P) has a disability if:- P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."

41. This definition is supplemented by the provisions of Schedule 1 and the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" issued by in April 2011 (the Guidance). The time at which to assess whether a person has a disability is the date of the alleged discriminatory act.

42. Paragraph 2 of Schedule 1 provides that

> "(1) The effect of an impairment is long-term if—
>
> (a) it has lasted at least 12 months;
>
> (b) the period for which it lasts is likely to be 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."

43. In considering whether an effect is likely to recur for the purpose of paragraph 2(2) the House of Lords has determined that likely means "could well happen" rather than "more likely than not" SCA *Packaging Ltd v Boyle* [2009] IRLR 746.

44. The word 'substantial' has been defined in the Guidance as being "more than minor or trivial" reflecting "*the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people." Aderemi v South Eastern Railway 2103 ICR 591* identifies that if something is not trivial then it is substantial. There is no middle ground. The threshold is relatively low, and the Tribunal must look at what the Claimant cannot do, rather than what he can do, (McNichol v Belfour Beatty)

45. Paragraph 6 of Schedule 1 provides that in considering whether or not an impairment had a substantial adverse effect on the ability of a person to carry out normal day to day activities, the effects of medical treatment should be ignored, and it is necessary to consider the normal day to day activities which the individual will not be able to undertake without the medical treatment, see also *Goodwin v Patent Office, [1999] ICR 302.*

46. In *Paterson v Commissioner of Police and the Metropolis* [2007] ICR 1522 the Employment Appeal Tribunal concluded that "normal day-to-day activities" must be interpreted as including activities relevant to professional life following the European Court of Justice decision in *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706

Submissions

47. For the Claimant Mr Robison refers to the Claimant's evidence, to *Goodwin v Patent Office 1999 ICR 302* and *Elliot v Dorset County Council UKEAT/0197/2*1 to emphasise the relatively low bar set for the meaning of substantial. He submits that staff at the Respondent would corroborate that from the middle of 2015 the Claimant was suffering from pain in her wrists and hands which had a substantial effect on her daily life. As to the experts' opinion he states that the Claimant had been treated for physical problems for years and no-one had suggested that the Claimant was making up or exaggerating her problems.

48. For the Respondent Ms Prince submitted that the Claimant was not suffering from a physical impairment amounting to disability, but that she was in fact suffering from a mental impairment. She referred to *Hospice of St Mary of Furnace V Howard UKEAT/0646/06*, and to *Rugamer v Sony Music Entertainment UK Ltd* which I refer to below.

Conclusions

49. Physical or mental impairment? It is the Respondent's case that the Claimant was not at the material time suffering from a physical impairment which amounted to a disability – that she was in fact suffering from a mental impairment (somatisation symptom disorder) as diagnosed by Dr Hallstrom and supported by Dr Perez.

50. I have no doubt that at all material times the Claimant was disabled and that she experienced real physical symptoms from July 2015 and that at least by March 2016 (the material time) those symptoms had a substantial adverse effect on her ability to carry out normal day-to-day activities. Thereafter she continued to experience significant pain and discomfort and limitations and weakness in her hands, arms and neck.

51. It is the Respondent's case that this was not a physical impairment because those continuing limitations had a mental cause rather than a physical cause. There is no definition of a physical or mental impairment in the act or in the guidance. In McNichol the Court of Appeal held that "*impairment in this context has its ordinary and natural meaning. It is left to the good sense of the tribunal to make a decision in each case and whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects*."

*52.* In this case I am satisfied that the Claimant's day-to-day activities were substantially adversely affected by pain and weakness in her wrists and arms, so that she satisfied definition of a disabled person at all times. Appendix 1 to the EHCR Employment Code states that "there is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause." This endorses the decision in *Ministry of Defence v Hay 2008 ICR 1247, EAT*, where 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…. It may not always be possible, nor it is necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa'.*

53. Despite that, the task before me was to determine which conditions had led to her various symptoms. The Claimant was relying on a number of

different conditions and the task was to make clear which symptoms were attributable to each of those conditions. In *Morgan Stanley International v Posavec EAT 0209/13* the EAT observed that in some circumstances it was incumbent on the Tribunal to identify the nature of the disability and to make findings as to which symptoms were attributable to the relevant conditions.

54. In *Rugamer v Sony Music Entertainment UK Ltd and another 2002 ICR 381* the EAT upheld an employment tribunal's findings that employees suffering from "functional" or "psychiatric overlay" – i.e. a condition where an individual claims to be suffering from physical injury, but the doctor is satisfied that there is no organic physical cause for the symptoms and believes that they result from the individual's mental state - did not have a physical impairment. In *College of Ripon and York St John's v Hobbs 2002 IRR 185* the EAT, on the other hand, found that the Employment Tribunal had been entitled in a similar case (where the neurologist found that there was no organic disease process causing the Claimant's symptoms and her disability was not organic) that the physical dysfunction described by the Claimant was sufficient to bring a case within the expression of physical impairment and that it was not necessary to know precisely what underlying disease or trauma because the physical impairment.

55. In *Hospice of St Mary of Furness v Howard UKEAT/0646/06* the EAT sought to reconcile the 2 cases, noting that in McNichol there had been evidence that there was no physical impairment, while in Hobbs there was no evidence as to lack of a physical impairment. The EAT summarised the authorities in this area and found that:

    a. It is not necessary for a claimant to establish the cause of an alleged physical impairment; but
    b. Where there is an issue as to the existence of a physical impairment it is open to a respondent to seek to disprove the existence of such impairment, including by seeking to prove that the claimed impairment is not genuine or is a mental and not a physical impairment"

56. All of those cases were decided at a time when in order to establish a mental impairment it was necessary for the mental impairment to be a clinically well recognised illness. That requirement no longer applies, so the distinction between a physical and mental impairment becomes less important. Nonetheless, I consider that the above summary remains good law.

*57.* In Rugamer the EAT said this. *"Impairment", for this purpose, and in this context, has in our judgment to mean some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition. The phrase "physical or mental impairment" refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally. Given*

*the apparent intention that the question of the presence of an "impairment" is to be differentiated both from its cause, and from its effects in terms of a person's functionality, the difficult dividing line between physical and mental impairment has, in our judgment, to depend not on whether a physical or mental function or activity is affected (a physical impairment may well affect mental activities as well as physical ones, and vice versa), but rather on whether the nature of the impairment itself is physical".*

58. I have carefully considered the reports of Dr Hallstrom and Dr Perez, the contemporaneous medical records provided by the Claimant and the oral evidence. Dr Perez is clear that save for an impairment caused by wrist ganglions for a limited period, the physical causes of the Claimant's symptoms would only have resulted in a trivial adverse effect. Dr Hallstrom is of the same opinion as to the cause of the Claimant's difficulties.

59. The Claimant rejects the conclusions of both Dr Hallstrom and Dr Perez. She does not accept that her physical limitations have a psychological, rather than a physical, cause. She refers me to the numerous treating physicians that she has consulted over the years. However, it is apparent that, in arriving at his opinion, Dr Perez was looking at the whole history of the Claimant's medical records**.** I understood that Dr Hallstrom had made himself available to attend this hearing (and had penciled in the date in case he was required to attend) but neither side had chosen to call him.

60. I accept the evidence of the Claimant when she describes the pain and limitations that she suffers in her wrists, knuckles and arms. She is able to describe how it feels but, as she herself says in her answers to written questions, she is not a medical professional and is unable to say to which condition at any point in time the pain should be attributed. For that I must turn to the experts.

61. I am unable to reject those reports as the Claimant urges me to do. Both the reports are clear and provided by experts in their respective fields. The reasons for their conclusions are clearly set out. Both experts were sent, and referred to in some detail, the many contemporaneous medical reports to which the Claimant refers. It is apparent that, before arriving at their respective conclusions, they had considered all the previous medical records. The reports were jointly commissioned, and both parties took the opportunity to ask supplementary questions of the experts when they were received.

62. In submissions Mr Robison refers me to the case management order of Employment Judge Khan (171) who accepted at the earlier case management hearing that the Claimant had a legitimate and non-fanciful basis for challenging the evidence of Dr Hallstrom. However, it was made clear by Employment Judge Stout that the additional expert evidence was required for a remedy hearing only-and the parties agreed to go ahead with this hearing in the absence of having obtained any further expert evidence to challenge the jointly instructed experts, other than the letter from Dr Nikolic to which I have already referred. I note what Dr Nikolic

says in his letter of 2020, but that does not detract form the overall conclusion. In any event, Dr Hallstrom did not say that Dr Nikolic had said in terms that psychiatric component might be related to her complaint of chronic pain. He said that the fact that Dr Nikolic considered further injections were inappropriate and that she should be discharged *suggested that* the psychiatric component might be related to those complaints.

*63.* The Claimant also relies on nerve pain, which may be the cause of her difficulties, but a letter to Dr Kochhar from Dr Leschziner a consultant neurologist, reported on 18 September 2018 that she had had numerous MRI scans which had not shown anything significant, that her neurological examination was very normal and that she had already been fairly extensively investigated from a neurological perspective. He said "*I suspect that there is no underlying structural neurological problem. I suspect this is probably central hypersensitivity exacerbated by poor quality sleep"*

64. Given the clear findings of Dr Perez or and Dr Hallstrom I find that there was no underlying physical cause for her upper limb disorder, muscoskeletal problems in her wrists or the compacted disc in her neck. In respect of the ganglions in her wrists Dr Perez's finding was that that would cause more than trivial adverse effect from January 2015 to July 2016. Thereafter the problems were real but had no physical cause. I accept that.

65. As I say the Claimant was at all times a disabled person. Her physical problems were very real. The relevance of what caused those problems is not about whether she was a disabled person – she plainly was, but relates to what caused those physical manifestations of her illness.

66. I asked the Claimant during the hearing whether, in the light of the medical reports, she wished to amend her claim to plead in the alternative, that she was disabled by reference to a psychological condition. She does not wish to do so. She rejects the report of the experts.

67. The Respondent says that it does not wish to take a technical pleading point and would accept an amendment if the Claimant wished to put her case on that basis. In fact, given that it is apparent that the Claimant did know and does not accept that her problems might be psychosomatic, I do not consider that a formal amendment is necessary. I have made a finding as to the nature of the Claimant's disability which will be binding on the Tribunal going forward, and it will be up to the parties how they wish to deal with that in the future conduct of the case.

68. I find that the Claimant was a disabled person at all material times. I find that her physical limitations were genuine and as described by the Claimant. I find however that she was not disabled by reference to

    a. Ganglions after July 2016

b. Muscoskeletal problems in her wrists at any time
c. a compacted disc in her neck

69. I also find that the Claimant was disabled by stress and anxiety from November 2018. This was in my view a continuation of the issues arising from her somatic stress disorder which Dr Hallstrom opined arose over time and had a substantial impact on her day to day activities by mid-2016, and I find that by then this condition was likely to be long term such that she became disabled by reference to that condition at that time. In relation to PTSD, the Claimant was suffering from complex PTSD, rather than PTSD, as diagnosed by Dr Hallstrom

70. The way forward. I have made findings which are not consistent with the way that the Claimant wishes to put her case. In the circumstances I think it is only appropriate for the Claimant to be given time to digest those conclusions before we consider how best to move forward, and to give instructions. As the Claimant is vulnerable, we also need to consider what adjustments need to be made to the final hearing, currently listed to begin on **19 September 2022** for 8 days, but excluding Wednesdays. The Claimant has an appointment for an intermediary assessment on 10th June, and Mr Robison has indicated that he will continue to represent the Claimant, which is very helpful.

71. A case management hearing has been listed on **30th June 2022 at 2 pm** by CVP to give further directions. If, on reflection, the parties consider that that hearing is not necessary, or if they consider that the hearing should be "in person" they should inform the Tribunal at the earliest opportunity.

72. As I have said the fact that the cause of the Claimants physical difficulties is psychological rather than physical does not alter the fact that she is a disabled person. My findings are unlikely to make much difference to the Claimant's claims of direct discrimination, discrimination arising from disability, harassment or victimisation. It may however make a difference to the issue of reasonable adjustments, and in particular to question 16 of the list of issues, and to remedy.

_____

15th June 2022

Employment Judge Spencer

JUDGMENT SENT TO THE PARTIES ON

15/06/2022.

FOR THE TRIBUNAL OFFICE