Neutral Citation Number: [2023] EAT 98

Case No: EA-2021-000252-JOJ

EMPLOYMENT APPEAL TRIBUNAL

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 9 June 2023

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MRS L BROWN

Appellant

- and -

GENERAL VENDING SERVICES LTD
(in Creditors' Voluntary Liquidation)

Respondent

- -

- -

Daniel Northall of counsel (through the auspices of Advocate) for the **Appellant**
The **Respondent** did not attend and was not represented

- -

JUDGMENT

- -

SUMMARY

Disability Discrimination

The tribunal erred in its approach to the question of whether the claimant was a disabled person at the relevant time, in particular in relation to paragraphs B7 and B9 of the *Guidance on matters to be taken into account in determining questions relevant to the definition of disability* (2011), and the distinction between a coping strategy and an avoidance strategy.

HIS HONOUR JUDGE AUERBACH:

1. The claimant in the employment tribunal was employed by the respondent from 30 April 2018 until she was dismissed with effect on 10 July 2019. Following this, she presented a claim form complaining of disability discrimination in respect of the dismissal. She was a litigant in person. It is not entirely clear whether she was complaining that the dismissal was an act of direct discrimination or perhaps discrimination arising from disability or, less likely, something else. But in any event it is clear that her complaint was dependent on her having been a disabled person at the time of dismissal.

2. There was a dispute as to whether that was the case, and a hearing was held to determine that issue before Employment Judge Sage sitting at London South on 2 December 2020. The claimant appeared in person. The respondent was represented by counsel. The claimant gave evidence, as did a witness for the respondent. The tribunal had a bundle which included various medical records. The judge gave an oral decision in which she held that the claimant was not at the time of dismissal disabled, and so dismissed her complaint. Written reasons were subsequently provided. An application for reconsideration was unsuccessful.

3. The claimant appealed, acting again as a litigant in person. The EAT judge who considered the notice of appeal on paper was of the view that there were no arguable grounds of appeal. However, at a Rule 3(10) hearing at which the claimant was represented by counsel under the ELAAS scheme, Eady J permitted five amended grounds to proceed to a full appeal hearing. That hearing has taken place before me this morning.

4. In May 2021 the respondent was placed into creditors' voluntary liquidation. The liquidator has informed the EAT that he would not be appearing nor be represented today. Mr Northall of counsel appeared for the claimant today.

5. Notwithstanding that the respondent has not appeared, I need to be satisfied that one or more of the grounds of appeal is meritorious in order to allow it. I note also that, whatever the practical implications of the liquidation may be (a matter on which Mr Northall told me the claimant has been advised), they do not as such affect the merits of this appeal.

6. Section 6 **Equality Act 2010** defines "disability" as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. Section 6(5) enables a Minister to issue guidance about matters to be taken into account in deciding any question for the purposes of that definition. Such guidance was issued in 2011. Section 212 provides that "substantial" means more than minor or trivial. Schedule 1 makes more detailed provision in relation to the definition of disability, including at paragraph 2 in relation to the meaning of "long-term." Paragraph 12 requires the tribunal to take into account such guidance as it thinks is relevant.

7. In its decision, the tribunal correctly set out the elements of the definition of disability and the meaning of "substantial", and noted that reference had been made to section B1 of the guidance. In line with established authority, the tribunal noted that the focus should be on what the claimant cannot do, or can only do with difficulty.

8. In this case there was no dispute, and the tribunal found, that the claimant had a physical shoulder impairment. However, the tribunal concluded that at the time of dismissal that impairment did not have a substantial or long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

9. In outline, the relevant chronology and findings made by the tribunal are as follows.

10. On 28 December 2017 an entry in the claimant's GP records recorded that the pain in her shoulder was better at weekends, but worsened towards the end of the day. At that time she was working for her employer previous to the respondent, and involved in heavy data inputting which made her neck and shoulder a lot worse.

11. The claimant joined the respondent in April 2018. The tribunal did not actually make a specific finding of fact about her job or the general nature of her work. I note that in her claim form she gave the job title as "region controller", a description with which the respondent did not disagree in its response.

12. Regarding the claimant's start with the respondent the tribunal found as follows:

> "8. The Claimant joined the Respondent company on the 30 April 2018. When she joined the company, she ordered a gel support for her wrist and a keyboard wrist support. She also swapped her chair for one that was more comfortable. The Claimant confirmed that when she was working for the Respondent, she was able to vary her tasks in order to minimise the adverse impact she suffered as a result of typing or using a mouse. The Claimant had to take painkillers at times to manage the pain."

13. The tribunal continued as follows:

> "9. The Claimant had surgery to repair her shoulder on the 12 February 2019, and a bankart repair was carried out on a dislocation and a torn labrum. She was required to wear a sling for 6 weeks after the procedure and was signed off for the 6-week recovery period.
>
> 10. The Claimant told the Tribunal that the operation was not a complete success because she still experienced difficulties with daily tasks and still had difficulty reaching her arm behind her, and struggled with heavy lifting and repetitive tasks. It was the Claimant's evidence that in her view, it could take over a year or more for her to be what she described as 'fully mobile'."

14. On 4 March 2019 the claimant was reviewed by her consultant surgeon, Mr Selvan. The tribunal found as follows:

> "11. The Claimant was taken in cross-examination to a number of documents. Firstly page 143, which was a letter written by Mr Selvan, the consultant surgeon who carried out the operation, after a clinic on 4 March 2019. It was his view that he carried out a satisfactory repair, and the Claimant was advised to keep her arm in a sling for six weeks and to follow regular physiotherapy. She was advised to take painkillers to

> manage the pain. The medical evidence therefore concluded that the operation successfully repaired the injury, but the Claimant would need physiotherapy to increase her mobility. There was no medical evidence to suggest that the procedure was not successful."

15. On 24 April 2019 the claimant returned to work on reduced hours. A box on the return-to-work form asking whether she had a disability was ticked in the negative. However, the judge did not find that piece of evidence particularly compelling, as the claimant had not in fact signed the form.

16. The tribunal continued as follows:

> "13. The Claimant confirmed in cross-examination that after her return to work she was able to drive, wash and brush her hair; she clarified that she was able to do this a couple of days before her return to work on the 24 April. The Claimant explained that she was able to manage her own workload and change up tasks to manage any discomfort after her return. The Tribunal find as a fact that both before and after the procedure, the Claimant was able to adjust or modify her behaviour to lessen the adverse effect that her physical impairment had on her daily activities.
>
> 14.The Tribunal was taken to a letter written by the Claimant's consultant surgeon at page 155 of the bundle, after a clinic on 27 May 2019, where he stated that the Claimant still had '*some stiffness, especially on external rotation and full elevation and is currently having physiotherapy. She will have a phased return to work and altered hours and steadily return to activities*'. This letter indicated that the Claimant would return to his clinic in three months' time which was what he described as a final check-up. There was no mention in his letter that the Claimant was experiencing significant pain apart from stiffness or that she was unable to carry out normal daily activities. The reference in the letter to her being able to steadily return to daily activities strongly suggested that he envisaged that she would make a full recovery and not suffer an impairment going forward.
>
> 15. The Tribunal was then taken to page 101 of the bundle, which was a consultation which took place on 31 May 2019 with Mr Johnson a Clinical Practitioner; it was recorded that the pain the Claimant experienced in her neck was now much reduced (from 10/10 whilst at work to 3/10 when at the appointment). The Claimant also stated that the repetitive use of the arm and using a mouse was the prime aggravator. There was no mention of the Claimant finding it difficult to perform household chores such as hoovering, cleaning or cooking. The only aggravator referred to in this consultation was when using a mouse. This record also showed that the shoulder was improved and when not at work the pain was reported to be significantly reduced.
>
> 16.At page 102 the Tribunal was taken to a medical record dated 24 June 2019 with Mr Moran Clinical Practitioner where the Claimant was recorded to have said '*feels shoulder is improving slowly. More movements and less pain*.' There was no reference in this consultation to the Claimant experiencing difficulties with daily household chores. This consultation a few weeks before dismissal reported a significant improvement with less pain and greater use of the arm. There was no

> indication that the Claimant was experiencing any adverse effects on her ability to care for herself or to carry out daily activities."

17. The claimant was dismissed on 10 July 2019.

18. The tribunal continued as follows:

> "18. The Tribunal was then taken to the Claimant's consultant surgeon's letter dated 26 July 2019, after a consultation on the 22 July 2019 at page 175 of the bundle. This consultation took place 12 days after dismissal. The letter stated that the Claimant was doing well but was suffering from some stiffness as a result of surgery. It was noted that the following was included in the letter: "*Mrs Brown has work commitments, but still has some disability and must take things easy. This disability could last for a year from the date of surgery. The stiffness could take a year from the date of surgery to improve*". The Claimant was taken to this quote in cross examination and explained that she told her consultant of her dismissal and he included this quote to backup what she had told the employer at the time. This was the first time that the consultant used the word disability when referring to the shoulder movement and function.
>
> 19.The Tribunal find as a fact that the consultant included the reference to disability and the stiffness taking one year to resolve in the letter because this is what he was told by the Claimant. Although the Claimant told the Tribunal that the surgeon wouldn't have written the letter in this way unless he believed it, the Tribunal find as a fact that the reference to one year in this letter was to the stiffness experienced post-surgery. The Tribunal saw in the medical records that the pain suffered by the Claimant was significantly reduced by 70 per cent by this time as reflected in the above medical reports. There was no evidence to suggest that the Claimant was suffering the substantial pain experienced prior to her operation. The medical records leading up to his letter all suggested that the pain the Claimant experienced had reduced and her shoulder was improving.
>
> 20. Although the Claimant told the Tribunal that she had previously been informed that she would suffer a further one-year of pain after the operation and therefore this would amount to disability, there was no evidence in the bundle that this was the case. It was noted that the consultant's previous letters had referred to a six-week recovery period and the need to have physiotherapy. Although the Claimant told the Tribunal she was told it would take up to a year to heal, the letter on page 175 did not state that, it only referred to the stiffness taking some time to improve."

19. The tribunal went on to refer to further clinical records. In September 2019 the claimant was seen by a clinical practitioner who recorded "*feeling shoulder is 70% there. Still painful if cleaning or doing repetitive tasks*". The tribunal observed that this was the first reference in any of the medical records to difficulty with household duties, previous references having all been to pain when using the mouse at work.

20. Later in September 2019 the claimant was seen by another clinical practitioner who identified that the symptoms were aggravated being at work with repetitive motions, and noted that using a mouse and looking at one screen to another aggravated the pain.

21. In February 2020 the claimant was seen by a clinical practitioner when she was recorded as saying that she felt that the shoulder was 70% improved, but was still painful if she used it for long periods. She was discharged after this appointment. The tribunal observed that there was no mention here of problems with daily activities, household chores or personal care.

22. There was then a record of a consultation with a Ms Hemmings in August 2020. This recorded the claimant saying that aggravating factors were "cleaning/washing-up/hoovering/ironing/brushing hair". The tribunal said it was noted that this was the first time that the claimant indicated in any medical record that she was experiencing difficulties with tasks such as hair brushing. It was also noted that the claimant had confirmed to the tribunal that she was able to brush her hair shortly before her return to work in April 2019. The claimant's evidence on this point appeared inconsistent, as it was again included in aggravating factors some 16 months after she conceded that she was able to brush her hair in April 2019. This was the first time that the claimant listed a number of household activities as aggravating factors that caused her pain.

23. The tribunal continued:

> "25. In the Claimant's witness statement at paragraph 60, she stated that she had trouble 'with daily tasks, repetitive movements and activities with certain stretches of the right arm'. Included in the list of activities she had 'trouble with' were brushing her teeth, doing her hair, ironing, hoovering, cleaning, getting dressed, using a mouse and excessive typing. It was noted that this list again included 'doing her hair' to that extent her statement appeared to be exaggerated in the light of the concession she had made in cross-examination. It also included for the first time that she had trouble getting dressed, but this was not recorded as a problem during consultations with clinical practitioners or with her consultant or GP. The Claimant

> provided no explanation of how her physical impairment caused her to experience difficulties when carrying out these tasks. There was no explanation of what the Claimant could not do or could only do with difficulty, her description of 'having trouble' with daily chores, gave no indication of the severity of the problem or how her ability to carry out each type of activity was impaired. There was no evidence to suggest that the shoulder injury was causally linked to the problems she was experiencing at the time."

24. In her self-direction as to the law, as well as covering the ground that I have already mentioned, the judge set out the full text of paragraphs B7 and B9 of the guidance:

> "B7. Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.
>
> For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-today activities. (**See also paragraph B12.**)
>
> **When considering modification of behaviour, it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such as shopping, or using public transport.**"
>
> B9. Account should also be taken of 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 employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability **it is important to consider the things that a person cannot do, or can only do with difficulty**.
>
> **In order to manage her mental health condition, a woman who experiences panic attacks finds that she can manage daily tasks, such as going to work, if she can avoid the stress of travelling in the rush hour.**
>
> **In determining whether she meets the definition of disability, consideration should be given to the extent to which it is reasonable to expect her to place such restrictions on her working and personal life.**"

25. Having noted that it was accepted that the claimant had a physical impairment, the judge continued as follows:

"44. The next part of the test is whether the adverse effects on normal daily activities were substantial. The evidence showed that the effects were worse when at work (when working in her previous employment) due to the nature of her role. However, when she joined the Respondent, she was able to take action that reduced the substantial adverse effect by switching tasks. Having taken into account the guidance at B7, the Claimant's strategy of switching between tasks appeared to reduce the adverse effect to such an extent that it was no longer substantial. At the relevant time, the main aggravator was the use of the mouse and screen; so switching away from these tasks regularly reduced the adverse effect to a manageable level, as the condition appeared to be exacerbated by repetitious tasks.

45. Although the Claimant was able to use avoidance strategies, the evidence suggested that the shoulder problem was continuing and required surgical intervention. The Claimant confirmed in evidence that from November 2018, despite being able to employ strategies to reduce the adverse effects, the effects had become substantial.

46. After the operation in February 2019, the Claimant was able to return to work on the 24 April 2019. It seemed that she had made a significant recovery by that date as in cross examination she confirmed when she returned to work she was able to drive and do her hair. The medical evidence showed that by May 2019 the Claimant self-described the pain to be 70 per cent improved during her consultation, and only referred to pain reverting to 100 per cent when at work using the mouse. There was no mention in her medical records of reporting that she was unable to perform basic household chores or that she was unable to tend to her own personal care.

47. By June, the Claimant was reporting more movement and less pain, which showed that she was making a steady recovery.

48. The evidence reflected that her physical condition was therefore much improved by June 2019, and it was found as a fact that the evidence that the Claimant provided during her consultations at the time were likely to be most accurate when describing whether or not her impairment had a substantial adverse effect on normal daily activities. At the date of dismissal, the medical record for June showed that the Claimant had less pain and more movement, and there was no suggestion that she was experiencing any problems with normal daily activities. The only activity shown to aggravate her shoulder was the use of the mouse. The contemporaneous evidence was consistent that the Claimant was making a good recovery, and her pain was reduced and her movement had improved. There was no evidence to suggest that at the date of termination, the physical impairment had a substantial adverse effect on the Claimant's ability to perform daily activities."

26. The tribunal also reviewed the evidence from the period after dismissal:

"50. The evidence the Tribunal was taken to in the bundle in relation to consultations that took place after dismissal were inconsistent with the medical evidence before dismissal. It was only after dismissal that the consultant referred to the Claimant's stiffness as amounting to a disability, despite previously reporting that the operation had gone well and was subject to physiotherapy improving her mobility. Findings of fact were made about the background to the insertion of these words into the letter, and they are above at paragraphs 18-19. The Consultant inserted these words at the request of the Claimant to show consistency with what she had told the employer. The letter was written in this way to assist the Claimant. The reference to one year

> was not recorded in any other documentation in the bundle or by any other medical practitioner.
>
> 51.The Claimant's evidence to the Tribunal was that her shoulder injury had a substantial adverse effect on her daily activities, but there was no consistent evidence that this was the case and not reported to any of her medical team until after she was dismissed. The medical records showed that the Claimant reported a consistent improvement of 70 per cent until after dismissal where she introduced the definition of disability when discussing her recovery with her surgeon. It was also noted by the Tribunal that the Claimant did not make reference to her physical impairment having a substantial adverse effect on normal day-to-day activities until after dismissal in July 2019 as reflected in the above findings of fact. The list of activities that she found difficult became more extensive in the Claimant's witness statement and in the most recent consultation with her GP on the 7 August 2020.
>
> 52.The Tribunal found the Claimant's evidence on the substantial adverse impact to be unreliable. The Claimant admitted that she was able to brush and wash her hair by the time she returned to work in April 2019 and was able to drive. However, the Claimant continued to allege that this was something she had difficulty doing in her statement and in the disability impact statement. Her evidence on this point was unreliable, and it must be concluded that her evidence was exaggerated on this point. It was also noted that the Claimant in her witness statement referred to not being able to dress herself, and this was something that she had not previously mentioned in any medical consultations. If the Claimant had been unable to dress herself, it would have been mentioned in the many consultations referred to above. It was not, and therefore it must be considered to be a further exaggeration."

27. The tribunal concluded that the evidence from the period after dismissal showed an inconsistency with the evidence from the period before that date, in particular in relation to daily activities such as housework. The judge concluded that at the date of dismissal the adverse impact on normal day-to-day activities was no longer substantial, nor had any adverse impact lasted 12 months at the point of dismissal. It had, found the judge, only lasted five months from November 2018 to April 2019.

28. The judge then considered whether that impact was likely to last more than 12 months, directing herself correctly in accordance with established authority that "likely" means "could well happen". She said that there was no such evidence. She continued:

> "57. I also considered whether the letter from the surgeon written after dismissal suggesting that the recovery from the residual stiffness would last or was likely to last for 12 months should be given any weight and, if so, how much. As referred to before, this letter was written to assist the Claimant; it was not a medical prognosis; at its highest, it makes reference to residual stiffness; and it did not suggest that the Claimant would continue to suffer substantial adverse effects for 12 months. The

> letter was also inconsistent with the other medical evidence referred to above, where it was recorded that good progress was being made and pain was reduced and mobility increased. I conclude therefore that the letter carried little weight, and the consistent evidence was that the impairment did not have a substantial adverse effect and was not long term."

29. The tribunal concluded that the claimant was not disabled at the relevant time.

30. I turn to the five amended grounds of appeal, the principal points that Mr Northall advanced in his skeleton and oral submissions in relation to them, and my conclusions.

31. Ground 1 contends that the tribunal's findings of fact about the 26 July 2019 letter from Dr Selvan (in particular, those made at [19]), and then, drawing on those findings, the tribunal's decision to attach little weight to that letter, were perverse.

32. In summary, Mr Northall made three points.

33. First, he submitted that it was wrong to find that the letter was not a statement of Mr Selvan's true medical prognosis. On the face of it, that was exactly what it was. It was written by the consultant who had carried out the surgery, upon assessing the claimant at a subsequent consultation. His letter was addressed to the GP by way of an update on her condition. The judge, submitted Mr Northall, was influenced by the fact that (as noted at [18]) the claimant said in evidence that she had told Mr Selvan that she had been dismissed, and that he had included the reference to disability and to a one-year recovery period to back up what she had told her employer. The judge inferred from this that the letter did not reflect Mr Selvan's actual opinion of the claimant's medical prognosis, but simply said what she wanted him to say.

34. However, submitted Mr Northall, there was no proper basis to make that inference, as there would have been nothing wrong with Mr Selvan recording this aspect of his opinion in order to assist the claimant, if what he wrote did in fact reflect his clinical view

and prognosis. This was not a "to whom it may concern" letter. It was addressed to the GP in the usual way, and it also included a recommendation of continuation of physiotherapy. There was nothing inherently suspicious about it, and there was no sufficient basis to infer that it did not reflect the consultant's view.

35. Secondly, said Mr Northall, the judge was also wrong to hold that the July letter was inconsistent with the earlier letters of clinical assessment in the period following the surgery and prior to the dismissal, as they all recorded pain and reduced mobility in the shoulder. None of them indicated that the claimant was at any point fully recovered.

36. Thirdly, Mr Northall submitted that the judge also erred in holding that Mr Selvan's July letter recorded no symptoms other than some stiffness. The relevant sentence in the letter – "*she has some stiffness, particularly on external rotation, and internal rotation is limited as a result of the surgery*" – was, on a natural and correct reading, recording two things: one was stiffness, particularly on external rotation; and the other was limited internal rotation.

37. My conclusions on this ground are as follows.

38. Firstly, I note that this is a perversity challenge which, as is very well-established, faces a high hurdle. In coming to her decision, the judge had to make findings and draw her inferences or conclusions from the totality of the evidence before her. That included not only the medical evidence, but the claimant's own evidence, and there was also evidence from a witness for the respondent. The EAT did not read or see or hear all of the evidence, including the cross-examination of witnesses.

39. However, it is also clear that the judge's appraisal of the medical evidence, what it recorded contemporaneously at different points, and what she regarded as significant

differences between what the medical assessments recorded before and after the dismissal, was a key factor contributing to her view of the reliability and credibility of the claimant's account and her overall conclusions. The content of the medical advices was found to have contradicted and undermined the claimant's own testimony about the impact which her impairment had on her during different periods. The judge's findings about the July letter from Mr Selvan were plainly very significant to her overall assessment.

40. It seems to me that there is some force in Mr Northall's point that, on a natural construction, the letter from Mr Selvan referred not only to some stiffness but also to limited internal rotation as a result of the surgery. This may seem a small point. But the judge's appraisal of what symptoms were being reported or found at this time was a part of her overall assessment as to the credibility of the claimant's own evidence about that.

41. The inference that Mr Selvan had recorded an opinion which did not reflect his actual view was also a significant one to draw. The judge's task, of course, was still to weigh the evidence on the standard of balance of probabilities, which was a matter for her. But it would have been relevant in doing so to take into account her appraisal of the likelihood that Mr Selvan would knowingly state an opinion which was not his actual view, bearing in mind also that she had not had the benefit of hearing evidence from him nor of hearing him cross-examined. I also see some force in the third strand of this ground.

42. To repeat, the hurdle of perversity is a high one. Also, it does appear to me that the bigger-picture point that the judge was making was that it appeared to her that, prior to dismissal, the overall picture from the medical evidence was of steady recovery and significant progress since the operation, whereas, in her view, the picture being reported by the claimant to her clinicians, following dismissal, was significantly different.

43. Nevertheless, the three points made together, about the judge's approach to this letter, and her reasoning and findings about it, persuade me that her reasoning on this aspect was at least not sufficiently rigorous or clear, and so to uphold ground 1.

44. Ground 2 challenges the tribunal's approach to the guidance at paragraphs B7 and B9 which, it asserts, the judge misunderstood or misapplied. I have already set out the relevant parts of the guidance and the tribunal's relevant findings at [44] and [45].

45. Mr Northall submitted that what the judge should have done, but did not do, was, first, to make a factual finding about the activity that was at issue and whether it was a normal day-to-day activity. He submitted that the activity at issue was the claimant using her laptop, or other computer, at work, with a mouse, and that the judge should have first found that that was a normal day-to-day activity.

46. Then, he said, the judge should have gone on to consider what the claimant did with respect to that activity, because of the impairment; and whether what she did amounted to a coping strategy which enabled her to continue to engage in that normal day-to-day activity and which, if it was a reasonable strategy, would have fallen within paragraph B7 of the guidance; or whether what she did was to avoid that normal day-to-day activity, which, following paragraph B9, might have led to the conclusion that there was a substantial adverse impact on that activity, because she had to avoid it.

47. Mr Northall also submitted that [45] revealed that the judge had made contradictory findings, because she seemed to be saying both that the claimant was able to use avoidance strategies successfully and also that from November 2018 she was not.

48. I agree with this ground insofar as it is asserted that the judge's reasoning at [44] does not demonstrate clear findings navigating the distinction between coping strategies

(as envisaged by paragraph B7 of the guidance) and avoidance behaviours (as discussed in paragraph B9).

49. I am inclined to think that the judge did take the view that, using whatever type of lap top or computer the claimant was using at work, with a mouse, did amount to a normal day-to-day activity. But this paragraph does not show that she applied her reasoning sufficiently to what the claimant had in fact done in relation to that activity. There is at least a suggestion that what the claimant did was to avoid using the computer altogether and instead to switch away to other tasks that did not involve using it at all. If so, the judge needed to consider whether that meant that the claimant's behaviour was more appropriately viewed as avoidance behaviour, to which paragraph B9 applied, rather than a coping strategy, to which paragraph B7 applied.

50. However, I am not similarly persuaded by the distinct criticism of the judge's reasoning in [45], as, whatever it was precisely that the claimant was doing, the judge seems to have been saying there that it was effective for a time, but, as the impact of her impairment worsened, that declined, and by November 2018 it was no longer effective. But, having regard to what I have said about [44], I uphold ground 2.

51. Ground 3 relates to what the tribunal said at [48]. This is another perversity challenge. The criticism here is that the judge wrongly focused on what the claimant could do, rather than what she could not do, or could only do with difficulty.

52. Mr Northall submitted that the judge did not take on board her own findings that, at the relevant time, although the pain had improved, it had not entirely gone away; and, in particular, her own findings about the pain that the claimant continued to experience when using a mouse, as well as the evidence, and finding, that she still experienced some stiffness or reduced mobility.

53. As to this, I note that the point of law is a very familiar one, and the judge gave herself a correct self-direction in relation to it. The EAT should be slow to find that she did not then apply that self-direction when reaching her conclusions, unless it is very clear that the judge, despite that self-direction, later went astray on this point.

54. It seems to me that the judge's point in this paragraph was that there was an absence of evidence about what, during this period, the claimant was not able, or only able with difficulty, to do *outside work*, as opposed to the position during the earlier period, and as opposed to the evidence about the difficulty that she experienced in particular with using a mouse *at work*. In particular, it seems to me the judge was saying that there was an absence of evidence as to her experiencing difficulty during this period with household chores.

55. It is also contended, however, as part of this ground, that the judge came to an erroneous conclusion, because she failed to recognise that the pain caused by the use of the mouse, and the claimant's behaviours in response to that, needed to be taken into account.

56. It seems to me that, thus far, the points being made overlap essentially with the territory of grounds 1 and 2.

57. Mr Northall however also submitted that it appeared from what the judge said at [48] that the judge considered that using the mouse with her computer was not a normal day-to-day activity. If so, he said, that was also an error.

58. On this last point, it seems to me that the judge did proceed on the basis that using a computer with a mouse at work *was* a normal day-to-day activity. If the judge had thought otherwise, I think she would have said so, and she would not have given as much attention to this aspect of the evidence as she did at [44] to [46]. I do not, therefore, need

to decide whether, had she concluded that it was *not* a normal day-to-day activity, that would have been an erroneous or impermissible conclusion.

59. My overall conclusion on ground 3 is that it does not add any material challenge to grounds 1 and 2.

60. Ground 4 relates to what the judge said at [52]. This is another perversity challenge, in particular, to the finding that the claimant's evidence referred to there was unreliable. The perversity is said to lie in the tribunal's conclusion that the claimant had given inconsistent evidence, when, it is said, on a proper analysis, the different parts of her evidence that the judge had in mind were not inconsistent.

61. In his skeleton, Mr Northall referred in particular to the judge having apparently found an inconsistency in the claimant's evidence on the question of her ability to wash, brush her hair and dry it; and to have, he said wrongly, attached weight to her evidence that she had difficulty getting dressed being something that she was said not to have raised previously. Mr Northall said that that was not in fact correct, as the claimant *had* raised this in her particulars of claim. He also referred me to [13] where, he said, the judge wrongly found, within the same paragraph, both that the claimant was able to dry, wash and brush her hair, but also, further on, that she had adjusted or modified her behaviour because of the adverse effect that her impairment otherwise had on her daily activities.

62. Once again, this is a perversity challenge which rests on a submission that the judge had failed correctly to apply a principle of law, namely that a substantial adverse effect may be demonstrated by evidence not only that the complainant is not able to engage in a particular activity, but also evidence that they are able to do so, but only with difficulty.

63. Once again, that is a legal proposition that is extremely familiar to judges in this field and that this judge correctly set out in the course of her self-direction. Once again, she should be taken then to have applied the law correctly unless it is very apparent that she nevertheless went astray. Her decision also has to be read and understood fairly, with the particular paragraphs alighted upon by counsel being put in the overall context of the decision as a whole. Once again, it also has to be borne in mind by the EAT that the judge was in part appraising the evidence that she heard from the claimant who was cross-examined before her, which evidence I have not seen.

64. Taking that approach, I do not find any inconsistency in what the judge said at [52]. An overarching theme of the discussion in the tribunal's decision is that the judge had to consider evidence in relation to two areas of the claimant's activities being: activities outside of work (such as washing, getting dressed, brushing her hair, driving her car and so forth) and activities within the work context (in particular, the use of the computer with the mouse). The judge properly did not rule out the latter as constituting normal day-to-day activities, on account of the work context, and gave consideration to both areas of activity.

65. Nor do I agree with the criticism of the judge's point that the claimant had not raised difficulty with getting dressed previously. The judge's clear point was not about what was or was not in the claim form, but that, on the evidence the judge had, this particular difficulty was not mentioned at any of the medical consultations, and the judge considered that the claimant could have been expected to have done so, had she experienced it at the time. It was new in the sense that it was raised for the first time in her tribunal claim. The judge was entitled to take that view. Ground 4 is, therefore, not upheld.

66. Ground 5 challenges the judge's finding that the adverse impact became substantial only in November 2018. It is said that there was a failure here to consider the evidence

and the findings about how matters stood prior to November, and that the judge erred by taking the fact that the pain was only as bad as it was described as being, as of November 2018, as precluding the need to consider whether there was nevertheless a substantial impact of the impairment before that date. It was said that the judge also failed to consider her own findings about the claimant's evidence about difficulties that she had prior to November 2018, in particular at [7].

67. This challenge is close to the margin. Ultimately, I am not persuaded that it is well made. The judge had to consider whether the evidence was sufficient to persuade her that the threshold of "substantial" effect (the definition of which she reminded herself of) was crossed during these different time periods. It is unsurprising that the judge felt confident that, at a point when the claimant was describing the pain as unbearable, that threshold had been crossed. It was not necessarily an error for her not to find that the evidence persuaded her that it was crossed before then, in point of time.

68. However, the errors that I have found (in particular in relation to ground 2 and the consideration of paragraphs B7 and B9 of the guidance, as well as ground 1) lead me to the conclusion that this decision is unsafe, the appeal must be allowed, and the tribunal's finding that the claimant was not a disabled person at the relevant time must be quashed.

69. Mr Northall invited me, were I so to find, to substitute a finding that the claimant was disabled at the relevant time. He submitted that this was a case where the facts already found admitted of only one conclusion, because of the findings about the difficulties that the claimant had experienced with using a mouse with her computer, the error in the analysis of that on the part of the judge, and the finding that those difficulties had, by the time of the claimant's dismissal, been a feature for more than a year.

70. I do not agree. To reach a conclusion about that, the tribunal will need to make careful findings of fact about exactly what it was that the claimant was doing or not doing vis-à-vis the use of a computer and the use of a mouse in the relevant time periods. It will also need to say something rather more than this tribunal did, about the nature of her work tasks and how she used a computer; and it will need to come to a view as to whether the relevant activity was, as a matter of law, a normal day-to-day activity. If so, it will need – drawing on its findings and taking due account of the relevant provisions of the guidance – to then come to a conclusion about whether, in this regard, there was a substantial adverse effect on normal day-to-day activities and, if so, whether it was long-term.

71. All of that will involve the tribunal making more findings of fact and clearer overall findings than this tribunal made; and in order to make those findings, an important feature will be the tribunal's appreciation of the evidence of the claimant herself, as well as its evaluation of other features of the evidence and the claimant's overall case. The EAT is not in a position to make the necessary findings, let alone to say that on the facts found in this decision only one conclusion is possible. The matter must therefore be remitted.

72. I understand that EJ Sage has, since the date of the hearing in this matter, retired. But in any event, given the strength of her findings regarding the credibility and reliability of the claimant's evidence, it would have been difficult to have expected her to come to the matter afresh; and so I would in any event have directed that the matter be determined afresh upon remission by a different tribunal.