# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Nadine Jolly

**Respondent**: Secretary of State for Justice

# JUDGMENT AND WRITTEN REASONS OF THE EMPLOYMENT TRIBUNAL

**Heard at:** Birmingham via CVP **On:** 20 - 24 February 2023

**Before:** Employment Judge **Algazy KC**

**Panel:** **Ms K. Ahmad**

**Mr N. Howard**

**Appearances**

For the claimant: **Mr R. Ennis – Solicitor**

For the respondent: **Mr S. Stevens - Counsel**

# JUDGMENT

**THE UNANIMOUS JUDGMENT OF THE TRIBUNAL IS THAT:**

1. The claims set out below are not well founded and are dismissed:

   - Discrimination arising from disability (section 15 Equality Act 2010)
   - Indirect discrimination-disability (section 19 Equality Act 2010)
   - Failure to make reasonable adjustments (section 20 Equality Act 2010

2. The claim for indirect discrimination on grounds of religious belief is dismissed on withdrawal by the claimant.

# WRITTEN REASONS

The judgment of the Tribunal was handed down orally on 24 February 2023.

The respondent confirmed its request for written reasons on 20 April 2023.

## 1. INTRODUCTION

1.1 The claimant applied for and obtained a position as a Prison Custody Officer at HMP Young Offender's Institution, Brinsford in Wolverhampton in around January 2021. She was employed from 4 May 2021 until her resignation with immediate effect on 18 June 2021.

1.2 The claimant suffers from asthma which she says amounts to a disability under the Equality Act 2010 ("EqA") and moreover means that she is unable to wear a face mask. The claimant brings a number of disability discrimination claims which are more fully particularised below.

1.3 The respondent resists all the claims and denies that the claimant is disabled within the meaning of section 6 of the EqA.

1.4 The claimant had also brought a claim for indirect discrimination based on religious belief in relation to her refusal to wear a face mask. This claim was withdrawn in closing submissions by the claimant and is not considered further.

1.5 The claimant was represented by Mr R. Ennis (Solicitor) and gave evidence on her own behalf. The Respondent was represented by Mr S. Stevens (Counsel) and called four witnesses. They were Darrin Cotton ("DC"- Manager and Health Resilience Lead at HMP Brinsford, the "Prison"); Daryl Taylor ("DT" - Offender Management in Custody Coordinator with associated "People Hub" duties); Jacqueline Quirke ("JQ" - Head of Business Assurance at the Prison); and Sarah Mincher ("SM"- Senior Health, Safety & Fire Manager for two prisons within the West Midlands Region (HMYOI Brinsford & HMP Featherstone).

1.6 There was an agreed Hearing bundle and references in square brackets are to the Hearing bundle. Both sides produced helpful written submissions.

## 2. THE ISSUES

The issues that the Tribunal had to determine had been discussed and were set out in the Tribunal's Case Management Order ("CMO") that emanated from the Preliminary Hearing before Employment Judge Faulkner [51-60] on 7 March 2022 (The "Faulkner Order"). These were slightly tweaked in light of the claimant's further particulars [48-50] and by agreement of the parties. The Tribunal determined liability only in the first instance and the relevant issues were:

2.1 **Disability**

It was accepted that the claimant had the physical impairment of asthma at all relevant times, namely May and June 2021. The issue was whether

the claimant was, at those times and by reason of that impairment, a disabled person within the meaning of the EqA, namely whether the impairment had a substantial and long-term adverse effect on her ability to carry out normal day to day activities.

**2.2 Discrimination arising from disability- S15 EqA**

2.2.1 Did the respondent treat the claimant unfavourably by:

2.2.1.1 Insisting that she wear a face mask after she had said she could not do so.

2.2.1.2 Refusing to allow her to carry out the duties of a Prison Officer without a face mask.

2.2.1.3 Placing her in a separate building where she could not carry out her duties.

2.2.1.4 Failing to follow its own internal policies and procedures as related to individuals with a medical exemption.

2.2.1.5 Obliging the claimant to try on a smoke hood at a meeting on 27 May 2021 [Added by further particulars at [50]]

2.2.2 Did the following thing arise in consequence of the claimant's disability, namely the claimant's inability to wear a face mask?

We note the specific observation of EJ Faulkner in his CMO in respect of this issue:

*"That may of course require medical evidence of some description, with the burden being on the Claimant to establish that it did.*

2.2.3 If it did arise in consequence of the claimant's disability, was the unfavourable treatment because of the claimant's inability to wear a face mask?

2.2.4 Was the treatment a proportionate means of achieving a legitimate aim? The aims on which the respondent relies are set out at paragraph 22 of its response, and in short are the protection of staff and other people, ensuring compliance with relevant guidance, ensuring a safe workplace and ensuring that personal protective equipment being used in the workplace met the required specifications so as to reduce or prevent staff absence.

2.2.5 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

**2.3 Failure to make reasonable adjustments - S 20 EqA**

2.3.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

2.3.2 It was agreed that respondent had the following PCP:

The Respondent required that all staff, including prison officers and trainees, wear face masks at the relevant times / locations. The relevant times and locations were within red zones, such as the entrance gate.

2.3.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that

she was unable to fulfil her duties? The claimant's case is that her disability is that of a person with asthma which prevents her from wearing a mask.

2.3.4 Alternatively, did the lack of an auxiliary aid, namely a face shield or visor, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was unable to fulfil her duties?

2.3.5 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the substantial disadvantage?

2.3.6 What steps could have been taken to avoid the disadvantage? The claimant suggested the respondent could have:

2.3.6.1 Exempted her from the requirement to wear a face mask.
2.3.6.2 Allowed her to wear a face shield.
2.3.6.3 Provided her with a face shield.
2.3.6.4 Given her duties which she could carry out at home.
2.3.6.5 Offered her alternative work assignments.
2.3.6.6 Offered her a deferred start date.

2.3.7 Was it reasonable for the respondent to have to take those steps?

2.3.8 Did the respondent fail to take those steps?

2.4 **Indirect discrimination - Section 19 EqA**

2.4.1 It was agreed that respondent had the following PCP:

The Respondent required that all staff, including prison officers and trainees, wear face masks at the relevant times / locations. The relevant times and locations were within red zones, such as the entrance gate.

2.4.2 It was agreed that the respondent applied the PCP to the claimant.

2.4.3 Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic, namely non-disabled persons who can wear a face mask.

2.4.4 Did the PCP put persons with whom the claimant shares the characteristic, namely disabled persons who cannot wear face masks by virtue of their disability at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, namely non-disabled persons who can wear a face mask in that they were unable to fulfil their duties?

The claimant has to show that she falls within the category of disabled persons who cannot wear face masks by virtue of their disability in order to test whether the operative effect of the PCP is to disadvantage her as a disabled person.

2.4.5 Did the PCP put the claimant at that disadvantage?

2.4.6 Was the PCP a proportionate means of achieving a legitimate aim? The aims on which the respondent relies are set out at paragraph 22 of its response, and in short are the protection of staff and other people, ensuring compliance with relevant guidance, ensuring a safe workplace and ensuring that personal protective equipment being used in the workplace met the required specifications so as to reduce or prevent staff absence.

## 3. THE FACTS

3.1 On the evidence presented to the Tribunal, we found the following facts and such additional facts as are contained in the conclusions section set out below.

**Credit**

3.2 The respondent makes a number of submissions at §4 of its written submissions regarding the credibility of the claimant. We broadly accept the strength of those submissions.

3.3 The Tribunal had its own reservations concerning the reliability of the claimants evidence. For example, Paragraph 35 of the claimant's witness statement says this:

> "*The Respondent's response was that they will (sic) still not satisfied with this and required further clarification (page 168.) I do not understand why this was needed. The report explained that I could not wear a face mask but that I could wear something which could not cover my face."*

3.4 The report itself contains this extract:

> *"Mrs Jolly reports that she has a 'mask exemption' certificate and refuses to wear a fluid resistant surgical mask in areas where this is deemed mandatory. Whilst she reports that this is a personal decision she advises me that she has an underlying but well controlled respiratory condition, namely asthma.*
> *Mrs Jolly advises that wearing a mask for any length of time makes her feel as if she is suffocating."*

3.5 In cross-examination, the claimant accepted that the author of the Occupational Health ("OH") report did not specifically say that the claimant

was unable to wear a face mask because of her asthma. The claimant went on to explain that her witness statement might have been the result of her confusion with the "summation of the OH report writer". Also, that there were two OH reports and she might have been confused. The claimant said that she had never asserted that the report specifically said that she could not wear a mask.

3.6 Another example concerns the documents the claimant was asked to read online. The claimant had in her evidence before us originally described the policies and procedures she had been assigned to read by the respondent as "only a small document". Later in her cross-examination it was put to her that she didn't read all those policies and procedures and that they could not be described as a small document. The claimant responded by saying that she didn't know or couldn't remember the size of each document. She went on to qualify her description of "a small document" as being based on the documents that she had actually read and that that would be a more accurate statement.

3.7 We found ourselves unable to agree with the submission of the claimant that we should prefer her evidence where there was any factual dispute between her and the respondent's witnesses in respect of the contents of her discussions with them. In fact, the Tribunal approached the accuracy of the claimant's evidence with some caution. As a further instance of concern, we consider it inherently unlikely that the claimant's account of her conversation with DC on her first day (4th May 2021) is accurate. According to the claimant, DC did not ask why she was not willing to wear a mask and she did not volunteer any reason. This was put to DC in cross-examination who flatly rejected the suggestion in his response, which evidence we accept. DC said that he had been doing the role of Covid Lead for some 8 months at that point. He explained that he had been in lots of situations where there had been an issue with masks or tests and track and trace. In those circumstances he said "We are always sensitive and find out why the person won't comply and we try to work around it".

3.8 There were a number of other factual conflicts of evidence which the Tribunal resolved on an individual basis as appeared necessary.

**Chronology**

3.9 Prior to commencing employment, the claimant was referred to Optima Health who produced a report on the claimant dated 1 February 2021 [81-82] which contained this reference:

> *"Mrs Nadine Jolly has asthma which is well controlled with inhalers.*
>
> *In my opinion she is medically fit for the proposed position. She will need to take an inhaler into the prison with her, so please make appropriate provisions for this."*

3.10 On 27 April 2021, about a week before the commencement of her employment, the claimant attended the Prison for a walk around. Darren Taylor had agreed to show the claimant around. The respondent accepts that the claimant was allowed into the Prison without a face mask in error.

3.11 It is the claimant's case that the only part of the Prison they did not visit during the walk-through was the wings. That was because she was wearing civilian clothes and not a uniform. She maintains that it was not connected to the fact that she was not wearing a face covering. DT disputes the claimant's account. The claimant had been allowed into the gatehouse without a mask and DT told the Tribunal that he informed her of the policy that face masks were mandatory. The claimant stated she was exempt on grounds of asthma and produced a small card attached to a lanyard.

3.12 DT went on to explain that since the claimant was already inside the gaol, he decided to continue with the tour but informed the claimant that

they would be mainly restricted to the grounds, as they could not enter any of the wings or other communal areas due to the Covid-19 restrictions that staff must wear masks in designated RED areas. The tour lasted approximately 30 minutes and there was no interaction with anyone else. DT denied telling the claimant that the restrictions on the visit were due to her not wearing a uniform in cross-examination. He stated that that was absolutely incorrect and that there would have been no point in turning up for the tour at all if uniform was required. He denied the claimant's assertions that:

- he had not told the claimant that masks were mandatory in red areas;
- they had passed anybody else; and
- that there was any discussion with Maxine Ostler.

We accept DT's evidence concerning this visit.

3.13 The claimant attended the Prison on 4 May 2021 for her first day of work as a prison officer entry level trainee (POELT).There is a dispute about the exchanges between DC and the claimant. We accept DC's account for the reasons above referred to and find that DC did ask the claimant why she was not willing to wear a mask.

3.14 DC told us that he had had a call from the gate entrance area about a person refusing to wear a fluid resistant surgical mask (FRSM) which was a mandatory requirement for all staff and visitors at that time. The claimant refused to wear a facemask but was not specific about the reason for this. She initially stated that she could not wear a face mask because she is asthmatic and DT explained that face masks were only required in certain areas, known as red areas and that they had a number of individuals at the Prison who have similar conditions but were able to manage it for relatively short periods of time. DC's intention was to explore the claimant's concerns to find out what was workable given that face masks are mandatory in certain areas. The claimant then stated that it was her "life choice" and said that if God intended her getting Covid-19, then it was God's will.

3.15 There then ensued some discussion which lasted approximately 20 – 30 minutes regarding the requirement to wear a face mask. The claimant was then asked to return home and told that the respondent would contact her after making contact with its health and safety advisors and the governor responsible for personnel. DC denied that anyone had made a complaint about the claimant's exemption from wearing a mask or that he told the claimant that someone had made a complaint. The claimant made no reference to a complaint in her e-mail of the same day regarding the events that morning [93]. There were no exceptions and face masks were mandatory in restricted areas.

3.16 Later that day, a call took place with the claimant and with DC, JQ and SM in attendance. On balance we prefer the account of the respondent's witnesses as to the disputed contents of the call. The claimant initially said that she was unable to wear a mask due to asthma. She then said that it was because she was claustrophobic after JQ mentioned the example of another staff member with asthma who wore masks. The claimant denies saying that she had claustrophobia but says that she said that she felt that wearing a mask was like claustrophobia and that it made her feel like she was suffocating. The respondent points to the fact that it asked additional questions of the OH adviser that related to claustrophobia and would not have done so if the claimant had merely said the mask made her feel claustrophobic as she claims. The respondent was, in effect, on special leave from this point so as to allow the respondent time to assess the situation.

3.17 There was a further call with JQ and the claimant on 7 May 2021, DC and SM were also on the call. The claimant says that JQ's tone was "passive aggressive" on this call and this was put to JQ in cross-examination. In explanation of what that meant specifically, Mr Ennis for the claimant, said that JQ was trying to pressure the claimant to wear a mask. We reject the claimant's allegations that JQ pressured her to wear a face mask or

suggested that it would be a strain on the public purse to keep the claimant employed until the end of the pandemic if she could not wear a mask. JQ told the Tribunal, in evidence which we accept, that she would absolutely never say that. JQ went on to say that many staff had not set foot in the building for over 12 months, that she didn't think you can put a price on safety and that the respondent absolutely supported its staff. There had been over 700 staff absences and one more would make no difference. It was not something she would say. SM gave evidence supporting JQ's account of this purported exchange and told the Tribunal in convincing testimony that she would have challenged any such statement if it had been said by JQ.

3.18 JQ told the Tribunal that on 7 May 2021, they discussed the situation, government rules appertaining to face masks in Government buildings and at the Prison, the claimant's exemption badge and why she had it. There was discussion about claustrophobia and asthma as well as what support she might get and what adjustment could be made. The claimant was also asked what she thought she could do. The type of support discussed included options of working in an external work area, wearing a mask for a short period and a possible room in the admin area for the claimant to work in and have access to IT. The claimant confirmed that she could not wear a mask and did not suggest any arrangements about what she could do. The claimant was also asked to consider working in a building external from the Prison where she would not be required to wear a facemask which she said she would consider.

3.19 On 10th May 2021, DC and SM met the claimant at the Visitors' Centre where face masks were not required to be worn. The claimant was shown the applicable policy and it was reiterated that masks were mandatory in certain areas. The respondent wanted to find a solution to ensure that the claimant could continue with her employment and training. At that stage they were still waiting to hear from the national training managers as to whether the claimant could complete formal prison officer training without wearing a mask when required. SM sent an email to Lindsey Lee of HR summarising

the meeting [130]. It was the claimant's evidence that SM and DC told her that "it was an expectation but not mandatory" to wear a face mask at the Wandsworth training facility. That is not accepted, and DC says that he stated says that he was not optimistic that the claimant could attend the training facility without a mask, and so would not have said those words.

3.20 The email in full says:

*" Hi Lindsey,*
*Myself & Darrin Cotton met with Nadine Jolly this morning to discuss the face masks and to understand her concerns.*
*Unfortunately she's unable to wear the Fluid Resistant Masks whilst on site, she has declared that she's got asthma. The FRSM are mandated therefore no exemptions are given at this stage.*
*I explained the reasons behind why they are mandated, and then went into the Standard Operating Procedures where masks are required to conduct tasks such as searching, escorts, visits, Healthcare Duties, Bed watches etc*
*We discussed her forthcoming training at Wandsworth, and the scenario's that will require wearing of FRSM due to close proximity with colleagues (C&R, First Aid, RPE). She wants to complete the 8 week course rather going back to undertake scenario base sessions once covid restrictions have been lifted.*
*She is clearly very worried, stressed, frustrated and not sleeping because she's given her previous job up to start working for the prison service, and not sure what will happen.*
*Brinsford have submitted a further OHA to establish further information.*

- *We need to establish if she is able to attend training college next Monday 17th May?*
- *Can she work in another establishment that doesn't mandate FRSMs?*
- *If she can't attend college what work can be given until covid restrictions have lifted?*

*I need to ring Nadine back this afternoon or tomorrow morning to update her, but I need further information on what she's able to undertake. Any support or information would be appreciated.*
*Many thanks"*

3.21 The claimant sought to rely on the email at [130] as supportive of her account that she was told masks were only encouraged and not mandatory. The respondent maintains that the email is consistent with its version of the exchange. The email is somewhat equivocal at its highest but does not constitute a clear indication that masks were merely encouraged at Wandsworth. The Tribunal notes the claimant's unsupported evidence at §26 of her statement that she "*called the London facility myself and was told that any exemption would be risk assessed and there were no mandatory requirements*". DT's email of 11 May 2021 demonstrates that he confirmed that it was mandatory to wear face masks in the classroom at the Wandsworth training facility [139].

3.22 On 11th May 2021, there was a further call with the claimant, JQ and SM. With regard to the POELT Training at HMP Wandsworth, JQ and SM advised the claimant that they could not facilitate her on the course as face masks were mandatory. As the claimant was insistent that she would not wear a mask, she would be unable go on the POELT training at Wandsworth. JQ and SM advised that they were exploring other training venues that would be closer to home for her to travel to. The claimant raised the issue of using a face shield and JQ also mentioned a 'filler', both of which were rejected by SM as inadequate PPE and not practical because of reduced effectiveness. Other adjustments were discussed including working from the Technical Support Services (TSS) office.

3.23 JQ asked whether the claimant would be able to try to wear a mask to see how it impacted on her, but she was not willing to do so. At this stage, the respondent was awaiting the outcome of an OH report pursuant to a referral dated 10 May 2021[374-375] and was trying and get a deferred place at a training facility closer to the claimant's home. Further, Jenny Old

(“JO” - Head of People Hub) would be the claimant’s line manager and would assign her duties and access to POELT materials at an office external from the Prison where face masks were not required to be worn.

3.24 On 12th May 2021, JO and SM met the claimant outside the Prison and they took her to the TSS building to show her where she would be working and to check-in on her wellbeing. JQ went to meet them afterwards and introduced herself in person to the claimant. JQ offered the claimant the opportunity to take some facemasks away if she wanted to try and practice wearing them. JQ denied pressuring the claimant in anyway. The claimant told JQ she would not wear a mask as it was her choice.

3.25 JO and DT met the claimant and talked her through the training and policies that she could read or access via the intranet and learning hub. It was JQ’s evidence that she strongly disagreed that the respondent refused to allow the claimant to carry out her duties. The claimant was supported in carrying out the duties of a POELT to ensure that she could continue to work and undertake training. The claimant could not work from home because of the Prison Service’s security requirements regarding the use of the Prison’s IT equipment and data protection.

3.26 JO kept in regular contact with the claimant who had access to the Prison’s online systems to support online learning, some of which is mandatory for POELTs [163 –168, 177, 348 – 351]. JQ told the Tribunal that she was made aware from JO that the claimant was instructed to complete mandatory E learning modules, look at the local security strategy (LSS), read the National security framework (NSF), complete fire awareness training, information assurance training and to look at the intranet and read up on policies and frameworks that would support her in her role. The claimant had access to the separate training portal from 20 May 2021 [167-168]. The claimant thus was able to access additional training modules to review had she desired to do so.

3.27 The claimant gives an account of a visit by JO and DT at the office from which she was working in her witness statement at §§36 and 37:

*36….Darryl greeted me with 'Hey, trouble.' He said that everyone was confused by me, that my behaviour made no sense and that they were struggling to figure out what to do with me. I was asked again why I would not wear a mask and how I would wear a smoke hood during my training. This was despite the fact that I had explained repeatedly why I could not wear a mask and the issue of the smoke hood was covered by the Optima report.*

*37. They insisted that I try a smoke hood on. This was not the context in which this would normally done. The hood was not comparable to a mask which directly covers your eyes and nose and had no bearing on my inability to wear a face mask.*

3.28 The events of 27 May 2021 are in dispute. DT's account appears at §§12 13 and 15 of his witness statement and was repeated and expanded on in his cross-examination. He denied making the statements attributed to him and was adamant that he neither asked nor expected the claimant to try on the smoke hood. On balance, we prefer the evidence of DT whose evidence was clear and convincing and was not shaken by cross-examination on this topic nor on other topics such as whether the lack of a uniform restricted the claimant's visit on 27 April 2021 as was alleged by the claimant.

3.29 JQ was also aware that JO had spoken with the claimant at some point because her attendance fell below 37 hours per week. This appeared to be for a number of reasons which included attending other job interviews, caring for her child and having car trouble [172 – 173, 178, 182 – 183, 185 –186]. The claimant told the Tribunal that she started looking for alternative employment from about 12 May 2021, the day she was shown around the TSS building.

3.30 The OH report dated 24th May 2021 [169 – 171] confirmed that the claimant suffers from asthma which is well controlled. See §3.4 above which sets out the relevant extract from the report. Whilst the report stated that the claimant was fit for work, it did not clarify whether she could not wear a face mask because of her asthma. On 1st June 2021, JQ asked OH for confirmation as to whether the claimant would be able to wear PPE required of her role, including a facemask in light of her condition [174]. The claimant resigned before any response was received from OH.

3.31 The 24 May 2021 OH report also contains this passage:

**"Disability Advice**

My interpretation of the relevant UK legislation is that Mrs Nadine Jolly's condition of asthma is likely to be considered a disability because it:

- has lasted longer than 12 months or is likely to last longer than 12 months and
- would have a significant impact on normal daily activities without the benefit of treatment"

3.32 In June 2021 the claimant had to isolate for a period of time due to contact with someone who had Covid. She did not attend work from 1 to 14 June 2021. While she was self-isolating, JO called the claimant and asked her when she would be returning to work. The claimant indicated that it would be on 15 June 2021.

3.33 However, by 14 June 2021, the claimant was of the view that nothing further had been done to resolve matters. She told the Tribunal that she was fed up with not being allowed to do the duties for which she had been appointed and it was obvious that the respondent was not going to change its position. She therefore gave 2 weeks' notice to terminate her employment on 28th June 2021 [180 - 181]

3.34 On 16th June 2021 the claimant had car trouble which meant she had difficulties getting to work. She tried unsuccessfully to contact JO to update her but did not hear back. On 17th June 2021 there was an exchange of emails between JO and the claimant in which she suggested that she finish her notice from home given that there was no actual work for her to do [184-185].

3.35 JO's response at 14.55 contained these words:

> *"I am currently in the process of updating INVISION to reflect the actual work hours undertaken to ensure this accurately reflects working arrangements."*

3.36 The claimant took this to imply that her wages might be altered to "accurately reflect working arrangements". The claimant said that this caused her more distress and worry about her finances and she decided that she could not put up with it anymore. Accordingly, she resigned with immediate effect on 18th June 2021 in an email headed "Constructively Dismissed Immediate Resignation [187-188].

3.37 The claimant issued proceedings on 20 September 2021 following ACAS conciliation from 16 July to 19 August 2021.

## 4 <u>THE LAW</u>

### Disability

4.1 Section 6(1) of the EqA provides that:

**(1) 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.**

4.2 Per **Goodwin v Patent Office** [1999] ICR 302 at p308, this breaks down into four conditions:

a. **The impairment condition:** Does the claimant have an impairment which is either mental or physical?

b. **The adverse effect condition**: Does the impairment affect the claimant's ability to carry out normal day-to-day activities and does it have an adverse effect?

c. **The substantial condition**: Is the adverse effect (upon the claimant's ability) substantial?

d. **The long-term condition**: I*s the adverse effect (upon the claimant's ability) long term?*

Further, the Tribunal should be aware of the risk that disaggregation should not take one's eye off the whole picture: **Goodwin** at p308.

4.3 The foundation of a proper analysis is the identification of the day-to-day activities, including work activities, that the claimant could not do, or could only do with difficulty - **Elliott v Dorset County Council** UKEAT/0197/20/LA(V) at [82].

4.4 The Equality Act 2010 '*Guidance on matters to be taken into account in determining questions relating to the definition of disability'* ("the Guidance") should be considered by the Tribunal insofar as it appears to it to be relevant – see paragraph 12 of Schedule 1 to the EqA."

4.5 For the purposes of determining whether the claimant was disabled the effects of measures taken to treat or correct the impairment are to be disregarded – Para 5 (1) Schedule 1 Equality Act 2010.

4.6 We found the Northern Irish Court of Appeal case of **Veitch v Red Sky Group Limited [2010]NICA 39** and in particular §19 instructive and of assistance in this case:

> **"From the way in which it did express itself it appears that the Tribunal elevated the production of medical evidence on the issues at each stage of the Goodwin inquiry to the status of a necessary proof. This is to overstate the position. Although it heard submissions on the question of the extent of the appellant's difficulties the Tribunal did not set out what evidence it had heard on those issues and it did not set out its findings of fact on those issues. It appears to have concluded that it should make no findings in respect of the claimed difficulties because of the absence of medical evidence. The presence or absence of medical evidence may be a matter of relevance to be taken into consideration in deciding what weight to put on evidence of claimed difficulties causing alleged disability but its absence does not of itself preclude a finding of fact that a person suffers from an impairment that has substantial long-term adverse effect. The absence of medical evidence may become of central importance in considering whether there is evidence of long-term adverse effect from an impairment. Frequently in the absence of such evidence a Tribunal would have insufficient material from which it could draw the conclusion that long-term effects had been demonstrated"**

4.7 We reminded ourselves that we should consider the cumulative effects of the impairment and that the focus of the test is on the things that the claimant cannot do, or can only do with difficulty, rather than on the things that the person can do - **Goodwin** at p309. It is wrong to conduct an exercise balancing what the person cannot do against the things that he can do - **Ahmed v Metroline Travel Limited** UKEAT/0400/10 at [46].

**Actual and constructive knowledge of disability**

4.8 A respondent must know 3 things for actual knowledge, firstly the nature of the impairment; secondly that the impairment has a substantial adverse effect on day-to-day activities; and thirdly it is long-term or likely to be long-term.

4.9 The EHRC Code provides guidance on the issue of knowledge:

**§6.21**
**"If an employer's agent or employee … knows, in that capacity, of a worker's disability, the employer will not usually be able to claim that they do not know of the disability."**

See also §5.14 and §5.15 of the Code reproduced in the extract from **A v Z Ltd [2019] IRLR 952** below**.**

4.10 The Supreme Court in **A v Z** laid down the following guidance at §23, per Lady Hale:

**'23. In determining whether the employer had requisite knowledge for s 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:**

**(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see… [2018 ] ICR 1492 CA at para 39.**

**(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see Donelien v Liberata UK Ltd (2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec) at para 5, per Langstaff P, and also see Pnaiser v NHS England (2016) UKEAT/0137/15/LA, [2016] IRLR 170 EAT at para 69 per Simler J.**

**(3) The question of reasonableness is one of fact and evaluation, see [2018] EWCA Civ 129, [2018] IRLR 535 CA at para [27]; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.**

**(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017 ICR 1610 per His Honour Judge Richardson, citing J v DLA Piper UK LLP … [2010] ICR 1052, and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at para 31.**

**(5) The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (relevantly) provides as follows:**

> " **5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.**
>
> **5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."**

**(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v T C Group… [1998 IRLR] 628; Alam v Secretary of State for the Department for Work and Pensions…. [2010] ICR 665.**

**(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code'**

**Discrimination arising from disability- S 15 EqA**

4.11 Section 15 of the EqA 2010 provides:

" **(1) A person (A) discriminates against a disabled person (B) if**

**(a) A treats B unfavourably because of something arising in consequence of B's disability, and**

**(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

**(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

4.12 No comparator is required. Section 15 discrimination requires only that the disabled person shows that they have experienced unfavourable treatment because of something connected with a disability.

4.13 The EAT in **Pnaiser v NHS England and another** [2016] IRLR 170 summarised the correct approach at §31:

**(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**

**(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**

**(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).**

**(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.**

**(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding**

**that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.**

**(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.**

**(g) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.**

**(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.**

**(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.**"

4.14 As regards unfavourable treatment, §5.7 of the Equality and Human Rights Commission's Code of Practice on Employment states that it means that the disabled person '**must have been put at a disadvantage'.**

4.15 The Tribunal also noted §§5.20 and 5.21 of the EHRC Code:

> "**5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 6).**
>
> **5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. …"**

**Objective Justification/Legitimate aim/Proportionality**

4.16 The test for objective justification is unlike the band of reasonable responses test - **Hardy & Hansons plc v Lax** [2005] EWCA Civ 846, [2005] IRLR 726.

4.17 The EHRC code provides:

**§4.28**
"**The concept of 'legitimate aim' is taken from European Union (EU) law and relevant decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence."**

**§4.29**
**"Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate**

**aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."**

**§4.30**
**"Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts'**

4.18 Whilst the burden is on the respondent to adduce evidence in respect of the legitimate aim it advances, that is subject to this caveat:

**"It is an error to think that concrete evidence is always necessary to establish justification… Justification may be established in an appropriate case by reasoned and rational judgement. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions."**

**Per Chief Constable of West Yorkshire Police and anor v Homer** [2009] ICR 223, EAT

4.19 **Hampson v Department of Education and Science** [1989] ICR 179 identifies 3 elements that a respondent must establish, namely:

i. the policy alleged to be discriminatory corresponds to a real need on the part of the employer;

ii. that the policy is appropriate with a view to achieving the employer's objective; and

iii. that the policy is 'necessary' for this purpose.

4.20 The respondent who successfully negotiates the “Hampson” test must also objectively justify the legitimate aim and show that the reasons for its imposition are sufficient to overcome any indirectly discriminatory impact. Is the PCP a proportionate means of achieving a legitimate aim?

4.21 In **MacCulloch v ICI [2008] IRLR 846**,the EAT set out the position as follows:

**"(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].**

**(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must “correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end” (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to “necessary” means “reasonably necessary”: see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31**

**(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].**

**(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no “range of reasonable response” test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."**

**Reasonable adjustments - SS 20 & 21 EqA**

4.22 Section 20 EqA 2010 provides insofar as is material:

**"Duty to make adjustments**

**(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**

**(2) The duty comprises the following three requirements.**

**(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

**…**

**(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**

4.23 Paragraph 20 of Schedule 8 of the EqA 2010 provides**:**

"**20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**

**(a)in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;**

**(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."**

4.24 According to Section 212(1) EqA 'substantial' means more than trivial. This is a question of fact to be assessed on an objective basis and is not a high threshold to satisfy.

4.25 The claimant is required to establish a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has not been complied with.

4.26 An employer has a defence to a claim for breach of the statutory duty (and, in fact, is relieved of any legal obligation to make reasonable adjustments) if it does not know and could not reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP.

4.27 That proposition has to considered against the backdrop of §6.19 of the EHRC Employment Code:

> **"For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment."**

4.28 It is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment

- **Royal Bank of Scotland v Ashton** UKEAT/0542/09/LA & 0306/10/LA per Mr. Justice Langstaff at paragraph 24.

**Indirect discrimination**

4.29 S.19 EqA provides:

> **“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”**

4.30 The EHRC Code gives guidance on the meaning of disadvantage:

> **“§4.9. ….something that a reasonable person would complain about — so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently”**

**Burden of proof**

4.31 The Tribunal also considered S 136 EqA and the correct approach to the burden of proof as set out in **Igen V Wong** [2005] IRLR 258.

4.32 With regard to the timeless question of the "reason why". Underhill J. (as he then was) said this in **A Gay v Sophos plc** UKEAT/0452/10/LA:

> *27 "It is now very well-established that a tribunal is not obliged to follow the two-stage approach: see Laing v Manchester City Council [2007] ICR 1519 , at paras. 71-77 (pp. 1532–3) (approved in Madarassy ). If it makes a positive finding that the acts complained of were motivated by other considerations to the exclusion of the proscribed factor, that necessarily means that the burden of proof, even if it had transferred, has been discharged."*

4.33 The then President of the EAT, Simler J. opined in **Pnaiser v. NHS England and another** [2016] IRLR 170:

> *38 "Although it can be helpful in some cases for tribunals to go through the two stages suggested in Igen v Wong, as the authorities demonstrate, it is not necessarily an error of law not to do so, and in many cases, moving straight to the second stage is sensible"*

## 5. CONCLUSIONS

### Disability

5.1 The claimant's impact statement contains the following passages:

*"7. I experience symptoms of breathlessness most nights which can interfere with my sleeping, dust and pollen are particular triggers. I tend to have to use my blue inhaler 2-3 times a day mostly at night to control a tightening chest.*

*8. If I did not use my inhaler to keep my asthma under control I would not be able to carry out any vigorous activity at all such as exercise, heavy lifting, housework or any work related activities which involved any exertion. My asthma tends to be worse in the summer as I also suffer from hay fever and these interact with each other. The dust from a carpeted bedroom or from other indoor surfaces makes my asthma worse. Even with my inhalers my exercise is sometimes restricted by my asthma.*

*9. Climbing stairs can make me short of breath.*

*10. If I had an attack when I did not have access to my inhalers there is a risk that this could be fatal."*

5.2 The respondent set out the basis on which it denied that the claimant had a qualifying disability in an email to the Tribunal dated 22 March 2022:

"*It is the Respondent's position there is insufficient evidence that the Claimant's asthma has a substantial adverse effect on her ability to carry out normal day-to-day activities, which is based upon the following:*

*a) The medical records from 12th October 2010 to 8th February 2022 show the Claimant attended her GP regarding her asthma on 7th March 2014, 29th May 2015, 7th December 2015, 13th September 2016,14th November 2016, 16th January 2017, 10th April 2017, 27th March 2018, 22nd May 2019, 13th August 2020 and 8th February 2022.*

*b) On 27th March 2018 the medical records state "Asthma causes symptoms most nights, asthma never causes daytime symptoms, asthma not limiting activities, asthma not disturbing sleep".*

*c) On 13th August 2020 the medical records state "asthma causes symptoms most night. Asthma never causes daytime symptoms. Asthma not limiting activities. Used brown inhaler before but stopped."*

*d) On 8th February 2022 the medical records state "current inhalers not ordered for a long time".*

*e) The medical records do not show any asthma related entries for a period of 18 months from 13th August 2020 to 8th February 2022.*

*f) The Claimant states in her disability impact statement that she is prescribed inhalers (Clenhil and Salbutamol) to keep her condition under control. However, from the medical records as set out above it seems she stopped stopped using Clenil (known as the brown inhaler) and her inhalers were not ordered for a long time.*

*The information provided does not support the position that the Claimant had an impairment which had a substantial effect. The Respondent considers the relevant period for the purposes of the Claimant's claim is 4th May to 18th June 2021, although the complaints and issues need some clarification so the period may be more limited than this.*

*The Claimant's disability impact statement and medical records do not shed any light on a causal link between asthma and an inability to wear a face masks. The Claimant is requested to*

*provide further information such as a letter from her GP about this issue for the Respondent to consider."*

5.3 In the course of the claimant's evidence, she was taken to other entries in her GP records [357- 372]. In re - examination but not before, the claimant gave evidence that there " would or should have been repeat prescriptions" for her inhalers before March 2022 and that they would have been in place before May 2021. In answer to questions from the Tribunal, she told us that she could just go to the pharmacy for a repeat prescription and that she did not need to trigger a prescription.

5.4 However, the GP records were produced at some point after the last entry on 8 February 2022 and note that the claimant's registration with her current surgery appears to have been actioned on 12 October 2021. Further, the GP records contain an entry at [358] under "Medication" that the claimant had "No current medication". The claimant was invited to shed some light on how this fitted in with the other entries, her evidence about repeat prescriptions and her earlier explanations in cross-examination that she was stockpiling medication. Having reviewed the entries, the claimant said that:

- the 8/2/22 entry was made by the Mayfield medical centre, that she had moved house and she registered with Mayfield

- That last entry was made on her becoming a new patient – once she became a new patient, she had had a stockpile and so hadn't ordered any medication for a long time

- On her review she was given a new drug to try and that appears above the entry for salbutamol on [371]

- She went from her previous practice to Mayfield at some time in 2021

- She thought that the new practice may have missed an entry

- The GP records didn't make any sense to her and she didn't want to make assumptions.

5.5 In light of the way the claimant was putting her case in her written submissions, the claimant was recalled at the end of the respondent's case to be asked a few more questions by the respondent about her medical records and her disability. She was reminded that she had previously accepted that her asthma was not interfering with her day to day activities either on the day of her attendance at the GP on 20/12/2018 or on her first day of work on 4 May 2021. At first the claimant did not recall the question about the 4 May 2021 being put to her – the Tribunal's notes (Both of the Employment Judge and of a Panel Member) confirmed that it had. The claimant said that her recollection was that she had said she worked nights and that her symptoms were mostly at night. She had been using her inhaler at around 4 May 2021 but did not think she was using her brown preventative inhaler at that time. The claimant also accepted that, from the GP documents at least, there was no evidence of any stockpiling of medication and she recalled that the documents were confusing.

5.6 It is of course for the claimant to establish that she has a qualifying disability. The **impairment condition** is satisfied by the physical impairment of athsma.

5.7 Is the evidence before the Tribunal sufficient to discharge the burden on the balance of probabilities that the remaining conditions in the **Goodwin** inquiry have been met? The GP

records of themselves provide little assistance, if any, to the claimant in that regard. Indeed, on one view the GP records are positively unhelpful to the claimant. There is no specific medical report addressing the impact of the claimant's asthma on her day to day activities at the material time, much less the effect of her medication in mitigating such impact.

5.8 We find considerable force in the respondent's submission at §34 of its written submissions regarding asthma being a nuanced condition that causes signs and symptoms that range in severity calling for medical evidence to establish the "but for" position. That is to say, what would have been the claimant's condition but for the treatment she was having,

5.9 Here, the Tribunal then is left with the claimant's bare assertions in her impact statement together with whatever can be gleaned from the GP records. The GP evidence taken at its highest, shows that the claimant may have used a Salbutamol inhaler rarely between 27 March 2018 and 8 February 2022. There is no evidence to support the suggestion that the claimant regularly used either a brown inhaler or a blue inhaler to mitigate symptoms causing a long-term or substantial adverse effect on her normal day to day activities.

5.10 The 24 May 2021 OH report's conclusion on disability is itself unreasoned and unexplained and in any event the determination of the disability issue is for the Tribunal based on the evidence placed before it. See eg **Vicary v British Telecommunications Plc** [1999] IRLR 680 (EAT).

5.11 The Tribunal cannot ignore the unsatisfactory nature of the claimant's evidence on this and other issues which has been highlighted in these reasons. The absence of supportive medical evidence is a matter of relevance to be taken into consideration

in deciding what weight to put on the claimant's evidence of claimed difficulties – see **Veitch** (op cit). The Tribunal finds itself in a position not dissimilar to that foreshadowed in the **Veitch** case where the absence of medical evidence leaves us with insufficient material from which to draw the conclusion that long term substantial adverse effect has been demonstrated. We were also unpersuaded by the claimant's attempt to explain unhelpful entries in the medical records indicating a lack of daytime symptoms by reference to the fact that she mostly slept during the day because she worked at night.

5.12 Stepping back and looking at all the evidence in the round, the Tribunal is not satisfied that the claimant has established on the balance of probabilities that she had a qualifying disability at the material time within the meaning of S.6 of the EqA.

5.13 Had it been necessary to decide the issue of knowledge, we accept the claimant's submission that the respondent would have been aware of the disability by 24 May 2021. If we are wrong in our conclusion on disability, we go on to consider whether the claims are otherwise well founded.

**Discrimination arising from disability**

5.14 It is convenient to firstly consider the issue of "something arising in consequence of the claimant's disability". Issue 2.2.2 , namely:

> *Did the following thing arise in consequence of the claimant's disability, namely the claimant's inability to wear a face mask?*

5.13 Notwithstanding EJ Faulkner's indication that this issue might require medical evidence, the claimant chose not to lead any medical evidence on this question.

5.12 The claimant's position is that none is needed. Mr Ennis in his submissions for the claimant initially referred to logic and plausibility as supporting the claimant's assertion in this regard.

5.14 The claimant's evidence before us was that "breathing organically", meaning without obstruction, was her preferred way of breathing. This, as the respondent submitted, is consistent with personal choice as opposed to medical need. A matter equally reflected in the 24 May 2021 OH report.

5.15 We conclude that the claimant has not established that her decision not to wear a mask was "something arising in consequence" of her condition of asthma. (Issue 2.2.2)

5.15 Our conclusion on this issue is sufficient to deal with the S15 EqA claim. However, we go on to consider whether the alleged unfavourable treatment was justified on the assumption that it occurred. We have of course found as a fact that the "Smoke Hood" incident (Issue 2.2.1.5) did not take place.

5.16 The respondent's legitimate aims are not in dispute. They are set out at §22 of the Amended Response [73] and are summarised in the respondent's skeleton as follows:

- to protect staff and others from the risk of harm arising from COVID-19, particularly in confined areas;

- to ensure compliance with Government, public health and health and safety guidance;

- to ensure compliance with the Respondent's obligations to employees to provide a safe working space;

- to ensure that PPE meets the required specifications; and

- that adjusting the duties of a Prison Officer in these circumstances ensured that staff could continue to work/train and ensured the proper management of public funds.

5.17 The Tribunal needs to be satisfied that the treatment was reasonably necessary to meet the legitimate aims. Mr Ennis for the claimant suggested that the respondent's blanket approach to mask wearing failed that test. He argued that the respondent needed to lead evidence such as would enable the Tribunal itself to evaluate whether insistence on masks as opposed to visors was reasonably necessary.

5.18 In response, Mr Stevens for the respondent drew our attention to the fact that the respondent's policy HMPPS Staff Face Mask (FRSM) Strategy [329 @ 341] was itself based on advice from Public Health England and Public Health Wales.

> ***'19. Can visors be worn rather than the mask?***
> *Public Health England and Public Health Wales have advised HMPPS that visors are not as effective as face masks for providing protection for others. At this time, HMPPS would not consider visors an effective means of controlling the spread of COVID-19.'*

5.19 Mr Stevens also referenced the document at [328] in support which sets out the Public Health England "**Recommended personal protective equipment (PPE) for staff (clinical and**

**non-clinical) in custodial settings and in community offender accommodation (COVID-19)".**

5.20 We find that this material, together with all the matters raised in §104 of the respondent's submissions, is more than adequate to satisfy the proportionality requirement. Accordingly, if the claimant had managed to otherwise establish any discrimination arising from disability, the respondent would have been able to justify the unfavourable treatment.

**Failure to make reasonable adjustments**

5.21 On the assumption that the claimant had established that she had the disability of asthma and that the respondent had knowledge of that disability at the material time, we consider whether the agreed PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was unable to fulfil her duties.

5.22 Even if the claimant had established that she had a qualifying disability of asthma as such, she has not established that her condition of asthma precluded her wearing a face mask.

5.23 There was no evidential basis for concluding that the claimant as an asthma sufferer, without more, was substantially disadvantaged in fulfilling the duties of a Prison Officer. The claim for reasonable adjustments would have also failed on this ground even if the claimant had established asthma as a qualifying disability.

5.24 The alternative claim in respect of an auxiliary aid, namely a visor, is also unfounded because the provision of a visor would not have avoided the alleged disadvantage in light of the

respondent's justified requirement for wearing face masks in red areas.

5.25 Further we were not satisfied that the suggested adjustments were reasonable in any event. The interim arrangements put in place by the respondent whilst it sought to find a long-term solution were, in our judgment, both reasonable and sufficient to satisfy any duty to make reasonable adjustments if the duty had arisen.

**Indirect discrimination**

5.26 For the claimant to succeed in this claim she would have needed to establish that she fell into the category of a disabled person who was unable to wear a mask because of her disability. Mr Ennis in his submissions accepted that the relevant groups to compare were disabled persons who cannot wear face masks by virtue of their disability and non-disabled persons who can wear a face mask.

5.27 The claim for indirect discrimination fails because the claimant has not established that she falls into the required category of disabled persons even if her asthma had been found to be a qualifying disability.

5.28 For completeness, we would not have found that there was an evidential basis for concluding that asthma sufferers in general are substantially disadvantaged in fulfilling the duties of a Prison Officer.

5.29 If the claimant had established indirect discrimination, we would have found that the agreed PCP was justified in any event for the reasons given in respect of the S.15 EqA claim.

5.30 The claims are not well founded and are dismissed accordingly.

Employment Judge Algazy KC

7 May 2023