



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. N. J. Tretis

**Respondent:** DHL Services Ltd

## OPEN PRELIMINARY HEARING

**Heard at:** Bury St Edmunds Employment Tribunal (remote via CVP)

**On:** 5 May 2022

**Before:** Employment Judge Mason

### Appearances

For the Claimant: Ms. Ibbotson, counsel

For the Respondent: Mr. Sangha, counsel

## RESERVED JUDGMENT

The Claimant had a disability (within the meaning of section 6 and Schedule 1 of the Equality Act 2010) during the period 26 May 2020 to 3 March 2021 and his complaints of unlawful disability discrimination contrary to the Equality Act 2010 proceed.

## REASONS

### Background

1. The hearing was to consider and determine whether the Claimant was, at the time relevant for the claim, disabled within the meaning of s6 Equality Act 2010 by reason of Chronic Fatigue Syndrome (CFS). The parties agree that the relevant period of alleged discrimination is December 2019 to 3 March 2021 (“the relevant period”).
2. This hearing was listed by EJ George who conducted a case management hearing on 1 February 2022.
3. EJ George summarised the factual background to this case as follows:  
*“43. The Claimant was employed by the Respondent, a global logistics services provider, as a General Manager, from 31 July 1996 until 3 March 2021. Early*

conciliation started on 21 April 2021 and ended on 1 June 202. The claim form was presented on 28 June 2021.

44. The claimant's case is that, during a period of secondment to the role of general manager of a site in Huntingdon, he began to experience general feelings of tiredness. He was off work for a total of six weeks between 26 May 2020 and 8 July 2020, a period of absence which was certified by his GP to be due to exhaustion. He was diagnosed with Chronic Fatigue Syndrome on 6 August 2020. He alleges that this was caused by being required to work excessive hours but also that, following the diagnosis, the respondent continued to expect him to work longer hours and did not put in place actions which were suggested by occupational health to alleviate his symptoms. He started a period of sickness absence from which he did not return on 6 September 2020. He alleges that an offer which had been made for him to be confirmed into the seconded role was rescinded when he was diagnosed with CFS.

45. The respondent's defence is under the terms of the claimant's secondment agreement, if the claimant were unable to return to his then current role for any reason when the secondment came to an end the company would make every effort to identify a suitable alternative employment but, if none were available, then a redundancy situation would arise. They argue that adjustments were made to working conditions on occupational health advice but that they were unable to facilitate working from home in the seconded role."

4. Whilst the Respondent accepts the Claimant has been diagnosed with CFS, it does not accept that this impairment meets the definition of "disability" in s6 EqA.
5. I was provided with a bundle of documents, 249 pages, to include the pleadings, EJ George's order, the Claimant's disability impact witness statement and medical evidence. The Claimant also provided a second OH report from Dr McCrea dated 29 April 2022; we adjourned briefly to allow Mr. Sangha time to read this.
6. I heard evidence from the Claimant who confirmed his disability impact statement was accurate and truthful and was cross-examined by Mr. Sangha and re-examined by Ms. Ibbotson.
7. Both representatives helpfully provided written submissions and made brief verbal submissions.
8. Due to lack of time, I reserved my decision.

### **Relevant Law**

10. **S6 Equality Act 2010 (EqA)**  
“(1) 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”
11. A tribunal must take into account any relevant aspect of :  
11.1 **Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) ( “the Guidance”);** and

11.2 **The Equality and Human Rights Commission: Code of Practice on Employment 2011 (“the Code”)**

12. The question of whether a person meets the definition of disability is matter for the Tribunal and not medical experts: **Paterson v The Commissioner of Police of the Metropolis [2007] ICR 1522**. While the view of doctors on the nature and extent of claimed disability is relevant, the crucial issue is one for the tribunal itself to decide on all the evidence.

13. **Does the impairment have an adverse effect on their ability to carry out normal day-to-day activities?**

13.1 EqA 2010

*“5(1) 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.*

*(2) “measures” includes, in particular, medical treatment ...”*

13.2 The Guidance:

A4 Whether a person is disabled for the purposes of the Act is generally determined by reference to the **effect** that an impairment has on that person’s ability to carry out day-to-day activities.

It is the effects of the impairment(s) that need to be considered, rather than the underlying condition(s) themselves.

B9 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.

D3 In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading, and writing, having 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.

13.3 The Code: Appendix 1:

7. 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.

14. Normal day-to-day activities are activities “carried out by most men or women on a fairly regular and frequent basis”.

15. Day-to day activities thus include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing, going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one’s self. Normal day-to-day activities also encompasses the activities which are relevant to working life.

13.4 “Day-to-day activities” encompass activities which are relevant to participation in professional life as well as participation in personal life (**Paterson v The Commissioner of Police of the Metropolis** [2007] ICR 1522).

14. **Is that effect substantial?**

14.1 EqA: S212(1) defines “substantial” as “more than minor or trivial”.

14.2 The Guidance:

B2 & B3: The time taken to carry out an activity and the way in which an activity is carried out are factors to be considered when assessing whether the effect of an impairment is substantial.

B4 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, when taken together, could result in an overall substantial adverse effect.

B7. Account should be taken of how far a person can **reasonably** be expected to modify his or her 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.

Appendix:

This sets out an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

14.3 The Code: Appendix 1:

8. A substantial adverse effect is something which is more than minor or trivial.

9. Account should be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities.

14.4 In **Leonard v South Derbyshire Chamber of Commerce** [2001] IRLR 19 the EAT gave the following guidance:

- i) the focus should be on what an employee cannot do or can do only with difficulty, and not on what they can do easily;
- ii) the tribunal should look at the whole picture but should not attempt to balance what an employee can do against what they cannot do;
- iii) the statutory guidance should not be used too literally; and.
- iv) the fact that an employee is able to mitigate the effects of an impairment does not prevent there being a disability.

15. **Is that effect long-term?**

15.1 EqA Schedule 1, Part 1

(i) “2(1) *The effect of an impairment is long-term if –*

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

*(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.”*

(ii) 2 (2) *If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if it is likely to recur”*

15.2 The Guidance:

A16. Someone who is no longer disabled, but who met the requirements of the definition in the past, will still be covered by the Act.

C2. The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect.

C3 “Likely” should be interpreted as meaning that it could well happen.

C4 “In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)”.

C5. Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of “long-term”.

C6. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term.

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the ‘long-term’ element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.

C9. Likelihood of recurrence should be considered taking all the circumstances of the case into account.

15.3 The Code:

2.9 In most circumstances a person will have the protected characteristic of disability if they have had a disability in the past, even if they no longer have the disability.

Appendix:

13. If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it might well recur.

15.4 In **SCA Packaging Ltd v Boyle** [2009] UKHL 37, the HL held that “likely” means “could well happen”.

15.5 Recurring or fluctuating effects:

(i) In **Swift v Chief Constable of Wiltshire Constabulary** [2004] IRLR 540, the EAT suggested four questions should be answered:

i) was there at some stage an impairment which had a substantial adverse effect on the claimant’s ability to carry out normal day-to-day activities?

ii) Did the impairment cease to have such an effect and, if so, when?

iii) What was the substantial adverse effect?

iv) Is that substantial adverse effect likely to recur?

- (ii) The likelihood of recurrence of a disability must be assessed at the date of the act of discrimination. A tribunal must determine what the prognosis would have been in the light of information available at the time of the act of discrimination. Anything which occurs after the time of the alleged discrimination will not be relevant in assessing the likelihood of an effect lasting for 12 months.

### **Findings of Fact**

16. My findings are limited to the issue of whether the Claimant at the relevant time was disabled at the relevant time i.e. during the period December 2019 to the date of his dismissal on 3 March 2021.

#### December 2019 to May 2020

17. I make no finding with regard to the Claimant's contention evidence that on four occasions between December 2019 and May 2020 he asked for extended time off due to feeling tired and run down. This is disputed in the Response (ET3) and is there is no supporting evidence. However, I accept he requested time off in February and March 2020 as his GP notes refer to these requests (24 June 2020).
18. I accept on the balance of probabilities the Claimant's evidence that he "struggled" in the latter half of 2019. This is a reasonable conclusion in light of his requests for time off in February and March 2020. In the absence of any medical evidence and more specific evidence from the Claimant, I find that "struggled" means he was tired and run down. I also accept that he struggled in the same way in the first months of 2020 with the addition of headaches and joint pains.

#### 26 May to 7 July 2020:

19. On 26 May 2020, the Claimant was signed off work for exhaustion for 6 weeks until 7 July 2020. He was signed off by the Respondent's own GP (Medical Solutions).
20. On 15 June 2020, the Claimant's GP Dr Bland noted that he was "*exhausted and no energy by mid-morning*" .
21. On 23 June 2020 his GP noted he was "*exhausted most of the time*" and the diagnosis was "*exhaustion*".
22. On 24 June 2020, his GP noted "*Depletion of energy with activity ongoing since January. So far 4 weeks into sign off with exhaustion, does feel it is helping ... Tried to take time off in Feb and March no help, not restorative ... slower paced activities*".

#### 7 July 2020 – 3 March 2021

23. The Claimant returned to work on 7 July 2020. On the same day, he had a telephone consultation with his GP and the notes show:  
"*Diagnosis: PRISM Chronic Fatigue Syndrome/ME Service accessed*  
*Plan: -CFS referral ? CFS ? support access.*  
*-Classified only as mild, all tests negative otherwise.*"
24. On 15 July 2020, his GP referred him to the Chronic Fatigue Clinic ("CFS Clinic").

25. On 6 August 2020, Ms. Rekha Patel, Mental Health Practitioner, assessed the Claimant at the CFS Clinic and reported to the Claimant's GP:  
*"A pleasant 54 year old male presenting with chronic fatigue syndrome of a mild severity... "*. He was offered 6 sessions of CFS management.  
The Claimant's GP notes record the diagnosis of CFS.
26. On 21 August 2022, the Claimant attended an OH appointment with Dr. Jacques Saayman of BHSF Occupational Health Ltd. Dr Saayman refers in his report to the Claimant's recent diagnosis of CFS and says the Claimant *"felt very tired in the first quarter of this year", "still has ongoing fatigue", a "slight permanent headache", and "short term memory loss"*. He records that he explained to the Claimant that he needed to change his work life balance and that if he did not make any changes *"his symptoms will deteriorate"*.
27. On 3 September 2020, the Claimant attended a Health Review Meeting with the Respondent and the notes show he said: *"I've got a headache, Just feel tired, not tired like normally its bit more than that"; "It's gone from a faint dull headache to something stronger – it's not a migraine"*
28. On 6 September 2020, the Claimant commenced a period of absence which lasted until his employment ended on 3 March 2021. He was signed off by Medical Solutions.
29. On 10 September 2020, the Claimant attended the CFS clinic and discussed with Ms. Patel techniques for coping with CFS.
30. On 13 November 2020, the Claimant attended the CFS clinic and again discussed techniques for coping with CFS.
31. On 23 November 2020, the Claimant attended a Welfare Meeting with the Respondent. The notes show that the Claimant reported he was attending the CFS clinic sessions and was *"Feeling ok, joints ache not sure if it's because of age or the cold, CFS seems to think it's down to illness. Headaches almost gone now. Energy levels are still up and down – still trying to work on consistency around that. Trying to rest as much as I can and plan for the future. Trying to get my health back to a level playing field and come back as the old Nick Tretis"; "I've enjoyed keeping fit and lost that, put a bit of weight on, feel bad about yourself, trying to stay positive. I'm seeing this period as a short positive you invest in to get better"; "Energy levels are a lot less, it's a lot more hard work, it's a really hard slog. Trying to do something to keep active."*
32. On 11 February 2021 the Claimant attended the CFS clinic. His GP notes record that he was *"managing CFS symptoms reasonably well although had a "crash" due to over exertion on a good day; is beginning to understand triggers and perpetrators of symptoms"*.
33. 3 March 2021, the Claimant's employment was terminated by the Respondent.
34. I accept the Claimant's evidence that the symptoms of his CFS resulted in fatigue, muscular aches, joint pain (shoulder and knees), a dull headache and flu like

symptoms and “brain fuzz” which made him forgetful, confused and slightly depressed; I will refer to these as “the Symptoms”. I do not accept his evidence that his faltering eyesight and breathing difficulties are connected to his CFS as there is no medical evidence to support this.

35. I accept the Claimant’s evidence that he suffered from the Symptoms on a fluctuating recurring basis during the period December 2019 to 3 March 2021. This is supported by:
- 35.1 A report from Dr Jacques Saayman BHSF who refer to the Claimant’s tiredness in January to March 2020;
- 35.2 My findings (above) that, starting in December 2019, he asked for extended time off due to feeling tired and run down and that he struggled in the last part of 2019.
36. I also accept the Claimant’s evidence that during the same period the Symptoms adversely affected to a varying extent the following normal day-to-day activities:
- 36.1 His ability to walk any meaningful distance e.g., for more than 5 minutes;
- 36.2 Showering;
- 36.3 Sleeping;
- 36.4 Driving long distances;
- 36.5 Shopping trips;
- 36.6 Exercise;.
- 36.7 Socialising;
- 36.8 Using the computer for a prolonged period;
- 36.9 Housework;
- 36.10 Cutting the grass;
- 36.11 Washing the car;
- 36.12 His ability to work; I accept he struggled to complete tasks on time and to complete projects.
37. The adverse effect varied depending on the severity of the Symptoms. At their worst, the Symptoms substantially adversely affected these day-to-day activities; on other occasions it was minor.
38. I find that the Claimant has learned coping mechanisms to ameliorate the Symptoms with the help of guidance given at the CFS clinic. This includes Graded Activity Therapy, pacing tasks, mindfulness and generally thinking about his energy levels.

## **Submissions**

### **Claimant**

39. Ms. Ibbotson submits as follows:
- 39.1 The symptoms of CFS had a substantial adverse effect on the Claimant’s ability to carry out normal day-to-day activities; she rehearses the symptoms and the activities affected as described by the Claimant and the supporting medical evidence, specifically his GP and CFS Clinic notes.
- 39.2 CFS had a “long-term” adverse effect:
- (i) Between December 2019 and November 2020 it was likely to last for at least 12 months, or it was likely to last for the rest of the Claimant’s life, or it was likely to



recur beyond 12 months after the first occurrence; as at 3 March 2021, it had lasted 12 months having started in December 2019.

- (ii) The typical length of the effects of CFS on an individual is life-long, so once adverse effects had started in December 2019 it was likely – in that it “could well happen” – that they would last for at least 12 months, the rest of the Claimant’s life or recur.
- (iii) Dr McCrea reports:  
“Chronic fatigue syndrome is a complex disorder characterised by extreme fatigue which has lasted for at least 6 months and worsens with physical activity and may not improve with rest” (1<sup>st</sup> report)  
“Essentially [CFS] is a lifelong condition and whilst it can improve with time their condition is prone to relapses and remissions can last for many years after onset” (2<sup>nd</sup> report).

### Respondent

40. Mr. Sangha submits as follows:

- 40.1 The Respondent accepts that CFS is a physical “impairment” within the meaning of the EqA but points out the CFS diagnosis was “mild”.
- 40.2 There is no medical evidence to support the Claimant’s contention (para 9 impact statement) that faltering eyesight and difficulty breathing are linked to CFS.
- 40.3 The earliest onset that can be noted from the GP records is January 2020; the Claimant cannot demonstrate substantive adverse effect from that period on the basis that it did last 12 months or that it was likely to last 12 months.
- 40.4 This is a case of mild CFS in which the substantial adverse impact was limited to the period between September 2020 and July 2021; there is no real evidence of a substantial adverse impact prior to September 2020. The Claimant accepted that the severe period was September 2020 to July 2021.
- 40.5 Dr McCrea confirms in his second report that that GP records confirm that there was no substantially adverse effect on the Claimant’s ability to manage normal day to day activities citing entries on 6 August 2020, 11 February 2021 and 3 June 2021.
- 40.6 The Claimant’s evidence is vague.
- 40.7 Dr. McCrea, having reviewed the medical records, reverses his medical opinion that the Claimant was a disabled person.

### Conclusions

- 41. Applying the relevant law to the findings of fact to determine the issues, I have reached the following conclusions.
- 42. I have found that the Symptoms adversely affected the Claimant’s normal day-to-day activities during the period December 2019 to 3 March 2021 and that the extent of that adverse effect varied depending on the severity of the Symptoms. At times, the Symptoms substantially adversely affected these day to day activities; on other occasions it was minor.
- 43. A key question is when the Symptoms first substantially adversely affected the Claimant’s day-to-day activities. I have accepted the Claimant’s evidence that he struggled in the latter half of 2019 in the sense that he was tired and run down, but

I cannot conclude that normal day-to-day activities were substantially adversely affected at that point.

44. I do however accept that by the time he was signed off work for exhaustion on 26 May 2020, normal day-to-day activities were substantially adversely affected by the Symptoms. The start date therefore falls somewhere between December 2019 and 26 May 2020.
45. I have accepted the Claimant's evidence that he requested time off in February 2020 and March 2020 and taking into account Dr. McCrea's report that the onset of the Claimant's symptoms was in or around January 2020. However, there is insufficient evidence before me to sustain a conclusion that the symptoms substantially adversely affected his day-to-day activities until 26 May 2020 when he was signed off with exhaustion. At that point the effect was more than minor or trivial.
46. The relevant period of alleged discrimination is December 2019 to 3 March 2021 and I have found that the Claimant's activities were substantially adversely affected by the Symptoms for part of this period, specifically 26 May 2020 to 3 March 2021. The effect of the impairment had not lasted 12 months at any point during this period. However, I am satisfied that it was likely to last for at least 12 months and was likely to last for the rest of the Claimant's life.
47. The Symptoms were likely to recur at any point after 26 May 2020. At various points after this date, the CFS symptoms may have ceased to have had a substantial effect on the Claimant's ability to carry out normal day-to-day activities – whether due to coping avoidance strategies adopted by the Claimant or remission - but from 26 May 2020, the Symptoms were likely to recur (i.e. could well happen) beyond 12 months. The Claimant was therefore disabled within the meaning of the EqA during the period 26 May 2020 to 3 March 2021.

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EJ Mason  
Date: 8 May 2022

Sent to the parties on:

20 May 2022

For the Tribunal Office: