

Case No: EA-2020-000110-JOJ (previously UKEAT/0137/20/JOJ)
EA-2020-000278-JOJ (previously UKEAT/0172/20/JOJ)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 July 2021

Before :

HIS HONOUR JUDGE AUERBACH

Between :

EA-2020-000110-JOJ
MISS S DIAS DA SILVA PRIMAZ **Appellant**
- and -
1) CARL ROOM RESTAURANTS LIMITED T/A MCDONALD'S
RESTAURANTS LIMITED
2) JON CARPENTER
3) IAN ROBERTS
4) KAREN WALA
5) DANIEL FISHLOCK
6) NICOLE OLIVE
7) GABRIEL GRAMA **Respondents**

EA-2020-000278-JOJ
CARL ROOM RESTAURANTS LIMITED T/A MCDONALD'S **Appellants**
RESTAURANTS LIMITED & OTHERS
- and -
MISS S DIAS DA SILVA PRIMAZ **Respondent**

Mr E Brown (instructed by Advocate) for **Miss S Dias Da Silva Primaz**
Ms K Anderson (instructed by Ashfords LLP) for **Carl Room Restaurants Limited & Others**

Hearing date: 15 July 2021

JUDGMENT

REVISED

SUMMARY

DISABILITY DISCRIMINATION

(1) The claimant in the employment tribunal had had a brain tumour surgically removed about ten years before the matters in 2018/2019 of which she complained. She claimed that the tumour had been cancerous. She relied upon diagnostic records which identified the particular type of tumour which she had had, and guidance materials from Public Health England (PHE), as showing that a tumour of that particular type is cancer. The tribunal considered that her medical records required interpretation, and in the absence of her clinical records using the word “cancer” in relation to her tumour, or other expert evidence, it was not persuaded that the tumour probably had been cancer. There was no dispute that the clinical records unambiguously identified the particular type of tumour that the claimant had had. There was also no dispute that she could rely on the PHE material in relation to the designation of a tumour of that type. The natural meaning of that material was that a tumour of that type *is* cancerous. The tribunal should have found, therefore, that the claimant had had cancer, on which, under section 6(4) **Equality Act 2010**, she could rely in 2018/2019.

(2) The tribunal did not err in concluding that the claimant did not have, or still have, cancer at the time to which her complaints related. As to that, she relied on the fact that she continued to have epilepsy and vitiligo, and on material to the effect that such conditions can sometimes be caused, directly or indirectly, by cancer. But her clinical records that were before the tribunal contained no evidence of cancer being diagnosed in the years following her surgery. The tribunal was entitled to conclude that the evidence did not sufficiently support this part of the claim.

(3) The tribunal erred, in concluding that the claimant’s epilepsy and her vitiligo both amounted to disabilities, in so far as it relied upon its findings that she had abstained from certain activities or avoided certain products, because she believed that they would cause a harmful triggering or reaction in connection with either condition, in circumstances where there was no appropriate evidence to

support her beliefs, and where she had not claimed that her thought processes in this regard were themselves affected by a mental impairment. The tribunal had in any event also failed properly to consider whether her behaviours had the requisite impact on normal day-to-day activities.

The matter was remitted to the tribunal for fresh consideration of whether the evidence, apart from that of the claimant's avoidance behaviours, established that either condition was a disability in her case. In relation to epilepsy the tribunal needed to consider afresh, in particular, whether the evidence in relation to periodic nocturnal seizures, and their effects, was sufficient to establish this. In relation to vitiligo the tribunal needed to consider in particular whether the evidence as to the nature and degree, of the risk of harm to her through exposure to sunlight, supported this.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I will refer to the parties as they are in the employment tribunal, as claimant and respondent. The claimant works in a fast food restaurant for which the franchise is owned by the first respondent. The other respondents are all managers or supervisors of hers. She complains of multiple incidents of disability discrimination of various kinds, during 2018/2019. She claims to have, or have had, a number of disabilities. Those claims are contested and the matter is ongoing in the tribunal.

2. These appeals relate to a decision of Employment Judge Maxwell arising from a preliminary hearing in December 2019 on the question of disabled status. At that hearing the claimant represented herself. The respondents were represented by Ms Anderson of counsel. The tribunal found that the claimant was, at the relevant times, a disabled person by reason of epilepsy and vitiligo, but not by reason of cancer, whether in the past or the present, dermatitis or an episode of organic psychosis.

3. At a preliminary hearing in the EAT, at which the claimant was represented by Mr Brown of counsel under the ELAAS scheme, Lavender J permitted two grounds of her appeal to proceed to a full hearing, being respectively against the decisions that she neither had in the past, nor currently had, at the time of the matters complained of, cancer. The respondents appeal against the decision that she is disabled by reference to epilepsy and vitiligo. All of their six proposed grounds of appeal, which were settled by Ms Anderson, were considered by Judge Keith on paper to be arguable.

4. At the hearing today the claimant has been represented by Mr Brown, now under the auspices of Advocate, and the respondents have been represented by Ms Anderson.

The Statutory Framework

5. The core definition of disability is in section 6 **Equality Act 2010**:

“6. Disability

- (1) A person (P) has a disability if -
- (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.

- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability -
- (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) -
- (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
- (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
- (6) Schedule 1 (disability: supplementary provision) has effect.”

6. Guidance was issued by the Secretary of State, under section 6(5) in 2011.
7. Section 212 defines the word “substantial” as meaning “more than minor or trivial”.
8. Schedule 1 expands on the definition of disability, including the following paragraphs:

“Effect of medical treatment

5. (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if -
- (a) measures are being taken to treat or correct it, and
 - (b) but for that, it would be likely to have that effect.
- (2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.
- (3) Sub-paragraph (1) does not apply --
- (a) in relation to the impairment of a person’s sight, to the extent that the impairment is, in the person’s case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;
 - (b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

Certain medical conditions

6. (1) Cancer, HIV infection and multiple sclerosis are each a disability.
- (2) HIV infection is infection by a virus capable of causing the Acquired Immune

Deficiency Syndrome.

...

Past disabilities

9. (1) A question as to whether a person had a disability at a particular time (“the relevant time”) is to be determined, for the purposes of section 6, as if the provisions of, or made under, this Act were in force when the act complained of was done had been in force at the relevant time.

(2) The relevant time may be a time before the coming into force of the provision of this Act to which the question relates.

...

Examples

11. The guidance may give examples of -

- (a) effects which it would, or would not, be reasonable, in relation to particular activities, to regard as substantial adverse effects;
- (b) substantial adverse effects which it would, or would not, be reasonable to regard as long-term.

Adjudicating bodies

12. (1) In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant.

(2) An adjudicating body is -

- (a) a court;
- (b) a tribunal;
- (c) a person (other than a court or tribunal) who may decide a claim relating to a contravention of Part 6 (education).”

The Tribunal’s Decision

9. The employment tribunal made the following findings of background fact:

“24. The Claimant had produced medical records from the time when she was living in Portugal and more recently (from circa 2012) in the UK. She did not create a translation of the Portuguese documents in advance of this hearing, although in cross-examination she was asked what various reports contained and whether they included the word “cancer”.

25. The claimant was born in 1981. She was diagnosed as suffering from epilepsy in 1996, which affected her at night and although she was not consciously aware of having seizures, they were observed by her family and also recognised by her in terms of where and in what state (e.g. enuresis or a bitten tongue) she awoke. During treatment and

investigations for her epilepsy, a brain tumour was discovered. An operation was carried out in 2008 to remove this tumour.

26. The nature of this tumour and whether it was cancer (the Claimant's case is it was) is a contentious point between the parties."

10. The tribunal described how the claimant put her case in relation to cancer and epilepsy:

"Tumour Removal

27. The Claimant does not say that her treating physicians told her at the time (i.e. in 2008) that her tumour was cancer, rather she says (and relies upon recent public health advice and scholarly articles in this regard) that all brain tumours are now classified as cancer and so that is what she had.

28. Furthermore, the Claimant understood her doctors to have advised in 2008 that the tumour was causing her epilepsy and this would cease on its removal. As the Claimant has experienced further episodes of epilepsy subsequent to the operation, she believes the tumour has not been entirely removed. On this basis she reasons, she continues to suffer with cancer. The Claimant also says she has cancer because it cannot be proved that no cancerous cell remains in her body."

11. Further on, the tribunal referred to medical records that were in Portuguese, dating from 2009. These included a report about the claimant's tumour which she acknowledged did not include the word "cancro", being the Portuguese word for cancer. The tribunal continued:

"33. The Claimant was referred to another document dated 28.11.19, which did appear to be a pathology report; this included a heading of "RELATORIO NEUROPATOLOGICO" and text below (again, not including "cancro"):

Nos fragmentos correspondente a amigdala, apeneas em um dos cortes histologicos e numa area restrita do tecido amigdalino, e possivel observar uma proliferacao neoplasia benigna de elementos astrocitarios de morfologia "pilocitica" e "fibrilhar", fortemente immunoreactivo para a GFAP, que corresponde a astrocitoma de [de] baixo grau (I/II).

The Claimant responded "yes it says low grade". She then referred the Tribunal to a document in the bundle from the PHE website which provided:

Astrocytic tumours are the commonest type of cancer of the brain. They originate in a particular kind of glial cells, star-shaped brain cells in the cerebrum called astrocytes. This type of tumour does not usually spread outside the brain and spinal cord and it does not usually affect other organs. Astrocytomas can occur in most parts of the brain.

Astrocytic tumours include a range of histological types* and malignancy grades.

The least aggressive WHO grade I tumours re Pilocytic Astrocytomas and Subependymal Giant Cell Astrocytomas. The WHO grade II tumours include Piloxyoid Astrocytoma, Pleomorphic Xanthoastrocytoma, as well as the Diffuse Astrocytomas, which include the following subtypes Fibrillary, Gemistocytic and Protoplasmic. Anaplastic Astrocytomas are more aggressive and are WHO grade III.

The Claimant said that “pilocitica” and “fibrillar” in her report were the Portuguese equivalents of pilocytic and fibrillary on the PHE website, her tumour being a WHO grade 1 or grade 2 on that basis.

34. The Claimant was asked about a letter of 10 December 2012, which she explained was a response to her complaint. The Claimant said “mais malign” meant more malignant and she translated the material passage in the course of giving her oral evidence as:

‘In good hour the patient had surgery because she was diagnosed with low grade tumour of the glial, which despite being low grade, it will probably grow and have biologic behaviour more malignant’ ”

12. The claimant told the tribunal that her records used the Portuguese words for pilocytic and fibrillary. Hence, she said, according to the PHE website, her tumour was a WHO grade 1 or grade 2 tumour.

13. The tribunal then set out a very detailed account of the material contents of the claimant’s UK medical records before it, drawn from a period from 2013 to 2019, which I do not need to reproduce.

14. The tribunal then gave itself a detailed self-direction as to the law, including citation of a number of pertinent authorities, which is not, I think, criticised by either party, as such. Points that the tribunal identified in the course of this analysis included: that it is not necessary to identify the cause of an impairment; that when considering the effect of an impairment, the focus should be on what a person cannot do, or can only do with difficulty, not what they can do; the definition of “substantial” in section 212 and examples given in the guidance; the fact that past disabilities are covered; the fact that cancer is a deemed disability. It also referred to what the EAT said about the concept of cancer in **Lofty v Hamis** UKEAT/0177/17, including, at [47], as follows:

“47. When determining whether a condition satisfies the deeming provision of paragraph 6, there is no justification for the introduction of distinctions between different cancers or for an ET to disregard cancerous conditions because they have not reached a particular stage. I equally agree that it is undesirable that ETs’ determinations under Schedule 1

paragraph 6 should necessarily be required to be based on high-level medical expert evidence as to what is, or is not, cancer (not least as it is not impossible to conceive that this might be a matter of some specialist academic debate). Equally, however, Schedule 1 paragraph 6 does require that a complainant have one of the specified conditions; it is not sufficient that they *might* develop a relevant condition in the future and I am not persuaded that a purposive construction requires such a broad approach to be adopted.” (Original emphasis)

15. The tribunal opened the concluding section of its decision with the following:

“Approach to Evidence

68. During the course of this hearing [on] more than one occasion, the Tribunal sought to explain to the Claimant the difference between, on the one hand, public health guidance and academic material of a general nature relating to medical conditions, and on the other hand, notes and reports which involved a doctor giving an opinion or advice about her illnesses in particular. I did not have the impression the Claimant failed to grasp this distinction, rather that she was resistant to accepting it because the conclusions she wished the Tribunal to reach relied to a great extent on the general material. More than once during the hearing, the Claimant mischaracterised discussions which had taken place in this regard by saying the Tribunal was telling her she “cannot trust” the NHS or PHE. I repeat here what I told the Claimant at the time, I am certainly not saying she cannot trust the guidance offered by the NHS or PHE, there is however a difference between general material saying, for example, that cancer may cause epilepsy and a medical report about her where a doctor gives an opinion on what has caused her epilepsy in particular.”

16. I should set out in full the tribunal’s reasoning and conclusions with respect to the claimed disabilities of cancer (past or present), epilepsy and vitiligo:

“Astrocytoma Brain Cancer

71. The Claimant had an astrocytoma brain tumour in 2008, which was surgically removed. This was classified at the time as being benign and low grade. On the evidence before me, I am unable to make a finding on the balance of probabilities that this tumour was cancer. Nowhere in the medical evidence relating to the Claimant specifically (reports, letters, GP notes) is it said that her tumour was cancerous.

72. The Claimant has sought to prove she had cancer by relying upon material she has obtained from the internet, public health guidance and academic articles. She says this material establishes that all astrocytomas are now regarded [as] being cancer. The Claimant may be correct in her analysis. Her medical records do, however, [require] interpretation to arrive at this conclusion. The oral evidence the Claimant has given me on this point is argument and opinion, which would need to come from a person with appropriate expertise and qualifications in order to be accepted. Whilst the Claimant undoubtedly spends a great deal of her time researching her various medical conditions or concerns and may have acquired considerable knowledge in that regard, this cannot substitute for the evidence or opinion of an appropriately qualified professional. It is not

the case that “high level” expert evidence is necessary. Had her GP or any treating physician stated her tumour was cancer, that is likely to have been sufficient. The Claimant agreed, however, that nowhere in the medical records relating to her (be those in Portuguese or English) does any doctor say she had “cancer”.

73. For the sake of completeness I should add that the Claimant did not seek to argue in the alternative she was a person disabled by reason of having a non-cancerous tumour in 2008. As such, I cannot say that by reason of this tumour in 2008, she was then a disabled person.

74. Whilst I anticipate that my conclusion on the question of cancer in 2008 will be a great disappointment to the Claimant, I doubt that such a finding would have assisted her in these disability claims in any event. The complaints in these proceedings do not begin until some 10 years later. The Claimant is not likely to have established a relevant PCP in 2018 which put her at a disadvantage by reason of having had a cancerous tumour in 2008, or that because of something arising from the same she was unfavourably treated. In order to succeed here, the Claimant will need to relate her treatment in 2018 to some impairment she was suffering from at that time.

75. As highlighted in the amendment application, the thrust of the Claimant’s argument was not that she was a disabled person at the material time because of a historic cancer diagnosis, rather she maintained she was suffering with cancer in 2018 and this is the continuing cause of her other impairments, including epilepsy and vitiligo. This is a point I can deal with briefly. Whilst I do not doubt the sincerity of the Claimant’s belief in this regard, there is no medical evidence relating to her which supports such a conclusion. Extensive medical records have been disclosed by the Claimant. Nowhere is there any evidence of a medical practitioner making a cancer diagnosis in the period subsequent to the removal of her tumour. I note also that on more than one occasion the Claimant has gone to a medical practitioner with theories as to the cause of her impairments which they did not support.

76. The Claimant says her cancer induced her other illnesses including epilepsy and vitiligo (which she characterises as an autoimmune disorder). She has produced public health guidance and scholarly articles to say that cancer can cause immunity disorders, vitiligo can be caused by immunity problems and cancer can cause epilepsy. Whilst the Claimant has produced documents which say that cancer may cause epilepsy or vitiligo, she has nothing from a medical practitioner to say that her conditions have that cause.

77. When asked during the hearing whether the doctors may not believe what she does about the cause of her ongoing medical conditions, the Claimant responded that she was “not a mind reader”. With respect, the Claimant does not need to read minds to understand that her beliefs are not shared by her treating physicians, rather she need only read their reports, letters and notes, in which she will not find an opinion that her current illness is caused by ongoing cancer.

Epilepsy

78. The Claimant has suffered with epilepsy over many years. The nature and frequency of her seizures has varied. Because the seizures are nocturnal, the Claimant is not conscious of them as they are taking place, rather she becomes aware of their occurrence

the following morning, by reasons of a bitten tongue, enuresis or waking out of her bed.

79. There appear to have been lengthy periods during which she has suffered no seizures at all, or at least not been aware of doing so. At other times these attacks have been more frequent. The Claimant did not give very helpful evidence on the frequency of her seizures. Her focus was very much on why she suffered with epilepsy, which she attributed to her brain tumour, (which she would say was cancerous). She relied upon the fact of ongoing problems with epilepsy as evidence of ongoing cancer. Accordingly, the Claimant's approach and her evidence was much concerned with cause (which is of relatively little importance for EqA section 6) and far less concerned with practical effect (which is much more important for EqA section 6). Some evidence of frequency did, however, emerge from her medical records and in the course of cross-examination.

80. The material period begins circa July 2018 and, subject to the outcome of the amendment applications, may run until circa July 2019.

81. The Claimant is likely to have had a seizure prior to attending at A&E on 20 November 2017. She was referred to Dr Martin who prescribed anti-convulsant medication, which she declined to take. In April 2018 the Claimant did not think she was having seizures. In June 2018, however, the Claimant attended the epilepsy nurse having symptoms of a recent seizure and discussing treatment options. The next occurrence of epilepsy appears to have been February 2019, when she reported the aftermath. A further possible seizure was discussed [...] with doctors in April 2019. In August 2019 the Claimant reported sporadic seizures. In October of 2019, she reported 4 seizures in 4 months as being more than previously.

82. The adverse effect which results from the Claimant's epilepsy is not, however, limited to the symptoms experienced in the morning after she has a seizure, but also includes the shadow this casts over her in the periods in between.

83. The Claimant's reaction to her epilepsy and beliefs about that are strong, fixed and somewhat conflicted. She is very worried about the risk of SUDEP, despite reassurance in this regard from the professionals treating her. She has been advised that the best safeguard with respect to the risk of death is to control her seizures by taking anti-convulsant medication. The Claimant is, however, unwilling to take the prescribed medication because she is very fearful of the possible side effects in this regard. The Claimant is prone to conducting extensive online research, formulating conclusions (which she shares with her treating physicians) and then relying on her own view, in some instances, over and above expert professional advice. The Claimant's fear of SUDEP is exacerbated by her research and has reinforced her in the view that she must avoid triggers. This includes that she does not drink coffee and she does not drink alcohol. The Claimant strives to avoid any exposure of her body to chemicals (such as cosmetics and ordinary cleaning products). The Claimant also said she avoids taking drugs and from the medical records it is apparent this has extended to her refusing to take strongly recommended prescribed medication.

84. The Claimant is very fearful of SUDEP, having discussed this with many of the professionals treating her. This fear is an ongoing feature of her living with epilepsy. The Claimant's avoidance of potential triggers with respect to epilepsy has resulted in the adoption of a restricted, spartan lifestyle, which is an important part of the impact this

impairment has on her. These lifestyle consequences, together with post-seizures symptoms and attendances upon her doctors for investigation and exploration of treatment options, create an impact on her day to day activities which is more than minor or trivial. This impairment is long-standing in nature, well in excess of 12 months and documented in her medical records before the material period began. I find the Claimant was a disabled person at material times by reason of the impairment of epilepsy.

Vitiligo

85. The Claimant has suffered with vitiligo over many years. In addition to the medical records documenting this condition, she provided photos showing the marked loss of skin pigmentation (and protection).

86. The main impact of this condition is again in the restrictions it has imposed on the Claimant's lifestyle. In the course of cross examination Ms Anderson suggested to the Claimant that the step she took of not wearing makeup had not been recommended by the professionals treating her. The Claimant responded that she knew to avoid triggers without such advice (which I took to mean it was the result of her own reading and knowledge of vitiligo). The steps the Claimant took in this regard did not seem to be unreasonable or surprising. No specific cause for the Claimant's vitiligo has been found by the doctors. She has decided, amongst other things, not to put any chemicals, including cosmetic products, onto her skin.

87. The Claimant keeps her skin covered and attempts to avoid sunlight. Despite living by the beach, she keeps out of the sun. She does not go on holiday to sunny places. In the course of cross-examination, the Claimant was asked how she travelled to the Civil Justice Centre for this hearing, the purpose of which question appeared to be to establish that she was exposed to sunlight and this issue was, therefore, only a minor one. The Claimant said she kept herself covered. The Respondent's point on this had little force, especially on an overcast day in December. The Claimant did not go so far as to say she could not leave the house.

88. There was some overlap here with the triggers perceived by the Claimant for her epilepsy, as she also referred in connection with her vitiligo to avoiding, coffee, alcohol and drugs (she declined the exploration of treatment options for vitiligo in October 2014 when a definite cause could not be identified).

89. The Claimant is concerned about and avoids exposure to chemicals, including cleaning products. Whilst this is a workplace issue, it is also relevant to her life at home. In cross examination she was asked about the substances she avoids (she referred to corrosives and bleach) and the steps she takes to avoid exposure (wearing thick gloves). Whilst it was, not unfairly, suggested that these are common concerns, the level at which the Claimant is fearful in this regard is very considerable. She believes there is a real and immediate risk with respect to her health and life, in a way that most other people do not. Her strength of feeling in this regard is reflected in the workplace dispute with the Respondent, with respect to using chemical products, wearing protective gloves and exposure to heat from the grills (whilst I make no findings about the rights and wrongs of such matters at this stage, the fact of her raising her fears repeatedly and forcefully is not in dispute).

90. Once again the Claimant's fear that her health in this regard may be aggravated is an ongoing feature of the vitiligo and her avoidance strategy has led to a restricted lifestyle and workplace conflict. In my judgment, this impact is more than minor or trivial. This impairment is long-standing in nature, well in excess of 12 months and documented in her medical records before the material period began. I find the Claimant was a disabled person at material times by reason of the impairment of vitiligo."

17. Following the tribunal's discussion of its conclusion in relation to the other claimed disabilities, there was also the following paragraph:

"Cumulatively

102. In case I am wrong about the Claimant's epilepsy and vitiligo having a substantial adverse effect separately, I have gone on to consider the position cumulatively. As set out above, there is a substantial overlap between the adverse effect relating to the Claimant's epilepsy and vitiligo, in relation to the restricted lifestyle this had led to, her ongoing fearfulness and the difficulties in carrying out workplace cleaning or cooking tasks. Her concerns interlink and reinforce her in the belief that she is in danger and needs to take various protective steps. The adverse effect as a whole is plainly both long term and more than minor or trivial."

The Claimant's Appeal: Arguments, Discussion, Conclusions

18. I will consider first the claimant's appeal. This relates to the tribunal's determinations, firstly that the tumour that was removed in around 2008 or 2009 was not cancer, and secondly that she did not have cancer at the time to which her complaints relate.

19. In relation to the first of these, ground 1 asserts that the tribunal erred in not giving weight to the evidence from the PHE website, which she says is to the effect that astrocytic brain tumours are in all cases now classified as cancer.

20. In relation to the second of these, ground 2 asserts that, as the tribunal was wrong not to conclude that the claimant had cancer in 2008/2009, it consequentially erred by failing to consider whether she continued to have cancer thereafter, including, possibly, cancer that was in remission.

21. In support of ground 1, Mr Brown's skeleton referred to the passage from the PHE website that the tribunal cited. This passage showed, he submitted, that it was clear as a matter of current clinical knowledge that astrocytic brain tumours are cancers of the brain. Accordingly, it did not

matter that the claimant's medical records did not use the word "cancer" to describe her tumour. It followed from the evidence that she had an astrocytic brain tumour, and the evidence that astrocytic brain tumours are a type of cancer, that she then had cancer, and the tribunal erred in not so finding.

22. In oral submissions, he added that the tribunal had wrongly taken the view that the claimant's medical records required interpretation. They were clear as to the nature of her tumour and the PHE guidance was clear that such tumours are, or at the very least probably are, cancer.

23. Ms Anderson reminded me of the high threshold which must be surmounted by a perversity challenge. It was not perverse for the tribunal not to conclude that the material from the PHE website showed that the tumour was cancer. That material stated, "Astrocytic tumours are the commonest types of cancer of the brain". That did not mean that *all* astrocytic tumours are classified as cancer. As confirmed in **Lofty v Hamis**, it would also not be enough that, had it not been removed, the tumour might have turned into cancer in the future. The question was whether it *was* cancer. The tribunal was right to conclude that this was a question for expert opinion. The claimant was not, herself, an expert, and her opinion was rightly regarded as not a substitute for that of a medical professional.

24. In **Lofty v Hamis** the position was different. The tribunal there had evidence from Mrs Lofty's GP explaining the medical terms used. That went beyond the simple proposition that her condition was pre-cancerous, and pointed to the conclusion in that case that cancer cells were present. But in the present case there was no evidence from the claimant's GP or any other qualified professional to point to the conclusion that the claimant's tumour was cancerous. The tribunal had been entitled to conclude that the evidence before it did not on balance of probability show that it was.

25. My conclusions on this ground are as follows. As to the law, from **Lofty v Hamis**, in particular at [47], I draw two propositions. First, where someone claims to have had cancer at a certain time, it is not sufficient that there was a risk at that time that they could develop cancer in the future. Secondly, however, Parliament has decided that all cancers are deemed to be a disability, regardless of the stage that the cancer has reached in the given case. If there are cancer cells present, then the individual has

the disability of cancer, regardless of whether all the elements of the section 6(1) definition read alone would have been satisfied at that time.

26. Where there is a factual dispute as to whether an individual had cancer at a given time, what evidence may be sufficient to satisfy a tribunal that they did? The process of diagnosis requires appropriate expertise, and so the expression of a diagnostic opinion ordinarily should come from some expert source, whether in the form of primary clinical records or expert evidence produced for the purposes of the litigation. The tribunal in the present case was also right in principle to highlight at [68] the significance of the difference between *generalised* material relating to medical conditions, and material in relation to a particular individual that is the product of direct investigation of their condition and/or the expert assessment of primary clinical evidence specifically relating to them.

27. The present tribunal did have evidence from a specialist primary source, as to the nature of the claimant's tumour, being the contemporary pathology report referred to at [33]. Although plainly it would have been better had the tribunal been provided with a certified translation, no issue was taken with the claimant's explanation that "pilocitica" and "fibrilhar" meant "polycytic" and "fibrillary", and "astrocitoma de [de] baixo grau" referred to a low grade astrocytoma. It was not disputed that the tribunal properly found that this was the type of tumour that the claimant had.

28. The claimant then relied upon the PHE website material, in relation to the question of whether a tumour of the kind diagnosed in her case, is correctly described as cancer. That, in itself, is a question which requires some expertise to answer. However, PHE could fairly be regarded as a reputable and reliable, though perhaps not necessarily always infallible, source. Ms Anderson did not contend that it would have been wrong, as such, to rely on PHE guidance. Rather, she submitted that the PHE material relied on in this case did not convey the meaning that the claimant claimed.

29. I disagree. Firstly, it appears to me that the natural meaning implicit in the sentence "astrocytic tumours are the commonest types of cancer of the brain" is, indeed, that *all* astrocytic tumours are cancers, even though, as the next paragraph goes on to explain, they come in a range of types or

grades. Secondly, this material conveys in its natural meaning that astrocytic tumours, as a group, all carry the risk of propensity to spread to some degree, which is why they are all regarded as malignant; but that they vary in their degree of aggressiveness or malignancy as between different subtypes, and are graded accordingly. Thirdly, it conveys the meaning that pilocytic astrocytomas are the least aggressive, and are WHO grade 1; and fibrillary astrocytomas are WHO grade 2, so: more aggressive than grade 1, though less than grade 3. But both are, to some degree, aggressive tumours.

30. Ms Anderson submitted that the significance of a tumour being labelled malignant or aggressive was, itself, a question on which the tribunal would have required expert evidence. It could not assume that this signified that these were cancers. However, the overall sense is that they are all cancers, and all malignant, because they all have some propensity to spread, to one degree or another.

31. Accordingly, the tribunal had undisputed clinical evidence before it that, prior to her operation, the claimant had an astrocytic tumour which was pilocytic or fibrillary. The PHE material supported the proposition that such a tumour is cancer. Chiming with its analysis, the pathology report described the claimant's tumour as low grade. It was not suggested that there was any other evidence to show that the PHE material was wrong. Given that, as a matter of law, if a condition is cancer, it does not matter what stage it has or has not reached, it appears to me that the tribunal ought to have concluded on the evidence before it that the claimant's tumour *was* cancer, albeit low grade and albeit that there was no evidence before the tribunal that it had spread before it was removed. I will therefore allow ground 1 of the claimant's appeal.

32. I turn to ground 2. Ms Anderson made the following principal submissions. First, the tribunal specifically addressed the claimant's case that she still had cancer in 2018/2019, at [75] to [77]. It properly concluded that the evidence did not support that. In particular, it properly rejected her case that her epilepsy and her vitiligo were caused by continuing cancer. This ground also failed to identify any evidence before the tribunal that an astrocytoma may go into remission or that, in any event, the claimant had cancer in remission almost ten years on. Nor did the ground explain what, for these

purposes, was meant by being in remission. Even if the tumour that was removed should have been found to be cancer, the only basis advanced for her still having cancer was that this should be inferred just from her continuing epilepsy and/or vitiligo. That was properly rejected.

33. Mr Brown accepted that the tribunal was right to say that there was, in fact, no diagnosis or suggestion of cancer in the medical records in the years following the operation. He also accepted that the tribunal was entitled to find that the fact that the claimant still had epilepsy and vitiligo did not itself support an inference that she, therefore, probably still had cancer. But, he submitted, the tribunal had not, at [75] or following, addressed the scenario that if, contrary to its view, her original tumour was cancer, *that* might itself support the conclusion that she still had cancer in 2018/2019.

34. On this ground, I am with Ms Anderson. First, it seems to me that the argument about remission does not add anything of substance. What the tribunal had to decide was simply whether in 2018 the claimant probably had, or still had, *some* cancer cells present, even if a clinician might describe the cancer as being in remission. The only basis for that proposition advanced to the tribunal was that this could and should be inferred from the fact of her continuing epilepsy and vitiligo. But, as Mr Brown accepted, the tribunal made proper findings that the evidence showed no more than that cancer *may* cause epilepsy and *may* cause immune disorders which, in turn, *may* cause vitiligo. There was nothing in the medical evidence before the tribunal specifically relating to her, to support the claim that *her* tumour was, or was probably, the current cause of either or both of those conditions.

35. From [28] it appears to me that the claimant did not advance the alternative case that the continued presence of cancer could and should be inferred simply from the fact that the tumour she had had removed was itself cancerous. I therefore do not think it was an error for the tribunal to fail to address that alternative case, in terms. But, in any event, having rejected her case that the persistence of cancer should be inferred from the continuing epilepsy or vitiligo, and there being no suggestion that there was any other evidence before it, for example as to the continuing presence of

astrocytomas, I cannot see any basis on which the tribunal properly should have concluded that the claimant had cancer in 2018/2019. Accordingly, ground 2 of the claimant's appeal fails.

The Respondent's Appeal: Arguments, Discussion, Conclusions

36. The respondent's appeal challenges the tribunal's conclusions that the claimant is disabled by reference to epilepsy and to vitiligo. Although there are six numbered grounds, there is considerable interaction and overlap among them. A number of them attack the tribunal's reasoning that both these impairments had an adverse effect on the claimant's ability to carry out normal day to day activities, in view of the behaviours that she adopted. Specifically in relation to epilepsy, this relates to the tribunal's findings as to: the claimant's fear of SUDEP; her belief that various substances and medications were potential triggers, and hence her abstinence from coffee and alcohol; her non-use of cosmetics and avoidance of exposure to certain chemicals; and her refusal to take recommended medication. Specifically in relation to vitiligo, this relates to the findings at [86] to [90] that the claimant did not use make-up and kept out of the sun, including not going on holiday to sunny places; and, once again, as to her avoiding coffee, alcohol, and exposure to certain chemicals; and declining medication. This regime, said the tribunal, had led to a restricted lifestyle and workplace conflict.

37. The specific grounds of appeal are as follows.

38. Ground 1 asserts that the tribunal erred because it had not found that the epilepsy or the vitiligo did, in fact, have an adverse effect on the claimant's ability to carry out normal day to day activities. There was no evidence that she would, in fact, suffer any adverse consequences if she undertook any of the activities which she avoided. The tribunal erred further by relying on her subjective fears as sufficient to establish that these impairments had had the requisite effect, despite its own findings pointing to the conclusion that those fears were not objectively well founded.

39. Ground 2 asserts that the tribunal's conclusions cannot be upheld on the alternative basis that the claimant's fears or avoidance behaviour *themselves* bespoke the existence of a mental impairment

amounting to a disability in its own right, such as a phobia. That had been neither argued nor found by the tribunal.

40. In relation to vitiligo, insofar as the tribunal concluded at [86] that the claimant's avoidance of cosmetics or certain chemicals was not unreasonable or surprising, ground 3 asserts that that finding was perverse. That is having regard to the finding that this behaviour was not medically advised, the inference that the claimant had adopted it on the basis of her own research, the finding that the behaviour was influenced by the fact that the cause of the claimant's vitiligo was undiagnosed, and the lack of any evidence that exposure to chemicals was even a possible cause of the vitiligo.

41. Ground 4 contends that it was perverse to describe the claimant's choices as leading to a "restricted, spartan lifestyle", as the tribunal did at [84]. If, by that, the tribunal meant behaviour going beyond the normal range of lifestyle choices that people choose to make, the tribunal also, it is said, made insufficient findings as to the extent to which the claimant does not go out in the sun.

42. Ground 5 contends that the reference to the claimant living by the beach at [87] was perverse. English is not her first language and this seemed simply to have been a mistake, the tribunal misunderstanding her evidence about where she *used* to live when she lived in Portugal. She had confirmed in correspondence that she had never said in evidence that she *currently* lives by the beach.

43. Ground 6 contends that the tribunal erred insofar as it considered that the following contributed to adverse effects on the claimant's ability to participate in normal day to day activities: post-seizure symptoms, attendances upon her doctors and not going on holiday to sunny places.

44. In argument in support of ground 1, Ms Anderson developed the following particular points. First, as highlighted in **Aderemi v London and South Eastern Railway Ltd** UKEAT/0316/12/KN, the question was whether the impairments had an adverse effect on the claimant's *ability* to carry out normal day to day activities. That was an objective question and could not be determined by her own beliefs about the nature of her epilepsy and vitiligo. There was no objective evidence to support her

beliefs or fears, that the various behaviours that she avoided, or substances from which she refrained, would, on account of her impairments, risk, cause or exacerbate harm to her health or wellbeing.

45. Indeed, to the contrary, the general tenor of the evidence was that these behaviours were *not* professionally advised or supported by other objective evidence, but simply stemmed from her own views, formed, to some extent, in the light of her own researches. These were not sufficient, said Ms Anderson, to establish causation for the purposes of section 6. Indeed, the implication of Mr Brown's approach would be that, if an individual abstained from a normal day to day activity because of a genuine belief about the effect of an impairment, then, however minor that impairment itself was, they would then fall to be treated as a disabled person. That could not be right.

46. Thirdly, the tribunal erred insofar as it failed to consider whether the claimant's decisions to refrain from various activities went beyond the normal range of differences in lifestyle choices which may exist among people, such as whether or not to drink coffee. In addition, the tribunal had failed to consider whether all of the activities in question were properly viewed as normal day to day activities. Going on holiday abroad to sunny places, for example, was not. The tribunal had also made insufficient findings, for example, as to the extent to which the claimant does, in fact, avoid sunlight.

47. In relation to grounds 2, 3, 4 and 5, Ms Anderson essentially repeated with some expansion the points made in the grounds themselves. In relation to ground 6 she submitted that the tribunal was entitled to find that the symptoms of nocturnal seizures were consequences of the epilepsy; but it failed then properly to consider whether they had a substantial adverse effect on her ability to carry out normal day to day activities, taking account of its limited findings as to their frequency. Ms Anderson also did not accept that sleeping, as such, was necessarily a normal day to day activity. Nor, she said, was it any part of the claimant's case before the tribunal that attending upon her doctors had had an impact upon normal day to day activities, and it would have been perverse to find that it did. Going on holiday to sunny places, she repeated, was not a normal day to day activity.

48. Mr Brown's principal submissions in response to the respondent's appeal were these. Generally as to epilepsy, the tribunal had found that the claimant was at the relevant time experiencing seizures around four times a month, with the consequences that it described. She had been advised to take anticonvulsant medication. On occasions, she needed to attend an epilepsy nurse. She was advised that the medication would address the risk of death that she feared in relation to SUDEP. This was all enough, by itself, to support the conclusion that her epilepsy was a disability.

49. More generally **Vicary v British Telecommunications Plc** [1999] IRLR 680 warned tribunals that, when considering whether someone is disabled, they should not be blinkered by the stereotypical image of an obviously visible physical disability. That admonition, submitted Mr Brown, had some resonance with the respondent's view in this case, that the claimant's behaviour was irrational or lacked transparent cause. Many impairments, particularly mental impairments, produce psychiatric consequences that may seem not rational or reasonable from the perspective of a non-disabled person. The tribunal had set out clear and proper findings as to the impact of these two impairments on her ability to carry out normal day to day activities at [82] to [87]. The definition also does not require there to be some adverse consequence of attempting to carry out the activities, only an adverse effect on the ability to carry them out.

50. The tribunal had found that these impairments compel the claimant to avoid various day to day activities with a consequent impact on her lifestyle. It was not a matter of her choice. The tribunal had correctly understood the approach to mental impairment in **J v DLA Piper UK LLP** [2010] ICR 1052. The distinction that the respondent sought to draw, between an objective and a subjective consequence of an impairment, was irrelevant. A mental or psychiatric impairment was, by definition, in the mind. All of its manifestations were, in that sense, subjective, though they might also be objectively reasonable. Adverse effects were not to be excluded from consideration simply because they were triggered by mental impairments.

51. In oral submissions, Mr Brown submitted that, once it was accepted, as it was, that the claimant had genuinely refrained from certain activities on account of having epilepsy and/or vitiligo, then the chain of causation was made out, regardless of whether her beliefs were rational. All that remained, then, to be decided was whether they were normal day to day activities.

52. I interpose that, in further discussion and reply, Ms Anderson submitted that the difficulty for this line of argument was that the claimant had not claimed to have any sort of mental impairment, nor to have adopted beliefs or harboured fears that were irrational or required explaining. Her case before the tribunal was that her beliefs and her fears were well founded, and that her clinicians and others who disagreed about that were just wrong. That being so, there was no basis for the tribunal to investigate whether, still less to find that, her behaviours were caused by some mental impairment.

53. Returning to Mr Brown's submissions in relation to ground 2, he acknowledged that the tribunal had not made a finding that the claimant's fear and avoidance behaviour was a form of mental impairment, but he argued that that arose through or from the epilepsy and/or the vitiligo.

54. In relation to ground 3 concerning the avoidance of cosmetics and chemicals, Mr Brown submitted that the claimant was as well placed as anyone to determine what might aggravate her vitiligo. All that section 6 required was that there were adverse effects, not that there was some logical or rational cause underlying them.

55. In relation to ground 4, nothing turned on the tribunal's use of the expression "restricted, spartan lifestyle". The tribunal had made sufficient factual findings to support the conclusion that the claimant was a disabled person by reference to epilepsy and vitiligo within the meaning of section 6.

56. Ground 5 was, said Mr Brown, trivial. The parties were agreed that when the claimant spoke of living near the beach, she was referring to her time living in Portugal. The tribunal had made an error that did not matter, as it was not relying on going to the beach as a normal day to day activity.

57. Ground 6, he submitted, did not materially add to the other grounds. More generally on the question of normal day to day activities, the tribunal was properly entitled to regard drinking coffee,

for example, and the other activities from which the claimant abstained, as amounting to normal day to day activities, and to find that the impact of the claimant abstaining from them was substantial.

58. I turn to my conclusions. I start with the words of the statute. Where the complainant has or had a particular physical or mental impairment, the tribunal must ask in accordance with section 6(1)(b) whether that impairment has a substantial and long term adverse effect on their ability to carry out normal day to day activities. There are two related points to note. Firstly, as Mr Brown accepted, the issue raised here is one of causation. Did the impairment have the requisite effect? Secondly, the requisite effect must be on the *ability* to carry out normal day to day activities.

59. Ground 2 postulates that, *had* the tribunal found that the claimant had a distinct mental impairment, giving rise to her fears and avoidance behaviour, akin to a phobia, it would have erred, because she did not advance any such case. However, both parties in fact agree that the tribunal did *not* purport to find that the claimant had a distinct mental impairment of that sort. This ground, therefore, as such, goes nowhere. Nevertheless, it highlights an important point. The relevant adverse effect must have been properly found to have been *caused by the epilepsy and/or the vitiligo*.

60. Mr Brown fairly accepted in oral submissions that the better view is that epilepsy is itself a physical impairment, although he submitted, and I agree, that whether it is a physical or mental impairment does not, as such, matter. What matters, in my view, is that it was not suggested that epilepsy is the sort of condition that *itself directly or intrinsically* causes aversion or avoidance behaviours, in the direct or intrinsic way that a mental impairment such as a phobic, obsessive or compulsive disorder or a severe stress reaction disorder might do.

61. Mr Brown also cited **Ministry of Defence v Hay** [2008] IRLR 928 for the proposition that the cause is irrelevant; but he accepted in oral submissions that the point being made there is that, so long as there is an impairment, it does not matter that it may not be known or shown what has *caused the impairment*. Indeed, in **DLA Piper**, it was recognised that in some cases the existence of an

impairment may be *inferred* from the evidence of its effects. But none of that means that it is not a requirement, one way or another, that the impairment be found to have caused the requisite effect.

62. I agree with Ms Anderson that the test is objective, as it is one of causation. The impairment has to be found *by the tribunal* to, in fact, have had the requisite effect. In many cases, the answer will be straightforward and uncontroversial. But where there is a dispute about it, then whether the impairment does or not does not have the claimed effect must be determined by the tribunal on the evidence before it. It is not enough that the claimant truly believes that it does. The tribunal must decide for itself. This means that, in a case where the claimant asserts that engaging in a certain activity will risk triggering or exacerbating some adverse effect of the impairment itself, such as bringing on a seizure or an adverse skin reaction or something of that sort, and that is disputed, the tribunal must consider whether it has some evidence that objectively makes good that contention.

63. Ms Anderson makes the submission that the tribunal in this case did not find that there was, in fact, any risk to the claimant from indulging in any of the activities which she avoided or abjured on account of a risk of triggering some adverse reaction or interaction with her epilepsy or vitiligo. The tribunal properly concluded that the claimant's case, put that way, did not succeed.

64. Mr Brown accepted that the test of causation is, in itself, objective, in the sense that it is a matter for the tribunal to decide. He also accepted that in this case the tribunal did not find that the claimant would have risked any harm or adverse health consequences on account of her epilepsy or vitiligo by way of a reaction or flare up or something of that sort had she, for example, drunk coffee, or used make up. He argued, however, that the tribunal had properly found that the requisite causation was found to have been established in this case by a *different* route, as follows.

65. The tribunal accepted that the claimant had adopted her various behaviours because she genuinely believed that to indulge in them would cause or risk harm on account of how they would or might exacerbate or trigger her epilepsy or vitiligo. Those were, as such, subjective beliefs. But the tribunal itself properly concluded that those conditions had, *through the route of her acting on*

those beliefs, caused her to refrain from those activities. That conclusion was not dependent on whether those subjective beliefs were well founded. The tribunal had properly concluded that her beliefs caused her to refrain from those activities, and so had adversely affected her ability to carry them out, and that these were, in turn, beliefs about her epilepsy and her vitiligo. So the chain of causation was established.

66. This line of argument gave me some real pause for reflection. But ultimately I have concluded that it is not sustainable. That is for the following reasons.

67. Firstly, to be clear, I do not think that it would always follow that, because the complainant has taken a decision to refrain from a particular activity on account of their impairment, such a decision will in every case, as it were, break the chain of causation. That would not be so where, for example, the complainant was following sound medical advice that indulging in the activity would, indeed, risk or cause some harmful exacerbation or reaction of their condition. But in a case of that sort, the underlying basis of causation would be established by the evidence that, objectively, the impairment *does* affect the *ability* to engage in that activity. But in a case such as the present, where the claimant relies purely on their own belief, but there is no evidence accepted by the tribunal that they are right in what they believe, causation cannot be established by that particular route.

68. I also agree with Mr Brown that the complainant does not necessarily have to demonstrate to the tribunal that they have tried indulging and experienced adverse consequences. The fact that the individual has avoided the activity and has not experienced any harmful effects in fact, would not matter, if the tribunal were satisfied, for example by appropriate medical evidence, about the harmful impact that would have ensued, had they indulged. But if the tribunal is not satisfied of that, then the individual's decision to abstain out of conviction cannot, by itself, make good that evidential gap.

69. In the present case, the tribunal found that there was what lawyers would call "but-for causation". Had the claimant not had epilepsy and/or vitiligo, she would not have formed the beliefs and, hence, would not have refrained from the activities. But it seems to me that the tribunal's

reasoning stops there. What it has not considered is whether the facts were sufficient to support the conclusion, not just that there was “but for” causation, but that either of these impairments had the requisite material causal effect on the claimant’s ability to carry out the activities in question, in the sense required by section 6.

70. Mr Brown submits that the claimant was compelled to engage in these behaviours and that it was not a matter of choice. However, the tribunal did not so find. It did find that she had strong and fixed views. She was very worried about the risk of SUDEP. She feared that drinking coffee or alcohol would trigger adverse reactions. She was strongly motivated by her fears, which the tribunal described as very considerable, and could not be shaken or dissuaded by the advice of clinicians.

71. But it was the claimant’s case that she stuck to her views, as her guide to action, because they were right, and the contrary advice from her clinicians was simply wrong. It was not her case that these were behaviours that were not wholly voluntary because of any obsession, compulsion, or phobia. The point here is not merely that she was not claiming to have an independent mental impairment of that sort, amounting to a disability in its own right. The point, more fundamentally, is that it was her case that her behaviours were simply the result of wise and informed choice.

72. This evidence and argument, on her part, was, therefore, simply a further reflection of her underlying case about what she said was in fact the direct impact on normal day to day activities, that indulging in coffee, alcohol or putting on cosmetics would have, because, on her case, of the interaction that those activities would have with her epilepsy or her vitiligo.

73. Ultimately, I do not think the fact that the claimant acted in accordance with her own case and beliefs could be regarded as sufficient properly to make good the chain of causation, so as to establish that the epilepsy or the vitiligo had the requisite effect as required by section 6. To put it in the language of causation, on the evidence and findings made by the tribunal, these behaviours on the claimant’s part broke the chain of causation. To put it another way, the evidence that she adopted

these behaviours did not add anything to her true underlying case, which was that the epilepsy and vitiligo *were* liable to be exacerbated by these activities, a case that the tribunal undoubtedly rejected.

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

75. I have already addressed ground 2.

76. As to ground 3, it follows from what I have hitherto said, that I agree with it insofar as it relies on the proposition that the tribunal did not find there to be any objective foundation for the claimant's belief, that cosmetic products would trigger some negative effect of her vitiligo. That being so, even if its view that her decision to refrain from using them was not unreasonable or surprising was not necessarily perverse, it could not properly be relied upon to support its conclusion that her vitiligo had the requisite adverse effect.

77. Grounds 4, 5 and 6 all raise issues about whether the tribunal made proper findings about whether the behaviours and activities about which it heard were all normal day to day activities. If I am right, that these behaviours were not sufficient to establish causation, then these grounds largely fall away. That is save in relation to the question of exposure to the sun, where Ms Anderson accepted that there would be a proper basis for exploring the interrelationship between that and the claimant's vitiligo. I will return to that, but first will also generally address these grounds for good order.

78. I consider that the tribunal's decision in respect of the normal day to day activities aspect is, indeed, unsatisfactory. As to ground 4, the use of the phrase "restricted, spartan lifestyle" would not by itself matter, had the tribunal properly found that these specific activities were disrupted in a

manner that amounted to the requisite adverse effect on normal day to day activities. But the use of a colourful description is not adequate by itself. I also do not think that the tribunal gave sufficient specific consideration to whether abstaining from coffee or from alcohol or not using cosmetics would bespeak a substantial adverse effect on the ability to carry out normal day to day activities in the requisite sense. I note in this regard that the tribunal did not cite or appear to consider section D of the guidance, or the appendix, listing examples of things that it would be reasonable to regard as having that effect. The guidance is, of course, just that; and the list provided there is illustrative and non-exhaustive. Nevertheless, it is a pertinent resource to consider in such cases.

79. The tribunal did not, for example, consider whether, in relation to food or drink, matters might lie on a spectrum. At one end of the spectrum, it might be questioned whether, if an individual refrains from consuming a single particular drink or food product, that would be sufficient to have the requisite effect. The position might be said to look very different, however, if they are unable to eat or drink a very wide range of things, and their diet is extremely limited or restricted. Be that as it may, the tribunal did not give that sort of consideration to this aspect of the claimant's case.

80. A similar point, it seems to me, arises in relation to visits to the doctor. The fact that an individual may need to visit the GP in connection with their impairment, for a periodic check-up might not be enough. But at the other end of the spectrum, an individual who has to spend several hours each week receiving treatment at the local hospital might have far less difficulty in persuading the tribunal that this substantially disrupted them going about normal day to day activities.

81. I also agree with Ms Anderson that the tribunal's reference to the claimant's aversion behaviours causing workplace conflict was by itself not sufficient to establish the requisite impact. I observe that in this regard the tribunal would also need to take care at a preliminary hearing not to trespass into territory that might be the subject of factual dispute in the substantive claims.

82. Turning to exposure to the sun, once again it seems to me that there is a potential spectrum. The case of someone who is advised to stay indoors as much as possible, even on a gloomy day,

might not be viewed in the same way as that of someone who is advised merely to take extra care when holidaying at particularly sunny destinations. I also cannot say that the tribunal's error about the claimant living by the beach is of no concern, as it seems to have attached some weight to this mistaken understanding of her evidence. But in all events, reading its findings as a whole, I do not think that the tribunal sufficiently addressed this aspect.

83. I have borne in mind that the tribunal referred at [102] to the cumulative picture. It was right to consider the possibility that, even if some individual aspect did not have, by itself, the requisite adverse effect on normal day to day activities, the cumulative picture emerging overall might have led to a different conclusion. But I do not think that the inclusion of this paragraph by itself makes good the deficiencies in the tribunal's analysis that I have identified.

84. I have borne in mind that the tribunal was not obliged to refer to all of the evidence or to set out its reasoning blow by blow, as long as it has done sufficient to explain materially the reasons for its conclusions. But in a case of this sort, where the issue is whether there is an adverse impact on normal day to day activities, the law is as subtle as it is, and the case being advanced was by no means straightforward, having regard to the particular behaviours and activities on which the claimant relied, I do conclude that the tribunal's analysis and explanation of its conclusions was not adequate. Had I been of the view that it was proper to rely upon the claimant's avoidance behaviours, I would therefore still have remitted the matter for fresh consideration of the question of impact on normal day to day activities of the particular behaviours on which she relied.

85. Given the foregoing conclusions, the consequence is that the tribunal's decision that the claimant was disabled in relation to vitiligo cannot stand, and the tribunal will need, on remission, to give further consideration to the question of the significance of exposure to the sun in the claimant's particular case and whether, once it has considered and made more detailed findings about that, they point to the conclusion that the claimant's vitiligo did or did not amount to a disability.

86. In relation to epilepsy, Mr Brown has submitted that, should I find, as I have, that the claimant's reactive behaviours were not properly relied upon, nevertheless I should allow the conclusion that her epilepsy amounted to a disability to stand. He points in particular to the tribunal's findings that she continued to have seizures during the period with which the tribunal was concerned, with a frequency of around one a week, as to the practical impact of her nocturnal seizures when she had them, and as to the medical support that she continued to receive in that regard.

87. Ms Anderson did not concede that these features were alone sufficient to support the conclusion that the claimant's epilepsy amounted to a disability. She did not concede that sleep is, itself, a normal day to day activity, nor that the reference to sleep in the guidance at paragraph D16 indicated that it was. She submitted that in the event that I found as I have, I should remit the question of whether the claimant's epilepsy amounted to a disability to the tribunal to consider afresh.

88. I have come very close to concluding that the tribunal made sufficient findings of fact, in any event, to support its conclusion that the claimant's epilepsy is a disability. That is having regard to the guidance at D16, to what I am inclined to think is the better view, that sleep is, in itself, a normal day to day activity, to the tribunal's findings of fact as to the frequency of the seizures at the relevant time, and the aftermath that the claimant discovered on waking up the morning after having had such a seizure. But I am just persuaded that I should remit this back to the tribunal for further consideration, assuming that between now and then there is no concession on the part of the respondent.

Outcome

89. In summary, I allow the claimant's appeal against the finding that she did not have cancer in the past. I substitute a finding that she did, and so could rely on that in 2018/2019. I dismiss the claimant's appeal against the finding that she did not at that time have, or still have, cancer. I allow the respondent's appeal against the tribunal's finding that the claimant's vitiligo amounted to a disability; I remit that question for fresh consideration, in particular with reference to the significance

of exposure to the sun in her case. I allow the respondent's appeal against the finding that the claimant's epilepsy amounted to a disability and I remit that question for fresh consideration.

90. I have heard submissions on what further direction I should give regarding remission of the two issues that the tribunal will have to consider afresh. Ms Anderson expressed a concern that the judge had gone significantly wrong in relation to his reliance on the claimant's behaviours as making good her case on causation. However, Mr Brown fairly submitted that this was a novel and, dare I say, difficult point of law that, as far as either counsel or I am aware, has never specifically come up in this form until now.

91. Further, next time around, the tribunal will not be concerned with the behaviours. It will simply be looking at a narrower set of issues in relation to the evidence about the vitiligo and exposure to the sun, and about the impact that the claimant's epileptic seizures have on her and their frequency, and some argument in relation to the law. That being so, I do not see any reason to lack confidence in the judge's ability to come to these questions with a fresh and professional eye. I do also see some advantages to the matter returning to Judge Maxwell if he is available. So, I will direct remission to Judge Maxwell, if available, or another judge nominated by the REJ if not.