



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112457/2021

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Held via Cloud Video Platform (CVP) on 5 April 2022

Employment Judge J D Young

Mr T Burke

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**Claimant
Represented by:
Ms McKillen
assisted by
Ms Walker -
Student Advisers**

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Turning Point Scotland

**Respondent
Represented by:
Mr C Asbury -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was a disabled person within the meaning of s6 of the Equality Act 2010 in the period between 25 November 2020 and 13 August 2021.

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REASONS

Introduction

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1. In this case, the claimant has presented a claim to the Employment Tribunal complaining that he has been unfairly dismissed, discriminated against because of the protected characteristics of disability and age and that there was failure to pay him a redundancy payment.

2. The respondent denies all these claims; raises time bar and disability status as preliminary issues; and maintains that after due process the claimant was fairly dismissed on grounds of his ill health with effect from 13 August 2021.

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3. At a preliminary hearing of 18 January 2022, it was agreed that this preliminary hearing would consider the issue of whether or not the claimant

was a disabled person in terms of section 6 of the Equality Act 2010 (“the Equality Act”)

The hearing

4. At the hearing, I heard evidence from the claimant and his daughter Tressa
5 Burke. The parties had helpfully liaised in providing a single file of documents
paginated 1-76 (J1-76).

Relevant law

5. Section 6 of the Equality Act provides a definition of “disability” as follows:

(1) *A person (P) has a disability if:*

10 (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.*

6. Section 212 (1) of the Equality Act provides that “*substantial*” means more
than minor or trivial.

15 7. Schedule 1 of the Equality Act gives further detail on the determination of a
disability. For example, Schedule 1, paragraph (1)(i) provides that the effect
of an impairment is long-term if it “*has lasted for at least 12 months, is likely
to last for at least 12 months or is likely to last for the rest of the life of the
person affected*”.

20 8. Paragraph 2 (ii) of Schedule 1 provides that if an impairment ceases to have
a substantial adverse effect, it is to be treated as continuing to have that effect
if that effect is likely to recur. In that context, “*likely to*” has being determined
by the House of Lords as “*could well happen*” rather than “*more likely than
not*”. (*SCA Packaging Ltd v Boyle 2009 UK HL37.*)

25 9. Paragraph 5 of Schedule 1 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 correct it
and but for that, it would be likely to have that effect.

10. The Tribunal must take into account statutory Guidance on the Definition of Disability (2011) which stresses that it is important to consider the things that a person cannot do or can only do with difficulty (B9). This is not offset by things that the person can do which was confirmed in **Aderemi v London & South Eastern Railway Limited** 2013 ICR 391. Day to day activities are things people do on a regular daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work relates activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc (Guidance D2/D7).

Issues

11. The respondent accepted that the claimant had a physical impairment in the period 25 November 2020 to 16 June 2021 caused by COVID but not thereafter. The Tribunal had to determine the following issues:
- (i) The relevant period when the claimant had a physical impairment?
 - (ii) Did that impairment have an adverse effect on his ability to carry out normal day to day activities?
 - (iii) If so, was that effect substantial (as in more than minor or trivial)?
 - (iv) If so, was the effect long term?
 - (v) If the impairment had ceased to have a substantial adverse effect at the relevant time, was the substantial adverse effect likely to recur?
12. From the evidence led, admissions made and documents produced, I was able to make findings in fact on the issues.

Findings in fact

13. The respondent is a charity which provides services to people in need across Scotland including those with learning disabilities, those experiencing homelessness and those suffering from a range of mental health conditions.

14. The claimant was employed by the respondent in the role of caretaker/security in the period from 23 April 2001 until his employment was terminated on 13 August 2021. The respondent's reason for dismissal related to the claimant's continuing absence from work.
- 5 15. The claimant first contracted COVID-19 with a positive test on 15 November 2020. (J7) He became absent from work and did not return prior to dismissal.
16. The symptoms of COVID were "*very mild at first*" for him albeit his wife was severely affected. He described his symptoms as being "*flu like*" over the isolation period. However, after the isolation period, he developed severe
10 headaches and symptoms of fatigue.
17. He stated that in the time following isolation, after "*waking showering and dressing*", he would require to lie down to rest from fatigue and exhaustion and that he struggled standing for long periods. He had been accustomed to helping around the house in activities such as cooking meals, ironing and
15 shopping but those activities ceased due to a lack of energy. He had been accustomed to walking to the local shop "*at the end of my block to buy a newspaper*" but that became difficult and ceased. Problems were exacerbated by joint pain in his arms, legs and shoulders together with a loss of appetite. He also found that his concentration was not the same in that he
20 could be watching a TV programme and "*drift off*". Additionally, his sleep pattern was "*wrecked*" as he would wake up and be unable to return to sleep. That was still an issue for him.
18. He did not feel well enough to socialise or attend important events such as his uncle's funeral on 12 December 2020 because of fatigue and headaches
25 which was very much out of character for him. Additionally, in December 2020, albeit three households were permitted to meet indoors, he did not attend any Christmas celebrations.
19. He found the symptoms unpredictable in that at certain times he felt he would be improving but only to again suffer from fatigue and exhaustion. That
30 unpredictability made him become anxious.

20. His daughter, Tressa Burke, worked with Glasgow Disability Alliance supervising a number of people who to a large extent were disabled. She had worked with disabled people for about 30 years.
21. She gave general assistance in domestic matters to her mother and father with whom she was in regular contact. She advised that her father was *"fatigued for months"*, had no appetite and lost weight. She described her father as normally active in getting up and doing lots of chores around the house, walking to get his paper and other essential supplies. However, he was unable to cook or shop anymore and she made arrangements for the shopping to be delivered.
22. She considered that only from around January 2022, had matters improved and that now sleep disruption seemed to be the main issue for him. Prior to that time however, while her father had been a great reader, he was simply unable to concentrate for any length of time. She confirmed that she had not seen him in Christmas 2020 and while *"Zoom calls"* had been arranged in January 2021, that did not happen as he *"could not be bothered"* which was very unlike him. She had seen him in a garden gathering in April 2021 when he had indicated that he was hoping to return to work but knew that he was *"zonked"* and *"exhausted for days after"* and was unable to return to work. She confirmed that there were days when he seemed to feel better and then exhaustion would come over him.
23. The claimant advised that his health had gradually improved and as at April 2022, no longer suffered from joint pains and headaches but still experienced some fatigue and his sleep pattern was still very disrupted leading to tiredness in the day. However not until around beginning January 2022 had he *"began to feel better"* with continuing fatigue being the main issue and flare up of joint pain. Those symptoms continued to affect his day to day activities in domestic chores and concentration.

Claimant's medical records

24. The claimant's medical records (J8-12) noted contact with the Meadowbank Surgery by telephone given the restrictions on *"in person"* consultation. The

notes indicate that he advised the practice on 25 November 2020 that he was unable to return to work and a Statement of Fitness to Work (“fit note”) was issued for the period to 3 December 2020. Further calls to the surgery resulted in fit notes stating unable to work being issued to 7 January 2021 with a note on the records of 22 December 2020 indicating the next contact was to “clarify nature of symptoms - ? post-viral fatigue” It is not clear if any discussion took place with a GP at this point but the diagnosis noted on 7 January 2021 was that the claimant had had Covid and was “generally unwell”.

25. Further fit notes were issued and on 21 January 2021, the claimant was advised to speak to his doctor on the next contact to “clarify symptoms”. That discussion with the claimant’s GP took place on 3 February 2021 when he spoke with Dr Amanda Gibson. A fit note as unable to work was issued to expire 10 March 2021. The note stated at that time:

“COVID in November, still a bit fatigued in the middle of the day, working still in addiction and support, no sob, no cough, feeling otherwise well likely post COVID, advised on gentle exercise to try and get back to baseline.”

26. A further fit note was issued on 10 March 2021 on the basis of “fatigue”.

27. Further fit notes were issued without direct consultation with the claimant’s GP through to July 2021. The notes indicate that the claimant was requesting those fit notes on the basis of the “after effects of long COVID – still fatigued” and “post viral fatigue syndrome” (J10-11)

28. The claimant’s payment of sick pay from the respondent ceased around June 2021.

29. A telephone discussion with a Dr Mena Kadhim took place on 16 July 2021. At that time, it was noted that the claimant was “still feeling fatigued post COVID – worked for a homeless unit – not getting paid when off sick but does not mind – still feels needs time off. And agreed to have routine blood checks.” He was then issued with a further fit note as unable to work to 27 August 2021 with the diagnosis as “post viral fatigue syndrome”. (J10)

30. The blood checks requested by Dr Kadhim disclosed no issues (J1-6).

31. The claimant was challenged on the absence of particulars within the GP notes which reflected the severity of symptoms which he claimed. The claimant advised that (i) the symptoms varied from day to day; (ii) that he had advised his GP practice of symptoms and was not responsible for what was contained in the notes; (iii) there was no reason for him to exaggerate or seek to be deceitful about his symptoms as he had been a long serving employee without history of absences, there was no sick pay being paid from around June 2021 and so no motivation for him to continue to be off sick.

10 *Occupational health reports*

32. The claimant was referred to “Integral Occupational Health” by the respondent. He attended a telephone assessment in April 2021 and a report was issued 27 April 2021 (J67-68). That advised that the claimant and his wife had COVID-19 infections in November 2020 and whilst the claimant’s *“respiratory symptoms and fever were mild, he did develop significant fatigue.”* However that had *“decreased”* over the intervening months and it was reported that the claimant was now *“lightly exercising daily and reporting no difficulties concentrating. His night-time sleep quality has returned to his usual baseline. Terence is now keen to return to work.”* The occupational health report then concluded that the claimant was *“medically fit to return to work”* with advice regarding a phased approach to gradually increase shift times to the usual 12 hours and that it was *“unlikely”* that the disability provisions of the Equality Act 2010 would apply.

33. The claimant did not return to work. He stated that he was keen to do so but found that the effects of the COVID-19 infection had *“peaks and troughs”*. On some days he would feel that he was improving only to feel worse the next day or a few days later and the fatigue was then still extreme. Prior to this planned return to work, he *“suffered an exacerbation of symptoms”* and was signed off by his doctor for a further period of four weeks in line with the fit note issued 5 May 2021 (J10).

34. The absence of the claimant continued and so a further Occupational Health report was requested and report following a telephone consultation made on 16 June 2021 (J69-70). It was noted that on the previous assessment, the claimant had indicated that he was making good progress with recovery from COVID-19 and at that point keen to return to work. However, he had become concerned about “*episodes of daytime sleepiness*”. It was stated:

“I evaluated Terrance’s daytime sleepiness today. If Terrance is seated with little distraction he can fall asleep. This is occurring predominately in the afternoons and evenings and is more likely if he has slept poorly the preceding night.

That said, Terence can maintain alertness if kept busy, such as when going for walks or shopping. He reports no persistent concentration difficulties. Terence’s symptoms as reported today would be in keeping with normal daytime sleepiness and as such not to the degree that it would be of significant medical concern. I have reassured Terence regarding this.”

35. Again, it was indicated that it was “*unlikely*” that the disability provisions of the Equality Act 2010 would apply to the claimant.

36. Again the claimant advised that the symptoms exacerbated after this discussion and there was a relapse of symptoms of extreme fatigue. A fit note had been issued on 2 June 2021 and that was renewed on 1 July 2021 with the diagnosis “*post viral fatigue syndrome*”.

Merger discussion

37. Around 16 June 2021, the claimant was advised by the respondent that there was an intention to combine the respondent’s drug crisis operation with the homelessness services which would result in a new integrated service. That affected the claimant and others. A formal consultation meeting was held on 1 July 2021 regarding this proposal followed by a letter to him of 9 July 2021. There was concern expressed by the claimant at that time about his proposed role in the merged operation as there were nightshift changes and he considered that the job that was being offered was not a match for his existing

role. That was an issue for others who also considered that they were effectively being made redundant.

Dismissal

5 38. Dismissal proceedings affecting the claimant commenced prior to any second consultation meeting on the effect of the merger proposal resulting in the claimant's dismissal with effect from 13 August 2021. The letter of dismissal (J73-74) stated:

10 *“having reviewed the capability report including occupational health opinion closely, and taken the details of our discussion into consideration, it is my view that you remain too ill to return to work. It is my view that you remain too ill to return to work and there appears to be nothing further we can do to adjust your duties or work environment that would make your return more likely. In addition, there does not appear to be a potential date on which there is a likelihood of you being able to return to full duties in the future.”*

15 It was advised that as a charitable organisation, the respondent was not able to hold the post open and so given the *“uncertainty around a potential return to work date”*, the claimant was dismissed on the grounds of ill health.

COVID Report

20 39. The TUC report entitled “Workers experience of long COVID” (J78 – 1007) related to evidence of “long COVID”. It advised that the most common symptom was fatigue although other symptoms related to concentration, joint pain, headache and muscle pain. It also stated that the most common time for those responding to the survey to have experienced symptoms was between 3-6 months (35% of responders) whilst others experienced symptoms for 12 months or more (29% of responders) (J89 – 90). There was also comment that the symptoms varied over time (becoming worse on some days than others) (J89-91).

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Submissions

40. I was grateful for the submissions which were made and no discourtesy is intended in making a summary.

For the claimant

5 41. Reference was made to the statutory test on disability at section 6 of the Equality Act 2010 and emphasis placed on section 2 (ii) of Schedule 1 to the Act indicating that substantial adverse effect is to be treated as continuing if the effect is likely to recur.

10 42. The physical impairment relied upon in this case was “*post viral fatigue syndrome*” or “*long COVID*”. The claimant had indicated that the symptoms were unpredictable with occasional improvements and then worsening. As a consequence, the claimant was absent from work from the time of his positive test in November 2020 until dismissal on 13 August 2021 and as of March 2022, experienced residual symptoms. The effects impacted his day to day life in the manner spoken to by him and observed by his daughter.

15 43. Reference was made to **Goodwin v Patent Office** (1999) IRLR 4 and the sequential steps recommended to be followed in determining whether the definition of disability was met. The guidance emphasised the consideration of the effects of an impairment rather than its cause being the approach adopted in **Walker v Sita Information Network Computing Limited** UKEAT/0097/12.

20 44. The effect on the claimant did relate to his day to day activities. The claimant had spoken of the difficulties in showering and dressing; standing for long periods; preparing meals; walking long distances; concentration and sleep disruption. That had affected him in socialising. These were more than minor or trivial effects.

25 45. While the claimant had not suffered substantial adverse effects in a consistent manner, the symptoms were likely to recur and therefore should be deemed to have long term effect within the parameters of the legislation. The claimant had indicated to occupational health that he was keen to return to work but

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later suffered an exacerbation of his symptoms. In line with the questions that should be answered in **Swift v Chief Constable of Wiltshire Constabulary** [2004] IRLR 540, there was substantial adverse effect which was likely to recur and so met the disability definition.

- 5 46. In those circumstances, the case should proceed to a hearing in respect of discrimination arising as a consequence of disability, indirect disability discrimination, and failure to make reasonable adjustments.

For the respondent

- 10 47. In relation to the claims made, the relevant time to consider whether the claimant was disabled is the date of the alleged discrimination (**Richmond Adult Community College v McDougall** 2008 WAL40959). It was stated that the requirement to work nightshift was one suggested on 9 July 2021 (albeit a proposal in the context of the consultation process); the failure to exempt nightshift working was also that date (albeit again a proposal) and the dismissal was on 13 August 2021 being allegedly an act of discrimination arising from disability. The relevant time therefore was 9 July 2021 to 13 August 2021.

- 15 48. The burden of proof rested on the claimant and the standard of proof was on the balance of probability (**Kapadia v London Borough of Lambeth** 2000 WL775032).

- 20 49. In this case, the claimant relied on the physical impairment of post viral fatigue syndrome as a result of COVID-19.

- 25 50. So far as the GP records were concerned, the first mention of that issue was on 22 November 2020, but the diagnosis is “*generally unwell*”. There was no detail given in the GP notes of the symptoms of which the claimant complains. It seemed that the claimant was in receipt of fit notes on the basis of what he was telling the GP practice rather than any informed medical examination. An entry on 21 January 2021 was an example of the claimant’s GP making a decision to provide a fit note and without speaking to the claimant. The entry on 3 February 2021 when he asks for a further fit note only has the details that
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he was "*feeling a bit fatigued in the middle of the day*" and was "*otherwise generally well*". That would be insufficient to amount to a disability. The GP seemed to be advising "*gentle exercise to try and get back to baseline*". The lack of detailed examination of the claimant is a feature of the GP records.

- 5 51. The Occupational Health report of 24 April 2021 was the first piece of evidence to provide any substantive insight into the health condition and did not support the claimant's contention that he was a disabled person. The recommendation at that time was that the claimant should return to work and the disability provisions are unlikely to apply. It was noted that the claimant
10 was "*keen to return to work*".
52. A further referral was made on 16 June 2021 with the same result namely that the claimant disclosed no evidence in line with the disability impact statement or his statement in evidence that he was extremely fatigued and unable to conduct day to day activities. The claimant at this point appears to make no
15 reference to the variability or occurrence of his symptoms. If he had made that observation, it would have been recorded in the report.
53. The only entry after this event is on 16 July 2021 when it is recorded by the GP that the claimant was "*still feeling fatigued*" post COVID and "*still feels needs time off*". The claimant made no approach to his GP after the
20 consultation on 16 July 2021.
54. No medication was prescribed. It would not appear that the claimant sought any advice on what medication might improve his symptoms.
55. It was submitted that the only documentary evidence that contained any substantive medical opinion on the claimant's health condition were the
25 reports from occupational health and on each occasion the claimant was determined to be fit for work. While the claimant may well have had an impairment due to post viral fatigue in the weeks after the isolation period in November 2020, it would appear his health had gradually improved with any sleepiness or fatigue experienced from 16 June 2021 insufficient to meet the
30 test of disability. It was submitted that the claimant had not provided sufficient

evidence to establish that he suffered from a physical impairment at the relevant time.

56. In any event, it was denied that any impairment impacted on his day to day activities to any substantial extent. There was nothing in the GP records or occupational health reports which would suggest that an impairment adversely impacted on his ability to carry out day to day activities.
57. Around June 2021, the proposed shift rota for the claimant was proposed and the claimant referred to general anxiety. (disability impact statement, paragraph 14 – J14). However, there was no medical evidence which would show that anxiety was a symptom that he suffered. There is no pleading of any mental impairment and so anxiety would not be a relevant consideration in this case.
58. It was submitted that the claimant's views on the proposed new structure and that he wished to be made redundant was the real reason why he did not wish to return to work rather than his health.
59. It was submitted that the likelihood of the claimant's disability lasting for 12 months should be decided at the date of the alleged act of discrimination (9 July 2021 – 13 August 2021). It was not possible for the condition to have already lasted for 12 months by 13 August 2021 given that the alleged condition commenced after the isolation period around 25 November 2020. The issue was then whether it was "*likely to last*" for 12 months and an assessment has to be made at the date of the alleged discriminatory acts. In **SCA Packaging Limited v Boyle** [2009] UKHL37, the House of Lords determined that "*likely*" meant that something "*could well happen*". Again, there was no medical evidence produced to show the likelihood of the condition lasting until the end of November 2021. The claimant had no inkling as to how long it might last as he preferred to hope that it would "*get better soon*".
60. It was also submitted that the evidence of Tressa Burke should be treated with some caution being the claimant's daughter; in her professional life she had spent a considerable time advising those with disabilities and would have

a familiarity with the Equality Act and the definition of disability; there would have been long periods when she had no direct contact with the claimant given lockdown rules; and she was not a medical professional.

Discussion and conclusions

- 5 61. There was no dispute in this case regarding the tests to be applied. It is necessary to consider the questions set out in **Goodwin v Patent Office**.

Did the claimant have a physical impairment?

62. The physical impairment relied upon is “long COVID” or “post viral fatigue syndrome”. Either way, it arises out of the claimant contracting COVID-19 in
10 November 2020. There is no dispute that he did contract COVID at that time and that the isolation period would end around 25 November 2020.

63. The information on COVID has included the phenomenon of long COVID as a recognised difficulty and the possible outcomes of those contracting COVID-19. The TUC report makes reference to their members’ experience of the
15 condition and that was largely reflective of the claimant’s evidence on the matter.

64. The difficult issue is whether the claimant was exaggerating his symptoms and not being truthful in his account given the lack of medical evidence to
20 support his claims that he suffered from extreme fatigue, joint pain, lack of mobility, sleeplessness and general lack of energy which affected his day to day activities.

65. I did find that the claimant and Tressa Burke gave their evidence in a straightforward and credible manner. However the difficult matter to judge is whether the acceptance of credibility is well founded given that the GP reports
25 did not particularise the issues that affected the claimant in the period November 2020 – July 2021 and that two OH reports would also counter the evidence given.

66. On the balance of probability, I considered that the evidence given by the claimant and his daughter was to be accepted as regards the condition of long

COVID and its effect on the claimant. I had the following reasons for that view:

- (i) The first instance as indicated, I did feel that their evidence was given in a credible manner.
- 5 (ii) I was conscious that in the period until the last fit note was provided to expire 27 August 2021 there were severe restrictions on the “*face to face*” meetings with GPs. It is the case that on various occasions the claimant’s request for fit notes was given to the practice’s receptionist and a fit note was then issued by a GP without consultation with the claimant. There appeared to be three telephone discussions with a GP
10 in the period November 2020 – July 2021 (7 January 2021, 3 February 2021 and 16 July 2021). The claimant advised that he had told his GP in the practice of his symptoms he was experiencing. There was no particularisation given within the notes but I would not take that as
15 convincing evidence that the symptoms did not exist. The essential diagnosis was of “*post viral fatigue syndrome*” caused by COVID-19 and it would appear there had been that assessment by telephone discussion. In particular that was the assessment as a result of the telephone consultation of 16 July 2021 when the fit note to expire 27
20 August 2021 was provided. Perhaps such consultation is not as exhaustive in person consultation but that was a way in which matters were being dealt with in the period.
- (iii) I accepted the claimant’s evidence that his symptoms fluctuated. That would be in line with the general understanding within the TUC report
25 and generally that there can be “*good days and bad days*” and periods when the symptoms are not as pronounced as other periods.
- (iv) The claimant accepted that in April 2021, he was keen to return to work and felt when he spoke with the occupational health advisor that he could do so. That turned out not to be the case. It was around this
30 time that his daughter described a family gathering outdoors when his father was talking of returning to work but a few days later when

checking he found that he was “zonked” and “exhausted for days after”. I accepted that evidence.

5 (v) The OH report of 16 June 2021 stated that the claimant was fit to return to work. Again the claimant advised that the symptoms of fatigue returned. It was difficult to understand why the claimant would pretend that he suffered only minor symptoms in the period through to end June 2021. The suggestion was that the symptoms were not the real reason for absence because discussions had commenced regarding an integrated structure and the claimant had strong views that the proposed new role was not a “match” and that he should be made
10 redundant. It would appear that no direct proposal was put until at earliest 1 July 2020 so the evidence would not suggest that formed a reason for his absence prior to that time.

15 (vi) Also, sick pay apparently had ceased around June 2021 and he was not on benefits so there was no financial benefit to the claimant remaining off ill at that time. He had been engaged by the respondent for some 20 years and that length of continued service did not suggest that he was likely to be pretending to be unfit for work when he was not.

20 (vii) The issue would then become whether the real reason for absence beyond 1 July 2021 was not post viral fatigue syndrome caused by Covid-19. Firstly as indicated there was telephone assessment with a GP on 16 July 2021 with that continued diagnosis. Secondly the suggestion that he was not really ill but had not returned to work
25 because of his disquiet about the new role seems undermined by the respondent’s own view of matters when it came to determine dismissal after a formal ill health review meeting (via Zoom) on 9 August 2021. The letter sent to the claimant on 13 August 2021 (J73-74) records that the claimant advised he was “still experiencing symptoms of extreme
30 fatigue. You explained that your symptoms alter from one day to the next specifically one day you can wake up feeling fine and then you suddenly feel very tired and sit down and/or go to sleep. You described

5 *that when you go for a short walk, your legs and body ache*". The letter goes onto indicate "*having reviewed the capability report including occupational health opinion closely and taking the details of our discussion into consideration, it is my view that you remain too ill to return to work. It is my view that you remain too ill to return to work and there appears to be nothing further we can do to adjust your duties or work environment that would make your return more likely. In addition, there does not appear to be a potential date on which there is a likelihood of you being able to return to full duties in the future.*" At

10 that time, the respondent was in possession of the GP fit notes, took into account what was said within the two occupational health reports and also had the benefit of the claimant's own account of his symptoms and health condition. The conclusion was that he was "*too ill to return to work*" and would reinforce the view that the claimant's account was

15 credible. There was no conclusion that the real reason for a non return to work was only because he was unhappy with the proposed role in the integrated service. On balance therefore, I did consider that the claimant suffered from the physical impairment of post viral fatigue syndrome caused by Covid -19 and that lasted in the period through to

20 13 August 2021; and included the period which the respondent considered relevant namely between 9 July 2021 and 13 August 2021.

Did that impairment have an adverse effect on the claimant's ability to carry out normal day to day activities?

25 67. Given the acceptance of the claimant's evidence, then I consider that the impairment did have an adverse effect on day to day activities. His account included what he could not do by way of walking to the nearby shop to collect his paper as he had done; help with the cooking and ironing chores; shopping. He also had difficulty in reading for any length of time or following a TV programme. His sleep was also disturbed. That affected his socialising and

30 family events. As indicated the syndrome affected him through to 13 August 2022 as did the adverse effects with fatigue being the main issue latterly.

Was that effect substantial?

68. The seriousness of the effects varied but over the relevant period, it appeared that the adverse effect was substantial meaning more than minor or trivial. One requires to concentrate on matters that the claimant could not do and as indicated, he was not able to do the cooking chores and ironing chores that he had done; walk to the shop nearby; sleep through the night; concentrate for any length of time certainly in the period to around April/May 2021 and in my view these effects were more than minor or trivial. Thereafter it was more difficult to assess the position through to 13 August 2021. However the claimant's position was that fatigue affected him badly until around January 2022 and that could "floor him", sleep remained disturbed and there could be flare up of joint pain. He gave a similar account in August 2021 of symptoms (J73/74) and described requiring to sit and rest "and/or go to sleep" and his legs and body aching on a short walk. That affected his ability to continue with household chores, shop, and his concentration to an extent more than minor or trivial

Was the substantial adverse effect long-term?

69. It is accepted that the question of whether an effect is long-term has to be viewed from the date of the alleged discriminatory act which in this case was between 9 July and 13 August 2021.

70. It would appear that such is the nature of this particular condition that it is very difficult to predict when it may be resolved. The issue is effectively whether it "could well happen" that the condition would subsist until 25 November 2021. The claimant was dismissed by letter of 13 August 2021 in which it is recorded that he "explained that you do not know when, if at all, you would be fit enough to return to work". The respondent's own view was that "there does not appear to be a potential date on which there is a likelihood of you being able to return to full duties in the future" and "due to the uncertainty around a potential return to work date" it was with regret that dismissal was to be effected. Considering the position then as at 13 August 2021 being the last date of the alleged discriminatory acts, it would appear that it could well

happen that the condition and substantial effects would have lasted until end November 2021 thus complying with the condition that the substantial adverse effect was “*long-term*” meaning that it was likely to last for a period of 12 months.

- 5 71. In those circumstances, I consider that the relevant tests are met to meet the definition of disability as that is defined and that the claimant was a disabled person in the period 25 November 2020 – 13 August 2021 and which included the relevant period of the alleged discriminatory acts.

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Employment Judge: J Young
Date of Judgment: 27 May 2022
Entered in register: 30 May 2022
15 **and copied to parties**