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EMPLOYMENT TRIBUNALS

Claimant: Ms F Farah

Respondent: Spire Healthcare Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Manchester (in private; by CVP)

On: 17 March 2022
12 May 2022

Before: Employment Judge Shotter (sitting alone)

Representatives

For the claimant: In person

For the respondent: Ms R Kight, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not disabled in accordance with section 6 of the Equality Act 2010 with an impairment of *significant weaknesses in auditory working memory* in the relevant period 17 November 2020 to 24 November 2020.
2. The Tribunal does not have the jurisdiction to consider the complaints of disability discrimination, which are dismissed.

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Preamble

1. This has been a remote preliminary hearing by video which has been consented to by the parties. The form of remote hearing was CVP video fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 156 pages, the contents of which I have recorded where relevant below, in addition to the claimant's unsigned and dated impact statement, the written statement of Andrea Boylan, a nurse employed by the respondent, and written submissions received from both parties, for which I am grateful. Apart from the two medical reports the claimant did not provide any other medical records or evidence..

Preliminary hearing

2. Today's preliminary hearing is to consider whether the claimant was disabled for the purpose of section 6 on the Equality Act 2010 ("the EqA") in the relevant period 17 November to 24 November 2020.

3. The hearing was adjourned from 17 March 2022 as an adjustment for the claimant.

Issues

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

- a. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about 17 November 2020 to 24 November 2020. The Tribunal will decide:
 - (i) Did she have a physical or mental impairment: auditory processing disorder ?
 - (ii) Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
 - (iii) If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
 - (iv) If so. would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

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- (v) Were the effects of the impairment long-term? The Tribunal will decide:
 - (a) did they last at least 12 months, or were they likely to last at least 12 months?
 - (b) if not, were they likely to recur?

5. The key issue in this case is did the claimant's impairment have a substantial adverse effect on her ability to carry out normal day-to-day activities, as agreed.

Claimant's disability issue

6. In order for the complaints of disability discrimination to succeed, the claimant will need to establish that she had a disability within the meaning of section 6 of EqA, and this is the issue before me today.

7. Oral evidence has been heard on oath from the claimant who confirmed the contents of her impact statement was true. On behalf of the respondent I heard from Andrea Bolan who gave credible evidence supported by my experience of the claimant at this preliminary hearing. On balance, I did not find the claimant a credible witness for the reasons stated below, concluding she had exaggerated the effects of her condition in order to continue with this litigation which stems from an unsuccessful job application with the respondent following an interview with Andrea Bolan.

8. The claimant's case is that she was disabled by Auditory Processing Disorder, and this had been the position throughout her life. The claimant has not been diagnosed with Auditory Working Memory and she has self-diagnosed this condition. The claimant has been diagnosed with "*significant weaknesses in auditory working memory*" and she has produced two medical reports to this effect.

9. Whilst studying for her nursing degree the claimant was diagnosed by a chartered psychologist on the 3 June 2016 ("the 14 June 2016 report") as having "specific learning difficulties arising from weakness in her auditory working memory...particularly in the context of literary skills in a higher education environment." Recommendations were made to support the claimant in her university studies as the claimant was struggling with organising her studies and complying with its demands. The claimant argues today that reading for a degree and sitting exams were day-to-day activities. I disagree, preferring Ms Kight's submissions on this point. The 14 June 2016 report was aimed at ensuring the claimant was given additional support from the university, for example, extra time in exams. I have explored this report in greater depth below.

The medical evidence

14 June 2019 psychologist Report ("the 14 June 2019 report")

3 The 14 June 2016 report covered a wide range of tests from attainments in literacy, spelling and writing, vocabulary, and cognitive processing. The psychologist found that the claimant whilst "English is her third language, after Somalian and

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Danish...her difficulties do not appear to be related to her stage in the acquisition of English skills...Fatima has strong phonological awareness, word reading and spelling skills. **She does however, struggle to understand information which she can read accurately and needs to re-read information to process meaning...she has some weaknesses in perceptual reasoning and significant weaknesses in auditory working memory... [that] continue to impact on her ability to process written information** [my emphasis]. Recommendations included not requiring the claimant to read out aloud in groups, guidance and support when preparing written work and note taking, and extra time.

4 In written closing submissions the claimant refers to the 14 June 2016 report which she interpreted confirmed she was “having difficulties organising my thoughts; having difficulties understanding what is required in examination questions; going off on a tangent when expressing my ideas; often losing concentration in both social and academic settings; trouble following conversation; writing things down in order to remember them; experiencing difficulties understanding written information despite being able to read the words and having a below average score in perceptual reasoning”. The 14 June 2016 report did not reflect the description given to it by the claimant in its entirety, and if I am incorrect in my interpretation of the report it is apparent the difficulties described by the claimant may have an adverse effect, for example, losing concentration and having difficulties organising her thoughts, but it was not substantial and her ability to take part in conversations, for example, with patients including translating on their behalf, appeared largely unaffected by the weaknesses set out in the 14 June 2016 report.

5 The claimant maintains today that her impairment has caused her difficulties in the following areas: understanding sounds and spoken words; comprehending written information on its first reading, and writing information down quickly.

The claimant’s application for the band 5 registered nurse position

6 In the claimant’s application to the respondent for the band 5 registered general nurse role in 2019, reference was made by her to the following personal attributes in direct contrast to the contents of her impact statement and the oral evidence given at this hearing; “...One speciality that stood out to me was working on day case and short stay wards. **This was because of the interactions I was able to have with patients and being their advocate** on their journey from pre-assessment to post-operative care...My most recent post was as an agency nurse...I gained the qualities to be adaptable to the demands of each individual department. **One of these is being able to work effectively in a team.** I have had to work with multiple teams...**I adapt to situations very quickly** whilst maintaining a warm, yet professional manner...I am enthusiastic and a compassionate person **who finds it easy to converse and communicate with a range of people.** I speak fluent English, Danish and Somali; these interpersonal skills allow me to be a part of the patient’s journey as their advocate, enhancing experience. A particular scenario that highlights this was when, I had to use my language skills in practice; during a patient history taking...**I made sure my colleagues were well informed throughout the conversation and were able to participate**...One thing that has strengthened the standards I should be working towards is **having students work alongside me...teaching new starters and junior staff the same**...”[my emphasis].

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7 Even allowing for exaggeration in job applications it is apparent the claimant's condition did not prevent her from organising her thoughts; she was able to express ideas; concentration in both social and work setting and follow conversations in direct contrast to the picture painted by the claimant in this application.

Medical report 10 June 2021 ("the 10 June 2021 report").

8 A second report was provided by a different chartered psychologist following an assessment of the claimant on the 20 and 21 April 2021 referred to as a "Top up" report following the claimant experiencing challenges in the workplace. The assessment was described as follows; "Fatima requested a further "top up" assessment after being previously identified with specific learning difficulties while studying at university...while the current assessment was not a full diagnosis, it served to identify that the pattern of difficulties experienced...in terms of literacy and working memory are consistent with those identified in her earlier assessment. It can be concluded that she still experiences a specific learning difficulty...is likely to benefit from support strategies and reasonable adjustments within the working environment and with any further studies she may embark on."

9 The claimant was assessed at having "well-developed language skills [and]...non-verbal skills and her ability to process information quickly and accurately. Fatima presents some **relative weakness with regards to working memory**...Fatima's reading fluency lies within the average range but she reads a little slowly and does have **considerable difficulties with retention of information in order to apply it in the opportunity to re-read where necessary**" [my emphasis].

10 The learning difficulties with regard to working memory "appear to have a negative impact on some of her literary attainments, namely the retention of information in order to apply it in the short term, either from reading or from listening to verbal information and being able to write it down efficiently...working memory is susceptible to the impact of mood and emotion and these factors may exacerbate her difficulties."

11 A number of recommendations were made including test to speech software likely "to make reading less time consuming and may also help with the retention of information, extra time to re-read information and complete her written work without being pressurized and a recording device at training events or meetings as the claimant may have difficulties recording information in terms of her speed of handwriting." With reference to working memory, it "contributes" to the claimant "experiencing some difficulties in terms of speed and accuracy" when producing written documents. She may find it "hard to remember instructions or processes" and "instructions or tasks...given verbally...could be written down in a staged process in order to aid her memory."

12 I do not agree with Ms Kight that it was clear from the reports that the claimant's ability to read, write or spell are not affected by her condition given the suggestion that the impairment could contribute to the speed in which the claimant performs such tasks. However, there was no satisfactory evidence before me that the claimant's attention and concentration were impaired and in direct contrast to the picture

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presented by the claimant in this application, the chartered psychologist found “Fatima demonstrated good attention and concentration throughout the assessment session.”

13 With reference to working memory which “refers to our ability to remember and work with information for a short time...for example, remembering the initial part of a sentence while reading the latter part, or remember a sequence of information...her performance was below that expected of someone of her age group...and also lower for her as an individual when compared to her other skills...” The claimant was found to present “some relative weakness with regards to working memory...and these appear to be having a negative impact on some of her literacy attainments, namely the retention of information in order to apply it in the short term, either from reading or from listening to verbal information and being able to write this down efficiently.”

Impact statement and evidence on adverse effect

14 I intend to concentrate on what the claimant cannot do as set out in the impact statement (which focuses on understanding, sounds and spoken words) and the claimant’s written submissions, taking each one individually and then cumulatively.

Conversations in noisy places.

15 “I have difficulty not only in very noisy places but also in places where there are normal levels of noise such as shopping centres and cafes – places which are regular features of day-to-day activity for most people whilst socialising. Most people can hold conversations without difficulty in such places without having to move to quieter environments. To do so is unrealistic, unreasonable and inconvenient and is an imposition on the other people involved.”

16 In oral evidence the claimant explained that whilst she had good concentration and attention levels “most of the time” when it came to background noise in a busy shopping centre she found it difficult to hold a conversation, and accused Ms Kight of “minimising my experiences” when it was put to her that “lots” of people find it difficult to hold a conversation in a busy shopping environment. The claimant described how she would move to a quieter environment to have the conversations with her friends.

Listening to the radio.

17 “I do not listen to the radio without songs because there is no means of pausing or rewinding it. Therefore, I am often unable large parts of what is being said.” The example given by the claimant was not being able to tell anyone what the score was in a football match. In written closing submissions the claimant submitted “If it is common for the general population to listen only to music radio programmes as the Respondent suggests, it is because they have a preference to do so, not because they are unable or have difficulty listening to non-music only programmes as I do. It is far easier for me to listen to music than to listen to, remember and understand the spoken word on the radio.”

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18 In oral evidence the claimant described how she was unable to give family and friends the “full low down” about what was being said on the radio, but “I will have an idea...I will try my best to keep up with it and have some sort of insight.”

Watching television.

19 “I always need subtitles...I have to pause and/or re-wind.” In written submissions the claimant stated “watching a variety of television programmes is a normal day to day activity which I am unable to or have difficulty doing. If watching with others and having to repeatedly ask them to repeat or explain things or constantly having to pause or rewatch things to understand is a significant adverse effect on ability to enjoy television as others do.”

20 In oral evidence the claimant described how she watched a range of films, including box sets on which “I sometimes binge...40-45 minutes...I use subtitles...can pause or start when I want to...”

21 It was put to the claimant in cross-examination that the medical reports do not reflect the fact that she was experiencing difficulties watching television (or listening to the radio) and the claimant explained that “I didn’t know how I was affected in my everyday life” a statement I find surprising given the claimant’s position now that she has experienced the difficulties described all of her life, and yet she had not raised them with the psychologist at either assessment. I accept Ms Kight’s submission that were the impact on the Claimant’s ability to watch television as substantial as the Claimant asserts in her witness statement it would have been impossible for her to not have noticed it in 2016 and therefore highly unlikely that she would not have reported it specifically to the psychologist.

22 As invited by Ms Kight, I have inferred the Claimant’s evidence on this particular matter does not accurately reflect the reality, concluding she has exaggerated her evidence for the purpose of this litigation. The claimant’s reference to using subtitles rather than listen to the dialogue in a film, appears to contradict her assertion that she experienced difficulties understanding written information despite being able to read the words and undermines the medical evidence.

Understanding verbal instructions.

23 The claimant described difficulties she had “understanding even the most basis of instructions” which she described as a “major issue in everyday life.” In written submissions the claimant stated “I submit that I do have substantial difficulties in understanding and or following instructions. With regard to shopping lists I accept that many people use these but, in my case, I do this on every occasion even when there are very few items. Taking notes generally in a work setting, in meetings or in any formal or informal educational or learning environment is I submit a normal day to day activity.”

24 It was put to the claimant in cross-examination that she had better than average ability at listening and talking notes, to which the claimant agreed, arguing she was talking about basic instructions and not understanding a lecture at degree level. There was no satisfactory evidence before me that the claimant’s ability to understand basic

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instructions had been substantially adversely affected by her condition and it is apparent from her oral evidence that she understood requests from her friends which she was able to write down in a list, for example, a shopping list and carry out her role as a nurse which entailed following instructions. I find the claimant exaggerated the effect, and was capable of taking notes when given “long lists of orally given instructions” for example, on the handover sheet.

25 The claimant referred to making notes during handovers in a clinical setting which she doubled-checked for correctness and having difficulty taking accurate notes at university.

26 Ms Kight is correct that the claimant explained in evidence she is trilingual and translated a patient history for a patient to a colleague in a clinical setting, one of the examples given by the claimant in her application referenced above. Ms Kight submitted that not only must the claimant have understood what the patient was telling her in one of her languages, but she was able to explain what that was in English to her colleague, and this does not suggest that the adverse effect of the Claimant’s impairment on understanding or following instructions, even in a specialised setting, is substantial. I agree.

27 The claimant also described how she would need to keep a shopping list describing in her impact statement how she would forget to buy bread and milk if asked by a friend unless the person asking texted her. The text “overcame” the difficulty. She also described if asked to add to the list by a friend, she would need to be sent a text having forgotten “a couple of times to the point it’s caused a strain in my friendship.” I did not find the claimant’s evidence that she strained her relationship with people, a point she repeated in oral submissions today referring to the weaknesses in her auditory working memory “affecting my ability to retain relationships with family and friends” credible.

28 The claimant accepted in cross-examination that large numbers of people made shopping lists before going shopping so as not to forget the things they need to buy.

Conversations with people.

29 The claimant maintains “I have difficulty having conversations with people even when this isn’t a normal environment” explaining how she had difficulty recalling a point previously made. In written submissions the claimant described how “During normal day to day conversations with people whether it is one person or more than one I have difficulty concentrating and understanding and participating in those conversations as others do. My inability to understand, prepare and make written or oral submissions at the end of the previous hearing demonstrate that this difficulty is substantial.”

30 In oral evidence the claimant stated she stuttered, got her words back to front and had difficulty concentrating. In oral evidence the claimant described her stuttering as a “anxiety tick. Where I can’t get my words out...and go blank – in a pressured environment like this” referring to the preliminary hearing.

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Understanding written information on first reading.

31 In the impact statement the claimant referenced “my difficulties with comprehension are not limited to information given orally. I also have difficulty comprehending written information, even basic written information and I have to read written information at least twice in order to understand it.” In written submissions the claimant stated “my need for repeated re-reading of written information or getting assistance from others is real and genuine and does I submit does amount to a substantial adverse effect. In order to understand handover information, I have to clarify this by repeating to a co-worker, nurse in charge or ward manager in a separate room. Although this was a reasonable strategy used in my last employment, this was not always maintained due to working in a ward setting due to the unpredictability.”

32 The psychologists’ reports confirm the claimant needs to re-read written information once to be able to understand it and answer questions about it. In her impact statement the claimant refers to having to read written information at least twice or get assistance. The claimant’s evidence is not supported by the medical reports, and I accept the submissions made by Mr Kight that the claimant’s evidence is exaggerated and prefer to rely on the medical evidence which was not disputed by the claimant and on which she relies. The 10 June 2021 report refers to the claimant “struggle to understand information which she can read accurately and need to reread information to process meaning.” The reference to the claimant needing to reread information is in the singular not plural and there is no indication the claimant needs to read information “at least” twice” and seek assistance.

33 The claimant’s evidence on cross-examination was she “always clarify the information” on social media and Twitter feeds. When it was put to the claimant on cross-examination that she had overcome any weakness in the auditory function by finding ways to resolve it and/or coping strategies the claimant accept this “to get me degree” describing her learning difficulty was “me not missing a part, it takes me time to digest what is happening.”

Writing down information.

34 In her impact statement the claimant explained how it would take her “around ten seconds” to write ‘milk’ and ‘bread’ when most people take 4 or 5 seconds, and at work she managed by “going through handover with a colleague in a quiet environment. “ In written submissions the claimant described how “I do write slower than others when recording vital information and more significantly then have difficulty understanding what I have written and comprehending the meaning and this does have a substantial adverse effect on my ability in this area. Although it was suggested by the judge, I would be given time to write down questions and then answer. I was not able to do this simultaneously due to my disability and how lengthy the hearing was. Another contributing factor of this was due to stress which exacerbates my symptoms. I was not able to continue making notes for the rest of the respondents’ cross examination.”

35 In oral evidence the claimant explained that she needs to make sure “there is a positive outcome and attention to detail it will take me time to write down.” The

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claimant's evidence is not supported by the psychologists report. The claimant's handwriting speed when being dictated to was judged to be "considerably faster than the expected adult rate". The speed at which the Claimant can free write was also measured to be in the "average range". I found the claimant had exaggerated her evidence, which could not be relied upon.

36 With reference to the claimant's reference that she would be given time to write down questions and then answer, but " I was not able to do this simultaneously due to my disability and how lengthy the hearing was." At the outset of the preliminary hearing reasonable adjustments were discussed and agreed with the claimant and parties referred to the Equal Treatment Bench Book, and later in the process were provided with a link.

37 The claimant agreed that she could write down all of the questions asked by counsel before she answered them. It was agreed she would be given time to write down the questions, seek clarification if needed and request a repeat of the questions before answering, which the claimant did. In direct contrast to the written submission the claimant did not indicate she was unable to write down questions before answering them at any stage throughout the first day of the hearing. It had been agreed the claimant would be given time to read any documents referred to by either counsel or the claimant, which the claimant did. The claimant actively took part in the preliminary hearing and provided a substantial amount of oral evidence, during which time she never complained that she was unable to write down counsel's questions and then answer them. It was apparent the claimant answered the questions put to her in cross-examination without any difficulties, other than the occasional request to Ms Kight to repeat the question.

38 It was also agreed the claimant would be given any number of breaks as and when required which the claimant took up, and I made it clear that the claimant would not be put under any time pressure. It became apparent when Ms Kight was making oral submissions that an adjournment was necessary in order that the claimant could be provided with the respondent's written submissions beforehand as it was clear she was struggling with the legal principles and case law, requesting a copy of Ms Kight's notes. In recognition that the claimant was finding the prospect of responding the Ms Kight's oral submissions daunting and making oral submissions herself, case management orders were agreed for the claimant to be sent Ms Kight's submissions before she prepared her own written submissions with a reasonable intervening period between the two events. The claimant produced a 4-page response with references to case law.

Law and conclusion: Disability status

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

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

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

42 Paragraph 5(1) of Schedule 1 to the EqA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, *likely* means 'could well happen' — the well-known case of Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL In assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored. Ms Farah has had no medical treatment and measures have not been taken to treat or correct her condition.

43 For any claim to succeed, the burden is on the claimant to show, on the balance of probabilities, something an 'impairment' whether it is a mental or physical condition. In the case of Millar v ICR [2005] SLT 1074, [2006] IRLR 112, the Court of Session held that a physical impairment can be established without establishing causation and, in particular, without being shown to have its origins in any particular illness. The focus should be on what the claimant cannot do, and this test is particularly relevant the claimant's case and the fact she has self-diagnosed that she was disabled by Auditory Processing Disorder does not go to the heart of the issue and my focus is on what the claimant maintained she could not do as set out in her impact statement and oral evidence.

44 It is not appropriate to have an examination for the purposes of discovering the causes of an alleged disability, since, whatever the cause, a disability which produces the effects specified in legislation will suffice. In considering what amounts to an 'impairment', its effect, not cause is what is of importance. This approach is set out in the Guidance issued under the EqA 2010, where (at para A8) it is stated that 'it is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded.

45 Ms Kight referred me to the Goodwin v Patent Office [1999] ICR 302, EAT, the EAT said that of the four component parts to the definition of a disability and judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows:

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'What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. **In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts.** Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.'

46 Appendix 1 to the EHRC Employment Code states account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that 'a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation' (our stress) — para 9. This was not an issue in Ms Farah's case.

47 Ms Kight also referred to Primaz v Carl Room Restaurants Ltd t/a Mcdonald's Restaurants Ltd and ors [2022] IRLR 194, EAT, the EAT held that there was no sufficient causal relationship between P's impairments and the restrictions that she voluntarily imposed on her day-to-day activities because of her beliefs about what would trigger her condition. P suffered from epilepsy and vitiligo and took steps to avoid what she believed, following her own research, to be triggers, including coffee, alcohol, cosmetics, ordinary cleaning products and sunlight. The EAT allowed CRR Ltd.'s appeal holding that the tribunal had been wrong to focus on the adverse effect of P's coping mechanism. The EAT accepted that, for the purpose of S.6 EqA, the impairment must cause the adverse effect on the person's ability to do normal day-to-day activities, and the test of causation is objective. When it is in dispute whether the impairment has the claimed effect, this must be determined by the tribunal on the evidence before it; it is not enough that the claimant truly believes that it does. Thus, in a case where the claimant asserts that engaging in a certain activity will risk triggering or exacerbating some adverse effect of the impairment itself, the tribunal must consider whether it has some evidence that objectively makes good that contention.

48 The focus must be on the extent to which the impairment adversely affects the claimant's ability to carry out normal day-to-day activities. Substantial is defined in S.212(1) EqA as meaning 'more than minor or trivial'. In determining whether an adverse effect is substantial, the tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability she would have if not impaired. 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

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beyond the normal differences in ability which might exist among people’ — para 8. This should not be interpreted as meaning that in order to assess whether a particular effect is substantial, a comparison should be made with people of ‘normal’ ability — which would be very difficult to ascertain.

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

50 The test is whether an adverse effect is ‘substantial’ in the light of the statutory definition: the Guidance and Code are supplementary to this. Ms Kight referred to the meaning of “substantial.” Section 212(1) EqA 2010 defines it as being something which is “*more than minor or trivial*”. In terms of establishing whether the effect of an impairment is substantial, the Guidance, paragraphs B2-B17 sets out several factors to be taken into consideration.

51 Paragraphs in section D of the Guidance provides an indication of the parameters as to what may constitute a normal day to day activity and the Appendix provides two illustrative lists of factors which it might be reasonable and unreasonable to regard as having a substantial adverse effect on a person’s ability to carry out day to day activities. “Normal day-to-day activities” is not intended to include activities that are normal only for a particular person or small group of people, nor does it include work of a particular form. Equally it does not include normal activities that the person in question is not actually required to perform in their day-to-day life - Vance v Royal Mail Group plc EATS 0003/06). In accordance with this test I found studying for a degree and taking exams did not fall under the definition preferring Ms Kight’s submissions on this point to the claimant’s.

52 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. With reference to Ms Farah and the time she states it takes her to write “bread and milk” being ten seconds as opposed to four/five does not amount to a substantial impairment. It is notable the 14 June 2016 report confirmed the claimant wrote at a rate of 30 words per minute “considerably faster than the expected adult rate of 24-25

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words per minute” and I find she was not a credible witness. In the free writing test the claimant wrote at a rate of 25 words pre minute, the highest in the range for students using “appropriate academic vocabulary and spelling.”

53 Another factor to be taken into account, relevant to the claimant’s claim, is ‘how far a person can reasonably be expected to modify 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. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities’ — para B7 of the Guidance. The Guidance gives the example of a person who needs to avoid certain substances because of allergies who may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect. The guidance is relevant to the claimant who, for example, moved to a quieter part of a busy shopping centre in order to have a conversation with friends, prepared shopping lists and made notes of conversations/instructions to as an aid to her memory all of which have reduced the effect of her condition on normal day-to-day activities with the result that the impairment is not “substantial,” and is in accordance with Section 212(1) EqA 2010 not something which is “*more than minor or trivial*”.

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

55 Paragraph B9 gives the example of a woman who experiences panic attacks who can achieve the day-to-day activity of travelling to work if she travels outside the rush hour. It states that in determining whether she meets the definition of disability, consideration should be given to the extent to which it is reasonable to expect her to place such restrictions on her working and personal life. Ms Farah imposed no restrictions on her day-to-day activities.

56 Paragraph B10 states that if it is possible a person’s ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment. The Guidance gives the example of someone who has dyslexia and whose coping strategies cease to work when he or she is under stress. There was no satisfactory evidence before me that the claimant’s coping strategy’s ceased to work when she was under stress, and it is apparent making lists, re-reading documents and having conversations in quiet areas were successful strategies for the claimant who achieved her nursing degree, translated for patients, and worked in a busy hospital training other nurses according to her job application referenced above.

57 Paragraph D22 states that an impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a

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substantial adverse long-term effect on how he or she carries out those activities. The Guidance is relevant to the claimant and her coping strategies.

Conclusion – applying the law to the facts

58 With reference to the first issue, namely, did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about being 17 November 2020 to 24 November 2020, I find on the balance of probabilities that the claimant has not discharged the burden of showing she had the impairment of auditory processing disorder as relied upon by the claimant, who self-diagnosed.

59 The claimant does have the impairment of a “*significant weaknesses in auditory working memory*” a condition for which she has been diagnosed. The respondent accepts that the claimant has specific learning difficulties arising from weaknesses in her auditory working memory, as identified in the 14 June 2016 psychologist’s report. The Respondent also accepts that the effect of that impairment is long-term. The key issue in this case is did it have a substantial adverse effect on her ability to carry out day-to-day activities, and it is this difficult issue I will be concentrating on taking the claimant’s day-to-day activities relied upon in the same order as above, individually, and then cumulatively.

60 Whatever label is placed on the claimant’s medical condition, when determining whether the claimant meets the definition of disability under the EqA the Guidance emphasises it is important to focus on what the claimant cannot do, or can only do with difficulty, rather than on the things that she can do (see para B9).

61 Turning to the individual allegations referenced above and applying legal principles to the facts.

Conversations in noisy places.

62 Meeting friends and having conversations in shopping centres and cafes are ordinary day-to-day activities, whether they be busy, noisy, or quiet areas. It is not unusual for people to have difficulties carrying out a conversation in a noisy place with or without impairments.

63 Ms Kight referred to the Appendix to the Guidance; “*Inability to hold a conversation in a very noisy place, such as a factory floor, a pop concert, a sporting event or alongside a busy main road*” as an example of something it would not be reasonable to regard as having a substantial adverse effect on normal day to day activities., and I took the view that the claimant being unable to hold conversations in busy noisy shopping areas and busy noisy cafes fell into this category. Clearly she has no such inability when it comes to conversing in quieter places and she is not prevented by her medical condition from visiting noisy places. There is no satisfactory evidence before me that the claimant experiencing difficulties having conversations in noisy places would be any different had she not have the impairment of a “*significant weaknesses in auditory working memory*.” On the balance of probabilities I find the impairment did not have a substantial adverse effect on the claimant’s ability to carry out day-to-day activities in respect of carrying out conversations in noisy places such hospital wards, cafes and shopping centres.

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Listening to the radio.

64 The fact that the claimant can listen to the radio and is unable to give family and friends the “full low down” about what was being said but “I will have an idea...I will try my best to keep up with it and have some sort of insight” does not fall under the statutory definition. On the balance of probabilities I find the impairment did not have a substantial adverse effect on the claimant’s ability to carry out day-to-day activities in respect of listening to the radio when music is not being played.

65 Ms Kight in submissions records the Claimant accepted in cross-examination that people who do not have a particular interest in a subject do not to pay enough attention to such programmes when they are on, to then be able to recall what has been said with any accuracy, for example, football matches the outcome of which the claimant may not be interested in. There was no satisfactory evidence before me that had the claimant not suffered from a significant weaknesses in auditory working memory she would have been better able to listen to the radio and give family and friends a “full low down” of what had been said rather than some “insight”.

Watching television.

66 I accept that watching a variety of television programmes is a normal day to day activity for the claimant. On the balance of probabilities I do not accept that the claimant was “unable to or have difficulty” watching television based on the medical evidence before me. The claimant’s evidence was not credible, and had she been incapable or had difficulties in watching television (which the claimant reported she had done all of her life) this would have been raised with both psychologists, and it was not. The claimant’s explanation that she failed to raise it because “I didn’t know how I was affected in my everyday life” was disingenuous and not credible. The claimant explained in oral evidence how she watched a wide range of different programmes ranging from current affairs through to films and box sets, which she could watch for 40-45 minutes at a time, and how she “binged” watching steaming series. This behaviour does not suggest the actions of a person who had difficulty watching television, and taking into account the fact that there was no reference of this difficulty in the medical evidence, I concluded the claimant had exaggerated her evidence and the reality was that she had not reported or mentioned this difficult because there was no substantial impact in 2016, 2022 or more relevant to my consideration, between 17 November 2020 to 24 November 2020.

67 With reference to the claimant’s use of sub-titles, I repeat my observation set out above, that the claimant’s reference to using subtitles rather than listen to the dialogue in a film, appears to contradict her assertion that she experienced difficulties understanding written information despite being able to read the words and this undermines her evidence further.

Understanding verbal instructions.

68 As the EAT pointed out in the case of Goodwin (above) the claimant may be able to perform many activities, such as speak three languages, translate for patients, pass her driving licence, study at degree level, achieve a nursing degree and work within a clinical environment, and the impairment may still have a substantial adverse

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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. I accept the claimant's submission that the fact she has studied for a nursing degree does not indicate her ability to carry out normal day to day activities was not substantially adversely affected: Paterson (above). The claimant submitted that her case "is a clear example that you can maintain a professional job which is a normal day-to-day activity, and have the effects of impairment awhile doing work related activity." I also accept the claimant's submission that the fact that she was able to cope in a career or with an academic situation does not mean that she was not substantially disadvantaged. However, on the balance of probabilities and based on the evidence before me, I do not accept the claimant was substantially disadvantaged in carrying out the normal everyday activities of reading, writing, comprehension and processing verbal communications and instructions.

69 The medical evidence is that the claimant has better than average ability at listening and talking notes, to which the claimant agreed. The claimant's maintains her issue is with understanding basic instructions and not a lecture at degree level. I have difficulties with the claimant's arguments bearing in mind she is capable of translating a medical history in a clinical setting. Ms Kight submitted that not only must the claimant have understood what the patient was telling her in one of her languages, but she was able to explain what that was in English to her colleague, and this does not suggest that the adverse effect of the Claimant's impairment on understanding or following instructions, even in a specialised setting, is substantial. I agree with Ms Kight. The reality is that the claimant can understand verbal instructions, and there is no satisfactory evidence before me that the substantial adverse of the claimant's impairment on understanding or following instructions is substantial.

70 The same point applies to the claimant keeping a shopping list, a reasonable strategy for the claimant and most of the population, to ensure they do not forget to buy the items. I accepted on the balance of probabilities that writing a shopping list or receiving a text from a friend removes or minimise any adverse effect to such an extent that it becomes no more than minor or trivial in relation to the claimant's ability to shop.

71 Finally, I accept that the taking of notes either in a clinical hand-over situation, or at university lectures and passing exams are not normal day-to-day activities as submitted by Ms Kight. I accept it requires a level of attainment beyond huge swathes of the population, as does passing exams, however, this is not the test. Mr Justice Elias in Patterson 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 applying the statutory definition of more than minor or trivial. It is uncontroversial the claimant has used coping strategies for a number of years, to prevent or reduce the effects of the impairment on normal day-to-day activities hence her success at degree level and professionally as a nurse. Taking notes of what is being said forms part of that strategy, and in the claimant's case her strategy has altered the effects of the impairment to the extent that they are no longer substantial, they are minor or trivial and no longer meet the definition of disability. The claimant is capable of successfully taking notes, whether it is a shopping list, lecture notes, hand-

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over notes, and in so doing she is fortunate that the impairment ceases to have a substantial adverse effect. The fact the claimant makes notes has not resulted in her avoiding normal daily activities, the notes have supported her in achieving academic and professional success. This is not a case where the claimant has placed any restrictions on her working and personal life, and there is no satisfactory evidence that the claimant's ability to manage the effects of the impairment will break down so that effects will sometimes still occur, i.e. that her coping strategy of taking notes has ceased to work. The claimant's submission that she was unable to take notes in order that she could deal with the evidence at the preliminary hearing was not evident by the claimant's behaviour, the way she gave evidence and conducted herself when cross-examining Andrea Boylan, and when she was challenged by Ms Kight on this, failed to provide a coherent explanation to the Tribunal. It is notable the claimant made no reference to being unable to take notes of the hearing until it came to oral closing submissions when she wanted sight of Ms Kight's notes.

72 With reference to the claimant's behaviour and how she conducted herself at the preliminary hearing, I have not used it as a basis of drawing a conclusion that her behaviour was representative of the claimant generally in the relevant period. It is merely a factual observation of what transpired at the preliminary hearing which undermined the claimant's submissions on this point and raised credibility issues.

Conversations with people.

73 The psychologists' reports do not refer to the claimant stuttering and I preferred Ms Kight's submission that there is no evidence of it being a result of her identified impairment. Both reports refer to the Claimant having "good concentration and attention" which the claimant accepted in cross examination was true "most of the time" as recorded above. There is no medical evidence to the effect that the claimant was and is inarticulate or struggles to keep up conversations with people. Clearly, the claimant can successfully converse with people, including the psychologists, her friends (providing she is not in a busy noisy area), her family discussing what she had heard on the radio and television, patients by translating their care needs, handovers which she records in writing by taking notes and those lecturers/tutors at university when she was reading for her degree.

74 I have dealt with the claimant's evidence as recorded above, having found her to have been a less than credible witnesses, preferring the written and oral evidence of Andrea Boylan that she did not recollect the claimant came across with any difficulties at the interview when it was put to her by the claimant that she had stuttered, searched for words and her mind had gone blank. Andrea Boylan gave credible evidence that the claimant had come across to her as articulate, could answer any question without pause or difficulty, no stutter or problems or issue articulating the answer to the question, a description that fit the claimant's behaviour at this liability hearing, despite the reference by her to it being a pressured environment, which is unsurprising given the claimant is a litigant in person involved dealing with a preliminary hearing.

75 It was put to the claimant by Ms Kight that she had not stuttered or got her words back to front at the interview with Andrea Boylan and throughout the first day of the preliminary hearing. The claimant disputed this referring to an interview question

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she had struggled with at the interview, and maintaining she had stuttered during the preliminary hearing when “I can’t get words out.” It was put to the claimant that she had been able to answer comprehensive questions without help, had read documents accurately and read out a document accurately. Ms Kight was correct in her analysis of the claimant’s performance at a preliminary hearing which any party would find stressful, even with the implementation of the reasonable adjustments that were put in place for the claimant. The claimant did not stutter, she did not go blank, there were no instances of the claimant not getting her words out, she did not get her words back to front (which the claimant conceded), she extensively cross-examined Andrea Boylan without any difficulties and was able to answer questions on cross-examination, read documents, give evidence, and make oral closing submissions without difficulty.

76 Ms Kight is also correct in her submission that in giving her evidence the claimant demonstrated not only an ability to understand many of the questions she was asked without there being a need to repeat them, but also an ability to retain information from earlier questions and clarify her answers to several points she had raised in her evidence earlier, as well as explain and expand upon her answers. According to the claimant’s written submission, all of this was done without her taking any notes despite the invitation that she do so.

77 The reality is that the claimant can understand and have conversations with people, and there is no satisfactory evidence of any substantial adverse effect on the claimant. On the balance of probabilities I find the Claimant’s impairment does not have a substantial adverse effect on her ability to carry out normal day to day activities relating to verbal communication.

Understanding written information on first reading.

78 The psychologists’ reports confirm the Claimant needs to re-read written information once to be able to understand it and answer questions about it. The reference is to the claimant needing to re-reading information is in the singular not plural. There is no indication the claimant needs to read information “at least” twice” and seek assistance from other people in order to understand what she is reading and having found the claimant was not a credible witness on a number of matters, I concluded that her evidence could not be relied upon bearing in mind the earlier evidence that she gave concerning being unable to watch television without using subtitles and stuttering.

79 Ms Kight is correct in her submission that there was no evidence before me to suggest that the effect of the Claimant’s impairment on her comprehension of written information on its first reading prevents her from doing any normal day-to-day activities or that she avoids doing any such activities as a coping strategy. Ms Kight accepts having to re-read information once would have some impact upon the amount of time it takes the claimant to do normal day-to-day activities which involve understanding written information, it is submitted that this is not sufficient to amount to a substantial adverse effect. I agree.

80 Ms Kight referred to the Appendix to the Guidance which provides the following example as a factor which if experienced by a person it would be reasonable to regard

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as having a substantial adverse effect on normal day-to-day activities: “Persistent and significant difficulty in reading or understanding written material where this is in the person’s native written language, for example because of a mental impairment, or learning disability...” submitting that the claimant needing to re-read information once is not demonstrative of a “significant difficulty”, particularly when one considers that the claimant’s evidence is that she is tri lingual.

81 I accepted Ms Kight’s submission that there is no evidence to suggest that the effect of the Claimant’s impairment on her comprehension of written information on its first reading prevents her from doing any normal day-to-day activities altogether, or that she avoids doing any such activities as a coping strategy. The claimant’s need to re-read written information prevents or reduces the effects of the impairment on normal day-to-day activities and I repeat the observations made above concerning the strategies put in place by the claimant and the lack of any satisfactory evidence that her ability to manage the effects of the impairment will break down so that effects will sometimes still occur, i.e. that she is unable to re-read documents. I find on the balance of probabilities that the Claimant’s impairment does not have a substantial adverse effect on her ability to carry out normal day-to-day activities which require her to understand written information.

Writing down information quickly.

82 There was no satisfactory evidence that the claimant’s impairment had a substantial adverse effect on the speed with which she can write things down. The claimant’s evidence is not supported by the psychologists’ reports. The claimant’s handwriting speed when being dictated to was judged to be “considerably faster than the expected adult rate”. The speed at which the Claimant can free write was also measured to be in the “average range”. I found the claimant had exaggerated her evidence, which could not be relied upon.

83 In conclusion, taking into account my findings above, on the balance of probabilities I found any adverse impact of it on the claimant’s ability to carry out normal day-to-day activities was no more than minor or trivial. The claimant did not have medical treatment, including medication, or take other measures to treat or correct the impairment. The claimant has not discharged the burden to show she has an impairment which falls under section 6 of the EqA during the relevant period, the Tribunal does not have the jurisdiction to consider the complaints of disability discrimination, which are dismissed.

84 At the end of oral closing submissions the claimant indicated that she intended to appeal if I found against her. We had a brief discussion when I explained that she had every right to appeal and information concerning appeals to the EAT will accompany this reserved judgment and reasons.

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28.6.22
Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
28 June 2022

FOR THE SECRETARY OF THE TRIBUNALS