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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4106034/2019 (V)**

**Held in Edinburgh via Cloud Video Platform on 1 November 2021**

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**Employment Judge Brewer**

**Ms A Reid**

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**Claimant  
Represented by  
Ms D Reynolds,  
Solicitor**

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**Sainsbury's Bank Plc**

**Respondent  
Represented by  
Ms C Scarborough,  
Counsel**

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## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is:

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1. At the material time the claimant was disabled within the meaning of section 6 Equality Act 2010, by reason of ADHD.
2. At the material time the claimant was disabled within the meaning of section 6 Equality Act 2010, by reason of Ehlers Danloss Syndrome.
3. At the material time the claimant was disabled within the meaning of section 6 Equality Act 2010, by reason of eating disorder.
4. At the material time the claimant was not disabled within the meaning of section 6 Equality Act 2010, by reason of anxiety alone.

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5. At the material time the claimant was disabled within the meaning of section 6 Equality Act 2010, by reason of a combination of ADHD and anxiety, and/or a combination of Ehlers Danloss Syndrome and anxiety, and/or a combination of ADHD, Ehlers Danloss Syndrome and anxiety.

## REASONS

### Introduction

- 10
1. This case has a long procedural history which I do not need to set out here in any detail. The claim was presented on 2 May 2019. Part of the claimant's claim is that she was subject to disability discrimination. The respondent denies that the claimant was a disabled person at the material time and therefore the case was listed for a one day open preliminary hearing to determine the question of whether, at the material time, the claimant met the definition of disability in section 6 of the Equality Act 2010.  
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  2. For the hearing I had an agreed bundle of productions running to 250 pages. I heard oral evidence from the claimant and submissions from both representatives. Hearing the evidence and submissions took all day and given the amount of information and the number of alleged disabilities, I reserved my judgement which I set out below.  
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### Relevant law

3. I set out below a fairly detailed summary of the law.

#### ***Meaning of disability***

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4. Section 6 of the Equality Act ("EqA") provides that a person has a disability if
  - a. they have a physical or mental impairment, and
  - b. the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.  
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5. The EqA defines a ‘disabled person’ as a person who has a ‘disability’ — (s.6(2) EqA). The burden of proof is on the claimant to show that he or she satisfies this definition.
6. In **Chacón Navas v Eurest Colectividades SA** 2007 ICR 1, ECJ, the Court  
5 held that the concept of 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’. Given the broad scope of the definition of ‘disability’ in s.6(1) EqA, it does not appear that there is currently any substantive conflict  
10 between the concept of disability in EU law and the coverage of the domestic disability discrimination provisions.
7. Although the definition in s.6(1) is the starting point for establishing the meaning of ‘disability’, it is not the only source that must be considered. The supplementary provisions for determining whether a person has a disability  
15 are found in the Equality Act 2010 (Disability) Regulations 2010 SI 2010/2128.
8. In addition, the Government has issued ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) (‘the Guidance’) under s.6(5) EqA. The Guidance does not impose any legal obligations in itself but courts and tribunals must take account of it where they  
20 consider it to be relevant (paragraphs 12, Sch 1, EqA).
9. Finally, the Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) (‘the EHRC Employment Code’), which has some bearing on the meaning of ‘disability’ under the EqA. Like the Guidance, the Code does not impose legal obligations, but tribunals and  
25 courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.
10. The requirement to ‘take account’ of the Guidance or Code applies only where the Tribunal considers them relevant, and they must always give way to the statutory provisions if, on a proper construction, these differ. In **Elliott v Dorset County Council** EAT 0197/20 the EAT noted that where  
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*'consideration of the statutory provision provides a simple answer, it is erroneous to find additional complexity by considering the Code or Guidance'.*

***Material time for establishing disability***

- 5 11. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd** 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect. An employment tribunal is entitled to
- 10 infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination (see **John Grooms Housing Association v Burdett** EAT 0937/03 and **McKechnie Plastic Components v Grant** EAT 0284/08).
- 15 12. Note that evidence of the extent of someone's capabilities some months after the act of discrimination may be relevant where there is no suggestion that the condition has improved in the meantime (**Pendragon Motor Co Ltd t/a Stratstone (Wilmslow) Ltd v Ridge** EAT 0962/00).
- 20 13. In **All Answers Ltd v W** 2021 IRLR 612, CA, the Court held that the EAT was wrong to decide in **C v A** EAT 0023/20, that the tribunal's failure to focus on the date of the alleged discriminatory act was not fatal to its conclusion that the claimants satisfied the definition of disability. The Court held that, following **McDougall v Richmond Adult Community College** 2008 ICR 431, CA, the key question is whether, as at the time of the alleged
- 25 discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently.

***Physical or mental impairment***

14. In **Rugamer v Sony Music Entertainment UK Ltd and another case** 2002 ICR 381, EAT, the EAT suggested the following definition of physical or mental impairment under the DDA: *'some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition'*. And in **McNicol v Balfour Beatty Rail Maintenance Ltd** 2002 ICR 1498, CA, the Court of Appeal held that 'impairment' in this context bears *'its ordinary and natural meaning... It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects.'* It would seem, therefore, that the term is meant to have a broad application.
15. In **Goodwin v Patent Office** [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken. A tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a substantial impairment. The focus ought to be on what the claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.
16. The EAT said that the words used to define disability in what was s.1(1) DDA (now S.6(1) EqA) require a tribunal to look at the evidence by reference to four different questions (or 'conditions', as the EAT termed them):
- a. did the claimant have a mental and/or physical impairment? (the 'impairment condition')
  - b. did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')
  - c. was the adverse condition substantial? (the 'substantial condition'), and
  - d. was the adverse condition long term? (the 'long-term condition')?

17. These four questions should be posed sequentially and not together (**Wigginton v Cowie and ors t/a Baxter International (A Partnership)** EAT 0322/09).

18. The approach in **Goodwin** was approved in **J v DLA Piper UK LLP** [2010] ICR 1052 (paragraph 40). It was said at paragraph 38 of that judgment:

*“There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the Claimant’s ability to carry out normal day-to-day activities has been adversely affected – one might indeed say “impaired” – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from a condition which has produced that adverse effect — in other words, an “impairment”. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred.”*

**Substantial adverse effect**

19. 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 (s.6(1)(b) EqA). If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities but that effect is likely to recur, it is to be treated as continuing to have that effect (see paragraph 2(2), Sch 1).

20. In **Goodwin** (above) the EAT said that of the four component parts to the definition of a disability in what was then s.1 DDA (now s.6 EqA), judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows:

*‘What the Act is concerned with is an impairment on the person’s ability to carry out activities. The fact that a person can carry out such*

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

21. This approach reflects the advice in Appendix 1 to the EHRC Employment Code that account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that ‘a person *avoids* doing things which, for example, cause pain, fatigue or  
25                    substantial social embarrassment; or because of a loss of energy and motivation’ (see paragraph 9).
22. There must be a causal link between the impairment and the substantial adverse effect, but it need not be a direct link.
23. In determining whether an adverse effect is substantial, the tribunal must  
30                    compare the claimant’s ability to carry out normal day-to-day activities with the ability he or she would have if not impaired. It is important to stress this

because the Guidance and the EHRC Employment Code both appear to imply that the comparison should be with what is considered to be a 'normal' range of ability in the population at large. Appendix 1 to the EHRC Employment Code states:

5                    *'The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people'*

(see paragraph 8).

24.    In cases where it is not clear whether the effect of an impairment is  
10        substantial, the Guidance suggests a number of factors to be considered (see paragraphs B1– B17). These include the time taken by the person to carry out an activity (paragraph B2) and the way in which he or she carries it out (paragraph B3). A comparison is to be made with the time or manner that might be expected if the person did not have the impairment.

15    25.    The cumulative effects of an impairment are also relevant. An impairment might not have a substantial adverse effect on a person in any one respect, but its effects in more than one respect taken together could result in a substantial adverse effect on the person's ability to carry out normal day-to-day activities.

20    26.    The Guidance states that where a person has more than one impairment but none of the impairments considered in isolation has a substantial adverse effect on normal day-to-day activities, account should be taken of whether the impairments together have such a substantial adverse effect (see paragraph B6).

25    27.    Paragraph 5(1) of Schedule 1 to the EqA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means '*could well happen*' (**Boyle v SCA Packaging Ltd**



**(Equality and Human Rights Commission intervening)** 2009 ICR 1056, HL).

28. When determining whether a person meets the definition of disability under the EqA 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 (see paragraph B9).

29. In **Aderemi v London and South Eastern Railway Limited** [2013] ICR 591, the EAT held that the Tribunal:

*“has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. 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.”*

***Normal day to day activities***

30. Appendix 1 to the EHRC Employment Code states that ‘normal day-to-day activities’ are activities that are carried out by most men or women on a fairly regular and frequent basis. The Code says:

*‘The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition’*

(paragraphs 14 and 15)

31. The Guidance thus emphasises that the term ‘normal day-to-day activities’ is not intended to include activities that are normal only for a particular person

or a small group of people. Account should be taken of how far the activity is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning (see paragraph D4).

5 32. The EAT in **Paterson v Commissioner of Police of the Metropolis** 2007 ICR 1522, EAT, concluded that 'normal day-to-day activities' must be interpreted as including activities relevant to professional life.

10 a. The Guidance states that it is not possible to provide an exhaustive list of day-to-day activities. However, in general, day-to-day activities are things people do on a regular or daily basis. The examples given are 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. Normal day-to-day activities can also include general work-related activities and study and education-related activities, such

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### Issues

33. The issue in this case which I was asked to decide was whether the claimant met the definition of disabled, at the material time, in respect of the impairments set out in the claim form. Those impairments are:

- 20
- a. ADHD
  - b. Anxiety
  - c. Eating disorder
  - d. Ehlers Danloss Syndrome (EDS).

25 34. In answering that question, I must answer the following in respect of each, or any combination, of the impairments:

- a. did the claimant have a mental and/or physical impairment? (the 'impairment condition')
- b. did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')

- c. was the adverse condition substantial? (the 'substantial condition'),  
and
- d. was the adverse condition long term? (the 'long-term condition')?

### Findings in fact

- 5 35. I make the following findings in fact.
36. The claimant set out in her claim form that she suffers from four impairments which either separately or together amount to a disability for the purposes of the Equality Act 2010. These are ADHD, anxiety, eating disorders and EDS.
37. The claimant was originally diagnosed with ADHD as a child in 1996. She has  
10 been confirmed as having ADHD into adulthood. ADHD is a lifelong condition.
38. The claimant was diagnosed with EDS as a child. EDS is a lifelong condition.
39. The claimant has had a long history of starving herself and binge eating which is what she means by eating disorder. It was difficult to pinpoint precisely when this started but on any reading of the claimant's medical notes she has  
15 had an eating disorder for a significant period of her life and certainly considerably longer than 12 months at the material time.
40. The claimant has suffered from anxiety from 2004, and throughout her medical notes there are references to variations of anxiety including stress, depression, and suicidal ideation.
- 20 41. The claimant was employed by the respondent from September 2016 as a customer service assistant.
42. The claimant was absent from work from 17 July 2018 to 5 November 2018. That period was covered by valid sick notes and the claimant was said to be unfit for work.
- 25 43. On 14 September 2018 the claimant was invited to attend a disciplinary hearing to take place on 18th September 2018. This meeting was to discuss the claimants 7 periods of sickness absence within a rolling 12-month period.

44. 20 November 2018 the process in train for dealing with the claimant's sickness absence was superseded by another disciplinary matter. The claimant received a letter on that date stating that she was to be suspended on full pay because of an allegation that she had made false declarations of fitness for work and had fraudulently claimed sick pay.
45. On the same date, 20 November 2018, the claimant was invited to an investigation meeting to take place on Monday 26 November 2018 to discuss the allegations. The claimant attended that meeting.
46. On 7 November 2018 the claimant was invited to a disciplinary hearing to take place on 13 November 2018 which she attended. The claimant was advised at the end of the meeting that she was being summarily dismissed.
47. The claimant appealed against her dismissal and an appeal hearing took place on 20 December 2018. The outcome of that was that the decision to dismiss was upheld.
48. The claimant presented her claim to the employment tribunal on 2 May 2019. She brought claims of unfair dismissal, disability discrimination and breach of contract.
49. A case management hearing took place on 12 July 2019. It was noted that a number of conditions were referred to in the claim of form, but it was unclear which of these conditions the claimant sought to rely upon as meeting the definition of disability within s.6 of the Equality Act 2010. It was agreed that within six weeks of the hearing the claimant would, among other things, provide confirmation of "*the conditions upon which the claimant wishes to rely as disabilities*".
50. A further case management hearing was fixed for 28 October 2019. That hearing was postponed following representations by the claimant's then representative.
51. In the event the claimant did not meet the requirement to confirm which conditions she was relying upon as disabilities within the period of six weeks

of the 12 July hearing. As a result, the respondent asked for an “unless order” requiring the claimant to provide the information.

52. In the meantime, a further case management hearing was fixed for 18 December 2019. That hearing went ahead, and the claimant represented herself. The hearing was fixed in part to consider the failure to reply to the original order for further information of the disabilities and the respondent’s application for an unless order which, in the event, was made.

53. The claimant did respond to the unless order by providing a letter from her GP, a five-page handwritten impact statement and 63 pages of medical documents. Having considered the evidence provided by the claimant, the respondent did not accept that the claimant had complied with the unless order and asked that the claim be struck out. However, at a hearing on 1 July 2020 to consider whether the claimant had complied with the unless order, the judge determined that there had not been material non-compliance with the unless order and the claim was not therefore struck out. That being the case, disability remained an issue and it was at this hearing that the case was listed for this open preliminary hearing to consider the issue of disability.

54. I have set out in some detail how we arrived at today’s hearing because one significant issue which arises from the preceding process needs to be determined as a preliminary point. During her evidence and indeed during the course of submissions on behalf of the claimant, as well as the four conditions I have referred to above as potentially amounting to disabilities, a number of other impairments have been referred to including hearing loss, UTI, IBS, migraine, depression and abdominal pain. These impairments are referred to in the GP letter, the claimant’s impact statement and the medical documentation provided by the claimant in support of her claim. In submissions all of these were referred to as the claimant’s physical and mental impairments and there was considerable debate about whether, if it is contended that all these amounts to disabilities, a response to a request or an order for further information can be used to expand the claim. In other words

does the provision of further information form part of the pleadings? The claimant says they do, the respondent says they do not.

55. I find as a fact that they do not. In **Chandhok v Tirkey** [2015] IRLR 195, the then President of the EAT, Langstaff J, stressed the importance of the accurate pleading of the claim. He described at [16] that:

*"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made—meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1."*

56. Further information whether provided voluntarily or in response to an order is further information of the claims as pleaded in the ET1 it is not the basis upon which they claim can be expanded without an application to amend the claim. I agree with Ms Scarborough's view that if that were not the case the claimant could expand the claims simply by adding claims in purported further information which would drive a coach and horses through the principal espoused in **Chandhok**. I am satisfied therefore that my role is limited to considering whether, as I have set out above, the claimant met the definition of disability at the material time in respect of the four impairments set out in the claim form.

### Observations on the evidence

57. The claimant's evidence was clear and cogent, and I found her to be a credible witness. She described in great detail the struggles she has with various impairments, and as well as the medication she takes to cope with the effects of her impairments she also described the adaptations she makes to her life in order to be able to live as normal a life as possible in the circumstances. It

is not necessary for me to describe in any detail that evidence here. I will deal with that in the discussion below.

### **Respondent's submissions**

58. Ms Scarborough on behalf of the respondent submitted that even accepting  
5 all the evidence which the claimant gave, she did not meet the burden upon  
her to show that normal day to day activities were substantially adversely  
affected at the material time by any of the purported disabilities. Ms  
Scarborough pointed out that during her evidence the claimant referred to a  
number of ailments such as migraine, various infections, abdominals issues  
10 and so on, as related to or caused by her underlying condition of EDS.  
However, that has to be proved and, says Ms Scarborough, the claimant has  
not done that. What the claimant has done is pointed to a number of acute  
illnesses which she suffered during the material time (June to November  
2018) and asserted that these were caused by the EDS or that the EDS made  
15 the claimant more susceptible to those acute conditions, but that mere  
assertion is not sufficient says Ms Scarborough, it has to be proved and on  
that basis the claimant's claims fail.

### **Claimant's submissions**

59. For the claimant, Ms Reynolds submitted that the claimant had been a truthful  
20 and consistent witness, she was clear about what was wrong with her and  
clear on the effect of impairments on her ability to undertake normal day to  
day activities. Ms Reynolds says that all the claimant says is supported by  
the medical evidence contained in the bundle.

### **Decision**

25 60. In the discussion below references in square brackets are to page numbers  
in the agreed bundle.

#### ***Material time***

61. As I have mentioned about the material time in this case is agreed to be the  
period between June and November 2018 because the claimant complains

about the processes is she was taken through during that period, including her suspension and dismissal.

**ADHD**

- 5 62. It does not seem to me to be capable of dispute that at the material time the claimant had the physical impairment of ADHD. It also does not seem to be capable of dispute that at the material time the claimant had the mental impairment of EDS. It is also clear from the evidence that those conditions are long term and in essence the claimant has suffered with them for her whole life and there is no suggestion that she will not continue to suffer with those
- 10 impairments.
63. The key question is whether either or both of those impairments substantially adversely affected the claimant's ability to carry out normal day to day activities at the material time.
- 15 64. In relation to the ADHD, at the material time the claimant was taking Methylphenidate. According to the claimant's GP [111/112], the ADHD "*particularly affects her ability to concentrate and take in information at work*". I infer from the evidence that the ADHD affects the claimant's ability to concentrate and take in information in general and not simply at work. It must be remembered that the GP was being asked for a report about work, but it
- 20 seems to me straightforward enough to infer wider effects than simply those at work referred to in the report. In the occupational health (OH) report prepared for the respondent in February 2018 it states that the ADHD may cause the claimant difficulty in being organised and following instructions [205].
- 25 65. I consider that the need to concentrate and take in information, being organised and following instructions are normal day to day activities. I consider that it is clear from the GP and OH reports referred to above that those normal day to day activities are impaired by the impairment and therefore, in relation to the **Goodwin** conditions, in relation to the ADHD the
- 30 impairment condition and the adverse effect condition were met. It is also



clear that the ADHD met the long-term condition. That leaves the substantial condition i.e., was the adverse condition substantial?

66. In her impact statement, which the claimant also dealt with in her oral evidence, the claimant says that

5                   *“If I am due my medication things begin to overwhelm me, I am unable to put my thoughts into order. If I had a list of tasks they would look like a big messy blob. I can't focus on one thing as it all runs into each [other]. the same happens when I'm not on medication but on a larger scale... without my medication I feel anxious and out of control, I lose my impulse control,*  
10                   *I can be dangerous to myself for example crossing a road I know to look for traffic but my brain is racing ahead and thinking about being on the other side and what I'm going to do and I forget to look for cars etc and just walk out into traffic. With my medication my impulse control is normal my brain processes the appropriate steps”*

15   67. I have no doubt that in relation to the ADHD the adverse substantial condition is met. If the effect of the medication is ignored the claimant's evidence is clear that the adverse effect on her ability to carry out normal day to day activities of the ADHD is substantial. Her inability to concentrate, and thus control her impulses, means that she can be a risk to herself not least in the way she has described above.  
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68. I conclude that at the material time the claimant met the definition of disability in section 6 of the Equality Act 2010, in relation to her ADHD.

### ***Ehlers Danloss Syndrome***

69. I turn next to the EDS. Originally the claimant was diagnosed with  
25                   hypermobility as a child. In 2017 the claimant obtained a formal diagnosis of EDS. There are different types of EDS and in this case the claimant was diagnosed with hEDS, the “h” referring to hypermobility. The claimant's EDS causes her multiple joint pains, aching and nausea [111]. As the claimant describes in her impact statement, the EDS is caused by faulty connective  
30                   tissue which affects her joints as well as a number of other organs. The

principal issue is loose and unstable joints which are prone to frequent dislocations or hyperextension. The claimant suffers severe pain and takes powerful pain relief medication daily. The occupational health report prepared for the respondent in February 2018 [205] states that, in relation to the EDS:

5            *“In terms of her functional impairments therefore she will experience a lot of joint pain and stiffness. Her joints can come out of position without warning and it can take some minutes or hours before she can reposition them.”*

70. In her impact statement the claimant says she suffers from severe pain. She  
10 says amongst other things that even writing can cause her shoulder, elbow, wrist or finger to “pop out” and she says that “when walking my toes pop in and out by themselves” [111].

71. The claimant’s oral evidence was that the EDS can cause fatigue as well as  
15 pain. But she also asserted that the EDS is responsible for her migraine, IBS, abdominals pain, urine infections and cystitis. The claimant also said that she was now suffering from arthritis in her hands. The claimant described that she used strategies to cope with everyday activities. For example, on a bad day she was unable to put socks on her feet and she has a gadget to assist her to do that. The claimant also said that she has adaptations for washing and  
20 bathing but sometimes she needs physical assistance, most notably from her mother but also from other family members. The claimant has said that walking any distance is a challenge. The claimant has difficulty holding teacups which are full of tea, and at times has difficulty using cutlery. The claimant did not suggest that this was the case every single day, she clearly  
25 has some days which are better than others. What is clear is that to some degree every day is a struggle and the bad days, that is the days on which even lifting a full teacup is difficult, are recurring and I infer from the evidence I heard that without adaptations and pain relief the claimant would find considerable difficulty undertaking even the simplest normal day to day  
30 activities such as dressing herself, washing and making food.

72. In my judgment, at the material time the claimant was suffering with EDS and therefore she meets the impairment condition. The condition is clearly long term and clearly affected her ability to carry out normal day to day activities. The claimant meets both the long-term condition and the adverse effect condition in relation to her EDS.

73. Establishing the severity of impact is always problematic when an individual is constantly medicated in the way the claimant is. But taking account of the requirements of the Code and considering that in the light of the evidence, I find that on any measure the claimant was at the material time substantially adversely affected in relation to her ability to carry out normal day to day activities and that therefore she meets the substantial condition in respect of her EDS. In short therefore my judgment is that at the material time the claimant met the definition of disability in relation to her EDS.

***Anxiety***

74. According to the claimant's GP, the claimant has a history of anxiety which causes symptoms of nausea, dizziness, sweating and IBS when she is anxious [111].

75. There is no reference in the OH report [205] to anxiety and the claimant makes no reference to it in her impact statement. There are references to frequent migraines and it may be tempting to infer that the claimant's anxiety causes migraines amongst other things, but I see no reason for me to come to a conclusion about that given the limited scope of this hearing.

76. I have also considered the documentation provided by the claimant in the bundle and although there are references to anxiety and although I accept the claimant's evidence that she is in effect anxious all of the time, I cannot from the evidence conclude that at the material time such anxiety as the claimant had, in and of itself, substantially adversely affected her ability to carry out normal day to day activities. It is in any practical sense impossible to differentiate between the impacts of the ADHD and the EDS which I have outlined above from the impact of any anxiety. In that context I consider that

the claimant does not match the burden of proof in respect of the impairment of anxiety alone.

5 77. However, looking at the evidence, what is also clear is that the claimant's ADHD and her EDS both cause her to be anxious and the anxiety then causes symptoms of nausea, dizziness, sweating and IBS. The IBS means that the claimant has to a) be careful about being in situations where she might get anxious and b) plan for circumstances where she may soil herself as a result of not being able to access toilet facilities in time. This means the claimant plans as much as possible, in advance. So, for example she will pack her 10 bag for the next day and will include spare clothes 'just in case'. This need to plan also means that the claimant finds it difficult to be spontaneous and even if there is a planned event, the claimant has to think about where she can sit to be near enough to toilet facilities.

15 78. It seems to me that although the evidence suggests that anxiety is not in itself a disability, in tandem with the claimant's EDS and/or her ADHD, both of which cause or exacerbate the anxiety, and which then adversely affects the way the claimant organises her work and social life, the definition of disability is met. I consider that the need to plan, the need to do things like take extra clothing out, to avoid certain situations, to be unable to be spontaneous for 20 example there is a *ad hoc* invitation to a social event, the need to plan where to sit is sufficient to say that the claimant's normal day to day activities were substantially adversely affected by a combination of ADHD and anxiety, and/or a combination of EDS and anxiety, and/or a combination of ADHD, EDS and anxiety.

25 ***Eating disorder***

79. The claimant attended a clinic appointment with the Fife Health and Social Care Partnership Nutrition and Dietetic Service on 15 March 2019. Although this is beyond the material time for the purposes of this claim it does throw some light on the historic position in relation to the claimant's eating disorder. 30 The report of the dietician is at [214] and among other things says that the claimant reported a history of anorexia in her teenage years and at that time

also reported food avoidance through the course of the day drinking lots of diluting juice and cups of tea, having an evening meal but then binge eating in the early hours of the morning. There is also a psychological assessment which starts at [216]. This describes the claimant having body image and associated eating difficulties and that she attempts to compensate for perceived problems with weight and appearance through restrictive eating practises. The claimant tends to avoid eating breakfast and tries to maintain a set calorie intake of between 500 and 1000 calories. The report indicates a history of dietary control and that this required a treatment plan consisting of three phases which I need not set out here. There is no suggestion in these reports that this is new. On the contrary, it is quite clear that the claimant has suffered with an eating disorder for much of her life.

80. I am satisfied that the claimant's history is that she has had a difficult relationship with food from a young age sufficient to be of concern such that it is a mental impairment for the purposes of s.6 of the Equality Act 2010 and therefore meets the impairment condition.

81. What is more difficult to establish is whether that impairment had a long term and substantial adverse effect from the claimant's ability to carry out normal day to day activities.

82. The claimant's oral evidence was that she could go all day without eating which had an impact on her other conditions. She said that there was a constant battle inside her head about how other people saw her against how she saw herself. But even on her own evidence it was difficult to separate how the claimant felt in relation to eating and how her anxiety made her feel.

83. Of course, it might be that "eating normally" is a normal day to day activity. I suppose that one objection to that is that people have all manner of different eating patterns for any number of different reasons, and it is difficult to accept that there is a normal eating pattern or regime. However, I do not consider it difficult to argue that eating a balanced healthy diet is a normal day to day activity even if that is achieved in multiple different ways. Should an impairment interfere with that activity I see no reason why it cannot be said

that therefore one has an impairment which adversely affects a normal day to day activity.

5 84. So, on one view, it may be argued that it does not follow that because the claimant did not eat in a way which might not be considered “normal”, there is no evidence of any adverse impact on normal day to day activities. However, an alternative view is that it is a normal day to day activity to eat a healthy balanced diet and an adverse impact on that is having an eating disorder which means that one does not eat a balanced healthy diet. The evidence in the bundle is that the claimant did not eat a balanced healthy diet such that she is described as having an historic eating disorder and therefore the normal day to day activity of eating “normally” (in the sense of eating a balanced healthy diet) has been substantially adversely affected for most of the claimant’s life and was during the material time.

15 85. In short, the evidence suggests that for a very long period the claimant has suffered from an eating disorder which has the effect of causing her to not eat in a way which is considered normal (which we know because she is defined as having an eating disorder) and although that seems like a circular argument, I consider that it is not. It is a significant effect of the eating disorder that the claimant has struggled to eat normally, which is a normal day to day activity and that activity has been substantially impaired.

20 86. I conclude that at the material time the claimant met the definition of disability under s.6, Equality Act 2010 in respect of her eating disorder. She has a mental impairment which is long term and which meets the adverse effect condition and substantial condition.

25 ***Other impairments***

87. As I have set out above, during the hearing a number of other impairments were referred to including migraine, urinary infections and IBS, the claimant’s case is that either these are disability’s or they are caused by, either directly or indirectly her ADHD or her EDS.

88. Given the discussion above I do not consider I need to decide whether those other impairments amount to disability's because that is not how the case was pleaded. Furthermore it is beyond the scope of this hearing for me to decide whether those other impairment impairments stand alone or are caused by,  
5 again directly or indirectly, any of the disabilities I have found that the claimant had at the material time. That seems to me to be a matter for a final hearing to determine.

**Further procedure**

89. There now needs to be a case management hearing for the purpose of listing  
10 this case for a final hearing and making case management orders to ensure the parties are prepared for that hearing

90. The Tribunal will contact the parties separately about that further procedure in this claim.

91. For the avoidance of doubt, the findings in fact in this judgment relate only to  
15 the issue of disability status. They would not bind a future tribunal dealing with the merits of the claim and considering issues such as knowledge of the respondent.

20 Employment Judge: Martin Brewer  
Date of Judgment: 02 November 2021  
Entered in register: 11 November 2021  
and copied to parties