EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113745/2021

Held via Cloud Video Platform (CVP) on 27 April 2022

Employment Judge J D Young

TD **(anonymity order made)**	**Claimant** **Represented by:** **Ms J Forrest - Solicitor**
NHS 24	**Respondent** **Represented by:** **Ms K Henderson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

1. the claimant was a disabled person within the meaning of s6 of the Equality Act 2010 in the relevant period between 12 July 2021 and 17 December 2021; and

2. the respondent could reasonably have been expected to know that the claimant had a disability and likely to be placed at the disadvantage referred to in paragraph 20(1) (b) of Part 2 of Schedule 8 of the Equality Act 2010 from 20 August 2021.

REASONS

1. In this case, the claimant had presented a claim to the Employment Tribunal complaining that she had been discriminated against because of the protected characteristic of disability. She maintained that she had a physical impairment of Long QT syndrome being a heart rhythm condition; that the respondent failed to make reasonable adjustments in her request for altered shift pattern to not work nightshift ; and that there was indirect discrimination in requiring

the claimant to work nightshifts on an 18 hour contract. Those claims are resisted.

2. This preliminary hearing was to determine whether the claimant, who continues to be employed by the respondent, is a disabled person on account of Long QT syndrome within the meaning of section 6 of the Equality Act 2010 (the Equality Act) in the relevant period commencing 12 July 2021 with the claim being presented 17 December 2021; and whether the respondent had knowledge or could reasonably be expected to have knowledge of the impairment in the relevant period.

3. Prior to the preliminary hearing, the respondent advised that they accepted the claimant was diagnosed with Long QT type 1 syndrome in April 2021 and so had a physical impairment. However it was not accepted that the impairment had a substantial adverse effect on her ability to carry out normal day to day activities or that any substantial adverse effect was long-term.

4. On the issue of knowledge, it was accepted that (if disabled) then from receipt of an occupational health report dated 8 September 2021 the respondent knew or ought to have known that the claimant was a disabled person.

5. Essentially then the Tribunal required to determine the following issues in respect of the relevant period:

(i) Did the physical impairment of long QT syndrome have an adverse effect on the claimant's ability to carry out normal day to day activities?

(ii) If so, was that effect substantial (as in more than minor or trivial)?

(iii) If so, was the effect long term?

(iv) If the claimant is a disabled person, when was it that the respondent knew or could reasonably be expected to know that the claimant had a disability and likely to be placed at a disadvantage.

6. Section 6 of the Equality Act provides a definition of "disability" as follows:

(i) A person (P) has a disability if:

a. P has a physical or mental impairment, and

b. the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

7. Section 212 (1) of the Equality Act provides that "substantial" means more than minor or trivial.

8. Schedule 1 of the Equality Act gives further details on the determination of a disability. For example, Schedule 1 para 2 (1) provides that the effect of an impairment is long term if it has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to last for the rest of the life of the person affected.

9. Paragraph 2 (2) of Schedule 1 provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In that context, "likely to" has been defined as "could well happen" rather than "more likely than not" **(SCA Packaging Limited v Boyle** 2009 UKHR 37).

10. Paragraph (5) provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to correct it and but for that, it would be likely to have that effect.

11. The Tribunal must take into account statutory Guidance on the definition of Disability (2011) ("the Guidance") which stresses that it is important to consider the things that a person cannot do, or can only do with difficulty (89). This is not offset by things that the person can do. That was confirmed in **Aderemi v London & Southeastern Railway Limited** 2013 ICR 391. Day-to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc. (the Guidance D2 - D7). Night shift working has also been determined as day to day activity.

The Hearing

12. The parties had helpfully liaised in providing a joint file of documents paginated 3-81 (J3-81). At the hearing, I heard evidence from (1) the claimant who adopted as true and accurate her disability impact statement (J33-36) and answered supplementary questions and questions in cross examination and (2) Nuala Quinn, senior charge nurse, with the respondent. Each party also made helpful submissions with reference to the appropriate authorities.

13. From the evidence led, admissions made and documents produced, I was able to make findings in fact on the issues.

Findings in fact

14. The claimant has been employed by the respondents since 31 July 2017 initially as a Band 7 Clinical Team Leader and since 1 June 2020 as a Band 6 Clinical Supervisor. She is based at a Contact Centre. She worked 18 hours per week until being absent from work from 27 October 2021 until return on 17 January 2022 at which time she commenced working reduced hours of 12 per week from 24 January 2021. She has not worked a nightshift since June 2020 as she utilised her annual leave to avoid working nightshifts.

15. The respondent is part of NHS Scotland and delivers telephone based and online health advice across Scotland 24 hours a day, 365 days a year.

16. The claimant's diagnosis of long-term QT syndrome was made around April 2021. There had been indications prior to this time of the claimant having *"prolonged QT".* She had presented to Crosshouse Hospital with chest pain in February 2017. The ECG at that time noted prolonged QT which may be *"due to one of her antidepressants (agomelatine)".* However, given that the claimant had *"complained on a number of occasions over the years of intermittent palpitations lasting over 10-20 minutes",* it was suspected that there may be an *"underlying arrythmia"* (J40 - 42). At that time, an exercise tolerance test was undertaken and disclosed no chest pain or other arrythmia

and that the claimant had a *"slightly prolonged* Q7""and the recommendation was to stop antidepressants and review the situation.

17. In April 2020, the claimant was advised that there had been identified in her brother a gene associated with Long QT syndrome and that she was at risk of carrying this *"familial genetic variant"(J48).* After a predictive genetic test, it was confirmed that the claimant had inherited that gene change. The letter of advice dated 22 April 2021 (J49) indicated that the result did not *"mean that you have this condition but only that you may be at slightly increased risk of developing this"* The type of long QT syndrome was diagnosed as *"long QT type 1"* and that could cause heart rhythm to *"beat faster than normal"* as a result of certain triggers. In particular, the claimant was advised *"not to swim in cold water unaccompanied"* and that there were certain medications that can prolong the QT interval and she should monitor what she took from a website which contained possible medication triggers. The claimant was also advised that she should not get dehydrated as that might lead to a drop in potassium level which could affect the QT interval. At that time, a referral was made to a cardiologist at Glasgow Royal Infirmary and a consultation took place in May 2021.

18. Recommendations to limit abnormal heart rhythms in Long QT syndrome were advised as avoiding certain prescriptions and over the counter drugs on an up to date list which could be accessed through the internet; avoiding use of all recreational drugs; in some strenuous exercise can be a trigger and if there were symptoms of palpitation or dizziness in association with exercise then she should cease until the cause is identified; remain hydrated; if developing a fever take measures to keep temperature down such as paracetamol or ibuprofen. (J54).

19. Not in any documentation produced but in information provided and advised to the claimant orally was that the condition can cause fast and chaotic heartbeat and at its most serious cardiac arrest. She should avoid situations of stress and tiredness and should *"stop if felt having impact" and "if collapse go to accident and emergency"* She was given an alert cord so *"people would know".*

20. Further consultation took place in March 2022 with a cardiologist which showed that the QT was more prolonged than previously and that the claimant should be prescribed *"beta blocker"* medication. That had not occurred at date of hearing. She was very reluctant to proceed with that medication and was aware of the strain on GP practices and had not yet asked her GP to source a prescription. She had also been advised that the condition was *"U shaped"* in that it could be pronounced in childhood and then level off but become more pronounced again in later age.

21. Once diagnosed, the claimant was able to refer this condition back to events in her life since childhood when she was prone to dizzy spells/fainting and was told this was something that she would *"grow out* or and so dismissed it as being due to any underlying condition.

22. The symptoms experienced by the claimant and which since diagnosis she was able to ascribe to the syndrome were:

- Dizziness;
- Fainting;
- Blackout;
- Nausea;
- Breathlessness; and
- Palpitations. (J34)

23. With the respondent, the claimant worked nightshift and would feel unwell around 4am or 5am experience *"heart palpitations"* and become *"dizzy and nauseous"* and left feeling *"exhausted and stressed".* Since June 2020, she had organised annual leave on days when she would be rostered on nightshift so that she did not require to be on those shifts. She agreed that she had never raised the issue of those symptoms with the managers she had been involved with since commencing duties with the respondent in 2017 until advising Nuala Quinn of her diagnosis by email of 13 June 2021 which was further discussed at a meeting around 18 June 2021 . At that time, Ms Quinn

understood the claimant to advise of symptoms that she had suffered in the past but did not understand that she still suffered from such symptoms as dizziness or fainting.

24. The claimant agreed that many nightshift workers felt unwell around 3am-5am and it was a common problem. Ms Quinn advised that a number of people would go out *"for a walk around the building"* around that time which seemed to help.

25. Ms Quinn advised that she was aware of long QT syndrome as she had worked in cardiology some time previously. She was also aware of the symptoms it caused and that it could be a serious condition.

26. The claimant agreed that she had never advised her managers of any palpitations or dizziness. She agreed that in June 2020, when stepping down from Band 7 to Band 6, she had not asked to be relieved of any nightshift duties. She advised that she did not *"believe that to be an option"* as she was *"aware how difficult it was to get the numbers for nightshift rota".*

27. She also agreed that she had not advised her managers of any of the symptoms listed, whether on nightshift or not, and that she had good working relationships with them all with regular *"catchups"* on professional matters.

28. Her absence record in the period 31 July 2017 - 25 April 2022 showed no absence on account of the symptoms of Long QT syndrome (J78 - 81).

29. She never required to leave her duties or be sent home as a consequence of experiencing symptoms.

30. She had found standing for lengthy periods caused her to feel dizzy and would avoid shops which were busy if she felt that she was going to require to stand for any lengthy period of around 20 minutes or more. In her 8.5 hour shift working she tried to *"sit as much as possible"* to avoid becoming dizzy. She agreed her managers would never be aware of her feeling dizzy during duty. While her disability impact statement indicated that she would require to *"lie down and rest"* when experiencing dizzy spells at work she advised that had not happened.

31. The claimant required to eat and drink regularly to prevent symptoms and was wary about being out without eating or drinking in case she felt dizzy or faint. She would not undertake an activity which would take her to a remote location such as hill walking without a knapsack containing something to eat and drink.

32. She indicated that the condition affected her socialising in that when attending a 30th birthday party after working all day, she required to return home at around 11pm because she felt *"dizzy and unwell"* and generally did not stay out late in the event symptoms became exacerbated.

33. She advised that heart palpitations were troubling and could last for a minute or up to 30 minutes and if experienced when driving would pull over until feeling better. Her journeys to and from work took about 45 minutes each way. The symptoms affected her driving once every six months or so. Mostly her husband drove on non work occasions.

34. She stated that loud noises were to be avoided and for that reason avoided public transport. She accepted that driving meant she was equally at risk to noises occurring around her.

35. She had not suffered a blackout since childhood. She had fainted *"the previous week but had COVID"* and wondered if that may be the cause. Prior to that she had fainted *"a couple of years ago",* when walking the dog on the beach. She had fallen to her knees but recovered and completed her walk before returning home.

36. The claimant had been a keen runner but no longer ran any long distances with the last half marathon run being about *"two or three years ago"* .She attended five exercise classes per week, each lasting one hour, being a mixture *of "stretching exercises; body combat classes"* and weights.

37. The claimant lodged a flexible work request on 18 June 2021 to work an *"18 hour rota No night shifts".* That request was refused on 12 July 2021. The claimant appealed and the appeal took place on 20 August 2021 (J59 - 61). She was asked if there were any other shifts she was finding difficult to work

or if it was *"specifically nights"* and advised that *"it's just the nightshifts"* between 3-4am.The appeal was refused on 8 September 2021 ,

38. The claimant was referred to the respondent's occupational health service who completed a report on 8 September 2021 (J62 - 65). The background to the referral indicated that advice was sought to see whether or not *"occupational health would support this request to remove nightshift as a consequence"* of the diagnosis of Long QT syndrome. The response indicated that *"research studies have linked night shift working with an increased risk of atrial and ventricular arrhythmias. In my clinical opinion TD would be best supported in managing her condition by exclusion from nightshift".*

39. In answer to the question whether the claimant had a condition which was likely to be regarded as a disability by the Equality Act, it was stated Ws *would be determined by a legal not medical decision. In my opinion, her condition is likely to be covered under the act."*

40. The Long QT syndrome would affect the claimant for the rest of her life

Submissions

Claimant

41. I was grateful for the careful submissions made. No discourtesy is intended in making a summery.

42. It was submitted that Long QT syndrome diagnosed in April 2021 had been with the claimant for her whole life being a genetic condition which in worst case scenario could lead to serious cardiac arrest. It was a heart rhythm disorder that causes a fast and chaotic heartbeat. The symptoms were set out in the disability impact statement being dizziness, fainting, blackouts, nausea, breathlessness and palpations. That meant that the claimant did not feel comfortable going anywhere remote in case she suffered those symptoms and whenever they commenced, she required to rest and have something to eat and drink. She was unable to drive when she experienced dizziness or stand or any lengthy time in queues. The symptoms inhibited her

social life as she would generally not stay out late due to concerns about becoming overtired and exacerbating symptoms.

43. Whenever palpitations occurred, perhaps once or twice a week, she required to stop whatever she was doing. That also had an impact on socialising and travel.

44. There was no cure for the condition. No medication was currently taken but she had been recently advised that beta blockers should be prescribed. Given the difficulties of arranging GP appointments that prescription had not yet been requested.

45. Reference was made to the guidance under the Equality Act as regards *"normal day to day activities"* which indicated that such activities were "things people do on a regular or daily basis…" and in deciding whether an activity was a *"normal day to day activity",* account should be taken as to how far it is to be carried out by people on a daily or frequent basis.

46. It was submitted that the claimant's ability to do normal day to day activities was affected substantially given the effect on her ability to stand in a queue in a shop; sit rather than stand to assist call handlers at work; taking public transport due to concern of sudden loud noises; socialising with friends due to concerns about being tired if out late; driving a car when experiencing palpations; travelling at peak times; working nightshifts.

47. Working nightshifts particularly between 2-4am was held to be a normal day to day activity under the definition in section 1 of the Disability Discrimination Act 1995 **(Chief Constable of Dumfries & Galloway Constabulary v Adams** UKEATS 0034/08). It was clear that performing the claimant's role at night was a normal day to day activity with many people working nightshifts across various sectors.

48. While marathon running itself may be a specialised activity, general running to keep fit was not and that was also affected by the claimant's syndrome.

49. Substantial was to mean *"more than minor or trivial".* Even if the Tribunal did not consider that the effect of one or more impairment was substantial, then

the Guidance on the definition of Disability stated (paragraph 84) that it was important to consider whether its effects on more than one activity when taken together could result in overall substantial adverse effect.

50. Also, the Guidance provided that account should be taken of how far a person can reasonably be expected to modify behaviour by the use of a coping or avoidance strategy to prevent or reduce the effects of an impairment on normal day to day activities. When considering modification of behaviour, it would not be reasonable to expect a person to give up or modify normal activities that might exacerbate symptoms such as shopping or using public transport.

51. The Guidance clarified that account should be taken of a situation where a person *"avoids doing things which for example cause pain fatigue or substantial social embarrassment or avoids doing things because of a loss of energy and motivation".* It would not be reasonable to conclude that a person who employs such an avoidance strategy was not a disabled person (paragraph B9). It was submitted that the impacts were clearly more than minor or trivial and that the condition had become more prominent as age increased. The claimant did require to avoid situations that would result in symptoms such as standing for prolonged periods, avoiding remote locations, ensuring she is well hydrated and ate regularly, avoiding stressful situations, excessive exercise, loud noises and sudden exposure to extreme cold.

52. It was also submitted that the claimant's condition was long-term. It had been confirmed that such assessment of disability having a long term adverse effect is made at the time of the alleged acts of discrimination. **(Tesco Stores Limited v Tennent** [2019] 11WLUK730). The claim of failure to make reasonable adjustments referred to the flexible working request process lodged on 18 June 2021 and turned down on 12 July 2021. The appeal was turned down on 8 September 2021. The material time was the period between 18 June - 8 September 2021 .

53. The claimant's evidence was that she had suffered from long QT syndrome all her life albeit formally diagnosed April 2021 . There was medical evidence

of such symptoms from February 2017. It would last for the rest of the claimant's life. The symptoms were to increase as she aged as did the risk of cardiac arrest. It was submitted that at the point the request for flexible working was refused on initial consideration and then on appeal, the impairment had lasted at least 12 months. If that was not accepted then it was submitted that the impairment was likely to last for the rest of the life of the claimant (or at least 12 months).

54. On the issue of knowledge, the case of **Gallop v Newport City Council** [2013] EWCA Civ 1583 advised that the required knowledge is of the facts of the employee's disability. The employer does not need to also realise that those particular facts meet the legal definition.

55. Prior to submitting her flexible working request on 18 June 2021, the claimant discussed her condition with her line manager Nuala Quinn as she was concerned that nightshifts were making her unwell. It was at that point that the claimant was advised to make a flexible working request. The respondent therefore had knowledge of the claimant's condition which had been disclosed at that time. That was accepted by Ms Quinn and it was also accepted that as she had worked in cardiology, she was familiar with the chronic condition and knew it was lifelong.

56. It was submitted that the respondent had knowledge of the claimant's disability when she made her flexible working request on 18 June 2021. If the Tribunal did not accept that the respondent had actual knowledge, it was submitted that the respondent could reasonably be expected to know that the claimant was a disabled person under the Equality Act.

57. It was also submitted that given what was explained at the appeal hearing on 20 August 2021, the respondent knew or ought to have known that the claimant was a disabled person.

Respondent

58. It was submitted that the burden of showing disability lay on the claimant and it was for the Tribunal to determine the matter on the balance of probabilities **[Kapadia v London Borough of Lambeth** [2000] IRLR 699].

59. Disability status required to be assessed under reference to the time the incidents of discrimination were alleged. It was submitted that the relevant period for the purpose of determining whether the claimant was a disabled person for the purpose of the complaint of failure to make a reasonable adjustment was 12 July 2021 being the date the flexible working request was declined. As the EAT held in **Humphries v Chevler Packaging Limited UKEAT/0224/06,** the time limit for a failure to make reasonable adjustments made under the Disability Discrimination Act 1995 commenced from the date that a decision not to make an adjustment was made or the employer does an act inconsistent with making an adjustment.

60. So far as the indirect discrimination claim was concerned, the relevant period was between 12 July 2021 being the date the flexible working request was declined and 17 December 2021 when the ET1 was lodged.

61. Reference was also made to the Guidance and the list of day to day activities provided. It was agreed that a substantial effect was one which was *"more than minor or trivial"* and going beyond normal differences in ability which may exist among people.

62. It was submitted as a general observation that the claimant had worked with the respondent for over 4.5 years and for the majority of that time managed by four managers. The claimant had agreed that in each case, there was a good working relationship with frequent *"catchups"* and that the claimant had been quite open with one of the managers following an adverse effect at work which had affected the claimant but at no time other than in June 2021 when discussing the diagnosis of LQT syndrome had there been any reports of dizziness, fainting, blackouts, nausea, breathlessness or palpitations.

63. In the case of **Law Hospitals v Rush** [2001] IRLR 611, the Court of Session accepted that it was right for a Tribunal to have regard to how an applicant would carry out duties at work in an assessment of credibility in deciding whether a claimant fell within the definition of disability under the Disability Discrimination Act 1995. Also, in **Seccombe v Reed in Partnership Limited** EA/20 19/00478-00, the EAT commented that what a person does or does not say about their abilities may be relevant to the question of whether at the relevant time, the person was disabled. The EAT noted that the issue was not a matter of law and one of fact and degree.

64. If the claimant was struggling to the extent now alleged then it was submitted that it would have been a matter which would have been reported to her managers or noted by them as they went about their day to day business. There was no medical treatment in the claimant's GP notes. There was no medication and if there had been substantial adverse effect, one would have expected both to be apparent.

65. While the claimant gave evidence that since March/April 2022, she had been advised to take beta blockers, no evidence of that had been produced. She had not approached her GP on that issue.

66. In **Primaz v Carl Room Restaurants Limited t/a McDonalds Restaurants Limited** [2022] IRLR 194, the EAT advised that the test as to whether or not there was substantial adverse effect was an objective one of causation. The impairment must be found by the Tribunal to have the adverse effect, it is not enough that the claimant subjectively believes that is the case.

67. On the issues raised by the claimant, it was accepted that nightwork had been determined to be a day to day activity but in that case, the claimant suffered from ME and the findings were that this worsened between 2am and 4am in so far as he had to walk slowly, needed assistance or a handrail to climb stairs, needed to be driven home at times, sometimes required help with undressing when he got home and at times couldn't finish a shift.

68. In this case, the claimant contended that her ability was adversely impacted between 3am - 5am but there was no objective evidence of that. The claimant

had never raised any concerns with any of her managers about her ability to perform her work during night prior to discussion with Nuala Quinn in June 2021. She agreed that she had never made any complaint to her managers about nightwork or feeling unwell. It was submitted there was no basis to make a finding that the claimant's ability to do her job during nightshifts had been adversely impacted. In any event, it was accepted by the claimant that it was common among staff at NHS24 to report feeling exhausted and nauseous between the hours of 3am and 5am. This was not an uncommon symptom and there was no evidence to support a finding that any limitation the claimant may have felt was as a consequence of long QT syndrome. It was not shown that the feelings on nightshift went beyond the normal difference in ability that may exist amongst people.

69. It was stated that the claimant's concentration was affected by dizzy spells. It was not clear whether that suggestion affected her ability to work during the day or whether this was simply a nightshift symptom. If it was suggested that the day work was also affected then at the hearing on the flexible working request appeal (J60), she indicated that it was *"just nights"*.

70. The claimant accepted that she had never approached her managers about requiring to lie down or sit for lengthy periods.

71. The claimant clearly continued to drive to and back from work and never raised a concern about her ability to drive with her managers. There had never been any indication that because of dizziness or palpitations, that affected her ability to drive.

72. At no point had the claimant approached her managers to complain that she was suffering from any dizzy spells as a consequence of being on her feet for extended periods of time. If the claimant had been struggling with dizziness or palpations during her shifts, it would be expected that it would have been raised with her managers as affecting her ability to perform her role.

73. It was stated by the claimant that the syndrome had affected her mental health as she felt vulnerable and anxious. However, this case was based upon physical impairment. It was not clear in any event what day to day activity the

claimant was alleging was substantially impacted in this regard and again no medication was being taken to address any impact on mental health as a consequence of her condition. Again, there was no evidence of absence from work as a result.

74. The Appendix to the 2011 guidance indicates that a substantial adverse effect could include *"persistently wanting to avoid people, or significant difficulty taking part in normal social interaction or forming social relationships, for example, because of a mental health condition or disorder".* It was clear that any impact on the claimant's mental health was not at that level and so any impact on mental health as a result of her condition was not substantial.

75. The Guidance indicated that account should be taken of how far a person can reasonably be expected to modify his or her behaviour. The claimant had stated that she makes modifications in her behaviour which have impacted on her day to day life.

76. Carrying water to ensure that the claimant was well hydrated was not a substantial adverse effect. Many people carried water who had no impairment. There was no evidence that the claimant was advised to avoid stressful situations and no evidence of what it was that she actually avoided. Her role as an NHS Practitioner was stressful but it continued.

77. The claimant was advised to avoid strenuous exercise and ceased half marathon running. However, she did still attend hour long exercise classes and that was evidence that she could engage in exercise without any substantial adverse effect.

78. It was maintained that the claimant did not use public transport for fear of loud noises. Again, there was no evidence that the claimant had been advised to avoid loud noises. The claimant still drove and in doing so risked being exposed to car horns or pneumatic drills or other outside noises.

79. Evidence on exposure to extreme cold was that she had been advised she should not swim in cold water unaccompanied. It was submitted that avoiding

such circumstances was reasonable and engaging in such activities would not be classed as a day to day activity.

80. The claimant advised that she was concerned about staying out late because she would become tired and that exacerbated symptoms but there was no evidence that tiredness could be a trigger for symptoms. In any event, leaving early for a party around 11pm was not regarded as being a substantial adverse effect.

81. On the issue of "long term", reference was made to **Seccombe** when it was observed that the long term requirement relates to the effect of the impairment rather than merely the impairment itself. It is not sufficient that the impairment is long term. The impairment must have a substantial adverse effect on day to day activities that is long term. If it was accepted that the impairment of Long QT syndrome as a genetic condition was long-term but it was not accepted that any substantial adverse effect was long-term. In this respect reference was also made to **Swift v Chief Constable of Wilshire Constabulary** [2004] IRLR 540.

82. On knowledge of disability, the EAT advised in **Secretary of State for Work and Pensions v Alam** 2010 ICR 665 of the questions which should be asked on alleged failure to make reasonable adjustments in considering whether the employer knew an employee was disabled or whether it ought to have known.

83. In this case, there had never been any complaint by the claimant about working on nightshift until she made her flexible working request. The respondent was not bound to accept that before further evidence that issue was connected with her long QT syndrome. Only on receipt the OH report indicating that the claimant was likely to be a disabled person could knowledge of that condition be ascribed to the respondent. Accordingly, the respondent should not be found to have knowledge of the matter prior to 8 September 2021.

Conclusions

Impairment

84. In this case, the impairment relied upon is the physical impairment of Long QT syndrome which was diagnosed for the claimant in April 2021. There was no dispute that the claimant has been diagnosed with this impairment.

85. It is a genetic condition and the claimant advises that it explains instances of fainting and dizzy spells especially when she was younger which caused her on occasion to be off school. However, those concerns were often dismissed as part of *"growing up"* and so she has always been used to dismissing concerns.

86. The letter from West of Scotland Centre for Genomic Medicine of 22 April 2021, which confirmed the diagnosis (J49 - 50) advised that the syndrome was *"type 1"* and there was a discussion on *"triggers that can cause your heart rhythm to beat faster than normal".* In particular, the advice in that letter was that the claimant should *"not swim in cold water unaccompanied; that there were certain medications which should be monitored and which could be found on a particular website; that she should not get dehydrated; and if the claimant required surgery at any time then she should advise the anaesthetic staff of her condition"*.

87. The claimant was advised by letter of 25 May 2021 from *"Inherited Cardiac Conditions"* (J54) that the condition can *"predispose to abnormal heart rhythms" and* advised of *"known triggers for abnormal heart rhythms in LQTS".* Again, monitoring over the counter medication by use of a named website was recommended; recreational drugs were to be avoided; dehydration was to be avoided particularly if there was *"diarrhoea or vomiting"* and patients could be at risk when developing a fever in which case measures should be taken to reduce temperature by taking paracetamol and/or ibuprofen. It was stated that in some people, *"strenuous exercise can be a trigger"* and that if that came about, high intensity exercise should be avoided. If there were symptoms of palpitations or dizziness in association with exercise, then refrain until the cause was diagnosed.

88. This complaint had been investigated in 2017 after the claimant had been admitted to Crosshouse Hospital with an episode of chest pain and an ECG found that there was a prolonged QT. At that time, it was thought that may be due to one of the anti depressants being taken. It was noted that the claimant had complained *"of a number of occasions over the years of intermittent palpitations lasting over 10-20 minutes and given her recent episode of chest pain, I wonder whether there may be an underlying arrythmia".* A subsequent test in February 2017 indicated *"slightly prolonged QT'.* It was suggested that a "72 *hour tape"* be fitted to monitor the condition at that time but no action was taken. (J40/41)

89. While these letters did not identify stress, tiredness or loud noises as triggers it was clear that other information (orally and in leaflets) was being provided to the claimant. The claimant indicated these triggers were also to be avoided as symptoms may occur and I accepted this evidence.

Relevant period

90. The claim for the claimant is of failure to effect reasonable adjustments (failure to allow non nightshift work) and indirect discrimination (applying a provision criterion or practice [PCP] of requiring nightshift work on an 18 hour contract). These both arise as a result of a flexible working request made by the claimant on 18 June 2021 regarding nightshift working which was refused, on 12 July 2021. The ET3 was lodged on 17 December 2021. I would agree that the act of refusal would be the beginning of the relevant period as prior to that point, the request for a different rota was only under consideration rather than there being a positive determination of the issue. I do not consider that the failure to make reasonable adjustments or applying the PCP could apply prior to the decision being made on 12 July 2021. The lodging of the ET1 would determine the "end date" in respect of the claim and so the relevant period would be between 12 July 2021 and 17 December 2021 for the purposes of assessing whether the claimant was a disabled person.

Did the impairment affect the claimant's ability to carry out normal day to day activities?

91. As stated (paral 1) the Guidance indicates that in general, day to day activities are things people *"do on a regular or daily basis"* (section D3).

Palpitations

92. The claimant advised in her impact statement that she had suffered palpitations *"once or twice per week".* She states that she has to *"stop whatever I am doing because I feel too unwell to continue"* and *"unable to socialise with friends".* The palpitations can last between 1 minute or up to 30 minutes. Whenever she experiences that when she is driving, she requires to pull over until she feels better If they were to last for a *"long period of time, I have to go to accident and emergency department to seek medical attention".* There was no evidence of any attendance at A&E after attending Crosshouse Hospital with an episode of chest pain in February 2017.

Dizziness

93. In her impact statement the claimant advises that she is unable to concentrate when experiencing dizziness. She also states she requires " *to lie down and rest"* However in evidence she advised that was not the case but she would sit down and put her head between her knees and wait for the feeling to pass. She advised she would not tell anyone that was just the situation because it was *"not for long - couple of minutes".* She advised that this was exacerbated on night shift but the effects also took place during day shift. She also advised that she was unable to stand and wait in long queues when shopping as that may cause dizziness. If it looked as if there would be a wait longer than 20 minutes then she would put the items back on the shelf and leave the shop. She advised that dizziness affected her driving which stopped her going out for meals or to cafes and restaurants and the like and that when she attended a 30th birthday party after working all day she had to go home early because she felt dizzy and unwell and so this impacted her social life.

Nightshifts

94. She advised that around 4am—5am on nightshifts, she would feel *"dizzy, nauseous and unwell"* and was left feeling exhausted and stressed. She also advised that when working nightshift and becoming tired, she would get more stressed and start to experience other symptoms such as palpitations which had an adverse impact on her ability to do her job at nights.

Eating and drinking

95. The claimant advised she required to ensure she ate and drank regularly. She did not like to go anywhere that was *"remote"* as she needed to have somewhere to rest and something to eat and drink. As a result, she always carried food and water.

Palpitations in exercise

96. The claimant advised that she had ceased *"half marathons"* in case she experienced symptoms. She had enjoyed running but had now stopped. She took part in 5 one hour long exercise classes per week and had to leave an exercise class early *"on some occasions".*

Fainting and blackouts

97. The claimant advised that she had not had a blackout for some considerable time. She advised that what she meant by *"fainting"* was that she did not lose consciousness but *"go to ground"* and still be aware of where she was and *"hear things around her"* Such episodes were *"quite infrequent".* The incident with her dog oh the beach had taken place "a *couple of years ago".*

Loud noises

98. The claimant advised that she did not take public transport because of the fear of loud noises. She also accepted that loud noises could occur around her when not on public transport, by walking around or driving. While the claimant might be anxious about this, I did not consider that the anxiety over loud noises could reasonably be identified as a reason for avoiding public transport.

Are the adverse conditions substantial?

99. As indicated in the Guidance (paragraph B1), substantial adverse effect should reflect the *"general understanding of disability as a limitation going beyond the normal differences in ability which may exist in all people* "and that a substantial effect is one that is *"more than a minor or trivial effect".* Factors would include the time taken to carry out an activity; the way in which an activity is carried out; the cumulative effects of an impairment and account should be taken of how far a person can reasonably be expected to modify his or her behaviour by use of coping or avoidance strategies to prevent or reduce the effects of an impairment on normal day to day activities. As indicated, it is important to consider matters that a person cannot do or can only do with difficulty *"in making an assessment".*

100. The claimant is not under any medication . While she states that she has been advised that beta blockers might be prescribed that has not happened, and so there is no need to ignore any treatment when making the assessment as to whether or not the adverse effects are substantial.

Driving

101. The evidence was that the claimant drove to and from work being approximately 45 minutes each way over three shifts being six journeys per week. She advised that so far as requiring to stop driving due to palpitations was concerned, that would be *"once every six months or so".* There was no evidence that she was ever late for work as a consequence of having to stop her journey to work for a shift. She had been diagnosed with the syndrome in April 2021 but had not advised DVLA until around January 2022 after this claim was raised of her condition. She advised that her husband *"mostly drove"* but that appeared to be a matter of habit rather than an avoidance strategy. She acknowledged that it was a requirement to tell DVLA *"if you have long QT syndrome"* She advised that the process would be for DVLA *"if they deem necessary to contact GP".* There had been no requirement from DVLA to cease driving to the date of the hearing.

102. I did not regard the adverse effect on driving to be substantial. The claimant clearly continued to drive to and from work in accordance with her shift pattern and her evidence of adverse effect on effect of driving through palpitations or dizziness was slight and rather vague on the occasions when the claimant would require to *"pull over".*

Exercise

103. I did not regard running half marathons as being a *"normal day to day activity".* Certainly taking exercise would be regarded as such but the fact that the claimant attends five exercise classes a week each of one hour duration would suggest that her exercise regime is better than average and leaving a class early on some occasions of no real consequence given the level of exercise taken.

104. The claimant stated that she had stopped running which she had enjoyed. On this aspect (i) there no was no evidence that running actually caused the symptoms but rather a fear that it might; and (ii) in any event I regard it as reasonable to expect the claimant to modify her behaviour by not running but to go exercise classes as she has done.

105. I did not consider that the effect on the day to day activity of exercise to be substantial.

Shopping

106. There was clearly no difficulty in the actual act of shopping. The difficulties seem to arise if it was thought that a queue might be lengthy and the claimant would require to stand for more than 20 minutes or so. There are avoidance strategies that I considered could reasonably be adopted to avoid any substantial adverse effects such as online shopping or if necessary to attend a shop, to go at a quieter time or another time if met by lengthy queues. There was no evidence of other activities which the claimant could not do because of standing for lengthy periods. In the workplace she described that most conversations of any length with colleagues were when seated.

Going to remote locations

107. The evidence on this appeared to be that if taking walks into the countryside or for example hillwalking the claimant would need to ensure that she carried a knapsack with something to eat and drink and avoid any symptoms. There was no evidence that this was a difficulty or that hillwalking or other long walks to remote places was inhibited. I considered that taking something to eat and drink was a reasonable modification and indeed might be regarded as normal for hillwalkers who did not have long QT syndrome.

Socialising

108. The claimant advised in her disability impact statement that standing and waiting for long periods of time meant that this affected her day to day life in the *"running of errands and socialising.* As far as errands were concerned, I did not think that its effect as indicated was *"substantia?.* It was not clear why socialising was affected by an inability to stand for long periods without becoming dizzy. She stated that whenever she experienced dizziness, that would stop her from going out for meals to cafes and restaurants *"on a number of occasions".* There were no examples given of that and how frequent it might have occurred. The example given of dizziness affecting her was attending a 30th birthday party after working all day and having to *"go home earlf.* However, leaving at 11pm and so not *"staying out late"* did not appear to me to be something which was more than minor or trivial as regards socialising. It may be an inconvenience not to be able to stay out late but it was not clear what late night events the claimant was prohibited from attending through dizziness. The one occasion when she stated she required to go home at 11pm because of feeling dizzy did not appear to me to be a substantial adverse effect when socialising.

Eating and drinking

109. It was maintained that the claimant was *"wary about going out without eating or drinking in case she started to feel dizzy or faint".* In that respect, she had to become more *"regimented and organised"* in planning food and drink around a busy schedule. However, it would appear that related to simply

ensuring that she did not go out without having breakfast and having regular subsistence during the day and there appeared nothing unusual in that regime. A requirement to ensure that she is hydrated would be beneficial. I did not regard there being any substantial adverse effect on the claimant in respect of eating and drinking.

Exposure to extreme cold

110. The advice for the claimant was to avoid *"swimming in cold water unaccompanied".* As an avoidance strategy against the symptoms occurring, I would have not considered that to be an unreasonable modification. There was no evidence that unaccompanied swimming had been a feature of the claimant's lifestyle and she was now prevented from enjoying that on any regular basis. I considered that the avoidance strategy altered the effects of the impairment to the extent that this was not substantial.

Palpitations and dizziness effects

111. The claimant's position was that palpitations and dizziness affected her performing what would be normal day to day activities in the workplace in being unable to carry out her role as she is *"unable to concentrate"* and needed to sit down to recover. This issue is separated into dayshift working and nightshift working.

Dayshift working

112. There was challenge to the frequency of the dizzy spells or palpitations. It was accepted that the claimant had never been absent from work on account of any symptoms related to long QT syndrome since she commenced work with the respondent in August 2017. There was no complaint made by the claimant to any of her managers with whom she had good working relations about feeling dizzy or having palpitations. The managers had never been aware of such. There was no reason why she would not have advised them of dizzy spells or palpitations during working time. There was no issue of any poor work performance by the claimant.

113. The claimant's answer to this was that she was a private person who protected her own personal information. She would not want to talk of any weakness. She did not regard that as being part of the culture within the nursing organisation. Nurses were there to heal others and not to complain of their own ailments. She may have shared information on her own mental health issues with her managers but that was because that episode had arisen out of an adverse incident at work.

114. However, the adverse effects of which the claimant complained namely being unable to concentrate due to a dizzy spell or having to sit down to recover from palpitations lasting 1 minute to 30 minutes was of significance in the role in which the claimant was employed namely to supervise, answer queries from and make decisions about the treatment of those contacting NHS24. These effects were not likely to have passed unnoticed, or without comment.

115. Also the frequency of palpitations was at odds with the information on driving. The claimant would say that if palpitations occurred, she would require to pull over but that would happen "every six months or so". That would not support a claim that the palpitations were once or twice a week.

116. The challenge included whether or not these symptoms experienced by the claimant at work were in fact restricted to nightshift working. There is support for that proposition in the notes of the appeal hearing. (J59-61) The claimant's explanation at that time related solely to difficulties she had with nightshifts in feeling unwell and how she had initially *"just accepted that but it has gotten particularly bad over the past few years"* and that the difficulty with work was *"just the night shifts"* There was no reference to palpitations or dizzy spells or feeling unwell and nauseous on dayshift. Within the occupational health report, the question is asked whether there was a *"change in symptoms and frequency of symptoms from dayshift to nightshift" and* the answer given that "*T reports that her symptoms are triggered more frequently and severely on nightshift, consistent with clinical evidence referred to above".* In that respect, the symptoms at nightshift were stated to be described by the claimant as *"dizziness, palpitations, fatigue and overwhelming sense of imminent collapse which are all associated with long QT"* Again, in answer to the question *"has*

T had symptoms on other shifts", it is stated *"T confirms that she experiences symptoms on dayshift but states they are less frequent and generally milder".*

117. A lack of any mention of difficulty in dayshift work from the claimant during the appeal or her original application for flexible working; the absence of representation to the claimant's managers of any disquiet on dayshift working; the lack of any observation by the managers themselves on the claimant's dayshift working being affected; that there was no performance issue noted; the lack of any absence record for dayshift working on account of the syndrome all led to the conclusion that there was no substantial adverse effect on day to day activities arising out of working dayshifts.

Nightshift working

118. In the first instance, it was accepted that nightshift working is a day to day activity **(Chief Constable of Dumfries and Galloway Constabulary v Adams** UKEATS/0046/08).

119. There were three issues of challenge to the claimant's position on nightwork namely: (i) that the severity of the effect in the **Chief Constable v Adams** case was marked and not as significant as the claimant's position in this case; (ii) in any event the claimant never raised any concerns with any of her managers about her ability to perform nightshift prior to discussion with Ms Quinn in June 2021 ; and (iii) it was very common amongst staff at NHS24 to report feeling exhausted and nauseous when working between 3am and 5am and the symptoms described by the claimant when working at this time of night was common.

120. However, there was evidence to support a finding that adverse effects in nightshift working were as a consequence of symptoms of long QT syndrome.

121. In the first instance, albeit I was of the view that there was some exaggeration within the evidence given by the claimant, I did accept that she had effects of of nausea, palpitations, dizziness and fatigue in nightshift. She had avoided nightshift by booking annual leave since June 2020 which was prior to any diagnosis of Long QT syndrome and I did consider that was significant in an

assessment of whether she did in fact have symptoms (which could be put to long QT syndrome) rather than simply disliking nightshift and then using long QT syndrome as a reason for seeking a change in shift pattern.

122. I also accepted the evidence that many working nightshift felt similar symptoms between 3am - 5am in the morning. Some did not namely Ms Quinn who indicated that she had been working nightshift for sometime and did not experience those symptoms but was well aware that others did and required to *"walk around the block"* to overcome them. **Da Silva Primaz v Carl Room Restaurants Limited t/a McDonalds Restaurant Limited & others** [2022] IRLR 194 advised that in a consideration of whether the impairment had a substantial effect on the ability to carry out normal day to day activities, the impairment had to be found by the Tribunal to in fact have had the requisite effect. The test is objective and whether the impairment does or does not have the claimed effect must be determined by the Tribunal on the evidence before it. It was stated that it was *"not enough that the claimant truly believes that it does. The Tribunal must decide for itself. That means that the Tribunal must consider whether it has some evidence that objectively makes good a contention that engaging in a certain activity will risk triggering or exacerbating some adverse effect of the impairment itself'.*

123. In this case, I accept that the claimant believes that nightshift working exacerbates her symptoms and that is why she feels unwell and nauseous and fatigued. There is no direct medical evidence to indicate that nightshift working will exacerbate Long QT syndrome. That is not an issue raised in either of the NHS letters produced and no information leaflet on Long QT syndrome was produced which would advise that nightshift working was likely to exacerbate or trigger the symptoms.

124. However, there is information within the Occupational Health report on this matter (J62 - 65). This report is from a *"clinician* ''designed as *"Occupational Health Nurse team Leader"* and advises: *"research studies have linked nightshift working with an increased risk of atrial and ventricular arrhythmias. In my clinical opinion, T would be best supported in managing her condition by exclusion from nightworking."* It also states that:

"one significant risk she has been advised to avoid is becoming dehydrated, which is more likely to be a risk on the longer duration of nightshifts. "

Further the report advises that the claimant reports her symptoms being *"dizziness, palpitations, fatigue and overwhelming sense of imminent collapse, which are all associated with Long QT"*

125. It is not stated what *"research studies"* have been considered in the link between *"risk of atrial and ventricular arrhythmias"* but I have no reason to dispute that statement.

126. The reference by the clinician to the link between nightshift working and arrhythmia would provide evidence that it is not just the claimant's own belief that her symptoms are exacerbated by nightshift working but provides necessary evidence of the link between the impairment and the effect on the day to day activity. There is then objective evidence on which to base the necessary causation. It is appreciated that others may have similar symptoms but in this case I consider the effect is caused by the impairment.

127. It is then necessary to consider whether that effect is substantial. I consider that to be the case. While the effect may be marked to a much greater extent in **Chief Constable v Adams,** I consider that the adverse effects of the impairment are substantial. There is sufficient to establish the link between exacerbation of the symptoms associated with long QT syndrome by way of dizziness, palpitations, fatigue and sense of imminent collapse and nightshift working; which symptoms have a substantial effect on the day to day activity of nightshift working. The substantial adverse effect was being unable to carry on with the activity when feeling so unwell and replacing the shifts by the use of annual leave instead.

Long term effect

128. The substantial adverse effect has to be Jong term to fall within the definition of disability. Under paragraph 2 (1) of schedule 1 to the Equality Act, the effect of an impairment is *"long term"\f* it has lasted for at least twelve months,

is likely to last for at least 12 months, or is likely to last for the rest of the life of the person affected.

129. Given the finding that the substantial adverse effect is associated with nightshift working and that the syndrome is genetic and so is lifelong, I would consider that the substantial adverse effect has lasted for more than 12 months. The evidence was that the claimant had taken leave instead of nightshift working from June 2020 because she had been experiencing exacerbated symptoms on nightshift. The impairment has continued since that date and will continue for the rest of the claimant's life. The effects will also remain.

130. In that respect, the effects have lasted for 12 months until the date of the refusal of flexible work request on 12 July 2021. The relevant period is from that date to 17 December 2021 and so again in respect of each of the complaints of discrimination, the long-term effect is established.

131. It would also be the case that the effect is likely to last for the rest of the life of the claimant given the impairment is genetic and there is no cure.

132. In all the circumstances, I find that the definition of disability is established and that the claimant is a disabled person in respect of the relevant period.

Knowledge of disability

133. An employer has a defence to a claim of failure to make reasonable adjustments in terms of paragraph 20 (1) (b) of Part 2 of Schedule 8 to the Equality Act. That provides that a person is not subject to the duty if he does not know, and could not be reasonably expected to know *"that an interested disabled person has a disability. .."*

134. An *"interested disabled person"* in this context is defined by reference to tables set out in Part 2 of Schedule 8 and includes an employee of the employer such as the claimant (paragraph 5)

135. The words *"could not be reasonably be expected to know"* in paragraph 20 of schedule 8 allows a Tribunal to find that the employer had *"constructive"* knowledge of the disability.

136. As was submitted in **Secretary of State for Work and Pensions v Alam** 2010 ICR 665, the EAT advised a Tribunal should approach this aspect by considering:

- Did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?
- If not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially.

137. It is not disputed that (if disabled) the respondent knew or ought to have known that the claimant was a disabled person on receipt of the occupational health report dated 8 September 2021. The dispute is whether the respondent ought to have known earlier with emphasis on the meeting between the claimant and Ms Quinn. There was no precise date put on the conversation between the claimant and Ms Quinn who advised that she was first told of the claimant's symptoms by *"email on 13 June and met sometime 18 - 20 June 2021".* The flexible working request was submitted 18 June 2021 and any meeting therefore would have been by that date. I would assess the question of whether or not the respondent knew or ought to have known that the claimant was a disabled person as being at earliest 18 June 2021 being the date the flexible work request was made by which time the claimant had met with Ms Quinn.

138. The evidence of Ms Quinn on this meeting was that she was advised the claimant had a diagnosis of Long QT syndrome and was in possession of a *"leaflet on if.* As a consequence, the claimant was able to rationalise symptoms of palpitations and fainting when she was younger. She also stated that *"as a result felt wise to come off nightshift.* There was no particular discussion on symptoms but Ms Quinn thought that the claimant *"did say she*

took leave'" in place of working nightshift and that was the first time that Ms Quinn became aware of her taking leave rather than working nightshift.

139. Ms Quinn was previously engaged in a cardiac unit and was aware of Long QT syndrome and its symptoms and effects. She advised that she had *"asked HR if refer to Occupational Health and HR said not needed'* under explanation that such a request of HR was not because this syndrome had been disclosed but was normal on any application for flexible working. However, she did consider that the diagnosis of Long QT syndrome did *"raise a red flag that could be serious. . .".*

140. In **Gallop v Newport City Council** 2013 EWCA Civ 1583, the Appeal Court advised that constructive knowledge was of *"the facts"* constituting the employee's disability which could be *"regarded as having three elements to them namely (a) a physical or mental impairment which has (b) a substantial and long term adverse effect on (c) his ability to carry out normal day to day duties".* The employer does not also need to know *"that as a matter of law the consequence of such facts is that the employee is a "disabled person" as defined...".*

141. As at 18 June 2021, the respondent certainly had information on the impairment and that having been diagnosed as a genetic condition the effects were likely to be long term. The issue was then whether the facts available supported an assessment by her employer that there were substantial adverse effects on her ability to carry out normal day to day activities.

142. By the claimant's own evidence, she had not advised her managers of adverse effects previously. She had no diagnosis of Long QT syndrome when she arranged leave rather than nightshift from June 2020 and she agreed that she had made no representation to her managers at any time before meeting with Ms Quinn that her ability to work night shift was affected.

143. Her application for flexible working stated that she had *"noticed over the years that when I work nightshift, I tend to develop palpitations and it would seem this is because of the condition. I have been advised to avoid any situation that causes this as it could lead to cardiac arrest. I am therefore asking for a*

rota that has no nightshift. " She advised that with the benefit of hindsight her initial application for flexible work had not been sufficiently fulsome in identifying adverse effects and that the application was short of detail.

144. Those circumstances would not in my view be sufficient to indicate the facts necessary for an assessment by the employer of *"substantial adverse effect".*

145. However by 20 August 2021 being the date of the appeal against refusal further information had come forward which was more specific as regards the substantial adverse effects relative to nightshift. The statement by the claimant which accompanied the appeal papers (J57/58) gave detail of the effects on her of nightshift work of palpitations dizziness and extreme lethargy and that these were symptoms of the impairment. Particular information was provided that between 13 July 2020 and 27 July 2021 , the claimant had taken annual leave for 17 of the 20 nightshifts on her rota and one was changed to an earlier shift. She had also booked three nightshifts in September 2021 as annual leave.

146. There was further information provided at the appeal hearing on 20 August 2021 conform to the notes of that hearing (J59-61) and again the issue of night shift working is highlighted. Specific representation is made that the claimant would be *"protected under the 201 0 Equality Act. "*

147. While the Occupational Health report was not available until 8 September 2021 given the information available on the impairment and its effects and the better particulars available on the difficulties associated with nightshift work I consider that there was constructive knowledge of the position as at 20 August 2021. The likely disadvantage was the requirement of night shift working.

148. I consider at that date that the respondent could have reasonably been expected to know that the claimant had a disability and likely to be placed at the disadvantage referred to in paragraph 20 (1) (b) of Part 2 of Schedule 8 of the Equality Act 2010 from an assessment of the facts available at that time.

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10 **Employment Judge:** **J Young**
Date of Judgment: **09 June 2022**
Entered in register: **10 June 2022**
and copied to parties