EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106963/2023

Held in Glasgow via Cloud Video Platform (CVP)
on 15 February & 27 March 2024

Employment Judge McManus

"A"	**Claimant** **Represented by:** **Ms R Owusu-Agyei - Counsel** **(Instructed by Prospect)**
British Broadcasting Corporation	**Respondent** **Represented by:** **Mr R Bhatt - Counsel** **(Instructed by BBC Legal)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the claimant has the protected characteristic of disability under section 6 of the Equality Act 2010.

REASONS

Introduction

1. The claim is for unlawful discrimination on the basis of the claimant having the protected characteristic of disability. At this Preliminary Hearing ('PH') I required to determine whether, in the relevant period, the claimant had the protected characteristic of disability in terms of section 6 the Equality Act 2010, in respect of the effects of the impairment of Type 2 Diabetes.

2. This PH commenced at a hearing on 15 February 2024 ('the February PH'). For reasons set out below, that PH was continued to 27 March 2024 ('the March PH'). My initial decision was issued orally, with reasons, at the

conclusion of the March PH. That decision was that the claimant did not have disability status. Separately, for reasons given orally and now referred to below, I decided that it was appropriate in the circumstances that the claimant's name be anonymised, on application of Rule 50 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Tribunal Rules').

3. The written Judgment in respect of the decision given orally was promulgated on 5 April 2024.

4. After issue of the oral judgment, I decided, on my own initiative, under Rule 73 of the Tribunal Rules, that I should reconsider my decision issued orally in respect of disability status. This Judgment includes my reconsideration of the decision on disability status issued orally at the conclusion of the March PH.

5. The reason for the reconsideration is that in the oral Judgment, having found that in the relevant period the claimant had not suffered substantial long term effects of her Type 2 Diabetes for at least 12 months, I had failed to go on to consider whether at any point during the relevant period the claimant's exhaustion (found to be an effect of her Type 2 Diabetes) affected her to the extent that that effect was likely to be a substantial long term effect (i.e. to apply EqA Schedule 1, Para 2(1)(b), also taking into account Schedule 1 Para 5(1) EqA in respect of measures taken to correct the impairment).

6. As set out in the letter issued to representatives on 5 April 2024 informing them of the reconsideration, under Rule 72(2) parties' representatives were given until 19 April 2024 to comment on the reason for reconsideration. That comment was expected to be made on the basis of what was set out in the letter to representatives of 5 April informing of the reconsideration, and the reasons given orally.

7. In the circumstances of this case, I considered it to be in accordance with the overriding objective in Rule 2 of the Employment Tribunal (Constitution and Procedure) Regulations 2013 ('The Tribunal Rules') for the procedure to be as set out in the correspondence issued to parties' representatives of 5 and 12 April 2024 and for this promulgated Judgment with written reasons to be

the reconsidered Judgment. The reasons set out in this Judgment are in line with the oral decision, but then go on to consider the application of the EqA Schedule 1, Para 2(1)(b) ERA and Schedule 1 Para 5(1).

Proceedings

8. The PH was arranged following a Case Management Preliminary Hearing ('CMPH') before EJ Whitcombe on 12 January 2024.

9. Evidence at the PH was heard from the claimant only. Reliance was placed on documents included in a Joint Bundle ('JB1'), with page numbers 1 – 113. That JB1 included Occupation Health reports on the claimant which had been instructed by the respondent and extracts from the claimant's GP records. The GP records in that JB1 referred to at the February PH had redactions.

10. During both the February PH and the March PH the claimant was often tearful and emotional. Accordingly, frequent breaks were taken during both hearings.

Impact Statement

11. At the February PH, considerable time was spent dealing with a preliminary matter raised by the respondent's representative. The respondent's representative (Mr Bhatt) had set out their position in respect of this PH in skeleton submissions lodged prior to this PH. Mr Bhatt's first submission was that the claimant's disability impact statement was 'procedurally defective' and accordingly the claimant should not be permitted to rely on it, or in the alternative, the Tribunal should attach very little weight to the document. His position was that the disability impact statement fails to comply with the Practice Direction ('PD') and Presidential Guidance ('PG') applicable for the use of witness statements in Scotland. Mr Bhatt's position was that at the CMPH in January, EJ Whitcombe had impressed upon the claimant and her representative the importance of complying with the PD and PG, being that the Tribunal may disregard the statement entirely or assign very little value to it. Mr Bhatt relied on the Note issued after that CMPH, stating that the disability impact statement *"must"* comply with the PD and PG, and containing links to those documents.

12. The primary position of the claimant's representative (Ms Owusu – Agyei) was that the impact statement should be taken as the claimant's evidence, without any examination in chief. Her alternative position was that questions should be allowed, based on that impact statement.

13. I indicated at the outset that in line with the overriding objective, I was minded to proceed with hearing the claimant's evidence in accordance with the normal procedure in Employment Tribunals in Scotland. I heard parties' representative's submissions on this preliminary matter.

14. I considered the terms of the PH Note from the CMPH on 12 January 2024 ('the CMPH Note') and noted the position at paragraph 29 of that Note. I took into account the Practice Direction and Presidential Guidance dated 3 August 2022 on the use of witness statements in the Employment Tribunal in Scotland, which indicates that that use of witness statements is not the normal position in Scotland, and sets out the factors to consider when assessing whether to use them. I decided that oral evidence would be taken from the claimant in accordance with normal procedure before the Employment Tribunal in Scotland, i.e. from her answers to questions in examination in chief, cross examination and any re-examination on matters arising from cross.

15. Following further discussion, I noted that the impact witness statement appeared to have been prepared by the claimant's representatives, rather than being in the claimant's own words. Little weight was attached to the content of that statement and the claimant's evidence was taken without her reference to that statement. That statement was generally consistent with the claimant's position in her evidence.

Supplementary Bundle

16. At the conclusion of the claimant's cross – examination at the February PH, at around 4.55pm, the claimant's representative sought that a Supplementary Bundle, running to 167 pages and containing website extracts, be allowed to be relied upon. The respondent's representative objected to that. I took into account the respondent's representative's objections. I balanced the

prejudice to the claimant of not allowing the Supplementary Bundle, with the prejudice to the respondent of allowing that Supplementary Bundle. I had already heard the claimant's evidence on her beliefs on the cause of her symptoms, based on the internet research she had carried out. There was no medical report included within the Supplementary Bundle and the additional documents from online resources could only contain general information. Given the volume of Supplementary Bundle, the timing of the application for this to be allowed and in circumstances where we had heard the claimant's evidence, including her evidence on the online research she had carried out, the prejudice to the respondent of allowing the Supplementary Bundle outweighed the prejudice to the claimant in not allowing this to be admitted as evidence. The respondent could not reasonably be expected to consider a 167 page Supplementary Bundle presented at 4.55pm, after the claimant's cross examination.

17. There was no subsequent request that that evidence be allowed and be taken into account.

Written Submissions

18. Given the time when the claimant's evidence was concluded at the February PH, it was then agreed that both parties' representatives would provide their written submissions, to an agreed timescale, with a written Judgment setting out the decision and reasons, being promulgated thereafter.

19. Following receipt of the claimant's representative's submissions, I directed that correspondence be sent to the parties' representatives in the following terms:

'In determining whether the claimant has the protective characteristic of disability, consideration will be given to The Disability: Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability must be taken into account ('the Guidance'), in particular at A7, B4, B11, B12, B13, C2, C3, D3, D22,and D23.

Parties' representatives are also asked to consider the following authorities:

- *Aderemi v London and South Eastern Railway Ltd 2013 ICR 591, EAT;*
- *Nissa v Waverly Education Foundation Ltd [2018] 11 WLUK 718;*
- *Veitch v Red Sky Group Ltd;*
- *Igweike v TSB Bank plc [2020] IRLR 267'*

Both representatives then provided their comment on these authorities.

Unredacted GP Records/Continued PH

20. Unusually, at the stage of providing his written submissions, the respondent's representative relied upon an unredacted version of the claimant's GP records. The claimant's unredacted GP records were presented as an addendum to Mr Bhatt's submissions. In summary, it was Mr Bhatt's submission that the position in the unredacted GP records detrimentally affected the claimant's credibility. On my direction, correspondence was sent from the Tribunal office to the parties' representatives in the following terms:

'EJ McManus notes the content of both representatives' submissions, and that, as set out at para 31 of the respondent's representative's submissions, an unredacted set of the claimant's GP records are said to be appended to those submissions.

The respondent's representative is asked to state what application he makes in respect of these unredacted records.

If it is the respondent's position that the unredacted GP records should be considered, they must first make an application for those records to be allowed in evidence. In such an application, they should set out the reasons why the unredacted records were not included in the Joint Bundle prepared for the Preliminary Hearing on 15 February 2024. It is noted that paragraph 29 of the respondent's submissions records that the claimant had 'initially disclosed unredacted copies of the medical records'.

If an application is made for late inclusion of the unredacted GP records as additional evidence, that should confirm when the respondent's representative were first disclosed those unredacted records.

The respondent's representative's submissions are that both the content of what was redacted and the claimant's evidence on the reasons for the redactions affect her credibility.

The decision at the Preliminary Hearing can only be made on the basis of the evidence which was before the Tribunal at that Hearing. The claimant must have the opportunity to speak to the evidence which is taken into account in making the decision. That is particularly important where credibility may be a significant factor.

If it is the respondent's representative's application that these unredacted records should be included as evidence at the Preliminary Hearing, then the claimant will require to be recalled to give her evidence on the now-unredacted sections.

The respondent's representative is asked to confirm their position in respect of any application made within 7 days.'

21. The respondent's solicitor then made an application for the unredacted records to be allowed. They confirmed that the unredacted GP records had been sent to the respondent on 30 January 2024. In all the circumstances, including parties' representatives' positions set out in the respondent's solicitor's letter to the Tribunal of 1 March 2024, and in the attachment to the claimant's solicitor's email to the Tribunal of 12 March 2024, I decided that it was in furtherance of the overriding objective in Rule 2 of the Tribunal Rules for:

- The unredacted GP records to be included in the evidence before the Tribunal at the PH on disability status.
- The claimant to be recalled to give her evidence only on the position in the now unredacted parts of those GP records, and why she considered it appropriate for those parts to be redacted.

22. The continued PH on disability status was arranged to take place on 27 March 2024 ('the March PH'). Given that the Final Hearing ('FH') in this case was scheduled to proceed in April 2024, my position to parties was that I would intend to issue an oral Judgment on the conclusion of the March PH.

23. On the conclusion of the submissions at the March PH, which was at around 4.45pm, I noted the time and that I had indicated previously that I would issue an oral judgment. It was the position of both representatives that they wished an oral judgment that evening. It was the position of both representatives that if an oral judgment, with reasons, were given on that evening, they would not intend to then request written reasons. Despite the late hour, I proceeded to consider the issues and deliver my oral judgment, which concluded at approximately 5.50pm.

24. Immediately after the oral judgment had been given, the claimant's representative asked for written reasons. Given both representatives' prior position, and that there had been no time after delivery of the oral judgment within which the claimant's representative could have obtained her client's instructions, I directed that the representative should take instructions from their client and revert within 7 days should written reasons be required.

Bundles

25. There was delay in starting the March PH because the parties' representatives had not liaised to agree what material should be before the Tribunal for the continued PH. Reliance was then made on a second Bundle (JB2), with pages 1 - 21, with the relevant sections of the claimant's GP records being unredacted.

Issues

26. I required to determine whether, at the relevant time, the claimant had the protected characteristic of disability, in terms of section 6 of the Equality Act 2010. In doing so, I required to determine:

- Does the claimant have a mental and /or physical impairment?

- If so, did such impairment have an adverse effect on her ability to carry out normal day to day activities?
- If so, was that effect substantial?
- If so, was the effect long term?

27. At the stage of submissions, it became apparent that parties were not in agreement as to the parameters of the relevant period. I therefore also required to determine the relevant period.

Burden of Proof

28. As noted by Lord Hoffman in Re B (Children) [2008] UKHL 35: *"If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof."*

29. The burden of proving disability lies with the claimant. The relevant test is 'on the balance of probabilities'.

Findings in fact

30. The following facts are material to the determination of the issues and are agreed or found on the evidence before me at this PH.

31. The claimant's GP records show that the claimant has consulted her GP practice about a number of symptoms, since 2015. The claimant's GP sought to treat the claimant's symptoms. The claimant's GP records show a history from 2021 of being certified as unfit for work because of work related stress.

32. The claimant had considered herself to be a fit individual. As part of her normal day to day activities, the claimant enjoyed practicing yoga and riding her bike. She had previously regularly cycled a 12 mile commute to work. The claimant had regularly cycled a 3 mile commute to work from her current home.

33. The Claimant has frequently taken paracetamol and / or Ibuprofen to treat or avoid headaches. Having decided to take daily painkillers, she no longer experienced the full extent of the headaches and did not then consult her GP about these headaches.

34. On 19/4/21 the claimant consulted a GP about pain in her right shoulder and intermittent foot pains. The claimant had been involved in a road traffic accident ('RTA') some 20 years previously. The Claimant consulted her GP about joint pain on a number of occasions, including on 15 April 2019 (JB1 /91) and 19 April 2021 (JB1 /90).

35. On 16/11/21 the claimant consulted a GP about vertigo symptoms. Her GP records for that date include *"3yr Hx of vertigo Sx when lies down in bed or if looks up – Sx do seem to improve if doing yoga."*

36. In December 2021 the claimant commenced hormone replacement therapy ('HRT') for treatment of menopause symptoms. The claimant experienced some benefits from HRT. The HRT medication was changed on 28/2/23. Following the commencement of that therapy, the claimant had an improvement in some of her symptoms, particularly brain fog.

37. The claimant's GP records show that on 28/2/23 the claimant was diagnosed with Type 2 diabetes mellitus. (JB1/76 & JB2/2). The record of the claimant's phone discussion on 9/3/23 with the pharmacist within the Claimant's GP practice (JB1/86). states *"New diagnosis diabetes, has done some research. Has had a stressful time recently. Has some strange symptoms which she now wonders if could be due to high blood sugars: tired, tingling in hands and headaches. Would like to lose weight…Exercises and eats well…."*.

38. On 13/3/23 the claimant attended her GP. The GP record of that visit states the problem as 'newly diagnosed diabetes'. It then includes *"upset + weepy – works for BBC and already in trouble re. time off work – lots of different issues including? ADHD"*

39. On 15/3/23, the claimant attended a physiotherapist at her GP practice. The claimant sought advice at that time because she had previously noticed that her right hip 'clicked' when she was doing certain yoga positions and because around that time, the claimant's sister was diagnosed with a medical condition which affected her hip joint. The claimant was concerned that the click may be a symptom of that condition. The entry in the claimant's GP records for 15/3/23 records the problem as *'Right hip clicking'* and states:

"Pt consent to Rx. Noticed a 'pop/click' with yoga positions lying on back, full circle of LL, from outer range abd to almost at neutral, feels a click at anterior hip. No pain, deep into groin Sx, SIJ Sx. Only in clockwise direction. Hobbies – yoga a few time a week, bike no issues. No giving way, some balance issues linked with ADHD, no neurology, no LBP, no issues donning shoes/socks, getting out of bed/car. Systemically well, no unexplained weight loss/ fevers/ fatigue / unexplained lumps or bumps – sweats improved on HRT, actively trying to lose weight with DM Dx. Has sister with Paget's disease – is wondering whether her Sx could be this, concerned will get worse.

Obs – appears well. No shift, deformity, swelling. Lx FAROM – no limit or pain. Hip FAROM no limit or pain L=R, Nil TOP around troc bursal/hip flexor complex / glut med. Tight EOR FABER L+R no pain, -ve FADIR, -ve SIJ provocation tests no pain. Hip strength 5/5 no issues, SL bridge mildly more effort R no pain. Deadbug – fatigued R. Asked to reproduce movement – evident hip flexor tendon snap with full circumference of hip AROM.

Likely insidious hip flexor click as moving through extremes of range – essentially normal examination otherwise, non-painful, full functional ROM. Provided with advice on strengthening and reassurance given. Added some specific hip flexor/ core strengthening ex's to incorporate into yoga. Happy with this, worsening advice given to make further review."

40. After diagnosis of Type 2 diabetes, the claimant initially sought to control that condition with diet. Her symptoms did not significantly improve. In March 2023 the claimant was affected by fatigue as a result of her Type 2 Diabetes. As at 15 March 2023, that fatigue / exhaustion did not affect the claimant to the extent that she could no longer exercise.

41. The respondent had referred the claimant to their Occupational Health ('OH') advisor. Following that referral, an OH report was sent to the respondent on 28/3/23 (JB1/ 97). That report accurately records the claimant's health at that time. That report includes that the claimant *"….reported being recently diagnosed with Type 2 Diabetes and ongoing work related stress, dull headaches, feels very fatigued, tingling in her hands in the morning, her vision*

is deteriorating, feels drowsy. she feels very fatigued… her vision is deteriorating, feels drowsy". It also records *"She reports difficultly coping at work and is struggling with self care, housework, cooking correspondence etc. and finding things difficult to organise. She was continuously tearful and in low mood, when narrating her circumstances today." Then, under the heading 'Response to questions', "Her health is likely to improve with appropriate treatment and an early resolution of work related circumstances."*

42. On 30/3/23 the claimant had a GP telephone appointment. The record of that appointment includes:

"Has been assessed by Occupational Health advisor – had telephone consult yesterday – suggested < A> should be off work at the moment until diabetes controlled – c/o TaTT."

43. On 30/3/23, the claimant was certified by her GP as unfit to work, backdated from 28/3/23 and until 25/4/23 (JB1/ 79), because of *"newly diagnosed Type 2 Diabetes."*

44. On 18/4/23 the claimant had a GP telephone appointment. That appointment related to menopausal symptoms. The record of that appointment noted there had been a change in HRT medication 6 weeks previously and that some changes *"Likely relates to changes in HRT."*

45. On 25/5/23 the claimant attended her GP. The record for that appointment includes:

"Hba1c has reduced substantially in 2 mths. Has made lifestyle changes. Has lost 5 pounds. Caution with sugar. Re-check hba1c and TC in 2 mnths and re-visit statin. Exercising."

46. Hba1c is a blood test for measuring blood sugar levels. It is used for diagnosing and managing Diabetes.

47. A further report was instructed by the respondent from their OH provider. They provided a report on the claimant dated 30/5/23. That report (JB1/100 – 102) records *"She also reports that she has been referred for further assessment*

of a potential neuro diverse condition. This can often be associated with the visual issues that she has been confirmed as having…". The section under the heading 'Responses to questions' includes *"It is hoped that better control of her diabetes and adjustments to support a neurodiversity will result in reduced stress and improved attendance."*

48. On 1/6/23 the claimant had a GP telephone appointment. That appointment related to menopausal symptoms.

49. On 14/7/23 the claimant had a GP telephone appointment. The record of that appointment includes the problem as being *"Wishes to discuss diabetes diagnosis and effect on diabetes. Says told by Occ health that she should not work shifts. Is diet controlled at present, awaiting f/u bloods." It records "Offered short IC due to stress but does not want this."*

50. On 26/7/23 the claimant had a telephone consultation with the pharmacist at her GP practice. Her GP records for that date record the position at that consultation, including: *"Under a lot of stress at work, feels stress has worsened diabetes. Feeling unwell when working late, causing physical symptoms. Tearful and stressed about work."*

51. On 14/8/23 the respondent's OH provider prepared a further report on the claimant (JB1 / 103 – 106). That report notes the claimant's position as suffering from fatigue. It includes *"Should the claimant's diabetes deteriorate and require medication*….". While noting that the question is a legal one, the OH provider's position in that report was that the claimant was likely to be covered by the Equality Act.

52. From 19 /8/23, the claimant was certified as unfit for work because of work related stress and Type 2 Diabetes. On 25/8/23 the claimant had a GP telephone appointment. The record of that appointment includes the problem as being "Feeling more stressed. The claimant was certified by her GP as unfit to work, backdated from 19/8/23 and until 9/9/23 because of *"Work related stress/ Type 2 diabetes".*

53. On 8/9/23 the claimant had a telephone consultation with a GP. Her GP records for that date include: *"Struggling with everything. Had covid infection and trying to recover". The claimant was certified as unfit for work from 8/9/23 – 6/10/23 due to "work related stress/Type 2 diabetes."*

54. On 6/10/23 the claimant was certified by her GP as not fit for work from 6/10/23 to 11/11/23 because of *'stress'.*

55. On 11/10/23 the claimant was certified by her GP as unfit to work, backdated from 6/10/23 and until 11/11/23 because of *"work related stress / diabetes."* From 11/10/23 the claimant was prescribed medication to control her Diabetes (Metformin). The claimant experienced some improvement in her symptoms after starting that medication.

56. On 10/11/23 the claimant had a GP telephone appointment. She was certified as unfit for work from 10/11/23 to 8/12/23 because of *"work related stress / Type 2 diabetes."*

57. On 8/12/23 the respondent's OH provider prepared a further report on the claimant (JB1 / 108 – 111). That report records the claimant's position at that time as including *"She is anxious if she will be able to maintain regular meal times, without which she feels incredibly tired and her concentration fails. She reports struggling with self-care, housework, cooking, correspondence etc and finding things difficult to organise."*

58. On 8/12/23 the claimant had a GP telephone appointment. She was certified as unfit for work from 8/12/23 to 19/1/24 because of *"work related stress / Type 2 diabetes."*

59. On 16/1/24 the claimant had a GP telephone appointment. The 'History' section of that record of that appointment states:

"Aware stress has had a huge impact on her – may have dismissed symptoms or attributed them all to stress rather than other issues

Feels has withdrawn from many things – neglected things around house over past few years so does not invite people over – increases personal isolation

Feels better now her diabetes is better controlled

Aware when she eats (esp wrong things) gets a spike and falls asleep within an hour – feels this is similar to what happened at work when she made a mistake (occurred around 30 mins after eating on a meal break – drowsy)."

60. The claimant's exhaustion is a symptom of her Type 2 Diabetes. Due to her exhaustion, she could not keep up with household tasks such as cooking and cleaning and became embarrassed about the state of her house, so stopped invited friends and family round to her home. Due to her exhaustion, the claimant stopped regularly using her bicycle to commute the 3 mile journey to work. She didn't take steps to get her car repaired because she was concerned that if driving she would fall asleep at the wheel. Her relationships with others was affected. She often fell asleep during conversations, particularly after a meal.

61. In January 2024 the claimant was prescribed an alternative medication to manage her Type II Diabetes. Since commencing that medication, the claimant has experienced an improvement in her exhaustion. She has noticed that she no longer falls asleep when sitting after a meal.

62. Exhaustion was an effect of the claimant's Type 2 Diabetes during the relevant period In addition to the exhaustion suffered as an effect of the claimant's Type 2 Diabetes, the claimant suffers or has suffered from the other 7 symptoms relied upon at this PH. During the relevant period the claimant was affected by menopausal symptoms. During the relevant period the claimant was affected by brain fog. The claimant's change in medication to control her Diabetes, which took effect in January 2024 has had a significant effect on her symptom of exhaustion.

Relevant law

63. The Equality Act 2010 ('EqA') provides for certain *'protected characteristics'.* Disability is a protected characteristic under s 4 of the EqA. The definition of 'disability' is set out in s6, as follows:

"6

(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."

64. Section 212 defines the word *"substantial"* as meaning *"more than minor or trivial".*

65. Part 1 of Schedule 1 EqA expands on the definition of disability, including the following paragraphs:

"2.

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

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

(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.

5.

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

66. The Disability: Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability ('the Guidance') must be taken into account.

Equality Act 2010 Statutory Code of Practice 2011 ('EHRC') Appendix 1

66. Paragraph 7 - ‘What if individual has no medical diagnosis?’

“There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause.”

67. Paragraphs 8 – 10 – ‘What is a ‘substantial’ adverse effect?

8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.

68. Paragraphs 11 - ‘What is a ‘long term’ effect?

‘11. A long-term effect of an impairment is one:

- *which has lasted at least 12 months; or*
- *where the total period for which it lasts is likely to be at least 12 months; or*
- *which is likely to last for the rest of the life of the person affected.’*

69. Paragraphs 14 - 15 – ‘What are ‘normal day to day activities’?

'14. They are activities which are carried out by most men or women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition.

15. Day-to-day activities thus include – but are not limited to –activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one's self. Normal day-to-day activities also encompass the activities which are relevant to working life.'

Authorities

70. In Goodwin v Patent Office [1999] ICR 302, the EAT (at paragraph 308) said:

'Section 1(1) defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a tribunal to look at the evidence by reference to four different conditions:

(1) The impairment condition. Does the applicant have an impairment which is either mental or physical?

(2) The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day-to-day activities in one of the respects set out in paragraph 4(1) of Schedule 1 to the Act, and does it have an adverse effect?

(3) The substantial condition. Is the adverse effect (upon the applicant's ability) substantial?

(4) The long-term condition. Is the adverse effect (upon the applicant's ability) long-term?'

71. The Court of Appeal in Sullivan v Bury Street Capital [2022] IRLR 159, CA summarised the relevant questions that a tribunal must ask when determining disability (at para 38) as:

(1) Was there an impairment?

(2) What were its adverse effects?

(3) Were they more than minor or trivial?

(4) Was there a real possibility that they would continue for more than 12 months or that they would recur?

72. *'Likely'* means *'could well happen'* (Boyle v SCA Packaging Ltd [2009] UKHL 37, [2009] IRLR 746, [2009] ICR 1056, per Lord Hope at para 4, and Lord Rodger at para 42, Baroness Hale at paras 70–72 (with whom Lord Neuberger agreed at para 81), Lord Brown at para 77).

73. The assessment of how long the adverse effect(s) of an impairment have lasted, or how long they are likely to last, is to be made at the time of the alleged discrimination (All Answers Ltd v W and another [2021] IRLR 612, CA, para [26] per Lewis LJ).

74. In Royal Borough of Greenwich v Syed EAT 0244/14 Mr Justice Wilkie observed: *'[T]he question which the tribunal has to ask itself is not whether the mental health impairment was likely to last at least 12 months but whether the substantial adverse effect of the impairment was likely to last more than 12 months. That is a different question.'*

75. The test is a functional and not a medical test. In Aderemi v London and South Eastern Railway Ltd 2013 ICR 591, the EAT commented on the definition of 'substantial' (paragraph 14):

"Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-today activities, a

Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."

76. And at paragraph 15:

"As a matter of first principle when considering the statute, this requires the focus of the Tribunal to be not upon that which a Claimant can do but that upon which he cannot do. It is what he cannot do that requires to be assessed, to see whether it is truly trivial and insubstantial or whether it is not."

77. In determining whether an adverse effect is substantial, a tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability the claimant would have if not impaired. That is the approach taken by the EAT in Aderemi, as described at paragraphs 16 - 17:

"16. We take that to be the approach which a reading of the statute would require. It is the approach as we see it which was adopted, albeit under the Disability Discrimination Act 1995, in Paterson [Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522, EAT]. There, the headnote rightly reads: "The only proper approach to establishing whether the disadvantage was substantial is to compare the effect of the disability on the individual. This involves considering how he in fact carries out the activity compared with how he would do it if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial.

17. By "compare the effect" we think it means "assess the effect".'

78. In Nissa v Waverly Education Foundation Ltd [2018] 11 WLUK 718, then HHJ Eady QC held, in allowing the claimant's appeal from the ET, that the ET had erred when: *"In determining whether the effect of the Claimant's impairments was "long-term", the ET had focused on the question of diagnosis rather than the effects of the impairments and had adopted a narrow approach, rather than looking at the reality of risk - whether it could well happen - on a broad view of the evidence available."*

79. The Northern Ireland Court of Appeal in Veitch v Red Sky Group Ltd [2010] NICA 69 set out guidance on whether medical evidence is necessary (paragraph 19):

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

80. In Igweike v TSB Bank plc [2020] IRLR 267, the EAT (HHJ Auerbach) set out a useful review of the case law and found that

"The Tribunal had not erred in not finding that the Claimant's grief reaction amounted to an impairment. It had not made the errors of thinking that there

had to be a clinically well- recognised condition, or that an impairment could only be proved by medical evidence. It had properly considered that a natural reaction to adverse life events does not necessarily bespeak an impairment."

81. At paragraph 16 of that decision, HHJ Auerbach stated:

"16. I referred the parties to the decision in Royal Bank of Scotland v Morris UKEAT/0436/10 and, in particular, paragraph 63 of the Judgment so that the parties might make submissions with it in mind. The case sets out that in the case of mental impairment involving depression or cognate impairment contemporaneous medical notes or reports are not likely to be of assistance in answering questions about long term conditions. I consider that this authority demonstrates that the tribunal must be clear that it has sufficient evidence on issues relating to long term effects. That evidential basis must necessarily include expert evidence in circumstances where the tribunal is unable to draw clear conclusions from medical notes alone."

82. At paragraph 35, it was noted that:

"Walker v SITA Information Networking Computing Ltd [2013] UKEAT/0097/12 is one of a number of authorities which make the point that there is no requirement to identify the cause of the impairment although, if there is a lack of an apparent cause, that could potentially be regarded as evidentially significant, for example to an issue of whether a complainant's reported symptoms were genuine."

That referred to submissions made, as reflected at paragraph 8, in reference to *"…..the error identified in Walker v SITA Information Networking Computing Ltd [2013] UKEAT/0097/12 of '….taking the approach that disability cannot be established in such a case unless the Tribunal can identify the cause of the postulated impairment, and conclude that this was a clinically well-recognised medical or psychiatric condition."*

83. Paragraph 40 of *Igweike*, quotes paragraph 55, of the EAT's decision in Royal Bank of Scotland Plc v Morris [2011] UKEAT/0436/10:

"55. The burden of proving disability lies on the claimant. There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and 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 that reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression (see in particular paras. 18-20, at pp. 482-4).'

84. HHJ Auerbach concluded at paragraphs 50 – 51 of Igweike:

"50. Secondly, while there is no longer a rule of law that a mental impairment must be clinically well-recognised, nor is there any rule that such an impairment cannot ever be made out without medical evidence, nevertheless, as the discussion in both J v DLA Piper UK LLP and Morris explains, it is a practical fact that, in some cases of this type, the individual's own evidence may not be sufficient to satisfy the Tribunal of the existence of an impairment. In some cases, even contemporary medical notes or reports may not be sufficient, and expert evidence prepared for the purposes of the litigation may be needed. To say all of this is not to introduce either of these legal heresies by the back door. The question is a purely practical or evidential one, which is sensitive to the nature of the alleged disability, the facts, and the nature of the evidence, in the given case.

51. Returning to this Decision, I see nothing in the Judge's remarks, at the end of paragraph 3 or in paragraph 28, to suggest that he thought that, as a matter of law, medical evidence of a certain kind was a necessary requirement to establish an impairment. I also see no basis at all to infer that the Judge thought that it was still the law that a mental impairment had to be a clinically well-recognised illness. It seems to me that all that the Judge was doing, in paragraph 3, was remarking on the fact that there was, in this case, no contemporaneous medical

evidence from the relevant period, which might, had it been present, have been relied upon evidentially to support the Claimant's case that there was an impairment."

85. Even where there is a jointly instructed medical expert, ultimately the issue of whether a claimant has an impairment that amounts to a disability in terms of the Equality Act 2010 is one for the Employment Tribunal to determine (*McKechnie Plastic Components v Grant EAT 02824/08*).

Equal Treatment Bench Book

86. In dealing with these proceedings I took into consideration the relevant guidance in the Equal Treatment Bench Book ('the ETBB'), in particular I noted the section on 'Diabetes' in the 'Glossary of Impairments'. Steps were taken to ensure that breaks were taken as required.

87. I noted:

"This Glossary does not purport to give a medical diagnosis or listing of symptoms. It is derived from information available on sources such as NHS Choices or specialist disability organisations. The Glossary is intended only to provide an initial introduction, highlighting potential areas of difficulty in court proceedings where adjustments might be needed.

The purpose of the Glossary is not to provide a basis for deciding:

Whether an individual meets the definition of 'disability' under the Equality Act 2010…."

88. I did not use the ETBB as a basis for determining the issue in this case. The ETBB does not list symptoms likely to be caused by Type 2 diabetes.

Submissions

89. Both representatives prepared written submissions, submitted to agreed timescales, following the February PH, and then further submissions at the March PH.

90. Both representatives were given the opportunity to provide written comments on the reconsideration, and did so by 19 April.

91. The claimant's representative (Ms Owusu – Agyei) initially relied on:

- College of Ripon & York St John v Dr C C Hobbs [2002] I.R.L.R. 185, EAT
- All Answers Ltd v W and another [2021] IRLR 612, CA
- Sullivan v Bury Street Capital [2022] IRLR 159, CA

92. In summary, it was Ms Owusu – Agyei's initial submission that the claimant had the protected characteristic of disability on consideration of 8 symptoms relied on as effects of the impairment of Type 2 diabetes.

93. On my direction, both representatives provided their comments on:

- Aderemi v London and South Eastern Railway Ltd 2013 ICR 591, EAT ;
- Nissa v Waverly Education Foundation Ltd [2018] 11 WLUK 718;
- Veitch v Red Sky Group Ltd [2010] NICA 69
- Igweike v TSB Bank plc [2020] IRLR 267'

94. In addition to commenting on those authorities, the respondent's representative (Mr Bhatt) relied on the following authorities:

- Goodwin v Patent Office [1999] ICR 302;
- Woodrup v London Borough of Southwark [2003] IRLR 111
- Primaz v Carl Room Restaurants Ltd t/a McDonald's Restraints Ltd and others [2022] IRLR 194;
- Boyle v SCA Packaging Ltd [2009] ICR 1056,
- McDougall v Richmond Adult Community College [2008] ICR 431, CA).

- Morgan Stanley International v Posavec EAT 0209/13
- All Answers Ltd v Mr W [2021] IRLR EWCA Civ 606
- Square Global v Leonard [2020] IRLR EWHC 1008 (QB)

95. In summary, it was Mr Bhatt's initial submission that the respondent did not accept that the claimant had provided sufficient evidence to establish that she was disabled pursuant to s6 EqA, by virtue of her Type 2 diabetes.

96. In addition to commenting on those authorities, the claimant's representative then relied on the following authorities:

- Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 (specifically paras 14 – 15)
- J v DLA Piper UK LLP [2010] IRLR 936

97. Both representatives made reference to the statutory Guidance.

Comments on the evidence

98. Generally, there are a number of factors taken into account when making findings in fact. These factors include:

- internal consistency (i.e. that the individual's version of events does not change throughout their evidence);
- consistency of oral evidence with contemporaneous documentary evidence;
- consistency of oral evidence with written case;
- consistency with evidence from any other witnesses
- openness in answering questions
- any evasion or avoidance in answering questions
- willingness to make appropriate concessions
- demeanour and character (both to be approached with caution)

99. Consistency is an important aspect in the assessment of evidence. In making our findings, we took into account the guidance in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 2560 (Comm). There, following comments that:

".. The effect of this [litigation] *process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."*

And that:

"..such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth."

100. It was concluded that: *"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

101. It is well established *that 'contemporary documents are always of the utmost importance*' (Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, at para 431). Applying the above guidance, greater significance was placed on the position in relevant contemporaneous documents, rather than versions of events presented from memory.

102. The extent of the medical evidence before me was the claimant's GP records and the Occupational Health reports. The claimant conceded that she did not have medical reports or other evidence included in the Bundle to support her position that the symptoms she was describing can be caused by Type 2 diabetes. The claimant's position was that she *'didn't know'* that she had to provide such evidence. The claimant was professionally represented throughout. On a number of occasions during her evidence, the claimant referred to having conducted online research. For the reasons set out above, under the subheading 'Additional Bundle', and because after the February PH there was no further request for that Additional Bundle to be included, I did not consider the content of that Additional Bundle.

103. The claimant spoke to the position in her medical records. There was then medical evidence before me. The claimant's GP records show a diagnosis of Type 2 diabetes. There was no evidence before me to contradict that diagnosis.

104. The claimant made some concessions. The claimant conceded that some of her symptoms were more likely to have been caused by Menopause, (undiagnosed) neurodiversity and/or stress. The claimant accepted that she had had some benefit from commencing HRT. That indicates that at least part of the cause of some of her symptoms was the menopause. The claimant's representatives relied solely on Type 2 diabetes in respect of disability status. The PH Note from the January CMPH makes that clear. Although in Ms Owusu – Agyei's submissions, reliance was placed on all 8 symptoms experienced by the claimant, all of which were relied upon as being an effect of the claimant's Type 2 Diabetes. All of these symptoms were relied upon by Ms Owusu – Agyei as having a substantial adverse effect on the claimant. That position was not supported by the claimant's position in her evidence. In her evidence at the February PH the claimant conceded that at least some of the 8 symptoms may have been caused by something other than her Type 2 Diabetes. She did say that she considered that some of the symptoms (notably stress) were exacerbated by her Type 2 Diabetes. No medical evidence was relied upon to support that position. In her evidence, the

claimant did not rely on the 8 symptoms as each individually having a substantial adverse affect on her.

105. In deciding that the claimant's exhaustion was an effect of her Type 2 Diabetes, I attached weight to the claimant's evidence that there had been a marked improvement in her symptom of exhaustion since beginning new medication for her Type 2 diabetes. At the February PH, the claimant's evidence was that *'a few weeks ago'* her GP changed her medication from Metformin. The claimant volunteered that information, during examination in chief, when taken to the list of medications in her medical records. She described being surprised when after starting that new medication she didn't regularly fall asleep after a meal. At the February PH, the claimant did not give evidence on improvement of any other symptoms since that medication change. The claimant's position at the March PH was that her cognitive function improved after commencing diabetes medication, with the biggest change being after commencement of the new medication in January 2024. It was further the claimant's evidence at the March PH that *'virtually all'* of the symptoms she relied on as being caused by her Type 2 Diabetes had improved since starting the new medication in January 24. Given the short timescale between the time of the medication changing and these PHs, and taking into account that it is likely that any effect of the new medication would not be immediate, I did not find that evidence to be inconsistent. However, the claimant did not prove on the balance of probabilities that all 8 of the symptoms relied upon were effects of her Type 2 Diabetes. On the balance of probabilities, the only symptom which the claimant proved was likely to be an effect of her Type 2 Diabetes was exhaustion / fatigue.

106. It was agreed between the parties that some of what had been redacted from the GP records was not relevant and had been properly redacted. I accepted the claimant's position at the February PH that some of what was redacted was redacted by the claimant because it contained reference to some of her family members and their medical conditions. The claimant's position at the March PH was *"in my opinion, when I redacted them I didn't see any*

relevance." I accepted the claimant's position that the redactions done by were "*not done with any malicious intent".*

107. The findings in fact set out above include findings made following the March PH, on sight of the further redacted GP records. I accepted the respondent's representative's position that the entry in the claimant's GP records of 15 / 3/ 23 is relevant to the issue before me. I accepted the claimant's position that she did not seek to mislead the Tribunal by redacting that section of her GP records, or any other section. Although I accepted the claimant's position at the March PH that the reason for her making the redactions was because she saw them as unrelated to the issue for this Tribunal, on the face of the entry at 15/3/23, it is relevant to the issue before me. I accepted the respondent's representative's reliance on Square Global v Leonard [2020] EWHC 1008 (QB), that the responsibility in respect of the extent of the redactions in the Bundle lies with the representatives. The unredacted GP records were in the hands of both parties' solicitors in January 2024, but were not included in the Joint Bundle for the February PH. On application of the overriding objective in Rule 2 of the Tribunal Rules, it is in the interests of justice for the GP records to be considered, to the extent unredacted at the March PH.

108. The previously redacted entry in the claimant's GP records for 15/3/23 is relevant to the issue before me because that entry references *'fatigue'.* On the face of it, fatigue is relevant to the effect of exhaustion which claimant relies upon. Even if taken at the highest point of the claimant's evidence, that entry is relevant to the extent of the effect of exhaustion on the claimant's day to day activities. Riding a bike and yoga were normal day to day activities for the claimant. That is why it is relevant for me to consider the effect of the claimant's Type 2 Diabetes on these activities. The record at 15/3/23 is a contemporaneous record of what the claimant was reporting to a health professional at the time. I accepted that the 'hip click' was a historic matter and that the claimant had only sought medical input because of her sister's diagnosis of a medical condition affecting her hip. I accepted that the mention of her sister was part of the reason why the claimant had redacted that 15/3/23 entry. At the March PH the claimant admitted that she was doing some yoga

in March 2023. That is what is indicated in that 15/3/23 record. At the March PH the claimant conceded that her evidence at the February PH had been that she had been unable to do yoga.

109. The entry in the claimant's GP records in respect of the telephone conversation with the GP practice's pharmacist on 8/3/23 evidences that the claimant was exercising as at that time. That is consistent with the interpretation of the record on 15/3/23 that the claimant was doing yoga in March 2023.

110. One of the symptoms relied upon by the claimant as being caused by her Type 2 Diabetes is brain fog. Although I did not have the evidence before me to make a finding in fact that the cause of the claimant's brain fog was her Type 2 Diabetes, I accepted and I do make a finding that the claimant suffers and has suffered from brain fog. As suggested by the respondent's representative, that brain fog may have been caused by the claimant's menopause and / or be a 'Long Covid' symptom. The claimant did not provide sufficient evidence to prove on the balance of probabilities that her symptom of brain fog was caused by her Type 2 Diabetes.

111. I carefully considered the evidence before me in this case. I took into account the documentary evidence and the claimant's own evidence. I took into account that she was unclear on some dates and that she has brain fog. I did not have the benefit of a report from the claimant's GP. There was no oral evidence other than the claimant's own evidence. In considering the GP records, I proceeded on the basis that, on the face of it 'last issued' means the date when the medication was last issued by the GP and 'change' means a change in medication, including a change in dosage of the same medication, and a change in the time when that medication is to be taken. That is the interpretation which I took on the *prima facie* reading of the medical records, and without any expert evidence supporting the respondent's representative's interpretation. As there was no report from the claimant's GP and no oral evidence from any medical expert I did not have the benefit of any expert interpretation of the medical records.

112. The claimant's evidence was that she had stopped driving from January 2023, initially for financial reasons, because her car had not passed its' MOT test. Her evidence was that later she did not take steps to get her car back *'on the road'* because she was concerned that her exhaustion was affecting her to the extent that she was not fit to drive a car. The claimant was not clear about when she began to have that concern. Her evidence at the February PH was that she became concerned about falling asleep at the wheel or losing concentration and ending up on *"auto pilot"*, because of her exhaustion symptoms. The claimant's evidence at the February PH was that she experienced lapses in memory and concentration, her communications with family and friends was affected by her frequently falling asleep during conversations, she was unable to complete DIY projects she had started in her home, she was unable to keep up with household chores and as a result, she was too embarrassed to invite friends or family to her home, her social life was affected. All of that was consistent with the position in the OH report of March 23. That evidence was consistent with the documentary evidence in the GP records and the OH reports. That evidence in relation to driving was not consistent with the claimant's evidence at the February PH that her symptoms of exhaustion reached their worst as at April to September 2022, but had started before that date. Although I found the claimant to be a credible witness, I did not find her evidence to be entirely reliable in respect of her recollection of dates.

113. I had to decide this case based on the evidence before me. I could not ignore the content of the entry at 15/3/23 in the claimant's GP records. Even if it was the case that the claimant felt well on that day, as was her position at the March PH, that record is not consistent with, as at 15/3/23, there having been a significant effect which had lasted for at least 12 months. I also took into account that the record of 15/3/23 is consistent with the position in the record of the phone appointment on 9/3/23 that the claimant '*exercises and eats well'* On the evidence in the GP records, as at 15/3/23, the effect of the claimant's exhaustion on her day to day activities was not significant, to the extent that she was still able to exercise. On that basis, as at March 2023, the exhaustion

caused by the claimant's Type 2 Diabetes did not have a significant effect on the claimant's normal day to day activities

114. The claimant's evidence on the effects of her exhaustion were that she would fall asleep during conversations with family and friends, and that for a period of over a year she did not drive her car and did not use her cycle, because of her exhaustion. That evidence was unchallenged at the February PH. To an extent, that evidence was challenged at the March PH.

Decision

Relevant Period

115. The respondent's position was that the relevant period was from 10 March 2023 to 15 August 2023. At the March PH, it was understood that the claimant's representative's position was that the relevant period was from June 23 and continued until submission of the ET1 on 14 November 2023.

116. I took into account the position at paragraph 20 of the CMPH Note, that:

'The sole live issues in relation to the s.15 claim are therefore:

a. whether the respondent's belief that the claimant may have committed an act of misconduct arose from the claimant's disability; and

b. if so, whether the decision to commence disciplinary proceedings was a proportionate means of achieving a legitimate aim.

It was agreed that the respondent's case in this regard was sufficiently set out in the response.

117. On the basis of para 8 of the paper apart to the ET1 (JB1 / 15), the second disciplinary action taken by the respondent against the claimant was in connection with an incident on 7 June 2023. On that basis, and on application of (All Answers Ltd v W and another [2021] IRLR 612, CA, on the current case, the relevant dates are from 7 June 2023 to 14 November 2023. On those dates, the relevant period is from 7 June to 14 November 2023.

Disability status

118. While noting that the focus is on the statutory definition, I had regard to the statutory Guidance on matters to be taken into account when determining questions relating to the definition of disability. I considered this Guidance in its entirety. I make reference below to paragraphs in the Guidance which I considered to be particularly relevant.

Did the claimant have a physical or mental impairment?

119. The Guidance includes the following paragraphs:

> *"A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.'*
>
> *"A7. It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is expressly excluded from the scope of the definition of disability in the Act. What it is important to consider is the effect of an impairment, not its cause – provided that it is not an excluded condition."*

120. Although the examples in that Section A show that the focus should be on the effects of the impairment, rather than the diagnosis of the condition, in the circumstances of this case, I did not accept that Ms Owusu- Agyei's submissions following the February PH that I must simply consider the effect of the impairment, not the cause. It is very significant to my decision that at the CMPH, where the claimant was professionally represented, the claimant's position on disability status was presented as relying only on the effects of Type 2 Diabetes. The respondent is entitled to rely on that position. I did not accept Ms Owusu – Agyei's submission that the question of disability is not confined by any medical diagnosis or the way in which a claimant confines her claim at a case management hearing.

121. Although Type 2 Diabetes was the only impairment which the claimant relied on in terms of having an impairment under section 6 EqA, her evidence was that she also suffered from a number of other conditions, including menopause, Meares Irlen Syndrome, dyslexia and an undiagnosed neurodiversity (possibly ADHD and / or ASD). The consequences of the limitation of the claimant's position at the CMPH to reliance only on Type 2 Diabetes was that I required to consider whether the claimant met the statutory definition under section 6 with regard to my findings on the effects of the impairment of Type 2 Diabetes. I had to first consider what effect(s) the claimant had proved were caused by Type 2 Diabetes. I required to make findings in fact on whether the symptoms relied upon by the claimant did arise from her Type 2 diabetes, with regard to evidence before me and the burden of proof being on the claimant.

122. I accepted Mr Bhatt's submission that where a claimant's evidence on disability concerns a number of potential conditions and it is unclear which conditions may have led to their various symptoms, it is important that the Tribunal makes clear findings as to the nature of the disability and which symptoms are attributable to it. On the evidence before me, the only symptoms which the claimant proved, on the balance of probabilities, was attributable to the claimant's Type 2 diabetes was exhaustion.

123. I accepted Mr Bhatt's reliance on Primaz v Carl Room Restaurants Ltd t/a McDonald's Restraints Ltd and others [2022] IRLR 194, EAT that it is not enough that a claimant believes that an impairment has an adverse effect. Mr Bhatt relied in particular on HJJ Auerbach's comment at paragraph 62 of *Primaz.* The particular circumstances of that case are relevant to the EAT's decision. It is appropriate to consider that whole paragraph:

> *"62. I agree with Ms Anderson that the test is objective, as it is one of causation. The impairment has to be found by the tribunal to, in fact, have had the requisite effect. In many cases, the answer will be straightforward and uncontroversial. But where there is a dispute about it, then whether the impairment does or not does not have the*

claimed effect must be determined by the tribunal on the evidence before it. It is not enough that the claimant truly believes that it does. The tribunal must decide for itself. This means that, in a case where the claimant asserts that engaging in a certain activity will risk triggering or exacerbating some adverse effect of the impairment itself, such as bringing on a seizure or an adverse skin reaction or something of that sort, and that is disputed, the tribunal must consider whether it has some evidence that objectively makes good that contention."

124. HJJ Auerbach went on to state at paragraphs 73 - 74:

"73. Ultimately, I do not think the fact that the claimant acted in accordance with her own case and beliefs could be regarded as sufficient properly to make good the chain of causation, so as to establish that the epilepsy or the vitiligo had the requisite effect as required by section 6. To put it in the language of causation, on the evidence and findings made by the tribunal, these behaviours on the claimant's part broke the chain of causation. To put it another way, the evidence that she adopted these behaviours did not add anything to her true underlying case, which was that the epilepsy and vitiligo were liable to be exacerbated by these activities, a case that the tribunal undoubtedly rejected."

I have been mindful of Mr Brown's submission, that the respondent was arguing for a narrow minded view of disability, and that tribunals (and the EAT) should not fall into such a trap. But, whatever differing views there may be about its strengths and weaknesses, the tribunal was obliged to apply the legal definition of disability that Parliament has adopted. I do not think its findings that the claimant acted out of a genuine conviction were enough properly to support the conclusion, for the purposes of the section 6 definition, that the impairments of epilepsy and/or vitiligo had the requisite adverse effects on the activities in question. Ground 1 accordingly succeeds.'

125. I took into account Mr Bhatt's reliance on Morgan Stanley International v Posavec EAT 0209/13. In that case, the claimant pleaded 2 conditions in support of her contention that she was disabled. In that case, the Tribunal found that her evidence amounted to a *"pot-pourri of different conditions and symptoms which might or might not have been attributable to the 2 pleaded conditions".* The EAT held (at paragraph 28) that in those circumstances it was incumbent *"on the Employment Judge in his reasons to identify what it was the Claimant was disabled by during the relevant period and what symptoms were or were not attributable to the pleaded or other conditions, in the workplace or elsewhere."*

126. I did not accept Mr Bhatt's submission that the claimant had failed to provide rudimentary medical evidence such as an official diagnosis for type 2 diabetes and relevant blood test results. The GP records are medical evidence and confirm the diagnosis of Type 2 Diabetes. I accepted that there is no medical evidence before more to support the claimant's position that all 8 symptoms which she relies on were caused by her Type 2 Diabetes. On the evidence before me, the claimant has not met the burden of proof in that regard. To that extent, I accepted Mr Bhatt's reliance on Woodrup v London Borough of Southwark [2003] IRLR 111. There was no medical evidence before me to support the claimant's position on all of the deduced effects of the claimant's condition. The findings on fact were made on the basis of the claimant's evidence, her GP records (redacted to the extent agreed at the March PH) and the OH reports.

127. I accepted Ms Owusu – Agyei's reliance on *College of Ripon & York St John v Dr C C Hobbs [2002] I.R.L.R. 185, EAT*, particularly Lindsay J position at paragraphs 32-33:

"Nor does anything in the Act or the Guidance expressly require that the primary task of the ascertainment of the presence or absence of physical impairment has to, or is likely to, involve any distinctions, scrupulously to be observed, between an underlying fault, shortcoming or defect of or in the body on the one hand and evidence of the manifestations or effects thereof on the other. The Act contemplates (certainly in relation to mental impairment) that

an impairment can be something that results from an illness as opposed to itself being the illness — Schedule 1 para 1 (1). It can thus be cause or effect. No rigid distinction seems to be insisted on and the blurring which occurs in ordinary usage would seem to be something the Act is prepared to tolerate. Nor is there anything there to be found to restrict the Tribunal's ability, so familiar to Tribunals in other parts of discrimination law, to draw inferences…"

"It was accordingly appropriate in our view, and not simplistic, for the Tribunal (using the language both of the Employment Tribunal itself in the case before us and the language of Rugamer) to ask itself whether there was evidence before it on which it could hold, directly or by ordinary reasonable inference, that there was something wrong with Dr Hobbs physically, something wrong with her body?"

128. When considering whether the symptoms relied upon were effects of the claimant's Type 2 Diabetes, I attached significance to the claimant's evidence of improvement since commencing new medication in January 2024. At the February PH the claimant's evidence on her improvement since commencing that medication was only in respect of exhaustion. At the February PH, the claimant's evidence on that improvement was not challenged by the respondent's representative in cross examination. They relied on the claimant having not provided any documentary evidence to support her position that the medication had recently changed. Following the March PH, the respondent then relied on their general position that the claimant was not credible because of the redactions which she had made to her GP records and because her evidence at the February PH was inconsistent with the further unredacted GP records. It was not contested that there had been an improvement in the exhaustion symptom since the change in medication.

129. On the evidence before me, I found, on the balance of probabilities, that the claimant's symptom of exhaustion had improved as a result of the change in medication to control her Type 2 Diabetes, in January 2024. On that basis, I decided that the exhaustion symptom and resultant effects of that symptom on the claimant's day to day activities were more likely than not to be an effect of (i.e. to be caused by) her Type 2 diabetes. On the evidence before me and

on the balance of probabilities the claimant did not prove that all 8 symptoms which she relied upon were effects of Type 2 diabetes. On the evidence before me, the only symptom which the claimant proved was an effect of her Type 2 Diabetes is exhaustion. That is not to say to that some or all of the other symptoms may be related to her Type 2 Diabetes, but the burden of proof is on the claimant and she has not provided evidence to me to prove that the other 7 symptoms relied upon are effects of her Type 2 diabetes. I accepted the respondent's representative's submission that on the evidence there may be other causes for the other 7 symptoms. Although the claimant's evidence was that she did suffer from the other 7 symptoms, on her own evidence, those symptoms did not each have the same significant impact on the claimant's day to day activities. Had I been satisfied that all 8 symptoms had been an effect of the claimant's Type 2 diabetes, I would have considered the cumulative effect of them (with regard to the statutory Guidance Section C2). In circumstances where the claimant did not prove that the other 7 symptoms relied upon were caused by her Type 2 Diabetes, I did not then consider the effect of the other 7 symptoms on a cumulative basis. In these circumstances it was then not necessary for me to list all those other symptoms in this decision.

130. I did not accept Ms Owusu – Agyei's submission at the March PH that I should find that the claimant was disabled by way of the effects of Type 2 diabetes, and/or impairments that include Type 2 diabetes, at the material times. I did not accept her submission that I should look at all symptoms and determine if the claimant was disabled. The parameters of the claimant's case were clearly limited at the CMPH. It was therefore not appropriate for me to consider whether the claimant met the statutory definition in section 6 EqA because of stress and / or menopause. I accepted Mr Bhatt's submission that the respondent is entitled to rely on the position of the claimant's solicitor at the January CMPH. The Note issued following that CMPH clearly records at paragraph 17:

'The claimant now confines her case to the effects of Type 2 diabetes.'

131. The claimant had the physical impairment of Type 2 diabetes. That condition was diagnosed on 28/2/23. The claimant had that physical impairment in the relevant period (June – November 2023).

132. Having found on the balance of probabilities that the symptom of exhaustion was caused by the claimant's Type 2 diabetes, I considered the evidence on the effect of exhaustion on the claimant's normal day to day activities.

Did that impairment have an adverse effect on the claimant's ability to carry out normal day-to-day activities?

133. I had regard to the meaning of *'normal day to day activities'* in the Statutory Guidance, particularly at D2 – D6, D22 and D23. I had regard to the evidence, particularly as referenced in the 'Comments on evidence' and 'Findings in Fact' sections above. On the evidence before me, the claimant's exhaustion symptom had an adverse effect on her ability to carry out her normal day to day activities. The claimant's normal day to day activities included household chores such as cleaning, household DIY tasks, cooking, cycling (including cycling 3 miles commute between work and home), driving a car, yoga, having friends and family over to her house to socialise, having conversations with family and friends and working.

134. Yoga and cycling were part of the claimant's normal day to day activities. Those activities included cleaning, cooking and socialising. I considered the evidence on the effect of the claimant's exhaustion on her day to day activities (not limited to yoga and cycling). The claimant proved, on the balance of probabilities, that in the relevant period (June – November 2023) her normal day to day activities were affected by her exhaustion, which was an effect of her Type 2 Diabetes

Was that effect substantial?

135. Section B of the Guidance covers the meaning of 'substantial adverse effect'. I had particular regard to the Guidance at B1, B4, B9, B11, B12 and B13.

136. I took into account the approach in Aderemi, where the EAT said:

"The tribunal then had to bear in mind the definition of substantial under s.212(1) which was more than minor or trivial. Unless a matter could be classified within the heading "trivial" or "insubstantial" it had to be treated as substantial."

137. I had regard to the evidence, particularly as referenced in the 'Comments on evidence' and 'Findings in Fact' sections above. On the evidence before me, the exhaustion caused by the claimant's impairment of Type 2 Diabetes had a substantial adverse effect on her ability to carry out her normal day-to-day activities. I accepted that the claimant's day to day activities became limited because of her exhaustion, to an extent which was more than minor or trivial.

Was the substantial adverse effect long term?

138. I accepted Mr Bhatt's submission that the issue as to how long an impairment is likely to last should be determined as the date of the discriminatory act and not the date of the tribunal hearing (reliance on McDougall v Richmond Adult Community College [2008] ICR 431, CA).

139. On the evidence before me, taking into account the entry in the claimant's GP records at 15/3/23, the claimant did not prove that as at 15 March 2023 the effect of exhaustion from her Type 2 diabetes had had a significant long term effect on her day to day activities. In my oral Judgment given at the March PH, in considering the evidence before me on the effect on the claimant of her symptom of exhaustion in the period from June 23 to November 23, I found that the effect of the impairment was not long term because, on the face of the evidence in the GP records from 15 March 2023, by the relevant period the substantial adverse effect had not lasted for at least 12 months (EqA 2010 Part 1 of Schedule 1 EqA). That was the basis for my decision issued in my oral judgment at the March PH, and my conclusion that the claimant then did not have the protected characteristic of disability in the relevant period.

140. As set out in my oral judgment, I did not find that the claimant had been dishonest before me. I accepted that she has sought to properly give her evidence to this Tribunal. I accepted that the claimant is affected to the extent that she claims. What the claimant had not proved is that all 8 symptoms relied

upon were caused by the claimant's Type 2 Diabetes, or that the substantial effect had, by the relevant period, lasted at least 12 months. I accepted that the effects were variable.

Reason for reconsideration

141. The above reasons set out in this Judgment are in line with the oral decision issued at the conclusion of the March PH. In making that decision, I failed to consider the application of the EqA Schedule 1, Para 2(1)(b) and Schedule 1 Para 5(1): whether in the relevant period the substantial effect of the claimant was likely to last at least 12 months. I now make that consideration, with regard to the parties' representatives' submissions received in response to letter from the Tribunal of 5 April 2024.

142. I have considered the respondent's representative's objection to the reconsideration, as set out in their correspondence to the Tribunal of 19 April 2024. My reconsideration is in the interests of justice because in finding that in the relevant period the claimant had not suffered substantial long terms effects of her Type 2 Diabetes I had not properly considered the definition of 'long term' in terms of Schedule 1 para 2(1) (b) EqA. I reached that decision only on the basis that in the relevant period the substantial effect of exhaustion had not lasted for at least 12 months.

143. Having decided that it is in the interests of justice for my decision to be reconsidered, I have considered the representatives' submissions on the reconsideration issue.

144. In my reconsideration I noted the questions set out in letter to the parties' representatives of 5 April, being:

    (i) At any point during the relevant period (from June to November 2023) did the claimant's exhaustion (found to be an effect of her Type 2 Diabetes) affect her to the extent that that effect was likely to be a substantial long term effect? - Yes

    (ii) If so, from what date? – 11 October 2023

145. In making this decision, I have carefully considered the guidance from the Court of Appeal in All Answers Ltd v Mr W [2021] IRLR EWCA Civ 606, particularly at para 26:

"26. The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".

27. Against that background, the central issue in the present case is whether the employment tribunal did assess whether the effect of the claimants' mental impairment, assessed as at 21 and 22 August 2018, was likely to last for at least 12 months."

146. I accepted Ms Owusu – Agyei's submission that with regard to the guidance in All Answers, the determination of disability status should be with regard to

the time of the alleged discrimination. It is my understanding that no alleged discrimination is said to have occurred from March to June 2023. On the basis of the position in the paper apart to the ET1 alone (as I did not hear any evidence on the alleged discrimination), as I understand it, the alleged discrimination is said to have occurred in the period from 7 June – 14 November 2023 (being the date of submission of the ET1) The period from 7 June to 14 November 203 is then the relevant period. It is within those dates that the allegedly discriminatory acts are said to have occurred. I had regard to my findings on the substantial effect of exhaustion on the claimant's normal day to day activities, within those relevant dates (referred to as 'the relevant period'). I note that the relevant wording with regard to the extent of the effect is 'substantial' rather than 'significant'. On application of All Answers, to the circumstances of this case, in this reconsideration I have considered the question of disability status with regard to the application of the relevant law between the relevant dates (i.e. in the relevant period), rather than in respect of a particular date (within that period or otherwise), as envisaged in the questions put to representatives in the letter of 5 April.

147. The claimant was unclear as to dates. The OH reports were uncontested and are significant in respect of the effect on the claimant's normal day to day activities (not just yoga and cycling). From the OH reports, by the relevant period, there was a substantial effect on the claimant's normal day to day activities. In all the facts and circumstances I found that that affect was because of the claimant's exhaustion. I had found that the claimant's exhaustion was caused by her Type 2 Diabetes.

148. Although there is no specific mention of exhaustion in the GP records after 15/3/23, those records are not inconsistent with the evidence that the claimant continued to suffer from exhaustion as at that time, or that that symptom worsened. The respondent's representative relies on the OH reports as being 'particularly important'. The respondent did not dispute that the OH reports were accurate records of how the claimant was affected at that time. All of those reports (as set out in the findings in fact) record the claimant suffering from exhaustion. The position in those OH reports is not inconsistent with the

position in the claimant's GP records. As set out in the findings in fact, the March 23 OH report states, under the heading *'Response to questions', "Her health is likely to improve with appropriate treatment and an early resolution of work related circumstances."* The OH advisor considered, with regard to the legal definition, that the claimant was likely to be disabled in terms of the Equality Act 2010. Although the later OH reports record the Type 2 Diabetes as improving, the effect of the impairment requires to be considered without the effect of treatment (Schedule 1 Para 5(1) EqA). The OH report from August 23 included *"Should the claimant's diabetes deteriorate and require medication…."*. The claimant was prescribed medication to control her Diabetes (from 11/10/23). The fact that the claimant was unable to manage her Diabetes by lifestyle changes alone, and, in October 23, was commenced medication to manage her Diabetes, is consistent with the evidence of her exhaustion worsening. The fact that the claimant was certified by her GP as unfit for work from September 23 is consistent with her symptoms worsening (although not necessarily evidence of the symptom of exhaustion worsening). I did not accept the respondent's representative's submission that there was no evidence of the claimant's exhaustion worsening / deteriorating. It was the claimant's evidence at the March PH, that even after commencing medication to control her Type 2 Diabetes (which was in October 23), fatigue was *"still a problem"* and that at that time *"when I was sitting at the table I literally could not keep my eyes open – I would fall asleep."* I considered that evidence to be significant. That was evidence of the fatigue / exhaustion having a substantial effect on the claimant's day to day activities. On the evidence before me, I was satisfied that in the relevant period the claimant's Type 2 Diabetes had a substantial effect on her day to day activities. That effect was to the extent that she became unable to keep up with household tasks such as cleaning. Her social life was substantially affected because her exhaustion caused her to frequently fall asleep during conversations and after meals. She moved from frequently commuting to and from work by cycling to not doing so. Even after financial reasons were not her primary concern, she did not take steps to repair her car because she was concerned that it she drove it she would be dangerous because of the risk of her falling asleep at the

wheel. These are all substantial effects of her day to day activities. That evidence was not undermined by the evidence on the claimant being able to do some yoga and exercising in March 2023.

149. In my reconsideration, I have had regard to the Guidance section C, which covers 'long term effects' and includes:-

'C3. The meaning of 'likely' is relevant when determining:

- *whether an impairment has a long-term effect (Sch1, Para 2(1), see also paragraph C1)…..*
- *how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour (Sch1, Para 5(1), see also paragraphs B7 to B17)'.*

In these contexts, 'likely', should be interpreted as meaning that it could well happen.'

'C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).'

150. When considering how long the claimant's Type 2 Diabetes was likely to affect her ability to undertake her normal day to day activities, I considered the facts and circumstances at the time of the alleged discrimination (the relevant period of June - November 2023). The uncontested position in the OH reports, were significant. I concluded that in all the circumstances in that relevant period the claimant's Type 2 Diabetes had a substantial adverse effect on her normal day to day activities, which was likely to last at least 12 months. In the relevant period, the claimant had the protected characteristic of disability, with regard to the definition in section 6 EqA, and on application of Schedule 1, Para 2(1)(b) and Schedule 1 Para 5(1) and the Guidance, as

referred to particularly above. Her claim for disability discrimination under the EqA can proceed.

151. In my reconsideration, I have taken into account the guidance of the Court of Appeal that *"The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months."* In determining whether in the relevant period the effect of exhaustion was likely to last at least 12 months, I considered only the evidence and my findings on what had occurred during the relevant period. I did not consider the consequences of the claimant having changed medication in January 24 with regard to that issue. I considered that evidence on events in January 2024 only when determining, on the balance of probabilities, that the exhaustion symptom was an effect caused by the claimant's Type 2 Diabetes.

152. In making this reconsideration, I have noted Ms Owusa- Agyei's submissions with regard to the 'relevant period'. As set out above, this is with reference to the dates within which the alleged discrimination took place. It is understood that as part of Ms Owusu-Agyei's submissions on the reconsideration, her position is that the assessment should be from the date when the claimant told the respondent of her Type 2 Diabetes diagnosis (10 March 2023), on the basis that the assessment should be in the period within which the employer was '*reasonably expected to comply with its duty*'. The issue on which I advised representatives that I intended to reconsider my decision issued orally did not include reconsideration of the relevant dates. My decision on the relevant dates set out above is as my decision delivered orally at the conclusion of the March PH, and on the basis of the position in the ET1 with regard to the dates of the alleged discrimination. This reconsideration does not include a reconsideration of the scope of the relevant period.

Further procedure

153. The claim will be scheduled for a Final Hearing, including remedy. Date listing letters will now be issued to fix the Final Hearing on these remaining claims.

In their responses, representatives should provide information on the witnesses they intend to call at the Final Hearing.

154. Parties' representatives should now liaise to seek to agree the List of Issues for determination by the Tribunal at this Final Hearing. Case Management Orders will be issued separately in respect of exchange of documents and other preparations for the Final Hearing.

155. For the avoidance of doubt, the findings in fact in this judgment relate only to the issue of disability status. They would not bind a future Tribunal dealing with the merits of the claim and considering issues such as the respondent's knowledge of the claimant's disability.

Employment Judge: **C McManus**
Date of Judgment: **26 April 2024**
Entered in register: **29 April 2024**
and copied to parties