



# EMPLOYMENT TRIBUNALS

**Claimant:** Dr Maryna Anatolyeva

**Respondents:** (1) St Helens and Knowsley Teaching Hospitals NHS Trust  
(2) NHS England

**Heard at:** Manchester **On:** 10 October 2023

**Before:** Employment Judge Holmes (sitting alone)

## Representatives

For the claimant: in Person  
For the respondent: Ms L Gould, Counsel

## RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The claimant's application for permission to adduce further evidence, and for a postponement to obtain and serve further medical evidence is refused.
2. The claimant was not at the material times a person with a disability.

## NOTICE OF HEARING

3. There will be a further public preliminary hearing on **17 May 2024**, at **10.00 a.m.** listed for one day, at **Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA** in person, to determine:

1. Whether any or all of the claimant's claims should be struck out and/or the claimant should be ordered to pay a deposit as a condition of continuing with any of the claims; and
2. To give further case management directions and identify the issues to be determined; and
3. Whether the final hearing should be postponed.

## REASONS

1. The Tribunal convened to hear a number of preliminary issues, and applications, the first of which was whether the claimant was at the material time a person with a disability.
2. The Tribunal heard evidence from the claimant , and was hearing her closing submissions, when she indicated that she may wish to adduce further medical evidence in the form of an autism assessment (which she has not yet had) and , possibly, a further witness statement from herself.
3. To the extent that this was an application to postpone the hearing , and adduce further, as yet unavailable, evidence , Ms Gould for the respondents objected to it, given that it was a very late application, and the claimant had previously been advised at a previous preliminary hearing of what evidence she needed to adduce, and this very issue had been discussed.
4. The claimant , however, considered that she had been misled by a statement in the medical report that she had relied upon to the effect that her condition was “covered by the Equality Act 2010”, a statement that the Employment Judge considered was ambiguous and potentially went too far, as the determination of whether a condition which is not a prescribed disability such as cancer or HIV, amounts to a disability is a matter for the Tribunal.
5. As the hearing was drawing to a close and could not be concluded, the Employment Judge reserved judgment. He did so until 7 November 2023, during which period if the claimant wished to obtain and adduce further medical evidence, and possibly seek to make and admit a further witness statement , she could do so. The respondents would be entitled to make objections, and the Employment Judge would then consider whether to admit the new evidence, and make any consequential orders necessary.

### **Further developments after the postponement.**

6. Following the hearing the claimant wrote to the Tribunal, duly copying the respondent as required. There appear to be two occasions upon which she did so. The first was on 16 October 2023, when she sent an email to which was attached a further statement, dated 13 October 2023 from the claimant herself. There then was a further email of 20 October 2023, to which the claimant attached more evidence , in the form a screen shot from a mobile phone, and other documents.
7. By email of 23 October 2023 the respondent responded to the claimant’s recent communications , objecting to the admission of any new evidence, and inviting the Tribunal to determine the issue of disability upon the evidence that it already has.

### **Discussion and ruling upon the claimant’s applications.**

8. By her email to the Tribunal of 16 October 2023 the claimant simply attached her further statement, for the attention of the Employment Judge.

9. In this statement the claimant says that she has have familiarised herself with a Diagnostic and Statistical Manual, fifth edition (DSM-5) , we she says is the most common test for ASD assessment. The DSM-5 now includes a condition called 'social communication disorder', separate to 'autism spectrum disorder'. This diagnosis would be given where someone exhibits social interaction and social communication difficulties but does not show restricted, repetitive patterns of behaviour, interests or activities.

10. The respondent makes the valid point that the claimant now seeks to introduce a new condition, which she relies upon as her disability.

11. The claimant goes on to inform the Tribunal that ASD assessments take 8+ weeks to get a report, and the results may be inconclusive. She asked the Tribunal to let her know if it would be helpful for her case to go ahead with this assessment. It is not for the Tribunal to take decisions for parties. The Tribunal has no better idea of whether such a report would “help her case” than the claimant does. The claimant was given the opportunity, at the 11<sup>th</sup> hour of the hearing, to seek a further report, she has apparently not done so, notwithstanding that she could probably have one by now if she had actioned this quickly. If she has not taken that opportunity, she must accept the consequences.

12. In terms of the further witness statement, the Employment Judge agrees that this does indeed seek to introduce a new condition as the relevant disability. In terms of the other matters set out in the statement, the claimant has not explained why these matters were not in her previous statement. The case management orders made by EJ Howard on 10 July 2023 were very clear, and specified precisely what needed to be in the claimant’s witness statement for disability. She has not explained why these further matters were not.

13. A further consideration is that , if this further statement is to be admitted, the claimant will have to be re-called to be cross – examined upon it, in a further, oral, hearing. The final hearing listed for 5 days commencing on 3 June 2024. If a further hearing on disability is required, given that further case management is required, particularly the List of Issues being outstanding, there is a risk that this date will be jeopardised. Re-listing a five day hearing is likely to take it well into 2025, if not beyond it.

14. It is appreciated that to deny the claimant’s applications may weaken her case on disability. That is unfortunate, but must be set in context. The claimant brings claims other than disability discrimination claims, so failure on the issue of disability would not mean that she cannot proceed with her claims. She has claims of unfair dismissal, and age and race discrimination, all of which are proceeding. This is highly relevant to the proportionality of whether to grant the claimant’s applications.

15.The Employment Judge , for all these reasons, accordingly refuses the claimant permission to adduce further witness evidence on the issue of disability, and her application for a further postponement to adduce any further medical evidence. The Tribunal will determine this issue on the material before the Tribunal in the hearing. The Employment Judge apologises for the delay in the promulgation of this reserved judgment, occasioned initially by the non – referral to him of the claimant’s further

materials, and the respondent's response thereto, and then subsequently by pressure of judicial business.

**The disability issue: the evidence before the Tribunal:**

16. Turning to the issue of disability then, the Tribunal had before it a bundle, containing 726 pages . The claimant gave evidence. She confirmed her witness statement dated 12 August 2023, and was cross – examined upon it by Ms Gould. The Tribunal finds the following facts relevant to the issue of disability:

16.1 The claimant is a consultant anaesthetist . She lived in Belarus for 27 years before moving to the UK.

16.2 She was having difficulties when she started working in NHS in 2009, as sometimes she did not , as she puts it, meet multiple expectations. In 2012 she started Core Anaesthetic training. After that her College Tutor at that time said to her that he thought she had a communication problem. She sought medical help in ED on weekend, she spoke to a psychiatric nurse and she gave her SSRI to cope with stress (due to what she considered backstabbing at work). She was on these tablets for about 8 months. She did not , however, have depression, it was a response to what she described as covert mistreatments at work.

16.3 The claimant commenced her ST3 training in London in February 2017. In August 2018, she relocated to train in the North West. On 1 October 2018 her employment transferred to the respondent.

16.4 Between August 2018 and February 2019, the claimant undertook a placement at Salford Royal Hospital, part of the Northern Care Alliance NHS Foundation Trust. Between February 2019 and August 2019, she then undertook a placement Wythenshawe Hospital, part of Manchester University NHS Foundation Trust.

16.5 Between August 2019 and October 2020, the claimant undertook a placement at Royal Bolton Hospital, part of Bolton NHS Foundation Trust.

16.5 Between November 2020 and February 2021, the claimant returned to Wythenshawe Hospital. Between February 2021 and May 2021, the Claimant was placed at Salford Royal Hospital, part of the Northern Care Alliance NHS Foundation Trust.

16.6 Between May 2021 and August 2021, the claimant undertook a placement at Royal Preston Hospital, part of Lancashire Teaching Hospitals NHS Foundation Trust. The Claimant remained at Royal Preston Hospital until February 2022.

16.7 In early 2022, a further Outcome 3 was awarded, with six months of additional training time. The claimant undertook this additional training time between February 2022 and November 2022, at Royal Blackburn Hospital, part of East Lancashire Hospitals NHS Trust.

16.8 During her time in North West she found it harder to cope in tertiary ICU environment, as she found that this environment does depersonalise even

experienced doctors. She had particular issues at handover time. She felt like her every word was being scrutinised and then criticised.

16.9 In April 2021 , the former Head of School, said to her that someone had called her “Autistic”. It was the first time in her life that she was actually described in this way.

16.10 She considered that her personality was being criticised and not accepted, and that , in order to make a case for her dismissal viable, her anonymous assessors in ELHT/Salford criticised her for every minor single trivial thing , unfairly, which would have gone unnoticed in other, “normal”, trainee doctors.

16.11 The claimant also said “The rest is already known to the ET”. It is unclear what she means by that , but in terms of what her medical condition is, and whether it amounts to a disability, what is known to the Tribunal is solely that which is in her impact statement, her oral evidence to the Tribunal, and the documentary evidence before the Tribunal.

16.12 In addition to her impact statement the claimant sent an email to the Tribunal and the respondent on 11 September 2023 (page 378 of the bundle) in which she says this:

*“This is how it affects me, I am being religiously criticised and my career is being jeopardised, I am having unfair treatment at work for being different and having different thoughts processes and perceptions.*

*That does not mean that I cannot Hoover or cook or drive, etc.*

*There are invisible disabilities and I am qualifying for Access to Work help, they already replied and offered help, as soon I am employed again (I am not wanted as employee).*

*constant criticism and stalking at work did not help my wellbeing and mental health, especially in anonymous feedbacks (excessive and numerous), and reports behind my back to college tutors, on their requests(the reasons were ridiculous and minor). The allegations were unfair, with distortion and twisting of facts. My sleep was suffering badly for one year (time in Salford and Preston), after I made an appeal to O3, in January-22, my sleep had become marginally better. I submitted earlier the witness statement from family friend, how badly the situation at work affected me in my free time. My child also suffered from my stress.*

*That means, mobbing out of employment for about 2 years did give me a lot of mental strain, I was angry and upset.*

*This is how my day to day life was affected.”*

16.13 In terms of medical evidence, this has not been collated well in the bundle. Taking the medical evidence chronologically, the first is a letter, produced , it is assumed by the claimant , from Dr. Virginia Paul – Ebhohimhem dated 20 May 2014 (page 142 of the bundle), which refers to the claimant reporting a few months of a stress related disorder in May 2014. Whilst work related stressors were identified, there were also non – work related ones. The resolution of the former , however, was

stated to hopefully lead to an improvement in her condition. It was recorded that she had no past history of psychological disorder.

16.14 The next medical evidence in time is an Occupational Health report, from the time when the claimant was working in Inverness, from Dr Katherine Targett, dated 29 May 2015 (pages 271 to 272 of the bundle). That records the claimant as having confidence issues, following an unsuccessful application for a training course. It says very little about her condition, its prognosis or its effects upon her ability to carry out day to day activities.

16.15 In June 2021 the claimant was referred to Health Work and Wellbeing, for a telephone consultation following a referral from management. The report is at pages 143 to 145 of the bundle. The claimant at that time was reporting that she did not have problems at work, and had moved to a new host on 16 May 2021. The possibility of a neurodiversity assessment was discussed, the claimant seemingly wanting to prove to her employer that she did not have autism, or any other learning disorder or disability. In general, this assessment found no features in the claimant's presentation which suggested she had any form of condition which required management.

16.16 In anonymised feedback from colleagues (pages 147 to 151 of the bundle) there are references to the claimant's communication skills, and this is discussed. Reference is made to her communication being poor, but there is also discussion as to whether this may be because of her nationality, in terms of her accent, or her "thinking in Russian".

16.17 The Training Assessment dated 25 July 2021 (pages 152 to 154 of the bundle) resulted in the claimant getting an outcome at level 3 : "Inadequate progress by the trainee – additional training time required." In the detailed reasons section (page 153 of the bundle) it was noted that the claimant needed to develop "leadership, teamwork and communication skills" in the next 6 months. In the Explanatory notes (page 154 of the bundle) this is recorded:

*"Trainee struggles with non technical skills e.g. Communication and Leadership for level of training. Time can now be spent on working on improving these skills to enable progression."*

16.16 The claimant was next assessed by Health, Work and Wellbeing on 16 September 2022, in a telephone consultation. The ensuing report is at pages 727 to 729 of the bundle. In it the unidentified assessor reports that the claimant was stating that she was managing at work, and could work nights , if not scrutinised. He opined that there was no underlying medical condition affecting the claimant's work. She was awaiting an assessment for neurodiversity.

16.17 The claimant duly underwent that assessment, and has produced a Confidential Diagnostic and Cognitive Assessment Report from Carly Butler, a psychologist, dated 18 December 2022. It is in two parts. The first, some 8 pages is at pages 176 to 183 of the bundle, and the second, a full account of the various tests carried out for the Report s at pages 283 to 322 of the bundle. This is a very comprehensive document. Its conclusions (page 285 of the bundle) are :

*"The assessment concluded that Maryna has a neurodivergent cognitive profile. Furthermore, based on Maryna's self-report and personal history, there is evidence of*

*underlying autistic characteristics which warrant further formal assessment, should Maryna consent to this.*

*Without adequate aware or adjustments, Maryna's neurodivergence is likely to have a substantial, long-term impact on her performance in the workplace."*

16.18 More specifically (at page 287 of the bundle) :

*"Maryna's profile can lead to some tasks being more difficult for her than they would be for someone who is not neurodivergent. The following are examples.*

*Finding change more stressful than her peers – Maryna may require additional time and support to adjust to new environments, people and 'rules'.*

*Verbal communication with colleagues – particularly with people she is less familiar with;*

*Working at speed with visually complex information – Maryna demonstrates a preference for working methodically and accurately, which is advantageous given her clinical role.*

*Completing reading tasks in English at speed; this is understandable given that English is not Maryna's first language."*

16.19 Later in the report (page 289 of the bundle) Ms Butler says this, under the heading "Access to Work":

*"Neurodivergent conditions are covered under the Equality Act of 2010. Maryna would therefore likely be entitled to support under the government's Access to Work programme. Access to Work is a scheme that helps people with a range of disabilities/difficulties in the workplace. It can provide funding or part funding towards adjustments, including physical equipment and coaching....."*

16.20 Later in the Report, this appears (page 290 of the bundle), under the heading "Disclaimer":

*"Please note that the above recommendations and suggested strategies are examples of good practice and cannot be construed as reasonable adjustments if they are not part of a workplace needs assessment. Involvement with a professional body/consultant cannot automatically be construed as 'reasonable adjustment' and does not constitute legal advice about any duty to make reasonable adjustment within the meaning of the Equality Act 2010.*

*This report is not intended for use in legal proceedings.*

*If any of these recommendations are unclear, or if you want to discuss this further, please do not hesitate to contact me directly."*

16.21 In the ensuing details of the assessment, the following is recorded (pages 293 to 294 of the bundle):

*“Maryna stated that her current areas of difficulty are:*

**Social communication**

*Dealing with change: Maryna thought that she found the process of rotating and adjusting to a new environment, new people, and new rules more stressful than her peers.*

*Eye contact: Maryna reported that her colleagues have commented on how Maryna does not maintain eye contact during conversation. Maryna told me that when she consciously tries to maintain eye contact, she feels like she is “staring”. Maryna added that she thought that maintaining eye contact during conversation was a British social norm. Growing up with her family in Belarus, this was not something she was taught was important.*

*Understanding ‘British social norms’ and adjusting communication style: Maryna explained that she has found it challenging to adjust her communication style to ‘fit in’ with the expectations of the British culture. This can include being overtly “friendly” and “making small talk”. When Maryna communicates in this way, she feels as though it is “an act” and it takes a lot of energy from her. As this way of communicating is effortful for Maryna, she finds it difficult to sustain this communication style, particularly when she is already stressed or under pressure.*

*Sensitivity to criticism and others’ tone: Maryna acknowledged that she can often perceives (sic) others as aggressive and overly critical, particularly when she does not know the person well.*

*Managing emotions: Maryna can feel overwhelmed when she feels criticised by others, and can find it hard to manage her emotions within this context.*

**Planning and organisation**

*Multitasking; Maryna reported that she has had some anonymous feedback from her colleagues that multitasking is a relative area of need. Maryna, however, holds a different view and reported that she is able to manage the various demands of her work, training and raising her daughter as a single parent.*

*Leaving tasks until the last minute; for tasks which are not important or of interest to Maryna, she reported a tendency to leave these until the last moment.*

**Memory and attention**

*Maryna reported difficulty remembering appointments (due to the volume of these) for herself and her daughter. Maryna will write appointments down in a diary/calendar to support her memory with this.”*

16.22 In terms of autism, the Report concluded that it was not possible to provide a definitive view on whether the claimant’s condition was one of autism, and further tests were advised if this was to be explored.



16.23 There followed , dated 27 September 2022, a Multiple Trainers' Report ("MTR") which is at pages 155 to 166 of the bundle. This was completed by 12 participants, who are not identified. They were evenly split as to whether the claimant was making satisfactory progress for her stage of training. Amongst the comments made were:

The claimant could be a bit abrupt or rude in her communication , which could be interpreted as being rude;

Communication with colleagues had not developed much and she needed to be clearer when communicating with Consultants, although there was no concern over her communication with patients, whilst another participant did note that patients did not always understand what she was saying, compounded if she was wearing a mask;

The claimant did not handover and communicate succinctly;

The claimant found the subtleties of non – verbal communication frustrating;

No problems with communication skills in theatre were encountered;

The claimant at times appeared to lack confidence;

The claimant was improving her communication skills , but there remained issues when working with the wider team;

The claimant could appear slow to react to changing scenarios, and was less confident in emergency situations;

16.24 The claimant herself accepted that she found certain social interactions difficult. In particular she did not find it easy to engage in "smalltalk", and could not understand the British fascination with the weather. She believes this may be cultural, as when she was growing up in Belarus people did not chat about such a topic.

17. Those, then , are the relevant facts as found by the Tribunal. The Employment Judge would remark that parts of the bundle were not very clear, and were not , in fact referred to. Pages 168 to 175 , for instance, are redacted and undated comments about the claimant from colleagues. They appear to relate to her time at Salford, where she was taken off night shifts. There is not much that turns upon them, save to note again the theme of difficulties with communications, and speculation as to whether this may be cultural and/or because of the claimant's accent.

### **The Submissions.**

18. For the respondent , Ms Gould submitted that the claimant had not satisfied the test under s.6 of the Equality Act 2010. The claimant has the burden of proving that she has a disability, and the Tribunal had in the previous preliminary hearing told the claimant what she needed to do to prepare her case on disability.

19. The claimant had, and this was not to be critical of her, conflated the effects of the respondent's alleged treatment of her with the impact of her impairment. There was a lack of clarity too as to the extent to which certain aspects of her symptoms

were due to any mental impairment or were because of her race, her social upbringing, and/or her strong accent.

20. There are different types of neurodiversity, one could not just attach that label here, caution was necessary. The instances that the claimant had referred to of being criticised were not necessarily accepted by her as being the result of her neurodiversity. She had differences of opinion, and difficult interactions with colleagues at work. Such matters might be day to day activities, but these are very high ranking colleagues in a particular medical environment. The claimant has not identified any other day to day activities which are affected by her condition. Her witness statement was largely a rehearsal of events that had occurred, and was not what had been directed by the previous Employment Judge.

21. The claimant has given no evidence herself of how her communication is affected by her disability. Her condition is on a scale, which can vary from there being no disability within the meaning of the Act to there being a very obvious one. Ms Gould questioned whether the claimant would even have pursued this type of claim had it not been for the reference in the Report to the Equality Act 2010. That may have led the claimant to believe that she has such a disability now, but did she at the time to which the claims relate?

22. The claimant in her statement (page 378 of the bundle) had made reference to Access to Work. She has not produced any evidence of any assessment by that organisation.

23. Whilst the claimant had disclosed the letter at page 142 of the bundle, that was in 2014, and relates to a stress related disorder, which is not the condition that she is relying upon in these proceedings.

24. The documents at pages 147 to 151 of the bundle were anonymised feedback from colleagues. The claimant disagreed with some of this feedback, where it is negative. This evidence, she submitted, did not help the claimant establish her disability.

25. The Training Assessment at pages 152 to 154 did not establish any link between her communication skills and her condition. Further, the entry on page 154 refers to the claimant improving these skills, which is not the same thing as saying that she lacked them.

26. Ms Gould addressed the Report that the claimant relies upon. She urged great caution in the Tribunal's approach to it. On page 180 of the bundle the Report refers to the claimant finding change more difficult, but there is no linkage to the reasons for this being linked to the condition. The third "arrow" point – working at speed - is unclear and reveals only a preference, not a problem. Reading at speed, the fourth point is explained by the claimant having English as her second language, and is not linked to her condition.

27. In terms of social interaction, smalltalk and talking about the weather, she submitted that the Report did not reveal very much, and these matters were as likely to be cultural as the symptoms of the condition. In fact, the claimant disagrees with some of the conclusions, for example that she had planning or organisational issues. Many

of the scores that the claimant achieved do not assist her – those for cognitive abilities, page 287 of the bundle, for example. The graph summarising cognitive ability on page 303 is not helpful, it is unclear what it means. The other entries in the Report at pages 306 and 307 do not assist the claimant, and other difficulties encountered have a cultural or language – related factor.

28. The report of Health Work and Wellbeing of September 2022 suggested there were no medical issues.

29. In short, the claimant has failed to discharge the burden of proving that her condition amounts to a disability.

**The claimant's submissions.**

30. The claimant, not being a lawyer, and being unrepresented, did not make structured submissions. In essence, she relied upon her impact statement, the documents in the bundle and the Report of Ms. Butler. The latter was, understandably, a major part of her case. She contended that her neurodiversity did satisfy the definition of disability under the Equality Act 2010. It affected her communications, her response to rapid changes and interaction with her colleagues.

31. The claimant's submissions, however, were overtaken by her application, referred to above, for permission to adduce further medical evidence, discussed above.

32. The claimant, however, had, the Employment Judge considered, said what she wanted to say in support of her case on disability. To the extent that she may not have done so, however, the Employment Judge has considered any other points that she could have made when determining the issue of disability.

**Discussion and findings.**

33. The starting point, of course, is the definition of disability in s.6 of the Equality Act 2010, which is in these terms:

(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.*

34. In addition, the Tribunal has considered the Guidance on Matters to be taken into account in determining questions relating to the definition of disability (2011), issued by the Secretary of State.

35. In particular, the following provisions apply to the definition of impairment:

*Meaning of 'impairment'*

A3.

*The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.*

A4.

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

A5.

*A disability can arise from a wide range of impairments which can be:*

- sensory impairments, such as those affecting sight or hearing;*
- impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy;*
- progressive, such as motor neurone disease, muscular dystrophy, and forms of dementia;*
- auto-immune conditions such as systemic lupus erythematosus (SLE);*
- organ specific, including respiratory conditions, such as asthma, and cardiovascular diseases, including thrombosis, stroke and heart disease;*
- developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia;*
- learning disabilities;*
- mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some self-harming behaviour;*
- mental illnesses, such as depression and schizophrenia;*
- produced by injury to the body, including to the brain.*

A6.

*It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.*

36. Section D relates to normal day – to – day activities. Sections D2 to D6 are of particular relevance:

### ***Meaning of 'normal day-to-day activities'***

*D2.*

***The Act does not define what is to be regarded as a 'normal day-to-day activity'. It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.***

*D3.*

*In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, D4.*

*The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning.*

37. The Employment Judge has considered carefully the extent to which the claimant has demonstrated that her condition (and for these purposes he does not consider that it matters greatly what precise diagnosis is ascribed to it) has had the requisite effect upon her ability to carry out normal day to day activities. His conclusion is that she has not satisfied the burden of proving that the condition does have (or did have) this effect.

38. A major problem for the claimant's case on disability is the evidence she relies upon. Her own impact statement is vague and unclear, she fails to link her condition to any effects upon her day to day activities.

39. The Report from Ms Butler did initially seem to offer the prospect of the claimant being able to satisfy the tests for disability. That was mostly so in the activity of communication and interaction with the claimant's colleagues at work. As the Guidance states:

*Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews*

But it continues :

*The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning.*

40. All the evidence (and that includes historical evidence of the claimant's interactions with colleagues before she was placed with the respondents) suggests that the claimant's difficulties in communication are not general, and communication with patients, and in theatre settings, has been satisfactory. Where problems are noted is in communication with senior colleagues, often in stressful situations, in the course of medical procedures. These are not, the Tribunal considers, normal day to day activities. They are so for a small group of people, and that group is of highly specialised medical professionals.

41. Thus if the claimant's condition can only be shown to have this effect upon those activities, the Tribunal would not regard them as normal day to day activities.

42. There is, however, a further issue for the claimant's case on disability. She relies heavily upon the report of Ms Butler, but this expert has expressly issued a disclaimer that her report is not to be relied upon in legal proceedings. The claimant has, nonetheless, relied upon it. Quite why Ms Butler has issued this disclaimer is unclear, but it does lead the Tribunal to question the extent to which it can or should rely upon her conclusions, in the light of this express reservation.

43. That she has erroneously stated (page 289 of the bundle) that neurodivergent conditions are covered by the Equality Act 2010, when they clearly are not, further undermines the Tribunal's confidence in the extent to which it can rely upon Ms Butler's expertise.

44. There is, however, a further aspect of Ms Butler's Report which the Tribunal considers is unsatisfactory, and upon which, had she been called to give oral evidence, further questions would have arisen. The claimant comes from Belarus, and mention has been made of her accent, and, to some extent, of her social upbringing, which has resulted in her experiencing different cultural norms. She vividly illustrated this by her evidence of her view of the British obsession with the weather, which she

does not share, and which she indicated she considered was a very British trait. She similarly finds “smalltalk” difficult, but this too may be a cultural, rather than a medical, issue.

45. In her report, when considering , for instance, the claimant’s abilities in terms of completing reading tasks in English at speed, Ms Butler qualifies her findings by reference to the claimant not having English as her first language, finding that the claimant’s scores in that regard were acceptable , given that limitation. By contrast, however, when considering the claimant’s oral communications Ms Butler seems to make no such allowances.

46. It is clear from all the evidence, that many of those who have experienced communication difficulties with the claimant have queried whether these have their origins in her nationality, or her cultural background, and/or her accent.

47. Ms Butler, however, has ascribed these difficulties to the claimant’s condition, and not any other factors. Why she has taken one view on the claimant’s abilities in reading and writing, but another in connection with her personal interactions, and oral communication, is unclear.

48. There are other aspects of the claimant’s activities upon which Ms Butler does comment , and suggests that her condition has impacted upon them. These are :

*Finding change more stressful than her peers – Maryna may require additional time and support to adjust to new environments, people and ‘rules’.*

*Verbal communication with colleagues – particularly with people she is less familiar with;*

*Working at speed with visually complex information – Maryna demonstrates a preference for working methodically and accurately, which is advantageous given her clinical role.*

49. The Tribunal does not consider these activities amount to normal day to day activities. The ability to adapt to change is not one of the activities of which examples are provided in the Guidance (although the examples are not exhaustive) , people respond to change in a variety of ways, and many people find it stressful. The reference to “peers” suggests that this is in the context too of the claimant’s working environment, which is a very specialised one. The second issue, verbal communication with colleagues is the same point as discussed above. The third, working with speed with visually complex information is not a normal day to day activity, though it is doubtless an aspect of the claimant’s working environment. As it is, all Ms Butler says is that the claimant “demonstrates a preference” for working in a particular way, which is not the same thing as the claimant being unable to carry out that activity, or only being able to do so with difficulty.

50. The upshot of this is that Tribunal does not draw from Ms Butler’s Report the conclusion that the claimant’s condition meets the definition in s.6 of the 2010 Act . It might do, but the claimant has to satisfy the Tribunal on a balance of probabilities that it actually does so.

51. The Tribunal notes that the claimant has the benefit of assistance through the Access to Work scheme, but the Tribunal has been provided with no evidence as to how the claimant applied for, or qualified for, this scheme. Qualification for the Access to Work scheme may involve the claimant establishing a disability, but it is not an automatic prerequisite of the scheme that the applicant has a condition which satisfies the test in s.6 of the Act.

52. In the final analysis, the Tribunal does not consider that the precise diagnosis of the claimant's condition, and whether it does or does not meet the criteria for autism, actually matters. Whatever the condition, it is its effects that have to be considered. The claimant has, on the evidence, failed to establish that she has a disability within the meaning of the Equality Act 2010.

53. There remain other applications which require determination, and a further preliminary hearing is required. As the Employment Judge has only determined the disability issue, he sees no reason why the next hearing need be before him, although it equally well can be.

54. It is appreciated that the final hearing looms, and regretted that the next preliminary hearing cannot be held any sooner. Clearly, that may have consequences for the final hearing.

Employment Judge Holmes

DATE: 14 March 2024

JUDGMENT SENT TO THE PARTIES ON

14 March 2024

FOR THE TRIBUNAL OFFICE

**(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.**

**(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.**

**(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.**