Appeal No. UKEAT/0177/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 18 January 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MRS C LOFTY — APPELLANT

MR S HAMIS t/a FIRST CAFÉ — RESPONDENT

Transcript of Proceedings

JUDGMENT

AMENDED this 5th day of April 2018 pursuant to Rule 33(1)
of the Employment Appeal Tribunal Rules 1993 (as amended)

APPEARANCES

For the Appellant	MR ANDREW ALLEN (of Counsel) and MS ROSALIE SNOCKEN (of Counsel) Instructed by: Thompsons Solicitors LLP Condor House 5-10 St Paul's Churchyard London EC4M 8AL
For the Respondent	MR SADEK HAMIS (The Respondent in Person)

SUMMARY

DISABILITY DISCRIMINATION - Disability

Disabled person - section 6 and Schedule 1 ***Equality Act 2010*** *- Schedule 1 paragraph 6 - deemed disability - definition of "cancer"*

The Claimant had been diagnosed as suffering from lentigo maligna, described as a pre-cancerous lesion which could result in lesion malignant melanoma (skin cancer). Evidence before the ET from the Claimant's GP provided clarification of this condition, explaining that cancerous cells had been found in the top layer of the Claimant's skin and that lentigo maligna was a cancer *in situ*, a type of the earliest stage of a skin cancer called melanoma. The Respondent had referred the ET to information from the Cancer Research UK website, which also talked of this condition being a "stage 0" melanoma or an *in situ* cancer. That information went on, however, to say that in situ cancers were not cancer "in the true sense", because they cannot spread to other parts of the body; they were thus not "invasive". The ET had referred to the Claimant's diagnosis as "pre-cancerous" and on that basis concluded she had not suffered cancer; in the circumstances, the ET found that the deeming provision under Schedule 1 paragraph 6 **Equality Act 2010** did not apply and the Claimant was thus not a disabled person.

The Claimant appealed.

Held: *allowing the appeal*

The ET's reasoning failed to demonstrate it had engaged with the evidence before it, in particular from the Claimant's GP and the further clarification provided as to what was meant by "pre-cancerous" in terms of the Claimant's diagnosis. Although the information adduced by the Respondent distinguished between *in situ* cancer and invasive cancers, paragraph 6 of Schedule 1 drew no distinction and it was apparent that Parliament had chosen not to exclude minor cancers from the protection afforded by the deeming provision, which was intended to avoid unnecessary complexity and uncertainty. Adopting a straightforward approach to

paragraph 6 Schedule 1, the Claimant was required only to show that she had cancer. Having adduced evidence that there were cancerous cells in the top layer of skin - cancer *in situ* - she had done sufficient to discharge the burden of proof in this case and her appeal would be allowed.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter questions the approach taken by the Employment Tribunal ("the ET") to the definition of a disabled person under the **Equality Act 2010** ("EqA"), specifically whether it erred in failing to find that the Claimant was deemed to be disabled for the purpose of paragraph 6 of Schedule 1 of the **EqA**.

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Reserved Judgment of the Bury St Edmunds ET (Employment Judge Postle sitting with members, Mrs Handley-Howorth and Mr Briggs, over three days in October 2016 with a further day in chambers), sent to the parties on 9 December 2016. The Respondent appeared in person below, as he does on this appeal. The Claimant was then represented by Ms Snocken of counsel, who continues to represent her interests but is now led by Mr Allen of counsel. By its Judgment the ET (relevantly) held that the Claimant was not disabled for the purposes of the **EqA** and the ET thus had no jurisdiction to determine her claim of disability discrimination brought under section 15 **EqA**. The Claimant's appeal was initially considered by Simler P to disclose no reasonable basis to proceed. After a hearing under Rule 3(10) of the **EAT Rules 1993**, however, Soole J determined that amended grounds of appeal should be considered at a Full Hearing.

The Relevant Background and the ET's Decision and Reasoning

3. The Claimant worked as a café assistant, initially having started her employment for the Eastern Counties Norwich Bus Drivers' Canteen Management Committee in September 2001. In 2015, she had transferred to the Respondent's employment.

4. In or about the summer of 2014, the Claimant had become aware of a blemish on her left cheek and, following a referral to the Norfolk and Norwich Hospital on 3 March 2015, underwent a first biopsy. On 31 March 2015, she was advised by her Consultant Dermatologist (Dr Tan) that the biopsy result was consistent with lentigo maligna: "*a precancerous lesion which could result in lesion malignant melanoma (skin cancer)*" (see the Claimant's witness statement to this effect at paragraph 3, and the letter from Dr Tan of 31 March 2015). Dr Tan further advised that, following a second biopsy further down on the cheek, there were also "*some atypical changes but did not amount to lentigo maligna*", although these also needed to be excised by day surgery (see the ET at paragraph 8).

5. That led to a further appointment on 18 April 2015 which the Claimant described as, "*an operation to remove the cancerous cells from my face*" (see her witness statement at paragraph 5). The ET records that the result of this was reported to her by Dr Tan on 22 May 2015 advising that "*the Lentigo Maligna goes all the way to the margins*" (see the ET at paragraph 8) and recommending further surgery and a skin graft thereafter. That surgery took place on 27 August 2015 and the Claimant gave evidence that she underwent yet further surgery on 3 September 2015. Although the ET stated it did not have documentary evidence confirming that last surgery, it is at least apparent that the Claimant was signed off work on 17 August 2015 for four weeks because she "*had Moh's surgery for Lentigo Maligna*" (see the ET at paragraph 16).

6. In any event, the ET recorded that by mid-September the Claimant had been informed that her latest biopsy was clear of any possible cancer. In her statement, the Claimant observed:

> **"12. Had my condition been left untreated, without surgery or medical intervention it is highly likely that it would have invaded the healthy cells outside the epidermis and more aggressive cancer treatments such as radiotherapy/chemotherapy would have been required."**

7. The Claimant had thus been signed off work from 17 August for surgery for lentigo maligna. Thereafter, she continued to be signed off for this and related health issues including subsequent skin graphs and due to suffering extreme anxiety until 17 December 2015.

8. Meanwhile, the Respondent sought to undertake a review of the Claimant's attendance and to arrange various meetings with her and it appears that difficulties in this regard ultimately led him to terminate the Claimant's employment, by letter of 7 December 2015, due to her conduct in failing to attend meetings to discuss her continued absence from work.

9. On the Claimant's complaint of unfair dismissal, the ET found she had been dismissed for a potentially fair reason but her dismissal had been procedurally unfair and thus her complaint was upheld.

10. The Claimant had also complained, however, that her dismissal was an act of unlawful disability discrimination for the purpose of section 15 **EqA**. She contended that she had a deemed disability - namely cancer - and was thus protected under the **EqA**. The Respondent disagreed, disputing that the Claimant was a disabled person for the purposes of section 6 **EqA** and observing that it was unclear whether her condition would be deemed to be a disability under paragraph 6(1) Schedule 1 of the **EqA**.

11. Apart from the history and evidence already referenced above, for the purpose of her ET claim the Claimant also relied on two reports from her GP. In obtaining the first, dated 15 August 2016, the Claimant's solicitors posed the following questions under the heading "*Deemed Disability*":

> **"1. Did Mrs Lofty's condition amount to cancer?**

2. If not, had Mrs [Lofty] not had medical treatment or surgery could/would this have resulted in her developing cancer?

3. For avoidance, please explain at [what] point would someone in Mrs Lofty's condition would [sic] be deemed to have cancer?"

12. The Claimant's GP answered those questions as follows:

"1. A precancerous condition called lentigo maligna with atypical changes.

2. Yes

3. At presentation the Dermatology Department already had a query about malignancy of the lesion."

13. With that report, the Claimant's GP also attached a leaflet produced by the British Association of Dermatologists ("BAD") which included the following information:

"Lentigo maligna is one type of the earliest stage of a skin cancer called melanoma.

…

Lentigo maligna is a type of melanoma called 'in situ' melanoma. 'In situ' means that the cancer cells have not had the opportunity to spread anywhere else in the body. There are cancer cells in the top layer of the skin (the epidermis) but they are all contained in the area in which they began to develop. They have not started to spread or grow ('invade') into deeper layers of the skin. That is why some doctors call in situ cancers 'pre-cancer'." (Page 132 of the EAT bundle)

14. The Claimant's solicitors then sent further instructions to her GP, noting his description of lentigo maligna as a pre-cancerous condition and the section of the BAD leaflet dealing with the meaning of in situ cancer. They posed the following question: "*does this mean that Mrs Lofty's condition can be described as cancer?*".

15. The Claimant's GP responded in a further report, dated 13 October 2016 as follows:

"Mrs Lofty had cancer, the British association of dermatologists describes lentigo maligna as the earliest stages of melanoma, this is a cancer in situ but has the potential of becoming rapidly invasive and for this reason Mrs Lofty required surgery. Some doctors may call a cancer in situ or non-invasive, pre-cancer. Lentigo maligna can become malignant melanoma which is rapidly invasive."

16. During the course of the ET hearing, the Respondent also produced information on this question, in the form of a print-out from the Cancer Research UK website, which included the following statements:

> **"In situ melanoma is the very earliest stage of melanoma. There are cancer cells in the top layer of skin (the epidermis) but they are all contained in the area in which they started to develop. So they have not started to spread or grow into deeper layers of the skin. In other words, it has not become invasive …**
>
> **Some doctors call in situ cancers pre cancer. In a way, they are. Although the cells are cancerous, they cannot spread to other parts of the body, so in situ cancers are not a cancer in the true sense. But if they are not treated, in situ cancers can develop into invasive cancer." (Page 147 of the EAT bundle)**

17. Having observed the Claimant's diagnosis as being of a "pre-cancerous" condition, the ET did not consider that she had established that she in fact had cancer so as to come within the deeming provision at paragraph 6 Schedule 1 **EqA**, specifically:

> **"24. The Tribunal were unanimous in the view that given the evidence before us namely, that the Claimant was treated for Lentigo Maligna, a pre-cancerous condition, a fact that was confirmed by her treating Consultant. By September she was informed biopsies confirmed there was no skin cancer. Therefore the Claimant at no time had cancer and therefore does not all within the deemed disabilities under schedule 1 paragraph 6 or 7 of the Equality Act."**

18. The ET further went on to consider whether the Claimant otherwise fell within the ambit of section 6 **EqA** but decided she did not. There is no appeal against that finding.

The Appeal

19. The Claimant's appeal is put on the following grounds. First, that the ET misinterpreted "cancer" for the purposes of paragraph 6 Schedule 1 **EqA** and/or misinterpreted "diagnosis" for the purposes of the **Guidance** and the **Equality and Human Rights Commission Code of Practice** (see below). Secondly, the ET failed to provide adequate reasons for its rejection of the Claimant's case. Thirdly, the ET's conclusion was not supported by the evidence, alternatively and fourthly, was perverse.

20. The Respondent resists the appeal, relying on the reasoning provided by the ET.

The Relevant Legal Principles

21. The ET was concerned with the question whether, at the relevant time, the Claimant had a disability such as to fall within the protection afforded by the **EqA**, which provides, by section 6:

> **"6. *Disability***
>
> **(1) A person (P) has a disability if -**
>
> > **(a) P has a physical or mental impairment, and**
> >
> > **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.**
>
> **(2) A reference to a disabled person is a reference to a person who has a disability.**
>
> **(3) In relation to the protected characteristic of disability -**
>
> > **(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;**
> >
> > **(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.**
>
> **(4) This Act … applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) -**
>
> > **(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and**
> >
> > **(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.**
>
> **(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).**
>
> **(6) Schedule 1 (disability: supplementary provision) has effect."**

22. By Schedule 1, it is relevantly provided:

> **"6. *Certain medical conditions***
>
> **(1) Cancer, HIV infection and multiple sclerosis are each a disability.**
>
> **(2) HIV infection is infection by a virus capable of causing the Acquired Immune Deficiency Syndrome.**
>
> **7. *Deemed disability***
>
> **(1) Regulations may provide for persons of prescribed descriptions to be treated as having disabilities.**

(2) The regulations may prescribe circumstances in which a person who has a disability is to be treated as no longer having the disability.

(3) This paragraph does not affect the other provisions of this Schedule."

23. Pursuant to section 6(5) **EqA**, the Secretary of State has issued *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011) ("the Guidance"). By Schedule 1 paragraph 12 **EqA**, it is provided that:

"(1) In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant."

24. In the present case, the Claimant relies on the following parts of the **Guidance**:

"A9. The Act states that a person who has cancer, HIV infection or multiple sclerosis (MS) is a disabled person. This means that the person is protected by the Act effectively from the point of diagnosis. (Sch 1, Para 6). …"

And, in respect of progressive conditions:

"B21. The Act provides for a person with one of the progressive conditions of cancer, HIV and multiple sclerosis to be a disabled person from the point at which they have that condition, so effectively from diagnosis. …"

25. In addition, the **Code of Practice** issued by the Equality and Human Rights Commission ("**the EHRC Code**"). pursuant to section 14 **Equality Act 2006** - which must also be taken into account by an ET where relevant - relevantly provides:

"2.18. [Sch 1, para 6] Cancer, HIV infection, and multiple sclerosis are deemed disabilities under the Act from the point of diagnosis. In some circumstances, people who have a sight impairment are automatically treated under the Act as being disabled.

Appendix 1, para 19 Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act. …"

26. It is common ground that the onus is on a Claimant to show that he or she comes within the definition of disability for the purpose of the **EqA**.

Submissions

The Claimant's Case

27. On behalf of the Claimant, it is submitted there could be no doubt from the evidence that cancer cells were present in her skin; she thus had cancer. Defining cancer in any other way would be unnecessary and likely to lead to inconsistency. The ET was apparently influenced by the description of the Claimant's condition as being pre-cancerous but the evidence before it placed that description in context: "pre-cancer" may be regarded as medical shorthand for a particular stage in the development of cancer; it does not mean there is no cancer for the purposes of the **EqA**. The ET seemingly ignored the context evidence and thereby fell into error.

28. The ET had similarly fallen into error in describing the nature of the surgeries carried out on the Claimant, specifically failing to recognise the significance of her Moh's surgery, which was not a biopsy but cancer treatment to fully excise the lesion on her cheek. This, together with the very brief reasoning provided, suggested that the ET had failed to carry out a sufficiently rigorous examination of the evidence.

29. The ET had, moreover, failed to have regard to the **Guidance** or the **EHRC Code** in the context of addressing the question whether the Claimant's condition was or was not cancer and had made no reference to the necessity of addressing the question of diagnosis or of looking at the situation "at the point of diagnosis".

30. Yet further, the ET failed to adopt a purposive and broad construction of the statute, thus allowing that someone with pre-cancerous cells who might go on to develop malignant melanoma cancer would not have the protection of the **EqA**. An employer who thus harassed

A or dismissed such a person as a reaction to their having cancer treatment would thus suffer no penalty adopting the ET's approach.

B 31. Although unable to find specific authority on the approach to this question, those acting for the Claimant have referred me to the Incomes Data Services publications that explain how the Government made the decision not to exclude minor cancers from the deeming provision (see further below). They have also referred me to a summary of a first-instance Employment

C Tribunal decision in **Jameson v Roberts & Anor t/a Fleet Direct** (ET case number 1802434/15) referenced in IDS Brief 1071 (June 2017), see pages 14 to 20, where it was stated:

> **"… the tribunal held that a purposive and broad construction should be given to the word 'diagnosis'. Otherwise, [the Respondent's] construction would, for example, have the effect of depriving a woman suspected of having breast cancer of protection unless and until a biopsy or other investigation proved its existence, which the tribunal was not prepared to accept.**
>
> **The tribunal's approach in this case suggests that a medical adviser's belief that the symptoms an individual is presenting are caused by cancer is likely to be enough for the individual to be 'disabled' under the EqA, even if later tests prove otherwise. …"**

D

E 32. That said, Mr Allen has also quite properly drawn my attention to the EAT's judgment in **Peninsula Business Service Ltd v Baker** [2017] IRLR 394. In that case, the Claimant claimed to have suffered harassment related to the protected characteristic of disability, but was

F found not to have actually been disabled for the purposes of section 6 **EqA** and the EAT (Laing J presiding) held it was not enough for the Claimant to assert he was disabled: in order to gain the protection of the **EqA** so as to pursue a claim of harassment, he had first to establish that he was a disabled person as defined by section 6. Although the EAT allowed that a claim might

G still be pursued where "*a protected characteristic is attributed by the discriminator or harasser to the victim (conceptual discrimination or harassment)*" (see paragraph 56), the concept of perceived disability was seen as "*problematic because of the definition in s.6 of the 2010 Act*".

H As Laing J observed, if the Claimant's argument was right "*a person who alleges, falsely, and*

in bad faith, that he has a protected characteristic, can nonetheless make a harassment claim"; that, she concluded could not have been Parliament's intention (see paragraph 57).

33. More generally, the Claimant contends that if the ET did consider the evidence and the arguments set out above, it failed to refer to any of this material in its reasoning and failed to explain why it rejected the clear statement of the Claimant's GP that the Claimant had cancer. The reasoning did not meet the basic requirement of informing the Claimant why she had lost. In the alternative, the ET's conclusion was not supported by the evidence and/or is properly to be described as perverse.

The Respondent's Case

34. The Respondent accepts that the Claimant had two biopsies and two surgeries and says that this was apparent from the evidence before the ET and it could thus be taken to have been aware of these facts. The biopsies and first surgery took place before the Claimant transferred into the Respondent's employment and she had then returned to work. As he understood the position, after he took over the café, buying the business - which was based at the depot where he worked as a bus driver - for £1, the Claimant had then worked for him for 10 days and had then left for further surgery, after which she was declared free of cancer.

35. The Respondent contends the ET's decision should be upheld. At paragraph 24, the ET had concluded on all the evidence available to it that the Claimant had never had cancer. There was sufficient medical evidence to support that conclusion and the ET had given adequate reasons to explain the conclusion it had reached. Specifically, the diagnosis given by the Claimant's treating Consultant, Dr Tan, was that she had a *pre-cancerous* lesion. Pre-cancer was not, from the Respondent's own online researches, cancer: it meant the Claimant might

develop cancer but equally that must mean she might not. The evidence from the Claimant's GP did not provide the level of expertise that might have been provided by her treating Consultant. The ET was entitled not to accept the responses of the Claimant's GP but to prefer the evidence from the Consultant and to find that the evidence that the Claimant had presented was not sufficient for her to discharge the burden of proof.

36. More generally, the ET had approached the issue as to whether the Claimant came within the ambit of the statutory definition of disability correctly.

Discussion and Conclusions

37. As from December 2005, persons who have cancer, HIV infection or multiple sclerosis (MS) are deemed to be disabled for the purposes of the **EqA** (formerly the **Disability Discrimination Act 1995**; "DDA"). That is so irrespective of whether they exhibit symptoms of their disease. There is separate provision for progressive conditions to be treated as a qualifying disability (see Schedule 1 at paragraph 8 of the **EqA**), but it was considered that specific deeming provisions were needed to ensure the protection under the then **DDA** - now the **EqA** - covered the conditions specified at paragraph 6 Schedule 1 from the point of diagnosis (see the **Guidance** and the **EHRC Code of Practice**).

38. It is, further, apparent that the deeming provisions were intended to avoid unnecessary complexity and uncertainty. That is, in my judgment, something that is obvious from a straightforward reading of paragraph 6 of Schedule 1 of the **EqA**. It is, however, also corroborated by an aspect of the history behind the introduction of the deeming provision, as is described in the IDS Handbook, Volume Four, *Discrimination at Work* at paragraph 6.53 (which Mr Allen and Ms Snocken informed me was cited to the ET in argument), as follows:

> **"6.53. In addition, para 6 of Schedule 1 to the EqA provides that certain specified medical conditions are to be treated as disabilities. These are:**
>
> **● cancer**
>
> **…**
>
> **This means that individuals with these conditions are effectively deemed to have a disability from the point of diagnosis without the need to satisfy the various elements of the statutory test. Under the equivalent provision in the DDA (para 6A, Sch 1, DDA), regulations could be made excluding certain types of cancer from the scope of the deeming provision. However, after consulting in 2005 on the use of this power, the Government concluded that it would be too difficult to exclude minor cancers without also risking the exclusion of more serious conditions. Accordingly, the power was not exercised and it has not been carried over into the EqA."**

39. Yet greater insight into the Government's decision making in this respect is provided in an article on disability discrimination in IDS Brief 824 (March 2007), which explains as follows:

> **"The Government had originally intended to make use of the regulation-making power contained in para 6A(2) to exclude people with particular types of 'minor' cancer that do not normally require substantial treatment from the extended definition of disability in para 6A(1). However, following a review conducted in conjunction with the DRC [Disability Rights Commission] and others, including the main cancer charities, the Government decided not to exercise this power. It concluded, in the light of the review, 'that it is not possible to distinguish effectively between those people whose cancers are likely to go on to require substantial treatment and those whose cancers are not and that, if we were to attempt to do so, we would introduce uncertainty and complexity into the definition of disability'. This, said the Government, 'would lead to unfair and unequal outcomes for disabled people, and make it difficult for employers and others with responsibilities under the Act to understand and comply with their duties' (Anne McGuire, Parliamentary Under-Secretary of State for Work in Pensions, Written Ministerial Statement, House of Commons Hansard, 21 July 2005). As a result, all people who have cancer are to be treated as disabled for the purposes of the DDA."**

40. On its face, the question for the ET in this case was a simple one: had the Claimant had cancer? As the **Guidance** and the **EHRC Code** state, once a person is diagnosed with cancer, they are deemed to be disabled for the purposes of the **EqA**. That would support the Claimant's submission that this must mean the focus will be on the point of diagnosis and, in this respect, the Claimant criticises the ET for failing to determine the question before it at the relevant time. On that point, I do not think that is an entirely fair criticism; it is not right to say that the ET failed to give any consideration to the position at the point of diagnosis - that is 31 March 2015 - although it is apparent that it also looked at the position as at September 2015, at which point it considered it had been confirmed that there was no skin cancer (see ET at paragraph 24).

41. An ET is, of course, not an expert medical body. It was bound to reach its determination on the basis of the evidence before it. That task might have appeared to have been made somewhat more straightforward by the response the Claimant's GP had given on 13 October 2016, that the Claimant "*had cancer*". That said, as the Respondent has observed, that was not the only evidence before the ET and the other material - which talked in terms of the Claimant having suffered "*a pre-cancerous condition*" - might be seen as having introduced a complexity into the case. Even if that was right, however, the ET needed to engage with the evidence and explain the conclusion it had reached. Thus, it needed to demonstrate that it had had regard to the evidence adduced from the Claimant's GP. That was clearly relevant to the issue to be determined, and, if the ET considered that it did not accurately address the more nuanced position apparent from the other material, it was bound to say so and explain why.

42. Paragraph 24 of the ET's decision, purportedly providing its conclusion on the question whether the Claimant had cancer, fails, however, to demonstrate any engagement with relevant parts of the evidence. The Respondent says I can infer that the ET had regard to the material that was before it and I should not assume that it failed to do so. Adopting a reasonably broad-brush approach to the ET's reasoning, however, does not overcome the problems arising from the omissions in this case: there is simply no reference to the answers provided by the Claimant's GP and no explanation as to why that evidence might have been rejected.

43. True it is that the ET referred to the advice given to the Claimant by her treating Consultant - i.e. that she was treated for lentigo maligna, a pre-cancerous condition - but (in contrast to the GP's reports) that advice was not given for the purpose of explaining to an ET whether the Claimant had a condition that meant she was deemed to be disabled and there was also material before the ET that further unpacked that statement, which it again failed to

address. Thus, the Claimant's GP referred to advice from the BAD which explained that lentigo maligna was a cancer *in situ* and the leaflet contained with the GP's earlier report of 15 August 2016 had provided a more detailed description of the Claimant's condition, explaining that lentigo maligna is one type of the earliest stage of a skin cancer called melanoma and that to describe the cancer cells as *in situ* meant that they had not had the opportunity to spread or to "invade" (see above). The different terms used - in particular "pre-cancer" and "*in situ* cancer" - were further similarly explained in the Cancer Research UK print-out produced during the hearing by the Respondent. Again, the ET needed to demonstrate that it had engaged with that material and had reached some conclusion as to what it meant.

44. In this case, I am satisfied that the ET failed to demonstrate that it had properly carried out its task in this regard. The reasoning does not show that its assessment was reached after the ET had engaged with the relevant evidence before it.

45. The question then arises as to whether there was only one answer to the point the ET had to determine: if it had considered the entirety of the evidence, was it bound to find that Schedule 1 paragraph 6 applied and the Claimant had cancer? As Soole J observed when permitting this appeal to proceed to a Full Hearing, the burden of proof was on the Claimant and the evidence before the ET was limited to her statements, the GP's reports and the literature I have referenced above. If there is a possible difference of medical opinion as to whether pre-cancerous lentigo maligna is cancer, then the ET was arguably ill-served to determine that question, although that still did not absolve the ET of the responsibility of undertaking the task required of it, albeit that it could do no more than reach its conclusion on the evidence available.

46. The Respondent says that the ET was entitled in these circumstances to conclude that this was insufficient to discharge the burden of proof. That said, the evidence before the ET went further than the simple statement of her condition being "pre-cancerous"; it included evidence of the Claimant's surgery and an explanation for her condition that suggested it was indeed to be understood as cancer. For the Claimant, it is said that was sufficient: she had been diagnosed as having cancerous cells in her skin - cancer *in situ* - it would be contrary to the apparent intention of Parliament to require a complainant to adduce medical evidence dealing with these issues at any greater level of technical expertise. Parliament had decided not to go down the route of distinguishing between different types of cancer and it would be wrong, as a matter of principle, not to extend the protection to those who the employer feared might develop one of the conditions deemed to amount to disabilities under Schedule 1 paragraph 6.

47. I largely agree with the Claimant on these points. When determining whether a condition satisfies the deeming provision of paragraph 6, there is no justification for the introduction of distinctions between different cancers or for an ET to disregard cancerous conditions because they have not reached a particular stage. I equally agree that it is undesirable that ETs' determinations under Schedule 1 paragraph 6 should necessarily be required to be based on high-level medical expert evidence as to what is, or is not, cancer (not least as it is not impossible to conceive that this might be a matter of some specialist academic debate). Equally, however, Schedule 1 paragraph 6 does require that a complainant have one of the specified conditions; it is not sufficient that they *might* develop a relevant condition in the future and I am not persuaded that a purposive construction requires such a broad approach to be adopted.

48. In the present case, the evidence before the ET was that the Claimant had an *in situ* melanoma. That meant there were cancer cells in the top layer of her skin. It may be that a diagnosis of pre-cancerous cells might mean something different depending upon where the cells are to be found, but, in terms of skin cancer, the evidence before the ET was that this meant the Claimant had an *in situ* cancer. The evidence adduced by the Claimant to this effect took the form of her original diagnosis, as explained to her by her treating Consultant, together with the further clarification provided by her GP for the purposes of the ET hearing, along with the information leaflet from the BAD.

49. For his part, the Respondent had put before the ET information from the Cancer Research UK website. That, however, did not contradict the Claimant's case but confirmed that she had a condition in which cancer cells were in the top layer of her skin (the epidermis), and because these had not started to spread - a "*stage 0 melanoma*" or an "*in situ cancer*". Whilst the information went on to say that *in situ* cancers are not cancer "in the true sense" - because they cannot spread to other parts of the body - paragraph 6 of Schedule 1 does not distinguish between invasive and other forms of cancer; it requires only that the Claimant has cancer.

50. Adopting thus, an entirely straightforward reading of paragraph 6 Schedule 1, I consider that the Claimant is correct to say that, had the ET engaged with the evidence before it, it would have been bound to hold that she had had cancer and thus fell within the deeming provision securing the protection of the **EqA**. In those circumstances, I allow the appeal and set aside the ET's finding that the Claimant did not satisfy the definition of disability under the **EqA**, substituting that with a finding that she had met that definition having a condition deemed to be a disability for the purposes of paragraph 6 of Schedule 1 of the **EqA**.