Neutral Citation Number: [2026] EAT 94

Case No: EA-2024-001032-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 29 July 2026

Before:

SARAH CROWTHER KC,
DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MR K BADHAM

Appellant

- and -

JAGUAR LAND ROVER LTD

Respondent

- -
- -

Ms L Redman (instructed by **FRU**) for the **Appellant**
Mr C Crow (instructed by **Mills & Reeve LLP**) for the **Respondent**

Hearing date: 24 March 2026

- -

JUDGMENT

Disability Discrimination, Appeal Practice and Procedure

SUMMARY

When an appellant wishes to adopt the observations made by the EAT Judge at the rule 3(7) determination as his replacement Grounds of Appeal, he ought generally to apply at an early stage for permission to amend his Grounds of Appeal. That would be the normal route so that a respondent knows the case it must meet and can file any appropriate answer, should it wish to do so. However, given the extremely unusual circumstances of this case, it was in the interests of justice and in accordance with the principles established in **Khuddados v Leggate [2005] ICR 1013** to permit the Claimant to amend his Grounds of Appeal at the hearing.

The appeal would be dismissed on the basis that since the rule 3(7) determination an issue estoppel had arisen between the parties because of findings made at the final hearing of the Claimant's other causes of action. It was a necessary and fundamental element of the decision of the Tribunal at that final hearing that the Respondent took its decision to refuse to fund further counselling sessions for the Claimant for reasons wholly unrelated to any protected characteristic of the Claimant. It would not be open to the Claimant to re-litigate the 'reason why' issue based on a different disability which meant that the appeal was academic.

Had it been necessary to consider the appeal on its merits, it would in any event have been dismissed. On a proper reading of the written reasons, the Employment Tribunal had not misapplied the test in section 6 Equality Act 2010 to the facts of the case and was entitled to conclude that the Claimant did not have a disability in the form of a mental health impairment as of 7 March 2022.

SARAH CROWTHER KC, DEPUTY JUDGE OF THE HIGH COURT:

1. The Claimant appeals against the decision of Employment Judge Hena, sitting alone at a preliminary hearing on 10 July 2024, at which she found that he was not disabled within the meaning of section 6 Equality Act 2010 ('EqA') by reason of anxiety and/or depression.

Amendment to the Grounds of Appeal

2. Before getting into the merits of the substantive appeal, it is necessary to set out a little about the proceedings of the case before the Employment Appeal Tribunal. The judgment was given orally, and the written record of the determination is dated 11 July 2024. However, Judge Hena did not at that stage provide any written reasons for her decision. On 14 August 2024, the Claimant issued a notice of appeal. I stayed the appeal in order to permit written reasons to be produced and directed that the appeal be placed before a judge once written reasons had been circulated. The written reasons were sent to the parties on 15 January 2025, following which the appeal file was placed before HHJ Russell on 23 January 2025, who, in her reasons for allowing the appeal to progress to a full hearing, set out what she considered the arguable errors of law in the written reasons to comprise at paragraphs 6 and 7 of her reasons ("the Rule 3(7) Observations").

3. For the avoidance of doubt, the Rule 3(7) Observations were as follows: -

> "6. There is an arguable error of law in paragraph 20(b) in that amongst other things:
>
> > (i) The Tribunal focuses on ability to return to work as "the main impact" where the impact statement also refers to impacts on shopping, eating and inability to complete tasks;
> >
> > (ii) The Tribunal focuses on the cause of the impairment (said to be litigation induced) rather than its effect on day to day activities;
> >
> > (iii) The Tribunal focuses on the ability to return to work if issues are resolved rather than considering whether work was a normal day-to-day activity and, if so, whether at the material time as matters stood the Claimant's mental health had a substantial adverse effect upon his ability to return to work;

(iv) There is no consideration of the effect of the mental health impairment without treatment (CBT or medication).

7. There is an arguable error of law in paragraph 20(c) in the approach of the Tribunal to recurrence (apparently reliance is placed upon an earlier decision, possible of another Tribunal). It is not at all clear that the question of the period, or likely period, or any substantial adverse effect has been properly considered."

4. Whilst this step was no doubt undertaken with the best of intentions in an attempt to deal with the litigation expeditiously, in my judgement, it might have perhaps been better to invite further submissions from the Claimant as to whether he wished to proceed with his appeal in view of the fact that there were now written reasons for EJ Hena's decision and invite him to put forward such grounds of appeal as he wished to argue. It would at that point have been entirely appropriate for the EAT to assist the Claimant in formulating any arguable errors of law he had raised in a manner which made them more easily understood by the Respondent and any Judge hearing the appeal.

5. The Respondent submits that the process adopted was contrary to good practice and gave rise to a risk that it could appear to an impartial observer that the Employment Appeal Tribunal was running the Claimant's case for him. I have some sympathy with this argument, because, by undertaking an assessment of the written reasons in circumstances where the Claimant had not at that stage himself raised any complaint in respect of them, the EAT needed to exercise great care not to descend into the arena or give rise to the impression that it was assisting the Claimant in arguing his case. Mr Crow made this submission very properly and fairly recognised that even if an appearance of bias had arisen, on the facts of this case, it was difficult to see what could now at this stage of proceedings be done to remedy any appearance of bias.

6. Furthermore, Mr Crow pointed out, albeit understandably given the above chronology, none of the Rule 3(7) Observations were raised by the Claimant in his Notice or Grounds of Appeal. Neither had any application been made by the Claimant to amend his grounds of appeal to include the Rule 3(7) Observations as fresh or replacement grounds of appeal. The Respondent, by its skeleton

argument, contends that I should not entertain any appeal by the Claimant based on the Rule 3(7) Observations in the absence of a properly pleaded Notice of Appeal and Grounds. It submits that to do so potentially places it at a disadvantage in being able to respond and overriding important procedural safeguards, such as the Respondent's opportunity to object to amendment to Grounds of Appeal.

7. Again, I have sympathy with the Respondent's position, given the somewhat unusual history of the appeal. However, I indicated at the hearing of the appeal that I considered that the interests of justice required a pragmatic approach and therefore exceptionally I would treat the Claimant's skeleton argument, which is based on the Rule 3(7) Observations, as an informal application for permission to amend the Grounds of Appeal, and, that in the rather exceptional circumstances of this case, I would grant such permission, with my reasons to follow in my main judgment. These are those reasons.

8. The relevant principles with respect to the amendment of Grounds of Appeal before the Employment Appeal Tribunal were discussed in **Khudaddos v Leggate** [2005] ICR 1013. The starting point is to deal with cases justly and that it is relevant to take into account (i) whether the applicant is in breach of the Rules or the Practice Direction, in particular to make an application to amend as soon as the need for the same was known, (ii) the extent to which the proposed amendment would cause delay and (iii) whether allowing the amendment would cause prejudice to the other party and refusing it would cause prejudice to the applicant by depriving him of fairly arguable grounds of appeal (iv) whether the amendments raised a point of law which gave the appeal a reasonable prospect of success at a full hearing and (v) the public interest in ensuring that business in the Employment Appeal Tribunal is conducted expeditiously and that the resources are used efficiently.

9. Applying those principles to the facts of this case, I am not satisfied that the Claimant was in breach of any Rule, Practice Direction or order in failing to raise a formal application to amend his Grounds of Appeal following the Rule 3(7) Observations. The reasons of HHJ Russell did not indicate

that any application to amend was required and there was no direction for a revised Grounds of Appeal to be submitted by the Claimant. In those circumstances, whilst technically under the EAT Rules the Grounds needed to be amended if the Claimant wished to adopt the Rule 3(7) Observations as his case, it is understandable that no application was made, especially considering that although the Claimant has had the benefit of able assistance pro bono from counsel at the hearing before me, for the majority of this claim, he has represented himself in person and is not legally qualified.

10. Secondly, allowing an amendment now to permit the Claimant to use the Rule 3(7) Observations will not occasion any delay as the parties have prepared the appeal on the mutual assumption that they do in fact represent the Grounds of Appeal. Thirdly, a refusal to permit the Claimant to amend at this stage would effectively deprive him of his appeal in circumstances where HHJ Russell considered that it had reasonable prospects of succeeding and the prejudice to the Respondent is minimal, because although no formal application to amend was made, the substance of the appeal is set out clearly in the Rule 3(7) Observations and the Respondent has been well able to respond to them. Fourthly, HHJ Russell was of the view, as am I, that the written reasons did, on their own terms, give rise to arguable errors of law. Finally, the expeditious conduct of the matter and proportionate use of EAT resource demands that this appeal now be dealt with on its merits and without further delay: I have no hesitation in concluding that the appropriate course in the interests of justice is to treat the rule 3(7) Observations as the Grounds of Appeal and permit the Claimant to amend.

BACKGROUND FACTS

11. The Respondent described the Claimant as having been in 'sustained conflict' with it for over 7 years. The following chronology is derived from the parties' respective written submissions in the EAT and is not intended to be comprehensive.

12. The Claimant commenced employment with the Respondent on 19 January 2013. At some point thereafter he became a trade union representative. He first sought medical assistance in respect

of anxiety and depression in 2018. Following a dispute with the Respondent, the Claimant commenced a period of absence due to sickness on 18 July 2019, which continued until 17 June 2022. The Claimant's GP fit notes were marked 'stress at work'.

13. The Claimant first brought employment tribunal proceedings against the Respondent under claim number 1309749/2020. In that claim he alleged that he had been subjected to disability discrimination based upon disability arising out of an injury to his shoulder. The claim came before a panel comprising Employment Judge Woffenden and two specialist members in 2022. The claims were dismissed in their entirety. The Woffenden Tribunal made findings in relation to the Claimant's ill-health in the period from July 2019, including in respect of an occupational health report in February 2020 in which he was determined to be fit for work. The Claimant in the first claim alleged that he also had disability in relation to prostatitis and a back injury: the Woffenden Tribunal made findings rejecting any qualifying disability as a result of these alleged impairments. The Woffenden Tribunal was also invited by the Claimant find that he was disabled by reason for mental health impairment (anxiety and/or depression). It found that there was no disability as a result of any mental health impairment before 17 July 2019. Whilst he had a mental health impairment by 27 November 2019, he was not suffering from any mental health impairment by 4 February 2020.

14. The Claimant brought employment tribunal proceedings against his trade union (Case No 1311157/2020) which were struck out by EJ Gaskell on 14 February 2022 for want of reasonable prospects of success.

15. The Claimant continued to be employed with the Respondent, but absent from work. The Respondent referred the Claimant to its occupational health service and sessions of CBT (cognitive behavioural therapy) were provided to the Claimant. On 7 December 2021, the Claimant requested a further 16 sessions of additional CBT. On 7 March 2022, the Respondent refused that request.

16. On 21 May 2022, the Claimant issued a second set of proceedings before the Employment

Tribunal against the Respondent (Case No 1302543/2022) in which he alleged that the refusal to provide the additional counselling sessions was disability discrimination. It is in relation to these proceedings that this appeal arises. The Claimant alleges in these proceedings that he is disabled by reason of IBS (irritable bowel syndrome) and a mental health impairment (anxiety/depression).

17. As I have already said, the appeal is against the decision of EJ Hena at a preliminary hearing on 10 July 2024, that the Claimant had not established that as at the material time (7 March 2022) he was suffering from a mental health impairment.

18. In the meantime, the Employment Tribunal proceedings continued with respect to the claim for disability discrimination based upon the (admitted) disability of IBS. Those claims were all dismissed by an Employment Tribunal (EJ Platt sitting with specialist members) on 24 March 2025.

19. By its skeleton argument, dated 6 March 2026, Mr Charles Crow, Counsel for the Respondent made the following submission in this appeal,

> "C seeks, by this appeal of the decision of EJ Hena, to revive the same allegations as have been dismissed by that decision (insofar as they relied upon the impairment of IBS) by restoring the ability to argue that R's decision not to continue to fund CBT treatment was section 13 and/or section 15 disability discrimination due to mental impairment."

20. In light of that submission, I considered carefully the written reasons of the Platt Tribunal, which I accessed on the court file. In light of that reading, during the hearing, I invited Mr Crow to clarify whether by this submission, he was asserting that the issue of the reason why the Respondent had refused to fund further counselling sessions for the Claimant was unrelated to any impairment amounting to a disability and that therefore an issue estoppel arose between the parties such that the appeal was rendered academic. He confirmed that it was.

21. As it was apparent that the Claimant, and in particular Counsel representing him on his appeal had not appreciated the significance of this point taken in the Respondent's skeleton, I gave directions that the parties could put in submissions in writing on the question of issue estoppel following the

oral submissions. I have now received and been able to consider the written submissions from both the Claimant and Respondent.

ISSUE ESTOPPEL – THE LEGAL PRINCIPLES

22. Issues estoppel is part of the more general principle of *res judicata*, which was described by Lord Sumption JSC in **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd** [2013] UKSC 46; [2014] AC 160 as the 'portmanteau term' which encompasses the various situations in which a party is prevented from asserting or denying as against the other party in litigation, facts or matters on the basis that they have already been determined. The concept that once a court has reached a determination on a point it is conclusive as between the same parties, even where they come before the court for a different purpose, is very longstanding.

23. In the **Virgin** case, Lord Sumption defined issue estoppel as follows: (at paragraph 17):

> "there is a principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case (1776) 20 State Tr 355.* 'Issue estoppel' was the expression devised to describe this principle by Higgins J in *Hoystead v Federal Commissioner of Taxation (1921) 29 CLR 537, 561* and adopted by Diplock LJ in *Thoday v Thoday [1964] P 181; 197-198"*

24. In **Thoday** Diplock LJ set out what has been described as the classic statement of the law (at page 197) when he set out that issue estoppel as being an extension of the same public policy rule which underlies cause of action estoppel,

> "There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdictions, either upon evidence or upon admission by a party to litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the conditions was fulfilled if the court has in the

first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

25. In **Skatteforvaltningen v MCML Ltd** [2025] EWCA Civ 371; [2025] 4 WLR 52, the Court of Appeal was asked to decide whether a party can be estopped not just by a judge's conclusion on the facts of a particular case, but by the legal principles that he considered led to that conclusion. The Court of Appeal conducted a comprehensive survey of the decided cases to see what sort of issues have been held to be capable of giving rise to an estoppel. It was held that issue estoppel was capable of arising not only where there was a previous factual determination between the same parties to the proceedings, but also where there had been a finding as to the legal consequences of those facts. At paragraph 134, Newey LJ said (emphasis as in original),

"It is, I think, clear from the authorities that issue estoppels can arise from determinations on points of law as well as points of fact. Thus, *Spencer Bower* states in paragraph 8.04, 'The determination which will found an issue estoppel may be of law, fact, or mixed fact and law.' In *Jones v Lewis* [1919] 1 KB 328, Bankes LJ said at pp 344-345, "No question of fact which was directly in issue between the parties to the action before Bray J, and which was decided by him, could be further litigated by either party, and the same would apply to the exact point decided by Bray J, whether it were *a point of law or mixed law and fact'*. In *Hoystead*, Lord Shaw commented at p 165 that '[p]arties are not permitted to being fresh litigations because of new views they may entertain of *the law of the case*' and, at p 168, that, 'whether the point as to joint ownership depended upon admission of fact upon evidence led or upon argument upon *construction of a statute,* that is …. nothing to the point in considering the question of estoppel.' In *Blair v Curran,* Dixon J observed at p 531 that '[a] judicial determination directly involving an issue of fact or *of law* disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies'. In *Mills v Cooper,* Diplock LJ explained at pp 468-469:

'a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether or fact or of the *legal consequences of facts*, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not be reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.'

In *Watt v Ahsan,* Lord Hoffmann said in para 31 that issue estoppel arises 'when a court of competent jurisdiction has determined some question of fact or *law*, either in the course of the same litigation (for example as a preliminary point) or in other litigation which raises the same point between the same parties'…In *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, 916F-917B…Lord Reid indicated that there was no justification for a distinction between issues of fact and issues of law." (Emphasis as in original).

26. Following receipt of the written submissions from the parties, I sent a draft of this judgment to the parties' representatives on the usual embargoed basis prior to formal hand-down. The day before hand-down was listed, the Supreme Court handed down its decision in the **Skatteforvaltningen** case, overturning the decision of the majority of the Court of Appeal and giving a narrower statement of the law in respect of issue estoppel. Considering that development, I invited a second set of written submissions from the parties. In the event, submissions on behalf of the Claimant were prepared by Victoria Quinn, a legal officer at the Free Representation Unit, for whose assistance I am particularly grateful as she stepped in a short notice when counsel was not available.

27. In its decision in **Skatteforvaltningen,** the Supreme Court rejected the analysis of the Court of Appeal which I set out above. It emphasised that the doctrine of issue estoppel must remain strictly confined to avoid injustice and focussed on the pleaded cases as the basis for identification of the issues, holding at paragraph 44 of its reasons that issue estoppel, '*arises only in respect of the particular claim brought (or defence raised) in the proceedings.'*

28. The Supreme Court cautioned against treating steps in prior reasoning or more generalised characterisation of questions in dispute as a basis for issue estoppel, because that approach would give rise to the risk of a denial of justice. Only those facts which are both 'necessary' and 'fundamental' to the cause of action in the original proceedings can potentially give rise to an estoppel on an issue in later proceedings. Therefore, it was necessary to focus on "*the facts that are fundamental or ultimate (in the sense that they necessarily had to be established to make good the cause of action being alleged or a defence put forward) and the legal quality of those particular*

facts": [46]. Thus, the "*immediate foundation of the ultimate decision*" may give rise to an issue estoppel whereas "*elements of the prior court's reasoning leading up to that decision cannot*": [45].

THE PLATT TRIBUNAL FINDINGS

29. The sole detriment relied upon by the Claimant was the decision of the Respondent the decision on 7 March 2022 to refuse funding of further CBT. He contended that this decision was contrary to either section 13 Equality Act 2010, namely that it had been taken because of his disability (IBS), or section 15 Equality Act 2010, in that it was a decision which was taken by reason of something which arose out of his disability, namely his extended absence from work. The Respondent's defence to both of those claims was that the reason why it had refused to fund further CBT was because advice from its occupational health provider had indicated that it would not assist the Claimant in returning to work because the real barrier to his return was not his mental health but the ongoing dispute with the Respondent.

30. The Platt Tribunal found that the decision not to recommend funding of further CBT was taken by a Dr Iley (§29, 76 judgment) who at the time the decision was taken, did not specifically remember the Claimant (§24 Judgment). The Tribunal held that Dr Iley considered,

> "'the factors that he states were normally in his mind when making such decisions' which would have included 'the fact that CBT was not facilitating a return to work and the reason why CBT had been recommended'" (§32 judgment).

31. The Tribunal then held (at paragraph 78) that the reasons why Dr Iley had decided not to offer to fund any more CBT for the Claimant were (i) that there were barriers for the Claimant returning to work [which were unrelated to his health]; (ii) CBT appeared not to be facilitative of a return to work [because it was not the Claimant's health which was preventing him from working] (iii) consideration of the clinical guidance and (iv) that the Claimant was in litigation with the Respondent.

32. Against this background, the Tribunal went onto to find (§§81-82 Judgment) that Dr McDermaid's opinion about the cause of absence from work was accepted by Dr Iley. The Tribunal

found that the Claimant's inability to return to work arose because of 'the employee's perception of work-related issues'. The Tribunal found (§78 Judgment) that there was "no evidence" that IBS was any part of the reasoning for the decision not to offer CBT. That finding flowed directly from the earlier findings about what had and had not influenced Dr Iley. Accordingly, the claim for sections 13 and 15 Equality Act 2010 discrimination based on IBS as a disability failed.

DISCUSSION

33. The Claimant's central submission was that the findings regarding the Respondent's state of mind in refusing the funding of further CBT were properly to be seen as elements of the Court's prior reasoning leading to the decision to dismiss the discrimination claims, rather than as fundamental or necessary elements of the decision itself.

34. Ms Redman, in her submissions on behalf of the Claimant, reminded me that the Platt Tribunal had rejected a specific invitation by the Respondent to make findings about the Claimant's disability discrimination claim in respect of his mental health impairment if this appeal succeeded (§§12-13 judgment). Mr Crow accepts this and submits that although it follows that there is no cause of action estoppel arising in respect of disability discrimination based on mental health impairment the Platt Tribunal did in fact make findings which give rise to an issue estoppel on the question of the reasons for the refusal to offer CBT funding which make any subsequent claim for disability discrimination based on mental health impairment untenable.

35. The Claimant submits that the essential findings of the Platt Tribunal are limited to a finding that disability discrimination based on an impairment of IBS and that it would be open to a tribunal to conclude that the Respondent's decision not to offer to fund any further CBT was disability discrimination based on an impairment of mental health. I cannot accept that submission. In my view the findings were essential to the Platt Tribunal's conclusion that the Respondent had satisfied it that the reason for the refusal was wholly unrelated to any personal characteristic of the Claimant, which was essential for the Respondent's 'defence' of the discrimination claims. Although that defence went

wider than the specific basis upon which the Claimant had advanced his claim for discrimination, in my judgment, that finding was an essential part of the Platt Tribunal's determination that the decision was non-discriminatory and therefore was binding on both parties.

36. The findings of the Platt Tribunal were that the factors which influenced the Respondent's decision not to fund further CBT were unrelated to the Claimant's health. At paragraph 78 of its reasons, it made an express finding that the decision not to fund CBT was because it was not assisting the Claimant in a return to work. This finding is valid whether the underlying reason for needing CBT is a mental health impairment or IBS, or indeed any other potential qualifying impairment. It is an essential finding to the Tribunal's conclusion that the Respondent's reasons for its decision were unrelated to the Claimant's IBS. In light of that finding, it would not, in my judgement, be open to a Tribunal to reach a different conclusion on the same facts in respect of a different impairment which amounted to a disability: whatever the conditions were which amounted to a disability, it would still be the case that the Respondent refused to fund CBT because the treatment was not going to facilitate a return to work.

37. Similar considerations apply with respect to the Tribunal's conclusion that there were barriers preventing the Claimant from returning to work which were completely unrelated to his health. The Platt Tribunal found that the Respondent had concluded that it was the unresolved employment dispute which meant the Claimant was still on long-term sickness absence, and not any health condition, whether or not that condition amounted to an impairment. As in **Skatteforvaltningen**, the Tribunal's conclusion in respect of the facts as found is binding on the parties in respect of that issue, because it was necessary for the Tribunal to consider 'the reason why' the CBT funding was refused. As it would be an essential element of any claim for disability discrimination based on the mental health impairment to show the factors which influenced that decision included the Claimant's mental health or consequences which flowed from it, it is not open to the Claimant to seek to re-open or re-litigate the clear finding of the Platt Tribunal that the Claimant's health condition, whatever the actual

driving factors pathologically, had nothing to do with the Respondent's decision to stop funding CBT.

THE TRIBUNAL'S DECISION IN RESPECT OF DISABILITY

38. It follows, therefore, that the appeal will be dismissed. However, I have decided that I should, in the alternative, consider what the position is in respect of the findings of EJ Hena in respect of whether the Claimant's mental health condition did amount to a disability. This is because the Claimant has separately appealed the Platt Tribunal decision and so there is a possibility that its decision may be overturned.

LEGAL FRAMEWORK

39. Under s.6 EqA, 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.

40. Following **Goodwin v Patent Office** [1999] ICR 302, EAT, a tribunal should consider each question with regard to the definition of disability separately and where appropriate sequentially.

41. Under the EHRC Statutory Code Para 2.15, Substantial means more than minor or trivial. Day-to-day activities are not defined in the statute or code, but guidance is provided in Appendix 1 to the Code. At para 15 it states:

> 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.

42. In **Sobhi v Commissioner of Police of the Metropolis** [2017] UKEAT/0518/12, Mr Justice Keith found that the effective participation in professional life is considered a day-to-day activity. This was then added into the EqA at Schedule 1, Para 5A, which states:

> References in the relevant provisions to a person's ability to carry out normal day-to-day activities

are to be taken as including references to the person's ability to participate fully and effectively in working life on an equal basis with other workers.

43. In considering the day-to-day activities alleged to be affected the focus is on what the Claimant cannot do. In **Adremi v London and South Eastern Railway Ltd** [2013] UKEAT/0316/12/KN, Mr Justice Langstaff (President) explains at para 15 "that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment".

44. Under Schedule 1, Para 2(1) EqA, long-term means:

2. Long-term effects

(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, …

45. The term "likely" is to be interpreted as meaning that it could well happen, rather than it is more probable than not that it will happen see: **SCA Packaging Ltd v Boyle** [2009] ICR 1056.

46. A broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material time. See **Cruickshank v VAW Motorcast Ltd** [2002] ICR 729 EAT.

47. In **All Answers Ltd v W and anor** [2021] EWCA Civ 606, it was held that the question of whether at the time of the alleged discriminatory acts the effect of an impairment has lasted or is likely to last at least 12 months is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts and so the tribunal is not entitled to have regard to events occurring later. However, evidence of what happened later can be used by a tribunal in order make findings about what the facts existing were at the relevant time.

THE HENA TRIBUNAL FINDINGS

48. Judge Hena set out the evidence which she had seen and also a summary of the points of

argument made both by the Respondent and Claimant in submissions both in writing and orally. She then made the following findings:

> **"Fact Findings**
>
> 20. The Tribunal found the following in relation to the issues:
>
> **a. Did the claimant suffer a mental impairment of stress and anxiety at the time the claimed discrimination took place (loss of CBT counselling March 2022)?**
>
> I accept the relevant date is March 2022, from the evidence it shows the claimant to have suffered from anxiety in December 2021, which is not immediately prior, but due to the medical history could say around March 2022 there was stress and anxiety.
>
> **b. Did this stress and anxiety have a substantial adverse effect on the claimant's ability to carry out his day-to-day activities?**
>
> The report at page 108 by Karl, the CBT therapist and the Occupational Health report from 2022 do not support that suffering from anxiety impacted the claimant's day-to-day activities. They both say the claimant can return to work which is main impact the claimant argues.
>
> At page 127 the statement does state that the claimant cannot get out of bed, has paranoia etc, but none of this is recorded by his GP or other reports as the impact of the anxiety. They say that it is litigation induced stress and anxiety which impacts IBS and eating properly to support that condition. But if main day-to-day activity is working then not made out as reports all say can return once some of issues resolved by the respondent as they are viewed by the claimant to be issues.
>
> Whilst there is a summary of impacts on the claimant, there is no indication of the years they apply to and most seem to be from 2018 such as the assessment from the DWP which says from 2018 for 24 months but that does not bring it to the March 2022 date.
>
> The claimant failed to provide the 2022 Occupation Health notes for the report where suicide was discussed. Not clear why this was not provided for this preliminary hearing as that would support his condition being severe at the time. The claimant said he did not have time to provide this but if he is pursuing this matter then responsibility on him to provide key evidence he seeks to rely upon.
>
> **c. The effects of the stress and anxiety were likely to last at least 12 months or more from March 2022? Or likely to recur?**
>
> The 2021 report by Karl [Woolley] recommends 15 more sessions to assist the claimant in

> coping with litigation stress so he can manage things properly. Whilst the previous determination noted stress was bad for a period of time, I agree they would have considered recurrence in that decision – whether likely to occur again at that level within 12 month or more, but they did not find that it was likely to recur.
>
> I find I cannot look at 2023 evidence of the severity of the claimant's mental health as it needs to be what the respondent reasonably should have foreseen at that time. The condition seemed manageable at that point in time and the claimant's day-to-day activities were not impacted so say that condition could be foreseen as lasting 12 months or more"

DISCUSSION

49. Ms Redman attacked the finding at paragraph 20(b) where Judge Hena refers to the 'main impact' relied upon by the Claimant as being an inability to return to work. Ms Redman submits that this was an error of law because it resulted in a failure to consider the other impacts relied upon in the Claimant's disability impact statement.

50. However, that summary reflected the manner in which the Claimant had presented the case on day-to-day activities to the Tribunal. He himself argued that his inability to work was the main substantial adverse effect in respect of his day-to-day activities. It is correct to state that there was brief mention in the disability impact statement of other adverse effects on day-to-day activities which were also potentially substantial, however, these do not appear to have been developed in either submissions or evidence (the Claimant was not cross-examined on his impact statement at the hearing) and in any event, the Judge was careful to refer to inability to work as being the 'main' impact relied upon in contrast to the 'only' one. In her summary of the submissions of the parties, it is clear that she had read the impact statement and she referred to the other day-to-day activities mentioned in her recitation of the evidence and submissions – shopping, eating, completing tasks – (see the judgment paragraph 18 7^{th} bullet point).

51. In any event, the reasons at paragraph 20(b) expressly reject the Claimant's evidence in his impact statement regarding other impacts (e.g. that he was unable to get out of bed, has paranoia) on

the basis that the evidence found no corroboration in any of the medical records or reports. That finding specifically refers to the 'impact' of the anxiety which demonstrates in my judgment that the Judge correctly applied the test. She was entitled to find that the Claimant's evidence in respect of these other alleged impacts was not sufficient in circumstances where it was not supported by the contemporaneous documents. I do not accept Ms Redman's criticism of the Judge's reasons that they did not specifically reference the link which the Claimant made between his IBS and his mental health issues in his impact statement or as referred to by the therapy report from the CBT. There was no obligation on the Judge to refer to every single part of the evidence and, given that she had set out the evidence in summary earlier in her reasons, I am satisfied that she had the matters well in mind.

52. Ms Redman's second avenue of criticism was that the Judge had improperly focussed on the cause of the Claimant's inability to work rather than on whether that ability to work amounted to a substantial adverse impact on his day-to-day activities. In my judgement this does not amount to a fair reading of the reasons. For example, the Judge's finding in respect of the CBT therapist report is that it supports the contention that the Claimant was capable of returning to work . In making this finding, the Judge was entirely concerned with whether the mental health symptoms had the effect of preventing him from working and was entitled to find based on the evidence that they did not. Equally, her finding that,

> "If main day-to-day activity is working then not made out as reports all say can return once some of issues resolved,"

Whilst expressed with perhaps an excessive level of economy, does in my judgement show that the Judge was addressing her mind directly to whether the main impact alleged, namely inability to return to work, was an effect of the mental health issues. She rejected that contention, based squarely on the medical evidence from the Occupational Health report which was to the effect that once the Claimant had resolved his dispute with the Respondent, he could return to work, so that his mental health concerns did not of themselves present a barrier to a return to work.

53. Whilst there is a reference to the fact that the impairment is 'litigation induced stress and anxiety,' that formulation is a quotation taken directly from the reports themselves and whilst it would have been helpful for the Judge to set out this part of her reasoning more clearly and at some greater length, I am satisfied that when read as part of the reasons as a whole this reference is no more than recital of the way in which the medical reports describe the Claimant's mental health issues and is not, as Ms Redman suggests, the Judge falling into the trap of considering the cause of the issues rather than their effects.

54. The third strand of complaint is that the Judge erred in finding that the Claimant's mental health condition as at the time of the decision to stop funding his CBT was not preventing him from working. I do not read either the Occupational Health report or the Judge's reasons in the same way as Ms Redman. She invites me to conclude that the Judge had found that there was an inability to work due to stress and anxiety but that it would resolve *following* resolution of the employment dispute between the Claimant and the Respondent. My reading of the Judge's reasons is that she accepted the finding of the Occupational Health report which was that the Claimant's inability to work was **not** being caused by any mental health problem as at March 2022: it was due to his impasse with the Respondent regarding the conditions attaching to any return to work and that was the sole barrier preventing a return to work. It seems to me that was a finding open to the Judge. It would have been easier for the Claimant to understand had the reasons spelled the point out in more detail, but in the end, I have concluded that taken as a whole there is sufficient material in the reasons for the Claimant to understand why he had lost.

55. Next, the Claimant complains that there was a failure to consider the so-called 'deduced effects' in respect of the Claimant's condition. This does not appear to have been subject of argument before the Judge and in any event, in light of my conclusions regarding the point above, it is hopeless: the Judge had concluded that there was no mental health impairment stopping the Claimant from working as at March 2022, therefore it was entirely otiose for her to separately consider whether the

Claimant would have not been able to return to work if he had not been receiving CBT. In any event, as was held in **Woodrup v London Borough of Southwark** [2002] EWCA Civ 1716, [2003] IRLR 111 by Simon Brown LJ, the onus would have been on the Claimant to demonstrate in the expert evidence that the absence of mitigating treatment would have left him with a substantial adverse effect:

> '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 peculiarly benign doctrine under para 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary'.'

56. The final basis of challenge is in respect of the Judge Hena's treatment of the requirement for the Claimant to show that his mental health condition had a sufficiently long-term effect on him at paragraph 20(c) of her reasons, set out above. The Claimant's submission is that Judge Hena failed to apply the approach required under the statute as explained in the **All Answers** case.

57. The Claimant's evidence regarding the timing of his mental health issues and how long they had persisted was extremely thin indeed. In submissions, the only evidence to which Ms Redman was able to refer me in the bundles which addressed the point was a GP letter dated September 2023 which set out summary details of presenting complaints made by the Claimant to the GP surgery, presumably copied from his records, and confirmed that the Claimant "first came to me in August 2019" and that he "continues to struggle".

58. In effect, this complaint also becomes academic once it has been understood that the Judge had found that as of March 2022 there was no substantial adverse effect on the Claimant's activities of day-to-day life. Nor was this a recurrence case – the Claimant's case at tribunal was presented solely on the basis that he was continuing to suffer those adverse effects at the material date of 7 March 2022.

59. However, it is this part of the reasons of Judge Hena which I have found the most difficult to

comprehend and it is unfortunate that they are so brief and assume a large amount of background knowledge on the part of the reader. I shall say a few words to explain why I nevertheless consider that this criticism is unjustified. The first point to bear in mind is that the primary audience for written reasons is the parties to the dispute and Judge Hena is entitled to assume that they are apprised of the relevant facts and evidence. What I explain below can be taken to have been within the knowledge of the parties.

60. In order to understand the reasons under paragraph 20(c) it is necessary to be aware that there had been previous tribunal proceedings between the parties (before the Woffenden Tribunal) in which the Claimant had also alleged disability discrimination based on mental health impairment consisting of stress and anxiety which was rejected by the tribunal on the basis that any mental health symptoms were not of sufficient duration. In Judge Hena's reasons, once considered in conjunction with the summary of submissions, it is apparent that what she is explaining is her acceptance of the point made on behalf of the Respondent that the Woffenden tribunal would have needed to consider whether the condition was likely to recur and found that it was not and so did not constitute a disability. It seems to me that, whether Judge Hena was strictly bound by this finding (as contended by the Respondent) or not, she was entitled to have regard to the fact that the Claimant's alleged disability due to mental impairment during the period 2019 to 2021 had been subject of consideration by the Woffenden Tribunal and rejected.

61. It seems clear to me that the reference by the Judge in paragraph 20 (c) to "2023 evidence" is to the GP letter dated September 2023 and the Judge was entitled to attach little or no weight to that correspondence in when determining either what the position was in terms of the length of the impairment or what the Respondent ought reasonably to have foreseen as to its prognosis. The matter of weight to attach to evidence falls within the ambit of the Judge's fact-finding role and it was open to Judge Hena to find it wanting in terms of independence or detail. Again, it would have been more satisfactory had the Judge been able to descend into some detail as to what about the evidence led her

to consider it incapable of bearing the weight the Claimant wished it to carry, and that the Claimant's condition was 'manageable' at that time, however, I am just about persuaded that her failure to do so does not represent an error of law when the reasons are considered as a whole.

CONCLUSION

62. It follows that the appeal grounds are permitted to be amended in the form set out in the Rule 3(7) Observations, and the appeal will be dismissed.

63. An issue estoppel arises in favour of the Respondent because the Platt Tribunal has concluded that the Respondent acted by reason of factors wholly uninfluenced by any disability of the Claimant when it refused to fund any further CBT in March 2022 and it is not open to the Claimant to re-litigate that issue on the basis of any further or additional alleged disability, including the mental health impairment on which he relies in this appeal.

64. Had it been necessary to consider the appeal, whilst the written reasons could have benefitted from more detail and care in their preparation, I am satisfied that they are sufficient to demonstrate that the Judge correctly applied the test in section 6 Equality Act 2010 and was entitled to find that the Claimant did not have any disability by reason of mental impairment as at 7 March 2022.