EMPLOYMENT TRIBUNALS

Claimant: Ms F Farah

Respondent: Spire Healthcare Limited

HELD AT: Liverpool (in person) **ON:** 13 July and 14 July 2023 (in chambers)

BEFORE: Employment Judge Shotter

Claimant's representative Ms J Andrews, lay representative not for profit

Respondent's representative Mr J Boyd, counsel

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that –

1. The reserved judgment and reasons sent to the parties on the 28 June 2022 is revoked in the interests of justice and substitute a finding that the claimant was disabled during the relevant period in accordance with section 6 of the Equality Act 2010 on the basis that her learning difficulties arising from weakness in her auditory working memory had a substantial and long-term effect on her ability to carry out normal day to day activities.

REASONS

1. This is a reconsideration hearing under Rule 70 of the Employment Tribunal Rules to reconsider the reserved judgment and reasons sent to the parties on the 28 June 2022., to consider whether to confirm, vary or revoke the judgment and reasons. I apologise to the parties for the delay in promulgation this reserved judgment due to pressures of work and holidays.

2. In the notice of hearing sent to the parties on the 14 June 2023 it was confirmed this hearing is to deal with the following issues:

   2.1 whether taking an examination falls under the definition of a day-to-day activity,

   2.2 the fact that the claimant was given extra time during examinations following the 2019 psychologist's report

   2.3 Cumulative effect.

3. It was made clear in the notice that I did "not intend to revisit any other evidence or findings of facts set out in the Reserved Judgment and Reasons sent to the parties on the 28 June 2022 and the reconsideration hearing will be limited to issues of cumulative effect and whether sitting nursing degree examinations falls under the definition of normal day-to-day activities."

4. A provision was made for the claimant to produce further evidence concerning the issue of cumulative effect and sitting nursing degree examinations in a written statement. The claimant has not provided any additional statement or information.

5. I have before me the following documents:

   5.1 A preliminary hearing bundle that runs to 199-pages. The bundle is not agreed but there was no issue with it as far as Ms Andrews is concerned.

   5.2 Reserved Judgment and Reasons sent to the parties on the 28 June 2022 ("judgment and reasons").

   5.3 Appellant's Skeleton Argument (undated) and authorities that are before the EAT.

   5.4 Claimant's disability impact statement dated 29 July 2021.

   5.5 Claimant's submissions dated 14 April 2022.

   5.6 Respondent's submissions on disability dated 18 March 2022.

   5.7 Respondent's Skeleton Argument dated 12 July 2023.

6. I am grateful for Ms Andrews and Mr Boyd for their assistance at this reconsideration hearing, which I had listed in the interests of justice.

7. My starting point today is that both parties are in agreement that taking exams and taking clinical notes fall under the definition of a normal day to day activity. This is a change of material circumstances as far as the respondent is concerned given its position at the preliminary hearing was that they did not accept taking exams and taking clinical notes fell under

normal day-to-day activities, a submission I accepted at the time. I have been referred by both parties to the decision in *Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763* (paragraphs 57 / 66) and I am satisfied that the statement at paragraphs 9 and 71 in the reserved judgment and reasons is wrong in law, should be set aside and replaced by a finding that taking exams and taking notes are normal day to day activities.

8. What does the consequence of this material change on the judgment and cumulative effect? I have heard from both representatives who hold opposite views as to whether the respondent's concession should result in the judgment being overturned. I have attempted to paraphrase and record in short form the oral and written submissions as set out below, and hope that I have done justice to the parties when paraphrasing their submissions. I have not referred to the written notes taken at the preliminary hearing last year or the evidence bundle, I have however as requested by the parties re-read and taken into account the documents set out above referred to during oral submissions.

Submissions made on behalf of the claimant

9. Miss Andrews made a number of key submissions as follows:

9.1 The 25% extra time given to the claimant when taking exams is relevant and the claimant's case is on all fours with Paterson above. The 25% extra time for exams and note taking falls back on the claimant's assertion regarding her comprehension and re-reading a document/reading a document more than once, time to allow the claimant to read multiple documents when her working memory is reduced and her brain slower. If extra time is needed to comprehend an examination then extra time is needed to assimilate information. Exams involve comprehension, reading and writing, and the claimant has significant weaknesses in auditory processing according to the medical evidence which the respondent has not called into question. I accepted the validity of Miss Andrew's argument.

9.2 Miss Andrews referred to paragraph 68 of the judgment and reasons where I confirmed the fact the claimant studied for a nursing degree and was able to cope with a nursing career or academic situation does not mean that her normal day to day activities were not substantially adversely affected, before going on to find that she was not substantially disadvantaged in carrying out the normal day to day activities of reading, writing, comprehension and processing verbal information and instructions. In essence, Miss Andrews argued that this conclusion could not be reached given the contents of the medical report which includes the 25% extra time. Ms Andrews submitted that even if I find the claimant was not substantially disadvantaged I need to consider whether the disadvantage was minor/trivial followed by the cumulative effect.

9.3 The claimant has a number of different difficulties and the question is not that she is "better than average" but how she would be "but for" the disability: Paterson. Miss Andrews submitted that the claimant would have been even

better at her job. Reference was made to the EAT decision in Banaszczyk v Booker Ltd UKEAT/0132/15/RN. I note that in Banaszczyk it was held the claimant whose back injury had slowed the activity of lifting was a normal day to day activity, should not be confused with a particular requirement as to speed in which the activity was to be performed, and "paragraph B2 of the 2011 guidance was plainly correct in law; the time taken to perform an activity must be considered when deciding whether there is substantial effect. The effect of the claimant's long term physical impairment was that he was significantly slower than others – and significantly slower than he would have been but for the impairment when carrying out the activity of lifting…" Miss Andrews believed that I had fallen into the trap of focusing on what the claimant could do in a clinical setting and not what she could not do, which was an error of law despite setting out the law correctly in paragraph 71 of the judgment and reasons. Ms Andrews' submission in this regard had a considerable amount of force.

9.4 Miss Andrews submitted that both Ms Kight and myself had made an error in relation to whether the claimant "read at least twice" or "re-read once" both concepts meaning the same thing. Reference was made to paragraphs 31 to 34 of the reserved judgment and reasons and I accept her proposition that if one reads once then it must follow that one had read at least twice. The medical report at paragraph 4 refers to the claimant "re-reading the texts several times" which is an important point because of my finding that the claimant's evidence was not credible and missing the fact that re-reading a document reflected the claimant's comprehension. I accepted the validity of the submission with the proviso that in other respects the claimant's credibility remained in issue as recorded in the judgment and reasons, for example, the contradictions between the curriculum vitae and the claimant's evidence.

9.5 Turning to the issue of cumulative effect, Miss Andrews referred to paragraphs 4 and 9 of Ms Kights skeleton argument and paragraphs 14, 16 and 59 in the reserved judgment and reasons. She submitted that by referring to the Guidance at paragraphs B2-B17 Ms Kight set out the matter of cumulative effect. I do not accept this argument and confirm as a matter of record submissions were not made on cumulative effect by Ms Kight or the claimant when I should have invited submissions from both parties and failed to do so.

9.6 In relation to my findings concerning the individual day-to-day activities raised by the claimant Miss Andrews stated that it was unclear whether they were found to be minor or trivial, for example, in paragraphs 16 and 62 of the reserved judgment and reasons the reference was to a very noisy place or moderately noisy place so that appendix B applies. There was no distinguishing between very noisy and moderately noisy and whether the effect was minor. Miss Andrews was referring to the Appendix to the 2011 Guidance setting out the following: "An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities" including an "inability to hold a conversation in a very noisy place, such as a factory floor, a pop concert, sporting event or alongside a busy main road. Reference was made to Appendix B4 and B5 and the example of a

person whose impairment causes breathing difficulties who may experience minor effects on other activities which taken together, the cumulative result would amount to a substantial adverse effect on the ability to carry out normal day to day activities. Miss Andrews proposed that the question I should ask myself was at what point do the minor/trivial become more than minor or trivial and what does it take for them cumulatively to have a substantial effect overall. Am I saying the shopping area is a noisy environment or moderately noisy environment and this needs to be distinguished? I did not accept the submission; the shopping centre described by the claimant was "noisy" and she did not differentiate between moderately noisy or very noisy.

9.7 With reference to the claimant listening to the radio Mis Andrews posed the question "did you find there was a minor or trivial effect and how close was it to the threshold?" as this was not clear from the judgment. With reference to the claimant watching television Miss Andrews submitted that this goes back to the issue of sub-titles and re-reading and it was not clear whether I found this to be minor or trivial.

9.8 With the order of Mr. Justice Sheldon KC (adopting the *Burns Barke* procedure) in mind, Miss Andrews asked me to respond to two particular questions, the first relating to paragraph 71 of the Reasons regarding a finding that there was no satisfactory evidence that the claimant's ability to manage the effects of her impairment would break down. Miss Andrews made a number of limited submissions despite the narrow ambit of this reconsideration hearing, and it was left that this matter would remain with the EAT. In short, Miss Andrews argued that as the medical report stated the claimant had difficulties taking notes this cannot at the same time amount to a coping strategy. Further, it was unclear whether coping strategies "made it a minor or trivial effect", in other words, without coping strategies the effect would be substantial. Miss Andrews argued that Ms Kight had led me down the path of error as the medical report was "littered" with coping strategies and "stress has an impact on working memory" allegedly referenced in paragraph 10 of the judgment and reasons. Miss Andrews retracted this point, rephrasing it to "mood and emotion" not stress.

9.9 In conclusion, Miss Andrew's argument was that six difference areas are discussed in my conclusion, if they were individually minor or trivial in effect, cumulatively they were substantial taking into account the medical report, the concession made that exams and taking notes were day to day activities that require comprehension and reading which required 25% extra time for the claimant when taking exams. The claimant's position was on all fours with Paterson. Taken on their own the reading and comprehension was substantial, and in the alternative, taken cumulatively it must amount to a substantial effect.

The closing submissions made by Mr Boyd on behalf of the respondent

10 Mr Boyd referred to a Skeleton Argument and made a number of oral submissions as follows:

10.1 The concession that nursing exams and taking notes are normal day to day activities does not impact on my overall conclusion because in Paterson, the claimant specifically relied upon taking professional exams in the context of advancement as being a normal day to day activity in which he had been substantially disadvantaged by his disability of dyslexia. In contrast, Ms Farah does not rely on taking exams as normal day to day activities either in her impact or in written submissions and the judgment and reasons deals with the activities she relied on at paragraphs 14-38 [182-186] and paragraphs 61-84 [191-197]. Ms Andrews is now trying to fill in the evidential gaps and bring in new evidence.

10.2 Mr Boyd further submitted that section 6 EqA test requires the Tribunal to look at the evidence before it and the impact at the material time, not a theoretical exercise going back 5, 3 or 2 years. The issue about university exams arose in the Smith report (page 83) which was a point in time [2016] a number of years before the material time in comparison to Paterson where the claimant took professional exams in the context of day-to-day activities in real time. The claimant's university exams arose in the case as context, and paragraph 9 of the judgment and reasons set out this genesis. Mr Boys agreed that my conclusion reading for a degree and sitting exams were not day to day activities could not stand, however, as the claimant was not saying that at the material time there was an adverse effect on her day to day activity of taking exams at the material time.

10.3 Mr Boyd referred to the activities listed by the claimant within her impact statement and written submissions, submitting that these were the ingredients that fed into my analysis of the claimant's impact on normal day to day activities also taking into account the medical evidence. Mr Boyd argued that a critical part in my findings lay in the claimant's credibility in relation to a number of propositions. As indicated above, the claimant's credibility still remained in issue.

10.4 Mr Boyd suggested the taking of exams was a "red herring" in the claimant's case, and the "key" was the re-reading point which he agrees means reading more than once. In relation to that point I had found that the fact the claimant may have to re-read did not amount to a substantial adverse effect (paragraphs 68, 69 and 79 of the judgment and reasons). Mr Boyd argued that simply because the medical report suggests the claimant needs 25% extra time taking exams does not allow the Tribunal to reach a general conclusion that there was an adverse impact on the normal day to day activities. I accepted that the claimant does not rely on taking exams as normal day-to-day activities she was involved in at the time of the alleged discrimination, but do not accept they are irrelevant to the question of disability status taking into account Miss Andrews' submission that taking examinations are normal day-to-day activities and the adjustments needed by the claimant (i.e. 25% extra time) is evidence of the effect on comprehension, reading, writing, processing information and instructions adversely affected by a significant weakness of auditory processing which effects the claimant outside academia and in the workplace at the relevant time of the alleged discrimination.

10.5 Mr Boyd suggested that I ask myself the following question "how the acceptance or recognition of taking notes in a clinical handover situation is a normal day to day activity impact upon your overall conclusion when taking into account the other impacts you found existed: from a cumulative perspective? Mr Boyd expanded on this as follows; if it is the case I did not consider cumulative effect the aggregate needs to be added up including the impact in relation to taking notes in a clinical situation, look at them cumulatively and ask the question "does it amount to a substantial impact on day to day activities?" The "mischief" I am to remedy is (1) notes including taking notes on handover as one of the impacts and (2) not looking at all the impacts in a cumulative way, i.e. wholistically. Mr Boyd proposed that I insert the word "cumulative" into paragraph 83, suggesting that to do so would be beyond criticism as paragraphs 14 and 191 set out what I intend to concentrate on that includes taking into account cumulative effect. He suggests that evidence of the claimant making clinical notes at handover does not affect the overall assessment set out in paragraph 71 (withdrawing the error of law in relation to the normal day-to-day activities) my having concluded that the claimant had a coping strategy which meant the impairment was no longer substantial with the result that my conclusion will stand. I did not agree with Mr Boyd as the error in law relating to the taking of exams and the making of clinical notes materially changed my conclusion, not least the impact of the 25% extra time given to the claimant and the reasons why she required it as recorded in the medical evidence.

10.6 Turning to aggregation Mr Boyd referred to page 191 onwards as his starting point, submitting that if I looked at them individually or cumulatively I still get to the point where adverse effect was not accepted on credibility grounds, and when taken together they do not "vault the necessary hurdle" and my final conclusion was unalterable. I did not accept this proposition despite the live credibility issues with the claimant's evidence.

10.7 Mr Boyd suggested that as the claimant has not claimed taking an exam impacted on her day to day activities she is in the same position as a person who had a bad back 5 years ago and required adjustments. Miss Andrews objected to the analogy arguing that a reasonable adjustment was being conflated with disability status, and it was an error of law to conflate between a disability and impact of a disability in a hypothetical scenario. Miss Andrews submitted that I could take into account a 2016 medical report and rely on it 4 years later. There is also the second report confirming the same thing was ongoing including the claimant's comprehension skill. She suggested that both medical reports can be used to raise an inference and that I need to look at the totality and the additional concessions, considering all the effects combined without falling into the trap set by Mr Boyd when he used the terminology "substantial." The test is more than minor or trivial, and if it is more than minor or trivial it is substantial. I agreed with Miss Andrews that an inference can be raised by the medical evidence that the claimant's comprehension skill was affected by her significant weaknesses in auditory processing as confirmed in two medical reports and this remained the case during the relevant period of the alleged discrimination. I would add that the test of more than minor or trivial is a low bar, and given the concessions made by the respondent, conclude the affect is substantial taking into account the

findings in the reserved judgment and reasons.

10.8 Finally, Mr Boyd and Miss Andrews had an exchange over the fact that the claimant was a litigant in person and according to Miss Andrews, she was not in a position to "use the proper language. " There was confusion on the part of Miss Andrews whether the claimant may or may not have referred to her difficulties in "comprehension". She argued the claimant did referred to exams and taking notes and should not be penalised for failing to point out that she need the 25% extra time allowance for comprehension, and to read and write which still applies to "today" submitting under Paterson this should be sufficient. The claimant did refer to comprehension as a day to day activity by reference to the medical report and the 25% allowance for exams. Mr Boyd did not agree. He referred to the fact that the claimant was given an opportunity to "set out her stall" which she did with clarity after the hearing was adjourned to enable her to prepare written submissions. The Tribunal considered this and her impact statement before making a determination, and it was not for the Tribunal to make leaps it was not entitled to make. The claimant as a litigant in person had set out her position.

Conclusion

11 Turning to the submissions made by Miss Andrews I accept that the 25% extra time given to the claimant when taking exams is relevant and whilst I do not accept the claimant's case was on all fours with Paterson above, there were similarities in that Mr Paterson due to dyslexia was disadvantaged to the extent of requiring extra time to complete the assessment for promotion and the act of reading and comprehension (required to complete the assessment) was a normal day to day activity much the same as Ms Farah required additional time for her degree examinations as recorded in the medical reports. It is notable that Alison Fox in her report dated 10 June 2021 described the claimant's learning condition as being "akin to dyslexia."

12 I have been asked by the parties to re-read the medical evidence. Dr Smith's report dated 14 June 2016 confirms that the claimant reported difficulties when taking notes during her studies as she was unable to remember what the lecturer had said, written quickly, summarise and condense information and "she needs to re-read text several times in order to understand meaning." Dr Smith found the claimant "does have specific difficulties in the area of auditory processing, sequencing and memory" concluding "it is likely Fatima's weak auditory working memory difficulties arising from weaknesses in her auditory working memory" and on this basis the recommended support included a number of suggestions ranging from academic tutor support, additional resource support that may be required on a short time/occasional basis and examination support giving the claimant 25% extra time to read, plan and check".

13 The report prepared by Alison Fox dated 10 June 2021 confirms the assessment of Dr Smith concluding "she still experiences a specific learning difficulty" and "is "likely to benefit from support strategies and reasonable adjustments within the working environment and with any further studies she embarks upon." Dr Smith confirmed the claimant had difficulties with working memory and she "needed to read back through the passage once more" before answering comprehension

questions. Dr Smith concluded that the assessment "suggests that Fatima still experiences specific learning difficulties with regards to working memory and these appear to be having a negative impact on her literacy attainments, namely the retention of information in order to apply it in the short term, either from reading or from listening to verbal information and being able to write this down sufficiently."

14 I accept that based on the 2016 and 2021 medical reports the claimant had difficulties in taking exams (an ordinary day-to-day activity) and take the point that the 25% extra time to be given for her to undertaken the examination supports the claimant's assertion that she was adversely affected by her condition. Miss Andrew's argument that re-reading a document/reading a document more than once gives the claimant the extra time to read multiple documents when her working memory is reduced and her brain slower; in short, to assimilate information. I accept Miss Andrews submission referring to paragraph 68 of the judgment that my conclusion to the effect the claimant was not substantially disadvantaged in carrying out the normal day to day activities of reading, writing, comprehension and processing verbal information and instructions could not be reached given the contents of the medical report and the concession that taking exams and making notes were day-to-day activities.

15 Miss Andrews submitted I made an error in relation to whether the claimant "read at least twice" or "re-read once" both concepts meaning the same thing. Reference was made to paragraphs 31 to 34 of the reserved judgment and reasons and I accept her proposition that if one re-reads once then it must follow that one had read at least twice. The medical report at paragraph 4 refers to the claimant "re-reading the texts several times." I've noted above that this is important point because of my finding that the claimant's evidence was not credible and missing the fact that re-reading a document reflected the claimant's difficulties in comprehension. Paragraph 32 of the judgment and reasons cannot stand I was incorrect to conclude the claimant's evidence was exaggerated when it came to the claimant's evidence that she needs to re-read information at least twice. Setting aside the offending parts of paragraph 32 has repercussions on my conclusion taking into account the concessions made and cumulative effect.

16 Turning to the issue of cumulative effect, I do not agree submissions were made by Ms Kite as argued by Miss Andrews when the Guidance at paragraphs B2-B17 was referred to. No part dealt with cumulative effect either in evidence or submissions, however, I am now satisfied that this omission was addressed today. The claimant was given the opportunity to provide additional evidence and both representatives have addressed me in detail on cumulative effect. Cumulative effect was considered by me following the preliminary hearing held on the 12 May 2022 and at the time I took the view that the examples given by the claimant in her impact statement and written submissions as explored by me individually and then taken together did not have a substantial adverse effect. Taking into account the errors of law which have materially changed the circumstances of this case, this conclusion cannot stand with the Guidance in mind: "An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect. B5. For example, a

person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities."

17 In relation to my findings concerning the individual day-to-day activities raised by the claimant, Miss Andrews stated that it was unclear whether they were found to be minor or trivial, for example, in paragraphs 16, 62 and of the reserved judgment and reasons was the reference to a very noisy place or moderately noisy place so that appendix B applies. There was no distinguishing between very noisy and moderately noisy and whether the effect was minor. Miss Andrews was referring to the Appendix to the 2011 Guidance setting out "An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities" including an "inability to hold a conversation in a very noisy place, such as a factory floor, a pop concert, sporting event or alongside a busy main road." The claimant's evidence is recorded in paragraph 16 of the judgment and reasons. She referred to background noise in a busy shopping centre and how she would move to a quieter environment. In the conclusion I refer to "noisy places" and my conclusions are at paragraph 63. It must follow from this conclusion that I did not find the example of the claimant being unable to hold conversations in busy areas satisfied the definition of a disabled person for the purpose of the EqA, and there was no requirement for me to expressly set out whether the effect on the claimant was minor or trivial, it was sufficient that it did not have a substantial effect. Section 212(1) of the EqA states that 'substantial' means 'more than minor or trivial'. The claimant's description was a "busy shopping centre" as opposed to a "very noisy or moderately noisy shopping centre" which was not the evidence she gave and therefore could not be taken into account. I do not accept Miss Andrews' proposal that I should distinguish between a noisy environment or moderately noisy environment given the claimant's evidence.

18 With reference to the claimant listening to the radio Miss Andrews posed the question "did you find there was a minor or trivial effect and how close was it to the threshold?" as this was not clear from the judgment. I repeat my observations above in relation to holding conversations in noisy places. When I originally considered cumulative effect I took the view that this example taken with the other examples given by the claimant did not result in an overall substantial effect. However, in the light of the concessions made by the respondent and the link between the claimant having difficulty taking notes a recorded above, the conclusion that the effect was not more than minor or cannot stand, and at the very least it could, when taken together with the claimant's other examples (see below) result in an overall substantial effect.

19 With reference to the claimant watching television Miss Andrews submitted that this goes back to the issue of sub-titles and re-reading and it was not clear whether I found this to be minor or trivial. Paragraphs 66 and 67 of the judgment and reasons set out my findings, is unaffected in this reconsideration for the reasons set out relating to the claimant's evidence and credibility.

20 Turning to the other example given by the claimant of understanding verbal instructions and my findings at paragraph 68 I am satisfied that taking into account the concessions and medical evidence cited above, that my conclusion "I do not accept the claimant was substantially disadvantaged in carrying out the normal everyday activities of reading, writing, comprehension and processing verbal communications and instructions" cannot stand .I accepted Miss Andrews' argument in the alternative, that the effect of this when taken together with taking a shopping list, taking notes and understanding written information on first reading result in an overall substantial adverse effect on normal day to day activities. I accepted that taking notes should not come under the definition of a coping strategy as submitted by Ms Andrews.

21 In conclusion, Miss Andrew's argument was that six difference areas are discussed in my conclusion, if they were individually minor or trivial in effect, cumulatively they were substantial taking into account the medical report, the concession made that exams and taking notes were day to day activities that require comprehension and reading which required 25% extra time for the claimant when taking exams. I accept Miss Andrew's argument with the exception of including two of the six different areas (I am not including "stuttering" referred to by the claimant when giving oral evidence, and other evidence which was not found to be credible including busy shopping areas and watching television). Mr Boyd argued that a critical part in my findings lay in the claimant's credibility in relation to a number of propositions. My findings in relation to credibility are undisturbed save for the reference to re-read and read twice and its impact on credibility which cannot stand. The remaining areas, particularly the everyday activities of taking notes, writing, comprehension and processing verbal communications and instructions (reflected in the medical report and the increased examination time by 25%) when taken together, on the balance of probabilities, could result in an overall substantial adverse effect. I also accepted Ms Andrew's submission relying on Paterson that taken on their own the reading and comprehension was substantial, and in the alternative, taken cumulatively it must amount to a substantial effect.

22 Turning to Mr Boyd's submissions, I do not accept the concession that nursing exams and taking notes are normal day to day activities cannot impact on my overall conclusion because in Paterson, the claimant specifically relied upon taking professional exams in the context of advancement as being a normal day to day activity in which he had been substantially disadvantaged by his disability of dyslexia. Mr Boyd is correct that Ms Farah does not rely on taking exams as normal day to day activities either in her impact statement or in written submissions. By the date of the alleged act of discrimination the claimant was a qualified nurse, however, in her impact statement she refers to difficulties in writing information down quickly (making notes), understanding sounds and spoken words, and comprehending written information on its first reading. In written submissions the claimant referred to her learning difficulties encompassing processing information and writing down information. At paragraph 12.3 of her written submissions she refers to the 25% extra time given to her in written examinations, and the need for similar adjustments in a work setting, confirmed in the second medical report. I do not accept Mr Boyd's submissions that Ms Andrews is now trying to fill in the evidential gaps and bring in new evidence, the evidence was before me and discounted because I had

taken the view that passing an exam and taking notes in a professional setting were not day to day activities, an incorrect statement of the law.

23 I accept the section 6 EqA test requires me to look at the evidence before it and the impact at the material time, and it should not be a theoretical exercise going back 5, 3 or 2 years. I also accept as a matter of fact that the issue about university exams arose in the Smith report relevant to 2016 when the claimant needed extra support when undertaking exams, presumably to put her on a level playing field with her fellow students by mitigating the effect of her learning difficulties. It is correct that in Paterson the claimant took professional exams in the context of day-to-day activities in real time.

24 Mr Boyd suggested the taking of exams was a "red herring" in the claimant's case, and the "key" was the re-reading point which he agrees means reading more than once. In relation to that point I had found that the fact the claimant may have to re-read did not amount to a substantial adverse effect (paragraph 68, 69 and 79 of the judgment and reasons). Mr Boyd argued that because the medical report suggests the claimant needs 25% extra time taking exams does not allow the Tribunal to reach a general conclusion that there was an adverse impact on the normal day to day activities. I found that the claimant's evidence regarding reading for a degree and sitting exams coupled with having to re-read documents in order to gain an understanding of them, support her contention that at the material time there was an adverse effect on her day to day activity in relation to the activities covered by the adjustments made for her when taking examinations.

25 Mr Boyd suggested that I ask myself the following question "how the acceptance or recognition of taking notes in a clinical handover situation is a normal day to day activity impact upon your overall conclusion when taking into account the other impacts you found existed: from a cumulative perspective? My response is that given the concession taking of notes was a normal day to day activity which the claimant found difficulty due to learning difficulties, there was a substantial adverse effect on day to day activities. If the claimant's difficulty in taking notes was no more than minor or trivial, taking into account its effect all the other activities referred to above including reading and re-reading documents, this resulted in an overall substantial effect. Mr Boyd's proposal that I should merely Insert the word "cumulative" into paragraph 83 as paragraphs 14 and 191 set out what I intend to concentrate on that includes taking into account cumulative effect was not a viable option given the points raised above, the errors in law and interest of justice.

26 A judgement can be reconsidered where it is *necessary in the interests of justice* to do. There is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation and reconsiderations are a limited exception to the general rule that judgements should not be reopened and relitigated. It is not a method by which a disappointed party to proceedings can get a second bite of the cherry. In *Stevenson v Golden Wonder Ltd 1977 IRLR 474, EAT*, Lord McDonald said with reference to review provisions that they were 'not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before'. With this in mind I have limited this reconsideration to the points raised above, and not the other matters raised by

Miss Andrews on behalf of the claimant in her appeal, including the claimant's less than credible evidence on a number of matters.

27 The Tribunal's discretion must be exercised judicially and with regard not just to the interests of the parties seeking the reconsideration, but also to the other parties, the requirement for finality to the litigation and giving effect to the overriding objective. In conclusion, taking into account the overriding objective in rule 2, which requires the Tribunal's discretion to be exercised in a fair and just way the claimant has shown it is in the interest of justice to revoke the Judgement and Reasons promulgated on 28 June 2022 and substitute a finding that the claimant was disabled during the relevant period in accordance with section 6 of the Equality Act 2010 on the basis that her learning difficulties arising from weakness in her auditory working memory had a substantial and long-term effect on her ability to carry out normal day to day activities.

28 A telephone case management hearing will be listed for 2-hours will take place to discuss case management orders, the listing of the final hearing and an agreed list of issues. An agenda will be issued to the parties. The parties will within 7-days of receiving this judgment send through dates of availability for the next 6 months, failing which the Tribunal will list the preliminary hearing and advise the parties of the date in due course.

Employment Judge Shotter

25 August 2023

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

7 September 2023

FOR THE TRIBUNAL OFFICE