Case No: 2401398/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr E McGrath

Respondent: Lifeways Community Care Limited

Heard at: Liverpool (CVP) **On: 4 January 2022**

Before: Employment Judge A.M.S. Green

Representation

Claimant: Mr J Tinston - Solicitor
Respondent: Miss L Kaye - Counsel

RESERVED JUDGMENT

The claimant is not disabled for the purposes of Equality Act 2010, section 6.

REASONS

Introduction

1. For ease of reading, I have referred to the claimant as Mr McGrath and the respondent as Lifeways.

2. Mr McGrath claims that Lifeways breached their duty make reasonable adjustments under the Equality Act 2010, section 21 ("EQA") by requiring him to wear a face mask which, he says, placed him at a substantial disadvantage because of the distress that this caused him and his breathing difficulties whilst doing so. In his particulars of claim, Mr McGrath relied on three physical/mental impairments:

    a. PTSD;

    b. Anxiety;

    c. Asthma.

The material date of the alleged discriminatory behaviour was 4 September 2020. In their Response, Lifeways denies that Mr McGrath was disabled at the material date.

3. This public preliminary hearing was listed to determine whether, at all material times, Mr McGrath was disabled as defined by EQA, section 6.

4. In an email to the Tribunal dated 14 July 2021 [93], Lifeways set out its position regarding Mr McGrath's alleged disability as follows:

    a. PTSD - It is not conceded that Mr McGrath has PTSD, and no formal diagnosis of PTSD is apparent from his medical records. If Mr McGrath has PTSD, it has a substantial adverse and long-term effect on his ability to carry out normal day to day activities.

    b. Asthma - It is not conceded that: Mr McGrath has asthma, and no formal diagnosis of asthma is apparent from the medical records. If the Mr McGrath has asthma, it has a substantial adverse and long-term effect on his ability to carry out normal day to day activities, such references as there are to asthma in the medical records being to mild asthma.

    c. Anxiety - it is conceded that Mr McGrath has anxiety as set out in the medical records. It is not conceded that Mr McGrath's anxiety has a substantial adverse and long-term effect on his day-to-day activities (or was likely to have a long-term effect when assesses at the date of alleged discrimination).

5. In support of his client's position, Mr Tinston has provided a skeleton argument from which I note Mr McGrath has withdrawn his assertion that his PTSD and anxiety, as of 4 September 2020, were disabilities under EQA, section 6 given that at the relevant time these conditions did not have a substantial adverse effect on his ability to carry out normal day-to-day activities. However Mr McGrath maintains that the act of wearing a face covering brought on his symptoms of PTSD which in turn exacerbated his breathing difficulties. Furthermore, he contends that his breathing difficulties are made worse by the act of wearing a face covering, irrespective of his symptoms of PTSD. He submits that from the commencement of the alleged discrimination on 4 September 2020 and to the present date, he had a physical impairment which had a substantial and long-term adverse effect on his ability to carry out day-to-day activities. Mr Tinston also made oral submissions to the effect that Mr McGrath was relying upon COPD and his diagnosis of asthma. He also indicated there could be several contributory matters underlying Mr McGrath's breathing difficulties such as a heart condition and hypertension. He said that Mr McGrath's hypertension is a cause but is not relied upon as a standalone condition amounting to disability.

6. I conducted a remote CVP hearing. We worked from a 93-page digital bundle which included a disability impact statement prepared by Mr McGrath. Mr McGrath adopted his statement and gave oral evidence. The representatives made closing submissions.

Findings of fact

7. Lifeways provide support services for people with learning disabilities in community and residential settings. Mr McGrath is employed by Lifeways as a Support Worker and he is based at their premises in Uppingham Road, Liverpool. He has been working in that role for Lifeways since 2012.

8. Mr McGrath supports adults with learning difficulties by helping them to live independently. He works with his clients in their homes. In 2020, he was working in a semidetached property at the end of a terrace. Mr McGrath confirmed that the property in question has a staircase providing access to bedrooms on the first floor and when he worked at the property, he used the stairs on a daily basis.

9. Mr McGrath normally drives to work but sometimes his son will drop him off at the property.

10. In the first four years of his work for Lifeways, Mr McGrath worked a night shift from 10 PM until 8 AM. However, this changed to working during the day.

11. Mr McGrath's clients are required to take medication. Medication is administered to them during the day but sometimes after 10 PM. His clients receive medication three times per day.

12. Mr McGrath assists his clients with laundry, although they put their clothes into the washing machine themselves. Mr McGrath ensures that when they are doing this, they are safe. A similar arrangement operates with assisting them with cooking and cleaning but not with their personal hygiene.

13. When his shift pattern changed to working during the day, he would sometimes take his clients out. For example, this might be to take them to visit their parents or to go to college. One of his clients was allowed to go out on their own. He might also walk down to the local shop with his clients. When the Covid pandemic started and the lockdown came into force, shopping was ordered remotely and dropped off at the house.

14. On 19 September 2018, Mr McGrath attended his GP. This was the first time in his GP records that the problem of his breathlessness was recorded [63]. His records show that he had occasional problems with aspiration and Dyspnoea only when walking upstairs. Under cross-examination, Mr McGrath accepted that there was nowhere in his medical records which indicated that he was unable to walk upstairs at all.

15. On 18 October 2018, Mr McGrath attended his GP. His medical records indicate that he was concerned about his breathlessness [61] The notes indicate that his breathlessness was ongoing and that he suffered from shortness of breath but could walk from the GP surgery to Tesco without stopping although he felt that he could not get a proper breath. Under cross-examination, Mr McGrath accepted that this was correct. He also accepted, in contradiction to what he said in paragraph 7 of his statement, that there was no reference in this GP note to him having to lean on a lamp post to catch his breath when walking to Tesco. He accepted that he had only said this in his statement. He also accepted that in GP records, there was no reference to

him being unable to perform household chores. Given the discrepancy, I prefer what is written in the GP's records.

16. On 1 November 2018, Mr McGrath attended his GP in relation to his breathlessness. The GP's records note that he was not suffering from any new symptoms and his breathlessness remained only on exertion [60]. This contradicts what Mr McGrath said in paragraph 8 of his statement where he said that he was suffering additional symptoms including breathlessness when he walked from his couch to his front door and whilst getting dressed, particularly the act of bending over and putting his socks on. Mr McGrath was cross examined on this discrepancy. He accepted that the GP had not noted any new symptoms in his medical record although he thought that he might have told his GP about his problems about getting dressed but he was unsure when that was. Given this discrepancy, and the fact of Mr McGrath being uncertain about the chronology, I prefer the GP record to the extent that, as of 1 November 2018, Mr McGrath was not suffering any new symptoms and his breathlessness remained only on exertion.

17. The GP records for 14 January 2019 comment that COPD has not been coded pending a medical review [59].

18. On 31 January 2019, Mr McGrath attended his GP. Once again, this was in relation to his breathlessness as recorded in the notes [58]. The GP recorded that his breathlessness was ongoing and had worsened since his last appointment. The GP also notes that the breathlessness was always noticeable and Mr McGrath was aware of it when resting but was not particularly bothered by it when he was resting. The GP also notes that the results of the spirometry test indicated a COPD picture regardless of the fact that Mr McGrath had never smoked. Under cross-examination, Mr McGrath accepted that at that point, no formal diagnosis of COPD had been made. Rather, he could potentially have been suffering from COPD. He also accepted that this was the only reference to COPD in his medical records given to him by his GP. The first time that he had seen his medical records was when these were provided to him in 2021 in support of this litigation. There has been no formal diagnosis of COPD.

19. On 20 March 2019, Mr McGrath attended his GP. The GP's records [58] indicate that his breathlessness was much the same although Mr McGrath is recorded as feeling more exhausted by it. The notes also record that he was due to attend a respiratory clinic on 21 March 2019 which had been brought forward. The GP comments on the need to wait for the respiratory clinic outcome and to start iron tablets and to recheck his levels in three months' time. In paragraph 11 of his statement, Mr McGrath says that he returned to the respiratory clinic on 21 March 2019 and that he was given a preventative inhaler (Beclomethasone), and an inhaler to prevent further incidents of breathlessness (Salbutamol) and he was instructed on how to use them. Under cross-examination, he accepted that there was no reference in his GP records of him being issued with an inhaler at that time.

20. On 25 July 2019, Mr McGrath attended his GP. Regarding his breathlessness, the notes record that he probably had mild asthma and did not want "inhalers anyway" [57]. The GP also records that if his shortness of breath continued to bother him in the future, he should return to the surgery to

discuss inhalers again. He was also advised to look for foods rich in iron which suggests that he could be anaemic. Under cross-examination, Mr McGrath accepted that what was set out in the record was correct. He accepted that he did not want or need inhalers, and, at that time, his breathlessness was not really bothering him. He went on to say that he had been using an inhaler as a preventer from January 2021 to date.

21. Mr McGrath accepted that, in accordance with his medical records, the first time that he was issued with Salbutamol was 4 September 2020 [55]. He would take his inhaler to work but he did not need it. He explained that this was in response to him suffering from minor chest tightness. His chest tightness is recorded by his GP and the record of the appointment on 4 September 2020 [55].

22. On 14 September 2020, Mr McGrath attended his GP in connection with suffering from a chesty cough. His GP record indicates that he was not suffering from any chest pain or breathlessness [54]. He was advised to use Salbutamol more regularly if it was helping [55].

23. On 31 March 2021, Mr McGrath attended his GP. His records show that he was first presenting with wheezing [50]. His GP also records that he had been getting Salbutamol inhalers and no formal diagnosis had been made although it is noted that he had had tests in the past and told that he had mild asthma.

Applicable law

24. The EQA, section 6 defines a ‘disabled person’ as a person who has a ‘disability’. A person has a disability if he or she has ‘a physical or mental impairment’ which has a ‘substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities.’ The burden of proof is on Mr McGrath to show that he this definition.

25. The Government has issued ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) (‘the Guidance’) under EQA, section 6(5). This Guidance, which came into force on 1 May 2011, replaces the previous Guidance on the same matters issued under the Disability Discrimination Act 1995 (“DDA”) in 2006. The Guidance does not impose any legal obligations in itself, but courts and tribunals must take account of it where they consider it to be relevant, (EQA para 12, Sch 1). Indeed, in **Goodwin v Patent Office 1999 ICR 302, EAT**, the EAT’s then President, Mr Justice Morison, stated that tribunals should refer to any relevant parts of the Guidance they have taken into account and that it was an error of law for them not to do so. However, more recently, in **Ahmed v Metroline Travel Ltd EAT 0400/10** the EAT qualified the **Goodwin** approach, noting that the observations made in that case were now long-standing, well established and well understood by tribunals. Mrs Justice Cox said that it was especially important for the correct approach to using the Guidance to be understood in the early years of the DDA. However, it was more than 15 years since disability discrimination legislation had been introduced. In this particular case the employment judge had understood the potential relevance of the Guidance and the importance of using it correctly, and no error of law was disclosed by his failure to refer to the Guidance in more detail, particularly when his attention had been drawn to it so extensively in written submissions. Furthermore, where, as in the instant case, the lack of credibility

as to the claimant's evidence of his disability was the main reason for concluding he was not disabled within the meaning of the DDA, there could be no error of law if the tribunal failed to refer to the official Guidance.

26. Appendix 1 to the EHRC 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' (para 7). This endorses the decision in **Ministry of Defence v Hay 2008 ICR 1247, EAT**, where the EAT held that an 'impairment' under section1(1) DDA 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.'

27. Applying the functional approach to the case before it, the EAT ruled that a tribunal was entitled to hold that an employee who had a range of respiratory impairments, including tuberculosis, which led to his absence from work from June 2004 until his dismissal at the end of March 2006, was disabled. Although expert medical evidence indicated that the impairments attributable to tuberculosis alone would have had a substantial adverse effect on his day-to-day activities for less than 12 months, the tribunal held that he was nonetheless disabled by reason of 'a constellation of symptoms' that lasted more than a year, even though they were not all medically attributed to tuberculosis. Upholding this decision, the EAT concluded that someone who suffered from a combination of impairments with different effects, to different extents, over periods of time which overlapped could be regarded as disabled. This view is supported by the Guidance, which states that although a person may have more than one impairment — any one of which alone would not have a substantial adverse effect — account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities (see para B6).

28. Substantial is defined in EQA, section 212(1) as meaning 'more than minor or trivial'. This definition did not appear in the DDA but was used in the original Guidance and in the Code of Practice issued under the DDA (the 'Code of Practice for the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability').

29. In determining whether an adverse effect is substantial, the tribunal must compare Mr McGrath's ability to carry out normal day-to-day activities with the ability he would have if not impaired. It is important to stress this because the Guidance and the EHRC Employment Code both appear to imply that the comparison should be with what is considered to be a 'normal' range of ability in the population at large. 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 wording is virtually identical to that contained in para B1 of the Guidance. However, 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, in any event, be very difficult to define.

30. In **Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522, EAT**, an employment tribunal decided that P — a dyslexic police officer who wanted adjustments to be made under the DDA in respect of his application for promotion to superintendent — was not disabled. It acknowledged that his dyslexia was disadvantageous to him in comparison with his rivals for the post of superintendent. However, 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, as he then was, 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. The tribunal's approach had therefore been incorrect. 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.'

31. As **Paterson** suggests, it is vital that tribunals consider, first and foremost, whether an adverse effect is 'substantial' in the light of the statutory definition: the Guidance and Code are strictly supplementary. In **Elliott v Dorset County Council EAT 0197/20** an employment judge found that E was not disabled on the basis that any adverse impact on him as a result of his autism and Asperger's Syndrome was minor. The tribunal noted that 'on occasions he may be obsessive and he may need a routine' but that he did 'adapt his behaviour and adopt coping strategies.' However, the EAT overturned the judge's decision on the basis that it did not sufficiently identify the day-to-day activities, including work activities, that E could not do, or could only do with difficulty, to found a proper analysis. She only considered public speaking and socialising outside work but failed to focus on the core of E's claim, that he found it very difficult to deal with changes of procedure and, particularly in the context of stressful disciplinary proceedings, was not able to communicate properly with his line manager. Dealing with change at work, being flexible about procedures and communicating with managers are all day-to-day activities. She also focused excessively on coping strategies, without considering whether any coping strategies might break down in certain circumstances. Further, in considering whether the adverse effects of the impairment were 'substantial,' she relied too much on a comparison with the general population, rather properly applying the statutory definition of more than minor or trivial.

32. In cases where it is not clear whether the effect of an impairment is substantial, the Guidance suggests a number of factors 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.

33. The cumulative effects of an impairment are also relevant. An impairment might not have a substantial adverse effect on a person in any one respect,

but its effects in more than one respect taken together could result in a substantial adverse effect on the person's ability to carry out normal day-to-day activities. The Guidance gives the example of a man with depression who experiences a range of symptoms, which 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, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities (see para B5).

34. When determining whether a person meets the definition of disability under the EQA the Guidance emphasises that it is important to focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she can do (see para B9). As the EAT pointed out in **Goodwin**, even though the claimant may be able to perform a lot of activities, the impairment may still have a substantial adverse effect on other activities, with the result that the claimant is quite properly to be regarded as meeting the statutory definition of disability. Equally, where a person can carry out an act but only with great difficulty, that person's ability has been impaired.

35. EQA, like the DDA before it, only protects individuals whose ability to carry out 'normal day-to-day activities' is impaired. This criterion may seem strange given that the discrimination claims with which we are concerned here arise in the context of employment, but the requirement ensures that 'disability' under the EQA reflects a general understanding of the term in day-to-day situations rather than specific work situations requiring specific skills.

36. Previously under DDA, for an impairment to be treated as affecting a person's ability to carry out normal day-to-day activities, it had to affect one or more specified 'capacities' — namely, mobility; manual dexterity; physical coordination; continence; ability to lift, carry or otherwise move everyday objects; speech, hearing or eyesight; memory or ability to concentrate, learn or understand; or perception of the risk of physical danger (see para 4(1), Sch 1, DDA). However, this requirement has now been dropped as, in the Government's view, the list of capacities 'served little or no purpose in helping to establish whether someone is disabled in the eyes of the law, and was an unnecessary extra barrier to disabled people taking cases in courts and tribunals' ('The Equality Bill — Government response to the Consultation', July 2008 (Cm 7454), para 11.53). According to the Explanatory Notes to the EQA, 'This change will make it easier for some people to demonstrate that they meet the definition of a disabled person. It will assist those who currently find it difficult to show that their impairment adversely affects their ability to carry out a normal day-to-day activity which involves one of these capacities' (para 674).

37. 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. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition' (paras 14 and 15).

38. The Guidance emphasises that the term 'normal day-to-day activities' is not intended to include activities that are normal only for a particular person or a small group of people. Account should be taken of how far the activity is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning (see para D4).

39. The Guidance states that it is not possible to provide an exhaustive list of day-to-day activities. However, in general, day-to-day activities are things people do on a regular or daily basis. The examples given are 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 (see para D3).

40. Paragraphs D11–22 of the Guidance advises on what should be taken into account in deciding whether a person's ability to carry out normal day-to-day activities might be restricted by the effects of a person's impairment. The Appendix to the Guidance then gives examples of circumstances where it would (or would not) be reasonable to regard the adverse effect on the ability to carry out a normal day-to-day activity as substantial. However, these examples are 'indicators and not tests. They do not mean that if a person can do an activity listed then he or she does not experience any substantial adverse effects: the person may be affected in relation to other activities, and this instead may indicate a substantial effect. Alternatively, the person may be affected in a minor way in a number of different categories, and the cumulative effect could amount to a substantial adverse effect' (see para D13). The examples in the Appendix describe the effect that would occur when the various factors described under 'Substantial adverse effect' above and 'Long-term effect' and 'Effect of medical treatment' below have been allowed for. These include, for example, the effects of a person making such modifications of behaviour as might reasonably be expected, or of disregarding the impact of medical or other treatment (see para D14). Tribunals will fall into error if they ignore the Guidance in a case where it is relevant. This happened in **Coca-Cola Enterprises Ltd v Shergill EAT 0003/02,** where the EAT held that a tribunal had erred in disregarding the Guidance on the ground that in excluding a person's ability to play a particular sport it did not reflect current society.

41. The substantial adverse effect of an impairment has to be long term to fall within the definition of 'disability' EQA, section 6 whether the disability is current or a past disability under section6(4). This requirement ensures that temporary or short-term conditions do not attract the Act's protection, even if they are severe and very disabling while they last, such as acute depression or a strained back. Under to the EQA, para 2(1) of Schedule 1 the effect of an impairment is long term if it:

a. has lasted for at least 12 months;

b. is likely to last for at least 12 months; or

c. is likely to last for the rest of the life of the person affected.

42. To attract the protection from disability discrimination and disability-related harassment in the EQA, a claimant must be disabled at the time of the acts or omissions that form the basis of the complaint. Thus, the tribunal's findings as to the date when the impairment became long term can be very important. In **Tesco Stores Ltd v Tennant EAT 0167/19** an employment judge found that T's depression was a 'long-term' condition on the basis that it had lasted for the 12 months leading up to the date when she presented her claim in September 2017, and that this meant that she was suffering a disability for the whole of that period. TS Ltd appealed to the EAT. Although there was no authority directly on the point, the EAT considered that the employment judge was clearly wrong: as at any of the relevant dates – i.e. the dates of the allegedly discriminatory acts between September 2016 and September 2017 – T's impairment and its adverse effects had not yet lasted for at least 12 months and so she was not disabled at the relevant time. The EAT rejected T's submission that it was enough that the period during which the discriminatory acts occurred coincided with the period during which the impairment was producing the adverse effect. In the EAT's view, it was required to consider whether, as at the date that the acts occurred, there had been 12 months of adverse effect. It therefore held that T could only bring claims of disability discrimination on the basis of acts that occurred on or after 6 September 2017.

43. Clearly, had the tribunal found the impairment to have been likely to last for at least 12 months at an earlier stage, T would have been able to bring claims of disability discrimination in respect of acts or omissions that occurred from that stage onwards. However, T failed to cross-appeal on this basis and on the facts of the case the EAT considered that she should not be allowed to raise the point on remittal.

44. For current impairments that have not lasted 12 months, the tribunal will have to decide whether the substantial adverse effects of the condition are likely to last for at least 12 months. The word 'likely' is also used in other related contexts — namely, for determining whether an impairment has a recurring effect, whether adverse effects of a progressive condition will become substantial, and how an impairment should be treated for the purposes of the EQA when the effects of that impairment are controlled or corrected by medical treatment. In all four contexts the Guidance stipulates that an event is likely to happen if it 'could well happen' (see para C3). This definition of the word 'likely' reflects the House of Lords' decision in **Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL**. In that case B suffered from nodules on her vocal cords, which resulted in her experiencing chronic hoarseness when speaking. At a pre-hearing review to determine whether B was in fact disabled, the tribunal found that she suffered from a physical impairment and that, but for coping strategies which she used in her daily life, it was 'more likely than not' that the substantial adverse effect of the impairment would have continued. Therefore B was disabled for the purposes of the DDA. On appeal, the Northern Ireland Court of Appeal upheld the tribunal's finding on disability but held that, in

addressing the degree of likelihood required under the DDA, the tribunal should have asked whether the substantial adverse effect 'could well happen.' Dismissing the employer's appeal, the House of Lords unanimously decided that the Court of Appeal had been correct in endorsing the 'could well happen' over the 'more probable than not' approach. According to Baroness Hale, the word 'likely' in each of the relevant provisions of the DDA (now EQA) simply meant something that is a real possibility, in the sense that it 'could well happen,' rather than something that is probable or 'more likely than not.' This decision clearly makes it much easier for individuals with certain conditions to satisfy the statutory test for disability, in that their Lordships' construction of the word 'likely' represents a significantly lower hurdle than the probability test that was formerly thought to apply.

45. The Guidance stresses that anything that occurs after the date of the discriminatory act will not be relevant (see para C4). It also states that account should be taken of both the typical length of such an effect on an individual and any relevant factors specific to this individual, such as general state of health and age. In **Thyagarajan v Cap Gemini UK plc EAT 0264/14** T suffered a retinal detachment in his left eye on 9 February 2011, for which he received surgery. On 11 March he suffered a retinal detachment in his right eye and was operated on, on the same day. On 8 April he again suffered a retinal detachment in his left eye and had an operation the following day. He had periods off work before returning on a phased basis on 23 May. He continued at work until his dismissal on 26 August. On 18 May an occupational health report stated that full sight recovery could take up to three months but that the long-term risk of further retinal detachment was low following surgery. A joint expert medical opinion suggested that the risk of recurrence was about two per cent after 12 months and at its highest during the three-to-four-month period after detachment. The EAT upheld the employment tribunal's decision that as of 23 May (or, on the claimant's argument, 18 March) the chance of further detachment was such that it could not be said that a further detachment 'could well occur' over the following 12 months. Once the three-to-four-month danger period had passed, the chance of a further detachment was only two per cent after 12 months. That did not mean it could well happen over the next 12 months. Either it happened within three to four months or, if not, it was highly unlikely to occur thereafter.

46. In determining whether a person's impairment has a substantial effect on his or her ability to carry out normal day-to-day activities, the effects of measures such as medical treatment or corrective aids on the impairment should be ignored. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect (EQA, para 5(1), Sch 1). This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent (see para B13 of the Guidance).

Discussion and conclusions

47. In her closing submissions, Miss Kaye submitted that it was more probable than not that Mr McGrath was suffering from mild asthma and that this represented an informal diagnosis. Having reviewed the medical records, I agree with her. She also submitted that there was no formal diagnosis of COPD. In her submission, COPD is a specific degenerative lung condition or disease. I accept her conclusion in this regard because having reviewed the

medical records, there is no formal diagnosis of COPD merely an indication that his breathlessness could be suggestive of that condition. I do not find that there has been a formal diagnosis of COPD. I accept that Mr McGrath suffers from breathlessness and that he has suffered from this condition from at least 19 September 2018. He continued to suffer from breathlessness as at the material date (i.e. 4 September 2020 which was the first time that he was issued with Salbutamol to help them with his breathlessness). On 14 September 2020, Mr McGrath attended his GP in connection with suffering from a chesty cough. At that time that he was not suffering from any chest pain or breathlessness. Since January 2021, Mr McGrath has been using his inhaler and this would suggest the reason why he is not suffering from breathlessness. It is reasonable to infer that if he stopped using his inhaler, his breathlessness would recur. His breathlessness is a physical impairment, and it is long-term. As of 4 September 2020, it had lasted for more than 12 months.

48. In his statement, Mr McGrath refers to activities which he says causes him to feel breathless. In paragraph 4.1 he says that he becomes breathless whilst he is climbing stairs. He says climbing one flight of stairs is enough to make him feel breathless. In paragraph 4.2, he says that when he carries out household chores, for example if he hoovers one small room or cleans two windows, he becomes breathless. He also claims that he suffers from breathlessness when he walks from his couch to his front door and whilst getting dressed, particularly the act of bending over and putting his socks on. I accept that Mr McGrath has difficulty walking upstairs because of his breathlessness as indicated in his GP medical records but I do not accept that he is precluded from walking upstairs by his breathlessness. It was his own evidence that he uses the stairs at the house where his clients live. He is able to climb the stairs to the first floor where the bedrooms are located. I also note that as a matter of fact, he is capable of assisting his clients with their laundry, cleaning and walking with them to the local shops. These are all physical normal day to day activities, and he does not suggest that he finds it difficult to perform them. Other than his statement that he cannot complete household chores without becoming, there is nothing in his GP medical records to indicate that this was a concern that he raised with his doctor. Furthermore, he clearly did not feel the need to have Salbutamol when it was first issued, and he took it to work prior to January 2021 rather as a keep safe than as a requirement to assist his breathing.

49. At its highest, Mr McGrath's breathlessness occurs when he goes upstairs. There is nothing to suggest, for example that he has to stop to catch his breath which could be regarded as having a substantial adverse effect on that activity. Consequently, I do not regard his breathlessness as having substantial effect on his ability to perform this day-to-day activity.

50. As at the material date of 4 September 2020, I accept that Mr McGrath had a physical impairment namely mild asthma which causes breathlessness. It is long-term but it does not have a substantial adverse effect on his ability to perform normal day-to-day activities.

Consequently, as at that date, Mr McGrath was not disabled for the purposes of EQA, section 6.

Employment Judge Green
Date 6 January 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

10 January 2022

FOR EMPLOYMENT TRIBUNALS