

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102621/2016

5 **Held in Glasgow on 9 February and 2 and 3 May 2017, with
 Consideration Hearing on 19 June 2017**

Employment Judge: Ms Claire McManus

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Ms Donna Taggart

**Claimant
In Person**

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East Dunbartonshire Council

**Respondent
Represented by: -
Ms F Ross
(Solicitor)**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that: -

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- The claimant is not a disabled person in terms of section 6 of the Equality Act 2010 and her claim based on disability discrimination is dismissed.

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REASONS

Background

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1. The claimant's position is that she has the protective characteristic of being a disabled person in terms of section 6 of the Equality Act 2010. The respondent disputes that the claimant meets the definition of a disabled person in terms of this legislation. Preliminary Hearings ('PHs') for the purposes of case management took place on 25 August and 2 November 2016. The Notes of those PHs set out the issues discussed then.

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Issue

2. The sole issue for this Preliminary Hearing is to establish whether the claimant has the protective characteristic of disability in terms of section 6 of the Equality Act 2010. The claimant's position is that she has this protective characteristic as a result of dyslexia. The material time with regard to this question is the time of the alleged discrimination by the Respondent against the Claimant, set out in the ET1 as being in February 2016.

Preliminary and Procedural Matters

3. There was discussion at the commencement of the Hearing on 10 February about the email from the claimant to the Tribunal office of 8 February 2017, with regard to reasonable adjustments which the claimant requested be made by the Tribunal. The claimant was accompanied at the Tribunal by a friend, Mr Sullivan. It was agreed that Mr Sullivan be allowed to sit beside the Claimant throughout the Tribunal proceedings (including when giving evidence at the witness table) to assist her in locating particular pages and paragraphs in the documents referred to. It was agreed that the Claimant would use versions of certain documents in the Inventories printed in a larger font, and so having different pagination. It was agreed that questioning of the claimant would be in simple question sentence format. It was agreed that there would be regular breaks.

4. On the morning of the hearing, parties had exchanged their Bundles of documents which they intended to reply on before the Tribunal. The Tribunal was told that what was headed as the Joint Bundle of Documents was now being presented as the Respondent's Bundle, with a separate Claimant's Bundle, which contained some of the same documents. The claimant's position was that she needed time to process the documents within the Respondent's Bundle. After discussion with the parties, the Tribunal clarified that the documents in Respondent's bundle which were not included in the claimant's Bundle were mainly background documents, such as the ET1 claim form and the ET3 response, and that all of the documents

5 contained in the Respondent's Bundle had previously been seen by the claimant. The Respondent's Bundle also contained some additional documents produced to the claimant by the respondent's representative on the morning of the Hearing, being the Respondent's written Submissions and List of Authorities, with attached copies of the authorities relied on by the Respondent. The Tribunal Judge explained to the claimant the procedure which would usually follow at an Employment Tribunal and that normally the submissions and authorities would only be exchanged after the evidence was heard. The claimant's position was that she was at a disadvantage because she did not have time to process the information produced by the respondent and to rebut it with research on cases supportive to her. It was agreed on the morning of the first day of the Hearing that the evidence would be heard, then the claimant would be allowed time to produce written submissions, with the respondent's representative being allowed to comment on those submissions.

5. The Claimant's Bundle contained a 'Personal Statement'. The claimant's position was that this had been prepared by her to set out her evidence. The respondent's representative (Ms Ross) was asked for her position on this, which was that there had been no discussion previously on the use of witness statements, that she had only seen the statement that morning and that it appeared to contain a table of information. Ms Ross was concerned that the statement may not have been prepared entirely by the claimant. The claimant accepted that it was not ideal that the respondent only had sight of her witness statement that morning. Her position was that she had not known what was to be expected from her at this Hearing until correspondence from the respondent's representative about a Joint Bundle and that her statement had been finished at 4am that morning.

6. The Tribunal Judge took into consideration the overriding objective to deal with cases fairly and justly as set out at Rule 2 of the Employment Tribunals Rules of Procedure. The terms of the claimant's letter to the Tribunal of 1 August 2016 were noted. The Tribunal decided that in light of the reasonable adjustments to the proceedings sought by the claimant, the

appropriate way to proceed with the hearing was on the basis of the claimant adopting her 'personal statement' (witness statement) as her evidence in chief. It was explained that Ms Ross' concerns in respect of the statement could be addressed by way of cross examination.

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7. It was agreed that the Hearing would be adjourned until 12 noon to allow the Employment Judge to read the papers in the Bundles and to allow parties to further prepare for the Hearing. It was confirmed that the documents in the respondent's bundle which would be referred to at the Hearing were pages 105 – 108 and 109-114, although that position may be revised once Ms Ross had the opportunity to consider the claimant's witness statement. It was confirmed that the documents in the claimant's bundle which would be referred to at the Hearing were pages 1 – 31. The version of the bundle used by the claimant was in a different font size, and so ran to more pages. It was arranged for a further copy of pages 1 – 31 of the Claimant's Bundle to be taken, for use by Mr Sullivan, who could then direct the claimant to the section of her statement being referred to in cross examination. When the Tribunal proceedings continued at 12 noon, some further documents were produced by the Respondent, being the scoring sheets from the interview assessment process which is where the alleged discrimination is said to have occurred. The claimant disputed that that the scoring sheets produced were genuinely those used in that assessment process. The Tribunal noted that the claimant had sought the scoring sheets and the Respondent had now produced what on the face of it purported to her the relevant scoring sheets. It was noted that any issue as to the legitimacy of these being the accurate contemporaneous assessments was not an issue for this Tribunal, but could be addressed at any Merits Hearing stage, as appropriate.

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8. The Tribunal Judge took into account the claimant's position in her statement that she would 'ask as part of Reasonable Adjustments for this Tribunal that the Employment Judge prompts or asks supplementary questions about how my disability impacts on me as I often do not elaborate or go into sufficient detail as a result of my disability, this is one of the main hurdles I face as a result of dyslexia.' Following the claimant's request, and

the Obiter dicta guidance in *Goodwin -v- The Patent Office [1999] IRLR 4* (relied on by both parties) the Tribunal adopted an inquisitorial approach. The claimant was put on oath and confirmed that she wished the Tribunal to accept her statement at pages 1-31 of the Claimant's Bundle and the Table at pages 19 - 41 as her evidence before the Tribunal. Neither the witness statement not the table were read aloud. The Tribunal Judge then asked further questions with a view to obtaining evidence on the effect of the claimant's impairment on her day to day activities. The parties were in agreement to proceeding in this way. This process took from 12 noon until 12.50pm. An early lunch was then taken and proceedings commenced again at 1.40pm. At that stage, the claimant said that she wanted to say something further in relation to her working at present. The claimant also said that she getting fatigued and asked for a shorter question time. It was agreed to aim for a period of 30 minutes before a break. Unfortunately, there was then very loud drilling noise on as a result of major construction work immediately outside the Tribunal building. As a result of this noise, an adjournment was taken at 2pm. An alternative Tribunal Hearing room was identified, further away from the works, and the Hearing moved to that room at 2.25pm. Unfortunately, the extremely loud drilling continued in frequent, intermittent intervals. Frequent halts had to made and questions repeated. It was agreed that in any event the proceedings would not be completed that day and a further hearing would require to be scheduled. In all the circumstances, the Tribunal Judge decided to stop proceedings that day at 2.30pm. It was agreed that a further two days would be arranged, for the purpose of completing the claimant's evidence. Parties confirmed that there would be no other witnesses. It was agreed that given that the claimant would have time to consider the respondent's submissions and List of Authorities prior to the continued hearing, submissions would made by both parties on the second day of the continued hearing. The earliest dates for the continued hearing which were suitable for the Tribunal and both parties were identified as being in May. In order to avoid any likelihood of the case not being completed at that time, three days were scheduled, being 2, 3 and 4 May 2017.

9. On 26 April 2017, the claimant sent an email to the Tribunal Office, copied to the respondent's representative, seeking further adjustments. The claimant requested that she be provided in writing and in advance with the questions to be put to her by the respondent in cross examination. The respondent's representative objected to this request, for reasons set out in their response to the Tribunal copied to the claimant of 28 April 2017. This matter was discussed as a preliminary matter at the commencement of the Hearing on 2 May. The Tribunal Judge noted that the claimant's request for these further adjustments was made 11 weeks after the first day of this PH and 2 days before the continued hearing date. The claimant was asked why she had not made her request earlier. The claimant's position was that when she was thinking about attending the Tribunal again she thought it would be useful to have the respondent's questions in writing. The claimant's position was that if she was not allowed to have the cross-examination questions in advance, then she would like to have additional reference notes with her at the witness table.
10. Ms Ross' position for the respondent was that the basis for the adjustment being necessary was not clear and that all witnesses would probably like to have their cross-examination questions in writing. The Tribunal Judge considered the overriding objective to deal with matters fairly and justly. Consideration was given to the adjustments which had been put in place such as frequent breaks, after questioning of around 30 minutes, short questions, use of the witness statement, the version of the witness statement used by the claimant being in larger font and Mr Sullivan providing assistance to the claimant in locating documents and paragraphs within documents. It was noticed that the version of the witness statement being used by the claimant had red lines and some passages highlighted, although that had not been agreed as an adjustment. EJ McManus checked that version to ensure that there was no additional information on it. Consideration was also made of the timing of the request and that some 11 weeks had passed since the first hearing date in this case. In consideration of all these factors, and taking into account that cross examination assists

with the assessment of credibility, the Tribunal decided not to allow the claimant to be provided with her cross-examination questions in advance. The Tribunal decided that that would not a reasonable adjustment in all the relevant circumstances.

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11. The cross examination of the claimant proceeded with the claimant being directed to a particular paragraph of her personal statement, the claimant being assisted by Mr Sullivan to locate that paragraph, that paragraph being read to the claimant by the Respondent's representative and the Respondent's representative then asking cross examination questions arising from that paragraph. The cross-examination questions put to the claimant were in short sentences. Where the claimant indicated that she did not understand the question, the question was put to her in a simpler format, either by the respondent's representative or by the Tribunal Judge. The claimant was only allowed to refer during her evidence to papers lodged before the Tribunal as part of the Productions. The hearing continued proceeded with breaks after around 30 minutes of questioning.

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12. At the conclusion of the claimant's evidence on 2 May, there being no other witnesses, the Tribunal Judge confirmed the procedure for submissions. Ms Ross agreed to provide her updated written submissions and Authorities by email to the claimant by 8pm on 2 May. The claimant agreed to provide her draft submissions to Ms Ross by that time, although that may not be the final version. The Tribunal Judge made it clear that neither party would be confined to their submitted written submissions, rather they could expand on these verbally to the Tribunal and may well be asked questions by the Tribunal about their submissions. It was agreed that the claimant would give her written submission to be read by the Tribunal and would not be expected to read these out, rather the Tribunal Judge would read them at the Tribunal Hearing and ask additional questions of the claimant if required. The respondent's representative would then read out her submissions and may expand on these and answer any questions the Tribunal may have. The Tribunal Judge noted that part of the claimant's case is her use of coping mechanisms and asked that the Tribunal be referred to up to date

authorities on that point. The claimant confirmed that she understood the purpose of the submissions was to address the legal question of whether she was disabled in terms of the Equality Act and that she should refer to any previous judgments which supported her position. It was agreed that 3rd May would be used for hearing these submissions and that there would be no requirement for 4 May to be utilised as a hearing date in this case.

13. The respondent's representative provided the respondent's written submissions to the claimant and the Tribunal by email on the evening of 2 May. The claimant sent emails to the Tribunal and to the respondent's representative on 2 and 3 May 2017. The claimant's email of 2 May set out the claimant's 'List of Authorities'. The email sent at 09.21 on 3 May advised that the claimant was unfit to attend the Tribunal on 3 May due to difficulty with breathing and pins and needles which the claimant attributed to anxiety. The claimant asked for an indication as to how the case would progress and stated that she had scheduled an urgent appointment with her GP and would seek a medical note. The claimant did not attend the Tribunal for the Hearing on 3 May 2017. The respondent's representative, Ms Ross, was present at the Tribunal on 3 May and appeared before EJ McManus to be advised that, as the claimant was not present, neither party's submissions could be spoken to as arranged. The respondent's representative was told that the claimant would be written to advising that if she wished to lodge further written submissions in support of her case, then these would require to be sent to the Tribunal office and the respondent's representative within 14 days and that in that event the respondent would have the opportunity to comment on those written submissions within 7 days of their receipt of them. The claimant was written to in those terms in letter (sent by email) from the Tribunal office to the claimant (copied to the respondent) of 3 May 2017, but that letter incorrectly stated the date of the expiry of 14 days as being 24 May rather than 17 May 2017. That letter stated that the content of the claimant's email of 2nd May was noted, and that the Tribunal has the claimant's evidence. It stated that there was no requirement for the claimant to lodge any further written submissions unless she wished to do so. It stated that as the claimant had the benefit of being provided with the respondent's written

5 submission, if the claimant decided to provide further written submissions, then the respondent's representative would have the opportunity to comment on those in writing, if they wished to do so, within 7 days of the claimant's further written submissions being provided to them. It was also noted in that email that the claimant intended to seek a certification from her GP in respect of her ill health on 3 May. The claimant was asked to send a copy of any such certification to the Tribunal office. It had also been noted that the witness table copy of the parties' productions had been removed from the Tribunal room and the claimant was asked to return these to the Tribunal Office if she had removed them from the Tribunal room at the close of proceedings on 2 May.

14. Parties were advised by correspondence to them from the Tribunal office of 18 May 2017 that the Tribunal's consideration of parties' submissions was arranged to take place on 19 June 2017. The claimant sent her submissions and authorities to the Tribunal and the respondent's representative by email on 17 May 2017. The claimant also submitted a Private Medical Certificate confirming that she was unable to attend the Tribunal on 3 May 2017 due to her ill health. On 24 May 2017, the respondent's representatives sent an email to the Tribunal, copied to the claimant, requesting a period of 14 days to comment on the claimant's submissions. The respondent's representative's position was that such an extension would be in line with the Tribunal's overriding objective to deal with cases fairly and justly, given that the claimant's submissions were lengthy (some 50 pages), the claimant had had the benefit of sight of the respondent's skeleton submissions and list of authorities since 9th February 2017 and there would be no prejudice to the claimant as consideration had already been set to take place on 19 June 2017. The claimant commented on this request. It was her position that the respondent would be put to a 'significant advantage' if they were allowed this 7-day extension. The respondent was allowed until 30 May 2017 to lodge their comments on the claimant's written submissions, and did so by that date.

Relevant Law

15. Equality Act 2010 Section 6(1): -

A person (P) has a disability if -

(a) P has a physical or mental impairment; and

5 (b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Comments on Evidence

16. The Claimant's evidence was taken on oath via a witness statement consisting of a Personal Statement (C8 – C18), a Supplementary Table
10 (C19 – C31), additional questions from the Tribunal and cross examination from the respondent's representative. After her cross examination, the claimant had the opportunity to provide any clarification she wished to points made in cross examination. In her answers to questions put to her, the claimant often spoke at length giving detailed explanations and referencing
15 a number of situations. No evidence was heard from any expert witness. The only witness for the claimant's case was the claimant herself. There were no witnesses called by the respondent.

17. The medical evidence relied upon by the Claimant was: a Psychologist
20 Assessment Report dated February 1998 ("the 1998 Report") (R105 – R108), an Enhanced Employment Assessment Report dated 22 October 2014 ("the 2014 Report") (R109 – R114) and a letter from the author of the 2014 Report dated 8 December 2016 ("the 2016 Letter")(C1). The 2016 letter was not the result of a further, updated examination. EJ Garvie had highlighted to
25 the Claimant at the PH on 2 November 2016 (R73 – R82) that neither of these authors state that they consider the Claimant to be disabled for the purposes of the Equality Act 2010. EJ Garvie identified at that PH that the Claimant may wish to seek a further medical report from a specialist who could express a view on this point. There was no medical evidence before
30 the Tribunal which expressed a view that the claimant had the protective

characteristic of disability in terms of the Equality Act 2010. The claimant sent with her written submissions a copy of what bears to be a letter of instruction in respect of the 2016 letter. Neither of the authors of the reports relied on by the claimant appeared as a witness before the Tribunal and so could not be subject to cross examination. There was no opportunity for the Tribunal to hear evidence from the author of either report on the basis for their conclusions, the extent to which they relied on information reported by the Claimant rather than information obtained through objective assessment and to establish their view (which is not expressed in any of the reports) about whether Claimant is disabled, making sure they clearly understood the definition under the 2010 Act.

Findings in Fact

18. The following facts material and relevant to the preliminary issue before the Tribunal were admitted or found by the Tribunal to be proven: -

(a) The claimant was assessed in February 1998 by Rachel E Mulholland, an Occupational Psychologist at the Employment Service of Glasgow, Renfrewshire and Dumbarton PACT. A Psychologist Assessment Report dated 19/2/1998 (“the 1998 Report”) was produced. In the ‘Background Information’ section of this report, it set out: -

“Donna attended for assessment at the suggestion of her Disability Employment Advisor, as she was experiencing difficulty in her job.

Donna works as an admin/clerical assistant, and reports being under considerable pressure and stress in this job. She is also doing a Social Care course and feels she needs help. In the last two years she has had 3 jobs in clerical work, but has left because of her problems. Her son and mother have been

assessed as having “specific learning difficulty” (commonly referred to as dyslexia) and she feels that a lot of their problems are similar to her own.”

5 The 1998 Medical Report sets out what the claimant then reported as difficulties as follows: -

10 ‘In areas where she has to write and spell she gets very stressed and in comparison to others it takes her a long time to do things such as write letters and essays. She has difficulty structuring work and is forgetful. Tasks such as looking through a telephone book are very hard as she loses her position across the page. She has to re-write telephone messages and has to break reading down into smaller chunks to help her understand and
15 remember.’

This ‘Background Information’ section also sets out ‘Strategies employed’ by the claimant, as follows: -

20 ‘She works harder to keep up with work - reading and re-reading information until she gains an understanding of it. She uses strategies to remember things (e.g. codes, breaking down words to smaller chunks). She had some confusion between ‘b’ and ‘d’ but used ‘B’ as the template for the positioning of ‘b’. She had
25 directional problems but wearing her watch on her right allows her to quickly tell left-right. She is right-handed but uses her left hand a lot. She feels that her reading has become less monotone and word by word since she has started reading to her son.’

30 The ‘Background Information’ then notes that it was agreed that ‘A formal assessment would take place as her problems were impacting upon her employment’. A number of assessments were carried out, being the Wechsler Adult Intelligence Scale (WAIS-R); free reading and writing; non-

verbal reasoning; Wechsler Memory Scale- Revised (WMS-R) and the Bangor Dyslexia Test.

In respect of the Wechsler Adult Intelligence Scale (WAIS-R) test, the 1998 Report records: -

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'It consists of a series of 11 subtests, comprising verbal and performance measures that go together to build up part of a picture of general intellectual ability. Donna obtained a Full Scale IQ of 92, which places her in the Average classification in comparison to the general population. There was no significant difference between her verbal and performance scores. Particular patterns occur in relation to specific learning difficulty. Donna had relative weakness in her general knowledge (which may be in part due to her reported difficulties reading and recalling information) and a relative strength in her ability to describe the meanings of words. Other areas of non-significant weaknesses were: digit span; similarities; picture completion and digit symbol. As mentioned Donna has developed strategies to help her cope with tasks, such as coding and structuring, which may have helped her in some of these tasks.'

The assessment of the claimant in the 'Writing and Non-Verbal Reasoning Task' is recorded as: -

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'On a free writing exercise she was able to sequence her thoughts simply in legible writing. She made a spelling error, spelling the word by the way it sounded in speech ('washine' for 'washing'). She felt that the letter was a first attempt and she would have liked to spend 1 to 1 1/2 hours re-doing it. Results on a non-verbal reasoning exercise suggest that, when compared with the general population, Donna has a well above average capacity to learn new skills.'

The claimant's results in the 'Bangor Dyslexia Test' are recorded as follows:

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- 5 1. Left-right (body parts) – Responses to these tasks were characterised by hesitation and error in some cases.
2. Polysyllables – Had difficulty with one word from the five.
3. Subtraction – Had difficulty with one problem
- 10 4. Tables – Had difficulty learning these. Performance was characterised by loss of place in sequence and using rote and add on methods.
- 15 5. Months forward – Completed correctly but slowly.
6. Months reversed – Completed, but characterised by hesitation and repeating forward to go backwards.
- 20 7. + 8. Digits forward and reversed – Had difficulty in both tasks.
8. B-d confusion – Reported difficulty with these letter groups, but developed a strategy for recognition as mentioned previously.
- 25 9. Familial incidence – mother and son both diagnosed as having 'dyslexia'.

In respect of the Wechsler Memory Scale- Revised (WMS-R), it is stated: -

- 30 'This test examines memory functioning along 5 Indexes. The results of this test suggest that in comparison to the general population, Donna has particular difficulty recalling information after a time delay and recalling visual information, with some

weaknesses in other areas, such as attention / concentration and general memory.

5 The 'Conclusion' section states that the tests results were discussed with the claimant 'in detail' and reports: -

10 'Donna has developed coping strategies to help her do tasks such as writing, reading and recording information, yet results indicate the presence of difficulties. Given the nature of her reported difficulties and results on the range of assessment tasks, it is suggested that she has a specific learning difficulty.

15 The nature of her difficulties have resulted in a reduced capacity to organise, structure and write complex information due to problems such as memory processing and attempts to spell phonetically. From the assessment it should be noted that the IQ of a person with specific learning difficulties is usually an underestimate of their actual intellectual ability, so it is likely that her overall IQ score is higher than that recorded earlier.

20 The use of a modern word processor may help her to overcome some of the difficulties she has in producing written information. If she has access to such computer facilities (given appropriate training on software if required, for example the PAL (Predictive Adaptive Lexicon) or TEXT HELP system) it should help her to continue to develop her own potential, both in employment and educational terms. We also discussed the use of personal Dictaphone, notebooks and personal organisers as ways for her to note down and recall information such as telephone numbers and other details. We tried exercises aimed at helping her prioritise structure and learn more effectively and Donna took the written examples with her to practice with.

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5 In exam situations, where she is under severe pressure allowances should be made for her spelling and the time she takes over writing (access to word processors with spell-check and systems such as PAL should be given and during examinations allowances should be made, for example the use of an amanuensis.

10 In employment situations should be given access to the type of computer equipment and aids mentioned. It is also suggested that the use of specialist remedial help with her difficulties – where teaching methods should involve a multisensory approach, would help her (especially if it were focused on work related tasks and ways to make them easier for her to complete).’

15 19. There is no indication in the 1998 Report of how significant or otherwise the effect of the difficulties indicated were on the claimant’s normal day to day activities. There is no indication in the 1998 report that the coping strategies used by the claimant are not reasonable or are unsustainable. The claimant does not use a personal Dictaphone, notebooks or personal organisers as
20 ways for her to note down and recall information. The Claimant does not use electronic reminders on her phone or a personal organiser. The Claimant does not do the practice exercises given to her in 1998 to help her prioritise structure and learn more effectively.

25 20. The claimant was assessed by Margaret O’Donnell (Chartered Occupational Psychologist) for the purposes of the Enhanced Employment Assessment Report dated 22 October 2014 (“the 2014 Report” – R109 - 113). That 2014 Report sets out as the reason for referral: -

30 ‘Donna was judged dyslexic in a previous assessment by a DWP Employment Service Occupational Psychologist in 1998. She was referred for an up to date assessment and to discuss strategies to compensate for working memory issues in the work place.’

5 The report notes that since the time of her assessment in 1998, the claimant had successfully completed a degree in Psychology and qualified as a CBT (Cognitive Behavioral Therapy) Counsellor and was at the time of the assessment working as a counsellor in a voluntary basis. The 2014 Report states: -

10 'Donna's determination to overcome her difficulties has led her to develop strategies for performing the many literacy and language related tasks that she finds difficult. Adopting these methods can sometimes allow her to produce an adequate end result, but only by expanding much more mental effort and energy than someone without her difficulties would need to do. She is also acutely embarrassed by the occasional mistakes she makes in pronunciation and spelling; she reported that some colleagues' reactions to such errors, such as commenting or making fun of her in public, created a very difficult working environment for her in her last job, to the extent that she dreaded going to work every morning.

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20 It was clear from Donna's description of her treatment in this setting that it had had a marked and lasting detrimental impact on her self-confidence, personal resilience level and emotional well-being. She regretted not having made it clear to colleagues that such behaviour was unacceptable as soon as she took the post.'

25 21. The 2014 Report states under the heading 'Testing': -

'Screening tests demonstrated that Donna shared some of the difficulties often associated with dyslexia such as:

- Hesitation when judging left and right (the arm on which she wore her watch guides her)

- Mispronunciation of some words, particularly word endings
- Inability to recite times tables quickly and accurately from memory
- 5 • Transposition or forgetting of items when attempting to repeat strings of numbers of increasing length (she used chunking to make this easier)
- 10 • Some difficulty in reading aloud a passage containing real and nonsense words quickly and accurately.
- Some issues with linking the sounds of words or letters to their written forms
- 15 • Confusion of 'b' and 'd'.

22. The 2014 Report goes on to state: -

20 “Donna completed a multi-sectioned test of cognitive (or thinking) capacity, on which people with dyslexia tend to produce a particular pattern of scoring. By combining the results from tests of a similar nature in the test, four broad areas of thinking ability can be measured: these are Verbal Comprehension; Perceptual Organisation; Working Memory; and Processing Speed (for information).

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1. Verbal Comprehension (VC) is a measure of an individual's vocabulary range and how they reason using language.

2. Perceptual Organisation (PO) is a measure of non-verbal thinking skills and learning ability in novel situations, and of attention to detail.

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3. Working Memory (WM) is a measure of the capacity to retain information briefly and perform initial basic processing

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4. Processing Speed (PS) is a measure of the ability to process routine visual information quickly and accurately. As measured, it depends on other factors such as manual dexterity/ motor skill and coding / sequencing abilities.'

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23. The 2014 Report set out at Figure 1 an illustrative table for each of these test results, showing 'the four possible performance categories used in this test, the (rounded) percentage of the comparison group whose scores would be expected to fall within each category, and the categories within which Donna's scores for the four elements described are located.' There is no information in the 2014 Report as to what constituted the 'comparison group'. The 'possible performance categories' are set out as being 'Extremely Low – 2% of group'; 'Borderline – 6% of group'; 'Low Average – 15% of group'; 'Average – 50% of group'; 'High Average- 15% of group'; 'Superior- 6% of group' and 'Very Superior – 2% of group'. This Figure 1 shows the claimant as having test scores within 'Average- 50% of group' for Verbal Comprehension, Working Memory and Processing Speed and within 'High Average – 15% of group' for Perceptual Organisation.

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24. The 2014 Report comments on these findings as follows: -

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'...Donna performed best on the items requiring non-verbal reasoning and learning, attaining a score significantly higher than

those she attained on both verbal reasoning and speed processing tasks. This scoring pattern is consistent with dyslexia, though perhaps a lower level of scoring might have been expected.

5 That the difference between non-verbal reasoning and working memory was not significant appears in large measure due to the inclusion of the arithmetic subtest as Donna has an aptitude for figure work. However she performed this sub test by using her index finger to 'write' workings on the desk top rather than relying on
10 holding data in immediate memory as the test developers intended.

Donna appeared to expend much more effort in performing the assessment exercises than would be considered reasonable and seemed to be pushing her skills and coping strategies to the limit in
15 her determination not to make mistakes. She did her best to apply all of the (sometimes elaborate) methods that she has developed over the years to help her complete as many items as possible correctly. She reported being very tired towards the end of the test and, during feedback; she indicated that after she went home, it had taken a long
20 time for her reserves of energy to return to normal.'

25. Tests were also carried out on the claimant for the purposes of the 2014 Report on 'basic literacy and numeracy skills'. These were: -

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1. Word Reading (WR), in which single words printed on a card must be read aloud;
 2. Sentence Comprehension (SC), a cloze procedure exercise in which the tested person must identify omitted words from a series of
30 sentences.
 3. Spelling (Sp), in which a series of words is presented in the following manner: the word to be spelled is dictated, a sentence with the word contained in it is read, and then the word is repeated.

4. Mathematical Computation (MC), in which the tested person is expected to solve as many of a series of arithmetical / algebraic problems as possible within a fifteen minute deadline.

5 There is no information in the 2014 Report as to what a 'cloze procedure' is. The accompanying illustrative 'Figure 2' for those tests shows that in the basic literacy and numeracy skills tests, the Claimant scored within the 'Average 50% of group' category in all 4 areas. The comments following this Figure 2 are: -

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'There were no significant differences between any of the scores Donna attained on this test and from the results alone it would be difficult to justify the suggestion that she had difficulties with reading or spelling. However, that she reported having spent a great deal of time practicing these skills in an attempt to avoid being ridiculed, and that, on the main, she read words correctly with which she was already familiar but struggled with those she was seeing for the first time, suggested that she had some difficulty with phonic- based decoding. She tended to use her hand to shield Information below the line she was reading to ensure that she kept on track. When discussing the results, she reported that her decoding skills had improved but that she found it difficult or impossible to grasp the meaning of typescript passages from a single reading.

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It was a similar story with spelling, where basic words and those Donna used regularly tended to be spelled correctly, though here she continued to have issues with letter insertion, omission and transposition as well as the placing of silent and double letters. Donna completed two pieces of free writing and was able to express ideas and concepts successfully. However, examination showed that there was some inconsistency in how she spelled words, even on a single page. She also appeared to have difficulty in distinguishing between

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homophones (e.g. passed and past) and with issues of grammar such as ensuring agreement between subject and verb.'

26. Under the heading 'Outcomes', the 2014 Report states: -

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'Donna has worked extremely hard to find ways to overcome her difficulties and the results of her assessment suggest that this has borne fruit. However, that she can produce a reasonable level of written work when given time should not be allowed to mask the very real difficulties that she continues to experience.

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The usual adjustments for someone with dyslexia should continue to be made for Donna. These include:

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- In education or assessed theoretical training, the provision of a scribe for note-taking in classroom settings, the scheduling of extra time for examinations and access to services of an amanuensis if required (to read questions aloud and record dictated answers).

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- At work, if she is required to produce written material such as reports, access to a computer equipped with appropriate supportive software for dyslexic people.

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- Practical skills training for Donna should ideally have oral instruction accompanied by demonstration. She should have the opportunity for sufficient supervised practice to allow her to use the learned skills confidently and independently in a live work setting.

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- If Donna is given day to day instructions orally, they should be recorded on a mobile phone or MP3 player so that she can replay them as necessary to refresh her memory.

- Donna should not be expected to take minutes of meetings, as people with dyslexia tend to find the multitasking necessary to perform this activity very difficult to do.

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- In anticipation of returning to paid employment, Donna might wish to explore available assertiveness courses / self-directed learning opportunities, to ensure she is confident that a similar situation to the one she described above cannot develop again.”

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27. The 2014 Report does not support the Claimant’s assertion before the Tribunal that she has significant difficulties with spelling which affect her day to day activities. The 2014 Report does not address whether dyslexia (or any other mental impairment) has a significant adverse effect on the claimant’s normal day to day activities. There is no assessment of the level of any such effect. There is no indication in any nothing in the medical reports about difficulties with driving, different types of lighting or sound and visual stimuli.

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28. Margaret O’Donnell produced a further letter in relation to the Claimant on 8th December 2016 (“the 2016 Letter”). The Claimant was not re-examined by Ms O’Donnell for the purposes of the 2016 letter. The substantive content of this 2016 Letter is as follows: -

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“It can sometimes be hard for people who do not have dyslexia to understand the complexities of the condition. Often they expect that a person with dyslexia will be unable to read or write at all, and believe that someone who is able to produce a passable standard of written work cannot be dyslexic, or at worst only mildly so.

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In your case, although you have substantial difficulties, from a young age you have worked extremely hard to find ways to work around these issues. As it says in the report, the strategies you have developed can be very elaborate. They require you to spend a great

5 deal more time and mental energy (indeed some might say much more than is reasonable to expect) on performing a task that someone without these issues would have to do to produce the same level of result. To adopt this as your normal way of performing daily duties would be unsustainable and would be likely to lead to exhaustion, mistakes and burnout. If having access to work place adjustments and /or supportive equipment could remove the need for some of the coping strategies and reduce your mental load, you could then operate on a more level playing field with colleagues.

10 As I told you earlier, it is my understanding that only the courts can give a definitive legal judgement on whether someone's issues meet the Equality and Human Rights Act criteria for disability (duration of 12 months or more and substantial adverse impact). It may be that the work you have done on hiding your difficulties, and your ability to
15 produce adequate results sometimes through extraordinary effort, mask the substantial nature of the problems you face day to day. However, I am sure that the Act was never intended to penalise those who try to find ways around their problems or to develop their skills to the greatest extent they can.”

20 29. The 1998 and 2014 Reports were both produced in the context of the claimant being referred to a DWP Disability Employment Advisor. Following from the claimant's assessment in 2014, the claimant met a Disability Employment Advisor once a fortnight. She obtained assistance with completing application forms and 'pointers' for interviews. The claimant
25 attended 3 or 4 'Dyslexia Action' group meetings, intended to be for the purpose of learning strategies to help the claimant cope. The claimant was referred to Anniesland Job Centre for an assessment and to explore options to help her find a job. The claimant did not find these steps to be useful in informing her of coping strategies which she did not already utilise. The
30 coping strategies shown were strategies such as writing a 'to do' list.

30. When the claimant worked in clerical roles, she required to take orders over the phone, process invoices, process the paperwork for deliveries, wages

and do filing duties. When she was in a clerical role for a mental health project, she carried out a similar clerical role and also produced letters, answered the phone and processed time sheets and other administrative duties. The claimant was not aware at that time that she had any specific learning disability. The claimant had a number of such clerical roles, the longest being for around one and a half years. In one of these clerical roles, the Claimant had an 80-minute commute to work which she found exhausting. Other of her colleagues also found an 80 minute commute difficult. The Claimant has sought medical advice on her reported 'exhaustion and fatigue' but no underlying cause has been identified.

31. Following the claimant being assessed as having a Specific Learning Disability, which the claimant believes to be a diagnosis of dyslexia, the claimant started voluntary work in the care sector, working with young people. The claimant 'really enjoyed' that role, working part time and night shift in a children's home. During that time the claimant was also studying at university for her degree in psychology. The claimant attained a Bachelor of Science Honours' Degree at the level of 2:1 (Upper Second) in Psychology. During her studies the claimant started to develop her skills in structuring essays, which she initially found hard to do.

32. The claimant's Specific Learning Disability does not have the effect that she cannot do any normal day to day activity. The claimant's Specific Learning disability does has the effect of causing her some difficulties. She has weakness in areas of digit span, similarities, picture completion and digit symbol which were considered by the author of the 1999 Report to be 'non-significant', although with the use of coping strategies. Her general knowledge is weak in comparison to her IQ within the average classification of the general population. She has a relative strength in her ability to describe the meaning of words. The Claimant has some difficulty with spelling and grammar, although not in relation to basic words or words used regularly. She has some hesitation and error when asked in a test situation to differentiate left / right body parts. She has some difficulty with

polysyllables, being a difficulty with one word from five in a test situation. She has some difficulty with subtraction, being one problem in a test situation. She has difficulty learning times tables and an inability to recite times tables quickly and accurately from memory. She has some difficulty in
5 recalling month forward in sequence, leading to this being done 'correctly but slowly'. She has some difficulty in recalling months backwards in sequence. She has difficulty in tasks in a test situation on digits forward and reversed. She confuses 'b' and 'd'. She has difficulty recalling information after a time delay and recalling visual information. She has some
10 weaknesses in attention/ concentration and general memory. She has a reduced capacity to organise, structure and write complex information due to problems with memory processing and attempts to spell phonetically. She has some difficulty in recalling long lists. She had some difficulty in a test situation in reading aloud a passage containing real and nonsense words
15 quickly and accurately. She has some issues with linking the sounds of words or letters to their written forms. In a test situation she mispronounced some words, particularly word endings. The extent of these difficulties and reduced capacity is not established.

20 33. The claimant does not like to make mistakes and feels 'acutely embarrassed' when these are pointed out to her. The claimant uses various coping strategies to mitigate the effect of her specific learning disability. She reads and re-reads information until she gains an understanding of it. The claimant's learning strategy is to 'repeat repeat'
25 until she has processed information 'deeply enough'. She uses the capital letter 'B' as a code for the positioning of the lower case 'b'. When carrying out calculations she writes them down, sometimes using a finger to trace the numbers rather than storing the numbers in her memory. When she wore a watch, she wore this on her right hand to assist in differentiating left from
30 right. She prefers to read using larger text and using a ruler or her finger to help her to concentrate on the words. She uses a highlighter pen and underlines words to help her process them. She remembers multiplication by use of rote and add on methods. She uses codes to help her spell words and breaks down words into smaller chunks to spell them. She uses

5 'chunking' to remember long lists. She has practiced reading and spelling common words. She practices what she wants to write on a greetings card on a separate piece of paper and then copies this. She uses a satellite navigator for car journeys. She leaves her house keys near her front door for ease of finding them at the time when she is leaving the house. She pays bills by direct debit. For bills which are not dealt with by direct debit, she leaves the paperwork conspicuously on her living floor until she has paid the bill. She stores information in the "Notes' facility of her smart phone. She writes 'To Do' lists. The claimant does not use the 'Calendar' facility in her mobile phone. She does not use her mobile phone (smart phone) to store appointments or set reminders. The claimant uses a loud alarm clock as a reminder system. When the claimant starts a new job, she develops strategies to help her in the tasks of that job. Where the claimant has worked in a clerical job, she has looked at files to ascertain template or style letters and then creates her own templates to use as a time saving strategy when she had to produce similar type letters. The claimant is familiar with using 'Word' applications. Where there is an update, such as the introduction of Windows 10, the claimant takes some time to adjust to the new way of working. The claimant has experience of using computers and describes her computing skills as 'quite good.' The claimant uses a spell-check facility to correct spelling when she has completed a document. This does not recognise all mis-spelt words. She uses 'cut and paste' to produce documents from styles.

25 34. The claimant is not employed at present and does not require to regularly get up at a particular time. The claimant carries out some work as a self-employed CBT (Cognitive Behaviour Therapy) Therapist. The claimant lives alone. Her son is now an adult. When she requires to be somewhere at a particular time, such as a doctor's appointment, the claimant sets a 'really loud' alarm clock to go off at least 2 hours before the time of the appointment. The claimant's habit is then to 'hit snooze' for around an hour. The claimant finds it difficult to get up in the morning. When she gets out of bed she has a shower, gets dressed and then sets out. The claimant now leaves her keys in a particular place so that she is able to find them in the

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5 morning. The claimant used to leave her keys outside her bedroom door but then found that she would pick them up on her way down the stairs and then leave them somewhere else and so she wasted time by having to retrace her steps to find her keys. The claimant has developed her strategy so that she now picks her keys up just before leaving the house.

10 35. The claimant can forget where she has parked her car in a car park and now always parks on the top floor of car parks to assist her in locating her car. She uses a satellite navigation system when driving. The claimant does not use a diary system for personal appointments. When the claimant requires to attend an appointment, she puts the appointment card in the middle of her living room floor. The claimant uses a paper diary for work activities. The claimant does not use the calendar facility on her mobile phone. The claimant has tried to put an appointment into her phone calendar but was not successful in putting the reminder in place and did not know where she went wrong. The claimant has not asked anyone to show her how to use her phone calendar and reminder system. The claimant does use some functions of her mobile phone as part of her coping strategies. The claimant uses the 'Notes' function. The claimant does not use the Dictaphone function. The claimant keeps a record of telephone numbers in a book.

25 36. The claimant always manages to ensure that she has clean clothes to wear. She sometimes forgets that she needs petrol in her car and to take money out of the bank. She sometimes makes a packed lunch and then leaves that in the house by mistake. The claimant now has hair straighteners which have an automatic switch off because when her son was young she sometimes forgot to turn off her hair straighteners or the iron. The claimant does not do a weekly shopping. She shops for food as and when she needs it. When she was working she bought certain items in bulk so as not to run out.

Respondent's Submissions

37. The respondent's representative relied on the following authorities':-

5 **Goodwin -v- Patent Office [1999] IRLR 4**

De Keyser Ltd -v- Wilson [2001] IRLR 324

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Whitbread Hotel Co Ltd -v Bayley UKEAT/0131/06/MAA

**Commissioner of Police of the Metropolis -v- Viridi
UKEAT/0338/06/RN**

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Anwar -v- Tower Hamlets College UKEAT/0091/10

Metroline Travel Ltd -v- Stoute [2015] UKEAT0302

Equality Act 2010 Guidance on matters to be taken into account in
determining questions relating to the question of disability

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38. The Respondent's representative's submissions are summarised as follows:

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39. The Respondent relied upon there being no evidence of an express diagnosis of dyslexia put before the Tribunal by the Claimant. It was submitted that as dyslexia is not one of the conditions that is automatically recognised as a disability under the 2010 Act, the Tribunal must decide whether the evidence led by the Claimant establishes that the Claimant's condition meets the definition under section 6 of the 2010 Act. It was submitted that, on the basis of the evidence before the Tribunal, the Claimant does not meet the definition of disability in that she has not put forward sufficient credible evidence to demonstrate that her condition has the necessary substantial or long-term adverse effect on ability to carry out normal day-to-day activities.

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40. It was noted that the onus rests with the Claimant to prove that she has a disability and submissions were made to attack the reliability of the medical Reports and the credibility and reliability of the Claimant's evidence. In
5 summary, the Respondent relied upon the age of the Reports; that none of the reports state that the claimant is diagnosed as having dyslexia; that the claimant had the opportunity to seek a further medical report from a specialist who could express a view on this point and elected not to do so; that the Claimant's 'extremely lengthy witness statement' covered a large
10 number of matters not previously raised in the Claimant's pleadings or further specification of her claims and/ or are not supported by the medical reports and that no objective testing has been carried out which could prove the veracity of the Claimant's assertions. The respondent relied upon there being no indication throughout the claimant's oral evidence, 'even in the high
15 pressure environment of the Tribunal' to support the claimant's position that she had difficulty in pronouncing words and relied upon the way in which the claimant had responded to cross examination questions. The Claimant's position that she had extreme difficulties with spelling and structuring written documents was submitted to not be credible in light of the content and
20 structure of her lengthy statement, the 48-hour window she had to prepare this and her evidence that the Personal Statement was 'entirely her own work'. It was submitted that very little weight should be attached to the evidence contained in the Supplementary Table as the claimant had confirmed that Mr Sutherland assisted her with the preparation of this and
25 the Respondent had not had the opportunity to cross-examine Mr Sutherland on the extent of his influence over the content of the document. The respondent relied upon the claimant having admitted that she had discussed her evidence with Mr Sutherland on 9 February. It was submitted that the Claimant's approach to giving her evidence on 2 May differed
30 markedly from her approach on 9 February.

41. It was submitted that the 'extremely bleak' picture painted by the Claimant in her witness statement of the impact of dyslexia is not supported by the reports relied on by her. The Tribunal was invited to find that the Claimant

had, at best, exaggerated the difficulties which she experiences and, at worst, had been dishonest in her evidence and, in these circumstances, the Tribunal was asked to find the Claimant's evidence to be unreliable and lacking in credibility.

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42. It was noted that the Respondent had not had the opportunity to cross-examine the author of either medical report relied on by the claimant and that had the authors given evidence, it would have been necessary to ask them a number of questions about the basis for their conclusions, the extent to which they have relied on information reported by the Claimant rather than information obtained through objective assessment and to establish their view (which they do not express) about whether Claimant is disabled, making sure they clearly understood the definition under the 2010 Act.

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43. The Respondent highlighted aspects of the reports as showing subjectivity and lack of neutrality. It was submitted that little weight can and should be attached to the 2016 Letter or specified parts of the 2014 Report. It was submitted that these reports were not further to an objective assessment of the Claimant's condition, were not the result of a further examination and that it was not clear that Ms O'Donnell understands the test for disability. It was submitted that the medical reports relied upon have 'significant limitations' The Respondent sought to distinguish the claimant's case from the circumstances in ***Whitbread Hotel Co Ltd v Bayley*** **UKEAT/0131/06/MAA** on the basis that the Claimant does not have a 'clinical diagnosis of severe dyslexia'. Mr Justice McMullen comments at para 38 were relied upon.

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44. It was submitted that it was essential for the Tribunal to consider carefully the test for establishing whether someone is disabled as set out in section 6 of the Equality Act 2010. The Respondent relied upon there being no evidence of the claimant the having a mental impairment and the only diagnosis being "*a specific learning difficulty*" in the 1998 Medical Report. The Respondent relied upon none of the Reports expressly addressing whether the Claimant has a condition which has a substantial and long-term

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adverse effect on the Claimant's ability to carry out normal day-to-day activities. It was submitted that it was then necessary to break down the evidence from the Claimant, and the information given in the reports. It was submitted that it is not sufficient for the Claimant to refer to lists of difficulties which some individuals with dyslexia may have. The Claimant had submitted with the Further Specification provided by her on 15 September 2016, various extracts from the British Dyslexia Association ("BDA") website showing a wide range of possible difficulties that individuals with dyslexia can experience. The Respondent relied upon the Claimant having not put forward evidence to prove that her condition is consistent with all of the difficulties cited by the BDA or having a substantial adverse effect on normal day-to-day activities.

45. The Respondent referred the Tribunal to **Anwar v Tower Hamlets College UKEAT/0091/10**, and in particular Mr. Justice Wilkie's comment at Paragraph 24, that: -

"There is nothing, in my judgment, wrong in law or amounting to a misdirection of law for an Employment Judge to conclude that an effect of an impairment was more than "trivial" and yet still "minor" as opposed to "substantial".

46. The Respondent relied upon the content of the 1998 Medical Report as not showing that the alleged impairment had the necessary substantial adverse effect on the ability to do normal day-to-day activities. It was submitted that where weaknesses are identified such as recalling information after a time delay, no indication is given as to how significant the weakness was, or in what context it was measured or identified i.e. whether it was in a context which could be described as a normal day-to-day activity. It was submitted that the Tribunal cannot draw a conclusion that there is a substantial adverse effect from these findings, particularly given the test outcomes recorded in the 2014 Report. The Respondent relied upon there being no medical evidence to support the Claimant's position that her dyslexia caused her difficulties with driving, different types of lighting or sound and visual stimuli. It was submitted that as the Claimant had accepted other

colleagues also found an 80-minute commute difficult, it was difficult to see how that difficulty could be a substantial adverse effect of dyslexia. The Respondent relied upon the Claimant accepting that she did not know the cause of her exhaustion and fatigue, despite having sought medical advice. The Respondent relied upon the Claimant Referring in her evidence to having coloured glasses but not wearing them on 9 February or 2 May and appearing to manage without them and there being no reference to the need for glasses or lenses in the medical reports.

47. It was submitted that where the Claimant is asserting difficulties which are not tested for as part of the recognised tests for dyslexia it would seem more likely that such difficulties are attributable to something other than dyslexia or any specific learning difficulty. The Respondent relied upon the Claimant attributing all of the difficulties which she claims to experience to dyslexia and there being no medical evidence put forward as to the impact which these other conditions may have on her and the extent to which the difficulties which she claims to experience could be attributed to these conditions. It was submitted that the Claimant attributes to dyslexia (without any apparent medical basis) difficulties experienced by many people who do not have dyslexia such as finding it stressful starting a new job, taking time to get used to new software packages, being bad with directions and forgetting where she has put things. It was the Respondent's position that the Claimant's attribution of her interview scoring problems arising from dyslexia in circumstances where 11 out of the 18 candidates received the same or very similar feedback and the Claimant's reliance on her discomfort at answering closed questions during cross-examination indicates a lack of ability on the Claimant's part to distinguish between matters which are linked to her condition and matters which have nothing to do with her condition.

48. The Respondent relied upon the Claimant having not produced any evidence (medical or otherwise) as to how her condition affected her specifically in February 2016 which is the relevant time for purposes of this claim. It was submitted that the Claimant has not established that her condition has a substantial and long-term adverse effect on ability to carry

out normal day-to-day activities. In particular, it was submitted that it has not been established which, if any, of the adverse effects which may have been identified in med reports are long-term as there is no real comparison between first and second reports and there is no evidence at all of how her condition affected her in February 2016, the relevant time for the purposes of this claim.

49. It was submitted that when assessing the adverse effect, the severity of the impairment and an individual's ability to cope should be taken into account as set out in **Equality Act 2010 Guidance para B7**

“Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. 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”

50. It was submitted that following **Commissioner of Policy of the Metropolis v Viridi UKEAT/0339/06/RN/** (in particular at para 23, the adverse effect must therefore be assessed as being the severity of the impairment minus the person's ability to modify their behaviour to cope with it. The Respondent relied upon the content of the 1998 Report as evidence that the Claimant has developed strategies to help her cope. The Respondent also relied upon the Claimant's evidence that she did not use certain coping mechanisms and had not practiced exercises given to her. It was submitted that the effect of these strategies (or the effect they would have if the Claimant used them properly) should be taken into account when assessing the impact of the Claimant's condition and if the Claimant chooses not to use simple strategies such as using electronic reminders on her phone, the effect that these would have had if used should be taken into account in

5 assessing the severity of the Claimant's alleged impairment. It was submitted that the Claimant's condition does not have the necessary substantial adverse effect when the coping strategies are taken into account. The Respondent's position was that some coping strategies may involve more effort and energy than others would need to apply, but that is in the very nature of a coping strategy. They relied upon *Metroline Travel Ltd –v- Stoute [2015] UKEAT 0302 14 2601*, where the EAT held that abstention from sugary drinks was a coping strategy for someone with Type 2 Diabetes, even though others without Type 2 Diabetes would be able to enjoy sugary drinks. It was submitted that practicing spelling is a coping strategy which it is reasonable to expect.

15 51. The Respondent relied upon the Reports not stating what the effect would have been if the Claimant had not expended the effort she had. The Respondent relied upon the Claimant having been determined not to make any mistakes, although someone without dyslexia may have made some mistakes. It was submitted that the amount of effort expended by the Claimant was because of her personality rather than necessarily what was required by her condition. It was submitted that the test results shown in the Report mirrored the approach required by law and that it is the effect of the impairment when using the strategies which must be assessed.

25 52. The Respondent relied upon the Claimant's scores as shown in the 2014 Report, as giving no justification for any suggestion that the Claimant struggled with reading and spelling. The Respondent submitted that the Report shows that even with her difficulties, the Claimant achieved average or above average scores. It was submitted that in the Tribunal's assessment, the effort put in by the Claimant should be allowed to mask the difficulties and that only medical treatment/ measures are discounted (under Schedule 1, para 5), not coping strategies. It was submitted that the Equality Act Guidance does not require the effect of hard work to be discounted when assessing whether someone is disabled. The Respondent submitted that the effect of strategies undertaken to reduce or eliminate the impact of her issues should not be ignored, but should be taken into account

to assess the net impact. The Respondent relied upon the Claimant accepting that for 'no good reason' she does not use simple coping strategies (as recommended by the psychologists) such as setting electronic reminders on her mobile phone for appointments or for paying bills, using a notebook, a personal Dictaphone or a personal organizer.. It was submitted that these are normal steps to take in a busy modern world where everyone has many demands on their attention and can easily forget small things. It was submitted that there is very little basis for the Claimant's assertion that her scores would be much worse if it were not for the coping strategies which she uses. It was submitted that in the absence of any compelling evidence to support the Claimant's assertions, the Tribunal should reject them. It was submitted that, when the effect of the coping strategies used by the Claimant (or reasonably recommended to the Claimant) is taken into account, any alleged impairment does not have the necessary substantial adverse effect on her ability to do normal day-to-day activities.

53. The Respondent relied upon the way in which the claimant has managed these Tribunal proceedings, relying on **Goodwin v Patent office [1999] IRLR 4**, in their submission that when judging whether an impairment has a substantial adverse effect: -

"The tribunal may, where the applicant still claims to be suffering from the same degree of impairment as at the time of the events complained of, take into account how the applicant appears to the tribunal to 'manage'"

54. In this regard, the Respondent relied upon the Claimant having raised a discrimination claim based on specific heads of claim; completing the ET1; writing lengthy, cogent and detailed correspondence to the Respondent; making requests for documentation; preparing a 5 page letter to the ET requesting accommodations and adjustments; preparing a 5 page request for information; completing a 19 page Agenda ahead of the Preliminary Hearing; preparing 34 pages of further specification; preparing a 3 page request for Orders; pursuing her ET claim unrepresented; responding to correspondence from the Tribunal on 8 February at 15:28 by 16:13, being a

2 page response within 45 minutes, despite asserting that she needs additional time to understand and process information; producing a comprehensive, structured 23 page witness statement between the evening of 7 February and the morning of 9 February; giving evidence and responding to cross-examination questions in an articulate manner without hesitation or mispronunciation of words.

55. The Respondent relied on the Claimant being informed during the Preliminary Hearing on 2 November 2016 that it was for her to decide whether she wanted to obtain a further or supplementary medical report and her having had ample opportunity to seek a further medical report. It was noted that it had been agreed that the Respondent might wish to provide list of questions to be asked, which would assist in obtaining relevant medical opinion. The Respondent relied on the series of events leading to this PH taking place. The Respondent relied on ***Goodwin v Patent office [1999] IRLR 4***, where the EAT noted that, where expert evidence is to be presented, proper advance notice should be given to the other party and they should be provided with an early copy of any expert report referred to [para 19]. The Respondent also relied upon ***De Keyser Ltd v Wilson [2001] IRLR 326*** obiter guidance regarding instruction of experts, including that letters of instructions to experts 'should avoid partisanship and tendentiousness', that a timetable for disclosure of experts' reports should be specified and that failure by a party to follow the guidance could lead the Tribunal to consider whether there had been unreasonable conduct on the part of that party [para 36].

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56. The Respondent summarised their own submissions as follows: -

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- '1. We have been provided with no express diagnosis of dyslexia. Dyslexia is a common condition and not automatically a disability. It affects different people in different ways, with some suffering from severe dyslexia and others from more mild dyslexia.

2. There is no medical opinion on whether the Claimant meets the definition of disability
 3. In some instances, the tests carried out by the psychologists are not a useful measure of the Claimant's ability to carry out normal day-to-day activities as the skills assessed (such as reciting times tables or reciting months backwards) are not used in daily life.
 4. The 2016 Letter should be treated very carefully given its apparent subjective nature and that the author would not appear to be experienced in applying the Equality Act.
57. The evidence given by the Claimant is inconsistent with the medical reports and would appear therefore to be exaggerated and inaccurate.
6. The evidence points to an individual who has experienced some difficulties but has found or been given reasonable coping mechanisms and strategies such as using a notebook or wearing her watch on the same hand every day such that she is able to operate on an average or above average level. Any impairment which she has does not therefore have the required substantial long-term adverse effect on her ability to do normal day-to-day activities.
58. Based on the evidence presented to the Tribunal, the Respondent's representative invited the Tribunal to conclude that the Claimant has not discharged the onus on her to prove that she is disabled for the purposes of section 6 of the Equality Act. The Respondent's representative's comments on the claimant's written submissions were, in the main, that those submissions inappropriately sought to change or clarify her oral evidence or to introduce new evidence, which should be disregarded by the Tribunal as inadmissible.

Claimant's Submissions

59. The claimant relied on the following authorities:-

5 **Dunham -v- Ashford windows UKEAT/0915/04/DM**

Paterson -v- Commissioner of Police UKEAT/0635/06/LA

10 **Leonard -v- South Derbyshire Chamber of Commerce
UKEAT/789/99**

Aderemi -V- London and South Eastern Railway [2013] ICR 591

15 **PP & SP -v- Trustees of Leicester Grammar School HS/3792/2014**

Ekpe -v- Metropolitan Police Commissioner [2001] ICR 1084

SCA Packaging Limited -v- Boyle [2009] UKHL 37

20 **Chacon Navas -v- Euresst Collectividades SA [2006] IRLR 706**

Goodwin -v- Patent Office [1999] IRLR 4

25 60. The claimant's submissions were produced in a List of Authorities lodged on 2 May 2017 and 50 page written submissions with extended List of Authorities sent by email on 17 May 2017. These submissions are not reproduced in full below but are summarised, with some quotation and reproduction.

30 61. The claimant noted the statutory definition of disability and relied on the Equality Act Guidance, Part 2, Section A, A.5 'A disability can arise from a wide range of impairments which can be: developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia'. It was the claimant's submission that, on the basis of the evidence before the Tribunal, she meets

the definition of disability in the Equality Act 2010, on the basis of dyslexia, which she submitted has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. The claimant's position is that she is dyslexic and on occasions, due to pressure at interview, she feels that she does not perform her best. Her position is that she has problems with memory processing, organisation of information and recall when she is in stressful and non-routine situations such as interviews and that it is helpful to her to have such questions in advance to allow her time to process the information and organise her answers. Her position is that without adequate time to process information in non-routine situations, she can at times give very direct and short answers.

62. The claimant recognised that the onus rests on her to prove that she has a disability. The claimant's position was that in her witness statement, the 1998, and 2014 Report and the 2016 letter she had provided 'sufficient evidence' of her difficulties and the substantial impact dyslexia has on her day to day life. In recognition of the dates of the Medical Reports relied upon, the claimant's position in her written submissions was to rely on the 2014 Report. Her position was that that Enhanced Employment Assessment Report dated 22 October 2014 (the 2014 Report) was less than a year old at the time of the alleged discrimination. Her position was that she had produced a supplementary report on 6th February 2017 within the time limits and following direction from EJ Garvie, who had advised that the claimant could get a new report or try and seek supplementary evidence from the Psychologist who carried out the last report. The Claimant's position was that she 'choose the latter as the results from both reports were consistent and showed impairments in areas associated with dyslexia'.

63. The claimant relied upon information from the British Dyslexia Association on the effects of dyslexia. The claimant disagreed with the Respondent's position that neither of the reports nor the supplementary report identified her as being dyslexic. The claimant relied on extracts from the British Dyslexia Society Webpage describing dyslexia as a condition and the effects which it can have. The claimant relied on the content of the 2016

Report stating “Donna was judged dyslexic in a previous assessment”. Her position was that the previous assessment referred to was the 1998 Report. The claimant’s position was that the references to ‘specific learning disability’ within that report were references to dyslexia. The claimant submitted that the term ‘specific learning difficulties’ is an umbrella term used by the British Dyslexia Association. The claimant’s position was that although the term dyslexia ‘may not have been specifically used’, the 1998 Report does highlight that she has a “*specific learning disability*”. The claimant relied upon Margaret O’Donnell being ‘a skilled and Government and Chartered Trained Occupational Psychologist who read my first report and made reference to me as being judged dyslexic’. The claimant submitted ‘It is very clear and evident from the report that she is speaking about me and the difficulties I do have with being dyslexic.’

64. The claimant relied upon BDA information on the impact which dyslexia can have, set out as being a “very misunderstood and hidden disability’ which it was submitted impacts on her and effects the way information is learned and processed. It was submitted that it is neurological (rather than psychological), usually hereditary and occurs independently of intelligence. The claimant’s position was that she had ‘followed guidelines from the Equality Act 2010’ to provide ‘details of all aspects of how my disability impacted on me’ and that she was seeking to demonstrate that her problems are much more than with literacy, including problems with navigation and driving, sensitivity to noise and visual stimuli, body language and difficulties with time management and difficulties with my memory and organisation often mean that I do forget things, or am not organized as others might be.’ The claimant relied upon her results in the Wechsler Memory Scale test, which she submitted ‘perhaps explains why I have difficulties with navigation and driving, and my difficulty in recalling information at interviews etc.’

65. The claimant noted and did not dispute the respondent’s position that she ‘had no difficulties in pronouncing words and in processing information in order to be able to answer questions. That I responded quickly to questions,

giving articulate answers and deliberately given information beyond the score of the questions all of which indicated that she was well able to deal with the experience of giving evidence.’. The claimant’s position in response to this was that ‘the intensity of my effort which I put into anything I do to prove myself is often unsustainable’. Her position was that she had 11 weeks between the hearing dates ‘to think about her line of questioning which seemed quite logical in parts to which she was trying to prove’ and ‘to process the information from the last hearing and predict questions and responses to the line of questioning and scoring sheets she had given me’.

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The claimant submitted: - ‘I was also aware that it was important for me to read more of the information the Respondent had previously directed me to, as I had not previously understood the full context of the information or questions asked. I had written and rehearsed my response to these imagined questions and saw the flaws in the scoring sheets. I had practiced these answers many times to get them into my memory.’ The claimant submitted ‘I am surprised to find that I did not stumble over my words, however, there were several times where I had to stop the respondent as she was speaking too quickly with multi-facet questions. There were occasions when the Judge helped clarify some of the points the Respondent had made which I had struggled to understand. At the end of the hearing I was so tired, I provided closed answered to the Respondents last 3 closed questions as I choose not to elaborate as I was starting to feel fatigued.’

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The Claimant submitted that the amount of effort she put into preparing information and attending the Tribunal impacted on her to the extent that she was unfit to attend the hearing on 3 May 2017.

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66. The claimant’s position in her written submissions on the respondent’s reliance on the written documents produced by the claimant during the Tribunal proceedings was: -

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‘The respondent has continually complained of lengthy correspondence from me throughout this tribunal, so it might be helpful for her to know, that I often copy and paste from previous information I have sent her and sometimes rephrase. This is

probably the reason the information gets bigger and develops as I am reminded of information and add it on. I do struggle to be concise as I have difficulty at times structuring my thoughts so I often and end up with lengthy and repetitive information, due to struggling to recalling information in a logical fashion. My work is often re-juggled as I am not really adding anything new – just repeating myself. I believe the document which she refers to (my personal statement) was produced quickly, but it should be noted that I am dyslexic, not incapable. I can at times produce a reasonable standard of work. The first 7 pages are about me (personal statement) whereas the other 17 pages are all quotes and reference to report, much of which the Respondent has received before in similar form.'

67. The claimant's position in respect of the respondent's comments that her approach to giving evidence on 2 May differed from that on 9 February was:-

'As for my approach on 9 Feb, I am unsure what the Respondent is referring to but I do remember I advised that tribunal I had very little sleep the previous night at the first hearing. On the 9th March (*sic*), the whole process and thought of being questioned was very intimidating. I spend the first hour or so reading information away from the tribunal, this was draining before even starting the process of being questioned. We then had to move rooms, due to the noise which meant a lot of disruption and interruption to the process. The noise outside was deafening and I tried my best to answer but I struggled physically with the noise which made it difficult to concentrate on.

Therefore, I probably do agree with the respondent when she says *It was apparent that the claimants' approach to giving her evidence on 2 May differed markedly from her approach on 9 Feb, but not for the reasons she is implying. My approach may if it was different would be due to the fact that:*

A *I slept before the tribunal and did not stay up late before tribunal on 2 May*

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B *When attending the tribunal, I did not have to go away and use my mental resources to spend an hour reading materials before being asked questions*

C *There was no disruptions to the rooms or having to move rooms*

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D *The drilling noise did occur on one occasion (much less noise)– which interrupted me and I had to stop. However it ceased after that.*

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It should also be noted that following the adjournment, I have a better understanding of what was expected from me at cross examining. I was aware that I had been asked closed questions and had been directed to sentences without fully understanding this in context. I did inform the tribunal and respondent that I would take more time to process information. At one point when the judge left the room for me to read a document, I had to leave the room due to the noise from the respondent and her colleague, chatting about their holidays. I was unable to focus and felt very disrespected by their lack of consideration in such an important matter for me.

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At no time did I speak to my friend about the case once I was made aware I was not to by the Respondent, but I am capable of being able to process information and work on issues when I have time and space to do so. Again, to reiterate I am dyslexic, I do not have low intelligence, I process information differently which means that I do not process information as quickly as others, but given time and a lot of effort, I can produce a relatively competent piece of work without any help.'

68. In response to the respondent's submissions that in her personal statement the picture I paint of the impact of my dyslexia is extremely bleak, the claimant's submissions were: -

5 'I still find it hard to understand myself that when I pay so much attention to buying a card, that I can still come home and it has the wrong wording on it. I wish I could explain it but I cannot, it is not due to the lack of attention or the lack of interest I put into it, it may be that because I look at so many, I have information overload, which means that I read what I think is there. I can't explain it
10 either, so I am not upset that the respondent finds this bleak – as I do too. If I do something wrong and which I know is so simple, but that mistake takes more time and energy to rectify, I will call myself negative names and beat myself up mentally for not being better. This is one of the reasons why I try so hard to overcome any
15 difficulties I have, I work hard to compensate for the mistakes that impact on my self esteem. As Margaret O'Donnell says in her report, *the strategies you have developed can be very elaborate. They require you to expend a great deal more time and mental energy (indeed some may say more than is reasonable to expect.*'

20 69. The claimant submitted that the respondent had 'misunderstood the graph or misdirected the tribunal' with regard to the claimant's scores in the assessment for "Working Memory". The claimant submitted that 'I am falling within the lower end of the "Average Category" for the general population for working memory'. The claimant submitted the following to support this
25 position: -

30 'A within the average group, there are three columns which the information is read across from left to right. Although the respondent is referring to **upper ends** of the "average category" – and consistently referred to me scoring in the upper ends throughout the hearing, whilst being cross examined. I agreed with her, another difficulty with being dyslexic is that you often agree to something your unsure of.

5 Now I have had time to process the **upper level** as consistently repeated by the Respondent, I wish to clarify she is mistaken. If she is referring to the position of “the results attained as illustrated in Figure 2” as the scores being on the top or bottom of the graph, she has used and referred to this information incorrectly. She is not referring to the positions of the scores within the three columns which show I am in the first column, lower average within the average population. Considering I have a Hons Degree 2:1, if I did not have dyslexia I would be more likely scoring higher or above average in the population for working memory. Thus even with unsustainable coping strategies I did not perform as expected of a non dyslexic, 2:1 Hons degree holder

15 I have an aptitude for figure work, which helped improve and skewed my scores in the other areas. However, this is seen on the right hand side in the third column which suggests the upper level in the third column, showing the “Working Memory” on the first column. If using the Respondents theory of the “upper levels” then Mathematical Computations (MC) would be at the top of the graph and not at the bottom.’

20 70. The claimant submitted that she was ‘neither exaggerating or lying about how difficulty being dyslexic can be’. She submitted “My initial reasons for attending both assessments with the 2 psychologist 17 years apart where to provide me with support and strategies to help me overcome the difficulties I was experiencing with study and in the workplace and for no other reason.

25 She submitted that she approached the organization because she had ‘a genuine problem’ that she was ‘struggling with and needed support to manage’ and that this, along with her ‘evidenced coping strategies where I work so hard but is unsustainable demonstrates I have a significant issue/effect from being dyslexic and try to overcome it.’ Her position was

30 that ‘after all the strategies I had put in place over the years and which have allowed me to perform somewhat, I still experience difficulties with being dyslexic.’

71. The claimant's position in her written submissions in response to the Respondent's criticism of having had no opportunity to cross examine the author of either report was: - 'I did request attendance from the writer of the 2014 report, but due to bereavement leave she had missed my email and by the time of the hearing the Respondent had objected to her being called at short notice. The claimant's position was that the Respondent could have called the author of either Report and that she 'cannot be held responsible for the Respondents inactions.'
72. The claimant relied on the authors of the reports being 'both Psychologists (who) are professionals and hold a number of academic and professional posts, including 'demanding and important jobs in the Home Civil Service and Academia'. The claimant relied on them having 'vast experience' and being 'responsible for their actions, including evaluations and reports to their employer and their professional bodies through their Codes of Conduct'. The claimant included with her written submissions what purported to be the letter the claimant had sent to Margaret O'Donnell asking for more information. The claimant stated: - 'As can be seen from the email I sent, I kept it neutral. I did not ask for her to prove my disability or to fabricate any information for my benefit.' The claimant's submissions included what was set out as being responses from Margaret O'Donnell to further questions posed of her by the claimant. This being further evidence, the Tribunal did not attach any weight to this.
73. With regard to coping strategies, the claimant submitted: - 'My disability, dyslexia does not improve over time, as such, with time, I develop coping strategies to help manage it. These coping strategies also change over time with technology, but that is only when I utilise them and implement them into my daily life. I am competent now using technology, but when something such as an electronic calendar does not work for me, I revert back to safer techniques to help me not forget or miss appointments. I have to use strategies that are effective for me and not the usual strategies that work for everyone else.'

74. The claimant quoted in her submissions lengthy extracts from the BDA website on the symptoms and effects of dyslexia, including from-

<http://www.bdadyslexia.org.uk/dyslexic/dyslexia-and-specific-difficulties-overview#>

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[How it feels to be Dyslexic](http://www.bdadyslexia.org.uk/educator/contributory-factors)

<http://www.bdadyslexia.org.uk/educator/contributory-factors>, and
<http://www.bdadyslexia.org.uk/dyslexic/dyslexia-and-specific-learning-difficulties-in-adults>

75. In her submissions on the Reports, the claimant submitted that Dyslexia does not improve with time, therefore the age of the Reports is irrelevant. The claimant submitted that her dyslexia was long term, having been affected since birth. She submitted that this is evident from both Psychologist reports referring to her difficulties in childhood.

76. The claimant relied on the 'extreme effort' that she had to put in to achieve the scores shown in the Reports. Her submission was that as the reports show she has 'a well above average capacity to learn', that should mean that she would not have had to put in so much effort but that rather, because of her dyslexia, she has to put in extreme mental effort into achieving somewhere in the average range. The claimant submitted that this extreme effort extends to everyday tasks which other people take for granted. Her submission was that if she did not have dyslexia, she would not have needed to spend so much effort and her tests results would have been more in level with her higher than average capacity to learn. The claimant submitted that her Honors Degree at 2:1 shows that she is above average in ability to achieve a standard, but that this was only achieved by additional time and reasonable adjustments making the process longer and more mentally draining for her than others.

77. The claimant noted that in respect of each medical report relied upon she was referred for assessment because of the difficulties she had at work and was referred on both occasions by her disability advisor at DWP. The

claimant submitted 'I believe that work would be "normal day-to-day activities", which the results show that in relation to the general population the efforts I have to make in order to achieve somewhere in the average range of the general population is excessive and unsustainable long term.'

5 78. The claimant submitted that on the evidence she had presented to the Tribunal she had demonstrated that she is disabled in terms of the Equality Act (2010) and Article 1 of the UN Convention and EU Directive 2000/78. The claimant relied on a number of authorities, as referenced below.

79. In respect of the criticism of there being no specific reference in the medical reports relied upon to the claimant being considered to meet the definition of being disabled in terms of the Equality Act 2010, the claimant relied upon Margaret O'Donnell's understanding (as set out in the 2016 letter) that 'only the courts can give a definite legal judgement on whether someone's issues meet the Equality and Human Rights Act criteria for disability'. The claimant
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relied on ***Dunham V Ashford Windows*** as having parallels to her own case and being in support of 'the validity of non - medical evidence and the validity and appropriateness of evidence from Psychologists'. The claimant submitted that the Reports should be read in their entirety and that these show that she has a long-term condition. She submitted that her ability to learn, and inability to relay or put into practice that learning, shows a real deficit in her abilities. The claimant relied that 'With major effort I am scoring in the average range, only with great difficulty and the use of complex coping strategies.'

80. The claimant relied upon ***Paterson V Commissioner of Police*** as authority
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that it is not for the expert to tell the Tribunal whether impairments which had been found proved were or were not substantial. The claimant submitted that the cross examination was wrong to focus on what others could not do and to compare her difficulties with others who did not have the same disability as her. The claimant submitted that 'there should have been more a focus on what I cannot do rather than what others could or were likely not to be able to do.' The claimant submitted that her witness statement, supplementary table and the Reports, highlights similar experiences and

5 effects to those experienced by the claimant in Paterson. The claimant submitted that the Tribunal should follow Paterson and take into account the Equality Act Guidance at A2, A3 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.’ The claimant submitted ‘Throughout the months, I have continued to give lots of examples of the long term and substantial effects my disability has on me, this is different to the Paterson case where no specific examples had been given. My examples have been verified by the psychologist reports before the case and updated during the case.’

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81. The claimant submitted that ‘... throughout this lengthy process, I have been consistent with the information I have given the respondent and tribunal. The respondent view that there is discrepancies between my witness statement and medical reports is her opinion and not factual. The respondent fails to acknowledge the huge amount of effort and elaborate strategies I have to put in place to fall within the average range. In 2001, when I gained my Hons Degree 2:1, I do not believe that the average person, with results in the lower average range would be competent or able to achieve a 2:1 Hons Degree whilst holding down a job and raising a family.’

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82. The claimant submitted that the Respondent should have focused on what the claimant cannot do rather than on what others could not do. The claimant relied upon Leonard V South Derbyshire Chamber of Commerce as being a case where the Tribunal only had to decide if the impairment had a substantial effect, in particular at para 26 being ‘it is important to bear in mind that the focus of attention required by the Act is on the things that the Applicant either cannot do or can only do with difficulty rather than on things that the person can do and that the EAT ‘were satisfied the Tribunal did rely too heavily upon the Guidelines in this case and hence erred in their approach to dealing with the matter. They failed to focus on the things the Appellant could not do or those which she could do with difficulty rather than on the things she could do’. The claimant also relied upon the observation at Para 28 to ‘... They doubted whether the

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additional tiredness suffered by the Applicant was substantial. C6 notes that an impairment may also indirectly effect a person in the capacities set out under the Act For example, 'the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time'. The claimant submitted that she believed that 'it is this effect of not necessarily being able to repeat activities due to fatigue that is also prevalent in my case and is verified by the Psychologists during assessment.'

83. The claimant also relied upon **Aderemi V London and South Eastern Railway** that 'the focus of a tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment, as follows: -

'In other words the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading 'trivial' or 'insubstantial'. It must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.'

84. The claimant submitted that following **PP & SP V Trustees of Leicester Grammar School** and the reference therein to the Equality Guidance, section B2 & B3, the time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial.

85. The claimant relied upon **Ekpe V Metropolitan Police Commissioner** para 30

'In most normal cases it is likely that the answer to the question "Has a Paragraph 4 (1) ability been affected?" will also answer the question whether there has been an impact on normal day-to-day activities.'

86. The claimant submitted that the effects of her disability are substantial. She submitted that following **Paterson** 'the time taken to carry out an activity'

5 should be considered. It was noted by the Tribunal that here the claimant sought to introduce additional evidence and no weight was put on this additional information. The claimant relied on similarities between her case and the circumstances in Paterson. Her position was that she has 'a number of difficulties where I have to do things differently, often taking longer, being significantly more exhausted etc. than I would if I did not have any impairments'. She submitted 'This is confirmed in the Psychologist reports, with the amount of effort and use of elaborate strategies I have to put in to achieve average results.' The claimant asked the Tribunal 'to take
10 into account the way in which I carry out activities compared with the way I do as a result of my impairment and to consider the exhaustion, tiredness, time taken and anxiety it causes compared to how I would be able to perform, had I not had dyslexia.' Submissions were made by the claimant on the scoring sheets produced by the Respondent. These submissions
15 were not relevant to the issue for this PH.

87. The claimant's position was that her coping strategies were not sustainable and were liable to breakdown. She submitted that these had broken down, leading her to be unable to attend the Hearing on 3 May. The claimant
20 submitted that in 'assessing the extent of the effects of my disability, the Tribunal should take cognisance of the effect should all coping strategies break down or become ineffective.'

88. The claimant relied upon Paterson and the Guidance referred to therein in
25 submitting that what should be considered is 'how far a person can reasonably be expected to modify behaviour'. She relied on A8 of the Guidance, being: -

30 *'In some cases people have such 'coping' strategies which cease to work in certain circumstances (for example someone who stutters or has dyslexia is placed under stress) it is possible that 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 '.*

89. The claimant submitted that she uses coping strategies which she funds to be effective and which have changed with developing technology, but that not every strategy will work for everyone. The claimant sought to introduce additional evidence on her use of coping strategies, to which no weight was attached by the Tribunal. The claimant's position was that her coping strategies and the effort she puts in are not sustainable.
90. The claimant relied upon **Dunham V Ashford Windows** in particular at paras. 38 and 40 in her submission that medical evidence was not necessary and it was not necessary to have an express declaration of a condition in a medical report from a doctor and that a psychologist's report could be adequate.
91. The claimant referred to the Equality Guidance Section B4 (Cumulative Effects of an Impairment), B7 – B10, (Effects of Behaviour), B11 (Effects on environment) and B12 (Effects of treatment). The claimant again relied on her coping strategies as being unsustainable. The claimant sought to introduce additional evidence, on which no weight was put by the Tribunal.
92. The claimant relied upon Baroness Hale comments on 'corrective measures' at page 18, Para 48 in **CSA Packaging Limited V Boyle [2009] UKHL 37**.
93. The claimant sought in her written submissions to introduce more evidence on her use or otherwise of coloured glasses. The Tribunal attached no weight to new evidence sought to be introduced in the written submissions. The claimant made comments as to how she would wish questions to be asked of her in future proceedings. The claimant made submissions on the interview process in which the alleged disability discrimination is said by her to have occurred. Those submissions were not relevant to the issue for this PH.
94. The claimant referred to **Chacon Navas V Eurest Collectividades**, quoting from para 43 that '*Disability must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life*' and relying on para 45 in her submission that disability is

envisaged as where '*participation in professional life is hindered over a long period of time*'.

95. The claimant relied on **Goodwin v Patent Office** para 34 in her submission that her ability is impaired. She submitted that the impact of her attendance at the hearing left her feeling exhausted and requiring to attend her GP the following day with anxiety, stress and high blood pressure.

96. The claimant relied on **Leonard V South Derbyshire Chamber of Commerce**, in particular the following passages: -

'The tribunal in this case looked at each headings of the Guidance separately and then all the headings collectively as can be seen from paragraphs 14 and 15. We are satisfied that when they assessed the evidence as a whole through their interpretation and application of the Guidance, concentrating improperly on the things which the Appellant could still do.'

It is particularly important that a Tribunal considering a case of mental impairment takes into account the matters set out in paragraphs C6 and C7 of the Guidance. The tribunal made reference to C6, but only in the context for the submission by the Respondent that they doubted whether the additional tiredness suffered by the Applicant was substantial. C6 notes that an impairment may also indirectly effect a person in the capacities set out under the Act and under C\$ of the Guidance and states that this should be taken into account when assessing whether the impairment falls within the definition. For example, "the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task for a sustained period of time" C7 states "where a person has a mental illness such as depression account should be taken of whether, although that person has the physical ability to perform a task, he or she is, in practice, unable to sustain any activity over a reasonable period."

97. The claimant quoted information from the DBA website on Coping Strategies, Effects of Stress and Areas of Strength. The claimant's position was that she has 'a specific learning disability and not a learning disability with a low IQ. I have never reported that I am incapable of producing documents or reports. I attended university and gained an Hons Degree 2:1.' She stated

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'I chose to represent myself because I understand my difficulties and I understand that at times others have a very poor grasp on how basic things such as remembering something can be so difficult for me, even after they have repeated it several times. I am also fed up with being bullied and made to feel inadequate by organisations who think that it is ok to dismiss me or to make me jump through hoops in order that I will get fed up and go. I am fighting for my rights and the rights of other disabled people who cannot do this for themselves.'

98. The claimant submitted that she believed she had adhered to what had been required of her by the Tribunal. The claimant considered it to be important that 'at no time, although directed by the Judge, did the respondent produce any questions for me in order to provide who would assesses me, be it Margaret O'Donnell or another Psychologist.' She criticised the Respondent and the Respondent's representative's handling of the case.

99. The claimant criticised and the Respondent's representative's interpretation of the assessment results in the Reports. She submitted: -

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'I propose to address the Respondent's credibility during this process. The respondent indicated that there is an upper end and lower end of the scores. When she pointed this out I assumed she was right and agreed with her, I believed her, but now I know she is mistaken.

In the average range there are three columns. The respondent choose to mislead me into thinking that because it was at the top of

5 the first column it meant that it was in the upper average column, not being able to process that information quickly about what that actually meant I agreed, that was until I came home and looked again. She failed to use the columns correctly and misled the Tribunal. As I scored higher in the mathematical tests, which was located in the third column, but lower in the Working Memory that in the lower average and not in the higher average as she claimed.'

100. In her conclusion, the claimant's submissions were: -

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'1. I have provided two reports and a supplementary report, advising I have a specific learning disability (commonly referred to as dyslexia) by Psychologist and the BDA.

15 1. In asking the Psychologist to provide a definitive statement on whether my disability met the requirements of the Equality Act she declined, correctly, stating that although the report appears to 'stack up' that she felt it was for Tribunal to make that decision. This appears to be a position supported in Paterson at Paragraph 30 *'It is not for the expert to tell the tribunal whether impairments which had been found proved were or were no substantial'*.

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25 2. The Psychological tests carried out are very relevant for day to day life – every aspect of life requires, the ability to process information, retain into memory, reorganize and relay back, as well as reading and writing and other tasks such as paying bills, direction, knowing left or right. Every test is relevant for daily living.

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3. The 2016 letter is from a Government Chartered Psychologist with many years of experience carrying out workplace assessments for DWP, she belongs to a regulated body. She stated that although the report appears to 'stack up' that she felt

it was for Tribunal to make that decision. This appears to be a position supported in Paterson at Paragraph 30 *'It is not for the expert to tell the tribunal whether impairments which had been found proved were or were no substantial'*.

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4. I have provided a very detailed account of how my difficulties impact on me. I have worked since I left school at 18, and until recently have been unemployed. My disability has been a major contributory factor in not gaining employment, where employers fail to provide reasonable adjustments. Due to my difficulties, I apply for jobs that are unskilled to give me a greater chance at employment – this coping strategy may be effective in gaining jobs but it does not allow me to utilise my talents or skills and is not great for my confidence and self esteem.

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5. I have to use coping strategies in everything I do, I sometimes have to create very elaborate strategies help solidify important information into my head. The more I have to do the quicker and more exhausted I become. Margaret O'Donnell, advised that the coping strategies are effective, but are more than would be expected for others to undertake and would eventually lead to burnout and exhaustion. I have coping strategies in place for the multitude of effects of my impairment, it is difficult and I try my best. In terms of coping strategies, I and the psychologist mention a number of complex coping strategies I have put in place to tackle things in a different way to how I would if I did not have my impairments and to avoid activities that I cannot do. Unfortunately, however the effects of my impairments can be excessive complex and cumulative that at times my strategies do break-down. In addition, even when they do not 'break down' they have a massive impact on both my mental and physical wellbeing. My psychologist report details a number of these strategies in both calculations and reading and others. The psychologist even notes that I used complex ways of answering

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Dyslexia Assessment questions in ways not envisaged by the author of the tests. The key thing however if the psychologist recognising and confirming these are tiring, exhausting and not sustainable.

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6. The conduct of the Respondent has been verging on harassment and bullying, they have withheld information, falsified records and continually asked me to provide information then complain that I have provided excessive information. The gas lighting technique of denying my reality, making me having to check and recheck information has caused me a lot of anxiety and confusion over the past year or so. Their failure to even consider offering me an interview, short after I made a case at tribunal also indicates that they hoped I would go away when the pressure became too much.

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7. I believe that I have to my best of ability provided an honest account of my disability along with evidence that supports what I am saying. I ask that the Tribunal take the evidence from two trained Government Occupational Psychologists, take cognisance of the assistance I have received from two DWP disabled employment advisors and the reasonable adjustments I received whilst studying at university, along with additional disabled awards from SAAS.

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8. International law. The United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35) ('the UN Convention'), states in recital (e) in its preamble:

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'Recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and

attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.’

Under Article 1 of the UN Convention:

5 ‘The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

10 (c) European Communities, <http://eur-lex.europa.eu/>. Only European Union legislation printed in the paper edition of the Official Journal of the European Union is deemed authentic

15 Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’

20 9. I believe that I have demonstrated, (i) that I am disabled; evidence by two Occupational Psychologist Reports, and that (ii) my disability does substantially disadvantage me, this can be seen in the results of my performance at interview seen in the Respondents Scoring Sheets. Had the respondent provided me with reasonable adjustments requested at the time of interview, my scores would have been higher and I may have achieved employment (iii) that a particular adjustment would have assisted him; and (iv) that the particular adjustment he suggests would have been reasonable in all the circumstances. The reasonable adjustments requested would have no cost to have implemented. I have provided you with factual information from skilled and professional individuals in the field of assessing disabilities. I believe that on the balance of probability, where I have been assessed and treated as being dyslexic by 2

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5 Occupation Psychologist, supported by 2 DWP employees, student learning support agents, a University and a funding agency as dyslexic and disabled – against the word of the Respondent who, failed to initially provide reasonable adjustments, falsified records, was found guilty of data protection act, has used gas lighting techniques on a disabled person, during a stressful tribunal hearing, failed to rectify and offer an interview for a job which I was denied, when it became available within 3 months – I believe on the balance of probability that I am a dyslexic person under the act and the Respondents tactics were a way of hoping I would not pursue my case.'

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Consideration and Decision

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101. The claimant's case was not assisted by the fact that she had no other witness to support her position: neither a medical expert to speak to their Report nor any other witness to corroborate the claimant's evidence on the extent of the effect of her condition. This would have been helpful in respect of those areas where the claimant's evidence was that her condition had a significant adverse effect but where that position was not supported by, or in some instances, not addressed by, the Reports relied upon.

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102. The Tribunal took into account the medical evidence (being the 1998 and 2014 Reports and the 2016 Letter) in its consideration of the issue before it, although noting that no medical evidence was presented with regard to the material dates for the purposes of the discrimination claim, being 3 and 4 February 2016. There was no argument that the claimant's condition had deteriorated since the time of the Reports.

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103. The Tribunal accepted the Respondent's submissions that the medical evidence had limitations with regard to the issue for this Tribunal. The Tribunal accepted that the Reports are unclear in parts as to what has been reported by the claimant and what has been verified by objective testing.

Although it is for the Tribunal to determine whether the effect of any impairment is substantial, there was little or no indication given in the medical evidence presented to the Tribunal of the extent or level of the effect of the claimant's condition. There is little or no indication in the reports as to the significance of the difficulties identified, aside from some wording such as 'other areas of non-significant weaknesses', as set out in the findings in fact. The Reports do not address what the claimant cannot do because of her condition, with the exception of inability to recite times tables quickly from memory. The Reports do not address what the effect(s) of the claimant's condition would be without her utilising her coping strategies. Erroneous reference is made in the 2016 Letter to 'the Equality and Human Rights Act criteria for disability'.

104. Neither of the Reports or the 2016 Letter expressly state that the Claimant has dyslexia. Neither of the authors of the Reports or 2016 Letter state that they consider the Claimant to be disabled for the purposes of the Equality Act 2010. It was noted by the Tribunal that in the authorities relied on by the claimant concerning an individual with dyslexia, there was a diagnosis indicating the level of that condition e.g. 'severe dyslexia' or 'mild dyslexia'. There was no such diagnosis here.

105. The claimant sought to bring further evidence from Margaret O'Donnell before the Tribunal within her submissions. The Tribunal accepted the Respondent's submissions to attach no weight to what was presented within the claimant's written submissions as further evidence. The claimant had the opportunity to call a medical expert as a witness before the Tribunal and did not do so. The onus of proof is on the claimant and the claimant cannot rely on the Respondent as having the opportunity to call either of the Reports' authors as a witness.

106. The Tribunal proceeded by applying the relevant law, together with the Guidance and the position in the relevant authorities to which it was referred to the Findings in Fact. In its consideration of the evidence and conclusions as to what were Findings in Fact, the Tribunal took into account

inconsistencies between the claimant's evidence and the position in the Reports. This was in particular with regard to the claimant's position in evidence that she had an extreme level of forgetfulness which had a huge impact on her day to day activities. That position was not supported by the Reports.

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107. The Tribunal attached weight to the results of the testing carried out on the claimant, as set out in the Reports. It appeared to the Tribunal that these test results were objective assessments of the type envisaged in *Paterson - v Commissioner of Police of the Metropolis* as being useful as part of the consideration of the issue in this case. The Tribunal also found these objective test results to be of assistance in assessing the claimant's credibility and reliability. While noting that the test results were outcomes achieved with the aid of the claimant's coping strategies, the claimant's evidence was that even with using coping strategies in her day to day activities she had an extreme level of forgetfulness which very significantly impacted on her. That evidence was considered in light of the reported test results covering memory, as set out in the 1998 and 2014 Report. Without an expert to provide any interpretation on those test results, The Tribunal had to take the results on the face of them. The Tribunal noted the claimant's results as set out in the 1998 Report from the Wechsler Memory Scale – Revised test as being: -

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'The results of this test suggest that in comparison to the general population, Donna has particular difficulty recalling information after a time delay and recalling visual information, with some weaknesses in other areas, such as attention / concentration and general memory.'

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The apparent differential between 'particular difficulty' with regard to some aspects and 'some weaknesses' with regard to others, suggested to the Tribunal that the 'weaknesses' which the claimant showed in 'general memory' could not be equated with the claimant's description of her forgetfulness as 'extreme'. The claimant accepted under cross examination

5 that she could not say how often others experienced issues such as forgetting where they had parked their car in a car park, leaving an iron or hair straighteners on or leaving their packed lunch at home. The claimant's level of perception of her forgetfulness as being 'extreme' was inconsistent with the objective test results of her working memory. Without any expert interpretation of those results, and given the explanations set out the Reports on what was tested (as set out in the findings in fact), the Tribunal took 'Working Memory' to be applicable to these day to day activities. The claimant's evidence on the extent of her forgetfulness, as set out particularly in her statement and the accompanying Table was inconsistent with the test results placing the claimant's working memory within the range of 50% of the comparative group. The Tribunal accepted the Respondent's interpretation of the test results. The Tribunal did not find the claimant to be credible with regard to the extent of her level of forgetfulness. The claimant specifically relied on this level of forgetfulness as 'one of the major impacts' of her condition. That position was not supported by the objective testing as shown in the Reports. It was the claimant's position, and it was accepted by the Tribunal, that what was tested did impact on day to day activities. This would be of the type described by the claimant such as remembering what was written in a diary, remembering where keys were or where a car was parked and remembering appointments.

108. It was put to the claimant in cross examination that her scores in the test for 'Working Memory' fell within the upper end of average category. The claimant sought to address the fact of the objective testing showing that, with use of the coping strategies, she fell within the average range by interpreting the test results as meaning that she fell within the lower part of average and that without her impairment she would have achieved much higher. With regard to assessing the claimant's credibility and reliability, the Tribunal did not accept that explanation as reconciling the claimant's evidence with the objective test results. This negatively affected the Tribunal's assessment of the claimant's reliability and credibility.

109. There were other issues which negatively affected the Tribunal's assessment of the claimant's credibility and reliability. The Claimant's position in her evidence was that she had difficulties in a number of areas which were not set out in the medical reports and on which no medical evidence was produced. The Claimant's position before the Tribunal was that she has difficulties in pronouncing words, and in processing information in order to be able to answer questions. The 2014 Report noted that the Claimant had difficulty 'pronouncing polysyllable words', evidenced from a difficulty with one word out of 5. The Tribunal found that in giving her evidence the claimant showed no difficulties in pronouncing words. The Tribunal found that throughout her oral evidence the claimant responded quickly to questions, gave articulate answers and information beyond the scope of the question without being prompted to do so. On the face of it, this appeared to be in line with the finding in the 1998 Report of a 'relative strength in her ability to describe the meaning of words' and to be inconsistent with the claimant's position that a major effect of her impairment was that she did not elaborate in answers. The Tribunal accepted the Respondent's submissions that there was no medical evidence presented by the claimant supports the claimant's position that she often does not elaborate or go into sufficient detail as a result of my disability. The claimant's position in her witness statement was that 'this is one of the main hurdles I face as a result of dyslexia' but there was no corroboration of this. During the Tribunal proceedings the claimant showed no difficulty in processing information in order to be able to answer questions. The Tribunal accepted the claimant's explanation for any difference in the way in which she gave her evidence from February to May being due to the fact that in the May hearing date she knew what kind of questions to expect, had not stayed up late the night before and was not interrupted by the external noise which was experienced after lunch on the February Hearing date.

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110. The Tribunal accepted the Respondent's submissions that there was no medical evidence presented by the Claimant which addressed or supported her position that she has difficulties with driving and directions, sensitivity to noise and visual stimuli, body language or difficulties with time management.

The claimant described travel as 'horrendous' and that she was 'dangerous on the road' because of her problems with 'concentration and focus'. The Tribunal would have expected that extent of difficulty to be set out or at least indicated in the Reports.

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111. There were a number of areas of the claimant's evidence where her position was inconsistent with the Reports or was not mentioned in the Reports. An example of this is the claimant's evidence that she suffered from exhaustion and fatigue to the extent that she required to take regular naps. The Tribunal would have expected such a level of impact to be recorded in the Reports but it was not and it was not the claimant's position that her condition or its effect had deteriorated since the date of the Reports. The claimant's explanation in cross examination for areas where she said she experienced difficulties which arose from her dyslexia not being addressed in any of the medical Reports was that her statement 'is about life as a whole' and that 'I don't think they test for that.'. At another stage in cross examination, she was asked why the medical reports did not mention her claimed difficulties with noise and in certain lighting. The claimant accepted that there was no mention of these difficulties in the medical reports, stating 'I was trying to show the impacts on my daily life. I don't think the report assesses that.' The Tribunal did not accept this as explaining the inconsistencies between the claimant's evidence and the Reports.

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112. The claimant was noted to say 'with hindsight I shouldn't have used the coping techniques' (with regard to when she carried out the tests for the purposes of the Reports). That was taken by the Tribunal as an indication that she was prepared to present a picture of the effect of her difficulties which was not entirely accurate. Although the Tribunal accepted that it was the claimant's ultimate position that her main difficulty is not with reading and writing, the claimant's evidence on the extent of her difficulties with reading did change. The claimant at times maintained her position in her witness statement that she had extreme difficulties with reading, replying under cross "I do at times, yes.' That position is expressly discredited in the 2014 Report, which unambiguously states 'It would be difficult to support a

suggestion that Donna has difficulties with reading and spelling. When it was put to her that that position was not supported by the medical evidence, the claimant's position was that a lot of time she read using skills she had practised over the years. In a lengthy answer, she went on to say 'Reading and spelling are not the major problem for me - that's why I asked for the questions in advance at interviews – then I can structure my replies. My reading and spelling is not the best but it gets me by.' The Claimant's position in her personal statement was that when trying to choose a card for an occasion such as a birthday she often bought an inappropriate card. There was no indication in the Reports of the level of difficulty in reading presented by the claimant in her witness statement and the Table. The Tribunal noted that the claimant's written submissions did contain some spelling errors, of the type described in the Reports.

113. Because of these inconsistencies, the claimant was considered not to be a wholly credible and reliable witness. The Tribunal's findings in fact with regard to the coping strategies used by the claimant were in line with the claimant's evidence before the Tribunal on this (although did not take into account further evidence sought to be introduced by the claimant in her written submissions). The Tribunal did not make findings in fact that the claimant was affected in her day to day activities by fatigue in the way as described by the claimant. The Tribunal did not accept the claimant's evidence on the extent of her difficulties.

114. The Tribunal answered the questions as set out in **Goodwin – The Patent Office**, with reference to the Equality Act definition rather than the then applicable DDA definition. The issue was determined with regard to the Equality Act 2010 definition of the protective characteristic of disability, the Equality Act 2010 Guidance on matters to be taken into account in determining questions related to the definition of disability and the relevant authorities to which the Tribunal was referred by parties. The Tribunal answered those questions as follows: -

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(i) *Does the claimant have an impairment which is either mental or physical?* – Yes. The claimant has a Specific Learning Disability (understood by the claimant to be a term for dyslexia).

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(ii) *Does the impairment affect the claimant's ability to carry out normal day to day activities and does it have an adverse effect?* – Yes. The Tribunal reached this conclusion based on the test results in the Medical Reports. The Tribunal took into account the comments in EKPE that it affects then will be adverse effect QUOTE. The Tribunal followed the position in ***Paterson*** (at para 67), with reference to the decision of the ECJ in ***Chacon Navas*** that work activities should be taken into consideration as part of normal day to day activities. The Tribunal accepted the claimant's submissions that what was tested in the Reports impacted on normal day to day activities.

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(iii) *Is the adverse effect (upon the claimant's ability) substantial?* – The Tribunal did not find on the face of the evidence presented to it, taking into account its determination as to the credibility of the claimant, that the adverse effect was substantial when taking into account coping strategies which were or could reasonably be utilised by the claimant to mitigate the effects of her condition. Further consideration on this question is given below.

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(iv) *Is the adverse effect (upon the claimant's ability) long term?* – Yes. The Tribunal approached its consideration of this question on the basis that the claimant has had a Specific Learning Disability since birth. The Tribunal proceeded on the basis that that Specific Learning Disability was unchanging. The Tribunal does however note that the material date at which the claimant's level of disability should

be assessed is the date when the alleged discrimination is said to have taken place.

115. The Tribunal approached its consideration of this question following
5 *Paterson*, approved by the Honourable Mr Justice Langstaff (President) in
Aderemi -v London and South Eastern Railway Ltd stating, at para 15 -
17:- -

a. 'As a matter of first principle when considering the statute, this
requires the focus of the Tribunal to be not upon that which a
10 claimant can do but upon which he cannot do. It is what he
cannot do that requires to be assessed, to see whether it is truly
trivial and insubstantial or whether it is not.

b. 16. We take that to be the approach which a reading of the
15 statute would require. It is the approach as we see it which was
adopted, albeit under the Disability Discrimination Act in
Paterson. There the head note rightly reads:

c. *"The only proper approach to establishing whether the
20 disadvantage was substantial is to compare the effect of the
disability on the individual. This involves considering how he in
fact carries out the activity compared with how he would do it if
not suffering the impairment. It that difference is more than the
kind of difference one might expect taking a cross section of the
25 population, then the effects are substantial."*

d. 17. By "compare the effect" we think it means "assess the effect".'

116. The Tribunal also noted from section B9 of the Guidance that '.it is important
30 to consider the things a person cannot do, or can only do with difficulty'.
The only evidence of anything which the claimant cannot do because of her
impairment is 'recite times tables quickly and accurately from memory.'
(described as an 'inability in the 2014 Report). There was evidence of her
having difficulties in some areas. The Tribunal therefore considered the

effect of the impairment with regard to the claimant's difficulties, and the extent of those difficulties. There was a lack of objective evidence on the extent of the effect of the difficulties. There was no indication in the medical evidence before the Tribunal as to what the claimant's abilities would be if she did not have dyslexia. The claimant expressed her own view that her 'average' test results don't reflect her capability as someone who has achieved a 2:1 Honours degree. The Tribunal considered whether the extent the effect of the impairment was substantial.

10 117. The Honourable Mr Justice Elias gives guidance in Paterson on the meaning of 'substantial' in this context. Commenting on the then relevant guidance, as para 27, he states: -

15 'In our judgment, A1 is intending to say no more than that in the population at large there will be differences in such things as manual dexterity, ability to lift objects or to concentrate. In order to be substantial the effect must fall out with the normal range of effects that one might expect from a cross section of the population. However, when assessing the effect, the comparison is not with the population at large. As A2 and A3 make clear, what is required is to compare the difference between the way the individual in fact carries out the activity in question and how he would carry it out if not impaired.'

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25 This approach was confirmed in para 68, stated as:-

30 'In our judgment the only proper basis, as the Guidance makes clear, is to compare the effect on the individual of the disability, and this involves considering how he in fact carried out the activity compared with how he would do if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross section of the population, then the effects are substantial.'

118. On the face of the medical reports, the difference between 'how' the claimant 'in fact carried out' the activities on which she was tested and how she would have had carried them out if not impaired appears to be that she used 'coping strategies' such as coding and she has some difficulties as set
5 out in the test results. The 'how' was taken by the Tribunal to include the fact that she showed some difficulties. Although the authors of the report recommended that the claimant be scheduled 'extra time' in an exam situation, there is no indication of the extent of such extra time. The Reports indicate that the testing was done within a particular time frame, and so the
10 claimant did not in fact take more time to complete the tasks (although she would have liked to have had more time).

119. The claimant's test results as shown in the Reports put her at or above the range of 50% of the comparator group. The Tribunal took the view that that
15 this comparator group was a cross section of the population as considered appropriate in Paterson. If the claimant's impairment has any effect on her ability to do the activities tested, then it follows that without that impairment, the claimant would have performed better in the tests, and so would have achieved results placing her in the higher end of the comparator group. The
20 Tribunal took into account the Guidance at B1 which states:-

'The requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal
25 differences in ability which exist among people.'

Given the test results placing the claimant within the average 50% of the comparator group, the Tribunal concluded that the claimant did not have a disability which had the effect of placing on her 'a limitation going beyond
30 the normal differences in ability which exist among people'. In reaching this conclusion, the Tribunal attached weight to the results of the objective testing on the claimant as set out in the reports as being objective assessments of the type envisaged in Paterson -v Commissioner of

Police of the Metropolis as being useful as part of the consideration of the issue in this case.

120. The Tribunal took into account the evidence that the claimant achieved the test results she did because of the coping strategies which she has developed and uses. Under the heading 'Effects of Behaviour', the Guidance sets out at B7: -

- i. *“Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of 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 definitions of disability. In other instances, even with the coping or avoidance strategy, there’s is still an adverse effect on the carrying out of normal day to day activities ‘Account has to be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day to day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that that they are no longer substantial and the person would no longer meet the definition of disability. In other instance, even with coping or avoidance strategies, there is still an adverse effect on the carrying out of normal day to day activities.’*

121. In its consideration of the effect of the impairment, the Tribunal accepted the Respondent’s submissions that following **Commissioner of Police of the Metropolis -v- Viridi** the correct approach was to take into account the coping strategies used by the claimant. The Tribunal accepted the Respondent’s submissions that it was appropriate to take into account coping strategies which ought reasonably to be used by the claimant, such

as setting a mobile phone to issue reminders. The Tribunal took into account the claimant's position in evidence that for 'no good reason' she did not practice or use the coping strategies suggested to her by the authors of the Reports.

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122. It is of note that there is a distinction between coping strategies and corrective treatment. The Act states at Sch, para 5(1) that corrective treatment should be disregarded. That is what was referred to by Baroness Hale in **CSA Packaging Limited V Boyle [2009] UKHL 37**. As set out in **Paterson** (para 46) 'In principle, as para A7 of the (then relevant) Guidance makes clear, a coping strategy may in an appropriate case eliminate the adverse effect.'

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123. It appeared to the Tribunal on the face of the test results set out in the medical Reports that when the claimant utilised her coping strategies, then those coping strategies did eliminate the adverse effect to the extent that its effect was not 'beyond the normal differences in ability which exist among people.' She achieved test results placing her in or above the average 50% of the comparator group.

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124. The Tribunal took into account the heavy reliance by the claimant in her submissions on the unsustainability of her coping strategies and the claimant's position in evidence with regard to the test results being: -

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'I have really good coping strategies which I use to allow me to perform within average. It's only with very complex coping strategies. Margaret said in her report that these are not sustainable.'

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125. The Tribunal noted the wording of the 2016 Letter and that Ms O'Donnell did not express a view that the coping strategies were unreasonable. She said '...and some may say unreasonable'. The Tribunal took into account that there is no indication in the 1998 report that the coping strategies used by the claimant are not reasonable or are unsustainable. The 1998 Report states that the claimant 'works hard' and that various coping strategies were

used by her but does not indicate any level of unreasonableness in her coping strategies. The Tribunal made findings in fact on the coping strategies used by the claimant in her normal day to day activities. Given the Tribunal's conclusion that the claimant was not wholly credible or reliable in her evidence, the failure of the 2014 Report in particular to make it clear how was reported by the claimant was assessed for veracity and the lack of corroboration from any other witness, on the basis of these findings in fact, the Tribunal did not conclude that the coping mechanisms which the claimant used or could reasonably be expected to use in her day to a day activities were unreasonable or unsustainable. The Tribunal did not accept the claimant's submission that the veracity of her position was confirmed in the Reports. The Tribunal accepted the Respondent's submissions that the coping strategies were reasonable. The Tribunal noted that the 1998 Report was somewhat dated in its reference to aid from 'modern word processors'. The Tribunal noted the claimant's acceptance that her coping strategies changed with the development of technology and the claimant's use of some such technology. The Tribunal accepted the Respondent's submissions that use of the functions in a modern smart phone such as the calendar function were reasonable coping strategies. The Tribunal accepted the Respondent's submissions that the coping strategies were commonly used by people dealing with many demands in a modern world. The Tribunal accepted that the use of modern technology such as smart phone applications, including calendar and reminder functions, were reasonable strategies commonly used to assist in remembering. The Tribunal accepted the Respondent's submissions that the coping strategies used by the claimant in her day to day activities, such as leaving keys in particular place to pick up in the morning before leaving the house, were commonly applied by many people.

126. The Tribunal considered section B of the Guidance in its consideration of the meaning of 'substantial adverse effect'. It took into account paragraph B2 in respect of the time taken to carry out an activity. Although the Reports do support the claimant's position that her condition causes her difficulties in processing information so that she takes more time to understand meaning,

5 the Reports do not specify the extent of that difficulty and the amount of additional time the claimant takes in comparison to the time she would take but for the effect of her impairment. There was no indication that this additional time would be similar to the example given at section B2, where the words 'much longer' are used. The Tribunal noted that in the example given at B6 it is indicated that a person who has a mild learning disability which 'means that his assimilation of information is slightly slower than that of somebody without the impairment' would not, on that effect alone have a substantial effect (although in that example the cumulative effect of another condition should also be taken into account). Again, the Tribunal was not assisted by the lack of objective evidence on the extent of the effect of the claimant's impairment. It is stated in the 2014 Report that the claimant 'would have liked' an additional – 11/2 hours to complete the letter but there is no indication that that extent of additional time was required because of the effect of her impairment. There was no objective evidence on the extent of the effect of her impairment with regard to how much more time she would require to process information. The Tribunal accepted the Respondent's submissions that the claimant's desire to make no mistakes impacted on the amount of time she would wish to take. This is distinct from what would be required because of the effect of her impairment.

127. The Tribunal considered section B of the Guidance in respect of 'the way in which an activity is carried out', noting that 'the comparison should be with the way that person might be expected to carry out the activity compared with someone who does not have the impairment.' The Tribunal did not find the claimant's evidence to be credible in respect of the way in which she carried out activities. The Tribunal did not accept the claimant's evidence on the high level of fatigue or tiredness experienced by her as an effect of her impairment. Her evidence was not fully supported by the Reports and there was no other witness to support her position.

128. The Tribunal considered sections B4 – B6 with regard to cumulative effects of an impairment. This has two aspects: (i) the effect of an impairment on many activities and (ii) the effect of more than one impairment. Although the

5 Tribunal accepted the claimant's position that her specific learning disability had an effect on many day to day activities, as set out in the findings in fact, the Tribunal did not accept the claimant's unverified evidence as to the extent of the effect. There was no evidence, and it was not the claimant's position, that she was affected by any other condition, such as depression (as is referenced in the example at B5) which has a cumulative effect on her. It was the claimant's clear position that she attributed all of her difficulties to dyslexia and that she did not rely on any other condition. Although the claimant referenced in her evidence to having problems with her gall bladder and anxiety, and to receiving counselling related to a previous work situation, there was no medical evidence on the extent of the effect of any such condition. Her position was that 'dyslexia and anxiety are closely linked' and that she was 'not sure which causes which or makes it worse.' There was no substantive medical evidence before the Tribunal on the effect of anxiety on the claimant, whether linked to dyslexia or not. There was no evidence of any diagnosis of an anxiety related condition or on the effect of any such anxiety related condition.

129. The Tribunal considered sections B7 – B10 with regard to effects on behaviour and coping strategies. As set out above, the Tribunal considered the coping strategies to be reasonable.

130. The Tribunal noted sections B12 – B17 were with regard to corrective treatment rather than coping strategies. There was no evidence of the claimant having had any medical corrective treatment for her condition.

131. The Tribunal considered section C of the Guidance, in particular C10 which states: -

30 'In addition, it is possible that the way in which a person can control or cope with the effect of an impairment may not always be successful. For example, this may be because an avoidance routine is difficult to adhere to, or it adversely affects the ability to carry out day to day activities, or because the person is in an unfamiliar

environment. If there is an increased likelihood that the control will break down, it will be more likely that there will be a recurrence. That possibility should be taken into account when assessing the likelihood of a recurrence.'

5 132. The Tribunal noted the claimant's position that her coping mechanisms had broken down because of the Tribunal hearing. The Tribunal did not accept that the Tribunal proceedings were normal day to day activities or that the likelihood of breakdown of the coping strategies was such that the claimant's specific learning disability should be taken to have a substantial adverse effect. The Tribunal took into account Ms O'Donnell's comments in the 2016 Letter but did not attach weight to them. The Tribunal accepted the Respondent's submissions on the limitations of the 2016 Letter given its apparently subjective nature and that the author does not appear to be experienced in applying the Equality Act. The Tribunal's drew its own conclusions on the reasonableness of the coping strategies which are used or could be used by the claimant, based on its findings in fact and in a similar way to drawing its own conclusions on the issue of disability.#

133. The Claimant relied on the EAT's decision in **Whitbread Hotel Co Ltd -v- Bayley**. The present case is distinguished from the facts in that case. In **Bayley**, the claimant was presented as having 'severe dyslexia'. Results from tests showed Mr Bayley's specific learning difficulty of dyslexia as affected him in various areas, with tests showing him as having 'significant underachievement' and placing him 'close to the bottom of his peers'. There was no medical evidence led by the Claimant that her condition has a similar extent of effect. There was no medical evidence that the claimant had any of the 'secondary characteristics' which 'may occur'. It was not enough for the claimant to present a position that she has dyslexia and that dyslexia is a complex condition which has one or more affects. The Tribunal accepted that dyslexia is a complex condition which affects more than reading and writing but could not conclude on the basis of the medical evidence before it that the claimant has all of the possible affects with which a person with dyslexia may present.

134. The claimant has not discharged the onus of proof. The claimant has not proved on the balance of probabilities that she has the protective characteristic of being a disabled person within the definition of the Equality Act 2010. The Reports relied on by the claimant do not prove that she has a
5 mental impairment which has a substantial effect on her normal day to day activities. The claimant's evidence on the extent of that effect was not accepted for reasons of credibility. The claimant is does not have the protective characteristic of disability in terms of the Equality Act 2010. Having failed to establish at this PH that the claimant is a disabled person
10 within the meaning of section 6 of the Equality Act 2010, her claim for discrimination on the grounds of that protective characteristic is dismissed.

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Employment Judge: C McManus
Date of Judgment: 21 July 2017
Entered in register: 21 July 2017
20 and copied to parties