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EMPLOYMENT TRIBUNALS

Claimant: Mr S Bradley

Respondent: Cultureshift Communications Limited

Heard at: Liverpool (in private; by CVP)

On: 17 February 2023
& 15 March 2023
(in chambers)

Before: Employment Judge Shotter (sitting alone)

Representatives

For the claimant: Mr D Rogers, solicitor

For the respondent: Ms K Skeating, solicitor

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The judgment of the Tribunal is that:

1. The claimant was disabled in accordance with section 6 of the Equality Act 2010 with an impairment of anxiety and depression, lethargy and tiredness associated with long covid in the relevant period 29 April 2021 to 30 July 2021.
2. The Tribunal does have the jurisdiction to consider the complaints of disability discrimination which will proceed to a liability hearing along with the unfair dismissal complaint, and case management orders have been issued separately.

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REASONS

Preamble

The claims

1. This has been a remote preliminary hearing by video which has been consented to by the parties. The form of remote hearing was Kinley CVP video fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The documents that the Tribunal was referred to are in a bundle of 368 pages, the contents of which I have recorded where relevant below, in addition to the claimant's signed and dated impact statement and updated impact statement. The written statement of Gemma McCall that was read by me, and as it was not relied upon by the respondent given no weight,. I also heard oral submissions received from both parties, for which I am grateful and taken into account but not repeated at great length below.

Preliminary hearing

3. Today's preliminary hearing is to consider whether the claimant is disabled for the purpose of section 6 on the Equality Act 2010 ("the EqA"). The hearing was adjourned to an in chambers hearing as I ran out of time. I apologise for the delay to the parties between the hearings caused by pressure of work on myself and the Employment Tribunal.

4. An issue was raised at the preliminary hearing concerning alleged the behaviour of parties, and an agreement was reached by all in accordance with the wording set out in an email sent to the Tribunal on the 17 February 2023 at 11.36am. A copy of the email has been placed on the Tribunal file and the parties are expected to adhere to the agreement in order that a fair trial can take place, with serious consequences if they do not including the possibility of the claim and/or the response being struck out if a fair trial cannot take place in the future. The parties are urged to take on board the case management orders made separately and work together to ensure that this case is ready for trial and it will not go part-heard.

Issues

5. We discussed and agreed the issues to be decided at this preliminary hearing as follows;

5.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 during the relevant period 29 April 2021 to 30 July 2021 as agreed between the parties. The Tribunal will decide:

- (i) Did he have a physical or mental impairment long covid fibromyalgia and chronic fatigue syndrome ?
- (ii) Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

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- (iii) If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
- (iv) If so, would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
- (v) Were the effects of the impairment long-term? The Tribunal will decide:
 - (a) did they last at least 12 months, or were they likely to last at least 12 months?
 - (b) if not, were they likely to recur?

6. One of the key issues in this case is did the medical conditions relied upon have a substantial adverse effect on the claimant's ability to carry out day-to-day activities.

Claimant's disability issue

7. In order for the complaints of disability discrimination to succeed, the claimant will need to establish that he had a disability within the meaning of section 6 of EqA. The burden is on the claimant to show, on the balance of probabilities, something an 'impairment' whether it is a mental or physical condition. In the case of **Millar v ICR [2005] SLT 1074, [2006] IRLR 112**, the Court of Session held that a physical impairment can be established without establishing causation and, in particular, without being shown to have its origins in any particular illness. **The focus should be on what the claimant cannot do**, and this test is particularly relevant the claimant's case.

8. Oral evidence has been heard from the claimant who confirmed the contents of both impact statements were true. The claimant's case is that during the relevant period and beyond, he was disabled by long covid and his physical symptoms were pain, chronic fatigue, exhaustion, brain fog and the mental impairment stress, anxiety and depression. It is agreed between the parties that depending on the individual circumstances of a particular case long covid can fall under section 6 of the Equality Act 2010 ("the EqA").

Medical history and the claimant could not do between 29 April 2021 to 30 July 2021

9. The claimant was unwell having caught coronavirus on the 4 November 2020, positively tested on the 20 November 2020 and by December 2020 he continued to feel ill, in pain, and lethargic (chronic fatigue) describing his mental state as being in a "brain fog" and experiencing feelings of stress and depression. He gave evidence that his symptoms were "at their worst" from November 2020 to mid-2021 when he suffered from "persistent brain fog" which made it difficult to concentrate and engage in conversation, was "largely unable to function in a work capacity" and "my exercise

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regime was practically non-existent compared to before.” The claimant attended work but found it difficult to carry out his duties and eventually he was absent due to ill-health.

10. The GP record entered on 15 December 2020 confirmed the claimant “had covid in November since then all symptoms resolved but left with fatigue...feels low in mood can cry and get tearful at times.”

11. In a fit note dated 8 March to 2 May 2021 the claimant was certified not fit for work because he had long covid. The GP records reflect on the 29 March 2021 that the claimant was “tired all the time...main issues are lack of energy motivation poor concentration...was going riding on bike in January for 2 hours...having talking therapy which is helping.” Reference was made to the “long covid clinic... stress, anxiety, low mood post covid...has counselling through work...will contact GP if wishes to start medication or any worsening symptoms.” The position did worsen and anti-depressant medication prescribed in March, which continued at 50mg once a day to date.

12. The claimant was prescribed Sertraline. In the GP record dated 28 April 2021 the GP recorded “sertraline has helped, going back to work phased return...sleep fractured.”

13. The GP records reflect that on 5 May the claimant had “anxiety disorder...long covid...anxiety and depression” and “prior marathon runner so covering 7km in this time is not indicative of normal health...more anxious, poor sleep...counselling signpost.” The 11 May 2021 record the claimant felt chest pains “work related” and “discussed continuing to try and socialise, walks gradually increasing, exercise as tolerated will be helpful to aid recovery...” On the 11 May 2021 the claimant was issued with another fit note until 11 June 2021 for long covid work stress and from 28 May to 22 August 2021 “anxiety disorder” followed by “anxiety disorder long covid” to 31 October 2021.

14. In a report dated 29 April 2021 the claimant’s GP confirmed the claimant’s main symptoms were “severe fatigue, poor motivation, difficulty with concentration and ‘brain fog’...right sided chest pains...he has also been suffering with anxiety since the covid and is having talking therapy for this.” In a long covid assessment form the GP described the claimant’s symptoms as “ongoing” ticking shortness of breath and a number of other conditions not present pre-covid, including chest pain, fatigue, memory/cognitive, low mood, referring to the Sertraline prescription and the claimant was returning to work and exercising dated 10 May 2021.

GP Report 13 April 2022

15. The claimant’s GP in a report dated 13 April 2022 confirmed the claimant had “post covid syndrome which has been complicated by a mixed anxiety and depression...was experiencing “ongoing symptoms of fatigue and low mood...there is a marked reduction from pre covid levels of exercise...” an anti-depressant was prescribed and the claimant was described as of 24 March 2021 that “he likely had a post covid syndrome due to ongoing **physical fatigue, poor concentration, low mood and recurring chest pains. Since this infection his ability to function in a**

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high pressure job was now significantly impacted [my emphasis]. Reference was made to the anti-depressant medication resulting in “some improvement” and “since this infection his ability to function in a high pressure job was now significantly impacted.” The GP confirmed that attending a family party and walking 7km were “encouraged...as part of the physical and mental recovery from covid and anxiety and depressive symptoms...” The change and increase to the claimant’s anti-depressant medication from sertraline to citalopram 20mg and 30mg in August 2021 to April 2022 was set out concluding “cognitively his levels appear to be close to his pre-covid levels as he is coping now in work situations however the symptoms of fatigue and depression although improved are not resolved...”

16. By mid-2021 the “brain fog” had lifted, but the claimant continued to feel lethargy needing to lie down during the day for a period between 1 and 3 hours which made it difficult to hold down a full-time job. The claimant, who is not a medical professional, indicated that the anti-depressant medication helped in relation to his “brain fog” symptoms and he was able to “set up his own business”. In his supplemental witness statement the claimant described how he dealt with Trust Brand Communications Limited as its managing director until dissolution in August 2021, was unable to carry out his duties as president of Greater Manchester Commerce, no longer sat on the steering group of Stockport Economic Alliance and continued to work for the respondent, including attending the 2019 Christmas party, managing staff and work but “not to my usual high standards” until his last day in March 2021.

17. The claimant joined the Guild of Inspirational Business Leaders in 2022 and Manchester Think tank.

18. With reference to physical exercise the claimant was unable to run 5k in 26 minutes instead of 20 minutes, run 10K in 1 hour instead of 40 minutes and reduced going to the gym to 3 times per week instead of 6 times per week. The claimant referred to several documents (“the Strava records”) in the bundle analysing his activity showing average exercise reflecting the difference between 2019 to 2022 when he was averaging 69 kilometres a month in 2019 to 63 kilometres a month in 2020 and 28.41 kilometres a month in 2021. In 2021 the claimant “completed” his 100th ParkRun.

19. The Strava records in the bundle reflect the claimant was increasing the amount of exercise he was recording, both in relation to walking, running and cycling. By February 2021 the claimant’s exercise had increased by 111km running and cycling. In April 2021 the claimant was running regularly with no distances given only maps, and this continued to be the case through the remaining months. From the maps the distances appeared to be substantial. I accept the claimant’s evidence that the therapy he was undergoing encouraged him to be active and it became part of his recovery routine, as confirmed by his GP in the medical records and report.

20. In a report dated 14 September 2022 Stockport Long Covid MDT Service the claimant had his first consultation in June 2021 and reported a number of symptoms including “**cognitive fatigue, memory and word finding problems, physical weakness and deconditioning, generalised fatigue: physical and mental...he was in a difficult place in life, struggling with home life, physical and mental health and**

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concerns about future work prospects” [my emphasis]. I accepted the claimant’s evidence that he attended the Long Covid Recovery clinic and 6 fortnightly counselling sessions to assist the low mood and anxiety associated with long covid and was supported by “Freehab” a physio sport rehabilitation service set up during the coronavirus pandemic to provide therapy by a friend of the claimant’s. I accepted the claimant’s evidence that he assisted the founder one hour week with business advice having accepted an unpaid non-executive position. By late 2021 the claimant had set up his own successful business, and I was concerned that this undermined the claimant’s oral evidence to the effect that from January/February 2021 to June/July 2021 he was unable to sit at a computer screen and carry out work, couldn’t prioritise, structure sentences, had difficulty finding the words and stammering, needed rest and recharge during the day. Starting a successful business take a great deal of effort, concentration and focus, however, I found the claimant’s evidence that he was able to carry out these activities because he could take breaks/sleep during the day when he needed to, as confirmed by the medical evidence which referred to the fatigue and his mental health issues.

21. The 14 September 2022 GP report referred to the claimant being self-motivated and changing “less helpful life-style habits...as a result Stuart has made progress, although he last reported that he has not returned to pre-COVID levels of health and well-being...a primary concern is to maintain consistency in health and energy status, **and avoid triggering flare-ups, setbacks or post external malaise**” [my emphasis].

22. In a letter dated 11 October 2022 to the claimant’s solicitor Dr John Bendelow confirmed the claimant was disabled under the EqA, a conclusion I have given no weight to and disregard. More relevant was the reference to the claimant’s “ongoing symptoms...of fatigue, reduced exercise tolerance, poor concentration, brain fog...” It is apparent from the medical evidence that the claimant was and remains prescribed Sertraline followed Citalopram referred to by Ms Skeating as “low therapeutic levels.” Ms Skeating suggested that “sufferers” can start at 200mg, the suggestion being the claimant’s condition was not that debilitating if he was prescribed 50mg and remained on that dosage. Without further specialist medical evidence I am not in a position to draw any conclusions from the dosage amounts, other than to note that there was some improvement to the claimant’s health as a result of the medication, which suggests the dosage was correct and without it the claimant’s health may not have improved.

Law: Disability status

23. S.6(1) of the Equality Act 2010 (“EqA”) provides that a person, ‘P’, has a ‘disability’ if he or she ‘has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.’

24. Schedule 1 of the EqA 2010 sets out factors to be considered in determining whether a person has a disability. S.6(5) of the EqA 2010 provides for the issuing of guidance about matters to be taken into account in deciding any question for the purposes of determining who has a disability. When considering whether a person is disabled for the purposes of the EqA regard should be had to Schedule 1 (‘Disability: supplementary provisions’) and to the Equality Act (Disability) Regulations 2010, and

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the 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' under 6(5) of the Equality Act 2010 should be taken into account.

25. The relevant time to consider whether a person was disabled is the date of the alleged discrimination; see the well-known case of McDougall v Richmond Adult Community College [2008] IRLR 227, [2008] ICR 431.

26. For any claim to succeed, the burden is on the claimant to show, on the balance of probabilities, something an 'impairment' whether it is a mental or physical condition. In the case of Millar v ICR [2005] SLT 1074, [2006] IRLR 112, the Court of Session held that a physical impairment can be established without establishing causation and, in particular, without being shown to have its origins in any particular illness. The focus **should be on what the claimant cannot do**, and this test is particularly relevant the claimant's case.

27. Mr Rogers referred to the well-known case of the Goodwin v Patent Office [1999] ICR 302, EAT, in which the EAT referenced four component parts to the definition of a disability and judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows: 'What the Act is concerned with is an impairment on the person's ability to carry out activities. **The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired.** Thus, for example, a person may be able to cook, but only with the greatest difficulty. **In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts.** Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected [my emphasis].'

28. Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of the Disability Discrimination Act 1995. Morison J warned of the risk of "disaggregating" the 4 questions –i.e. whilst they can be addressed separately, **it is important not to forget the purpose of the legislation, and to look at the overall picture** [my emphasis]. The four questions were to be answered by the Tribunal in order. This four-stage approach was approved more recently by the Court of Appeal in Sullivan v Bury Street Capital Limited [2021] EWCA Civ 1694, where Singh LJ listed the questions as:

28.1 Was there an impairment? (the 'impairment condition')

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28.2 What were its adverse effects [on normal day-to-day activities]? (the 'adverse effect condition');

28.3 Were they more than minor or trivial? (the 'substantial condition');

28.4 Was there a real possibility that they would continue for more than 12 months? (the 'long-term condition').

28.5 Singh LJ emphasised that these are questions for the Tribunal; although it may be assisted by medical evidence, it is not bound by any opinion expressed. This is also relevant to Mr Bradley's case, given the fact that I am not bound by the GP's conclusion that he is disabled under section 6.

29 Appendix 1 to the EHRC Employment Code states account should be taken not only of evidence that a person is performing a particular activity less well but also of **evidence that 'a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation'** (my emphasis)— para 9.

30 Appendix 1 to the EHRC Employment Code states that 'normal day-to-day activities' are activities that are carried out by most men or women on a fairly regular and frequent basis, and gives examples such as walking, driving, typing and forming social relationships. The Code adds: 'The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work.' The Guidance gives examples including shopping, reading and writing, having a conversation or 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, and taking part in social activities. **Normal day-to-day activities can also include general work-related activities** and study and education-related activities, **such as interacting with colleagues, following instructions, using a computer**, driving, carrying out interviews, **preparing written documents**, and keeping to a timetable or a shift pattern - para D3 (my emphasis). Ms Skeaping submitted following the answers given by the claimant on cross-examination, that he was not disabled because the claimant could carry out a number of the activities set out in the Code including shopping. I concentrated on what the claimant could not do, and the fact he could dress, shop and eat etc was not relevant.

31 In the well-known case of Primaz v Carl Room Restaurants Ltd t/a Mcdonald's Restaurants Ltd and ors [2022] IRLR 194, EAT, the EAT held that there was no sufficient causal relationship between P's impairments and the restrictions that she voluntarily imposed on her day-to-day activities because of her beliefs about what would trigger her condition. P suffered from epilepsy and vitiligo and took steps to avoid what she believed, following her own research, to be triggers, including coffee, alcohol, cosmetics, ordinary cleaning products and sunlight. The EAT allowed CRR Ltd.'s appeal holding that the tribunal had been wrong to focus on the adverse effect

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of P's coping mechanism. The EAT accepted that, for the purpose of S.6 EqA, the impairment must cause the adverse effect on the person's ability to do normal day-to-day activities, and the test of causation is objective. When it is in dispute whether the impairment has the claimed effect, this must be determined by the tribunal on the evidence before it; **it is not enough that the claimant truly believes that it does.** Thus, in a case where the claimant asserts that engaging in a certain activity will risk triggering or exacerbating some adverse effect of the impairment itself, the tribunal must consider whether it has some evidence that objectively makes good that contention. In Mr Bradley's case I took the view that the mechanisms he set in hand, such as resting/sleeping during the day for a substantial period of time, in order to cope with work, was credible and reflected the medical records and reports which confirmed his symptoms of fatigue and depression ongoing prior to and following the relevant period of this litigation.

More than minor or trivial (substantial)

32 The focus must be on the extent to which the impairment adversely affects the claimant's ability to carry out normal day-to-day activities. Substantial is defined in S.212(2) EqA as meaning 'more than minor or trivial'. In determining whether an adverse effect is substantial, the tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability he would have if not impaired.

33 The test is whether an adverse effect is 'substantial' in the light of the statutory definition: the Guidance and Code are supplementary to this. In terms of establishing whether the effect of an impairment is substantial, the Guidance, paragraphs B2-B17 sets out several factors to be taken into consideration. The Secretary of State's Guidance sets out a number of factors to consider including: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3]; the cumulative effects of an impairment [B4]; the cumulative effects of a number of impairments [B5/6]; the effect of behaviour [B7]; the effect of environment [B11] and the effect of treatment [B12].

34 Appendix 1 to the EHRC Employment Code states: 'The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people' — para 8. This should not be interpreted as meaning that in order to assess whether a particular effect is substantial, a comparison should be made with people of 'normal' ability — which would be very difficult to ascertain.

35 The Guidance provides that the cumulative effects of an impairment should be taken into account when working out whether it is substantial. 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, taken together, could result in an overall substantial adverse effect [B4]. For example: "A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone, or take much longer to complete than normal. Together,

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the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities.”

36 In the well-known case of Paterson V. Commissioner of Police of The Metropolis [2007] ICR 1522, EAT A dyslexic police officer wanted adjustments to be made under the DDA in respect of his application for promotion. In comparison with ‘the ordinary average norm of the population as a whole’, the tribunal considered that the dyslexia had no more than a minor or trivial impact on his day-to-day activities. Allowing P’s appeal, the EAT (the President of the EAT, Mr Justice Elias, presiding) emphasised that, in assessing an impairment’s effect on a claimant’s ability to carry out normal day-to-day activities, a tribunal should not compare what the claimant can do with what the average person can do. **Rather, the correct comparison is between what the claimant can do and what he or she could do without the impairment.** Referring to what is now para B1 of the Guidance, Elias P observed that in order to be substantial ‘**the effect must fall outwith the normal range of effects that one might expect from a cross section of the population**’, but ‘**when assessing the effect, the comparison is not with the population at large... what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired**’ [my emphasis].

37 Section D of the Guidance provides an indication of the parameters as to what may constitute a normal day to day activity and the Appendix provides two illustrative lists of factors which it might be reasonable and unreasonable to regard as having a substantial adverse effect on a person’s ability to carry out day to day activities. “Normal day-to-day activities” is not intended to include activities that are normal only for a particular person or small group of people, nor does it include work of a particular form. Equally it does not include normal activities that the person in question is not actually required to perform in their day-to-day life - Vance v Royal Mail Group plc EATS 0003/06). In accordance with this test I took the view that attending full time high pressure work is a normal day-to-day activity on which the claimant’s poor health had a substantial adverse effect taking into account the Guidance which suggests a number of factors are to be considered (see paras B1– B17). These include the time taken by the person to carry out an activity (para B2) and the way in which he or she carries it out (para B3). A comparison is to be made with the time or manner that might be expected if the person did not have the impairment.

38 Another factor to be taken into account, relevant to the claimant’s claim, is ‘how far a person can reasonably be expected to modify their behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. **In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability.** In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities’ — para B7 of the Guidance. The Guidance gives the example of a person who needs to avoid certain substances because of allergies who may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect.

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39 The Guidance states that it would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person (see para B9). In Goodwin v Patent Office (above) the EAT cautioned against accepting claimants' assertions that they can cope with normal daily activities when in fact they may simply have developed avoidance or coping strategies.

The effect of treatment (measures).

40 Schedule 1 para 5(1) of the Act provides:

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.

41 "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

42 Paragraph 5(1) of Schedule 1 to the EqA provides that 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 measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, *likely* means 'could well happen' — the well-known case of Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL In assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored.

43 The guidance provides that this provision includes treatments such as counselling, the need to follow a particular diet and therapies in addition to drug treatments. This provision applies even if the treatment results in the effects being completely under control or not at all apparent. There are situations where medical treatment may create a permanent improvement or "cure". Where treatment is continuing it may be having the effect of "masking" or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if the evidence establishes that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment [B13].

Conclusion: applying the facts to the law

44 With reference to the issue, did the claimant have a disability as defined in section 6 of the Equality Act 2010 during the relevant period 29 April 2021 to 30 July 2021, I found on the balance of probabilities that he did taking into account the cumulative effect of his loss of energy, anxiety and depression concluding he have

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the physical and mental impairment of long covid and chronic fatigue syndrome. There was no satisfactory evidence before me that the physical condition of fibromyalgia singularly or cumulatively came under section 6 of the EqA, and I found that it did not.

45 With reference to the issue, namely, did it have a substantial adverse effect on his ability to carry out day-to-day activities I found it did in respect of the claimant's loss of energy, anxiety, depression and fatigue evidenced by his need to sleep/rest during the day. Had the claimant's case been exclusively that his condition had resulted in a reduced athletic performance I would not have found him to have come within section 6 of the EqA, and fully understand the respondent's concerns with the claimant's evidence that it took him 20 minutes longer to run 10k, 6 minutes longer to run 5k and a reduced weekly gym attendance from 6 to 3, concluding that running, cycling, swimming and attending a gym were day-to-day activities, a reduction in performance as described by the claimant did not point to a substantial impairment. However, I have taken cognisance of all the claimant's conditions and accept that reducing gym attendance and re-building exercise supports the claimant's case he was experiencing chronic fatigue and on medical advice, taking measures to reduce the effects of it.

46 Ms Skeaping submitted that whilst long covid can amount to a disability the claimant had failed to produce any evidence that his day-to-day activities had been adversely affected, even when pushed by the judge to do so. She argued that during the period when the claimant was most unwell, January/February 2021 he had been able to exercise to a greater extent compared to an average person, had volunteered and was working, his sleep had not been impaired and the brain fog had lifted in May/June before the end of the relevant period.

47 Mr Rogers submitted that the claimant had been signed off unfit for work from 8 March 2021 to 21 October 2021, a 7 month period. I note that this did not take into account the undisputed time the claimant was substantially effected by covid from 4 November 2020 to 8 March 2021, a period of approximately 4-months. Reference was made to **Goodwin** above that purposive construction of the statute is to be emphasised. I accepted the arguments put forward by Mr Rogers, based on the evidence before me that the medical condition of long covid with associative anxiety and depression had a substantial impact on day to day activities as the claimant was not capable, during the relevant period, of holding down a "normal job" and eventually set up his own business to manage the effect of fatigue and lethargy on his day to day activities.

48 Mr Rogers relied on the EAT judgment in **Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19, EAT**, where L's clinical depression caused tiredness, which in turn affected her mobility in terms of the distances she could walk and drive, as well as her manual dexterity, because, when she was tired, her physical coordination went. Her vision also tended to blur and she could not maintain concentration and suffered memory loss. She was found to be disabled within the meaning of the DDA. I am mindful of the guidance set out in para. 27 that a Tribunal must consider "matters in the round and make an overall assessment of whether the adverse effect of an impairment on an activity or capacity is substantial, and I have taken into account the effects of tiredness on the claimant ranging from sleeping too well at night through to needing breaks during the day when Mr Bradley would sleep

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for a period of approximately 1 to 3 hours, which suggests an “inability to sustain an activity over a reasonable period (para.29) much in the same way as Ms Leonard, who suffered from problems in concentration and memory.

49 Mr Rogers also referred to the EAT decision in **Banaszczyk v Booker Ltd [2016] IRLR 273, EAT** at paragraph 47 of HHJ Richardson’s judgment that “it is to my mind essential, if disability law is to be applied correctly, to define the relevant activity of working or professional life broadly: care should be taken before including in the definition the very feature which constitutes a barrier to the disabled individual’s participation in that activity. In this case the activity was the lifting and movement of goods manually; the employer’s “pick rate” was not the activity, but a particular requirement of the employer as to the manner and speed of performance.” I also note at para 49 reference was made to B2 of the Guidance and at para 50 the conclusion that “the day-to-day activity was the lifting and moving of cases up to 25 kilograms; the substantial adverse effect was that the Claimant was by reason of his back condition significantly slower in carrying out this activity; the “pick rate” imposed by the Respondent was not the activity; but it was potentially a barrier which interacted with the Claimant’s disability to hinder his full participation in working life.”

50 Mr Roger’s argued that it was essential to define the level of activity in the claimant’s professional working life broadly, and his skill set means able to communicate, deal with paperwork and digest information all of which were adversely affected by the claimant’s fatigue and depression. I agreed with this analysis.

51 Finally, dealing with the issue of substantial, Mr Roger’s referred to **Aderemi v London and South Eastern Railway Ltd [2013] ICR 591, EAT**, the EAT warned that the purpose of the EgA should not be defeated by an overemphasis on the specificity of the label attached to a particular situation. Mr Roger’s relies on paragraphs 14 and 26 of the judgment of the Honourable Mr Justice Langstaff (the then President):

“It is clear first from the definition in section 6(1)(b) of the **Equality Act 2010**, that what a Tribunal has to consider is on adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities **but upon his ability to do so**. Because the effect is adverse, the focus of a **Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment**. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, **a Tribunal has then to assess whether that is or is not substantial**. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. **It means more than minor or trivial**. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other” [my emphasis].

52 I concluded that focussing on what Mr Bradley could not do as recorded above in the findings of facts, the effect of his impairment on ability to carry out normal day-to-day activities was not minor or trivial, and should be treated as substantial, thus meeting the test. The chronic fatigue syndrome relied upon by the claimant is

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supported by the medical evidence, although I accept Ms Skeating's submission that (a) setting up a business was not an easy option for the claimant, (b) there was no medical evidence the brain fog would return after it had "lifted" in June 2021 had the claimant stopped taking anti-depressant medication and (c) the claimant getting "back to normal" was not the legal test. I accepted the validity of these submissions, it has not been an easy case to assess and I understand why the respondent believes the claimant who successfully set up his own business, exercised and achieved a number of accolades, did not meet the test required under section 6 of the EqA. Taking the claimant's medical conditions as a whole and their effect on normal day-to-day activities which includes the ability to effectively carry out full-time working and managing a business, it is apparent the claimant was substantially affected, not least by fatigue and lethargy.

53 In the alternative, with reference to the issue, namely, if not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment, I found the claimant had taken a number of measures and medication for depression. The claimant gave evidence that his medication resulted in an improvement to the brain fog he had experienced and he had been advised this by his wife, who was medically qualified as a nurse. I did not give any weight to this evidence which was not referenced by the claimant's GP in any letters or records. However, I note the claimant was taking anti-depressant medication and his feelings of anxiety and depression was more likely than not to result in the adverse effects being more under control, especially when the claimant's personal coping strategies (that included building up his exercise) formulated following counselling sessions, are taken into account. I accepted the submissions of Mr Rogers, despite the absence of any medical report dealing with the deduced effect, that in the absence of the medication and steps taken by the claimant to put the counselling and advice on recovering from long covid into place, the substantial adverse effects would have continued beyond the 12- months period. The fact the claimant was able to exercise (having started from a position where he was already fit and performing well prior to catching covid), slept, ate well, set up his own business and volunteered to provide business advice (arguments used by Ms Skeaping) did not undermine the fact that he suffered from tiredness and lethargy during the relevant period, had difficulty concentrating, conversing, memory issues and working on a full-time basis.

54 In **Leonard** above there was no satisfactory medical evidence dealing with the deduced effect of the medication and measures taken by the claimant. The EAT (para. 34) held that the Tribunal should have looked at the evidence and taken into account the anti-depressant medication prescribed and conclude (as did the EAT) that at the material time Ms Leonard's condition would have been worse without medication and physiotherapy having inferred this from the GP's evidence and increased dosage. In the case of Mr Bradley the dosage of anti-depressant medication was not increased, it remained relatively stable before, throughout the relevant period and after the relevant period, coupled with the claimant's counselling and coping strategies, I was satisfied on balance that focusing on the tasks the claimant could not do, he still required the lengthy breaks which made it difficult for the claimant to work on a full-time basis or effectively for any lengthy periods of time despite taking anti-depressant medication, and had he not taken this or set in hand the measures referred to in the finding of acts, the adverse effect on day-to-day activities would have been even more substantial and long-term.

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55 With reference to the issue, namely, If so. would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures, I find it would. On balance, I am satisfied that without the measures taken by the claimant to treat his long covid symptoms, including the anxiety and depression, taking breaks/sleeping in the day, changing lifestyle and diet, the adverse effect on the claimant's day-to-day activities would have been even more substantial.

56 As indicated above, there is an issue with the respondent to the amount of exercise taken by the claimant, which the respondent believes, undermines his assertion that he was disabled. The GP report dated 13 April 2022 confirmed that the claimant's activities were "encouraged to take part in as part of the physical and mental recovery from Covid...given the prior level of activities prior to his covid infection covering the above distance in this time would not be indicative that he had returned to prior normal levels of fitness." The report confirmed the claimant's physical symptoms were gradually improving and "cognitively his levels appear to be close to his pre-covid levels as he is coping now [in April 2022] in work situations however the symptoms of fatigue and depression although improved are not resolved with ongoing reduced physical activity, increased requirement for sleep..."

57 I was concerned that there could be a contradiction in the claimant's evidence in that he reported being "extremely lethargic" and suffered from brain fog but still managed to return to work full-time in early December 2020 and attend meetings before being diagnosed with anxiety and depression and finally signed off unwell by the GP from 8 March 2020. On balance, I accepted the claimant's evidence that he struggled at work until signed off and prescribed anti-depressants and counselling, concluding the claimant, who had worked previously on a full-time basis, was no longer able to do so effectively as he required breaks in which to sleep during the day. I arriving at this conclusion taking into account the fact that the claimant started his own business, which takes a considerable amount of effort, it is a successful business and the claimant was able to do so because he was at home and could take breaks/lie down for 1, 2 or 3 hours during the day.

58 With reference to the issue were the effects of the impairment long-term, on the balance of probabilities I found did they were they likely to last at least 12 months taking into account the claimant fell ill with Covid on 4 November 2020 having enjoyed a fit lifestyle that involved him running 20K distances and marathons of 40k, cycling and attending the gym. The claimant's personal coping strategies, which includes taking daytime breaks, has not resulted in the adverse effects being completely under control. By the 30 July 2021 the impairment had not lasted 12 months, however, the period for which it lasts was likely to be at least 12 months. Likely' has been held to mean it is a "real possibility" and 'could well happen' rather than something that is probable or more likely than not: **SCA Packaging Ltd v Boyle [2009] ICR 1056**. Here the Supreme Court upheld Girvan LJ in the Court of Appeal (para 19): "The prediction of medical outcomes is something which is frequently difficult. There are many quiescent conditions which are subject to medical treatment or drug regimens and which can give rise to serious consequences if the treatment or the drugs are stopped. These serious consequences may not inevitably happen and in any given case it may be impossible to say whether it is more probable than not that this will occur..."

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59 In conclusion, the claimant was disabled in accordance with section 6 of the Equality Act 2010 with an impairment of anxiety and depression, lethargy and tiredness associated with long covid in the relevant period 29 April 2021 to 30 July 2021. Having arrived at this judgment the parties agreed that I would case manage in accordance with out discussion, which can be found in a separate document titled Record of Preliminary Hearing Case Management Summary to be sent to the parties at the same time as this reserved judgment and reasons.

15.3.23

Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
20 March 2023

FOR THE SECRETARY OF THE TRIBUNALS