Case Number: 2206595/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant:	**M**	**and**
Respondent:	**Home Office**	
SITTING AT:	**London Central in public, in person** **Submissions in January 2024 via CVP**	
ON:	**21, 22, 23, 24, 28 and 29 November 2023** **18, 19 and 22, 23 January 2024**	
BEFORE:	**Employment Judge G Smart** **Ms J Marshall** **Mr R Pell**	

JUDGMENT

On hearing for the Claimant in person with submissions made by Christopher Milsom (Counsel) and Ms Isobel Buchanan (Counsel) for the Respondent:

1. The Claimant was disabled at all relevant dates because of the impairments of dyslexia, dyspraxia and psychotic depression in accordance with section 6 of the Equality Act 2010.

2. The Claimant's claims for direct age discrimination and direct disability discrimination contrary to section 13 of the Equality Act 2010 are dismissed upon withdrawal.

3. The Claimant's claims for a failure to make reasonable adjustment contrary to section 20 and 21 of the equality Act 2010 are not well founded and are dismissed.

4. The Claimants claim for disability discrimination because of something arising in consequence of his disability contrary to section 15 of the Equality Act 2010 is not well founded and is dismissed.

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REASONS

Preliminary issues at the hearing

1. This hearing was originally heard on 21 – 29 November 2023. However, due to a number of difficulties with disclosure and agreeing the bundle of documents, as well as the need to locate a previous Tribunal claim that was heard some years ago, the case needed to be adjourned until 18 January 2024.

2. The note of the previous hearing was sent to the parties, which is annexed to this judgment at annex 2.

The issues to be determined.

3. The issues to be determined were clarified at the outset of the first part of the final hearing and are annexed to this judgment as annex 1.

4. The only time limit issues pursued were associated with the direct Age discrimination complaints. The Age discrimination complaints were withdrawn by the Claimant during submissions. Consequently, no time points or age discrimination claims needed to be decided.

5. This meant that the only issues to be determined that remained, were whether the Claimant was disabled within the meaning of the Equality Act 2010 at the agreed relevant dates, the allegations of unfavourable treatment because of something arising in consequence of disability and the allegation of a failure to make reasonable adjustments.

DISABILITY

The issues to be decided

6. The Respondent conceded disability for dyslexia before the first part of the final hearing and dyspraxia during the first part of the final hearing.

7. The Respondent conceded that the Claimant had the impairment of psychotic depression and that this impaired the Claimant, but denied this was a disability based on all other parts of the test.

8. The issues to be decided therefore were:

    8.1. Was the Claimant's impairment of psychotic depression long term?

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8.2. Did the Claimant's impairment have a substantial adverse impact on the Claimant's ability to carry out normal day to day activities?

8.3. As at the relevant dates?

9. The relevant dates are identified as being 16 June 2020, 10 July 2020 and 21 December 2020.

The Law

10. The definition of disability is found in section 6 of the Equality Act 2010, which states:

> "**6 Disability**
>
> *(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.*
>
> *(2)A reference to a disabled person is a reference to a person who has a disability.*
>
> *(3)In relation to the protected characteristic of disability—*
>
> *(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
>
> *(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*
>
> *(4)This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*
>
> *(a)a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*

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(b)a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5)A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6)Schedule 1 (disability: supplementary provision) has effect."

11. The Tribunal is obliged to take into account statutory guidance and any relevant codes of practice about the issue of disability.

12. Following the case of **Goodwin v Patent Office [1999] ICR 302** the EAT laid down detailed guidance on how this Tribunal should evaluate and decide the issue of disability. The following key points of guidance are given:

    12.1. Specific reference should be made to the pleadings and the issues clarified before the issue of disability is decided;

    12.2. When taking into account any part of statutory guidance or statutory code, the Tribunal should expressly refer to each section relevant to making its decision;

    12.3. If an activity can still be performed with difficulty and great effort, that does not mean the ability to do the activity is not impaired;

    12.4. Account must be taken of the fact that many people play down the effects their impairments have on them;

    12.5. The Tribunal should take into account how a person manages their condition;

    12.6. There should be no single focus on a narrow set of activities such as for example housework. How the impairment affects someone in all aspects of their normal lives should be looked at both at home, outside of home and in the workplace;

    12.7. If medication or other treatment is helping to treat the impairment, the Tribunal should take into account both the situation whilst medication for example is being taken and what the effects would be if the medication or other treatment was not being taken or taking place;

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12.8. The Tribunal should never lose sight of the overall picture when coming to its decision about the specific parts of the disability statutory test.

The relevant date

13. The Tribunal must apply the statutory test for disability at the date the alleged discrimination took place and not at the date of the hearing determining the issues **Cruikshank v VAW Motorcast limited [2002] IRLR 24.**

14. It has also been clarified that when looking at the relevant date, the only evidence that is admissible in applying the long-term part of the test, is evidence of facts and circumstances that existed at the date of the alleged discrimination or before it. Looking at evidence of facts and circumstances dating from after the relevant date, to determine the test as at the relevant date, is impermissible hindsight **All Answers Limited v W and R [2021] EWCA Civ 606.**

Impairments

15. Physical and mental impairments are treated differently by past and binding case law.

16. Whether an impairment has an adverse effect alleged, is a causation question to be determined objectively by the Tribunal **Dias Da Silva Primas v Carl Room Restaurants Limited t/a McDonalds restaurants Ltd and others [2022] IRLR 94.**

17. The Guidance deals with the definition of an impairment at paragraphs A3 – A8.

18. A4 says *"Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities. An exception to this is a person with severe disfigurement (see paragraph B24). It is not possible to provide an exhaustive list of conditions that qualify as impairments for the purposes of the Act. Any attempt to do so would inevitably become out of date as medical knowledge advanced."*

19. A8 says *"It is important to remember that not all impairments are readily identifiable. While some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious, for example some mental health conditions and learning disabilities."*

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20. In situations where there is clearly a physical impairment, but the medical cause is unknown, the focus is on the effects of the condition, not identifying the condition itself **College of Ripon and York St John v Hobbs [2002] IRLR 185 EAT.**

21. This is contrasted with the more rigid situation with mental impairments. Simple use of the broad words by GPs such as stress, anxiety, depression on fit notes and other documents, will not be proof of the mental impairment. There must be more medical evidence provided about the medical condition **Morgan v Staffordshire University [2002] IRLR 190 EAT.**

22. In **Royal Bank of Scotland v Morris UKEAT/0436/10/MAA,** the EAT quoted Morgan saying this at paragraph 55:

    "The burden of proving disability lies on the Claimant. There is no rule of law that the burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment. In Morgan v Staffordshire University [2002] ICR 475 this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" (see para. 20 (5), at p. 485 A-B); and it was held in that case the reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression."

Substantial adverse impact

23. To determine this point, the correct approach is to ask the question of what the Claimants ability to undertake the day-to-day activity would be, if they did not have the impairment **Elliott v Dorset County Council [2021] IRLR 880.**

24. If the impact is more than minor or trivial, then it must be deemed to be substantial **Aderemi v London and South Eastern Railway Limited [2013] ICR 591.**

25. The guidance at paragraphs B2 – B6 states that the Tribunal should take into account the time taken to do the activity, the way it is carried out, the cumulative effects of the impairment in question and paragraph B11 requires the Tribunal to also consider environmental factors that may trigger the impairment, make it better or make it worse.

26. B2 says *"The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should be compared with the time it*

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might take a person who did not have the impairment to complete an activity."

27. B4 says *"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."*

28. B6 says *"A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities."*

29. Paragraphs B7 – B9 deal with what a person can reasonably be expected to do to cope with an impairment before it is deemed to have a substantial effect.

30. B7 says *"Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities."*

31. Coping strategies can amount to measures taken in the same way as medical treatment when considering deduced effects as per **Elliott** above.

32. Where two or more impairments are relied upon which together but not individually cause the substantial impact, the overall effect of all the impairments should be considered **Ginn v Tesco Stores Limited [2005] All ER (D) 259 (Oct).**

33. When considering the effects of treatment, these are to be ignored for the purposes of determining the impact and the correct test is to determine whether the impact alleged could well happen but for the treatment **SCA Packaging v Boyle [2009] UKHL 37.**

34. It is also important to note that there needs to be medical evidence to prove what could well happen as a deduced effect if treatment were stopped. A

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mere assertion by an employee that something could well happen is unlikely to be sufficient **Woodrup v Southwark London Borough Council [2003] IRLR 111 CA**.

35. Paragraph B12 of the guidance also says *"The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (See also paragraphs B7 and B16.)"*

36. B16 says *"Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect. For example, a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics. This cures the impairment and no substantial effects remain."*

37. The correct question when deducing effects is what would happen if treatment had stopped at the relevant date, not what would have happened if treatment had never been received at all **Abadeh v British Telecommunications Plc [2001] IRLR 23.**

38. In the same case, it was also decided that the deduced effect argument was only applicable if at the relevant date, treatment was still ongoing. Deduced effects are not applicable where treatment had ceased at the relevant date.

Long term

39. The relevant parts of Schedule 1 say:

"Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

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(b)it is likely to last for at least 12 months, or

(c)it is likely to last for the rest of the life of the person affected.

(2)If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3)For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4)Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term."

40. When considering this issue and it is clear that an impairment has not lasted for 12 months, the Tribunal is usually required to take a broad rather than narrow view of the evidence and must consider the reality of risk of whether the effects of the impairment "could well happen" rather than focussing on the diagnosis itself from medical evidence. Consequently, if there is a diagnosed or present impairment that has not yet lasted 12 months, then it will be a long-term condition if the proven effects complained about could well happen **Nissa v Waverly Education Foundation Limited and another UKEAT/0135/18/DA.**

Normal day to day activities

41. The guidance addresses this issue at paragraph D3 and states that normal day to day activities are things that people do on a daily or regular basis in all aspects of their lives.

42. D4 states that this definition is not intended to include things that are simply normal for an individual or a small group of people. But in accordance with paragraph D5 a normal activity does not have to be done by the majority of people.

43. The emphasis when looking at activities is to pay attention to things the Claimant cannot do rather than what they can do and it is incorrect in law to apply a balancing or setting off exercise between things the Claimant can do and those they can't to produce an overall picture **Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19.**

44. Conducting litigation is not a normal day to day activity. Therefore, if the Tribunal makes adjustments for a party, it is not then bound to find that they

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were disabled at the relevant time **Henny v Dudley MBC and another UKEAT/100/16.**

Findings of fact - disability

The long term issue

45. The Claimant has issued proceedings in the Tribunal several times dating back many years. In the outcome of the previous hearing, issues were identified that may have and do overlap with the facts of this case when considering disability status. Consequently, these cases were defined in the last outcome of hearing annexed to this Judgment as the "Reading Cases".

46. The Claimant has had depression since at least 2009 and in the Reading Cases, the Respondent conceded disability because of all three impairments.

47. It is obvious to us that the impairment caused by the Claimant's depression whether it be combined with psychosis or otherwise has been ongoing for more than 12 months by the evidence in the Reading Cases alone. There is of course more evidence presented during this hearing, but we need not go into that given the previously promulgated judicial decisions about these impairments speak or themselves when considering the long-term issue.

48. To the extent that his condition fluctuates and may not have affected him on any of the relevant dates, it is also obvious to us that the effects of the condition are likely to recur and have done throughout most recently in July 2020, May 2021 and March 2023 as per his witness statement at paragraphs 2 d – f and the medical documents quoted in those paragraphs which stated:

    "d. EIS Letter for PIP application - Dr Desai - 30 March 2023 – see pages 695 – 696 of FHB. Psychiatrist letter supporting my application for PIP. She wrote,

    "[M] was under care of mental health services for several years for treatment of Depressive Episode. He has been under out care since April 2022 due to developing psychotic symptoms in addition to existing depression.

    Symptoms have included low mood, anxiety, social withdrawal, poor concentration and memory, poor motivation. He also can experience some impact on his movements feeling slow and less in control of his body movements such as balance and coordination. Sleep and appetite cab be poor. Psychosis symptoms have included hearing voices (auditory

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hallucinations) which can be intrusive. He can feel; there is a presence around him which feels disconcerting and distracting. He has to distract himself or use other coping strategies.

Whilst [M] has developed techniques to ignore these perceptual disturbances, he reports that he is often still challenged throughout the day, especially when he is travelling around. He can sometimes ignore and dismiss his symptoms consciously; at other times they are more intrusive. He can experience severe distress when he is walking or on public transport because of his mental health symptoms.

He reports he becomes very conscious of people around him in situations he is unbale to control. When he feels sometimes a [lack] of awareness and worry, he is attracting attention, he has palpitations, sweat profusely and reports sometimes he is incontinent of urine in public places dues to the stress feels in these situations. [M] reports such experiences cause anguish and extreme embarrassment.

[M] has needed the support of his sister who visits daily to help with looking after the domestic chores including making meals and cleaning the house."

e. EIS Letter for Blue Badge application – Dr Desai 30 March 2023 – see pages 693-694 of FHB. Psychiatrist letter supporting application of Blue Badge. She wrote,

"[M] is therefore seeking a Blue Badge to help him cope when he is outside so that he can minimise contact with others in public and thereby reduce anxiety. He wishes to avoid walking through busy car parks when he arrives at his place of work; alternatively, he travels with colleagues in their vehicle when needs to, as such he needs to easily access his car in public cap parks to minimise panic attacks."

f. EIS – CAARMS Assessment Report – Ms Patel 11 May 2021 – *see pages 688 – 692 of the FHB*. This is suitability assessment following GP referral in July 2020. The referral reported that,

"*I felt my mental health is deteriorating and is experiencing auditory hallucinations which disturb me 1 to 2 times per hour. I also reported poor sleep, rumination, constant worry, and anxiety. Ms Patel graded that I had 44% drop in functionality on social and occupational functioning assessment from my previous baseline taken while under care of depression*".

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49. There was also a review of the Claimant in March 2011 where a risk of relapse was also identified by the psychiatrist. The long-term issue is therefore proven however it is analysed.

The effects of the impairments

50. On 23 December 2009, the Claimant was reviewed by Dr Manisha Desai and the report is at pages 664 – 666 in the main bundle.

51. The important parts of the report were as follows:

    51.1. At the review, the Claimant was *"very depressed both subjectively and objectively".*

    51.2. When playing football with his son *"he had to sit down as he felt very tired very quickly".*

    51.3. There were no suicidal thoughts or psychotic symptoms;

    51.4. He was prescribed citalopram and zopiclone one for the depression and the other to assist with sleep.

52. On 4 March 2010, the Claimant was seen by Professor David McLoughlin. This covering letter to the report is at pages 668 to 669 in the main bundle. Whilst dyslexia and dyspraxia have both been admitted as disabilities by the Respondent, there is some crucial information in this document relevant to the third impairment of psychotic depression. The relevant parts of the letter are as follows:

    52.1. The Claimant's short-term memory is in the bottom two percent for the population;

    52.2. His working memory is at the bottom five percent of the population;

    52.3. He has very poor auditory memory;

    52.4. Very weak visual memory;

    52.5. *"The trouble with the label dyslexia is that i[t] does not do justice to the complexity of the experience of being dyslexic, the effort required to compensate or cope."*

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53. The report itself is in the bundle at pages 671 – 680 again dated 4 March 2010. The key parts of the report are;

    53.1. The Claimant has no learning Disability meaning his intelligence is within the average range for the population;

    53.2. Dyslexia is a memory and processing problem;

    53.3. He has trouble processing visual information because of a low visual memory, especially when visual information is sequential in nature;

    53.4. His reading skills on the other hand are of a professional level when reading things allowed but at a vocational level when silently reading to himself. He has difficulty assimilating and retaining read information efficiently.

    53.5. The day-to-day effects that caused the Claimant great difficulty with were described as:

        53.5.1. Keeping track of outstanding bills
        53.5.2. Remembering telephone numbers correctly
        53.5.3. Concentrating for longer than an hour
        53.5.4. Filling in forms
        53.5.5. Following spoken instructions
        53.5.6. Checking bank statements
        53.5.7. Reading newspapers
        53.5.8. Following written instructions
        53.5.9. Remembering where he left things
        53.5.10. Remembering appointments
        53.5.11. Organising daily life
        53.5.12. Reading bus and train timetables
        53.5.13. Reading maps
        53.5.14. Writing cheques
        53.5.15. Looking up telephone numbers in directories
        53.5.16. Following left- right instructions
        53.5.17. Reading signposts
        53.5.18. Orienting himself in a strange place.

    53.6. The day-to-day effects described as causing the Claimant some difficulty were described as follows:

        53.6.1. Reading official documents
        53.6.2. Reading letters

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53.6.3. Writing letters.

53.7. The author was keen to state that the described impacts on day-to-day activities were all subjective from the Claimant's point of view.

53.8. The report is silent on anything to do with facial recognition, facial cues of any sort or anything to do with difficulties in having face to face or video conversations with other people. We come on to this later when discussing the knowledge defence.

54. On 11 March 2011, the Claimant had a further review with Dr Desai. This reported that when he had been depressed in the past, he had symptoms of *"significant psycho motor retardation in (slowness of thought and movement). He is at risk of relapsing into more severe symptoms if there is deterioration in his depressive illness. Significant stressors at work can increase such a relapse"* At page 667 in the Main bundle.

55. It therefore struck us that if he was ever experiencing the sort of psycho motor retardation with his depression, this would clearly and obviously have an adverse impact on his processing speeds and short term or working memory deficits caused by his dyslexia.

56. On 17 May 2011, a further report is provided by Dr Desai in response to the Claimant requesting a change to his work environment at page 681 in the bundle. The report described that although his symptoms following his depressive episode have improved with treatment, medication and cognitive behavioural therapy, the Claimant had still not returned to the full functioning he had before this episode of depression had begun. Further treatment was advised.

57. A further report about dyspraxia was a produced after an assessment on 5 September 2011. This report is authored by Jackie King and is in the main hearing bundle at pages 682 – 687.

58. Whilst the report looks at dyspraxia rather than dyslexia, a number of the tests overlapped and it came to almost identical conclusions generally, but diagnosed moderate dyspraxia as well. Again, the report is silent on facial recognition, facial cues or anything to do with face to face or video conversations with other people.

59. On 11 July 2017, there was a workplace needs assessment conducted by a specialist in dyslexia which is in the supplemental bundle at page 279 – 283 as referred to in the Claimant's witness statement.

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60. The key points of this report are as follows:

    60.1. *"He has been diagnosed with depression and takes antidepressant: it is not uncommon for these to exist as result of difficulty associated with stress caused by dyslexia and dyspraxia."*

    60.2. *"It is clear that [M's] dyslexia and dyspraxia severely affects his work."*

    60.3. That the Claimant may find it useful to watch: *"YouTube has a range of clips where people talk about and explain dyslexia including Kara Tointon's BBC documentary don't call me stupid"* as well as other video clips. This is relevant to knowledge which we come onto later.

    60.4. None of the material in this workplace assessment identifies any issue or any adjustment this is needed for the Claimant when considering video or similar media, facial recognition, the ability for the Claimant to properly engage in face to face or video conversations, facial cues or any other similar difficulty specific to the Claimant or his duties.

61. The most recent medical evidence from before the relevant dates begin is a report dated 30 March 2020 by a senior counsellor at page 31 - 32 in the second supplemental bundle. This reports that at that time the effects the Claimant was experiencing were:

    61.1. Difficulty sleeping;
    61.2. Panic attacks;
    61.3. Hearing voices;
    61.4. Severe intensity of depression
    61.5. Severe intensity of anxiety symptoms.

62. The Claimant's impact statement is contained within the bundle at page 360 – 362. There were a number of noteworthy points made in it as follows:

    62.1. First it appears to be completely silent on the Claimant having any difficulties in watching video or similar media other than concentration length and is again silent on being at a disadvantage or being impaired when the Claimant cannot see people's faces during conversations either face to face or by video.

    62.2. He also claims to be compliant and tend not to challenge or question. We have no difficulty in rejecting that statement as being untrue because:

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62.2.1. The Claimant was challenging to this Tribunal during the hearing, failed to comply with an order that no further documents would be admitted part way through the final hearing, he also became argumentative with the Tribunal at the very outset of the hearing and at other points, claiming that he was not being given a fair trial or a fair chance when discussing whether documents should be admitted into evidence late. Later on, when asked to try to keep to a specific timeline about his cross examination, he said *"I might as well go home".*

62.2.2. In the Reading Judgment, the Tribunal found that the Claimant had raised repeated grievances against his managers, falsely challenged their integrity and honesty, breached rules amounting to gross misconduct and had then submitted numerous claims to the Employment Tribunal. This does not describe a person who is either compliant or tends not to challenge or question things either at work or outside of work. It is noteworthy that the ability to challenge appears to be well made out both from Reading Cases many years ago and before us.

62.2.3. In our judgement, the Claimant is a person who is fully capable of and indeed does challenge things he doesn't agree with, makes complaints about issues he finds objectionable and is perfectly able to verbally defend himself and stand up for himself generally, and so he should where there are grounds to.

62.2.4. After the November 2023 hearing of this case, the Claimant sent a formal email to the Tribunal listing accusations including accusing Counsel for the Respondent as having ridiculed him and complaining about the way the previous hearing was handled. However, we confirm as a matter of fact that Counsel for the Respondent has been nothing but professional. During the hearings she has committed no misconduct before us.

62.3. The other described impacts on day-to-day activities are focussed on now rather than any relevant date. However, they do reflect the outcomes of the reports from Professor McLoughlin and Dr Desai almost identically, from before the relevant dates and so we believe the Claimant was likely to have had these impacts to a fluctuating degree at all material dates from 2020 onwards based on the past medical documents.

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63. There were a number of other medical documents that we were taken to.

64. One such document is from 11 May 2021, which was an assessment as at that date, after all the allegations of discrimination had already happened. Mr. Milsom argued that all reports after the relevant dates can be taken into account to the extent they refer to facts and circumstances existing as at the relevant date or from before it. That is plainly correct because, as he put it, if that was not the case then medical reports ordered by the Tribunal in disability cases that must be retrospective, could not be used.

65. What is not permitted however, following **Cruikshank** and **All Answers,** is using evidence of facts and circumstances which occurred after the relevant date (or indeed dating from the date of the hearing), which are then used as hindsight to confirm what must have been happening in the past.

66. We have therefore discounted the following medical or other evidence because it is not admissible for the disability test at the relevant dates:

    66.1. The report dated 11 May 2021 at pages 688 – 692 in the bundle;
    66.2. The report dated 30 March 2023 at pages 693 – 694 in the bundle;
    66.3. The report dated 30 March 2023 at pages 695 – 696 in the bundle;
    66.4. The report dated 9 June 2023 at pages 1 – 3 in the Supplemental bundle.

67. At page 697 in the bundle, there is a short letter from Dr. Desai, which is undated. It describes the interplay between dyslexia and depression. Whilst she says she is not familiar with the research in this area, she is aware that generally, depression generally exacerbates the problems of other health conditions because depression affects both cognitive and other bodily functioning. She goes on that depression can worsen symptoms and make normal coping methods less effective.

68. We have considered the facts, as found above, in a way not limited to simply the last impairment left to determine (psychotic depression and its impairing effects). We also considered the cumulative impact of all three impairments. We have done this because the Claimant is arguing that there is interplay between all three impairments which means that even if impairment 3 is not a disability, its interplay with disabilities of dyslexia and dyspraxia may none the less mean that impairment 3 may be a disability within the meaning of section 6 of the Equality Act 2010 because of cumulative effects.

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Medication, treatment and coping strategies

69. At pages 288 – 318 in the Supplemental bundle, there is a comprehensive list of medications for all the Claimant's ailments some of which are relevant, others of which were not for us to consider.

70. As at the relevant date of 16 June 2020, it was clear to us that the Claimant was taking the following medication:

    70.1. Vencarm listed as treating depression as per the entry on 1 June 2020 at page 294 in the supplemental bundle;

    70.2. Quetiapine was listed for the same as Vencarm in the same entry.

71. As per the relevant date of 10 July 2020, we conclude that it is more likely than not that Vencarm was still being taken for depression as per the entry mentioned above but also because there is another medication entry as of 4 August 2020 again at page 294 of the supplemental bundle. The same is true of quetiapine because of another prescription entry on 11 August 2020 at page 293 in the supplemental bundle.

72. Finally, as at 30 December 2020, both drugs are still being taken because of a prescription entry dated 27 December 2020 at page 293 in the supplemental bundle.

73. Coping strategies are mentioned about dyslexia and dyspraxia, but nothing is mentioned about coping strategies or other treatment for depression and/or psychosis at the relevant dates.

Discussion and conclusions - disability

Impairment

74. The first point here is that applying **Hobbs,** we must look at the impairment not the label the impairment is given whether it be by diagnosis or otherwise.

75. Legally, it therefore does not matter whether this is a case of depression or psychotic depression. What matters is what the impairment is and how that impacts the Claimant.

76. The guidance at paragraph A5 describes what can count as an impairment or not and gives some helpful examples. We consider the impairment the Claimant has as being a fluctuating, sensory, physical and mental

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impairment. We have decided this because the medical evidence from before the relevant dates clearly states that the depression for the Claimant presents with hearing voices (a sensory and mental impairment), motor retardation (physical impairment) and cognitive retardation (mental impairment). The effects are also mentioned in various medical documents as being good on some days and bad on others hence the fluctuation of effects the impairment has on the Claimant over time.

77. Whist the guidance also states at A6 that you do not need to prove what the type of impairment is, that is physical or mental, that may be the case, but it is still very important to label the impairment as either physical or mental because the case law has made a distinction between the two when considering what evidential hurdle necessary for the Claimant to overcome.

78. It does not matter that the word psychosis does not appear in the medical material.

79. It is also noteworthy that the evidential material before us was not that of a broad-brush diagnosis by a GP. The medical evidence pointing to sensory, mental and physical impairments is from a psychiatrist (Dr. Desai). Therefore, applying **Morgan** and **Morris,** we have given this report more weight than we would have given GP evidence.

80. The impairment was therefore both physical and mental and had a sensory impairment element to it.

Long term

81. Clearly and obviously in our judgment, the depression the Claimant has, has been with him since at least 2009. This is more than 12 months as at all relevant dates.

82. To the extent that the impact may have ceased at any relevant date, looking at the definition of long term in the Equality Act 2010 Schedule 1 and applying **Nissa,** it was straightforward for us to determine that the impairments the psychotic depression caused could well happen in the future. That was shown by the continual use of medication, the fact that there was a documented history of depressive symptoms.

83. When also considering B11 of the guidance, the reality of the risk is that this impairment is likely to recur throughout the Claimant's life, dependent upon his stress levels and other environmental facts described in the medical reports such as work-related stress.

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84. The Claimant's impairment is therefore a long term one.

Adverse deduced effects

85. At all relevant dates, the Claimant was taking anti-depressive medication.

86. Given the report on 30 March 2020 from his senior counsellor he was assessed as having a PHQ-9 score of 20, which was severe depression and a GAD-7 score for anxiety symptoms as being 18, which was also severe.

87. We note that this score was present, whilst the Claimant was taking antidepressive medication, which was consistently being taken throughout 2020 as per pages 293 - 294 in the main bundle.

88. We therefore conclude applying **SCA** and **Aderami,** ignoring the effects of the medication, we conclude that at all relevant dates had the medication stopped being taken as at those dates, the Claimant would have relapsed into a more severe depression making the impact on normal day to day activities both more severe.

89. Applying **Woodrup,** the medical evidence that proves on balance what the effects would be during a relapse, is clearly set out in the report of Dr Desai from 11 March 2011 as follows *"He is at risk of relapsing into more risk and severe symptoms if there is deterioration in his depressive illness. Significant stressors at work can increase such risk of relapse."* The symptoms being described here were significant psycho-motor retardation in the context of the Claimant suffering with a severe depressive episode even with medication at 30 March 2020, just a few months before the relevant dates begin.

90. We are also supported in our judgment by the report of Dr Desai, from 17 May 2011 at page 681 in the bundle, where even by May 2011, the Claimant is still not back to his usual self even with CBT (Cognitive Behavioural Therapy) and medication.

Substantial Adverse impact

91. We find that the following normal day to day activities would have affected the Claimant at all relevant dates had his medication ceased:

    91.1. Difficulty in undertaking most daily tasks due to mental and physical pyscho-motor retardation;

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91.2. Difficulty sleeping;

91.3. Difficulty with attending work, carrying out normal daily work instructions and producing work at a normal speed that would be expected of reasonably competent colleagues without the Claimants impairments.

92. These normal daily tasks would be affected in a more than trivial way but for medical intervention. Applying **Aderemi,** that means they must be substantial.

93. In coming to this conclusion, we have applied **Elliott** and **SCA.** If the impairment wasn't there, would these abilities be impaired? Yes they would as per the medical evidence already discussed above. In the case of all the above activities, we also find they would not have been affected to such a significant degree with dyslexia or dyspraxia alone, when ignoring the effects of medication etc. However, the effects of the psychotic depression would have had much more of a physical impact on the Claimants ability to carry out normal day to day activities.

94. In coming to this decision, we reminded ourselves that, following **Dias Da Silva**, there needs to be an objective causal link to the adverse effects from the impairment. In our view, the medical reports of Dr Desai, Jackie King, Professor McLoughlin and the workplace assessment from Anthea Palmer, all provided ample specialist evidence that if medication was halted, the effects on the daily activities would have been made worse by the psychotic depression impairment.

95. In coming to our decision, we have not taken our eye off the overall medical picture when considering how the Claimant copes with his conditions and their treatment. We have taken into account relevant parts of the guidance and considered the code of practice as per **Goodwin.**

96. We have also applied **Leonard** and simply looked at what the Claimant cannot do or has difficulty with without applying a setting off exercise or looking at what he can do.

97. We have also not been distracted by the red herring of considering any adjustments necessary for the hearing in coming to our decision, applying **Henny.**

Cumulative Effects

98. We have considered paragraphs B4 and B6 of the guidance as well as applying **Ginn.** We have considered the medical evidence of Dr. Desai

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undated at page 697 in the bundle and the statement in the workplace report of dyslexia specialist Anthea Palmer which said that it was not uncommon for all three impairments of dyslexia, dyspraxia and depression to be present at the same time.

99. In our judgment, on balance, all three impairments interact with each other. The dyspraxia and dyslexia are describe as causing stress which can then result in anxiety and depression.

100. It is also clear from the medical evidence that when the Claimant is depressed, this causes him motor and cognitive slowness to varying degrees, which can then make his processing speeds and working memory ability more difficult.

101. Consequently, if we are wrong to conclude that the third impairment is a disability on its own, then we are unanimous in our view that it is a disability when combined with dyslexia and dyspraxia.

102. Consequently, the Claimant meets the definition of section 6 of the Equality Act 2010 and was disabled at all three relevant dates.

KNOWLEDGE (of disability and disadvantage)

The law

103. In section 15 of the Equality Act 2010, the discrimination section 15 describes:

"(2) …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."

104. Paragraph 20 of Schedule 8 to the Act provides, in wording akin to section 15(2)

"(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 -

…

(b) … 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".

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105. The burden is on the Respondent to show that it did not have the knowledge in question.

Enquiries about disability and health

106. The Respondent raises an interesting defence about reasonable enquiries that could and should be made when you are faced with an applicant for a job who has an unknown disability and about which the duration, severity and impact are unknown.

107. The Respondent claims that its decision makers, were effectively constrained in enquiring further about the Claimant's disability or its effect because section 60 of the Equality Act 2010 prevented them from doing so.

108. To sum it up, the Respondent argues that it cannot be reasonable to breach one part of the Equality Act 2010 (section 60) to comply with another part of the Equality Act 2010 namely making reasonable enquiries to enable it to make reasonable adjustments.

109. In addition, the Respondent argues that to have made such enquiries would also have breached the Claimant's privacy and dignity.

110. As far as is relevant, section 60 says:

"60 Enquiries about disability and health

> *(1)A person (A) to whom an application for work is made must not ask about the health of the applicant (B)—*
>
> > *(a)before offering work to B, or*
> >
> > *(b)where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work.*
>
> *(2)…*
>
> *(3)A does not contravene a relevant disability provision merely by asking about B's health; but A's conduct in reliance on information given in response may be a contravention of a relevant disability provision.*
>
> *(4)Subsection (5) applies if B brings proceedings before an employment Tribunal on a complaint that A's conduct in reliance on information given*

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in response to a question about B's health is a contravention of a relevant disability provision.

(5)In the application of section 136 to the proceedings, the particulars of the complaint are to be treated for the purposes of subsection (2) of that section as facts from which the Tribunal could decide that A contravened the provision.

(6)This section does not apply to a question that A asks in so far as asking the question is necessary for the purpose of—

> *(a)establishing whether B will be able to comply with a requirement to undergo an assessment or establishing whether a duty to make reasonable adjustments is or will be imposed on A in relation to B in connection with a requirement to undergo an assessment,*
>
> *(b) – (e)…*

(7)In subsection (6)(b), where A reasonably believes that a duty to make reasonable adjustments would be imposed on A in relation to B in connection with the work, the reference to a function that is intrinsic to the work is to be read as a reference to a function that would be intrinsic to the work once A complied with the duty.

(8)…

(9)"Work" means employment…

(10)…

(11)The following, so far as relating to discrimination within section 13 because of disability, are relevant disability provisions—

> *(a)section 39(1)(a) or (c);*
>
> *(b – j) …*

(12)An assessment is an interview or other process designed to give an indication of a person's suitability for the work concerned.

(13)For the purposes of this section, whether or not a person has a disability is to be regarded as an aspect of that person's health.

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(14)…"

111. Consequently, given that the wording of section 60 (6) (a) itself states that the prohibition on asking applicants questions does not apply when making enquiries about workplace interviews to see whether a person can undertake the interview and what adjustments may be needed, any arguments that a breach of s60 would have occurred if the individual decision makers had enquired further of HR or the Claimant when they were first on notice that a disability was present, is legally misconceived and this argument fails.

112. When considering the point on breaching privacy and dignity, we consider this below in the context of the knowledge tests.

Knowledge of disability

113. The EAT held in **Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10** that what this provision requires, is that the employer knew (or could reasonably be expected to know) that an employee was suffering from an impairment, the adverse effects of which on their ability to carry out normal day-to-day activities were substantial and long-term, that is the various constituent elements of the definition of disability in section 6 of the Act.

114. It is also made clear in **Gallop v Newport CC 2013 EWCA Civ 1583** that it is knowledge of the fact of the various elements of the statutory test that is required, not an understanding by the Respondent that those facts mean a person is labelled by the state as being disabled. This case was decided under the old Disability Discrimination Act 1995 but is still good law. The relevant paragraph from Gallop is below but formatted differently for ease of reference:

"36 …….Ms Monaghan and Ms Grennan were agreed as to the law, namely that:

(i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and

(ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in s.1(1) of the DDA.

Those facts can be regarded as having three elements to them, namely:

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(a) a physical or mental impairment, which has
(b) a substantial and long-term adverse effect on
(c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1.

Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in s.1(2). I agree with counsel that this is the correct legal position."

115. Similarly, the employer will be taken to have knowledge of the disability if they know of the impairment and its consequences. There is no need for specific knowledge of the diagnosis **Jennings v Barts and the London NHS Trust [2011] All ER (d) 73 (Aug) EAT**.

116. If the employer did not know and could not reasonably be expected to know the Claimant was disabled, knowledge of disadvantage does not arise.

117. What is reasonable for the Respondent to have known is for the Tribunal to determine. It will depend on all the circumstances of the case. The question is what the Respondent would have found out if it had made reasonable enquiries. In other words, there should be an assessment of what the Respondent should reasonably have done, but also of what it would reasonably have found out as a result **(A Ltd v Z EAT 0273/18 reflecting paragraph 5.15 of the EHRC Code on Employment (2011)).**

118. In the case of **A Ltd v Z [2019] IRLR 952** it was stated by Eady HHJ*:*

*"(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 **City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR746, [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)***

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UKEAT/0297/14, [2014] All ER (D) 253 *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 ***[Donelian]*** *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 (2016) UKEAT/0100/16, [2017] ICR 610****, per His Honour Judge Richardson, citing* ***J v DLA Piper UK LP (2010) UKEAT/0263/09, [2010] IRLR 936, [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 s15(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 enquiries 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 TC Group (1998) EAT/137/97, [1998] IRLR 628; Alam v Secretary of State for the Department for Work and Pensions (2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR 665).***

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(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."*

119. It is also clear from **Pnaiser** that it is only knowledge of the disability that is required for a section 15 case and not knowledge that the disability causes the something that led to the unfavourable treatment.

120. Following this, if the Respondent had knowledge of the disability, in a reasonable adjustments case, they must also have had actual or constructive knowledge of the disadvantage the Claimant was under, for the duty to make adjustments to have been triggered.

Specific legal arguments and discussion about knowledge

121. Counsel for the Respondent argued that the case of **IPC Media Ltd v Millar [2013] IRLR 707 EAT** was authority for the proposition that when considering knowledge, we should look at the knowledge of the alleged individual discriminators and whether *they* knew of the disability or ought reasonably to have known about the disability, even when the Home Office is the actual Respondent. The logical outcome of that argument is that if the working minds of the alleged individual discriminators passed both of those tests, then regardless of what their employer knew, then that was sufficient to prevent claims for unfavourable treatment and reasonable adjustments from succeeding.

122. We reject that submission. **IPC Media** is authority for the proposition that an act or omission can occur "because of" a proscribed factor as long as that factor operates in the mind of the putative discriminator (consciously or unconsciously) to a significant extent. It is authority for how to handle the "because of" test when considering the actual allegation of discrimination and whether inferences can be drawn to shift the burden of proof to the Respondent. In our view it is not relevant to the knowledge tests. Knowledge of disability and disadvantage does not fix a person with liability, it simply allows the reasonable adjustments and unfavourable treatment claims to be heard.

123. Looking logically at counsel's argument, this could give rise to a circumstance where the employer business knows every detail of an employee's disabilities, the disadvantages they cause and the impacts it has on their work and their home life. The managers making the decisions ask

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the right questions of the employer and take all reasonable steps to enquire about any disability or disadvantage, but the employer doesn't provide any information or incomplete information, leading the managers to innocently believe at the time (and later argue in proceedings) that they do not have any knowledge of either the employee's disability of any disadvantages it causes. Does that then absolve the *employer* of all and any claims that it treated the employee unfavourably because of something arising in consequence of the disability and/or because it failed to make reasonable adjustments? Of course it doesn't and it cannot, because that would give rise to a significant injustice to the disabled Claimant and undermine the protection provided to them by the Equality Act. It would allow employers to deliberately withhold vital information about a person's impairment and its effects from decision makers, to absolve the employer of discrimination.

124. If we are wrong about the **IPC** case, in our view, guidance can be drawn for the line of cases involving imputed knowledge. We aired this with counsel at submissions. This case is a similar (but not identical) situation to the situations discussed in the cases of **Royal Mail Group v Juthi [2019] UKSC 55, CLFIS (UK) Ltd v Reynolds [2015] IRLR 562** and **Alcedo orange Limited v Ferridge – Gunn [2023] EAT 78.**

125. These cases discuss when it is proper to impute knowledge to an innocent mind that hasn't knowingly made a decision based on a forbidden factor, such as, the protected characteristic or the fact that a protected disclosure has been made under whistleblowing legislation. Instead they have been unwittingly manipulated into make a discriminatory decision because of the motives or alleged motives of others.

Juthi

126. As this is a leading case on the issues of when it is appropriate to impute knowledge, we consider this case first. We also note that the facts of this case are not the same as the case we are determining. For example, that case involved the statutory regimes of unfair dismissal and protected disclosures, this case does not. That case involved an improper motive of a more senior manager of the employer whereas, in this case, we have identified no such motive. Finally, that case was about a bogus performance management process being created by a manager in retaliation for the employee making protected disclosures, this case is not about the creating of bogus information or evidence, but about the withholding of information from the decision makers. It is with this backdrop we need to consider the principles in **Juthi.**

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127. In the Claimant's case, it became evident that the HR department of the Respondent had redacted information about the Claimant' disabilities in the information it provided to the interview panel for the Claimant's interview for an internal promotion. Instead of information being provided about the medical conditions themselves and the impacts this had as held by entries on the Respondent's HR database of employees, the words (at page 341 – 342 of the supplemental bundle):

"***Do you feel that you met the criteria and would like to apply under the Disability Confident Scheme (DCS)?*** *Yes*

Will you require a reasonable adjustment during the interview/assessment stages? For instance, you may require wheelchair access for the interview *Restricted Data*

Your reason for requiring an adjustment
Provide details of disabilities or conditions we should be aware of – these will enable us to support you *Restricted Data*

Outline adjustment that may help? *Restricted Data*

Detail adjustments that have previously been provided (optional) *Restricted data"*

128. Therefore, it would appear the Respondent's HR team had deliberately withheld information from the managers on the Claimant's interview panel for this role. To be clear, we have not found that the Respondent had a discriminatory intention towards the Claimant in doing this. The Respondent deliberately withholds information about the Claimant's condition and its effects from the decision makers, with the good intention of preventing any bias against the person if their disabilities are known.

129. This point is discussed in **Juthi,** in detail, when citing another case namely the case of **Orr v Milton Keynes Council [2011] EWCA Civ 62** at paragraph 47 – 49 as follows:

"47………The Tribunal in the Orr case had not clearly found all the relevant facts and the three judgments in the Court of Appeal differ in their recital of some of them as well as in relation to the legal issue to which they gave rise.

48. An attempted summary is as follows:

(a) Mr Orr was employed by the council as a youth worker.

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(b) Contrary to his manager's instruction, Mr Orr discussed a recent sexual assault with the youths with whom he was working.

(c) The manager sought in an underhand way to reduce Mr Orr's working hours and Mr Orr discovered, or may have discovered, that the manager had done so.

(d) There was an altercation between Mr Orr and the manager, in which Mr Orr lapsed into Jamaican patois.

(e) The manager thereupon responded with words which were held to amount to unlawful race discrimination, to the effect that those who use the patois mumble unintelligibly.

(f) Mr Orr thereupon lost his temper and behaved in an insubordinate manner towards the manager.

(g) An officer was appointed to decide whether Mr Orr should be dismissed.

(h) Mr Orr chose not to contribute to the officer's inquiry.

(i) The manager did contribute to the officer's inquiry but withheld from him the facts at (c) and (e).

(j) Pursuant to the decision of the officer, who was unaware of the facts at (c) and (e), the council dismissed Mr Orr.

49. The main issue before the Court of Appeal was whether, for the purpose of section 98(4) of the Act, the council acted reasonably in treating Mr Orr's insubordination as a sufficient reason for dismissing him. For that purpose, what knowledge should be attributed to the council? Just the knowledge of the officer? Or also the knowledge of the manager? Moore-Bick LJ at para 58 gave a clear answer, with which Aikens LJ at para 86 agreed: it was the knowledge of the "person who was deputed to carry out the employer's functions under section 98", and only of that person, which fell to be attributed to the company for that purpose. So Mr Orr failed in his appeal against the rejection of his complaint of unfair dismissal.

50. But Sedley LJ dissented from the dismissal of Mr Orr's appeal. He held at para 19 that the officer appointed to decide whether an employee should be dismissed "has to be taken to know not only those things which he or she

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ought to know but any other relevant facts the employer actually knows [including] facts known to persons who in some realistic and identifiable way represent the employer in its relations with the employee concerned. If, as would seem inescapable, relevant things known to a chief executive must be taken to be known to both the corporation and its decisionmaker, the same is likely to be the case as the chain of responsibility descends. It is equally likely not to be the case when one reaches the level of fellow employees or those in more senior but unrelated posts."”

130. **Orr** is much more factually akin to the situation we need to decide because that case involved the withholding of information rather than making up a fictional reason for dismissal to cover an improper motive. It decided against imputing knowledge

131. Despite this, it is still not directly on point and is distinguishable because we are dealing with knowledge for the purposes of whether a duty to make reasonable adjustments applies to an employer, not unfair dismissal.

132. Consequently, both **Orr** and **Juthi** are distinguishable and therefore of guidance only rather than binding us.

CLFIS

133. This case raised similar issues, but in the discrimination context. In that case, decided under the now repealed Employment Equality (Age) Regulations 2006, a manager X had dismissed an employee and in doing so was alleged to have aided another more senior manager Y's stereotypical view of the Claimant that she could not change her ways of working because of her age.

134. In addition, the old regulations reflect what is now contained within s112 of the Equality Act 2010 stating that if a person such as an employee, knowingly aids an unlawful act committed by another person such as the employer or a more senior manager, they shall be treated as having done that unlawful act themselves.

135. Here, the Court of Appeal declined to impute knowledge and instead decided that the Claimant's remedy was to sue both X and Y for separate acts of discrimination. X for the decision to dismiss and Y for any stereotypical views that caused X to dismiss them.

Ferridge - Gunn

136. That case applied **CLFIS** to the extent that it was argued by the Claimant that

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the decision maker was unknowingly influenced by a more senior manager's discriminatory motive. It described the basis of the decision as follows:

"37. The ratio of Reynolds was very clearly summarised by Kerr J in Commissioner of Police of the Metropolis v Denby UKEAT/0314/16 at paragraph 52:

52. The ratio of CLFIS is simple: where the case is not one of inherently discriminatory treatment or of joint decision making by more than one person acting with discriminatory motivation, only a participant in the decision acting with discriminatory motivation is liable; an innocent agent acting without discriminatory motivation is not. Thus, where the innocent agent acts on 'tainted information' (per Underhill LJ at paragraph 34), i.e. 'information supplied, or views expressed, by another employee whose motivation is, or is said to have been, discriminatory', the discrimination is the supplying of the tainted information, not the acting upon it by its innocent recipient"

137. The cases are therefore clear, knowledge can only be imputed to an innocent mind, if there is some deception or falsehood amounting to an improper motivation that has been proven against those higher up in an organisation, which means that the Tribunal should cut through the lie, the mistruth or the sham and fix an employer with the improper view or liability.

138. In addition, it appears that knowledge should only be imputed where it is the employer only who can be liable for the wrong committed. The view is that in Equality Act cases, it would be unfair to fix a person with someone else's knowledge because this would also fix the individual with liability under what is now section 112, which mirrors the wording of older regulations like those considered in **CLFIS** and says *"(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention)."* presumably because the word knowingly in that section has currently been interpreted as meaning both actual and/or imputed knowledge, rather than simply actual knowledge even when a raw reading of the section would suggest the latter. It's difficult to see how a person can knowingly do something if knowledge wasn't actually there, it is simply imputed to prevent injustice.

The case before us

139. What is notable about the three cases above, is that they all deal with knowledge issues that would mean that a person is fixed with liability.

140. However, in our case we are dealing with the knowledge defence to see if the

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employer is fixed with a duty to make adjustments. If knowledge is imputed here, that does not mean liability automatically follows. There is still the need for the Claimant to prove that there was one of the three requirements, that there was a pleaded adjustment, that would have remedied/lessened any disadvantage and, even then, if that is proven then the Respondent can still argue that the suggested adjustment was or would not have been a reasonable adjustment to make.

141. We do not believe therefore there is any direct authority about this situation. The other cases discussed are all distinguishable.

142. Consequently, in our view, if an employer withholds information from a decision maker about knowledge of disability and/or knowledge of disadvantage (whether deliberately, by mistake or because they are negligent), in our judgment, the decision makers should have that knowledge imputed to them for the purposes of deciding whether the employer had a duty to make reasonable adjustments.

143. If the decision makers in question were also individual Respondents in these proceedings, we would look at the individual's actual or constructive knowledge, not the imputed knowledge that they did not actually know. If the decision makers truly knew nothing and ought reasonably to have known nothing of the disability or, in a reasonable adjustment case, of the disadvantage, then that should absolve them individually of liability because they have proven the defence in section 15 (2) as individuals. The defence for them as individuals would be made out and the Claimant still has a remedy against the employer.

144. The same is not so for the employer though. The employer is a different entity with the collective knowledge of everyone working within it. The employer as a whole will undoubtedly have more detailed knowledge than each individual worker.

145. We therefore suggest that there should be two different approaches to imputing knowledge of disability and disadvantage. One wider approach if the Respondent is the employer acting via its employees and a more restrictive approach with individual Respondents limited simply to the tests applicable to them for knowledge and not fixing them as individual Respondent's with imputed knowledge.

Findings of fact – knowledge

146. The Home Office is the only Respondent in this case, and it has not tried to

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ignore the issue of disability or failed to make enquiries about the Claimant's condition and its effects.

147. We find that the Respondent has made numerous adjustments for the Claimant throughout his career in its various different departments.

148. We were referred to the Respondent's HR records about the Claimant's disability at page 286 in the bundle. This lists the current adjustments for him as follows:

    a. He has been provided with specialist software such as text Help, Dragon Naturally Speaking and Mind Mapping Software;

    b. He has been supported to work from home on a regular basis;

    c. He has been provided with noise blocking headphones;

    d. He has been allowed more time to complete tasks where possible;

    e. He needs modifies procedures for assessments and work reviews, which would have been implemented at the interview in question in these proceedings;

    f. He is given advance notice of tasks where possible;

    g. He should be given 25% extra time at assessments.

149. There are more, but we don't need to list all of them. None of these were challenged by the Claimant.

150. The Respondent has commissioned a workplace assessment that we have already referred to when discussing the disability issue. This made a comprehensive set of recommendations for both the Respondent and the Claimant and these appear to have been implemented.

151. The Respondent's records also show the following:

    a. all three disabilities are listed, labelled as disabilities;

    b. a documented workplace assessment;

    c. the fact that dyslexia, dyspraxia and depression have all been declared since at least 2009;

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d. It records that the Claimant's dyslexia and dyspraxia mean *"extra effort often has to be applied to achieve the same outcomes as others. This may manifest in a variety of ways, including working longer hours than peers. It may also increase the likelihood of anxiety and stress."*

The application and shortlisting process

152. The Claimant complains of discrimination because he was not offered the job of Grade 7 – Team Leader.

153. It was common ground that when he applied for the role, the Claimant had indicated on his application form that he was a disabled person and that he needed an adjustment of more time complete assessments.

154. The application process and interview process all took place at the start of the Corona Virus Pandemic. In response to this, in around April 2020, the Respondent introduced new guidance about conducting video interviews, which was in the bundle at pages 232 – 243 as per Paragraph 6 of Ms Mapara's witness statement, paragraph 5 of Mr Ryder's statement and page 232 in the bundle, which states that the video interviewing guidance is *"…interim guidance that has been put in place to help the department continue to recruit during the current movement restrictions as a result of Covid-19."*

155. The three individuals who made that decision are Anjli Mapara, Ben Moore and Mark Ryder. It was a joint decision.

156. The interview panel usually consists of three people. There is the person with responsibility for the job (Ms Mapara), a person from the same team as the job (Mr. Moore) and a person from an entirely different department who is independent (Mr. Ryder). The consistent panel members for all interviews were Ms Mapara and Mr. Moore. The independent panel member would vary between interviews, as per paragraph 8 of Ms Mapara's witness statement.

157. It was common ground that the Claimant applied for this job through the guaranteed interview scheme or GIS for short. This is a scheme whereby if a person considers themselves to be disabled, so long as they meet the minimum criteria for the job role being advertised, they are guaranteed to be shortlisted for interview.

158. In the case of this Team Leader role, there was an initial sift. The way this was performed was by being more generous with scoring for GIS individuals

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when going through the initial sift and shortlisting process for the job. Applicants who were not applying through the GIS scheme needed to score a 6 on the lead behaviour to be short listed for full sift, where as a GIS applicant needed a lower score of 4, as per Ms Mapara's witness statement at paragraph 9.

159. The application forms were sent to Ms Mapara from the HR recruitment team. That triggered the entire shortlisting procedure. It is significant to note how the forms were received by Ms Mapara as follows as she confirmed during cross examination and at paragraph 9 of her statement:

159.1. The forms were anonymised with a 7-digit application ID. Names and personal data were removed from the forms so the person could not be identified.

159.2. This includes disability and reasonable adjustment data although the box about whether this is a GIS application remains visible at page 341 in the first supplementary bundle.

160. At this stage, Ms Mapara simply knew that the Claimant may have a disability, but we believe her when she says she did not know what that disability was or what its effects were.

161. After the initial sift, Ms Mapara was asked by HR to conduct a further sift to shortlist candidates for interview. This involved both Ms Mapara and Mr. Moore (Paragraph 10 of her statement). The reason for this was that Ms Mapara had scored the initial sift based on both the lead behaviour and on the personal statement of the candidates and it should have been by lead behaviour only as per the email at pages 367 – 368 in the bundle.

162. The sift was therefore re-done and left 9 candidates for interview of which the Claimant was one along with two other GIS interview candidates (Ms Mapara statement paragraph 10)

163. The above process was corroborated by Mr. Moore in his statement at paragraphs 5 – 8 and in our judgment the above is an accurate description of the process to the point of interview.

164. On 5 June 2020, the People Resourcing Hub emailed Ms Mapara and Mr. Moore with the candidate packs and guidance for the interview process as shown at pages 372 – 374 in the bundle.

165. At this stage, Ms Mapara stated that she was informed of the adjustment that

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the Claimant needed at his interview as per his application form. This is shown at page 372 in the bundle where the Claimant is named and under the heading *"Reasonable Adjustment Requests from Candidate(s)"* it says, *"Yes 1104207 [The Claimant's name] – Extra time in assessment."*

166. The important point here is the only adjustment the Claimant had requested at this point was additional time for the assessment. He had not indicated he needed assistance with anything else. In addition, all other personal details other than the Candidate's name were not provided and the disability, the adverse effect of the disability, its severity or the length of time the person had the disability were not made available.

167. It was common ground that, before the interview, the Claimant was informed that the interview would be via Skype for Business at page 407 – 409 in the bundle. This was by email dated 5 June 2020. The email continued:

    "We are committed to ensuring that you are able to fully participate in the process and I would be grateful if you could please let me know if you have any disability adjustments that you feel I need to be made [aware] of."

168. There is a typographical error in this paragraph of the e-mail where the word 'aware' has been omitted. However, the meaning of the paragraph and what it was asking the Claimant to do, in our view, was quite plain and straight forward regardless of the typographical error.

169. The Claimant failed to respond to that e-mail with any information about what adjustments he thought he needed, but did respond more generally on 9 June 2020 at page 410 in the bundle, about organising the interview. This is significant, because knowing the video was going to be by Skype, if there were any adjustments the Claimant thought he needed because of the video format in general, we are sure he would have said so in his response email and he failed to do so.

170. What neither Ms Mapara or Mr. Moore did, before the interview commenced, was ask any further questions internally about the status of the Claimant's disability or the effects he suffered as a result.

171. When considering the reason why the HR hub anonymised the application forms so as to only give basic information about the Claimant's disability and the adjustment he requested, we find this was done for the reasons Ms Mapara stated in her oral evidence, namely, to prevent conscious or subconscious bias against candidates at the sift stage of the process and later on.

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172. It is also our view that there is no evidence at all that anything done by the Respondent in failing to provide specific details to the interview panel about his disabilities was done in any way to try to get around making adjustments or for any other discriminatory purpose.

Bandwidth issues

173. All of the Respondent's witnesses gave evidence to the effect that, when the first pandemic lockdown was announced and there was a resulting massive increase in remote working, video calls and the use of remote technology, the Respondent's systems had difficulty coping with the amount of bandwidth being used. They said this was further complicated by the limitations of employee home computer networks and broadband capabilities. This was mentioned by Ms Mapara in her statement at paragraph 14, Mr. Moore at paragraph 11 and Mr. Ryder at paragraph 6 of their statements as well as in their oral evidence. We believe their evidence. They were consistent, had no reason to be dishonest from what we could determine and their evidence in general was mostly reliable.

174. All three witnesses were cross examined at length about that situation. The Claimant relied upon documents he had evidencing his own enquiries about whether there were any issues with the bandwidth between the months of April 2020 – August 2020. The Claimant produced the *"ITnow Support"* chats between the Claimant and a live chat adviser at pages 23 – 28 in the second supplementary bundle.

175. The chat goes as follows:

"Claimant: so there was no reported bandwidth incidents at 2MS?

Adviser: do you know who reported it? So I can check under their name.

Claimant: no, I was told it was a common incident which I took to mean was reported as probably a high priority incident which you put out on your alert but I don't remember seeing anything like that.

Adviser: I've put bandwidth on my side, the dates related to it and only got 2MS tech bar for them dates. I cannot see anything related to it."

176. Amongst other documents, the Claimant relies on this as disproving that issues with the bandwidth and connectivity were in existence. Whilst we do not doubt that this chat occurred or that the information fed back was correct,

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we reject the argument that it proves no such bandwidth or connectivity issues existed at the time.

177. In our view, the witnesses agreed that, with the exception of one interview mentioned by Mr. Moore in cross examination and in his grievance investigation meeting document at page 499 where the first interview he did had dropped out for 5 minutes on a different day, no interviews were adversely affected by connectivity or bandwidth issues on the day the Claimant was interviewed. The issue was described as being one which fluctuated dependent upon who was present on the calls and the number of people using the Respondent's system or broadband at any given moment. This is all plausible on balance.

178. In addition, the enquiry the Claimant made, only focussed on bandwidth issues. It did not focus on any other software or connectivity issues. It was therefore a very narrow search that in all likelihood did not pick up on any other types of reported IT problem such as for example connectivity, glitches of any other non-bandwidth type or any other issue.

179. In our judgment, the bandwidth and connectivity issues were taking place as the Respondent's witnesses described.

The interview

180. As a result of the IT issues at the time, on 11 June 2020, Ms Mapara emailed the interview panellists about how the video interviews would be conducted.

181. We say as a result, because one of the paragraphs clearly evidences that Ms Mapara advised the panel members of the interview procedure because of bandwidth issues. Here at page 414 it says *"My understanding is to prevent any bandwidth issues you should only turn your camera on when asking a question-whoever is asking the question should ask each other panel member in turn if there are any follow up questions (I think you can keep your camera off when asking follow up questions)".*

182. At the start of the interview, all three decision makers confirm that the situation regarding camera use, namely that some of the panel members would have their cameras off at various time during the interview was explained to the Claimant. They also all confirm clearly that the Claimant was asked whether there were any further reasonable adjustments needed after the format was explained to him and he said that there weren't any more adjustments needed. This is confirmed at Mr. Moore's statement at para 12, Mr Ryder's statement at paragraph 9 and Ms Mapara's statement at

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paragraphs 21 and 22.

183. The Claimant's statement is silent on whether the panel asked at the interview itself whether he needed any additional adjustments. The only evidence we were referred to on this point was at page 492 in the bundle. Here when asked whether he was asked about reasonable adjustments at the interview the Claimant is documented as responding *"Can't recall if Anjli asked if there were reasonable adjustments although probably did."*

184. The Claimant is also documented as saying that the only adjustment he requested was that of extra time for an assessment.

185. In our judgment the interview occurred without issue. The Claimant undertook the interview without difficulty and answered all the questions some of which were scored as being at an acceptable level. Some answers were not so good. The scores from his interview are at pages 416 – 426.

186. The questions were marked by each panel member. Then, each member gave an overall score for the Claimant. The agreed overall score for the Claimant was 4 meaning "acceptable demonstration" overall. However, he scored a 3 for a number of answers, which meant his was at moderate demonstration of some aspects of the tested behaviours, as shown by the overall score sheet at page 427 in the bundle such as for delivering at pace and making effective decisions.

187. The pass mark for each behaviour was 4 out of 7. If any candidate failed to demonstrate a score of 4 or above for any behaviour, they failed the interview overall despite cores in other areas as per Ms Mapara's statement at paragraph 24. We have no reason to doubt this.

188. In our view, the Claimant did not do a bad interview. He answered all of the questions and showed an acceptable standard in some of the competencies. However, others did better than he did.

189. After the interview, at some point on or around 10 July 2020, the Claimant was informed that he had been unsuccessful in the role and he asked for feedback. His email is of 10 July 2020 and is in the bundle at page 440.

190. Ms Mapara responded as follows by email of the same date at page 439 in the bundle:

"- overall, your answers would've benefitted from balancing what you *did to achieve the outcome and how you empowered and delivered through others to*

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achieve an outcome. A focus on how your desired outcome fit into 'big picture' objectives of your team, department etc also would've enhanced answers. Improving on those aspects of your answer will enable you to meet the behaviours required of a G7 as set out by the framework.

- specifically, on your communicating and influencing answer, we felt that your answer needed more focus on the influencing aspect. You touched on how you communicated with the 'difficult' stakeholder but didn't have as much focus on how you influenced his/her position."

191. We have taken the meaning of this email at face value and none of the evidence presented by Ms Mapara, or indeed the Claimant, has altered our view that when the word "focus" is used, this means that the Claimant's answers lacked focus on hitting all of the relevant criteria to score highly for the question; not that he lacked focus at the interview generally by an inability to concentrate or for any other reason.

192. When considering the point about cameras being switched off, the Claimant answered at the time of his grievance investigation as follows at page 491 in the bundle, when asked about the approach to camera use during the interview:

"Were you asked if that was OK? Did you challenge this decision at the time?
-doesn't recall- he thought that was the policy and assumed they knew what they were doing.

-Didn't ask anything at that point because was focusing on interview.

-Was when he got results and was disappointed that, that was when she said bandwidth issues.

-didn't have concerns at the time about cameras being off. But was surprised by the decision. Wasn't there to ask why it was happening, but just to do an interview. Did not know he would face hardship until the interview happened. Was relying on verbal communication only, not visual. He could not tell what people's reactions were.

-At all times his camera was on. Panellist would ask question and switch off camera immediately. Answering questions to no faces.

-Same process on follow up questions.

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-[Claimant] asked Ben a question about a PQ. Ben then came up on the video."

193. When asked about how the approach had affected him, the Claimant is documented as saying as follows:

"How do you feel the approach to cameras exacerbated your disabilities? How you feel this affected your performance?

-had difficulty picking up what the responses were to what he was saying. Difficult to gauge response of the panel and did not know what the impact

-dyspraxia, dyslexia and a mental issue [sic]. Difficulty identifying how responses were being received and therefore found it very anxiety inducing because of lack of visual clues. The interview was difficult to navigate because of this. Found it difficult to get interview mode although thought he answered the questions correctly".

194. In his statement or in oral evidence in response to cross examination, a summary of the Claimant's evidence is:

194.1. On the one hand the Claimant doesn't recollect the interview but on the other, recalls struggling and forcing himself through it;

194.2. He says he did not feel disadvantaged at the time, yet his case seemed to be that it was obvious at the time that he was struggling and distressed.

194.3. He accepts that the difficulties were not so severe that he needed to mention them at the time or immediately afterwards;

194.4. At the time he had no concerns about anything until he read the guidance after the interview;

194.5. That because he believed the approach was Home Office sanctioned, he did not raise anything at the time and would not have raised anything at the time;

194.6. He says he had concerns at the interview, but didn't realise they were an actual disability disadvantage until he received the feedback from Ms Mapara saying that his answers to the questions lacked focus;

194.7. At paragraph 38 in his statement, the Claimant claims that he could

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not construct coherent responses to questions;

194.8. At paragraphs 43 – 44, the Claimant stated that he applied for a different G7 role with the cameras on and that he performed very well, but he was not the strongest candidate and this shows that had the cameras been switched on at the previous interview he would have been in good stead to get the previous position.

Analysis and Conclusion– knowledge of disability

195. Applying **Gallop,** in the factual back drop above, we conclude that the Respondent employer knew every aspect of the Claimant's disability, how long he had the impairment for, the detail of its effects, how severe those effects were and the impact all three of his impairments had on the Claimant's daily life.

196. Whilst the Respondent doesn't need to appreciate either the specific diagnosis after **Jennings,** or the fact that the information know legally amounts to a disability after **Gallop,** we concluded that it is obvious that the Respondent knew both that this was actually a disability and what the specific diagnoses were, based upon the Claimant's HR records mentioned previously, the Reading Judgment where all three impairments (absent any issue of psychosis) were conceded as disabilities in the previous proceedings and given that it had taken appropriate steps to properly investigate what workplace adjustments may be needed as per the workplace assessment of Anthea Palmer also mentioned previously which on its own gave specific and specialist detail about the work related issues the Claimant had as a result of his impairments.

197. In addition, it simply does not make sense for the Respondent to on the one hand make numerous adjustments for the Claimant's impairments in his general working life, but then try to claim that it did not have sufficient knowledge of the disability.

198. To the extent that the Respondent is arguing that because the individual panel members did not know all factual aspects of the disability test meaning they did not know of the disability and that therefore means that the Home Office should be "off the hook" for all the disability claims the Claimant makes, we reject that submission.

199. In our judgment, it is clear that none of the panel members knew of the facts about the various aspects of the disability test to fix them with actual knowledge if they were individual Respondents.

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200. It is also clear that the policy of the home office for interviews was to limit personal information sent to interview panels so that they were not subconsciously prejudiced against any applicant in any way. A well-intentioned policy.

201. However, in our judgment that cannot absolve the Respondent employer of liability to make reasonable adjustments even if the Respondent behaved in this way with good intentions.

202. In our judgment, to allow the defence put forward by Counsel for the Respondent that the panel didn't know of the disability therefore the Home office should be deemed not to know of the disability, even though it clearly did, undermines the protection of the anti-discrimination legislation.

203. We therefore find that knowledge of the disability should be imputed to the panel members as discussed above, only this time, instead of there being an act of creating a false narrative about performance, misconduct or attitude that tricks an unwitting innocent decision maker to commit discrimination by proxy, instead with good intention, the Respondent employer on this occasion has deliberately withheld information about the impairments the Claimant has, their effects and other adjustments the Claimant needs in his daily work life.

204. We do not think this falls foul of the point made in **CLFIS** and/or **Ferridge – Gunn**, because we are only imputing knowledge of disability for considering whether to determine the liability issues against the Respondent organisation employer. We would not impute this knowledge to individual Respondents unless they failed to take reasonable steps to inform themselves about the Claimant's disability to thereby fix them with constructive knowledge of the same.

205. In our judgement, we are not therefore in the wholly unjust situation, about which we do not believe the higher courts were endorsing, namely, that an individual Respondent should be fixed with improper motives or prescribed knowledge even though they are entirely innocent, to make them liable for discrimination they have not actually committed and, consequently, unlimited compensation liability and reputational and possibly emotional damage as a result.

206. For the Home Office to argue that it was not fixed with knowledge about the disability simply because its internal decision makers, about which it is vicariously liable for discrimination, did not themselves know of the facts of

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the Claimant's disability, is a fiction.

207. Consequently, the Respondent has failed to prove that it did not have actual knowledge of the Claimants disability, and its knowledge defence for the section 15 claim fails.

208. A lack of knowledge of the fact that a disability may give rise to a specific something in consequence of disability, is not a defence to section 15 discrimination following **Grosset.**

209. We do not need to consider whether the individual panel members have constructive knowledge of the disability, simply because they are not individual Respondents and also because we have rejected the argument put forward about the **IPC Media** case discussed earlier in the judgment and alternatively have imputed actual knowledge of disability.

210. However, if we are wrong about **IPC,** we have considered it in the alternative.

211. In our view, given that the law is clear that a person is not prohibited from making enquiries about a person's health or disabilities for the purposes of reasonable adjustments at interview we believe that what Ms Mapara as the lead for the interview could and should have reasonably done, was ask the Claimant's permission to speak to HR about whether there was anything else they needed to consider about the disability that either the Claimant or the organisation may have missed. If the Claimant said no, then that was that. However, if he said yes, then HR should have been contacted and Ms Mapara would, on balance, then have known what the impairments were and the impact it had on the Claimant.

212. We consider this is especially important given that a lot of employees through pride, embarrassment or a lack of insight can play down their disabilities and the impact they have, or not even consider themselves to be a disabled person at the time decision were being made about them.

213. We point out that this may not have been how Ms Mapara or the other panellists have been trained by the Respondent or what the Respondent's policies say and Ms Mapara, in our view, was simply following what was accepted process within the recruitment procedures of the Home Office. However, the Respondent here is the organisation, not Ms Mapara, and this therefore does not absolve the Respondent organisation of constructive knowledge where it may have absolved Ms Mapara of constructive knowledge had she been an individual Respondent.

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214. Additionally, if this raises the question of subconscious bias if Ms Mapara knew about the disabilities and impacts in detail, that is the benefit of having a panel. She need not have told the other panel members and therefore only one of the panel would have this possible bias.

215. Consequently, when considering this issue in the context the Home Office being the Respondent, Ms Mapara did not take all the reasonable steps to find out about the Claimant's disability she could have, meaning at least she would have been fixed with constructive knowledge about the Claimant's disability.

Analysis and conclusion – knowledge of disadvantage

216. To determine the issue of knowledge of the disadvantage alleged by the Claimant, namely that every camera was switched off, and that meant the Claimant was unable to read non-verbal cues from the interview panel causing him increased anxiety and stress meaning it was harder for him to construct a coherent response to interview questions – in comparison to people who were not disabled, it is relevant to enquire as to whether the disadvantage factually happened. If the Claimant wasn't actually anxious, stressed or incoherent or did not realise at the time he was at any disadvantage, then that is a relevant factor when considering the Respondent's knowledge.

Actual knowledge of disadvantage

217. When considering the cameras, we needed to determine if they were all off at the same time either for the whole or part of the interview. In our judgment, there was always at least one camera on at any given time. The people who were visible did fluctuate and sometimes only the person asking the question as visible, but at no time do we believe that all the cameras of the panel members were off all the time. We think that would have been very strange and was implausible.

218. When considering all of the witness evidence from both the panel members and the Claimant, looking at it all as a whole, we believe that at least one camera was on at all times. This is proven by;

    218.1. The consistent and unwavering evidence of the three witness who, whilst having slightly varying recollections of what happened at interview, all stated that there was a camera on all the time of at least one person;

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218.2. The emailed instructions of Ms Mapara do not indicate that everyone's cameras will be off;

218.3. During the grievance interviews, Ms Mapara and Mr Ryder stated that the panellist asking the main questions would always have their camera on throughout. Mr. Moore's grievance note was silent on the issue, but he confirmed the same as everybody else during his oral evidence and in his witness statement at paragraph 12.

218.4. In response to the interview feedback given Ms Mapara the Claimant said at page 439 in the bundle by email dated 10 July 2020:

"Anjli, I think your email below is unfair, I did ask why your cameras were switched off as I was unable to see the panel members apart from the questioner. You did not give any explanation."

218.5. The Claimant case that he was staring at a blank screen for the interview at this hearing, does not fit with his own account from the time.

219. In any case, there is no evidence, other than the Claimant's assertion, that he was stressed or anxious at the time as a result of the panel switching some of the cameras off. Of course, here we mean anymore stressed or anxious than a person without a disability would have been when attending an interview. By their very nature, interviews are stressful and anxiety inducing situations even for non-disabled applicants.

220. None of the Respondent's witnesses reported anything untoward about the interview and we do not believe that the Claimant would have remained quiet about the situation if he thought he was being placed at a disadvantage for the same reasons we rejected his impact statement where it said he was compliant and tends not to challenge things. If he was stressed and anxious or had a problem with the cameras being turned off at any point, we believe he would have robustly said so.

221. The fact the Claimant also answered in oral evidence that the issues he experienced at interview were not so severe as to say anything, undermines his argument that he was disadvantaged to the extent he is now alleging.

222. It was also telling that the Claimant said in oral evidence that he did not appreciate he was disadvantaged at the time, until he received the feedback from Ms Mapara saying he lacked focus. The feedback doesn't say that and we believe that the Claimant has taken that word and used it as a medium to justify a retrospective case for discrimination against the Respondent. Ms

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Mapara's feedback has been taken out of context by the Claimant.

223. What this means is, the conclusion we are compelled to draw is the Claimant did not have the disadvantage he pleads at the time and, alternatively, if he did have the disadvantage alleged at the time, then he did not know about it himself.

224. The fact the Claimant did not have or did not know that he had the disadvantage at the time is significant. We say this because we have also considered the medical evidence when coming to this decision, such as, the reports of Professor McLoughlin, Jackie King and Anthea Palmer. All of these specialist expert medial reports are silent on the Claimant's impairments causing any impact or disadvantage if the Claimant cannot see the face of the person he is speaking to obtain visual cues from them. If the Claimant's assertion about the disadvantage was correct, then we would expect there to also be reported difficulties engaging on, for example, telephone conversations where the face of the person is never present and the reports only mention difficulty with concentration on calls if there is background noise.

225. Similarly, the Claimant's HR record, despite him having direct input into it, is silent on there being any difficulties about facial cues or if he cannot see the face of the people he is speaking with.

226. Even if the visual cues were a problem for the Claimant, him seeing the reaction of the panel members wouldn't have assisted him at interview. He would be giving his answer and the panel would be reacting to it. That wouldn't enable him to change his answer to a better one. He may have been allowed to add to it, but that is the extent of it. It may have also prompted an enquiry from him as to whether he needed to explain things in more detail, but that's the realistic extent of the situation in our view.

227. Ultimately, we are unanimous in our view that the Claimant was not aware of any disadvantage at the interview, because there was no disadvantage at the interview.

228. The cameras were not all switched off at any point in the interview. We are not persuaded that the Claimant was anxious or stressed to the extent that it would amount to a disadvantage compared to others who were not disabled. If he was anxious or stressed to any significant degree, we find this was for other reasons, not because he was placed at any disadvantage because of camera arrangements. There is no medical evidence supporting such a view and all we have is the Claimant's assertion about it, which we reject.

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229. Consequently, it follows that, at the very height of his case, if the Claimant was unaware of the disadvantage or as we have found, the disadvantage could not have been present because the panellists' cameras were not ever turned off all at the same time, then the Respondent could not have actually known about the disadvantage.

230. The Respondent employer having conducted extensive enquiries into the Claimant's specific disabilities and possessing detailed medical evidence about the Claimant's disabilities spanning tens of years, could not have known about the disadvantage the Claimant currently alleges because none of the medical reports or the Claimant identify it.

Constructive Knowledge of disadvantage

231. In our judgment, it is clear that the Respondent employer has done everything that it reasonably can do to make adjustments for the Claimant generally and to inform itself of the effects the Claimants disabilities have on his workplace activities. They have made extensive adjustments for him in his general work.

232. The question then arises, should the panel have made any further enquiries themselves? We conclude that it would have been unreasonable to expect them to do so. We say this for a number of reasons.

233. First, nothing that happened in the run up to or during the interview would have put them on notice that further enquiries were needed about the Claimant's alleged disadvantage. He was asked at application stage, before the interview and at the start of the interview what adjustments were needed. He said none were needed other than more time for assessments and an assessment was not part of the interview process. This did not indicate any issue with facial cues or cameras.

234. Significantly, the Claimant was asked whether he needed adjustments after it was explained to him how the panellists would use their cameras. His answer was still that he didn't need anything else.

235. Then we looked at what information would have been forthcoming if the panellists had gone back to HR and asked what other disadvantages if any the impacts of his disabilities could have caused. It is clear to us that because the medical reports and HR records of the Claimant all of which also had his detailed input are silent on there being any disadvantages about facial cues or using video as a communication medium, the answer that

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would have come back from HR was that there would be no documented difficulties with the cameras being off.

236. Yes, there are elements of the medical reports that if a lawyer analysed them when a case has been submitted to the Tribunal, they could argue that the Respondent should have pieced together the disadvantage and therefore known about it constructively. However, the Respondent is not a medical professional, neither were the panellists and neither is the Claimant. It is unreasonable to expect the Respondent, in the circumstances of this case, to become detective by placing all of the medical information under a microscope to guess and forensically piece together what disadvantages the Claimant might have when they have not been expressly made clear by the reports in their possession.

237. Therefore, applying **Ridout** and **Alam,** there was no basis for the panellists or the Respondent organisation, as a whole, to make any further enquiries in the circumstances of the disadvantage alleged and, in any event, following **A Limited** at point 7 of the quoted paragraphs from Eady HHJ's judgment, any further enquiries before the interview took place would, in our view, have resulted in the Claimant saying he had no problem with the proposed use of cameras as he did at the time, HR would have said there was no known difficulty on record and the medical professionals would in all likelihood have been led by what the Claimant said his difficulties were, which would again have drawn a blank about camera use on video calls and facial cues because he did not have any inkling that he would be disadvantaged at the time.

238. The Respondent has therefore proven that it did not have any actual or constructive knowledge about the disadvantage pleaded by the Claimant.

239. Moving onto the privacy point made by Respondent, namely that they would not have been able to ask any questions because of privacy issues, we would have rejected that argument because section 60 does not prohibit this enquiry. Yes, it is clear from **A Limited** that this is a factor to be taken into account. However, if enquiries need to be made, there is no harm, and indeed it is best practice, to ask the applicant permission to make further enquiries. If they say no or it is unnecessary, then that's that. However, if they say yes and give permission, then further enquiries can reasonably be made.

The reasonable adjustments claims

240. Consequently, as the Respondent had no knowledge of the disadvantages

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either actual or constructive, the reasonable adjustments claims fail.

241. Alternatively, the PCP alleged to have given rise to the disadvantage claimed by the Claimant, was not applied by the Respondent and so the claim would have failed at this point too. There was no occasion in the interview when all the panellists had their cameras off at the same time.

242. In addition, we were not persuaded that the disadvantage claimed by the Claimant as a result of his impairments existed or was caused by any cameras being switched off, whether compared to a non-disabled person or not, absent any evidence proving that it did, such as medical evidence for example, other than the Claimant's assertion that it did. These claims would have failed on this point too.

243. At all times the Claimant was able to see and respond to visual cues because the person asking the main questions, always had their camera on.

Section 15 discrimination arising in consequence – the law

Burden of proof

244. Section 136 of the Act provides as follows:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment Tribunals] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision"

245. Direct evidence of discrimination is rare and Tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] ICR 931,** updating and modifying the guidance that had been given by the Employment Appeal Tribunal in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.**

246. At the first stage, the Tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that

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there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them.

247. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable Tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the Tribunal must assume that there is no adequate explanation for those facts.

248. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

249. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act.

250. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a Tribunal would normally expect cogent evidence.

251. All of the above having been said, the courts have warned Tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054.**

252. In some cases, it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination **Laing v Manchester City Council UKEAT/0128/06/DA.**

253. Section 15 says:

"15. Discrimination arising from disability

(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

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

254. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others.

255. What caused the unfavourable treatment requires consideration of the mind(s) of alleged discriminator(s) and thus that the reason which is said to arise from disability be more than just the context for the unfavourable treatment. There need only be a loose connection between the unfavourable treatment and the alleged reason for it, and it need not be the sole or main cause of the treatment, though the reason must operate on the alleged discriminators' conscious or unconscious thought processes to a significant extent **(Charlesworth v Dronsfield Engineering UKEAT/0197/16).**

256. By analogy with **Igen**, "significant" in this context must mean more than trivial. Whether the reason for the treatment was "something arising in consequence of the Claimant's disability" could describe a range of causal links and is an objective question, not requiring an examination of the alleged discriminator's thought processes when linking the something to the Claimant's disability.

257. The approach to complaints of discrimination arising from disability was considered in detail by the Employment Appeal Tribunal in **Pnaiser v NHS England [2016] IRLR 170**:

"(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 been 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 they 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 …*

(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 … 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.

…

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

…

…

(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."

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Findings of fact - unfavourable treatment and the something

258. We have already gone through the factual backdrop of the interview and its aftermath.

259. All three panellists made the decision jointly to decline to offer the Claimant the job role after they conducted his interview.

260. The Respondent concedes that that decision was unfavourable treatment.

261. The panellists describe why they did not offer the Claimant the job as follows:

    261.1. Ms Mapara stated at paragraph 25 in her statement that the Claimant did not answer the questions to a sufficient standard and he automatically failed the interview because he did not score highly enough on two of the questions.

    261.2. Mr Moore confirms the same reason at paragraph 14 of his statement.

    261.3. Mr. Ryder corroborates the same at paragraph 11 of his statement.

262. Nothing said during oral evidence led us to doubt what the panellists were saying. In addition, they all agreed that other candidates scored higher than the Claimant at interview when giving their answers. We believe them. There is no reason not to. In particular, and as supported by her feedback email, Ms Mapara was clear that the reason the Claimant did not succeed was because of the content of his answers, not the lack of focus while at the interview. We believe her.

263. When considering the alleged something the Claimant says arose from his disability, namely a lack of focus which resulted in him being marked down by the interview panel, all of the panellists were consistent in their evidence that they did not notice any signs of a lack of focus or difficulty in concentration when the Claimant was answering questions or at any time during the interview. There is no evidence other than the Claimant's assertion after the interview, that he lacked focus when giving his answers.

Analysis and conclusion

264. We first turn to whether the "something" namely the lack of focus alleged by the Claimant could have been caused by any one of his impairments. It is clear from the medical evidence already discussed that the Claimant could

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lack focus as a consequence of his disabilities.

265. However, we are not persuaded that the Claimant actually lacked focus at the time of the interview. There is no evidence to support that assertion other than the Claimant's say so. The panel did not notice anything untoward during the interview and we believe their evidence.

266. The Claimant, at times, said he could not recall what happened at the interview both when the grievance investigation was underway at the time and during cross examination. Further, the medical reports we have seen suggest the Claimant's disabilities affect his working memory, not his long term memory.

267. In our view, the Respondent's witnesses were more credible overall. The Claimant confirmed that he did not realise he was at any disadvantage at the time of the interview and we conclude that's because he did not lack focus at the interview as he now retrospectively claims he did.

268. In addition, the interview score was not so low as to evidence in itself, a lack of coherence. If there was a general lack of coherence in his answers, we believe the feedback from Ms Mapara would have identified this.

269. We conclude that although the Claimant's disabilities could give rise to a lack of focus, they did not do so at the time of the interview. On balance, we conclude any lack of focus was not the reason why he was marked down at interview. The Claimant was scored at interview reflecting the quality of the answers he gave, in the same way as any other candidate was. He scored lower than other candidates, so he was not offered the job.

270. Applying **Laing** and looking at the "because of" part of the section 15 test, we are satisfied that the real reason for why the panellists marked the Claimant down, was because he did not give answers to the questions that covered the necessary criteria the panel were looking for in a successful candidate. Consequently, the real reason why the Claimant did not get the job was because others scored more highly in the answers to their questions, not because of something arising in consequence of his disability.

271. Consequently, not only do we find that the alleged something did not and could not have affected the minds of the panel members at the time, but the Claimant has also not shifted the burden of proof to the Respondent. Even if he had, the Respondent has proven a non-discriminatory reason for why it did not offer the Claimant the job.

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272. The Claimant's claim for discrimination because of something arising in consequence of his disability therefore fails. We need not consider the Respondent's justification defence.

273. This means that all the Claimant's claims fail, and they are dismissed.

EMPLOYMENT JUDGE SMART
08 April 2024

Judgment sent to the parties on

17 April 2024
……………………………………

For the Tribunal Office

……………………………………

Annex 1

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Agreed List of Issues

1. The dates of the relevant acts and/or decisions in this claim (the **"Relevant Dates"**) are as follows:

   a. 16 June 2020, being the date on which the Claimant was interviewed (over Skype) for the relevant Grade 7 position on the Building a Stronger Britain programme (defined above as the **"Interview"**, and the **"Role"**).

   b. Between 16 June and 10 July 2020, being the period in which the Respondent decided not to appoint the Claimant to the Role.

   c. 21 December 2020, being the date on which the Claimant was informed that the Respondent had decided that re-interview was not necessary as a reasonable adjustment.

2. As regards s.6 of the 2010 Act:

   a. It being agreed that the Claimant was disabled by reason of dyslexia and dyspraxia on the Relevant Dates, did the Respondent know or could it reasonably have been expected to have known that?

   b. Was the Claimant also a disabled person within the meaning of s.6 of the 2010 Act on the Relevant Dates because of the effects of his psychotic depression on his ability to carry out normal day-to-day activities?

   c. If the answer to §2.b above is yes: did the Respondent know or could it reasonably have been expected to have known that?

3. As regards s.13 of the 2010 Act:

   a. Did the Respondent decide not to select the Claimant for the Role in or around 10 July 2020 because of his disabilities?

   b. Did the Respondent decide not to select the Claimant for the Role in or around 10 July 2020 because of his age?

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c. As regards §3.b above: (i) the Claimant was 48 at the Relevant Dates; (ii) he relies upon the actual comparator of Bethan Salmon and a hypothetical comparator; and (iii) the Respondent does not rely upon a justification defence.

4. As regards s.15 of the 2010 Act, it being accepted that the Respondent treated the Claimant unfavourably when he was not appointed to the Role:

a. Was this treatment because of something – i.e., the Claimant's lack of focus which resulted in him being marked down by the interview panel – arising in consequence of the Claimant's disabilities?

b. If the answer to §4.a above is yes: can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

5. As regards ss.20 and 21 of the 2010 Act:

a. Was a PCP applied of cameras being switched off by all panel members when the Claimant answered questions in Interview?

b. If the answer to §5.a above is yes: did that PCP put the Claimant at a substantial disadvantage – i.e., in that he was unable to read non-verbal cues from the interview panel which raised his anxiety and stress and made it harder for him to construct a coherent response to interview questions – in comparison with persons who were not disabled?

c. If the answer to §5.b above is yes: did the Respondent know or could it reasonably have been expected to have known that the Claimant was likely to be placed at any such disadvantage?

d. If the answer to §5.c above is yes: did the Respondent take such steps as it is reasonable to have taken to avoid the disadvantage?

e. As regards §5.d above, the Claimant relies upon (i) all cameras being left

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on during the Interview; and (ii) the Claimant being re-interviewed.

6. Time limits:

a. The claims for failure to make reasonable adjustments (see §5 above) and direct disability discrimination (see §3.a above) as regards the disabilities of dyspraxia, dyslexia and depression were all made in the original ET1, which was filed on 8 October 2020. They are therefore in time.

b. The claim for discrimination arising from a disability (see §4 above) was added by consent in February 2023. The Tribunal treated this as a relabelling exercise, with the consequence that the claim was brought in time.

c. The claim was amended by consent in October 2023, to relabel the alleged disability of depression to an alleged disability of psychotic depression. The Tribunal treated this as a relabelling exercise, with the consequence that this claim was brought in time.

d. The claim for direct age discrimination was brought by way of an amendment allowed in October 2023, with the issue as to whether it is just and equitable to extend time for that application to be determined at the Final Hearing.

END

Annex 2

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Outcome of hearing

EMPLOYMENT TRIBUNALS

Claimant: M

Respondent: Home Office

At: London Central Employment Tribunal

Appearances: Claimant - in person

Respondent – Ms I Buchanan (Counsel)

CASE MANAGEMENT ORDERS

Summary of hearing

1. This case was listed for a final hearing which took place on 21, 22, 23, 24, 28 and 29 November 2023.

Adjustments

2. The Claimant has dyslexia and dyspraxia, both of which were admitted as being disabilities in accordance with the Equality Act 2010 by the start of witness evidence. The only disability put forward that remains in dispute is the impairment of psychotic depression.

3. The Claimant provided various medical evidence documents at the hearing. These suggested to us that he had the following significant impairments that might have prevented proper engagement at the hearing:

   3.1 Difficulty with the speed at which M can process new, written and visual information;

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3.2 Very poor working memory and/or working memory formation (in contrast with long term memory);

3.3 Difficulty in reading, interpreting and comprehending written text;

3.4 Slow comprehension speed;

3.5 Slow reading speed;

3.6 A susceptibility to anxiety when put under pressure;

3.7 Hearing disturbances that can cause distraction.

4. The following adjustments were made for the Claimant by consent after discussion with him and with Counsel for the Respondent:

4.1 Regular breaks every 45 minutes to an hour;

4.2 Counsel for the respondent was directed to take M to the relevant document, witness statement paragraph or part of the bundles before asking a question so the Claimant could refresh his memory of events before asking a question;

4.3 The Claimant was allowed as much time as he needed to read and re-read documents if necessary;

4.4 The tribunal explained steps in the procedure about the law or where the Claimant's evidence needed to be focussed as we went along;

4.5 Counsel for the respondent and the tribunal assisted the Claimant with finding the correct page references where needed;

4.6 The tribunal offered reassurance where the Claimant appeared flustered because he was asked to turn to a page or paragraph that he could not identify quickly;

4.7 The tribunal tried to manage proceedings so that all the evidence was heard before the hearing window finished so that evidence did not go part heard over any lengthy period of time;

4.8 Written submissions were ordered to assist the Claimant with trying to gather this thoughts, assist with processing time and commit submissions to paper whilst the hearing was still relatively recent.

5. The Tribunal would also make no adverse inferences from inconsistencies in the Claimant's evidence due to memory difficulties.

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6. There was one occasion, on day 5 of the hearing, where the Claimant became anxious resulting in a medical emergency. Steps were taken to safeguard the Claimant's health, emotional wellbeing and dignity. An extended lunch was directed from about 12.15 until 14.00.

7. By 14.00, the Claimant had recovered, stated that he wanted to continue and the hearing continued without further incident.

8. It is our unanimous view that the Claimant was very able to engage with the hearing, understand what was taking place, had plenty of time to ask the questions he wanted to, cross examined the Respondent's witnesses very well and referred them to various documents and statements in a structured and able way. The Claimant was articulate and ran his case in a structed and capable way to his credit.

9. At all times, we bore in mind the Equal Treatment Bench Book and any relevant Presidential Guidance.

Previous Tribunal cases and appeals

10. The Claimant has issued claims in the Employment Tribunal on a number of previous occasions.

11. It is noted in the judgment of the Employment Appeal Tribunal, cited below, that the Claimant has issued proceedings in the Tribunal for disability discrimination in 2005. The disability claims were dismissed because the Claimant was found not to be disabled at the relevant times in that case.

12. M issued proceedings again in 2008 and this case was dismissed because the earlier Tribunal had already determined the disability issue previously and there had been no material change in presentation since that determination.

13. Then further proceedings were issued in 2010. On this occasion, the disability point was not determined because the claims were deemed to be out of time. This case was against the UK Border Agency.

14. It was common ground amongst the parties that this agency had been subsumed into the Home Office after we enquired about this issue.

15. In that case, the Claimant had claimed disability discrimination for the same three impairments as in this case, namely dyslexia, dyspraxia and depression.

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16. Some of the claims were out of time in the previous case and the Tribunal had dismissed his claims because of this. The Claimant had appealed and this resulted in the decision of the case of **Mr. XX v UKBA EAT 0546/11/DM.**

17. After a successful appeal, the case was remitted back to the tribunal to determine the disability issue. We do not know the outcome of that remittance.

18. This situation was of significance because the Respondent was arguing knowledge of disability and knowledge of disadvantage points in defence of the claims made under sections 15, 20 and 21 of the Equality Act 2010.

19. If the corporate mind of the Home Office knew that the Claimant was disabled with all three impairments, then this may be relevant to any issues of imputed knowledge of the witnesses before us. If the same impairments were being argued by the Claimant as previously litigated and there was no alteration in the status of the Claimant since that time, then reopening the disability status issues could be estopped.

20. The Claimant stated that he remembered the case and said the tribunal had found that he was disabled under all three impairments at that time. The respondent could not remember the outcome of the case.

21. Both sides were asked multiple times to try to find the judgment from this case, during he course of the proceedings, but neither could find the case by the time the hearing had finished. The Claimant said that he knew where he thought the outcome was, but had not had enough time to find it.

22. Before we can make a final determination, we therefore directed that the respondent must apply for the judgment to be provided by the relevant tribunal archive service. This may be difficult as no one appeared to have the claim number from the original case, just the EAT case number.

23. During the hearing, the Tribunal did not have an official transcript of **Mr. XX v UKBA** decision cited above. Now, it has been able to find that decision and the following points are of note upon reading it:

    23.1 The appeal was against a judgment of Employment Judge Hardwick at Reading tribunal;

    23.2 Issues in dispute during that case were all three impairments and issue estoppel stemming from earlier 2005 proceedings;

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23.3 In 2005, Employment Judge Zuke dismissed the Claimant's disability discrimination complaints because that tribunal determined that the Claimant was not disabled at that time;

23.4 In 2007, this time in the London South Tribunal, the Claimant brought another disability discrimination complaint because he was rejected for a promotion. This claim was rejected by Employment judge Soulsby because the issue of disability had already been determined by the 2005 tribunal.

23.5 The Claimant appealed and his appeal was dismissed by HHJ Ansell on 3 December 2008.

23.6 A further claim was submitted by the Claimant on 15 July 2010. This was for a number of matters concerning performance concerns, declined promotion or acting up opportunities and issues about internal transfers.

23.7 In the meantime, the Claimant had appealed HHJ Ansell's decision to the Court of Appeal and this appeal was dismissed by Elias LJ (as he then was) under case number **82/2009/0411**. One of the main points in dismissing the appeal was at paragraph 7 of the judgment where Elias LJ stated:

"7. … Plainly, there are circumstances where disabilities may get worse over the years. It will not then be an issue of estoppel to come back to the Tribunal and say, 'I am now suffering significantly differently than I was three or four years ago'. But that is not, as Mr XX accepts, the position with relation to dyslexia or dyspraxia. So that in so far as he submits that the Tribunal should now consider fresh evidence, it follows that that evidence could have been provided before the Tribunal in 2005. I appreciate it can be difficult for litigants in person to pay for relevant reports and so forth, but that is a problem that many litigants face. It is for the claimant to establish his disability to the requisite standard. He had the opportunity in 2005 to do that. Nothing significant has changed. I do accept that he has been promoted, and I recognise that he considers the nature of the job he is now doing means his disability has a more marked affect on his career development, but that does not change the question of whether or not he is disabled in the meaning of the legislation.

8. It may be that if the Tribunal in 2005 had available a decision I gave last year in Paterson, it might have come to a different view. That I know not. Again, changes in the law in this context, particularly when

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they are of uncertain ambit, cannot be relied upon to justify having the case tried again. I have explained to Mr XX that the principle of finality is an extremely important one in this context. He suggested that the Tribunal in 2005 may not have focused properly on the dyspraxia element of this case; but that, it has to be said, looking at the documentation, has been something of a make weight, and in any event it was for to pursue all the relevant aspects of his disability before the Tribunal at the relevant time.

9. It follows that I can see no realistic prospect of showing that the Tribunal was wrong in 2008 to find that issue estoppel did apply. The question of whether his dyslexia and dyspraxia constituted a disability under the legislation was considered and determined at that stage, and finality requires that that must be the end of the [word missing]. It cannot be open to bring fresh material before the court, which could have been provided before the Tribunal in 2005."

23.8 We are therefore in danger of history repeating itself. We are again in a situation where historic documents are being relied upon by the Claimant to prove the issue of disability that could well have been considered and factual conclusions made about them in numerous previous tribunals. These documents are for example the report of Professor McLoughlin dated 4 March 2010 and the report of Dr Desai dated 11 March 2011, which are both in the bundle before us and are both clearly mentioned in quoted extracts from previous decisions in the **Mr XX** judgment.

23.9 This issue appears to have been raised in the Claimant's amended ET1 at page 76 in the bundle. However, we do not believe anyone has fully engaged with the issue before the full merits hearing began until we spotted it whilst reading into the case.

23.10 The judgment goes on to make reference to another case with case number **2703555/2009** which was apparently struck out by EJ Hill on 18 June 2010.

23.11 A further case under number **2701734/2011** was also struck out on 1 September 2011, which was then revoked and the case stayed pending appeal which the EAT declined to hear.

23.12 Two further cases were presented under case numbers **2700057/2012** and **2700058/2012** in January 2012. We do not know the content or outcome of those cases.

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23.13 The decision raises a further case of disability discrimination that was heard before the appeal tribunal under the case **XX v Foreign and Commonwealth Office**, which was not a decision about disability.

23.14 The judgment also makes reference to a medical report by Dr. Slavin dated 14 January 2010. We cannot find this document in the bundle. It also refers to an occupational health report by Ms Kearney from 15 December 2010. We cannot find that document in the bundle either.

23.15 The relevant paragraphs are these as quoted at para 20 of the judgment:

"20. The Tribunal then went on to consider the doctrine of issue estoppel based upon the change in the Claimant's circumstances. The Tribunal said this:

"23. In any event other medical evidence adduced by the Claimant from Doctor Desai (C65 and 67) refer to a moderate depressive issue which was likely to improve as his depression improves. Doctor Slavin from Health Management by letter of 14 January 2010 (R81-82) states on page 2 first paragraph: 'it is highly unlikely that with a short term common mental health problem that his mental health will be covered by disability legislation nor would it be regarded as a serious underlying medical condition.

24. We are clear that the Claimant is endeavouring to relitigate matters which have been determined previously by other Employment Tribunal and by the Employment Appeal Tribunal. He is endeavouring to introduce the dimension of depression to show a considerable change of circumstances to overcome the high bar described in the Judgment of His Honour Judge Ansell. We have seen evidence of a moderate depressive episode but no real evidence of a significant change in the Claimant's circumstances. The Claimant made great play of the psychological assessment report of Professor McLoughlin dated 4 March 2010 (C78). The Professor stated that at a memory/processing level he was one of the most severely dyslexic people he had ever met and assessed. However as Counsel pointed out the Claimant was able to address this Tribunal for over two hours without a note on submissions that Counsel had made and recalled them. The Claimant at the conclusion of the Hearing did say that he had done a lot of preparation and some of the arguments had been used previously. We have to say that in our view the Claimant was an articulate and, as Counsel put it, eloquent individual who presented his case in an ordered and professional manner which was commendable. We acknowledge the diagnosis of dyslexia but it is to the Claimant's credit

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that he seems to have found coping strategies, certainly in the presentation of his case."

21. In the light of those findings the Tribunal did not go on to consider whether the Claimant was disabled under the Act but that if it were to decide that it acknowledged that the Claimant would have 'some difficulty in establishing that he is disabled'."

And

"42. A year later on 15 December 2010 Ms Kearney, an occupational health adviser, was reporting to the Respondent in the following terms:

- **"Disability legislation implications:**

It is difficult to say if the Disability provisions of the Equality Act will apply to Mr XX's depression. His symptoms have been present for more than 12 months and do appear to be ongoing. They also have a significant impact on his functioning on a frequent basis and in this respect the condition would qualify. However, if his work issues could be resolved then Mr XX's depression would be expected to resolve. As you may be aware it is legal decision rather than a medical decision to determine if the legislation applies but I think in a case where there is any doubt it would be considered best practice to act as if the legislation would apply.

Whilst Mr XX's depression is ongoing he remains vulnerable to future related sickness absence compared to his unaffected peer group."

23.16 These paragraphs appear to us to be relevant to the current issues in this hearing. If an issue has been determined by a competent court after having heard the evidence and argument, then that issue should not be capable of being reopened by either party and is binding on the parties and other courts unless it is the subject of an appeal.

23.17 It seems to us that a legal issue must therefore be determined, namely, whether the Claimant's status has altered in terms of his impairment of depression since the 2011 Tribunal case and the interplay that that may have with the other two impairments of dyslexia and dyspraxia, which are conceded by the Respondent.

23.18 We must therefore have copy of the Tribunal's final decision about disability in the remitted case from the appeal of **Mr XX v UKBA.**

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The bundle

24. The first two days of the hearing were spent making decisions about various documents that the Claimant wanted to include in the bundle. The respondent needed some time to consider a supplemental bundle of documents brought by the Claimant and therefore day 2 of the hearing did not commenced until 2pm on 22 November 2023.

25. The bundle issues were resolved, meaning the Tribunal had the following evidence to consider:

    25.1 Opening statements from both the Claimant and the Respondent;
    25.2 Chronology and cast list from the Respondent;
    25.3 Final hearing bundle of 713 pages in the pdf version;
    25.4 The Respondent's Authorities bundle;
    25.5 The Claimant's first supplemental bundle of 321 pages;
    25.6 The second supplemental bundle in paper version only.
    25.7 The witness statement bundle containing the following witness statements:

25.7.1	Claimant's witness statement	page 1 - 21
25.7.2	Statement of Anjli Mapara	page 22 – 30
25.7.3	Statement of Benjamin Moore	page 31 – 35
25.7.4	Statement of Mark Ryder	page 36 – 39.

26. A determination was made to exclude periodical documents that were expert in nature and to which the Claimant was not qualified to speak.

27. The skype communication manual references were agreed between the parties rather than the whole document being referred to, given its length.

28. A list of issues was also agreed between the parties between hearing days 1 and 2. These will be referred to in the final judgment.

29. We heard from all the witnesses. Where necessary, the tribunal asked questions of the Claimant to elicit evidence in chief when new documents not mentions in his statement were referred to. This was done with the agreement of the respondent because he is an unrepresented vulnerable litigant on person and he could therefore not ask himself any supplemental questions.

The Claimant as a litigant in person

30. The Claimant was also offered as much assistance as we could fairly give him given that he was a litigant in person and whilst we put no positive case forward for him, the tribunal asked questions of the Respondent's witnesses

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where he had not put his case to them. However, despite not being represented, M was very able to cross examine the witnesses appropriately using appropriate questions and did better than a lot of litigants in person where they do not have the Claimant's impairments.

Conclusion

31. The hearing was concluded with all evidence having been heard about the liability issues. The following points were outstanding:

    31.1 The point about past decisions, estoppel and res judicata after the previous case of **Mr. XX v UKBA**. This may require further evidence to be heard and submissions made dependent upon its content;

    31.2 Written submissions are to be exchanged about liability with a further hearing to hear oral comments about those and the tribunal subject to the estoppel point should then be able to come to a decision.

Reconvened final hearing by consent after discussion of availability

32. The reconvened hearing will take place on the following dates and times:

    32.1 **18 January 2024 at 10 am** – Parties to attend in person make oral submissions;

    32.2 The remainder of 18 January 2024 and up to 2pm on 23 January 2024 will be for the Tribunal to deliberate and come to a decision about the claims. **THE PARTIES NEED NOT ATTEND ON THESE DATES AND TIMES.**

    32.3 **23 January 2024 at 2pm** will be for oral judgment to be delivered. Parties are to attend in person.

Documents

33. The Respondent is ordered to apply for and disclose when in its possession the judgment from the remitted case mentioned in the EAT decision of **Mr. XX v UKBA**.

34. The Claimant is ordered to make a reasonable search for the same judgment.

35. If the parties believe that claims **2700057/2012** and **2700058/2012** issued in 2012 may have a material effect on this Tribunal's judgment, they are to write

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to the tribunal **Forthwith** and say so as well as what steps they have taken to obtain these judgments.

36. **On or before 11 January 2024,** both parties are to have either disclosed the relevant judgments or write to the tribunal separately, copying each other in, to state what steps they have taken to try to obtain the judgment and if they have been unsuccessful, explain why and in the case of the Respondent how long it may be before the judgment is in its possession.

Written submissions

37. **By 13 December 2023,** both parties are to file their written submissions with the tribunal. When appropriate, the tribunal will then serve the arguments on the other party.

File of documents

38. Paper bundles are to be available at the hearing on 18 January 2024, in case any witnesses need to be recalled about the disclosed judgment when this becomes available.

About these orders

39. These orders must be complied with.

40. If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules.

41. Anyone affected by any of these orders may apply for it to be varied, suspended or set aside.

END

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