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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103575/2020

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Preliminary Hearing Held by Cloud Video Platform (CVP) on 3 and 4 June 2021

Employment Judge W A Meiklejohn

Mr G Nash

**Claimant
In person**

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Argyll and Bute Council

**Respondent
Represented by:
Mrs A Weaver
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant was disabled within the meaning of section 6(1) of the Equality Act 2010 at the relevant time for the purpose of his complaints of unlawful discrimination.

REASONS

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1. This case came before me for an open preliminary hearing, conducted remotely by means of the Cloud Video Platform, to determine whether the claimant was disabled within the meaning of section 6(1) of the Equality Act 2010 ("EqA") at the relevant time for the purpose of the complaints of unlawful discrimination he brought against the respondent. The claimant appeared in person and Mrs Weaver represented the respondent.

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Procedural history

2. The claimant presented his ET1 claim form on 2 July 2020 following ACAS early conciliation which commenced with the claimant's notification to ACAS on 18 May 2020 and ended with the issuing of the early conciliation certificate on 26 June 2020. The respondent's ET3 response form was submitted on 3 August 2020.
3. At a closed preliminary hearing (before me) on 7 October 2020, Mrs Weaver confirmed that the respondent did not accept that the claimant had been disabled at the relevant time. I directed that the claimant should provide a disability impact statement (or statements).
4. The claimant duly complied and also provided statements from his wife, Mrs G Nash, from his former line manager, Mr A McCulloch, and from his father, Mr G Nash (to whom I will refer as Mr Nash Snr). Mrs Weaver responded to these, stating that the respondent maintained its position that disability was not conceded.
5. Following a further closed preliminary hearing on 21 April 2021 (before Employment Judge Wiseman), the present hearing was fixed to determine the issue of whether the claimant was disabled at the relevant time.

Preliminary matters

6. A number of matters were discussed at the start of the hearing (and subsequently). I have recorded these in a separate Note.

Evidence

7. I heard evidence from the claimant and, on his behalf, from Mrs Nash, Mr McCulloch and Mr Nash Snr. I had an electronic bundle of documents from

the claimant in a Dropbox file. I also had an electronic bundle from the respondent.

Findings in fact

8. I should state at the outset that it is not the function of the Tribunal to record every piece of evidence presented to it and I have not attempted to do so. I have focussed on those parts of the evidence which were most relevant to the issue I had to decide, ie whether (rather than why) the claimant was disabled at the relevant time. I have deliberately sought to avoid making findings in fact which might impact on the determination of the complaints brought by the claimant.
9. It was a matter of agreement between the parties that the relevant time for the purpose of those complaints was 7 February 2020 to 3 September 2020.

Claimant's work

10. The claimant was employed by the respondent as a Senior Engineer between December 2017 and 30 September 2020. Mr McCulloch was his line manager. The claimant had previously worked for an engineering consultancy firm in New Zealand. Before that he had worked for the respondent.
11. In his role as Senior Engineer, the claimant managed six employees. One of these proved difficult. There was an incident in March 2018 when the employee refused to attend a site meeting on Islay. This led to informal disciplinary action initiated by the claimant. There was a further incident in March 2019 when the employee was verbally abusive towards the claimant. Shortly thereafter the employee again refused to go to Islay. The employee raised a grievance against the claimant which was pursued to the appeal stage but rejected. This delayed (because of doubtful HR advice) disciplinary

action against the employee. There were further incidents involving the employee and the claimant in September 2019.

Claimant describes his “normal” self

12. The claimant described himself as naturally resilient, good natured and long suffering. He was by nature a “*glass half full*” person. He had no history of long term absence from work nor of mental health issues.

Claimant describes changes

13. The claimant said that his sleep pattern “*became increasingly interrupted*”. He normally slept for seven/eight hours each night and described himself as a “*quite heavy sleeper*” who did not normally wake up in the middle of the night. From around March 2019 the claimant described going to bed “*mentally exhausted*” and being unable to get to sleep easily. He would get up once or twice during the night. Issues at work “*dominated*” his thoughts.

14. The claimant described a negative impact on family relationships and social interactions. Normally his focus was to support his wife and family, and to enjoy what Scotland had to offer. From around March 2019, he said that he gave “*lip service*” to spending quality time with his family, such as bike rides with his son. He developed a “*short fuse*”. He brought his pent-up anxiety home and his family bore the brunt of this.

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15. The claimant also described how he found it “*increasingly difficult to find the desire to exercise regularly*”. He said that his enjoyment of exercise diminished as unresolved issues at work tended to dominate his thinking.

16. While the claimant spoke of putting on his “*game face*” at work, he described how his ability to focus on problems was affected by the “*physical and mental effects of unresolved issues at work*”. He would normally promote face-to-face communication but he found that this became strained and he would focus on written communication. He described the prospect of dealing with the difficult employee as “*nauseating*”. He was reluctant to carry out this

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employee's annual performance review and had to be persuaded by Mr McCulloch to do so. The claimant described his ability to focus on his work as "*compromised*" as his underlying focus was elsewhere.

Mrs Nash describes the claimant

5 17. Mrs Nash described the claimant as patient and long suffering. She said that he was by nature "*calm and peaceable*". He was not keen on confrontation. He was "*level headed and easy going*".

18. From March 2019 Mrs Nash noticed a change in the claimant's disposition. During a family holiday in late March/early April 2019 the claimant was "*very*
10 *low on enthusiasm and enjoyment*". He seemed more stressed than normal on holiday and seemed not to have switched off completely. Mrs Nash described the claimant as "*withdrawn and distant*".

19. After the family holiday, Mrs Nash described a noticeable lessening in the claimant's motivation for normal activities. She referred to family cycling and
15 playing football or boules in the garden. The claimant would not participate and would say things like "*I can't think right now*" or "*I can't do that just now*". He seemed "*overwhelmed*".

20. At the time of their tenth wedding anniversary in July 2019, Mrs Nash had wanted to arrange a family gathering but the thought of this was too much for
20 the claimant. He said he did not want to do anything. He told Mrs Nash "*just get yourself something*". Mrs Nash again described him as "*overwhelmed with something*" and spoke of his "*agitation*".

21. Mrs Nash referred to a visit by friends from New Zealand in August/September
25 2019. They expressed concern to her about the claimant. They noticed a change in his personality, his nervous ticks, his inability to concentrate and his lack of energy, enthusiasm and motivation. They described him as "*very narky*". This made Mrs Nash more aware of the changes in the claimant's personality.

22. Mrs Nash observed that during 2019 the claimant was having difficulty in concentrating. He became “*paranoid*” about safety. He was “*obsessive*” about checking that taps were tuned off. He lost interest in social activities.

23. Mrs Nash described how the claimant’s sleep pattern became erratic. Previously he would sleep for eight hours but during 2019 he began to wake during the night and be unable to get back to sleep. He had difficulty getting out of bed in the morning.

24. Mrs Nash described how the change in the claimant affected their son. It was difficult for a child to express but he understood when the claimant narked at him that “*Daddy was stressed*”. He stopped asking the claimant to play football or go on the bike.

25. Mrs Nash also described physical changes in the claimant. He developed digestive problems. From around November 2019 he began to lose his hair, and his hair and beard started to turn grey. He suffered from palpitations, on one occasions sufficient to cause Mrs Nash to consider calling an ambulance.

Claimant consults his GP

26. Towards the end of 2019 Mrs Nash encouraged the claimant to consult his GP. She was concerned about his physical and mental wellbeing. The claimant did so on 17 January 2020. He asked for a “*To whom it may concern*” letter to give to the respondent. He was provided with such a letter dated 20 January 2020 in these terms –

“Mr Nash attended the surgery at Lochgilphead on 17 January 2020. He has been under a considerable amount of work related stress for the last 18 months. It is clear that this is now having negative impact on his health. He will return for follow up consultation in 2 weeks time to reassess the situation.”

27. Following his GP appointment the claimant sent an email to Mr J Smith, Head of Service (and Mr McCulloch’s line manager), on 17 January 2020 stating that he had “*not requested to be signed off work at this stage due to stress*”

but indicating that his GP had confirmed that he was “*prepared to do so if requested*”.

Claimant commences sickness absence

28. The claimant began a period of medically certified absence from work on 10 February 2020. His fit notes gave the reason for absence as “*stress at work*”. That absence continued until 24 August 2020.

29. The claimant was asked in cross-examination about the effect on his health of the principal stressor being removed by reason of his absence. He acknowledged this but indicated that there had been other events during his absence which had added to his stress levels. He referred to the change of line manager (in terms of managing his absence), the sharing of an OH report (which he regarded as a data protection breach) and delays in the absence management process. The claimant said that the lack of resolution and the fact that his entitlement to contractual sick pay was running out contributed to his stress.

30. Mrs Nash confirmed that the state of the claimant’s mental health continued to deteriorate after he went off sick. She said that he had enjoyed a good relationship with Mr McCulloch and the change of line manager (in terms of managing his absence) had been stressful for him. He had been “*overwhelmed*” by what he perceived as a GDPR breach. He lost hope of there being a resolution.

31. Mrs Nash said that the claimant’s nervous ticks got worse and that he was “*constantly agitated and fidgety*”. She said that he “*panicked*” when the phone rang or an email arrived. He began to suffer from profuse sweating. Mrs Nash described life being “*very sad and difficult*” for the claimant.

Occupational health reports

32. The respondent referred the claimant to PAM OH Solutions on three occasions. The first OH report was dated 11 March 2020. The OH opinion was as follows –

5 “In my opinion, the ongoing perceived work issue requires to be addressed in order for Mr Nash to recover and resume work sooner rather later (sic). Over the past two years, the build up of stress has clearly affected him and this was also noted by his family members. Mr Nash describes difficulties with his sleep pattern, focus/concentration and also having a good work-life balance. Since this has become more apparent this year, his GP recommended that he takes some time away from work....I do not think that he requires medication for his reactive stress but if the matters are not dealt with, he may be vulnerable to worsening symptoms including chronic anxiety and depression.”

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33. In response to a question about whether the claimant was likely to be able to make a return to the full duties of his post within the next three months, the report stated “Yes – see comments above”. That was a reference to the need to resolve the “work issue” to enable the claimant to recover and resume work, i.e it was conditional.

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34. The second OH report was dated 19 June 2020. The OH opinion was expressed in these terms –

20 “In my opinion, the ongoing perceived work issue requires to be addressed further in order for Mr Nash to be able to consider resuming work. As advised previously, I do not think that he requires medication for his reactive stress but if the matters are not dealt with in a timely manner, he remains vulnerable to worsening symptoms including chronic anxiety and depression.”

35. The same question about the claimant’s ability to return within the next three months was answered in a similar conditional way – “Yes – if an agreement could be reached by both parties”.

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36. The third OH report was dated 19 August 2020. In the current issues section, the report recorded that the claimant “describes ongoing psychological symptoms dating back to 18 months when the perceived work issues started”. The OH opinion was as follows –

5 *“In my opinion and as previously advised, the ongoing perceived work issues requires to be addressed further in order for Mr Nash to be able to consider resuming work in any capacity. He is suffering from symptoms of reactive stress and anxiety which in most cases would improve once the trigger for stress has been addressed.”*

37. In this report the question about a return to work was again asked and answered, but on this occasion the period specified was seven, not three, months. The answer given was -

10 *“See comments above. A return to work could only be anticipated if the perceived work issues can reach some resolution. It would be difficult to predict any specific timescales for this.”*

Second GP letter

38. The claimant produced a second *“To whom it may concern”* letter, this time from his usual GP, dated 9 July 2020. This letter was in these terms –

15 *“I am Graham Nash’s regular general practitioner. I have been seeing Mr Nash on a regular basis since January 2020 in relation to his ongoing stress at work. He was finding that his ongoing perceived stress at work was now impacting his general health, sleep, mood and home life.*

20 *Unfortunately, by February 2020 perceived stress at work was affecting Mr Nash so significantly we agreed that it would be much better for his physical and mental health to take a break from work. He was encouraged at this time to continue discussions with his line manager to find a way forward that could manage these issues and so facilitate a return to work as soon as possible.*

25 *I understand that Mr Nash has had several meetings with his line management and has also been assessed by occupational health. I understand that occupational health has recommended that if the situations at work causing the ongoing stresses could be remedied that Mr Nash could return to work. I have also been writing on Mr Nash’s sick lines that a return*

to work could be expatiated [expedited?] if these ongoing stresses could be alleviated.

I do feel that Mr Nash's general health both mental and physical would be greatly improved if he could return to work."

5 ***Claimant requests medication***

39. On 24 August 2020 the claimant told Mr McCulloch that he was returning to work. On 25 August 2020 the claimant emailed his GP in terms which indicated that they had spoken on 24 August 2020. He said that he and his wife had been discussing "*treatments as discussed yesterday*" and requested a prescription. The GP replied on 26 August 2020 confirming that a prescription would be available later that day. This was for anti-depressant medication, which the claimant continues to take.

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Evidence of Mr McCulloch and Mr Nash Snr

40. Mr McCulloch's evidence was broadly supportive of the claimant in terms of his having mental health issues from January 2020 onwards. Mr Nash Snr became involved in phonecalls between the claimant and the respondent from May 2020. He had become aware that the claimant had an issue at work in February 2020 because Mrs Nash had spoken to his wife, but he "*respected* [the claimant's] *privacy*".

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41. Mr McCulloch agreed that the claimant had referred to his "*game face*" before he went off sick. It was apparent that while Mr McCulloch was aware that the claimant was unhappy about matters relating to the difficult employee, he was not aware of the impact of this on the claimant outside of work.

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42. Similarly, Mr Nash Snr was unaware of the issues troubling the claimant until he became involved in May 2020. He spoke of leaving his children to lead their lives and not checking up on them. When he became involved, he

noticed that the claimant became “*increasingly anxious*” and was “*quick to react*” which was not his normal manner.

Comments on evidence

43. I found all of the witnesses credible.

5 44. Without wishing to be disrespectful to them, the evidence of Mr McCulloch and Mr Nash Snr added little to my assessment of whether the claimant satisfied the statutory definition of disability at the relevant time. That was because there was ample evidence that the claimant was suffering from a mental impairment at the relevant time. The key issue was whether the other
10 elements of the statutory definition were satisfied, and their evidence did not contribute anything of significance to that.

45. The claimant was, not surprisingly, somewhat uncomfortable when recalling events and emotions which he would have preferred never to have happened. However, his evidence was measured and not overstated.

15 46. Mrs Nash was robust in her support of the claimant. She was challenged in cross examination about the much greater level of detail in her oral evidence when contrasted with the terms of her disability impact statement. Her response was that it was the first time she had written such a statement. She had done it herself as she did not want the claimant or anyone else to help
20 her. She asserted that her testimony was not inconsistent with her statement but added details.

47. That answer served to enhance Mrs Nash’s credibility. By linking her observation of the claimant’s behaviour to particular events where she could be certain of the dates, she provided a compelling account of the impact on
25 the claimant of his mental impairment.

Submissions – claimant

48. The claimant accepted that the burden of proof was on him to demonstrate that he was at the relevant time disabled within the meaning of EqA. He sought to dispel any suggestion that he had obtained letters from his GP with

the intention of pursuing a claim against the respondent. He described it as “*ludicrous*” that he would deceive his GP and his wife and family, and take long term medication, just to help him win a disability claim.

5 49. The claimant argued that he had demonstrated that he had an impairment. His wife, Mr McCulloch and his father had all seen the changes in his character from different perspectives. His wife had seen the problems develop and had described them eloquently.

10 50. The claimant submitted that the effects of his impairment had been substantial. They had impacted on him day to day. This was supported by the evidence from his GP and OH. He had not “*flicked a switch*” in February 2020. The problem had developed over a long period. His own evidence and that of Mrs Nash indicated that he had been impacted from March 2019.

15 51. The claimant, in the context of whether his impairment was likely to last twelve months or more, referred to ***SCA Packaging v Boyle [2009] UK 37***. “*Likely*” meant “*could well happen*”.

Submissions – respondent

20 52. Mrs Weaver reminded me that there were four elements to the definition of disability in section 6 EqA – it was for the claimant to establish a mental impairment which had a substantial and long-term effect on his ability to carry out normal day-to-day activities. “*Substantial*” was defined in section 212 EqA and meant “*more than minor or trivial*”. In terms of Schedule 1, paragraph 2 EqA, “*long-term*” meant that the impairment had to have lasted twelve months or be likely to last twelve months.

25 53. Mrs Weaver reminded me of the ways in which the claimant’s impairment had been described by his GP, including in his fit notes, by OH and by the claimant himself. She suggested that the starting point should be to look at the claimant’s ability to carry out normal day-to-day activities. The Tribunal would have to make a decision on the truthfulness of the evidence presented.

54. The claimant was saying that Mrs Nash seemed to know more about the effects on him than he himself did. She gave much more information during her evidence than was in her disability impact statement. Mrs Weaver pointed out that the claimant and Mrs Nash were not independent in the sense that they had an interest in the outcome.

55. While further medical evidence was not essential, the available evidence was limited and the Tribunal should look closely at the GP letters and fit notes and the OH reports. Mrs Weaver stressed that the focus was on the claimant's ability to carry out normal day-to-day activities, not on his enjoyment of or inclination to do those activities. She referred to **Aderemi v London and South Eastern Railway Ltd UKEAT/0316/12** (at paragraph 14) –

“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 (sic) 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 in section 212(1) of the Act. It means more than minor or trivial.”

56. There had to be an impairment within the statutory definition, as opposed to a reaction to life events – **Herry v Dudley Metropolitan Borough Council UKEAT/0069/19**. The respondent accepted that the claimant had problems at work which resulted in stress, but not that he had a mental impairment satisfying the statutory definition. He spoke of not feeling like doing things, but there was a lack of evidence about his ability to do them.

57. In answer to a question from me about the impact on the claimant's sleeping pattern, Mrs Weaver acknowledged that the claimant said he had trouble sleeping but queried the extent of the problem. It was normal for stress at work to cause problems sleeping. While the claimant spoke about such problems, Mr McCulloch said nothing to that effect in his evidence and indeed referred to the claimant's conduct being "exemplary". The Tribunal could not be satisfied that the claimant's ability to carry out normal day-to-day activities at work was affected if his line manager did not notice.

58. If it was accepted that the claimant had a mental impairment, when did he have it and was it long-term? Mrs Weaver noted that the claimant did not go to his GP until January 2020. There was no clear evidence that he went for treatment or indeed needed treatment. Arguably he went to obtain the GP's first letter to try to resolve a workplace situation. There was no evidence that he had gone to his GP because of his physical symptoms such as palpitations. The lack of medical evidence made it more difficult to be convinced about the seriousness of the claimant's symptoms or the long-term nature of the claimed disability.

59. Mrs Weaver referred to **J v DLA Piper UKEAT/0263/09** (at paragraph 40) –
"Accordingly in our view the correct approach is as follows:

(1) *It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in **Goodwin**.*

(2) *However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense....to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.*

(3) *These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above....”*

5 60. Referring to ***Goodwin v The Patent Office [1999] IRLR 4***, Mrs Weaver said that the Tribunal should not go through rigid consecutive stages but , where the existence of an impairment was in dispute, should look at the effect on the claimant’s ability to carry out normal day-to-day activities on a long-term basis. Mrs Weaver urged me to find that the claimant had not shown that he had a disability, looking at the elements of the statutory definition.

10 **Applicable law**

61. The definition of disability is found in section 6(1) EqA –

“A person (P) has a disability if –

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

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

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62. This is supplemented by Schedule 1 EqA which, so far as relevant, provides as follows –

5 **“2. Long-term effects**

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

(a) *it has lasted for at least 12 months,*

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(b) *it is likely to last for at least 12 months, or*

(c) *it is likely to last for the rest of the life of the person affected.”*

15 **Guidance**

63. I reminded myself of the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (the “Guidance”). I noted in particular the following parts of the Guidance –

20 (a) Section A3 (Meaning of “impairment”) states – *“The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the*

5 *impairment have to be the result of an illness. In many cases there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.”*

10 (b) Section B9 states – *“Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would **not** be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability **it is important to consider the things that a person cannot do, or can only do with difficulty.**”*

15 (c) Section C3 (Meaning of “likely”) states – *“...”likely” should be interpreted as meaning that it could well happen”.*

20 (d) In relation to the meaning of “normal day-to-day activities”, Section D2 states – *“It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.”*

(e) In the Appendix, the list of factors which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities includes –

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- *Persistent general low motivation or loss of interest in everyday activities.*
 - *Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition*
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- *or disorder.*
 - *Persistent distractibility or difficulty concentrating.*
 - *Compulsive activities or behaviour, or difficulty in adapting after a reasonable period to minor changes in a routine.*

15 **Discussion**

64. In **Goodwin** the Employment Appeal Tribunal said that the words of the section (at that time section 1(1) of the Disability Discrimination Act 1995 – the terms of which are identical to section 6(1) EqA) require a Tribunal to look at the evidence by reference to four different conditions –

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“(1) **The impairment condition**

Does the applicant have an impairment which is either mental or physical?

(2) **The adverse effect condition**

Does the impairment affect the applicant's ability to carry out normal day to day activities....and does it have an adverse effect?

(3) The substantial condition

Is the adverse effect (upon the applicant's ability) substantial?

5 **(4) The long-term condition**

Is the adverse effect (upon the applicant's ability) long-term?"

65. I considered whether the claimant had an impairment. I looked at the following parts of the evidence –

10 (a) The claimant's own evidence – he described himself as "*naturally resilient, good natured and long suffering*". I accepted his evidence about the changes in his disposition. The work issue involving the difficult employee began to dominate his thoughts. His sleep pattern became disturbed. He became short-tempered. He lost his appetite
15 for and enjoyment of family life and exercise including things like cycling or playing football with his son.

(b) The evidence of Mrs Nash – her observations about the changes in the claimant mirrored his own evidence. Her description of those changes painted a graphic picture of a material deterioration in the claimant's disposition and mood. The linking of those observations to particular
20 events such as the family holiday in March/April 2019 and the visit by friends from New Zealand in August/September 2019 made her evidence compelling.

(c) The evidence relating to the claimant's GP – the letter of 20 January
25 2020 confirmed that the claimant's stress at work was having a negative impact on his health. The fit notes confirmed a diagnosis of stress at work. The letter of 9 July 2020 confirmed that perceived

stress at work was affecting the claimant to an extent that he needed a break from work.

(d) The OH evidence – I reminded myself of the passages quoted at paragraphs 32-37 above.

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66. I found that all of this evidence pointed to the claimant having a mental impairment at the relevant time. His disposition and mood had changed for the worse. Impairment is the state or fact of being impaired. The definition of “impaired” is “weakened or damaged”. I considered that those words were apt to describe the claimant. He did have a mental impairment at the relevant time.

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67. I next considered whether the claimant’s impairment affected his ability to carry out normal day-to-day activities, and whether that effect was adverse. I gave careful thought to Mrs Weaver’s argument that, per **Aderemi**, the focus was on the claimant’s ability to carry out those activities. I found no evidence that the claimant was unable, in the physical sense, of doing things like cycling or playing football with his son. I did find that his motivation to do these things was affected.

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68. I came to the view that it would be wrong to approach “ability” in the binary sense of simply looking at whether someone is able to do an activity or they are not. “Ability” means possession of the means or skill to do something. Persistent low motivation or loss of interest in everyday activities is included within the Guidance as an example of a factor which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. Having the “means” to do something seems to me to include having a state of mind which does not amount to a barrier to doing the activity. Viewed in that way, the claimant’s lack of motivation and low mood did affect his ability to engage in activities like cycling and football.

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69. It was a matter of regret for the claimant that he had lost his enthusiasm for activities, such as exercise, which he previously enjoyed. He was not able to derive enjoyment from things he previously enjoyed. I had no difficulty in deciding that this was an adverse effect on the claimant.

5 70. Even if I had been persuaded by Mrs Weaver's argument on "*ability*", I would still have found that the claimant's impairment had an adverse effect on his ability to carry out a range of day-to-day activities. These included social interaction, concentration and sleeping. I accepted the claimant's evidence, which was supported by Mrs Nash's evidence (see paragraphs 20-23 above),
10 about these matters.

71. I moved on to consider whether the adverse effects on the claimant were substantial. "*Substantial*" means more than minor or trivial – section 212(1) EqA. The changes in the claimant's mood and disposition were, in my view, quite clearly more than minor or trivial. They were sufficient to cause friends
15 who had not seen the claimant for some years to express concern about the change in his personality. They caused Mrs Nash to become concerned. They were apparent to the claimant's young son. The claimant reported to his GP that his perceived stress at work was "*impacting his general health, sleep, mood and family life*".

20 72. Finally, I addressed the long-term condition. For this to be satisfied, at the relevant time (i.e between 7 February and 3 September 2020) the claimant's mental impairment had to either (a) have lasted for at least twelve months or (b) be likely to last for at least twelve months. This required me to form a view about when the claimant had come within the definition in section 6(1) EqA
25 (apart from the long-term aspect).

73. I decided that there was sufficient evidence to indicate that the claimant had first come within the statutory definition (apart from the long-term aspect) in March 2019, ie from that time he had a mental impairment which had a substantial adverse effect on his ability to carry out normal day-to-day activities. He spoke of “*mental exhaustion*” and a change in his sleeping pattern at that time. Mrs Nash spoke of his being “*low on enthusiasm and enjoyment*” and “*withdrawn and distant*” during the family holiday in March/April 2019. These were adverse effects on his ability to carry out normal day-to-day activities such as social interaction and sleep.
74. I noted the point Mrs Weaver made about the GP’s letters referring to his stress “*now having negative impact on his health*” (January 2020) and “*now impacting his general health, sleep, mood and home life*” (July 2020) (my emphasis on “*now*”). I understood Mrs Weaver to be asking me to conclude that the use of the word “*now*” implied that the adverse impact had not previously existed. I did not agree with that. I did not read into the use of the word “*now*” that the state of affairs being described had not existed the week before, or the month before, or even the year before. I considered that it did no more than describe how the claimant presented at the time of the consultation in the case of the January letter. In the case of the July letter “*now*” was used in the context of referring back to the January consultation (“*he was finding....*”).
75. The consequence of my finding that the claimant had first come within the statutory definition of disability (apart from the long-term aspect) in March 2019 was that he satisfied the long-term condition as from March 2020. I found that he continued to do so until the end of the relevant period (3 September 2020). Although he returned to work as from 24 August 2020, I noted that he had sought a prescription for anti-depressant medication the following day and his GP’s willingness to prescribe these indicated that he continued to suffer from his mental impairment.

76. To determine if the claimant satisfied the statutory definition of disability as at 7 February 2020, I had to decide whether, judged at that time, his impairment was likely to last for at least twelve months. I noted that the claimant said in his email to Mr Smith on 17 January 2020 that his GP was prepared to sign him off work due to stress (see paragraph 27 above). I reminded myself that “likely” meant “*could well happen*”. I was satisfied that as at 7 February 2020, when the claimant had been within the statutory definition (apart from the long-term aspect) for around eleven months, it could well happen that he would remain within that definition (apart from the long-term aspect) for at least twelve months.
77. Lest I be criticised for proceeding by “*rigid consecutive stages*” I should add that if I had started by looking at the effect on the claimant’s ability to carry out normal day-to-day activities, I would have come to the same conclusion. Similarly, if I looked at matters in the round, I came to the same outcome.
78. Accordingly, my decision is that at the relevant time (i.e. between 7 February and 3 September 2020) the claimant was disabled within the meaning of section 6(1) EqA.

20 Employment Judge: Sandy Meiklejohn
Date of Judgment: 11 June 2021
Entered in register: 15 June 2021
and copied to parties