IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)

Judgment of the Employment Tribunal in Case No: 4105402/2023 Issued Following Open Preliminary Hearing Heard at Edinburgh on the Cloud Based Video Platform on 2nd and 3rd April 2024, with Continued Deliberation on 21 April and 4th May 2024

Employment Judge J G d'Inverno

Malgorzata Jurska	**Claimant** **Represented by:** **Ms Bacon, Trade Union Representative**
ABM Facility Services UK Limited	**1st Respondent** **Represented by:** **Ms Dinnis, Solicitor**
Jones Lang Lasalle (JLL) Limited	**2nd Respondent** **Represented by:** **Mr Holloway of Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

(First) That the claimant lacks Title to Present and the Tribunal Jurisdiction to Consider her complaints of Discrimination because of the protected characteristic of Disability.

(Second) That the claimant's complaints of Discrimination because of the protected characteristic of Disability are dismissed for want of Jurisdiction.

Employment Judge: **J d'Inverno**
Date of Judgment: **30 May 2024**
Entered in register: **30 May 2024**
and copied to parties

I confirm that this is my Judgment in the case of Jurska v ABM Facility Services UK Limited & others and that I have signed the Judgment by electronic signature.

NOTE

1. The issues for Determination at this Open Preliminary Hearing were:-

(First) Whether the claimant, at the material time for the purposes of her complaints that is from the period 20th April to 5th May 2023, was a person possessing the protected characteristic of Disability in terms of section 6 of the Equality Act 2010, by reason of her relied upon physical impairment of "Tennis Elbow with secondary impact upon her shoulder".

(Second) Let it be assumed that the claimant was disabled for the purposes of section 6 of the EqA at the material time, which is denied by both respondents, did the 1st, and or the 2nd named respondents,

at the material time, know or ought reasonably to have known of her disability and its effects.

2. The Hearing proceeded with the assistance of a Polish Language Interpreter. The claimant was represented by Ms Bacon from her Trade Union, the 1st named respondent by Ms Dinnis, Solicitor, the 2nd named respondent by Mr Holloway of Counsel.

3. The claimant gave evidence on her own behalf. The 1st named respondent led evidence from; Mr Steven Aitken, the claimant's Line Manager, Mr Andy Robertson, one of the 1st named respondent's General Managers, and from Mr Roger Pearce, one of the respondent's General Managers who heard the internal appeal against dismissal. All witnesses gave evidence on oath or on affirmation and answered questions put in the examination in chief, cross examination and re-examination. The 2nd named respondent relied upon the witness statement of Linda Stancliffe, who was not present to answer questions in cross examination, and to which relatively less weight was accorded on matters in which it was in conflict with the primary evidence of other witnesses given on oath or affirmation.

Submissions for the Claimant

4. The claimant's representative provided to the Tribunal and made available to the 1st and 2nd respondent's representatives, a document headed "Claimant's Written Submissions" which extended to some 51 paragraphs across 12 pages. The 1st named respondent's representative had likewise produced a similar document extending to some 39 paragraphs across 9 pages. While the provision of such documents for reference purposes was helpful in that, for example, they set out fully the citations of case authorities referred to, the Tribunal made clear that it was upon the submissions made before it orally and replied to, that it would determine the issues. In the circumstances the content of those documents is not set out at length below but rather the parties' respective submissions are summarised.

Submissions for the Claimant

5. The claimant's representative began by recognising that the burden of proof in respect of establishing disability status lay with the claimant and that the standard of proof to be applied was that of the balance of probabilities.

6. Under reference to the terms of section 6 of the Equality Act 2010, she reminded the Tribunal that it required to consider and be satisfied on the following four questions were the claimant to succeed; namely, at the material time for the purposes of her complaints,

   (a) Did the claimant have the physical impairment founded upon of "Tennis Elbow"?

   (b) Did the impairment have an adverse effect on her ability to carry out normal day to day activities, which is to be taken as including references to the claimant's ability to participate fully and effectively in working on an equal basis with other workers (Schedule 1, EqA 5A(2))?

   (c) Was the adverse effect substantial (meaning more than trivial), in terms of paragraph 5(1) and (2) of Schedule 1 to the Equality Act 2010 ("EqA")?

      (i) Measures taken to treat or correct the effect are to be discounted when assessing the effect, 'Measures' being defined in terms of paragraph 5(2) as including in particular medical treatment and the use of a prosthesis or other aid"; and

   (d) Was the effect long term (that is to say had it lasted for at least 12 months or was it likely to last for at least 12 months or likely to last for the rest of the life of the person affected (Schedule 1 EqA paragraph 2)

(i) The Tribunal should have regard to all contemporaneous evidence, without the benefit of hindsight, when assessing whether the claimant's impairment was likely to last longer than 12 months

7. In relation to the respondent's knowledge, the claimant's representative acknowledged that to succeed on the claimant's claims of Direct Discrimination and Discrimination arising from Disability the respondents must have known or ought reasonably to have known, at the material time, that the claimant was suffering from an impairment which had a substantial and long term adverse effect on her ability to carry out day to day activities. She submitted that a respondent who is an employer can be assumed to have knowledge of a disability where its agent or employee (knows, in that capacity), of a worker's disability, EHRC EqA 2010 (Employment) Statutory Code of Practice ("EHRC Code") 5.17 viz

> 5.14 it is not enough for an employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it.
>
> 5.15 An employer must do all that they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment.

8. Against the above background the claimant's representative invited the Tribunal to find in fact, based upon the claimant's oral evidence and the documents which she founded upon including her Impact Statement, that from March 2022 the claimant was unable to fully and effectively work on an equal basis with other workers because of her condition and as such to hold that it was having an adverse effect on her ability to carry out normal day to day activities and to find in particular;

(a) That she was only able to work with bandages on her wrist from March 2022

(b) That she was not fit to work in the period 18th August to 7th September 22

(c) Although her GP in the Fit Note supporting her return to work had recommended adjustments to the hours of work spent cleaning to assist in her recovery, these were not put in place

(d) That the claimant had to take time off work again because of her condition in the three day period 11th to 13th October 2022

(e) That the claimant was taking time off as holiday to undertake non prescribed self treating therapy (Bowen Therapy)

(f) That separately, the claimant's impairment was having an impact on her ability to do household tasks at the material time for the purposes of her complaints, being 20th April 2022 to 4th May 2023, and that that effect was substantial

(g) That the claimant was taking self measures to treat her condition without which her impairment would have had a substantial effect and that these should be discounted being; the wearing of her wrist straps, "Bowen Therapy" which alleviated some of the pain and painkillers and anti inflammatory pills which she obtained from a friend in Poland

(h) That although the claimant, on her own evidence, was undertaking many hours of strenuous labour at the time, she would have been unable to do so without the assistance of her self medicating measures and therapies and as such the Tribunal should hold that the effect of the condition founded upon was not trivial and thus substantial

(i) Let it be assumed that the founded upon condition had a substantial adverse effect upon her ability to carry out normal day to day activities, it followed that the condition was a physical impairment for the purposes of section 6 EqA (*JB v DLA Piper*)

(j) That at the material time the claimant had been experiencing symptoms which were having a substantial and adverse effect on their ability to carry out normal day to day activities for a period of over 12 months, that the claimant had complained of symptoms since December 2021 and by March 2022 was "*unable to work without bandages on [my] wrist*"; or, in the alternative,

(k) if taken from the 18th of August 2022, the date upon which reference to Tennis Elbow first appears in the claimant's medical records, should be regarded as an impairment likely to last more than 12 months in the sense that "it could well happen" – *SCA Packaging Limited v Boyle* [2009] UK HL 37 per Baroness Hale (Obiter at paragraph 52)

9. While accepting that NHS guidelines indicate that full recovery is made within a year in 9 out of 10 cases, Tennis Elbow could nevertheless last between 6 months to 2 years and that the claimant was still self medicating with non prescribed Bowen Therapy in March of 2023.

Knowledge of the Respondents

10. The claimant's representative submitted the Tribunal should find that the 1st named respondent had actual knowledge, at the time of the claimant's dismissal, that she was disabled within the meaning of section 6 of the EqA. She submitted that if the Tribunal finds that the claimant was a person possessing the protected characteristic of Disability, at the material time, by reason of the impairment of Tennis Elbow and associated joint pain then, in

the claimant's representative's submission it was not open to R1 to argue that they did not have actual knowledge of the same variously on the grounds that;

- In March 2022 the claimant told the respondent's Mr Aitken about the pain she was experiencing when he also observed her with a bandage/bandages on her wrist

- That on the 30th of August 2022 the claimant provided a Fit Note signing her off for work for "Tennis Elbow" for a period of 7 days

- That on the 8th of September 2022 the claimant submitted a Fit Note which recommended a reduction in the number of hours spent cleaning per day with a view to facilitating her recovery from Tennis Elbow

- That on the 16th of September 2022 the claimant had informed Mr Robertson "now I have Tennis Elbow so can't clean much"

- That in March of 2023 the claimant provided Mr Aitken with a copy of her Bowen Therapy Report

- That on the 28th of April 2023, during the third party removal meeting, Mr Aitken had acknowledged that Tennis Elbow was inhibiting the claimant's ability to carry out her tasks

(g) During her Appeal R1 was made aware by the claimant that she would be receiving injections and had been receiving Bowen Therapy and, at that time disclosed that she had a disability. Whilst the Appeal did not fall within the relevant timelines in respect of the "material time" it did relate to the dismissal which occurred within the bracket of material time

(h) That since, in her submission, R1 should be regarded as having had actual knowledge of the impairment as early as March 2022 (because the claimant had complained of pain in her wrists and could be seen to be wearing a wrist bandage), it was not open to them to contend that they did not have actual knowledge at the material time.

11. In the alternative, the Tribunal should hold that R1 had actual knowledge of the impairment from 30th of August 2022, the date of the Fit Note identifying Tennis Elbow as the basis of certification of the claimant being unfit to work for a period of one week and further, on the same ground, that R1 should be held to have known that it was long term. Thus R1 could not reasonably contend, as at the date of her dismissal, that they did not have actual knowledge that C was disabled at the material time.

12. Further in the alternative, let it be assumed that R1 did not have actual knowledge that the claimant was disabled at the time of the dismissal, the Tribunal should find that R1 could reasonably have been expected to know. The employer was under a duty to do all that it reasonably could in the circumstances to find out whether an employee was disabled (EHRC Code 5.15). On the claimant's evidence in March of 2022 she brought to Mr Aitken's attention the fact that she was wearing a wrist bandage/wrist bandages. In September of 2022, some 5 months later, she submitted a Fit Note which cited Tennis Elbow as the reason for her one week absence, and on the 20th of October 2023, some 4 months after the material time, the claimant was absent from work for a further 3 days with a Fit Note which cited "Bilateral shoulder pain with nerve irritation".

13. In relation to R2, the claimant's representative submitted that the Tribunal should find that R2 had actual knowledge at the material time, namely as at the date of the claimant's dismissal, that she was disabled within the meaning of section 6 of the Equality Act because it was not open to them to argue that they did not have actual knowledge, let it be assumed that the Tribunal were to determine that the claimant was disabled at the relevant time. In support

of that proposition she invited the Tribunal to find on the basis of the claimant's oral evidence that:-

- On or in September 2022 she told R2's on site Manager Georgi Gochev that she had been diagnosed with Tennis Elbow.

- On 15th of September that she had told Lynne Stancliffe of the 2nd respondents about her diagnosis

- That R2 was aware that the claimant had regularly been off sick on or around some time before October 2022

- She invited the Tribunal to hold that R2 had actual knowledge of the impairment as early as March 2022

- In the alternative, she submitted that the Tribunal should hold that R2 could reasonably have been expected to know that the claimant had the impairment of Tennis Elbow with secondary impact upon her shoulder. Alternatively that R2 had acknowledged the claimant's diagnosis from 11 September 2022 or at the very latest from on or around October 2022 such that they could reasonably be expected to know that the impairment was likely to be long term at the time of the removal request on 20th April 2023.

Submissions for the 1st Respondent

14. The 1st respondent's representative referred the Tribunal to:-

- *Cruikshank v VAW Motorcast Limited* [2002] ICR 729 at [29],

- the terms of section 6(1) - (2) of the Equality Act 2010,

- *Goodwin v Patent Office* [1999] ICR 302,

- the ECHR Code – Appendix 1 paragraphs 14 and 15

- Section 212(1) of the Equality Act 2010

- *Anwar v Tower Hamlets College* (UKEAT/0091/10/RN, 23 July 2010) and *Ahmed v Metroline Travel Limited* (UKEAT/0400/10/JOJ, 8th February 2011),

- Paragraph 2 of Schedule 1 of the EqA and,

- *Thyagarajan v Cap Gemini UK Plc* (UKEAT/0264/14/JOJ, 4th November 2014) at [19]

15. The 1st respondent's representative submitted; *that "the material time*" for the purposes of the claimant's assertion of possession of the protected characteristic of Disability is the time when the alleged discriminatory acts took place, in the instant case it was a matter of agreement between the parties at the material time was the time between 20th April 2022 and 4th May 2023. It was at that time that the claimant was required to prove, on the balance of probabilities, her possession of the protected characteristic.

16. Regarding the requirements of section 6 and its constituent parts, the respondent's representative's submissions were as one with those of the claimant's representative and the 2nd respondents. She submitted that in assessing whether effects are substantial the Tribunal should take into account reasonable modification to behaviour which may have the effect of rendering the effects of an impairment non substantial. As the statutory guidance issued under section 6(5) EqA states at paragraph B7:

> "*Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoiding strategy, to prevent or reduce the effects of an impairment on normal day to day activities. In some instances, a*

coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability"

17. While the Tribunal's assessment should be focused on what the person cannot do, it is appropriate to make Findings in Fact as to what they can do, where these throw light on what the claimant cannot do: *Ahmed v Metroline Travel Limited*.

C's Pleaded Disability

18. The disability relied upon by the claimant, in terms of her Disability Impact Statement, (at pages 64 to 67) is, "*Tennis Elbow and associated shoulder pain, Rotator Cuff Shoulder Syndrome and Allied Disorders, and Arthralgia of multiple joints"*. Parties were agreed, as previously recorded at Order (Fourth)(c) of the Tribunal's Case Management Orders of 17th November 2023, that in essence the claimant relies upon the condition of Tennis Elbow with secondary impact upon her shoulder.

19. At paragraph D.18 of her Impact Statement the claimant lists the ways in which she says her impairment affects her daily activities (using the present tense). The claimant claims variously to have been suffering in that way between August 2022 and her dismissal on 5th of May 23 or from March of 2022.

20. R1's representative submitted that the contemporaneous documentary and oral evidence indicates that the claimant was not affected in the way set out at paragraph D.18 of her DIS, or in any other substantial way at the material time.

21. In her oral evidence she stated that on her return to work after 7th September 2022 she carried out between 8 and 10 hours of strenuous cleaning work per day regularly involving:-

- Moving chairs away from 400 desks
- Operating spray bottles on a daily basis
- Carrying a bucket half full with water to the kitchen area to clean it two times per week
- Hoovering large spaces in the weekend using a hoover which weighed over 3 kilograms

  C's commercial cleaning activities went far beyond any normal daily activities in terms of how strenuous they were. Her continuous performance of these tasks was incompatible with the adverse effect which, in terms of her Impact Statement, she asserts she was experiencing at the material time.

22. The claimant accepted that, between 2018 and her dismissal on 4th May 23, she saw her Line Manager Steven Aitken several times per week and was very vocal in having detailed conversations with him about workplace complaints. The evidence relied upon, however, indicates that with the exception of her assertion that in or around March of 2022 she brought to his attention/he commented on the fact that she was wearing a wrist bandage, the claimant did not mention pain or any physical issues which she was having with the performance of her duties in any of these conversations.

23. The claimant's attendance record was good between September 22 and April 23. The claimant was absent from work only for 3 days between the 11th and 13th of October 22 and there was no documentary evidence to suggest the previously unheralded suggestion made by the claimant in her oral evidence that she periodically took holidays to give herself rest periods.

24. There were no contemporary documents presented to the Tribunal which describe or comment on how the claimant's activities were impacted in the period September 2022 to May 2023. Although C's health was mentioned a handful of times the contemporary record does not indicate daily pain or struggles.

25. The claimant's medical records reveal that she visited her GP several times a month between her return to work on the 8th of September 23 and her dismissal on the 5th of May 23 and did not mention any pain in her joints to her doctors whatsoever. The record of her contact, on 24th April 23, records that the claimant reported "feeling low" and there were "*lots of issues with work as Cleaning Supervisor planning to contact Citizens Advice to know her rights*" (page 69 of the Bundle) but the medical record shows that C did not report any joint pain or issues with the physical performance of her daily duties.

26. Although it was accepted that later in May 2023, at a time after the material time, the claimant did receive a steroid injection, such a treatment is not unequivocally referrable to the possession of a disability and is not infrequently sought by way of treatment for a minor ailment.

27. The 1st respondent's representative invited the Tribunal to prefer the evidence reflected in the contemporaneous materials to the content of the claimant's Disability Impact Statement in relation to the "long term" nature of the condition relied upon. On the evidence available at the point of dismissal, the claimant's Tennis Elbow and associated joint pain were not likely to recur to the extent that her daily activities would be impacted. The claimant had led no evidence on that point. The NHS Health Index stated that a full recovery is made within a year in 9 out of 10 cases and the "Bowen Treatment" letter of 5th March 23 (page 75) indicates that the claimant was making steady improvement at that time.

28. The 1st respondent's representative invited the Tribunal to hold that the claimant had failed on the balance of probabilities to establish that, at the material time, she was disabled for the purposes of section 6 of the EqA, by reason of the impairment given notice of as founded upon.

Knowledge of Disability

29. R1's position was that it denied that it knew, at the material time, that the claimant had an impairment which had a substantial adverse effect on her ability to carry out normal day to day activities as given notice of in her Impact Statement (67) viz:-

> "*22. I told my Manager, Steven Aitken about the pain I was experiencing around March 2022. He saw my bandaged wrists but didn't react or ask any questions. This discouraged me from discussing it further at the time.*
>
> *23. I sent a Fit Note from my GP to Steven Aitken on 9 September 2022, following a period of sick leave*
> *…*
>
> *26. In its message to the 1st respondent requesting my removal, the 2nd respondent complained that I had been "citing ill health for not being able to undertake tasks".*
>
> *27. When I internally appealed my dismissal by ABM, one of the grounds of appeal was that the dismissal had been discriminatory with regard to my disability."*

30. C had confirmed in cross examination by R1 that in March 2022, some sporadic pain had only just begun in her wrists. Taking that evidence at its highest it fell far short of what would be necessary to satisfy the requirements of section 6. In short the claimant not being disabled at that time there was no disability to disclose.

31. Of the several documents produced and founded upon relating to the period between September 22 and May 23 and which referred to the claimant's health, none suggested that the claimant had a condition which might amount to a disability. It was accepted that the claimant had sent to her Manager

Mr Aitken Fit Notes which disclosed a diagnosis of Tennis Elbow in September of 2022. Thereafter, however, the claimant accepted in evidence that she did not make any specific disclosures relating to Tennis Elbow or joint pain apart from passing references to health in the weeks after her diagnosis and on handing Mr Aitken a copy letter from Bowen Therapy in or around March 23. In R1's representative's submission, the content of those documents fell far short of what would be required to put the respondent on notice of a disability.

32. While it was accepted that R1 made reference to "ill health" of the claimant in its removal request of 20th April 2023, there was no indication that that referred to Tennis Elbow or joint pain or to any condition which might constitute a disability.

33. In her statement dated 5th May 23, the claimant made reference to reduced physical fitness due to overwork but there was no indication or evidence that the claimant's normal daily activities were significantly impacted at that time.

34. The claimant had not led any evidence of constructive knowledge and R1 denies that it should have known that she was suffering with an impairment amounting to her disability, or that it was put on notice such that it was under an obligation to make further enquiries. It was reasonable for R1 to believe that it had a clear understanding of the condition which she was suffering from and it had made adjustments for C accordingly, specifically with a view to facilitating the claimant's recovery from what was a self limiting condition. C's Line Manager, Mr Aitken, also knew that C had been working without complaint throughout the period following her return to work in September 2022 and had been told by the claimant in the Bowen Therapy Report that by March 2023, 7 months after the diagnosis, she had made good improvements with no medically prescribed intervention.

The Position after Dismissal

35. R1's representative submitted that in a discriminatory dismissal case knowledge of the disability arising at appeal stage is not sufficient if the employer lacked that knowledge at the dismissal stage (unless the claimant is also alleging specifically that the appeal itself was contrary to section 15): *Stott v Ralli Limited* [2022] IRLR 147, EAT, holding that *Baldeh v Churches Housing Association of Dudley and District* UKEAT/0290/18 (11 March 2019, unreported), established no rule of law that such after acquired knowledge can be used. In R1's submission, knowledge acquired after the decision to dismiss is irrelevant to the issue to be determined at the Preliminary Hearing and separately, in so far as the Tribunal may consider it relevant, R1 denied that it acquired actual or constructive knowledge of disability during the appeal process.

36. In C's letter of appeal dated 9th May 23 (132), C's Trade Union representative states that C had a disability and that "*is known to ABM that Ms Jurska has experienced significant and long term injuries which limit her ability to carry out extensive cleaning.*" "Extensive cleaning" is not a normal day to day activity for the general population, and C's evidence is that with the exception of some 2 or 3 weeks following her return to work on 8th of September when she reduced the number of hours which she spent per day in cleaning, she had been carrying out between 8 and 10 hours of strenuous cleaning work every day at work at her own election and discretion.

37. The suggestion contained in claimant's handwritten statement of 5th May 22 (128-131) at section 4C that she suffered workplace injury and took time off after which she cleaned for a period of 4 hours per day (for a period of 2/3 weeks), does not suggest that C had an impairment which had a substantial adverse impact on her ability to carry out normal day to day activities and which was long term, at that time.

38. At C's Appeal Hearing C had said it is said; "*I am not capable to do tasks? which is not true. I have health issues problems joint/muscles recently received injections for this. My problems are due to hard work*" (135).

39. Neither C nor her Trade Union representative indicated in the course of the Appeal Hearing how C was said to be affected by her condition day to day or why they believed that C had a condition amounting to a disability in terms of section 6. It was the evidence of the Appeal Officer who conducted the meeting with the claimant and had mentioned her ill health in passing only but that that was not the main basis of her complaint. Rather, her concern as expressed at Appeal Hearing was that the contract was being mismanaged. He had observed the claimant coming into the room holding a bag and a cup. There were no visible issues. Although it was accepted that the claimant had stated that she had had an injection, at a time after her dismissal, the having of such an injection does not connote the presence of disability.

40. The Appeal Officer's evidence was that his impression of the claimant's condition, from the documentation and the way in which the claimant presented on the day of the Appeal, was that the claimant was not significantly affected by any health issue at the time of the Appeal.

41. R1 denied that it should have known that the claimant was suffering as she now asserts at the Appeal Hearing nor that it should have made further enquiries. It was, she submitted, reasonable for R1 to believe that it had a clear understanding of the condition C was suffering/had been suffering from, namely the self limiting condition of Tennis Elbow which was neither long term nor had a substantial adverse impact on her ability to carry out normal day to day activities.

Submissions for the 2nd Named Respondent

42. The 2nd named respondent's representative invited the Tribunal to find in fact two points of context as established;

(a) that the claimant was an individual who was comfortable with raising, and regularly did raise, issues both with her General Practitioner whom she consulted frequently and with management with whom her practice was to follow up any point orally made by her with an email,

(b) that it was not uncommon in cases which had the potential to deteriorate that parties find it easier to focus their evidence on the symptoms which they are experiencing at the time of giving evidence whether in an Impact Statement as at the time of it being drawn up, (in the instant case as at 15th December 2022), or in oral evidence as at the date of a Hearing, April 2024 rather than being reliably able to recall those which they had experienced at the material time.

43. The 2nd respondent's representative invited the Tribunal to regard the evidence of the claimant as inconsistent with the contemporaneous documents which were before the Tribunal and insufficiently credible or reliable to support a Finding in Fact that the claimant was disabled in terms of section 6 at the material time. He focused upon a number of inconsistencies in the claimant's position as before the Tribunal on the one hand and of the written case of which she gave notice at the time of raising proceedings on 13th September 2023.

44. In the instant case the claimant had asserted in her oral evidence that each and every one of the impacts which she set out at paragraph 18 on page 3 of her Impact Statement dated 15th December 2023 and produced at pages 64 to 67 of the Bundle, were impacts which she was experiencing from as early as March 2022 up to and including the date of her dismissal upon a third party removal request on the 20th of April 2023.

45. In her Particulars of Claim at page 19 paragraph 10 of the detailed paper apart the claimant gave notice of offering to prove that; "*In April of 2022 the claimant began to feel pain in her wrists due to excessive cleaning and*

informed Steven Aitken the following month" (i.e. in May of 2022). In her evidence before the Tribunal however the claimant had stated that her symptoms commenced as long ago as December 2021 and had worsened by March of 2022 to the extent that she wore bandages to work. Those accounts were inconsistent one with the other but they were each inconsistent with the contemporaneous documents before the Tribunal including the claimant's medical records which disclosed at page 71 that the claimant had a consultation with her GP on the 18th of February 2022 and makes no mention of any such pain, nor again in the entries for 22nd April 2022.

46. Whereas in her oral evidence she indicated that matters had substantially deteriorated in March 22, her medical records disclosed that she did not consult her GP at all at that time.

47. Her oral evidence was that in March of 2022 she raised the question of pain in her wrists with her Line Manager, Mr Aitken showing him her wrist bandage. Mr Aitken's evidence was that he recollected seeing her wearing a wrist bandage on one occasion only but that was shortly after her return to work in September of 2023. He, for his part, had no recollection of an earlier notification by the claimant and expressed the view in evidence that he was confirmed in that recollection by the fact that had she done so and had she felt that he had not reacted appropriately to it, she would have followed it up with an email, which she had not done.

48. Her contemporaneous medical records indicate that whereas she did consult her GP on the 22nd of April 22, nowhere in the record of the consultation, (at page 71 of the Bundle), is any mention made by the claimant of Tennis Elbow, or pains in her wrists or other joints. Rather, the consultation focuses upon her low mood and lack of sleep which she attributed to stress at work with no mention of the physical impairment upon which she founds.

49. The contemporaneous medical records show that in the 8 month period from January to August 2022 while the claimant consulted her General Practitioner

on many occasions on no such occasion did she focus or make reference to the impairment upon which she founds.

50. Balancing and weighing up the claimant's changing account on the one hand with the lack of any contemporaneous email from her focusing such a matter with the 1st respondent, the complete absence from her medical records during those months of any reference to the impairment and taking into account the fact that throughout that period the claimant continued to work, on her own evidence undertaking strenuous cleaning duties for between 10 and 11 hours per shift and on occasions 7 days a week, led to the conclusion that it is unlikely that what the claimant says in her Disability Impact Statement, namely that she was suffering from as early as March 2022 all of the alleged substantial impacts which she narrates at paragraph 18, page 66 in the Bundle, was the case.

51. It may well be that these were impacts and symptoms which she was experiencing in December of 2023 when she drew up the Impact Statement but in relation to March 2022, it was inconsistent with the contemporaneous medical record and with her own account of the work which she was undertaking on a daily basis, such that the Tribunal should not conclude, on the balance of probabilities, that the claimant was experiencing these symptoms from as early as March 2022 and continuously throughout that period.

52. It was only during her period of absence, from 18th August to the 1st of September 2022, that reference to joint pain and Tennis Elbow appears in the claimant's medical records. The records show that the GP reassured the claimant at that time that her symptoms revealed nothing sinister and that the pain that she was experiencing "*will improve with load and time*" and further, that her request that she be signed off for an additional week before returning on light/amended duties was a reasonable one in the opinion of the medical practitioner.

53. The GP's Fit Notes supporting the claimant's absence for a further week between 31st of August and 7th of September 2022 and return to work at the end of that period, identifies the condition which the claimant is suffering from as that of "Tennis Elbow". The Note goes on to state that "*If available and with your employer's agreement, you may benefit from … reduced hours of cleaning – suggest 4 hours – not to empty rubbish bins or replenish dispensers – requires 1 hour break for exercises*".

54. The NHS Information Sheet on Tennis Elbow, which is produced at pages 82 and 83 of the Bundle, states that Tennis Elbow will get better without treatment (a self limiting condition) but there are treatments that may improve symptoms and speed up recovery … a full recovery is made within a year in 9 out of 10 cases.

55. The Fit Note of 8th September indicates that the doctor does not require to see the claimant again before her return to work.

56. Upon her return to work the claimant's Manager agreed that she should spend reduced hours on cleaning (4 hours) and authorised and directed the claimant to do that. It was the claimant herself who was responsible for the allocation of cleaning tasks and, notwithstanding the terms of the Fit Note and authorisation given to her, it was she who after a period of 2 to 3 weeks decided to return to and to continue to work, and on her own evidence did continue to work full cleaning hours between 8 and 10 with the exception of a short 3 day period of absence in October 2022.

57. The claimant continued to so work, on her own evidence, cleaning up to 400 desks in a single shift, moving chairs from that number of desks, hoovering before using a hoover weighing between 2 and 3 kilograms. The fact of her doing so is inconsistent with her assertion, in oral evidence, that at the material time she was unable to hold objects without them falling out of her hands, that she was unable to carry things that weighed over 2 kilograms, unable to remove caps from containers and bottles such as bottles of water

and chemicals without assistance, and unable to sleep due to pain in her elbow or shoulder.

58. While the claimant consulted her doctor on numerous occasions between her last absence in October 2022 and her dismissal, the records of those consultations show that the claimant did not raise the question of Tennis Elbow or joint pain further. The entry on the 3rd of March with Dr Clare Briggs states that the claimant was feeling much better in terms of her mental health and was able to function and was sleeping well. That entry directly contradicts the statement in the claimant's Impact Statement that when combined with her oral evidence in March of 2022 she was frequently unable to sleep due to joint pain.

59. The claimant's accounts of the symptoms which she was experiencing and of the impact that they had upon her ability to carry out day to day activities was an unreliable account such that in taking account of the contemporaneous documentary evidence the only conclusion which the Tribunal could properly reach was:-

a. that for a relatively short period, between August and September 2022, the claimant was suffering from a time limited and self limiting condition of Tennis Elbow
b. from which after 3 weeks sickness absence and 2 to 3 weeks lighter duties she had substantially recovered such that she was able to work and thereafter worked full time, with the exception of the short 3 day absence for long hours
c. she was able to work and thereafter worked full time, with the exception of the short 3 day absence.

60. All of the above was inconsistent with her assertion that at the same time she was experiencing a substantial adverse impact upon her ability to carry out day to day activities and particularly was so experiencing a substantial adverse impact at the material times for the purposes of her complaints.

61. The medical evidence presented did not support a finding that the condition was long term. The non NHS complementary medical "*Bowen works*" treatment with which the claimant decided to self medicate and whose letter dated 5th March 23, produced at pages 74 and 75, the claimant founds on, states that the claimant had noted good improvements over the preceding 4 months, which includes the material time.

62. The contemporaneous medical evidence presented did not support the proposition that at the material time the claimant had suffered from Tennis Elbow, the impairment founded upon for a period of 12 months, nor that what, in terms of the NHS Information Sheet is normally found to be a time limited self curing condition, was likely to last for more than 12 months. To the contrary, the evidence tended to show that it was more likely that the condition would not last for more than 12 months.

63. Separately it was impermissible to look retrospectively at what had happened since.

64. Although there was no medical evidence going to show a link of causation between the hours which the claimant asserted she was working on the one hand and her Tennis Elbow on the other, let it be assumed that that causal link existed, resting of the affected joints is a recognised way of facilitating and speeding up recovery from the self limiting condition, the NHS Information Sheet at page 82 stating "*You should rest your injured arm and stop any activity that's causing the problem*".

65. The claimant's Fit Note of 8th September 2022 suggests reduced hours of cleaning restricted to 4 hours which recommendation the claimant's Line Manager Mr Aitken immediately authorised and instructed the claimant to implement the same.

66. Separately, the entry in the claimant's medical records of 1st September 2022 indicates that the medical advice which she was given included a reassurance that there was nothing sinister in the symptoms which she

reported she was experiencing and "*pains will improve with load and time*". While in the 1st respondent's representative's submission the above falls far short of what would be required to establish a causal connection between the number of hours which the claimant advises she was spending cleaning, on the one hand, and her Tennis Elbow, on the other, the reduction in hours spent cleaning to the level medically advised having been authorised, the evidence suggests that the self limiting condition was unlikely to last for 12 months.

67. Separately, at the material time, the 1st respondents were advertising for 2 additional cleaning staff whom it was expected would be in post by June of 2023, a factor likely to assist in the speeding up of recovery, let it be assumed that it was caused by the number of hours which the claimant was herself spending in cleaning duties.

Knowledge

68. The matters relied upon to support the proposition that the 1st respondents and or 2nd respondents knew or ought to have known at the material time were, in terms of contemporaneous independent evidence;

    (a) the fact that her medical records show that she was diagnosed with Tennis Elbow in September of 2022 submitting two Fit Notes with that diagnosis covering her 2 periods of sick leave, in the second half of August and the first week of September 2022; and,

    (b) her assertion that in March of 2022 she brought to the attention of her Line Manager that she was wearing a wrist bandage.

69. All of that taken at its highest falls far short of what would be required to put the respondents on notice of a disability such as to give rise to a duty to proactively investigate. The wearing of wrist bandages is not uncommon and

is susceptible of many explanations. It is not unequivocably referable to any particular medical condition, often used in circumstances of temporary strain.

70. The 20th April email, at page 121 of the Bundle, to Mark Somerville from Linda Stancliffe, actively contradicts the claimant's account because in the claimant's statement at page 130 (4th May 2023) the claimant states that with the exception of the 3 weeks of sick leave which she had at the end of August/first week in September 2022, she has worked continuously including overtime, with the exception of the first 3 weeks after her return to work in September 22 during which period she cleaned for only 4 hours daily as suggested in her last Fit Note,

71. It was accepted that an employer has an obligation to proactively investigate matters once they are put on notice of a disability. The 2nd respondent, however, does not have the same obligation. It is not the claimant's employer and was not responsible for line managing the claimant.

72. Taking the claimant's evidence at its highest, what she says she did was,

(a) showing her Line Manager in March 2022, a year in advance of the material time, that she was wearing a wrist bandage,

(b) presenting 2 Fit Notes disclosing a diagnosis of Tennis Elbow in August and September 2022, some 6 months before the material time, with a recommendation of hours spent cleaning reduced to 4 per day to assist recovery, which she followed for a period of 3 weeks and then by her own option ceased to follow.

73. The above, when taken together with the fact that the claimant, with the exception of her 2 short periods of absence, worked continuously without any further complaint about Tennis Elbow for the succeeding 12 and 6 month periods falls far short of what would be required to amount to putting the respondents, either 1st or 2nd, upon notice of a disability.

74. The 2nd respondent's representative invited the Tribunal to find:-

(a) that the claimant was not a disabled person at the material time and,

(b) that neither the 1st nor 2nd respondent in fact knew of the medical condition upon which the claimant relies prior to the Fit Notes of August and September 2023 which confirmed its diagnosis of the self limiting condition of Tennis Elbow at that time.

(c) That neither the 1st nor the 2nd respondents were put on notice of disability and that neither the 1st nor 2nd respondents knew or ought reasonably to have known, in the circumstances, of the effects which, in her Disability Impact Statement of 15th December 2023, the claimant asserts she was suffering from as early as March 2022.

Findings in Fact

75. On the documentary and oral evidence presented the Tribunal made the following essential Findings in Fact, restricted to those relevant and necessary to the Determination of the Preliminary Issues.

76. The 1st respondent is a provider of cleaning, security, building maintenance, waste and facilities management services. The 1st respondent provides those services under contract to various clients. The 2nd respondent is a client of the 1st respondent.

77. The claimant started working for the 1st respondent on or about 9th September 2019 as a Cleaning Operative on a site managed by the 2nd respondent.

78. The claimant was made a Supervisor on 1st April 2020. The Supervisor role involved supporting and managing a team of approximately 8 Cleaning Operatives, as well as undertaking cleaning work personally when necessary as the site was relatively small.

79. On 4th May 2023 the claimant's employment was terminated by the 1st respondent following a "Third Party Removal Request Meeting".

80. The claimant appealed against her dismissal on the 11th of May 2023 on grounds including "*the Third Party Removal Request was discriminatory*".

81. On 31st May 23 the claimant attended an Appeal Hearing accompanied by her Trade Union representative. The internal Appeal Officer, Mr Pearce, did not uphold the Appeal, including in particular finding that the removal request was not inherently discriminatory in nature, referring rather to the claimant's performance and attitude and the way in which the claimant had conducted herself on site with other staff.

82. On 13th September 23 the claimant raised proceedings in the Employment Tribunal (Scotland), directed against the 1st respondent and against the 2nd respondent and comprising:-

    (a) A complaint of Unfair Dismissal in terms of section 98(4) of the Employment Rights Act 1996 ("ERA")

    (b) Complaints under the Equality Act 2010 ("EqA") of Discrimination because of the protected characteristic of Disability –

        (i) section 13 EqA Direct Discrimination

        (ii) section 15 Discrimination arising from Disability; and

(iii) section 19 Indirect Discrimination

83. The physical impairment upon which the claimant gives notice of relying for the purposes of giving rise to her possession, at the material times for the purposes of her complaints, of the protected characteristic of Disability in terms of section 6 of the EqA, is that of "Tennis Elbow and associated shoulder pain, Rotator Cuff Shoulder Syndrome and Allied Disorders, and Arthralgia of multiple joints".

84. It was a matter of agreement between parties, as recorded at paragraph (Fourth)(c) of the Tribunal's Case Management Orders of 17th November 2023 and confirmed by representatives, of new, at the outset of the Preliminary Hearing on 2nd April 2024, that the impairment relied upon was properly summarised and described as that of "Tennis Elbow with secondary impact upon her shoulder", ("Tennis Elbow").

85. It was a matter of agreement between the parties, again recorded in terms of the Tribunal's Case Management Orders of 17th November 23 and confirmed at the outset of the Preliminary Hearing, that the "material time" for the purposes of the claimant's complaints is the time between 20th April 2022 and 4th May 2023.

86. At paragraph D.18 of the claimant's Disability Impact Statement, compiled and created by the claimant on 15th December 2023 (pages 64-67 of the Bundle), the claimant, using the present tense, gives notice of the adverse effect upon her ability to carry out day to day activities which she asserts is caused by her Tennis Elbow; viz

    (a) "*dressing and undressing: for example, I can't fasten a normal bra so I have had to buy ones with a zip at the front. It's very difficult for me to put on any clothing that has long sleeves.*

(b) *Holding objects: they often fall out of my hands due to cramp in my fingers. For example, full glasses or mugs containing drinks sometimes fall out of my hands. When holding a frying pan or a kettle, I need to do it with both hands, which limits what else I can do.*

(c) *Carrying things that weigh over 2 kilograms. When carrying shopping bags, for example, I have to use both hands or support them with my hip.*

(d) *Opening containers. I need help to remove the caps from containers such as bottles of water.*

(e) *Sleeping; I find it difficult to turn during the night and I often wake up due to the pain in my elbow or shoulder."*

87. In the Disability Impact Statement the claimant asserts that she had been suffering the above adverse effects/impacts in the period from August 2022 up to and including her dismissal on 5th May 2023.

88. In answers to questions put to her in cross examination the claimant asserted that in fact that she had been suffering all of the adverse impacts which were set out in the Impact Statement and at the levels described therein, since March of 2022.

89. In the latter part of August and the first week of September 2022 the claimant had a three week medically certified absence from work, and in respect of which she submitted two Fit Notes to the 1st respondent.

90. The Fit Note of 1st September 2022 identifies "Tennis Elbow" as the medical condition diagnosed and the reason for the absence.

91. The claimant's Fit Note of 8th September 2022 states that her doctor did not require to see the claimant again before her return to work on that date.

92. The Fit Note of 8th September 2022 (73) contained the following recommendation for the claimant's return to work:-

> *"If available and with your employer's agreement you may benefit from … reduced hours of cleaning – suggest 4 hours – not to empty rubbish bins or replenish dispensers – requires 1 hour break for exercises"*

93. The claimant's Line Manager agreed those adjusted light duties on the respondent's behalf immediately upon the claimant's return to work. He authorised and instructed the claimant to give effect to those adjustments.

94. It was the claimant herself who was responsible for the allocation of cleaning tasks.

95. The NHS Information Sheet at page 82 states "*You should rest your injured arm and stop any activity that's causing the problem."* That general advice is consistent with the statement contained in the claimant's medical records for the entry of 1st September 2022 in which her doctor advised her that there was nothing sinister in the symptoms which she reported that she was experiencing and the "*pains will improve with load and time*".

96. The claimant's Line Manager told the claimant, in the context of instructing her to give effect to the adjustments, to do "*no more than she felt comfortable doing*".

97. Having received that authorisation and direction the claimant, as confirmed by her in her oral evidence, gave effect to the light duties adjustment for about 2 or 3 weeks after her return to work on 8th September 2022 but thereafter reverted to her pre absence practice of carrying out onerous cleaning duties of between 10 and 12 hours per day which she continued to

carry out up to and including the date of her dismissal (the end of the period which is the "material time for the purposes of her complaints").

98. The claimant was suffering from the self limiting condition of "Tennis Elbow" for a 3 week period from in or around the middle of August to in or around the end of September 2022.

99. Following her return to work on 8th September 2022 the claimant undertook a period of 2/3 weeks of light duties during which her self limiting condition improved such that;

    (a) it was not having a substantial adverse impact on her ability to carry out day to day activities, and separately,

    (b) to the extent that she was able to and did, with the exception of 3 days absence on 11th to 13th October 23, return, on her own decision and at her own election, to the carrying out of her pre absence onerous daily cleaning duties.

100. The claimant returned to work after a one week absence on the 8th of September 2022. She thereafter carried out between 8 and 10 hours of strenuous cleaning work each day, with the exception of a short period of two or three weeks during which, as recommended in her Fit Note with the purpose of aiding her recovery from the condition and as authorised by the respondent, she reduced her daily hours spent cleaning to some 4/6 hours per day.

101. At the end of the short period of reduced hours spent cleaning, the claimant, on her own assessment and decision, proactively returned to carrying out 8, 10 and on occasions 12 hours strenuous cleaning work per day.

102. The regular cleaning duties undertaken by the claimant included:-

(a) Moving chairs away from 400 desks, dusting the desks with a feather duster and wiping the desks down with a cloth on a daily basis

(b) Operating spray bottles on a daily basis

(c) Carrying a bucket half full with water to the kitchen areas to clean, about twice a week

(d) Hoovering large office areas at the weekend using a hoover which weighed over 3 kilograms

103. The claimant was carrying out the above duties at the material time.

104. The claimant's Line Manager, between 2018 and the date of the claimant's dismissal on 4th May 2023, was Steven Aitken.

105. Between September 2022 and May 2023 the claimant saw and spoke to Mr Aitken several times a week.

106. On the occasions when the claimant interacted with Mr Aitken she had detailed conversations with him about the claimant's workplace complaints. The complaints did not include complaining of pain or physical issues allegedly caused by her carrying out her duties.

107. In the period 8th September 2022 to the date of her dismissal in April 2023, the claimant was absent from work on 3 days only, that is from the 11th to the 13th October 2022. Following her return from that 3 day period of absence on 13th October 2022 the claimant continued to carry out her duties which included between 8 and 12 hours spent in daily cleaning without any further sickness absence.

108. There were no contemporary medical documents before the Tribunal which describe or comment on how the claimant's activities were adversely

impacted by Tennis Elbow in the period between September 2022 and May 2023, that is during the last 8 months of the material time.

109. The claimant's contemporary medical records show that the claimant's health was focused by her on several occasions in that period, but do not disclose her as presenting with Tennis Elbow or joint pain.

110. Notes of a meeting at pages 110 to 113 inclusive of the Bundle, of 16th October 2022 between the claimant and the respondent's Andy Robertson record that the claimant in criticising a member of her team mentioned her Tennis Elbow incidentally:-

> "*I was cleaning here 10/11 hours, now I have Tennis Elbow so can't clean so much, in his option I do nothing, he was shouting at me that he will not do extra jobs ….*"

111. An email of 21st October 22 from Linda Stancliffe to Steven Aitken refers to the claimant having stated to a member of her team that "*only Vassilio can fill up the hand towel dispensers due to her issues with her hand however he is very busy and can't do that all the time so that is why they pile up towels around the sinks …*" (114).

112. In the email of 22nd October (114) the 1st respondent's Linda Stancliffe made reference to the claimant calling in sick, but made no reference to Tennis Elbow.

113. The claimant's only periods of sickness absence were 18th August 2022 to 8th September 2022 and 3 days from 11th to 13th October 2022 inclusive.

114. In or around March of 2023, the claimant gave Mr Aitken a letter from "Bowen Works" (74-75). The letter stated the claimant had been undertaking Bowen Therapy.

115. Bowen Therapy is a privately sourced complementary therapy not available within the National Health Service. There was no scientific/medical evidence presented to the Tribunal that went to show that Bowen Therapy was effective as a treatment for Tennis Elbow.

116. The Bowen Therapy undertaken by the claimant was not medically prescribed within the NHS by her doctors. It did not fall within the definition of "measures" for the purposes of paragraph 5.1 and or 5.2 of the Schedule to the EqA.

117. The letter from "Bowen Works" dated 5th March 2023 contains a statement, that, as at that date, the claimant was showing "*good improvement*".

118. In her evidence, the claimant stated that she had felt improvement from in or about November 2022 onwards.

119. Throughout the period from November 2022 up to and including March 2023 and the date of her dismissal 5th May 2023, the claimant continued to carry out between 8 and 10 hours of strenuous cleaning work per day. In that same period the claimant did not complaint of a recurrence of Tennis Elbow or joint pain, to either the respondents or to her General Medical Practitioner although consulting her GP on other matters on several occasions.

120. R1's removal request of 20th April 2023 recounts that the claimant had "cited ill health for not being able to undertake tasks". The request contains no reference to the condition founded upon of "Tennis Elbow" or to "joint issues". It contains no indication that the claimant's normal daily activities were adversely impacted. (130)

121. In the period from 8th September 2023, when the claimant returned to work and her dismissal on 5th May 2023, the claimant visited/consulted her General Medical Practitioner several times in each month. On none of those occasions did the claimant mention any joint pain to her doctors.

122. On 24th April 2023 the claimant reported to her doctor that she was "feeling low" and that there were "*lots of issues with work as a Cleaning Supervisor, and was planning to contact the Citizens Advice to know her rights*" (page 69). The claimant did not report any joint pain or physical issues arising from her daily cleaning duties at that time.

123. On 19th May 2023, a date after the material time, the claimant received a steroid injection.

124. The receipt of a steroid injection is not unequivocally referrable to the suffering of an impairment which qualifies as a disability.

125. It was during the period of absence from 18th August to 1st September 2022 that reference to joint pain and "Tennis Elbow" first appears in the claimant's medical records. The entries record that:

    (a) her GP assured the claimant that her symptoms "revealed nothing sinister" and that the pain that she was experiencing will improve with load and time", and further,

    (b) that her request, at that point 1st September 22, that she be signed off for an additional week before returning on light amended duties for a period of time was a reasonable request in her doctor's professional opinion, it being likely to facilitate the claimant's recovery from the condition complained of.

126. Tennis Elbow is a self limiting condition (one which will get better without treatment), but there are treatments which may improve symptoms and speed up recovery (82 and 83).

127. A full recovery is made in 9 out of 10 cases within 1 year. (NHS Information Sheet pages 82 and 83 of the Bundle).

128. At the material time, the 1st respondents were advertising for 2 additional cleaning staff to be allocated to the contract and whom it was expected would be in post by June of 2023.

129. The allocation of those additional staff to the contract once recruited would have the effect of reducing the number of hours available for any existing individual cleaner to undertake.

130. In March of 2022, the claimant began to experience some sporadic pain in her wrist/wrists.

131. In March 2022, the claimant was wearing a wrist bandage on at least one occasion when her Manager Steven Aitken would have been able to see that she was doing so.

132. On the 1st and on the 7th of September 2022 the claimant's medical records record a diagnosis of "Tennis Elbow". On the 1st and on the 8th of September 2022 the claimant sent to the respondent's Mr Aitken, Fit Notes which identified "Tennis Elbow" as the reason for her absence from work which extended over a period of 3 weeks.

133. After the 8th of September 2022 the claimant made no specific disclosure relating to her Tennis Elbow or joint pain other than the incidental reference at a meeting in October 2022 (page 111) and the hearsay reference in Linda Stancliffe's email to Steven Aitken of 21st October to the claimant stating that only another member of staff could fill up the hand towels dispensers due to an unspecified issue "with her hand".

134. The wearing of wrist bandages is a not uncommon measure adopted by persons to assist in the recovery from the strains including minor strains. It is not something which, of itself, is unequivocably referable to the existence of a disabling impairment in terms of section 6 of the Equality Act 2010.

135. In or around March of 2023 the claimant gave Mr Aitken a letter from the Bowen Works (74-75) which contained a statement that the claimant had been undergoing "Bowen Therapy". Bowen Therapy is a complementary therapy not prescribed within the NHS. It is not scientifically proven to be an effective treatment. It does not amount to medical treatment, nor to "measures" to be discounted for the purposes of paragraph 5.1 and 5.2 of Schedule 1 to the EqA.

136. The Bowen Works letter of March 2023 includes a statement that the claimant was showing "good improvement".

137. In her oral evidence the claimant confirmed that she felt improvement from November 2022 onwards. The 1st respondent was aware that the claimant had, from in or about the middle of October 2022, shortly after her return to work on 8th September and with the exception of the 3 day absence 11th to 13th October 2022, had been undertaking long hours of strenuous cleaning work on a daily basis, without complaint as to its impact upon her physical condition.

138. Prior to the sick notes of 1st and 7th September 2022, neither the 1st named respondent nor the 2nd named respondent knew that the claimant was suffering from the founded upon condition of "Tennis Elbow".

139. At the material time, neither the 1st named respondent nor the 2nd named respondent knew that the claimant was suffering from a physical impairment which had a substantial and long term adverse effect on the claimant's ability to carry out her normal day to day activities.

140. On the preponderance of the evidence the claimant has not established, on the balance of probabilities, that the 2nd named respondent ought reasonably to have known that the claimant was suffering from an impairment amounting to a disability.

141. On the preponderance of the evidence the claimant has not established, on the balance of probabilities that the 1st named respondent ought reasonably to have known that the claimant was suffering from an impairment amounting to a disability.

Applicable Law

142. Discrimination occurs where, because of a protected characteristic, one person treats another less favourably than he treats or would treat others (the Equality Act 2010 ("EqA") section 13). Disability is a protected characteristic (section 4) and, in so far as relevant, is defined in section 6 at Schedule 1 of the 2010 Act as follows:

> "**6. Disability**
>
> 1. A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.
>
> ……
>
> (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of sub section (1)."
>
> ……..
>
> …….
>
> SCHEDULE 1
>
> DISABILITY: SUPPLEMENTARY PROVISION
>
> PART 1
>
> DETERMINATION OF DISABILITY
>
> …..
>
> …..
>
> *Effect of Medical Treatment*

> 5(1) An impairment is to be treated as having a substantial adverse effect on the ability of a 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 prosthesis or other aid …."

143. HM Government's Office for Disability Issues, issued guidance under section 6(5) in May 2011. It is not an authoritative statement of the law and does not purport to be. The passage at section B1 is relevant to the issue to be determined in the present case and is in the following terms:

> "B1 The requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect".

144. That statutory guidance reflects what is contained in the authorities. It is well established that the implication of "substantial" in section 6(1)(b) is that the effect requires to be of some substance; something significant and non trivial: *Goodwin v Patent Office [1999] ICR 302; [1999] IRLR 4.* Whether or not the effect of an impairment is substantial in that sense is a question of fact for the Tribunal. As for what amounts to day to day activity, that too is a question of fact for the Tribunal to determine, using its basic common sense: *Vicary v British Telecommunications Plc [IRLR 680].* Thus, the person allegedly discriminated against will usually give evidence before the relevant Tribunal about the impairment and its effects on them at the relevant time, that being, potentially the best evidence.

145. In *Goodwin v Patent Office,* an Employment Tribunal was criticised for having unduly focused on what the claimant could do whereas they ought to have looked at what he either could not do at all or only do with difficulty; that being so, they had failed to assess the effect that his mental impairment had on his abilities. *Goodwin* was a decision of the then President of the Employment Tribunal Morrison J, and has often been referred to for guidance as to the proper approach when determining whether or not a person is disabled within the meaning of disability discrimination legislation: see page 308. That guidance is essentially that the fact finding Tribunal needs to ask whether the person has a physical or mental impairment, whether it affects their ability to carry out normal day to day activities, as the Tribunal finds on the evidence these to be, whether any adverse effect is substantial and whether it is long term? That is a non controversial analysis as it effectively works its way through the statutory provisions in sequence.

146. *Goodwin* did criticise the practice of focusing on what a claimant could do. That, however, does not render irrelevant any evidence about what a claimant can do. It serves as a reminder that in order to properly assess effect, the Tribunal should take account of all of the evidence about what, in the course of normal day to day activities the claimant can and cannot do or can only do with difficulty. Read in that way the guidance reflects the application of the balance of probabilities test (and standard of proof), to make Findings in Fact as an exercise that should be carried out on the preponderance of the evidence.

147. Paragraph 5.1 of Schedule 1 to the 2010 Act provides that measures taken to treat or correct impairment are to be discounted when assessing whether the impairment has a substantial adverse effect.

148. Paragraph 5(2) of Schedule 1 defines “measures” as including, in particular, medical treatment and the use of a prosthesis or other aid.

149. Self intervention, non psychiatric counselling, or non prescribed cognitive or physical therapy (self treatment/self medication with non prescribed drugs) do not fall within the definition of "measures" for the purposes of paragraph 5(2) of Schedule 1 to the 2010 Act and thus, do not fall to be discounted, in terms of paragraph 5.1 of Schedule 1 when assessing whether an impairment has a substantial adverse impact (IDS Volume 5, Chapter 6, paragraph 6.14).

150. Regarding what is sometimes referred to as a "deduced discrimination" claim, namely where paragraph 5 of Schedule 1 is relied on, it will normally be essential to lead clear medical evidence to show what the "deduced" effects of the impairment would be if the person did not have the treatment in question.

> "*13 ... in any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this particularly benign doctrine ... should not readily expect to be indulged by the Tribunal of fact. Ordinarily .... one would expect clear medical evidence.* "*Woodrup v London Borough of Southwark* [2002] EWCA Civ 1716; [2003] IRLR 111, Simon Brown LJ at para 13."

Discussion and Decision

151. The matters upon which a Tribunal must be satisfied if it is to hold that a party was, at the material time for the purposes of their complaints a person possessing the protected characteristic of disability. Those elements are reaffirmed in *Goodwin v The Patent Office*. In all those matters the onus of proof sits squarely with the claimant.

152. The evidence before the Tribunal at Hearing consisted of:-

(a) The oral evidence, given both in chief and in cross examination, of the claimant and of the claimant's Line Manager, Mr Aitken, the 1st respondent's General Manager Mr

Andy Robertson and the respondent's General Manager who heard the internal appeal against dismissal, Mr Roger Pearce; and,

(b) Such documents in the Joint Hearing Bundle to which the Tribunal was referred by parties' representatives or to which witnesses referred in the course of giving evidence, including all of the medical evidence/reports upon which the claimant gives notice of relying.

153. The medical documentation presented contains no diagnosis of the condition (physical impairment) founded upon namely "Tennis Elbow", as defined above, prior to September of 2022.

154. Upon the findings in fact which it has made the Tribunal found that the claimant's account of the symptoms which she was experiencing and of the impact which she asserted they had upon her ability to carry out day to day activities, at the material time, was an unreliable account when considered in the context of the contemporaneous documentary evidence which the Tribunal accepted as reliable, such that, when taken along with that contemporaneous documentary evidence including materially such medical evidence as was presented and with which it was inconsistent;

(a) The Tribunal found the evidence sufficient to support a Finding in Fact that for a period of 3 weeks, in or about the end of August and beginning of September 2023, the claimant was suffering from the medical condition founded upon, namely the self limiting condition of Tennis Elbow from the effects of which she had substantially recovered following a further 2 or 3 weeks of light duties such that she felt able to and did return to her onerous level of daily pre absence cleaning.

(b) Taking the evidence presented as a whole the Tribunal considered it insufficient to support a Finding in Fact that, at the material time for the purposes of her complaints that is to say, including at the date of her dismissal, the claimant was suffering from the medical condition founded upon.

155. Separately, let it be assumed that the Tribunal had found the evidence sufficient to support such a Finding in Fact it would have found the contemporaneous medical and documentary evidence, the oral evidence of the respondent's Mr Aitken and the evidence of the claimant, insufficient to support a finding that;

(a) That the medical condition founded upon had, at the material time,

(i) the effect set out at paragraph D18 of the claimant's Disability Impact Statement, or otherwise,

(ii) a substantial adverse effect on the claimant's ability including her ability to participate fully and effectively in working on an equal basis with other workers; and,

(b) Insufficient to support a finding that at the material time the condition founded upon was such that any adverse impact was, or was likely to be long term;

all, in terms and for the purposes of section 6 of the Equality Act 2010

156. On the evidence presented, let it be assumed that the Tribunal had found that the claimant was suffering from Tennis Elbow at the material time, which it has not, it would have found that the claimant had not so suffered from Tennis Elbow for a period of 12 months, nor was it likely to last for more than 12 months. On the evidence presented, including the evidence available as

at the date of dismissal, the Tribunal would have considered that the claimant's Tennis Elbow and joint pain were not likely to recur to the extent that her ability to carry out day to day activities would be substantially and adversely impacted.

157. On the balance of probabilities, the claimant's continuous daily performance of the onerous and exceptional cleaning duties of 8/10/12 hours per day, which she insisted in cross examination she was carrying out and which the Tribunal has found in fact she did carry out in the period October 2022 up to and including the date of her dismissal, were inconsistent with her being so impacted as she asserted in her Disability Impact Statement.

158. Regarding knowledge, on the evidence presented and on the Findings in Fact which it considered supported by the evidence and which it has made, the Tribunal would have held that neither the 1st nor the 2nd named respondent had actual knowledge that the claimant was, at the material time, suffering from an impairment which constituted a disability and further that the Findings in Fact which it was able to make, fell short of what would have been required to put either the 1st and or the 2nd named respondent on notice of disability and thus that neither ought reasonably to have known, in the circumstances, of the effects which in terms of her Disability Impact Statement of 15th December 2023 the claimant asserts she was suffering from as early as March 2022.

159. For the above reasons the Tribunal has found the claimant has failed to discharge her onus of proof and has failed to establish, on the preponderance of the evidence and on the balance of probabilities that she was, at the material time for the purposes of her complaints, a person possessing the protected characteristic of disability in terms of section 6 of the Equality Act 2010 by reason of the founded upon condition of "Tennis Elbow".

160. The claimant's complaints of discrimination because of the protected characteristic of disability are accordingly dismissed.

Employment Judge: **J d'Inverno**
Date of Judgment: **30 May 2024**
Entered in register: **30 May 2024**
and copied to parties

I confirm that this is my Judgment in the case of Jurska v ABM Facility Services UK Limited & others and that I have signed the Judgment by electronic signature.