



EMPLOYMENT TRIBUNALS

Claimant: Miss S Oliver

Respondent: Neal's Yard (Natural Remedies) Limited

Heard at: Sheffield **On:** 27 April 2018

Before: Employment Judge Brain

Representation

Claimant: Miss K Nowell, Counsel
Respondent: Miss R McKay, Solicitor

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was a disabled person by reason of the physical impairments of asthma, the right wrist condition and her foot condition ('the physical impairments').
2. The respondent had actual knowledge of the asthma and right wrist condition; in the alternative, the respondent has constructive knowledge of the asthma and right wrist condition.
3. The respondent had constructive knowledge of the foot condition.
4. The claimant was disabled by reason of the physical impairments at the date of commencement of her employment with the respondent and for the duration of her employment.
5. The claimant was not a disabled person by reason of the mental impairment of anxiety and depression.

REASONS

1. By a claim form presented on 6 December 2017, the claimant brings complaints of discrimination by reason of her disability. It is her case that the respondent subjected her to unfavourable treatment because of something arising in consequence of disability and that the respondent failed to comply with the duty upon it to make reasonable adjustments. The claimant therefore says that the respondent subjected her to the conduct which is prohibited under section 15 and section 20 of the Equality Act 2010 and which prohibited conduct is made unlawful in the workplace pursuant to section 39(2) and (5) of the 2010 Act.
2. This case benefited from a private preliminary hearing which came before Employment Judge Rostant on 29 January 2018. A copy of his case management summary is at pages 40 to 46 of the bundle. There, Employment Judge Rostant comprehensively sets out the issues in the case. I shall not repeat those in these reasons. It is sufficient to make the following observations:-
 - 2.1. The claimant contends that she is a disabled person for the purposes of the 2010 Act by reason of both physical and mental impairments. These are: a painful foot; impaired function of the right wrist; asthma; and depression and anxiety.
 - 2.2. Part of the respondent's defence in answer to the claimant's claims is that the respondent did not know and could not reasonably be expected to know that the claimant was a disabled person for the purposes of section 6 of the 2010 Act. Further, in answer to the reasonable adjustments complaint, the respondent says that it did not know and could not reasonably be expected to have known that the claimant was likely to be placed at a substantial disadvantage in relation to relevant matter (in comparison with persons who are not disabled) by the application of the relevant provision, criteria and practice to her.
3. Employment Judge Rostant ordered that there should be an open preliminary hearing in order to decide whether the claimant at all material times was a disabled person for the purposes of the 2010 Act and the issues of the respondent's knowledge. He gave case management directions confined to the preliminary hearing that came before me. These extended to an order that the claimant provide copies of her general practitioner's notes and other medical notes and records for a period of up to one year prior to the start of her employment with the respondent. There was no order for the provision of a medical report. The claimant did not produce a medical report and relied upon her own evidence coupled with medical notes.
4. At the outset of the hearing, it was agreed that my determination of the knowledge issue should be confined to the question of the respondent's actual or constructive knowledge of the claimant's disability. The question (upon the reasonable adjustments complaint) of the respondent's actual or constructive knowledge of substantial impact was one for determination at a final hearing (should the preliminary issue be decided in the claimant's favour). Following the conclusion of the evidence I directed that the parties must file written submissions. The parties complied with the Tribunal's Order.

5. The respondent is a well known producer and retailer of ethical and organic health and beauty products. According to the grounds of resistance, the respondent “has 56 company and franchise retail stores across the UK”. The claimant was employed by the respondent between 24 April and 22 September 2017. At the outset of the hearing, it was agreed that it was open to me to decide that the respondent acquired actual or constructive knowledge of the claimant’s disability at some point during the course of her employment.
6. It is not in dispute that the claimant was recruited to work as the store manager at the respondent’s store in the Meadowhall shopping centre. This had been due to open in May or June 2017. However, there was an unforeseen delay in the opening of the store. This meant that the respondent was unable to place the claimant into that store upon completion of her initial training on 12 June 2017. As it was expected that the Meadowhall store would open shortly afterwards, the respondent asked the claimant to provide store management cover in a number of its other stores pending the opening of the Meadowhall store. Therefore, the claimant worked away from her home in Dewsbury. She worked in stores in Marylebone, Covent Garden, Stamford, Borough Market, Birmingham and, from 22 August 2017, in Leeds. It is not disputed that the claimant made a request in August 2017 to work in a store nearer to her home in Dewsbury. Hence, arrangements were made for her to work in Leeds.
7. The Tribunal was presented with witness statements from the claimant and, on behalf of the respondent, from Samantha Russell and Jane Carmona. The hearing bundle ran to over 250 pages. The parties’ submissions each ran to over 20 pages and I was furnished with around a dozen case authorities to consider. No criticism of the parties is intended by these observations. The case was conducted proportionately to the importance of the issues. This case does however show that the length of a reserved judgment and the difficulty of the dispute presented to the Tribunal are by no means always commensurate with the length of the hearing.
8. Miss Russell commenced employment with the respondent in October 2015. She was employed as a store manager for the respondent’s York store. She was then promoted to dual site manager, covering the Leeds store and the York store. Mrs Carmona has been employed by the respondent for approximately three years. Her current role is regional manager. She says, “At present, 11 store managers report directly into me. In addition, two cluster managers also report directly into me and they are also responsible for 11 stores between them.” Mrs Carmona says that, “during her employment, the claimant was one of my direct reports”. Miss Russell was a peer of the claimant and was at the same level as her. As she observed, Mrs Carmona was her line manager.
9. The claimant’s witness statement has passages (at paragraphs 2 to 15) dealing with the question of her disability and then (at paragraphs 16 to 23) passages upon the issue of the respondent’s knowledge.
10. I shall firstly summarise the evidence in chief which the claimant gave (in her printed witness statement) upon the issue of disability. I shall couple the summary with observations about the medical notes.

11. I shall take the physical and mental impairments in the order in which they are set out in the claimant's witness statement. She says in her statement that her wrist problem commenced in or around 2010.
12. Within the bundle (page 63) there is a letter from her GP of 20 September 2012 (addressed to an out-patient clinic) in which reference is made to the claimant having a ganglion on her right wrist for the last two years which developed following a trauma to her right hand. The GP says that, "For the past year the ganglion has been growing bigger and has become painful. She is now unable to hold things properly and it is affecting her at work. She is also frequently getting shooting pains going along the little finger". Arrangements were made for an MRI scan for diagnostic purposes to take place on 30 October 2012. Unfortunately the claimant did not attend the appointment. This was because there was an error in record keeping and her address had not been correctly updated following a house move.
13. At all events, she was eventually seen (following a further appointment with her GP on 5 September 2016: page 80) and the benign tumour was removed from the ulnar nerve of her right wrist on 3 January 2017. At the same time, some of the nerve from the outside of her right foot was transplanted into her wrist. The claimant refers to pages 128 to 131 of the bundle (being a discharge letter from the Pinderfield Hospital in Wakefield to her GP) which makes reference to this procedure having taken place. This confirmed the procedure that had been undertaken and the history which was described thus: "7 year history of mass right ulnar aspect of wrist with increasing pain, parasthesia and weakness over the last six months".
14. The claimant says in paragraph 3 of her witness statement that, "the wrist problems both prior to and since the operation are chronic pain, pins and needles, numbness, loss of balance, reduced strength, inability to safely lift moderately heavy objects, not being able to write or type for long periods or to write well and difficulty with repetitive tasks. The pain is intermittent and can happen at any time for varying degrees of time – it is usually short and sharp and can be quite shocking which results in shaking, jerking, dropping things or in the case of my foot, tripping or losing my balance. If completing repetitive tasks I suffer reduced mobility and strength in the hand which can result in uncontrollable shaking and an ache and stiffness that can last several days. Sometimes I am unable to make a fist or have any grip. It is debilitating and sometimes embarrassing as my handwriting is poor and people often stare." In evidence given under re-examination, she said that she had "underestimated the effects on me of my operation- I couldn't left a cup or tie my laces- it's quite shocking." She said that matters were improving but she still has to do things two-handed and that holding the steering wheel of her car was tiring. She said that she struggled to chop vegetables by reason of difficulties holding small utensils (around the period between April and September 2017: [the significance of this period is that at around this time the claimant was contemplating setting up a mobile food outlet which would involve vegetable and food preparation. She said that she would enlist the help of others with such tasks until the post-surgery recovery was substantially complete]).
15. The claimant says at paragraph 5 of her witness statement that, "The foot problem started in January 2017 following the surgery and means that I am not able stand comfortably for long periods. I have had a review with a

member of Mr Southern's team [*I interpose here to say that Mr Southern is the claimant's treating surgeon*] about this on 20 February 2018 and it is suspected that a suture that has been left under the skin, resulting in extreme sensitivity around the area. The pain is intense at times, I am unable to wear certain shoes as they press on the painful area and I have had to considerably reduce participation in things I enjoy such as running, skating and hiking as I end up in pain and the area of tissue gets very inflamed and sore". The claimant says (in paragraph 4 of her witness statement) that she is undergoing ongoing treatment under the care of Mr Southern. There are ongoing investigations in order to determine the next course of action. She refers to page 89 and the reference in her GP notes to her commenting (in a consultation of 4 August 2017) to being on her feet all day and having to use her arms a lot.

16. At paragraph 6 of her witness statement the claimant says, "As for my asthma, since 2013 that is generally controlled by medication but without that medication my symptoms would be disabling. I have previously suffered a suspected asthma attack in the late 1990s further to an allergy to dairy products and at that point was put on a nebuliser in A&E and prescribed steroids. I didn't have any further issues until 2013 when I was diagnosed with asthma after being subjected to black mould in the basement of a house I was living in during July 2013. I suffered extreme shortness of breath, a chest infection and sinusitis and I was taken to hospital as I could not breathe properly. I was prescribed steroid tablets and blue and brown inhalers. The brown inhaler (QVar) is a preventative and I have that twice a day. I take the blue inhaler (Salamol) when needed and feel tightness in the chest or short of breath. I can go weeks without needing the Salamol but if exposed to a trigger, become dependent on it".
17. At paragraph 8 of her witness statement the claimant says, "Asthma attacks can still be caused by allergies to foods and to mould/damp if I do not take precautions to prevent exposure. I am susceptible as a result of my asthma to ear, nose, throat and chest problems, for example, colds, sinusitis and chest infections". She then refers to a number of references within her medical notes which need not be recited here.
18. There are numerous entries (between 5 August 2013 and 8 January 2018) in the claimant's general practitioner's notes relating to the asthmatic condition. These are summarised in Miss Nowell's written submissions (in paragraph 27). I shall not list them all here. I note that the first entry at page 71 is dated 5 August 2013 and refers to the asthma as limiting the claimant's activities.
19. At paragraph 9 of her witness statement the claimant says, "I have suffered from anxiety and depression since November 2016. There is reference to stress/depression in my GP notes on 30 March 2015 (page 76); and 1 December 2016 when I began to take Sertraline (page 82). My symptoms include intense worry and anxiety about what would normally be a minor situation which then leads to debilitating panic attacks and moderate depression leading to difficulty in maintaining focus and remaining motivated. Symptoms are severely escalated and exacerbated by cyclical PMS leading to intrusive thoughts, loss of memory and inability to control emotions. 50mg of Sertraline was prescribed daily since December 2016".

20. She goes on to say in paragraph 10 that, “If the medication is not taken this induces headaches, nausea, panic attacks, forgetfulness and severe, uncontrollable anxiety. Within 42 to 72 hours of not taking the daily dose (which did happen sometimes if I was working away from home) I used to get a feeling like my head was being pressed really hard on both sides. I would feel sick and when I would talk to people I would feel anxious that I had said something strange and then sit and run the conversation over and over in my head. I would worry that I had not locked the shop properly or put the money away so would often go back after I had left just to check – sometimes this would happen three or four times until I was satisfied. I would suffer late waking insomnia where I would awake around 3am each morning and worry uncontrollably about small things that had happened in the previous days/weeks/months”.
21. Upon the issue of the respondent’s knowledge, I shall now turn to summarise each party’s evidence. The claimant contends that the respondent had knowledge of her disabilities. She says at paragraph 16 of her witness statement that, “My wrist and asthma problems are referred to in a text to Jane Carmona dated 31 May 2017 (page 169): *[I think this is an error and should be a reference to page 177]*. They are referred to in the email of 4 May 2017 – page 234. They are described in the risk assessment dated 1 June 2017 (pages 173 to 176). See also my email of 1 June 2017 to Jane Carmona and others. See also the email between Jane Carmona and Catherine Wilcox dated 12 September 2017 (page 195). The return to work form dated 13 September 2017 (page 208) refers to the risk assessment and problems with dampness at the Leeds store. There is also discussion of these issues in the various emails between Jane Carmona and Catherine Wilcox dated 31 September 2017 (pages 203 to 206)”.
22. The claimant says that she raised issues about problems with her foot with Sam Russell on 24 April 2017 when she attended for her induction in York. She says that she explained that if she had to stand for long periods she could develop pins and needles in her foot and occasional sharp, shooting pains, due to the removal of some nerve tissue from her foot. She also says that she explained to Sam Russell about the problems with her wrist including that she could not repeat repetitive tasks, large pieces of writing, handle heavy objects and that she was at risk of dropping things.
23. The claimant maintains that these problems were noted on the health and safety induction sheet. A template induction handbook is in the bundle at tab 42. It appeared to be common ground that the final page of the handbook (at page 231) should be upon the employee’s personnel file. Jane Carmona told the Tribunal that the rest of the document is kept by the employee as it is a standard printed document. However, the notes referred to by the claimant have not been produced.
24. The claimant says that Sam Russell and Jane Carmona were both aware of the issues with the claimant’s hand and foot as she attended the first interview wearing a large brace and there was a discussion about the operation. The claimant also says at the second interview (which was attended by Mrs Carmona but not by Miss Russell) she had got a new brace upon which Mrs Carmona made a comment and enquired as to the claimant’s welfare. The claimant says that at the second interview she raised the issue of asthma as Mrs Carmona had made arrangements for the claimant to work in

Stamford. Two hours of each day there was to be lone working. The claimant expressed concerns about this then asked for a risk assessment for her hand, foot and asthmatic conditions. She says that this was followed up by a text message of 31 May 2017 (page 177) in which the claimant made a request for a risk assessment “due to asthma and my hand.” Her evidence is that the risk assessment (at pages 173 to 176) was completed in June 2017 and sent to Jane Carmona who confirmed receipt.

25. The claimant also says that Miss Russell was aware of her asthma as, when she started working in Leeds, she was again concerned about lone working and working late shifts. The claimant makes reference to page 185 of the bundle. This is an email from the claimant to Sam Russell expressing her concerns. The claimant also says that she raised concerns about lone working and asked for a risk assessment at a return to work interview undertaken by Sam Russell on 13 September 2017 (following four days of illness due to sinusitis).
26. The claimant says that she discussed her anxiety and depression with Jane Carmona and others mentioned in paragraph 21 of her witness statement (including her assistant manager Hayley Youngman). She makes several references to documentation within the bundle in corroboration of her account (at paragraph 22 of her witness statement). This includes a text sent to Mrs Carmona on 31 May 2017 which makes reference to her taking a taxi that morning “as I had a bit of anxiety about being late this morning.”
27. Amongst the references to the Tribunal documentation made by the claimant are the following.
 - 27.1. On 5 April 2017 the claimant completed some ‘additional employee details’ (pages 166 and 167) as part of the recruitment process. It has to be said that due to the prominence of the respondent’s logo this form is difficult to read in places. The claimant answers in the affirmative to questions as to whether she is waiting for treatment or investigations for a medical condition and that she has in the past had health problems which have caused her to have absences from work. Having answered in the affirmative, she was asked to provide further details. There she says that she had a benign tumour removed from the ulnar nerve in her right wrist and that she was undergoing desensitisation treatment in her foot from which the nerve was removed in order to undertake the graft into her arm. She declared that she had had 35 days of absence spread over three spells over the last two years with a previous employer (The Body Shop). She referred to having had six weeks of absence following surgery to remove the tumour in January 2017. She also said that the operation had caused her some restriction in dexterity. In her submissions, Miss Nowell makes reference to the form being annotated thus: *“The restricted use in hand-nerve graft from foot into ulnar nerve in wrist in January 2017- full use of hand not fully returned leading to difficulty gripping/lifting heavy objects and herb jars. Occasional sharp/involuntary spasm or shaking in wrist/hand leading to dropping things. The nerve is still regenerating and constantly improving and I have been given a timeline of up to two years from the date of surgery.”* (This passage does not appear in the Tribunal’s bundle. The reference at the bottom of page 166 to there being “some restriction in dexterity” is followed by an asterisk: I

presume that the passage is annotated elsewhere than page 166. I can of course work upon the basis of what I am told is upon this form by Counsel).

- 27.2. On 4 May 2017 she emailed Jane Carmona (page 234). She made appreciative comments about her assistant manager Hayley Youngman. The claimant observed that, "Due to the issues with limited dexterity on my hand, Hayley volunteered to fill jars whilst I hit recruitment".
- 27.3. Page 169 is an email from Mrs Carmona to others. At all events, Mrs Carmona says, "To re-cap on our conversation regarding Sophie earlier please can you focus on the following tomorrow? 1. Completion of risk assessment regarding lone working relating to her asthma and her hand ..."
- 27.4. Page 170 is an email from the claimant to Mrs Carmona dated 1 June 2017. Here, she gives what she describes as "a little background" about her asthma. She says that this is controlled by inhalers. In the event of an attack, she may obtain relief from an inhaler or an antihistamine. Failing that, then she would need to seek medical attention. She says however that that has happened only once in four years. She said, "I can go days, sometimes weeks without having any shortness of breath symptoms and my blue inhaler is sufficient to ease symptoms and it works instantly". She also mentions restrictions upon the use of her right hand. She says that, "full use of hand not fully returned leading to difficulty gripping/lifting heavy objects and herb jars. Occasional sharp pain/involuntary spasm or shaking in wrists/hand leading to dropping things. The nerve is still regenerating and constantly improving and I have been given a time line of up to two years from the date of surgery".
- 27.5. The risk assessment referred to by the claimant in paragraph 16 of her witness statement is at pages 173 to 176. This was completed by Maria Lydaki, assessor. The risk being assessed was in relation to the task of lone working. In relation to the asthma, Miss Lydaki gave a risk rating of "amber – tolerable". In relation to the use of the hand, she attributed to a risk rating of "green – acceptable". That said, in relation to the restrictions upon the use of her hand, Miss Lydaki said that the claimant was not to be left alone to complete deliveries. There was reference upon the form at page 173 to the surgery to the ulnar nerve of January 2017 and that is had lead to "difficulty gripping and handling heavy objects and jars. Nerve pain and spasms can lead to dropping objects."
- 27.6. Page 189 is an email dated 5 September 2017 from the claimant to Catherine Wilcox. Unfortunately, the claimant had fallen ill while on annual leave. She had been diagnosed with a sinus infection. The claimant was in fact certified as unfit for work by her GP following an examination on 7 September 2017. He noted that the symptoms had started on 1 September 2017 resulting in a cancellation of the claimant's holiday. The GP certified her as unfit for work until 21 September 2017.

- 27.7. Happily, the claimant was in fact certified as fit to work prior to that date and expected to return on 12 September 2017. In the event, she had what was described by Jane Carmona as an asthma flare up on the evening of 11 September and therefore deferred her return by a day to 13 September and to her having “a lot of sickness in her previous employer. Jane [Carmona] knows about this.” I refer to pages 194 and 195. The claimant texted Jane Carmona on 12 September 2017 (page 196) to say, “It’s impacting negatively on my mental health so I am trying to keep busy with my colouring books and making scrap books.” She goes on to say that “I’ve also downloaded audible from audio books as I can’t read for long at the minute.” Mrs Carmona related this to the asthma attack. The claimant’s GP certified her as unfit to work for one day on 12 September 2017 by reason of sinusitis (page 198). The claimant emailed Sam Russell on 12 September 2017 to inform her of the previous evenings severe asthma flare up (page 199). On the next day she texted Sam Russell to say that the “steroids have kicked in” (page 200).
- 27.8. The claimant also refers to the emails between Jane Carmona and Catherine Wilcox of 13 September 2017 at pages 203 to 206. Mrs Carmona was asking for sight of the risk assessment that had been carried out following the claimant complaining of the working conditions in Leeds (in particular damp and mould in the basement) following that week’s asthma attack.
- 27.9. The claimant also mentions the return to work form of 13 September 2017 at page 208. This was conducted by Miss Russell who noted the claimant’s concern about damp in the basement of the Leeds store and that the risk assessment at pages 173 to 176 related not to Leeds but to the store in Marylebone. There is also a note at page 207. This was written by Miss Russell on the reverse of the return to work form. This reads that the claimant “wasn’t allowed to lone work due to asthma. NYR have no issue. Operation Jan-risk assessment completed with regards to lifting/repetitive tasks”.
28. In paragraph 22 of her witness statement the claimant mentions that she and her partner had unfortunately been involved in an assault in April 2017. In paragraph 11 of her witness statement she says that the anxiety symptoms described in paragraphs 9 and 10 of her witness statement were exacerbated by the requirement to work from home during the early part of her career with the respondent in circumstances where, following the assault, her partner was suffering from post concussive syndrome and struggling to cope alone. It was this that largely prompted her request to move to a store nearer to her home. The assault had in fact taken place in Leeds and the claimant had some concerns about working there as a result.
29. The claimant’s account (in paragraphs 12 and 13 of her witness statement) is that the conditions in the Leeds store and Miss Russell’s behaviour exacerbated her anxiety. Aspirations (in discussions with her GP) to come off her anti-anxiety medication were, she says, thwarted by a combination of the physical conditions in the store and Miss Russell’s behaviour. The claimant says:-

“(12) She [Sam Russell] would say and do things that would make my anxiety peak (reference the comment about her speaking to HR), she would talk inappropriately about her personal relationships and she would comment on my appearance and choice of clothing. She would talk about her clothes, personal relationship with Jane Carmona and how Jane was helping her with her aspirations within the company. She would comment about Hayley, my assistant manager and her close relationship with Jane Carmona but would then ask me when I last spoke to Jane (knowing that it hadn’t been for days). She would snap at me and humiliate me in front of other staff and customers. She made me stand knowing I was in pain. She would make continuous comments and how she was “paying for me” which made me feel degraded and worthless.

(13) As a result, I became increasingly anxious and depressed and I stopped sleeping and eating properly, despite taking my medication daily. I would have panic attacks when I knew I was having to work alone in the Leeds store as one of the people that attacked my partner and I had not been caught at that point and I was terrified they would find me alone in the shop or walking back to my car. I didn’t feel like I could burden my partner at this point and I felt incredibly isolated. It became impossible to concentrate on anything, even a book or music and I withdrew completely socially as I felt that I didn’t have anything to contribute. I started to think about ways to hurt myself so I didn’t have to be at work and so that I didn’t have to upset my partner with what was happening to me as I was ashamed of my feelings and that I was being bullied”.

30. The claimant then goes on to refer to appointments with her GP in December 2017 and February 2018. Her medication dosage was increased (and has been maintained at that doseage) as she was suffering extreme depression which was impacting upon personal relationships. (The description by the claimant of her condition in December 2017 seems to have been of limited importance given that the claimant was dismissed by Jane Carmona on 22 September 2017).
31. The following evidence emerged during the course of the claimant’s cross-examination upon the issues of disability and knowledge:-
 - 31.1. The claimant confirmed that at both interviews there was “quite a discussion” about her wrist operation and difficulties that this caused her with heavy lifting and repetitive work.
 - 31.2. The claimant maintained that she had raised at interview problems with handwriting and with dropping items. She said that the interviewers must have noted that she was having difficulty writing during the course of the interview.
 - 31.3. The claimant said that the role did require large pieces of writing (such as undertaking stock lists, taking notes during performance management and writing upon labels for jars).
 - 31.4. The claimant was taken to page 152 which is a letter from her plastic surgeon to her GP dated 3 April 2017. This was prepared three months following the operation. The plastic surgeon says that the claimant “had been discharged from hand therapy last week having had full functional recovery with no deficit to the hypothenar eminence

of the right hand but I have asked her to get back in contact with them today for some desensitisation of her donor site”: *[the donor site was a reference to her foot]*. It was suggested that this was indicative of full recovery. The claimant disagreed with this and said that she was only able to move her little finger. That was what was meant by the reference to “full functional recovery”. She was therefore able to use that part of her hand. She said that she had been warned prior to the operation of the possibility of the loss of the use of the right hand and had decided to proceed with the operation notwithstanding that risk.

- 31.5. The claimant maintained that Sam Russell knew of the claimant’s condition of asthma prior to 13 September 2017.
- 31.6. The claimant said that the issue of lone working represented a significant risk and that she had not simply raised it because she disliked it. She expressed disbelief that the respondent was prepared to allow a female employee to work alone particularly as the store was next to a Louis Vuitton shop. She was concerned that if she had an asthma attack she would be unable to summon assistance quickly enough if she was on her own.
- 31.7. When pressed as to the basis upon which she believed that Sam Russell knew that the claimant had asthma, she said that when they had worked together in Birmingham she would have seen her with her inhaler and also during the time she worked with her in Leeds she kept her inhaler on her desk. The claimant accepted that she had made no mention of this in her witness statement. The claimant said that in any event Jane Carmona had noted the claimant’s asthmatic condition which had found its way on to the risk assessment at pages 173 and 174.
- 31.8. The claimant said that she had mentioned her foot condition at the interview attended by Sam Russell. She recalled this because she had turned up for the interview wearing trainers as she could not wear business shoes. She felt a need to explain why she had turned up wearing trainers and was conscious that this was inappropriate footwear for the occasion. She also says that she was walking with a pronounced limp. She conceded that she was aware that the role would involve periods of standing but said that she had anticipated that the respondent would make reasonable adjustments to allow her to sit when required. She accepted that the symptoms to the foot were not referred to in the risk assessment. She said that as far as she was concerned the wrist condition was her priority.
- 31.9. The claimant said that Miss Russell had made her stand for a prolonged period upon her first day of work in Leeds on 21 August 2017. The claimant gave a detailed description of the office where they had met upon her first day in Leeds. The claimant said that there was no room within the office for a second chair. The only chair in the room was taken by Miss Russell leaving the claimant to stand.
- 31.10. The claimant accepted that she had chosen to park her car, when travelling to work into Leeds, in a car park that was about a 15 minute walk from the store. She did this because it is cheaper to park there than in a car park nearer to the city centre. The claimant said that it

would take her about 20 minutes to walk because her foot got sore and she would need to use her inhaler.

- 31.11. The claimant accepted that she drove significant distances during the course of her career with the respondent. However, she says that this caused her little difficulty as driving did not put much pressure on her foot. I note an entry in her GP records at page 94 (dated 15 November 2017) which refers to a “tender lump on scar of previous foot surgery.”
- 31.12. The claimant said that she discussed her mental impairment of anxiety and depression more with Jane Carmona than with Sam Russell. She said that she did not feel comfortable discussing such issues with Miss Russell. She fairly accepted that she had not told either of them of any specific diagnosis saying that it would have seemed “odd” for her to have done so. She did say that Miss Russell knew that the claimant was taking anti-depressants because they had had discussions about PMS following which Miss Russell recommended a herb. This prompted the claimant to say that she would not be able to take the herb alongside her anti-depressant medication. She also said that Miss Russell was aware of the anxious time that the claimant was having following the assault upon her and her partner. She fairly acknowledged that Miss Russell did not witness the claimant having a panic attack. Nonetheless, Miss Russell will have seen the claimant in tears at times (albeit that that was not mentioned in her witness statement).
- 31.13. The cross-examination then turned to an incident which occurred in mid July 2017. The claimant witnessed what she described as a “horrendous assault” upon a woman in Birmingham. The claimant says that this resulted in Mrs Carmona extending the claimant’s holiday and resulting in the claimant not being able to work at the Wilderness Festival (representing the respondent) between 3 and 6 August 2017. The claimant said that she had discussed matters further with Jane Carmona on 10 August 2017. The context of that conversation was primarily about performance issues concerning an employee at the Birmingham store. However, the claimant says that the conversation did touch upon the claimant’s mental health issues.
32. The claimant refers, in paragraph 23 of her witness statement, to a telephone conversation of 15 September 2017 with Jane Carmona. She says that she discussed her anxiety and depression and in particular extreme anxiety by reason of working in Leeds, the fear of being identified by her assailants and the behaviour of Sam Russell. She said that she had suffered several panic attacks and was getting increasingly anxious and depressed. She says that she discussed the need for a new risk assessment due to the damp room in Leeds and the lone working issue. In cross-examination the claimant said that she felt that she was being bullied by Sam Russell. She said that her anxiety had become debilitating and she was extremely anxious about being identified by her assailants.
33. In paragraph 23 the claimant refers to a handwritten copy of notes taken by Mrs Carmona which are at pages 210 to 214. Pages 210 and 211 appear to be a photocopy of Mrs Carmona’s notes which she jotted down in a notebook. The note at pages 210 and 211 appears, in fact, to be a record of two

discussions. The first was with Miss Russell. The date of 13 September 2017 is there recorded. There is then (on the same page) a note of the discussion between Jane Carmona and the claimant of 15 September. Mrs Carmona noted that the claimant was frustrated and fed up. She attributed this at least in part to the delayed opening of the Meadowhall store. Mrs Carmona noted that the claimant was “paranoid about the attack, court case, are they [*the assailants*] about etc in Leeds.” She then made a note that the claimant asked about the employee assistance programme. Mrs Carmona pointed her in the direction of the respondent’s Human Resources department. She also noted that the claimant said that she was “struggling with Sam”. The claimant says that the reference to the employee assistance programme was in connection with the claimant seeking help because she was struggling with anxiety by reason of her worry about the assault, working on her own in Leeds and because of Miss Russell’s behaviour towards her. The claimant takes issue with some of Jane Carmona’s notes but accepts that those issues are more relevant to the final hearing rather than this preliminary hearing.

34. In her evidence in chief, Miss Russell says, “The claimant and I worked together very briefly at the start of her employment. I cannot recall the exact dates, but it was at the Leeds and York stores. I also did a stock take with the claimant in the Birmingham store on or around 20 August 2017. Latterly, the claimant came to the respondent’s Leeds store, where I was store manager, to get more experience/training and to be closer to her home”. Prior to the claimant commencing work with the respondent, Miss Russell had met her as a customer and then at her first interview for the position of the Meadowhall store manager. Miss Russell was not present at the second interview.
35. Miss Russell says, about the claimant’s wrists, that she records the claimant discussing during her interview that she had undergone surgery on her wrist. Miss Russell says (at paragraph 2.1 of her witness statement) that, “I remember that she said something about having something removed from her wrist, and she showed us her scar. I believe she mentioned something about experiencing some difficulty with repetitive tasks and with lifting heavy objects, but she did not express this in any way that gave me cause for concern or made me think that there were significant problems. The claimant did not say that the surgery caused her any other issues”. Miss Russell says that the claimant “may have mentioned that something was taken from her foot for the purposes of her surgery but she did not mention this causing her any difficulties thereafter”. Her evidence is that the claimant raised no issue about the requirement for lone working hours nor did she raise any issues to do with her asthma or depression and anxiety.
36. Miss Russell denied any knowledge at the material time of the form completed by the claimant at pages 166 and 167 or of the risk assessment.
37. Miss Russell says that she does not recall having a conversation with the claimant upon her first day at work on 24 August 2017 about an inability to complete repetitive tasks, to undertake large pieces of writing, to handle heavy objects and a propensity for dropping items. Miss Russell fairly accepts that the claimant did mention the surgery to the wrist and the consequent difficulty with repetitive tasks and the handling of heavy objects at the interview which she attended. Miss Russell did not accept that her role would have required large pieces of writing anyway “as most documents are completed on the computer”. She said that she had no recollection of matters

- being noted on the health and safety induction sheet. She said that the health and safety sheet is not retained by the respondent anyway and the employee takes it away with them.
38. Miss Russell disputed that the claimant raised the wrist issue with her when she commenced working at the Leeds store on 21 August 2017. She also denied that she had made the claimant stand for a period of about an hour. Miss Russell's evidence is that she never saw the claimant have any issues with her wrist. In fact, to the contrary she says that she saw the claimant give a hand massage to a customer during which she showed no signs of pain or difficulty.
39. Miss Russell says that the only time that the claimant discussed her asthma with her was during the return to work of 13 September 2017. She accepted that the claimant had returned from a period of absence due to sinusitis and then mentioned damp in the store room which she linked to her asthmatic condition. Miss Russell made reference to her notes to which I have already referred at pages 207 and 208. Miss Russell says that the claimant did not link her asthma to the issue of lone working until 13 September 2017. To the contrary, Miss Russell formed the impression that the claimant simply disliked working on her own. She says that she never saw the claimant suffering from shortness of breath or using an inhaler. Miss Russell says that on the contrary she and the claimant had shared a couple of cigarettes on the evening of the Birmingham stock check. In cross-examination the claimant fairly accepted that this was the case and that she (the claimant) has been battling a nicotine addiction.
40. Miss Russell denied that she had made the claimant stand for an hour on 21 August 2017 upon her first day of working in the Leeds store. Miss Russell said that she was upset by that suggestion, there was a second chair in the office and that she would not have prevented a colleague from sitting. She said that she never observed the claimant limping or exhibiting any symptoms of pain.
41. With reference to the mental impairment of depression and anxiety, Miss Russell says that she never saw the claimant having a panic attack. As I have observed, the claimant fairly accepts this to be the case. Miss Russell says that the claimant "may have mentioned feeling anxious about her partner following the attack on him. However, I attributed this to a normal human emotion, rather than the medically diagnosable condition of anxiety. I do not recall the claimant saying that she felt very anxious about being identified by the assailants".
42. Miss Russell then makes mention of the claimant showing her an App on her phone that she used to monitor and record symptoms of pre-menstrual stress. Miss Russell says that, "On the App, you input information with regards to eating habits, mood and demeanour. The claimant showed me how to use the App by entering her details for that day. I recall her inputting words such as anxious and motivated, unproductive, disengaged and depressed. I just put this down to normal PMS symptoms. Just because someone says that they feel anxious or that they feel depressed one day that does not in my view amount to medically diagnosable depression and anxiety. As the claimant had not displayed symptoms of either of these conditions, nor discussed with me any diagnosis, I had no cause for concern. The only reason I raised it with

Jane [Carmona] was because I thought it was odd that someone new to the business would openly admit to feeling 'disengaged' and 'unproductive' at work. I had shared some verbal feedback with Jane, which she asked me to put down in writing. That was the reason for my email of 20 September 2017".

43. The following emerged from the cross-examination of Samantha Russell:-
- 43.1. Miss Russell said that she could not recall the claimant turning up for the interview in trainers or limping.
 - 43.2. She said that she observed that the claimant was wearing a brace on her right arm.
 - 43.3. She said that she could not recall the claimant mentioning that she was taking anti-depressants, she acknowledged the possibility that she did so but that she could not recall the claimant informing her of such.
 - 43.4. Miss Russell denied that notes had been taken regarding the claimant's physical impairments in her foot and hand at the induction in York. Miss Russell said that the last page of the induction booklet is sent to HR as evidence that the booklet has been given to the employee. This is a reference to documentation that I mentioned earlier in tab 42.
 - 43.5. Miss Russell fairly acknowledged that the claimant did tell her that she could not carry heavy items, that there was a significant risk of her dropping things and that she had difficulties with repetitive tasks.
 - 43.6. Miss Russell denied that there was a need for significant writing at a stock take. She said that much of it is undertaken on the computer. She could not recall the claimant using her inhaler in Birmingham that day.
 - 43.7. Miss Russell said that she could not recall ever seeing the claimant's inhaler on her desk in Leeds. Miss Russell said that she herself is asthmatic and carries her inhaler around with her in her bag.
 - 43.8. Miss Russell fairly acknowledged there to be damp problems within the basement in the Leeds store. She said that the claimant did complain about the damp conditions but only upon her return to work on 13 September 2017.
 - 43.9. Miss Russell fairly acknowledged that the office in which she and the claimant had met upon her first day of work in Leeds in August 2017 was a small room. Although she thought it was a little larger than as described by the claimant there appeared to be no significant disagreement as to its dimensions. Miss Russell said that there was room for a second chair and there was in fact a second chair in the office. She said that she could not recall the claimant having to stand but conceded that it was fair that she had no specific recollection of the occasion in question.
 - 43.10. Miss Russell could not recall the claimant asking if she could sit in store. She said that if a colleague needed to sit then she would allow them to go and do so in the office in order to obtain relief. She said that she would not have prevented her from sitting even on the shop floor given that she is not the claimant's line manager.

- 43.11. Miss Russell acknowledged that the claimant had referred to difficulties in writing upon labels for jars and bottles. Miss Russell qualified her answer by saying that it was not a common occurrence that people have to carry out that task.
- 43.12. Miss Russell fairly acknowledged that the reference to an asthma flare up (in a text of 12 September 2017 at page 199) was suggestive of a long term problem. She also acknowledged that the claimant had raised the issue of problems with her asthma and concerns about dampness in the basement in Leeds upon her return to work on 13 September 2017.
- 43.13. Miss Russell accepted that the claimant had linked her asthma and anxiety on the one hand with the lone working issue on the other at the return to work interview of 13 September 2017.
44. On 20 September 2017 Miss Russell emailed Jane Carmona (pages 215 to 217). This is sent under the heading “feedback points as requested for SO.” The reference to ‘SO’ is, of course, to the claimant. Miss Russell said that Mrs Carmona had asked her to record concerns that Miss Russell had about the claimant. Amongst other things, Miss Russell made reference to the App on the phone “that she uses for her monthly cycle”. Miss Russell also noted that the issues that the claimant had about lone working. She observed that, “lone trading as discussed in the interview was accepted at the time and has now become a battle she intends to fight. Expressing an aversion to lone trading and saying it absolutely will not occur in Meadowhall when it opens. She has expressed recently in her back to work interview that her initial risk assessment outlines a disability that means that she shouldn’t work alone; despite NYR saying that it is acceptable to do so under condition”. Miss Russell considered that the claimant was adopting a negative attitude which was “a constant strain for all that work in close proximity”. She observed, “There is always a significant drama to talk about – each day will bring a different conundrum or crisis that needs talking about throughout the day”. The note in fact started (at the top of page 216) with the observation that, “conversations taking twists, new forms or no recollection of previous discussion – from one day to the next. Telling me one thing and a colleague or myself something completely different to the next”. It was suggested to Miss Russell by Miss Nowell that these were symptomatic of an anxiety condition. Miss Russell said in answer that “it was baffling”. Miss Russell made reference the claimant saying that her “initial risk assessment outlines a disability.”
45. I asked Miss Russell if she had any recollection of the claimant talking about the assault upon her and her partner. Miss Russell said that the claimant had “told me she is concerned about her partner and worried about him.”
46. Mrs Carmona says that she was present at both of the claimant’s interviews. She says that there was a discussion about the operation that the claimant had had on her wrist during both interviews. Mrs Carmona said that the claimant “explained that she was experiencing some difficulty with heavy lifting and repetitive work as a result. I put that down to normal recovery from an operation. She did not tell me about any other effects of the wrist problem. In particular, she made no reference to shaking or problems with handwriting
[I pause to observe here that the claimant had said she had exhibited hand

shaking upon one occasion in front of Miss Russell. Miss Russell appears not to have been asked about that episode]. Mrs Carmona says that the claimant anticipated no difficulty with hands-on treatment such as hand and arm massages or mini facial massages. She says that there was a discussion about lone working and the claimant raised no issues. She says, "I always mention the reality of lone working at interview and on this occasion I particularly recall stressing it to the claimant as I was aware that, in her previous roles, she had managed higher turnover stores and larger teams and I wanted to be absolutely sure that she was aware of how different this role would be". Mrs Carmona accepted that the claimant had told her that she was currently "on an expected six week absence from work at her then employer following her operation".

47. Mrs Carmona then makes reference to the risk assessment undertaken by Maria Lydaki. She says that the focus of this was upon the asthma and the wrist. She noted that the risk assessment for each condition produced scores rated as "low" on the respondent's risk rating table. Mrs Carmona fairly accepted there to have been an error in the risk assessment about the asthma and that the claimant should have been given a higher score. Nonetheless, she maintained that would still have been within the lowest bracket in the respondent's risk rating table anyway.
48. Mrs Carmona said that the claimant had requested the risk assessment at pages 173 to 176 due to concerns she had about lone working in Stamford. However, she pointed out that the claimant had enjoyed a positive experience working in Stamford (by reference to the email at page 235).
49. Mrs Carmona says that during the interviews the claimant had mentioned that she had a graft from her foot into her wrist. She says, "At no point did she mention that she suffered any pain in her foot or had difficulty standing for long periods as a result of that operation". She says that the claimant would have been aware that her role would involve lots of standing given her experience within the retail sector. The risk assessment request that she had made in the text at page 177 only refers to asthma and her hand and not her foot.
50. Mrs Carmona denies that the claimant suffered from the medical conditions of depression and anxiety. She says that she was unaware that the claimant was on any medication. She acknowledged the claimant to be anxious about her partner but considered that to be by reason of her concern for her welfare. Mrs Carmona did arrange for the claimant to be excused from the requirement to attend the Wilderness Festival and agreed to the claimant extending her holiday to facilitate her staying at home.
51. Mrs Carmona refers to a telephone discussion of 10 August 2017. She acknowledges this to have taken place. It concerned several issues in Birmingham. Mrs Carmona says, "I think she may have said that she felt concerned about *[the need to performance manage an employee]* but that gave me no cause for concern in terms of her mental health."
52. The text messages of 12 September 2017 at page 196 and 197 made reference to impact upon her mental health. Mrs Carmona said that she believed this to be a reference to the sinusitis which had caused her to be off work for several days.

53. Mrs Carmona then turned to the telephone discussion of 15 September 2017. She said that the claimant had issues about the delay in the opening of the Meadowhall store. She says that, “at no point during the conversation did the claimant tell me that she was suffering extreme anxiety, that she had suffered panic attacks or that she was suffering from anxiety and depression nor did she request a new risk assessment.” She acknowledged that the claimant said that she was feeling paranoid about the attack and the court case. Mrs Carmona says that, I thought this was a natural reaction given what had happened to her partner.”
54. With reference to Miss Russell’s note at pages 215 to 217, she observed the comment made by her that the claimant appeared, “anxious, unmotivated, unproductive, disengaged and depressed.” Mrs Carmona says that, “on reading Samantha’s email, I really didn’t think much of that at all. I just thought that Sophie had recorded some normal PMS symptoms. I certainly did not think that she suffered from the medical conditions of depression and anxiety”.
55. The following emerged from the evidence given by Mrs Carmona under cross-examination:-
- 55.1. She acknowledged the claimant to be wearing a wrist brace upon attending both interviews and there being discussions about the operation.
- 55.2. Mrs Carmona fairly acknowledged that the claimant said that she had difficulty with repetitive tasks and heavy lifting. She could not recall the claimant saying that these problems would last for a period of two years. She said that she would have noted that had she been told.
- 55.3. She could not recall the claimant turning up for the interviews wearing trainers or walking with a limp. She did recall the claimant mentioning liking DM shoes (this being a reference to a range of comfortable flat women’s shoes).
- 55.4. Mrs Carmona said that the ‘additional employee details’ at page 166 would not have gone to her. The inference from paragraph 2.3 of her witness statement is that she did not see this document at the time.
- 55.5. The risk assessment which had been carried out during the claimant’s time in the Marylebone store (that being the document at pages 173 to 176) was not shared with Miss Russell. Mrs Carmona explained that the claimant did not spend a lot of time in the Leeds store and she was not in any event over-concerned by the outcome of the risk assessment.
- 55.6. Mrs Carmona accepted that the claimant did complain to her on two occasions of having difficulties undertaking physical tasks. She says that these were not tasks usually carried out by a store manager. The tasks were the filling of jars with herbs and the preparation of small clear sample bags. She said that she had no recollection of the claimant complaining about difficulties in writing upon labels. She denied that the replenishment of jars was a significant part of the store manager’s role. She did however acknowledge that this did form a component part of the role (albeit limited in frequency).

- 55.7. Mrs Carmona denied having seen the claimant struggle to write during the interviews. She said the claimant had not raised any issues with her about difficulties with writing.
- 55.8. Mrs Carmona linked the mental health impact referred to in the text at page 196 to the attack upon her husband and having witnessed the attack upon the woman in Birmingham. This in fact contrasts with what she had said in paragraph 5.6 of her witness statement to the effect that the impact upon mental health related to the period of sickness absence that the claimant had just undergone.
- 55.9. Mrs Carmona said that her understanding was that the claimant had not been assaulted in the incident which befell her partner. Her understanding was that he had been assaulted and that she had been with him at the time but was not assaulted herself. She did recall the claimant having witnessed the assault in Birmingham which had led to police involvement. She said that the claimant had expressed her discomfort about staying in Birmingham and she considered this to be part of the claimant's motivation for requesting a move to a store nearer to her home.
- 55.10. Mrs Carmona was then taken to the note at pages 212 to 214. This appears to be a typed note following on from the conversations written in the notebook at pages 210 and 211 but with annotated comments. Mrs Carmona appeared unsure as to the date upon which the document at pages 212 to 214 had been prepared. She acknowledged that the conversation between her and the claimant of 15 September 2017 had been arranged at the claimant's instigation by reference to the email of 13 September 2017. The claimant asked Mrs Carmona for a talk as she considered that things were "not really working". Mrs Carmona had discussed the situation with Miss Russell before discussing the issues with the claimant. Mrs Carmona noted that Miss Russell had told her that the claimant had said that: that the damp environment in Leeds was not appropriate for her asthma; that she was not happy with the lone working; that she should not be doing any lifting or repetitive work; and that she was not happy working late shifts". Mrs Carmona accepted that she had not, in the course of the discussion with the claimant, raised these points with her because the conversation had got quite heated concerning problems that the claimant perceived with Miss Russell.
- 55.11. Mrs Carmona accepted the claimant had requested the involvement of the employee assistance programme suggestive of the claimant seeking counselling.
- 55.12. It was suggested to Mrs Carmona that Sam Russell's observations in documents at pages 216 and 217 must have been sufficient to "ring alarm bells" (as it was put by Miss Noel). Mrs Carmona said that the cause of the claimant's anxiety was the assault and because of the issues around that she had relieved the claimant of the obligation to attend the festival and moved her to a store closer to her home.
56. By section 6(1) of the 2010 Act a person has a disability if he or she has "a physical or mental impairment" which has a "substantial and long term adverse effect on his or her ability to carry out normal day to day activities."

The burden of proof is upon the claimant to show that she satisfies this definition. There are supplementary provisions for determining whether a person has a disability. These are at schedule 1 of the 2010 Act. In particular, the effect of an impairment is long term if it has lasted for at least 12 months, it is likely to last for at least 12 months or it is likely to last for the rest of the life of the person affected.

57. Guidance has been issued upon matters to be taken into account in determining questions relating to the definition of disability. I shall refer to this as 'the Guidance' for short. The Guidance came into force on 1 May 2011 and is therefore relevant to this case. It is mandatory for the guidance to be taken into account by the Tribunal pursuant to paragraph 12 of schedule 1 to the 2010 Act.
58. The material time for establishing disability (that is to say, whether there is an impairment which has a substantial adverse effect on normal day to day activities) is the date of the alleged discriminatory acts. I am therefore concerned with whether or not the claimant was a disabled person from 24 April 2017 to 22 September 2017. This is also the material time when determining whether the impairment has had or was likely to have long term effect.
59. The definition of disability requires that the adverse effect on a person's ability to carry out normal day to day activities should arise from a physical or mental impairment. There is no statutory definition of either a "physical impairment" or a "mental impairment" and nor is there any definition in the guidance.
60. The terms have been held to have their ordinary and natural meaning, it being left to the Tribunal to make a decision in each case on whether the evidence available establishes that the claimant has a physical or mental impairment with the stated effects. Paragraph A3 of the Guidance tends to support this view as it states that in many cases there will be no dispute as to whether a person has an impairment and that any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition within section 6(1) as supplemented by the provisions in schedule 1.
61. In **J v DLA Piper UK Limited** [2010] IRLR 936 (which is included in the respondent's list of authorities handed to me at the conclusion of the hearing) the Employment Appeal Tribunal referred to four 'conditions' which a Tribunal is required to consider in determining the issue of disability. Guidance upon the approach to adopt was provided in **Goodwin v Patent Office** [1999] ICR 302. The four conditions or '*Goodwin questions*' (as they are sometimes known) are helpfully cited at paragraph 31(2) of **DLA Piper**. These conditions or '*Goodwin questions*' are:-
 - 61.1. *The impairment condition.* Does the complainant have an impairment which is either mental or physical? The word 'impairment bears its ordinary and natural meaning.
 - 61.2. *The adverse effect condition.* Does the impairment affect the claimant's ability to carry out normal day to day activities in one of the respects set out in paragraph 4(1) of schedule 1 to the Act and does it have an adverse effect?

61.3. The substantial condition. Is the adverse effect (upon the complainant's ability) substantial? The word 'substantial' in the 2010 Act means 'more than minor or trivial' pursuant to section 212(1).

*[I interpose here to say that **Goodwin** was decided under the Disability Discrimination Act 1995 (DDA). Thus, the reference in **Goodwin** to the normal day to day activities set out in paragraph 4(1) of the schedule is a reference to the DDA. Paragraph 4(1) of schedule to the DDA referred to a number of different "capacities" which needed to be affected to constitute adverse impact. This no longer features in paragraph 4 of schedule 1 to the 2010 Act].*

62. The fourth **Goodwin** condition is: the long term condition: is the adverse effect (upon the claimant's ability long-term?

63. The four **Goodwin** questions should be posed sequentially and not together. However, as we can see from paragraph 38 of **DLA Piper**, the EAT endorsed the view that there may be cases where identifying the nature of the impairment from which a complainant may be suffering involves difficult medical questions and thus it is easier and entirely legitimate for the Tribunal to park that issue and to ask first whether the claimant's ability to carry out day to day activities has been adversely affected on a long term basis. If the Tribunal finds that it has been, it will in many or most cases follow as a matter of commonsense inference that the complainant is suffering from a condition which has produced that adverse effect: in other words such will constitute an impairment.

64. Paragraph A8 of the Guidance provides that it is not necessary to consider how an impairment is caused. What is important to consider is the effect of an impairment (provided that it is not an excluded condition which issue does not arise in this case).

65. The second and third **Goodwin** conditions are the adverse effect condition and issue of substantiality. To amount to a disability, the impairment must have a "substantial adverse effect" on the person's ability to carry out "normal day to day activities". As I have said, substantial in this context means "more than minor or trivial". This reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people. The Guidance emphasises that it is important to focus on what an individual cannot do or can only do with difficulty rather than on the things that he or she can do. The reference for that proposition is paragraph B9 of the Guidance. Paragraph B6 also makes clear that where a person has more than one impairment, "account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities.

66. Appendix 1 to the Employment and Human Rights Commissions Employment Code states that "normal day to day activities" are those that are carried out by most men or women on a fairly regular and frequent basis. Paragraph 15 says that, "day to day activities does include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying every day objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking

part in normal social interaction or forming social relationships, nourishing and caring for one's self. Normal day to day activities also encompass the activities which are relevant to working life." At section D3 of the Guidance, it is said that "in general' day-to-day activities are things people do on a regular basis, and include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Norma day-today activities can include general work-related activities....." Section D4 says that "in deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal should be given its ordinary, everyday meaning."

67. The appendix to the Guidance has illustrative examples of factors which, if they are experienced by a person, would be reasonable to regard as having substantial adverse effects on normal day to day activities. This includes difficulty picking up and carrying objects of moderate weight such as a bag of shopping or a small piece of luggage with one hand. It also includes difficulty in preparing a meal because of her restricted ability to do things like open cans or packages. Examples of factors that would not be reasonable to regard as having a substantial adverse effect on normal day to day activities includes an inability to move heavy objects without assistance such as a large suitcase or heavy piece of furniture without a trolley and minor problems with writing or spelling.
68. The Guidance says at paragraph B12 that the 2010 Act (at paragraph 4 of Schedule 1 to the 2010 Act) provides that where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context "likely" should be interpreted as meaning "could well happen". The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question. This applies even if the measures result in the effects being completely under control or not at all apparent.
69. Paragraph C3 of the Guidance tells us that in the context of the likelihood of an impairment having a long term effect, the word "likely" should be interpreted as meaning that it "could well happen". In assessing the likelihood of an effect lasting for 12 months, accounts should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood.
70. The EHRC Code of Practice on Employment also deals with the issue of the question of knowledge in the context of reasonable adjustments complaints. Reference is made to paragraph 20(1)(b) of schedule 8 to the 2010 Act which provides that an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The Code goes on to say that the employer must do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend upon the circumstances. This is an objective assessment.

71. I shall not set out all of the parties' submissions in these reasons. I observe that a major plank of the respondent's submissions focuses upon the absence of a supportive medical report. The claimant submits that a medical report is not a condition precedent for establishing a disability. That is an uncontroversial proposition. If authority for it is required it may be found at paragraph 55 of **Royal Bank of Scotland v Morris** [2012 WL 608851].
72. That said, the respondent says in general that in the absence of a medical report the claimant is unable to discharge the burden of proof upon her. The respondent cites a passage at paragraph 13 of **Woodrup v London Borough of Southwark** [2002] EWCA Civ 1716 in relation to the issue of the so-called deduced effects (to which I refer at paragraph 68 above) to the effect that ordinarily, upon that issue, "*one would expect clear medical evidence to be necessary.*" This has particular relevance to the impairments of asthma and anxiety and depression.
73. The claimant seeks to distinguish **Woodrup** upon the basis that in that case the claimant had produced only scant medical records and sketchy evidence of fact. I note (from paragraph 22 *ibid.*) that she had no experience of how she would fare if medication was stopped and therefore nothing upon to base her answer about the deduced effects. Miss Nowell on her behalf also drew my attention to the fact that the issue of obtaining a medical report was aired at a case management discussion in **Morris** and claimant in that case had eschewed the opportunity. In contrast, in this case, no Order had been made compelling the obtaining of a medical report. There is nothing in the case management summary to indicate whether or not the issue of medico-legal evidence was discussed. The respondent contends, by reference to the passage at paragraph 63 of **Morris**, that "*in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow [the Tribunal] to make proper findings without expert assistance.*" A contrast was drawn between other kinds of impairment (where contemporary medical notes may, even if not addressed to the issues under the 2010 Act, found an evidential basis) and that of depression. I note from the case report in **Morris** that the Tribunal had the benefit of more extensive medical material (reviewed at paragraph 56) than was the case in **Woodrup** (which extended in **Morris** to apparently comprehensive letters from a psychiatric registrar).
74. I shall take each of the four impairments in the order set out in paragraph 11. This starts with the wrist condition.
75. I conclude that this is a physical impairment as that term is ordinarily understood, that it has a substantial (being more than minor or trivial) affect upon the claimant's ability to carry out normal day to day activities and is long term.
76. The claimant's evidence of fact in paragraph 3 (cited at paragraph 14 above) refers to a physical impairment impacting upon day-to-day activities including lifting and carrying everyday objects, food preparation and writing. On my view, the difficulties to which she refers are more than minor or trivial.
77. Her account in her witness statement of these matters is corroborated by contemporaneous documentation (including the additional employee details referred to at paragraph 27.1 and the risk assessment at paragraph 27.5). It is also supported by the contemporaneous medical notes: paragraphs 12 and

- 13). I find that the claimant's account about her limitations as at 3 April 2017 (referred to at page 10) is credible. Her account of the limitations is consistent with what she said in the 'additional employee details' form signed two days later and it is difficult to see any rational basis upon which the claimant would overstate the level of her impairment so early in her career. I take judicial notice of the fact that many employees seek to downplay impairment for fear of jeopardising their employment position. It is to the claimant's credit that she did not seek to do so and made a frank disclosure to the respondent.
78. I am satisfied that the condition to the claimant's wrist is long term. The GP refers to a seven year history with increasing discomfort over the last six months (paragraph 13). The letter there referred to is dated to 4 January 2017. It follows that the substantial impairment commenced in mid-2006 at the very latest. The letter at page 152 of 3 April 2017 (referred to at paragraph 31.4) refers to a follow up six months hence. The claimant was told that the surgery entailed a two year recovery period. I see no reason to disbelieve her account. Therefore, as at the date of commencement of her employment with the respondent it could be said that it was likely (in the sense that it could well happen) that the impairment would last longer than 12 months. I therefore conclude that by reason of her wrist condition the claimant was a disabled person for the purposes of the 2010 Act from 24 April 2017 and during the whole of her period of employment with the respondent.
79. I now turn to the foot condition. The claimant's account is recited at paragraph 15. Although it is not necessary for the Tribunal to determine the cause of the condition that the claimant's impairment to her foot began in January 2017 is corroborated by the letter of 3 January 2017 (at paragraph 13). That it is still troublesome over a year later is corroborated by the consultation of 20 February 2018 and the entry in her GP notes of 15 November 2017 at page 94 referring to a tender lump on the scar from the surgery.
80. Although I can accept that skating is not such, plainly walking and running are everyday activities. I am satisfied from the claimant's account that these activities have been impaired to a degree going beyond the minor and trivial. The claimant gives an account of feeling footsore after walking for just fifteen minutes or so.
81. The impairment is long term. It will have presented at the time of the operation on 3 January 2017. In November 2017 the claimant was complaining of it to her GP. She was referred about the complaint to the operating surgeon in February 2018. The problem persists. It is the case therefore that the condition could well be said likely to last more than 12 months at some point after 3 January. It is significant, in my judgment, that there is reference in the letter of 4 April 2017 (at page 152) to a need for de-sensitisation of the donor site. The claimant's account of the donor site in her foot being troublesome to her is therefore credible and given that it was persisting three months post-operation it was in my judgment a condition that could well persist long term for a period of 12 months or more.
82. Therefore, I find that the claimant was disabled by reason of her foot condition. This disability was present as at 24 April 2017 and persisted across the duration of her employment.

83. The next condition to consider is asthma. This is a physical impairment. I find little difficulty is finding the claimant's factual account of her condition (cited at paragraph 16) credible as it is supported by numerous entries referred to in her GP notes (at paragraph 18). She also made references to the condition at the material time: see paragraph 27 in particular.
84. It almost goes without saying that an ability to breathe is a day-to-day activity. Inability to do so properly will obviously impact upon all day-to-day activities including walking. Asthma is a significant physical impairment to that activity. The condition impacts upon other activities such as walking to work (as he becomes breathless). The claimant's account as to how she would fare without her medication is entirely credible. On any view the impairment is more than minor or trivial. Her asthmatic condition is long term having lasted from 2013 at the latest until the present. I therefore find that the claimant was disabled by reason of the physical impairment of asthma from 24 April 2017 until the termination of her employment with the respondent.
85. I now turn to look at the mental impairment of anxiety and depression. The claimant's contention that she has this impairment is corroborated by the GP entries at paragraph 19 and 30. She also made contemporaneous references to this condition: paragraph 27.7 and 31.13. The claimant's account of discussing her mental health with Miss Russell was fairly accepted by her: (paragraph 42).
86. Upon the issue of the deduced effects, in contrast to the factual position in Woodrup, the claimant has experience to draw upon of her mental condition without her medication: paragraph 20.
87. That said, the contemporaneous medical evidence upon which she seeks to rely is limited and certainly is less comprehensive than that which presented in Morris. The Employment Appeal Tribunal in Morris counselled caution upon this issue as explained in paragraph 73.
88. I have found the issue of mental impairment far more difficult to resolve in this case than I did the issue of physical impairment. The Tribunal would have been greatly assisted upon this issue with medical evidence. There was nothing to preclude the claimant from producing some medico-legal evidence: that no directions were given ordering that to be produced did not prevent her from so doing. There was no Order prohibiting such.
89. On balance, upon this issue, I prefer the respondent's case and agree that the issue of mental impairment where reliance is placed upon deduced effect is too subtle an issue for the Tribunal to determine without expert help. The matter is an issue requiring expert evidence, the question being a matter upon which the Tribunal requires assistance upon a matter of a technical nature beyond the Tribunal's knowledge. The claimant's own account and the short entries in the GP records are together, in my judgment, too small a peg upon which to hang the evidential coat of satisfying the Tribunal that the claimant has a mental impairment by reason of depression and anxiety (as opposed to the claimant having an adverse reaction to the significant life events which befell her and her partner).
90. I now turn to the issue of knowledge. In my judgment the respondent had actual knowledge of the wrist and asthma conditions.

91. As to the former, the claimant turned up to both interviews wearing a splint. This was observed by Miss Russell (paragraph 43.2) and Mrs Carmona (paragraph 55.1). The claimant's account of it being a discussion point is credible. Indeed, it would be surprising if nothing had been said about it. Mrs Carmona accepted that the claimant said that she had difficulty with repetitive everyday tasks and that the condition was expected to last for two years (paragraph 55.2 and 55.6). The wrist condition, the impact of it and the operation was referred to by the claimant in the form referred to at paragraph 27.1. This reference was of sufficient concern to cause Mrs Carmona to commission a risk assessment at which the operation was referred to again. That the risk assessment was within acceptable limits for the respondent (paragraph 47) is of no help to the respondent upon the issue of impairment affecting day-to-day activities given the low threshold imported into the statutory definition of 'substantial' in section 212 of the 2010 Act.
92. I accept that Miss Russell and Mrs Carmona had little first hand experience of seeing the claimant in the workplace up until the point at which the claimant moved to the Leeds store. That said, the claimant referred to her having difficulty with manual handling in the workplace on 4 May 2017 (paragraph 27.2). The respondent did not call evidence from anyone working alongside the claimant prior to late August 2017. Therefore I accept the claimant's account of the difficulties she experienced.
93. In my judgment, there was sufficient to put the respondent on notice of a difficulty with the claimant's right wrist. I find that the respondent had actual knowledge of the physical impairment and the claimant's disability. If I am wrong on that, I find the respondent to have constructive knowledge of it as the claimant had provided enough information to the respondent to put them on notice that further enquiry was warranted. The respondent's actions upon being put on notice that there was an issue fell short of doing all that could reasonably be expected of it to find out more (pursuant to paragraph 6.19 of the EHRC Employment Code). Had a detailed discussion taken place with the claimant and medical evidence commissioned then the extent of the impairment would have been ascertained. It was certainly ascertainable upon reasonable enquiry.
94. For much the same reason I find the respondent to have actual and constructive knowledge of the claimant's asthma. The condition was referred to in Jane Carmona's email commissioning the risk assessment (paragraph 27.3), by the claimant (paragraph 27.4) and in the risk assessment itself for which an amber rating was given. The respondent thus had actual knowledge of the asthma and in the alternative had constructive knowledge of it: there was sufficient to put the respondent on notice of it and to require it to make further efforts to find out more.
95. I accept the claimant's account that she turned up to the interviews wearing trainers. There is much in Miss Nowell's submission that such an event would be more memorable for the claimant than the respondent's witnesses neither of whom denied that the claimant had turned up in trainers. Rather, both said they could not recall her doing so. It is thus credible that the claimant would explain her appearance as wearing trainers to interview would be considered inappropriate absent a good explanation. The 'additional employee information' form (paragraph 27.1) refers in the annotation to the nerve graft from the foot.

96. It is the case that the foot condition was downplayed by the claimant as the risk assessment did not consider it. Nonetheless, in my judgment, there was sufficient to put the respondent on constructive notice of the condition by reason of the combination of the discussion around the operation at interview, the claimant wearing trainers to interview and the claimant referring to the nerve graft upon the information form. I do not find there to be sufficient to put the respondent upon actual notice of the foot-related disability given the claimant not seeing a risk assessment by reason of it (paragraph 31.8).
97. There was sufficient to put the respondent on reasonable enquiry and to require it to make reasonable efforts to find out more. As the respondent was upon constructive notice of the foot condition from prior to the claimant's employment, I need not resolve the factual dispute between the claimant and Sam Russell about the issue of whether the claimant was made to stand in the Leeds store.
98. In conclusion therefore, I find that: the claimant was a disabled person by reason of the physical impairments of asthma, the right wrist condition and the foot condition ('the physical impairments'); the respondent had actual knowledge of the asthma and right wrist condition; in the alternative, the respondent has constructive knowledge of the asthma and right wrist condition; the respondent had constructive knowledge of the foot condition; the claimant was disabled by reason of the physical impairments at the date of commencement of her employment with the respondent and for the duration of her employment; and the claimant was not a disabled person by reason of the mental impairment of anxiety and depression.
99. The matter shall now be listed for a private preliminary hearing before an Employment Judge upon the next available date.

Employment Judge Brain

Date 27/06/2018