



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Samuel Saul

v

Aarsleff Ground Engineering Limited

RECORD OF A PRELIMINARY HEARING HELD BY CLOUD VIDEO PLATFORM

Heard at: Nottingham

On: 4 November 2021

Before: Employment Judge Broughton (sitting alone)

Appearances

For the Claimant: Ms Linford - Counsel

For the Respondent: Ms Charalambous - Counsel

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

Judgement of the Tribunal

Introduction

1. The Claimant **did not** have the required continuity of service to bring a claim of unfair dismissal, pursuant to Section 108 of the Employment Rights Act 1996. The claim of unfair dismissal is not well founded and is dismissed.
2. The Claimant **did** meet the definition of a disabled person pursuant to Section 6 of the Equality Act 2010 at the relevant time. The claim of disability discrimination will proceed to the final hearing.

Written Reasons

Background

3. The Claimant presented his claim to the Employment Tribunal on 27 November 2020 following a period of ACAS Early Conciliation from 31 July 2020 to 31 August 2020.
4. The claims he is pursuing are:-

- a. Unfair dismissal pursuant to Section 95 and 98 of the Employment Rights Act 1996 (ERA)
 - b. Disability discrimination including claims pursuant to Section 15 and Sections 21 and 22 of the Equality Act 2010 (EQA) (discrimination arising from disability and failure to make reasonable adjustments).
 - c. Wrongful dismissal.
5. It is not in dispute that the Claimant's employment with the Respondent terminated on 29 July 2020. In essence, the Claimant complains that his dismissal was both unfair and an act of disability discrimination pursuant to Section 15 EQA because the reason for his termination was due to his alleged poor performance however, he has a medical impairment, namely Attention Deficit Hyperactivity Disorder (ADHD) and alleges that the issues with his poor performance were "*something arising*" from that disability. He also complains that the Respondent failed to make reasonable adjustments.
 6. Within its response, the Respondent denies that the Claimant was unfairly dismissed and alleges that the reason for his dismissal included allegations of poor work, negligence toward his duties and a failure to follow management instructions.
 7. The Respondent disputes that the Claimant is a disabled person for the purpose of Section 6 of the EQA. Further, in terms of the claim for ordinary unfair dismissal, the Respondent's case is that the Claimant does not have 2 years qualifying service as required by Section 108 of the Employment Rights Act.
 8. It is not in dispute that the Claimant commenced employment as a Placement Civil Engineer with the Respondent on 27 September 2017 and that this placement ended on 14 September 2018.
 9. The Claimant then returned to University to complete his degree. He had however, (subject to completion of his degree) accepted the offer of a graduate role as a Graduate Design Engineer with the Respondent. This offer was made and accepted by him in May 2018. He commenced the position of Graduate Design Engineer with the Respondent on 3 June 2019.
 10. His employment status as between 15 September 2018 and 2 June 2019, whilst he was at University, is in dispute. The Claimant's case, is that during that period he either remained an employee of the Respondent, or in the alternative, the weeks between those dates count in computing his period of employment because by arrangement, he was regarded as continuing in the employment of the Respondent for the purposes of Section 212 (3)(c) ERA.

Preliminary Hearing

11. This case came before Employment Judge Hutchinson on 24 February 2021 at a Case Management Hearing where it was decided to list the case for a Preliminary Hearing to determine;-

11.1 Whether the Claimant suffered from a disability at the relevant time

11.2 The date of commencement of his employment. This will determine whether the Claimant has sufficient service to claim unfair dismissal.

Today's hearing

12. The purpose of today's Preliminary Hearing was therefore to determine the two above issues, as set out in Employment Judge Hutchinson's Order.
13. I was presented with a joint bundle of documents which numbered 141 pages, however, on the morning of the hearing, the Respondent had produced a further

document which was a copy of an email exchange as between the Claimant and the Respondent (which the Respondent had paginated pages 142 and 143). The Claimant had no objection to including those documents within the joint bundle and therefore the final bundle ran to 143 pages.

14. The Claimant had produced skeleton closing submissions (no written submissions were produced by the Respondent).
15. The Claimant had produced a witness statement which incorporated his disability impact statement and gave evidence under oath. He was cross examined by the Respondent's representative.
16. The Respondent produced a witness statement from Ms Heather Suzanne Jones, Business and HR Manager of the Respondent, who attended the hearing and gave evidence under oath and was cross examined by the Claimant's representative.
17. There were no other witnesses.

Issues

18. At the commencement of the hearing, I discussed the issues in the case with the parties;

Disability discrimination claims

19. With regards to the disability discrimination claims, it was not clear what the relevant period was in respect of the disability discrimination allegations. The parties had not identified this within the pleadings or at the Case Management Hearing on 24 February 2021.
20. The Claimant complains about the dismissal as an act of discrimination. The Claimant's representative confirmed that the relevant period does not extend beyond the date of termination i.e. the 29 July 2020.
21. Despite not asserting this within her submissions or in the particulars of claim, Ms Linford went on to assert that it is the Claimant's case that the Respondent had actual knowledge from when the Claimant informed them of his disability on 10 July 2020 but that they had constructive knowledge from 20 September 2017.
22. Ms Linford ultimately put the Claimant's case as follows (I have quoted what counsel said to the Tribunal because there appeared to be some shifting of the Claimant's position):

“The Respondent should have had knowledge on 20 September 2017, that in the alternative it ought to have had knowledge shortly after 3 June 2019 when the Claimant started as a Graduate Engineer, it was between 3 June 2019 and 10 July 2020 when the Respondent raised concerns about his performance but it should reasonably have been apparent that he was disabled”.

23. Ms Charalambous complained that she had understood from the written submissions that the Claimant's case was that the relevant period was from 10 July 2020 which is the only date set out in the written submissions and is the date when it is alleged the Claimant informed the Respondent of his disability. However, this preliminary hearing is not concerned with the issue of knowledge, we are concerned only whether the Claimant is disabled or not and Ms Charalambous confirmed that for the purposes of today's hearing, she is content to agree that in terms of the issues, the issue of whether the Claimant is disabled or not, should be determined on the basis that the relevant period is **20 September 2017 to the effective date of termination, namely 29 July 2020.**

24. I checked for completeness with Ms Linford, given that there are references within the chronology to an appeal in August and an outcome in October 2020, that the relevant period ends on 10 July 2020, i.e. whether there are any other acts of discrimination alleged which post-date the effective date of termination. Ms Linford informed me that we are only concerned with the effective date of termination as the last act of discrimination.
25. **The relevant period is agreed therefore between the parties, to be 20 September 2017 to the effective date of termination, namely 29 July 2020.**

Continuity of service - issues

26. Ms Linford confirmed that the Claimant was **not** pursuing an argument based on the temporary cessation of work under Section 212 (3)(b).
27. Ms Linford confirmed the Claimant is pursuing his case on the basis that he either remained an employee under a contract of employment or that there was an arrangement pursuant to Section 212 (3)(c) during that period.

Disability discrimination - issues

28. In submissions at the close of the hearing, Ms Charalambous on behalf of the Respondent, informed the Tribunal that the Respondent was conceding that the Claimant had an impairment for the purposes of Section 6 of the EQA and that further, it was conceding that the impairment had lasted for a period of 12 months as at the **relevant time** and that the only issue that remained in contention and for determination by the Tribunal was therefore whether the impairment had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities at the relevant time.

Final Issues

Disability Discrimination

29. To be clear therefore, the final issues for the Tribunal to determine at this hearing, are as follows:-
- a. *Whether at the relevant time, the Claimant's impairment of ADHD had a substantial effect on his ability to carry out normal day to day activities*
 - b. *Whether the Claimant was in receipt of medical treatment during the relevant period and if so, what was it and when was he in receipt of it.*
 - c. *What would the effects of the disability have been without the treatment*

Continuity of service

30. *Whether during the period from 14 September 2018 to 3 June 2019;-*
- a. *Whether the Claimant was an employee of the Respondent pursuant to Section 230 of the Employment Rights Act 1996 and/or*
 - b. *Whether during the period of 14 September 2018 to 3 June 2019 the Claimant was absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose pursuant to Section 212 (3)(c) of the Employment Rights Act 1996.*

Continuity of Service

Findings of fact – relevant to issue of continuity of service

31. The Claimant commenced employment for the Respondent on 20 September 2017 in the position of Placement Civil Engineer.
32. The Respondents are an engineering firm based in Nottinghamshire providing services around the UK.
33. As part of the Respondent's recruitment programme, it has close ties with Nottingham Trent University and attends Engineering Recruitment Fairs at the university.
34. The Respondent offered the Claimant employment as a Placement Civil Engineer for one year, he had completed 2 years of his University course and this was an industrial placement. He was due to return to University at the end of the placement for a year to complete his degree. The Claimant confirmed under cross examination that on accepting the placement, he knew that it would last a year and that the placement would end on 14 September 2018. In the exit interview questionnaire which the Claimant completed toward the end of the placement, he confirmed his understanding that it was a '*one year contract*'. (page 113 – 116)
35. The offer of a Placement Civil Engineer position was made to the Claimant by letter of 3 July 2017 (page 47-48). The Claimant was paid a salary and a copy of the Conditions of Employment was enclosed with this letter. It stated the "*duties and responsibilities will be developed during your period of employment with us..*" and referred to this as an offer of employment. The Claimant was also provided with a Company handbook, the same handbook which is provided to other employees
36. The Claimant's terms of employment were set out in the offer letter (page 47-48), a letter about opting out of the '48' hour working week under the Working Time Regulations 1998 (page 49) and a document setting out the duties and responsibilities of the role (page 52 – 53) signed by the Claimant on 14 August 2017.
37. The offer letter states "*this is a student placement position in partnership with you and Nottingham Trent University. You will be required to also comply with the Placement Agreement set out in place by the University, details of which we will need to seek from the University. Please ensure that you contact Employability to set this process in operation. They will then supply a Placement Agreement which will require completion and signing by all parties*".
38. Ms Jones, the Respondent's HR Manager confirmed under cross examination, her understanding which was that during the placement the Claimant was an employee of the Respondent.
39. The Claimant confirmed under cross examination that he had not been told at the outset of the placement that he would be given a full time role at the end of the placement, he had been told that generally the Respondent keep people on. The Claimant was paid an annual salary and performed his duties under the control of the Respondent. The Claimant completed a New Starter Employment Form (page 54).

Placement Agreement

40. There was a Placement Agreement (page 55-57) (Agreement) , the parties to which were the Respondent and the University. The Claimant was not a party to this Agreement. It was signed by Ms Jones on behalf of the Respondent.
41. The Agreement includes the following in terms of the obligations on the Respondent as placement provider;-

3. "Recognise that although the student **is employed**/working for the organisation, they are also a student and likely to have some obligations as part of their course"

4. "Ensure that all necessary Employer Liability Insurances are in place and take responsibility for negligent acts of student"

42. The Agreement also places on obligation on the University during the placement to monitor, assess and record the students' progress during the placement.

Placement Feedback /appraisal

43. There was a feedback/ monitoring meeting on 3 November 2017. The undisputed evidence of Ms Jones was that the meeting was between the Claimant, Mr Ash Rodgers his Line Manager and a supervisor/visiting lecturer from the University.

44. During this meeting Mr Ash Rodgers completed an assessment of the Claimant grading him 1-5, 1 was needs improvement and 5 means extremely satisfied. He gave him the following grading;-

Self-management (punctuality/application to the job etc) grade 3 (satisfied)

Application of knowledge, grade 4 (very satisfied)

Interpersonal skills, grade 5 (extremely satisfied)

Verbal communication, grade 4 (very satisfied)

Written communication, grade 3 (satisfied)

Sense of urgency, grade 3 (satisfied)

Team working, grade 5 (extremely satisfied)

General conduct, grade 4 (very satisfied)

Willingness to accept responsibility, grade 4 (very satisfied)

Commercial awareness, grade 3 (satisfied)

Tribunal Stress

45. The areas therefore where the Claimant scored the lowest, achieving scores of only satisfied were for written communication, application/punctuality and sense of urgency.

46. It is not in dispute that there were no concerns raised with the Claimant regarding his performance during this placement year.

47. The Claimant was then due to return to university to complete the final year of his Civil Engineering Degree in September 2018.

Offer of graduate Employment : May 2018

48. On or around 16 May 2018 during a meeting with the Respondent, the Claimant was offered a graduate role subject to completing his degree and offered a monthly retainer payment while back at University. It is not in dispute that this was an offer of employment with the Respondent. The Respondent's case is that this was to constitute a second period of employment to commence on a date to be agreed after he had completed his University course and was contingent on him successfully completing his studies.

49. The Claimant's case is that he considered that he remained employed after his placement ended. He gave no evidence and it was not addressed in submissions however, on what basis he remained an employee, whether he remained employed as a Placement Engineer or in some other capacity.
50. The offer letter of 16 May (page 58) states as follows;-

*"I am pleased to offer you the position of Design Engineer with Aarsleff Ground Engineering Limited. The position will be directly responsible to the Design Manager or his nominee and is based at the above address. This is a graduate position and **will be dependent upon your successful completion of your current studies and the award of your degree**".*

Tribunal Stress

51. The offer letter goes on to state :-

"I am pleased to offer you a salary of £23,500 per annum which will be paid at the end of each month in arrears, in accordance with the conditions of employment a copy of which is already in your possession..."

*As is usual this new offer is **subject to a probationary period** of six months during which time we will be working together to establish you back into the business and the new role.*

Should you accept this offer of employment it is intended that the position will commence on a date to be mutually agreed by us but during June 2019.

***All other terms and conditions of your employment remain as at present**".*

Tribunal Stress

52. Ms Jones's evidence is that the reference to the terms and conditions "*remain as at present*", was intended by the Respondent to mean that the Claimant would be employed on the same terms and conditions when he returned in the graduate role as he had been during his placement and that "*all other terms ..*" was a reference to the terms he had been provided with and which were set out in the company handbook.
53. The Claimant accepted the offer of employment on 25 May 2018 (page 59). This confirmation states "*I confirm that I will commence this position on a date to be agreed but during 2019*".

Agreement – Retainer Payments – May 2018

54. Following the offer of a retainer payment the Respondent on or around 16 May 2018 (when the offer letter for the graduate role was provided to the Claimant), also provided him with an agreement to sign (page 108-109), hereafter referred to as the Retainer Agreement for ease of reference. This Retainer Agreement committed the Respondent to paying the Claimant what it describes as a retainer of £300 from September 2018 to May 2019 i.e. during his final year back at University. The Claimant signed the Retainer Agreement at the same time he accepted the graduate position which was about 25 May 2018.
55. The Claimant received this retainer payment every month from the Respondent during the period when he was back at University and the payment of this, the Claimant states, evidences that he was remained an employee or that there he was absent from work in circumstances such that, by arrangement, he was regarded as continuing in the employment of his employer for any purpose.

56. The Claimant confirmed under cross examination that he was not required to carry out any work or do anything in consideration for the retainer payment. It was put to the Claimant in cross examination and he accepted that it may be correct that he was told by the Respondent that the retainer payment was to assist his return to the Respondent and ease his final year at University.

57. The main provisions of the Retainer Agreement states as follows;-

(1). *In consideration of the employer agreeing to pay the **Employee** a retainer each month of £300 from September 2018 to May 2019, the **Employee** undertakes to reimburse the Employer the costs if;-*

*i. he voluntarily **withdraws from his course of study** or terminates his position of Design Engineer early without the Employer's prior written consent*

ii. he is dismissed or otherwise compulsory discharged from the training, unless the dismissal or discharge arises out of a discontinuance genuinely of the Course

*iii. **his employment is terminated by the Employer for any reason (other than redundancy) prior to completion of the course** and the first 2 years of his employment as Design Engineer or;*

*iv. **he resigns from the employment of the Employer either prior to completion of the course** or within 2 years after his appointment to the role of Design Engineer, except that, in the latter case, the amount which would otherwise be due to the employer shall be reduced by 1/24 part for which complete calendar month after the end of the course during which the Employee remains employed by the Employer.*

58. The evidence of Ms Jones was very much that this Retainer Agreement refers to the Respondent as the 'Employer' and the Claimant as an 'Employee' only because at the time it was prepared and entered into, the Claimant was still on his Placement and was an employee of the Respondent. Her evidence is that it refers to him as an employee in the future tense in the context of him returning after his degree as a Design Engineer but was not intended to indicate that he would remain an employee during the payment of the Retainer.

59. The Retainer Agreement at clause 2 states;

*"To the extent permitted by law. The Employee agrees that the Employer may deduct a sum equal to the whole or part of the Costs due under the terms of this Agreement from his salary (as defined in section 27 of the **Employment Rights Act 1996**) or from any other allowances, expenses or other payments due to the Employee".*

Tribunal Stress

60. Ms Jones's evidence under oath is that she did not see the terms of the Retainer Agreement as inconsistent with the Respondent's intention/understanding that the Claimant would not be an employee while at University completing his course but only during the placement and on his return to the graduate post and that the reference to the Employment Rights Act 1996, was not intended to imply any employment relationship during the time he would be completing his final year at University.

61. Paragraph (3) provides that ;

*"The amount due to the Employer under the terms of this Agreement is a genuine attempt by the Employer to assess its loss as a result of **the termination of the Employee's employment ...**"*

62. Ms Jones accepted under cross examination that paragraph (3) of the Agreement which refers to the repayment terms being an assessment of loss as a result of the termination of the Claimant's employment and was intended to cover any of the four situations listed in (i) through to (iv) which includes termination prior to the final year of his course at University, which the Tribunal note, given the Retainer Payment is only payable during the time the Claimant is at University, that can only relate to that period.
63. Ms Jones gave evidence that despite the wording of the Agreement, it was clear in discussions with the Claimant that his employment would end when his Placement ended but conceded that there was no written record of those discussions and she did not give evidence that she had personally spoken to him about that and if so, what was said. She also referred to the retainer being an ex gratia payment but confirmed that this description was not set out in any of the documents.
64. The Claimant under cross examination alleged that he had understood the terms and conditions of his employment contract would continue during the period of his return to University; 14 September 2018 to May/June 2019 albeit he accepted that he had not carried out any work for the Respondent during this period and he was under no obligation to maintain any contact with them and he did not identify how and in what way the employment terms would therefore continue to apply in practice.
65. The Claimant attended an Exit Interview with Ms Jones on 21 August 2018 and on the Exit form the Claimant was asked whether he would "reapply" to the Respondent if a future opportunity arose and replied; "yes".
66. In the exit interview questionnaire the Claimant completed (page 113 – 116) after he had been offered the graduate role, he responded to a set question in the form asking why he was *resigning*, stating that he was returning to University. Ms Jones however confirmed that the Employee Handbook requires resignations to be in writing and accepted the Claimant had not provided a letter of resignation. The reference to resignation was not an option which was selected by the Claimant..
67. The Claimant's placement ended on 14 September 2018.
68. In the letter of 25 September 2018 the Claimant was sent what is described as a "*final payslip*" and his P45 (page 61). It states; "*We thank you for your contribution to our company whilst you have been with us and we look forward to working with you again next year*". Attached with it (page 62) was an Employee Leaving Calculation Schedule which included a "*finish date*" of 14 September 2018.
69. The Claimant was issued with a P45 with a date of leaving of 14 September 2018 (page 63-64). The Claimant does not deny receiving that P45 but alleges that he was 'shocked' to see the leaving date as 14 September 2018, however, he confirmed that he had received P45's prior to this, he understood the purpose of a P45 and he did not raise with the Respondent why they had inserted a leaving date of 14 September 2018. He gave no reason for not chasing the P45, he simply confirmed he had not done so.
70. The Claimant completed a Placement Report (page 66-72). In its conclusion he states
"I found my placement year an incredibly valuable learning experience overall. Because I was working for a small company, I was consistently challenged and pushed to learn new concepts and design procedures and as a result had a high level of responsibility within the company. My experiences and practical education throughout my placement year have substantially increased by workplace skills and I have been offered a job with Aarsleff Ground Engineering, pending my graduation which I have accepted". Tribunal Stress
71. The Claimant confirmed he had an Exit Interview but states that at the Exit Interview he was told that the Respondent had not got him a leaving present because he would be

returning. Ms Jones conceded under cross examination that she had not asked whether his Line Manager had made this comment at the exit interview and accepted that “*very possibly*” it could have been said, because it was good working relationship.

72. The Tribunal find on a balance of probabilities, that this comment was made.

Chasing Retainer Payment

73. The retainer was not paid in October and November 2019 and on 8 November 2019 (page 76) the Claimant emailed Ms Jones asking whether he was mistaken in his understanding that retainer payments were to start from 31 October 2018.

74. Ms Jones replies stating; “ *..I believe it just to have been an oversight due to Frances leaving the business. Am guessing there were no notes available for him to pick up on payroll... ”* (page 75)

75. There is an email from Ms Jones to the Respondent’s company accountant in charge of payroll, on 8 November 2018 (page 73). The Claimant was copied into this email;

“ I think we have a situation that has fallen through the net due to Frances leaving the business and your [sic] taking over the reigns.

*Sam Saul who you will recall was our Placement Civil Engineer this year, has already been made an offer by us which has been accepted by Sam **to return to us next year as a Graduate Civil Engineer**. As part of this offer (and has previously been done in the case of x) we as a Company agreed to pay Sam a retainer, **a sort of sponsorship** if you will for his final year of University whilst he completes his degree. Please see the attached agreement between Sam and the Company.*

It looks like Sam has missed two agreed payments so far – can you please rectify this situation for me ?..”

76. In reply Mr Roe on 8 November 2019 states, copying in the Claimant;

“Apologies for this mix up with the retainer.

*I will process the payment tomorrow so it will be in your bank account on Tuesday/Wednesday **next week** “. Tribunal Stress*

77. There is *no* dispute that the October and November retainer payments were paid into the Claimant’s bank account.

78. There are payslips generated in **December 2018**, through to June 2019 (page 120 - 125) showing the retainer payments. There are no payslips prior to December 2018 showing the two missed payments, which were paid the Tribunal find on the evidence on or around 15 November 2018. The Claimant does not allege that the two missed payments identified in November 2018 were not paid into his bank account as advised by Mr Roe during the week following the 8 November 2018 .

79. At some point between November 2018 (when two payments of the retainer were made) and December 2018, when the next payment was made, the Respondent began generating payslips to the Claimant showing the retainer payments. The Claimant asserts that this supports his claim that he was an employee and/or there was an arrangement in place which preserved continuity of service.

80. The payslips show a payroll number for the Claimant (the same number which applied on his return to the Graduate post), the retainer is referred to as “salary” on the payslip and stakeholder pension employee and employer contributions are paid and the retainer subject to deductions for National Insurance. (PAYE Tax is shown as zero on the payslip) . Ms Jones’s evidence is that the generation of the payslips was an administrative error due to the change in the Head of Finance who had not appreciated

that the payments should have been made by BACS. There was also some disruption because in November 2018 the payroll was moved online. Ms Jones confirmed that these alleged errors; paying the retainer via payroll, making pension contributions and deductions for NI and tax, were not identified and continued throughout the remainder of the Claimant's time at University in that final year.

81. Ms Jones also confirmed that when the payroll moved online, all employees and the Claimant, were asked to set up a secure password and the Claimant had the same access to employee payroll documents as the other employees but not according to the undisputed evidence of Ms Jones, access to the wider intranet.
82. There is an email from the Respondents accountant Mr Hoe on 28 November 2018 (page 78) to a number of individuals who Ms Jones confirmed under cross examination, were employees. The Claimant was one of those to whom the email was sent. The email explained that the decision had been taken to move to an online web-based portal to send out payslips and P60s and that the service will start from December 2018 and "*we enclose an employee guide to using this system*". The Claimant received the email and the employee guide.
83. Ms Jones confirmed that the Claimant was not asked for his bank account details for payment of the retainer, the Respondent used those on the payroll system which he had supplied while employed under the placement and he was paid the retainer at the same time at the salary payments were made to employees.
84. Ms Jones was one of the individuals copied into this email, her evidence is that she would not have looked at who was included in the address bar. It is not disputed that payroll was Mr Hoe's responsibility and not hers.
85. Ms Jones gave unchallenged evidence that initially the Claimant was paid the retainer directly and this is supported by the payslips disclosed which only start from November December 2018 .
86. Further, the Retainer Agreement did not provide for payment of pension contributions and the Claimant does not allege that he had any expectation when accepting the retainer and starting back at University in September 2018 that the Respondent would pay and make deductions into the pension scheme.
87. The Retainer Agreement also provides for a payment of £300, it makes no mention of any deductions being made for tax or NI.
88. The Tribunal however, found Mr Jones to be a credible witness, she made concessions about how the drafting and use of certain terms in the Retainer Agreement, may give rise to a different interpretation and the Tribunal accept her evidence, was genuine regarding what she understood the intention was behind the drafting of this document. The Claimant does not dispute that the placement ended on the 14 September 2018.
89. The Claimant was invited and attended the Respondent's Christmas party although the undisputed evidence of Ms Jones was that he was under no obligation to do so.

Start of Graduate Employment

90. It is common between the parties that on 2 May 2019 the Claimant emailed Ms Jones (page 142) and requested a "*start date*" and suggested **3 June 2019**, which was agreed.
91. It is not in dispute that the Claimant commenced the position of Graduate Design Engineer from 3 June 2019.
92. The Claimant's undisputed evidence is that he was not provided with a new contract of employment when he returned in June 2019. He was not asked to complete a new

employee starter form. The undisputed evidence of Ms Jones was that this was not required because they had retained all his details on the system, which they were required to do for the purposes of employers liability insurance cover.

93. The undisputed evidence of Ms Jones was that the Respondent entered into a contract with Peninsula and were advised on the documents they should have in place for employees and as a result of that the Claimant was required to complete a Form for Existing Employees (page 88), which required him to provide his contact and emergency contact details. Ms Jones undisputed evidence was that the Claimant was working in the Graduate role at this time hence he was required to complete a form for Existing Employees rather than new ones.
94. The terms under which the Claimant was employed in the graduate role were Ms Jones confirmed, those documents including the offer letter issued in May 2018 and the Employee Handbook he had been issued with during his placement.
95. It is not in dispute that the Claimant was invited to a disciplinary hearing on **29 July 2020** which was held in his absence and the decision was taken to terminate his employment with immediate effect.

Submissions on continuity of service

96. The submissions of the party are set out in summary below, however their submissions have been considered in full;

Respondent's

97. The Respondent submits that there is no dispute that the Claimant did not perform work for the Respondent from 15 September 2018 to 2 June 2019 and it is submitted he resigned on 14 July 2018 to return to University and while he was completing his final year at University, did not receive a wage, there was no mutuality of obligation and no control was exercised by the Respondent; he was not it is submitted, an employee during this period.
98. Turning to section 212(1)(b) ERA, the Respondent submits that there was no arrangement in place and that while the Respondent used terminology in some of the documents, not necessarily reflective of the circumstances, they are not legal professionals. These were drafting errors. The Claimant began the placement understanding that it would be a placement for a year and there was no indication that it was longer term.
99. The Claimant alleged he was shocked to get a P45 but he knew the purpose of a P45 and understood that this was confirming termination of his employment.
100. Counsel for the Respondent refers the Tribunal to the case of **Mr B R Welton v Deluxe Retail Ltd t/a Madhouse (in administration) 2012 WL 4888953 (2012)** where it was confirmed by the EAT that an arrangement could not be entered into retrospective so as to confer continuity
101. With regards to the retainer payment, counsel submits that there was no requirement for work to receive it, no control placed over the Claimant, the Claimant was not during the final year at University prevented from working elsewhere, and the use of the word "employee" and "employer" in the Retainer Agreement was not used because the relationship of employment was continuing.
102. Counsel referred the Tribunal to **Curr v Marks and Spencer plc [2003] ICR 443 (2002)** for authority that there must be a meeting of minds for such an arrangement to be in place.

103. Counsel submits that the Claimant had no expectation that continuity was to be preserved after his placement ended. What was in place was more of a training agreement.
104. Counsel referred to ***GE Caledonian Ltd v Mc Candliss EAT 0069/10*** and argues the facts are similar, in that the payment of a retainer is common in his industry, he was not required to undertake work for it and he was paid it in the hope he would return in the future.

Claimant's submissions

105. Counsel for the Claimant submits that the Claimant had not highlighted to the Respondent that he was surprised to receive the P45 because he had received the payslips confirming that he was receiving a salary, confirming the same payroll number and the pension which was to be paid.
106. Counsel refers to receiving the email permitting him access along with other employees to access payroll documents as evidence of employment status.
107. Counsel submits that the Retainer Agreement referred to the ERA and it is clear at the time that there was a 'meeting of minds' that throughout the period September to June 2018, the Claimant was to remain an employee.
108. With respect to the evidence of Ms Jones that the payment of salary was a payroll error, counsel submits that if there had been one error the Tribunal may conclude that it was a mistake but that the documents leading up to that refer to a contractual relationship and there is no evidence it is submitted, that the relationship ended when the Claimant resigned or was dismissed. The evidence of Ms Jones was that according to the Company Handbook a resignation had to be in writing and the Claimant did not send in a letter of resignation. Further, counsel submits that the Claimant continued to be paid in the same way on his return, the Respondent had retain his details, the 'error' in the payroll was never addressed and the Respondent provided no evidence that payment of the Retainer was on an ex gratia basis, counsel submits that it was quite clearly 'wages'
109. Counsel submits that the case of GE is distinguishable in that the contractual relationship in that case was clear, the claimant was labelled as an apprentice and the payment was identified as a Sponsorship, in this case the reference to a retainer is "peppered " throughout and subject to terminology about 'employee' and 'employer'. Further, in GE there was no obligation on the employer to provide a job at the end of the University course but in this case, the retainer payment refers to obligations on employee to offer his services at the end of the University course or repay the "wages". He was also to return on the same terms and conditions .
110. Counsel submits that it is unjust for the Respondent to suggest that the Claimant should have read between the lines and inferred totally different words and meanings into the documents and that the relationship clearly remained that of employee or by reason of an arrangement.
111. Counsel when asked to address the Tribunal on mutuality of obligation during the period while the Claimant returned to University, stated that it is accepted that the Claimant was not expected to do anything for the Respondent and that there is no evidence to suggest otherwise and that if the Tribunal find there is no mutuality of obligation, the Claimant will sole rely on the argument that there was an arrangement and informed the Tribunal that counsel could assist with that point no further.
112. In terms of control; counsel submitted that all the terms and conditions remained the same and therefore when the retainer was agreed, the Claimant was bound by the disciplinary and grievance policy etc and that the offer of the retainer and the Graduate role gave rise to an expectation that he would remain with them as an employee . However, counsel was not able to expand further on how the Respondent was

controlling the Claimant's activities while he was a student at University but stated that the Claimant's "*emphasis was on an ongoing arrangement*".

113. Counsel attempted to submit that the Claimant was prevented from going to work for any other company while at University but conceded that this was not in the Retainer Agreement and had not been put to Ms Jones in cross examination, not only that but it had only just been brought to her attention by the Claimant during submissions. The Claimant had not given this evidence nor was the Tribunal taken to any documents where this was stated.

Legal Principles

Employees

114. As a general rule (the exceptions do not apply to this case), only employees can claim unfair dismissal rights. An employee is defined in S.230(1) of the Employment Rights Act 1996 (ERA);

Section 230.— Employees, workers etc

*(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a **contract of employment***

*(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether **express or implied**, and (if it is express) whether oral or in writing*

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment" —

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly.

Qualifying Service : section 108 ERA

115. To qualify for the right to claim unfair dismissal, employees must generally have been continuously employed for at least two years as at the effective date of termination. The relevant statutory provision is at section 108 ERA;

Section 108.— Qualifying period of employment

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than [two years]¹ ending with the effective date of termination.

116. 'Continuous employment' is calculated in accordance with the rules set out in Ss.210–219 ERA,

210.— Introductory.

(1) *References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.*

(2) *In any provision of this Act which refers to a period of continuous employment expressed in months or years—*

- (a) *a month means a calendar month, and*
- (b) *a year means a year of twelve calendar months.*

(3) *In computing an employee's period of continuous employment for the purposes of any provision of this Act, any question—*

(a) *whether the employee's employment is of a kind counting towards a period of continuous employment, or*

(b) *whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment,*

shall be determined week by week; but where it is necessary to compute the length of an employee's period of employment it shall be computed in months and years of twelve months in accordance with section 211.

(4) *Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment*

(5) *A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.*

117. The statutory provision relating to an 'arrangement' which may preserve continuity is set out at section 212;

Arrangement:

Section 212 Weeks counting in computing period.

(1) *Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.*

2).

(3) *Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—*

(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, . .

counts in computing the employee's period of employment.

(4) *Not more than twenty-six weeks count under subsection (3)(a) . . . between any periods falling under subsection (1).*

Tribunal Stress

Employment

118. There is no precise and uniformly applied legal definition of a contract of employment. What the Tribunal must do is weigh up all the relevant factors and decide whether, on balance, the relationship between the parties is governed by a contract of employment: ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 2 QB 497, QBD, Carmichael and anor v National Power plc 1999 ICR 1226, HL; Express and Echo Publications Ltd v Tanton 1999 ICR 693, CA; and Hewlett Packard Ltd v O'Murphy 2002 IRLR 4, EAT.***
119. Four essential elements must be fulfilled for a contract of employment to exist. There must be:
- *a contract (between the worker and the alleged employer)*
 - *an obligation on the worker to provide work personally*
 - *mutuality of obligation, and*
 - *an element of control over the work by the employer.*

Arrangements

120. An 'arrangement' is an arrangement by which an employee is regarded as remaining in employment *for any purpose*, even though his contract has terminated.
121. ***Vernon v Event Management Catering Ltd EAT 0161/07***: V had worked two or three days every week for three years, apart from two weeks when he was on unpaid holiday. The EAT held that V's continuity of employment was preserved over the holiday period by S.212(3)(c). Given that he had liaised with his employer's HR department about his holiday, there could be no doubt that he had been away from work by arrangement.
122. ***Tongue Hotel Co Ltd v Mackay EAT 416/83***. T was a waitress in a seasonal hotel that closed during the winter. She had been paid off in October but was one of the few staff whose P45 was retained by the employer, TH Ltd. She had also been asked to keep herself available for relief work during the winter. The EAT held that there was sufficient evidence to enable a tribunal to find that TH Ltd had regarded her, despite the termination of her contract, as remaining in its employment until she was re-engaged on a full-time basis a few months later. Accordingly, T's continuity of employment was preserved by S.212(3)(c).
123. ***McEwen v Brentwood and Ongar Conservative Association EAT 399/96***, where an employee who had resigned was reinstated two weeks later. The EAT held that discussions between the parties about the terms and conditions on which the employee might come back to work did not amount to an implied arrangement within the meaning of S.212(3)(c).

Timing of arrangement

124. In order for S.212(3)(c) to apply, any 'arrangement' upon which a claimant seeks to rely must have been made *before* the absence began.
125. As Lord McDonald in ***Murphy v A Birrell and Sons Ltd 1978 IRLR 458, EAT***, explained: 'It was observed in *Murray v Kelvin Electronics Co 1976 ITR 622, ET* that during any relevant week of absence it must be **in the minds both of the employer and the employee that he is regarded as still being in their employment**. It does not cover a situation where an employee leaves his employer's service apparently permanently and returns at a later date and where at that later date there is an agreement between them that his service can be regarded as continuous for certain purposes.

126. The reasoning in the *Murphy* case was subsequently applied by the EAT in ***MSA (Britain) Ltd v Docherty EAT 170/82*** where it was held that an arrangement could not be made retrospectively, it would need to have been made at the time of D's departure in order to qualify under S.212(3)(c).
127. **The EAT in *Welton v Deluxe Retail Ltd t/a Madhouse 2013 ICR 428, EAT***, Mr Justice Langstaff (then President of the EAT) affirmed that the issue must be determined as a matter of statutory construction. S.212(3)(c) is worded in the present tense and he concluded that its natural meaning is that the circumstances are those pertaining at the time of absence or preceding it. Consequently, an arrangement must be in existence before, or arise 'contemporaneously with', the relevant weeks of absence from work during which there is no contract of employment if it is to preserve continuity.

"para 58... "arrangements" within the meaning of section 212 will not have effect to bridge the gap in the continuity of employment unless the arrangement is in existence before or arises contemporaneously with, the relevant weeks of absence from work during which there is no contract of employment governing relations."

Tribunal Stress

Continuing in employment 'for any purpose'

128. To fall within S.212(3)(c), the employee must be absent from work in circumstances such that, by arrangement or custom, he or she is regarded as continuing in the employment of his or her employer *for any purpose*.
129. As held in ***Mark Insulations Ltd v Bunker EAT 0331/05***, the statute thereby requires tribunals to find that there was some discussion or agreement or custom to the effect that the parties regarded the employment relationship as continuing for some purpose, despite the termination of the contract of employment
130. It is only necessary that employment is regarded as continuing for *some* purpose, not all purposes.
131. In ***Curr v Marks and Spencer plc [2003] ICR 443 (2002)*** :

" para 30 ... But there must be a mutual recognition by the arrangement that the ex-employee, though absent from work, nevertheless continues in the employment of the employer. Without there being a meeting of minds by the arrangements that both parties regard the ex-employee as continuing in that employment for some purpose, section 212 (3)(c) will not be satisfied. Further, unless in every week of the child break the ex-employee is so regarded there will be a break in the continuity of employment".

132. In ***GE Caledonian Ltd v McCandliss EATS 0069/10*** :The EAT held *that the clear purpose and objective of the 'University Sponsorship' contract was to provide training and education to the Claimant*

Conclusions and Analysis

Employment Relationship

Existence of a contract.

133. The Claimant asserts that the reference to the Claimant in the Retainer Agreement as an employee is evidence of what the parties intended, namely that the contract of employment in place during the placement would continue.

134. Paragraph (iii) and (iv) of the Retainer Agreement provides that the Claimant must repay the retainer if his employment is terminated by the Employer prior to completion of the Course (which it is not in dispute means the University course).The retainer is not payable until the Claimant starts the Course (i.e. until his placement ends) and thus the time period in which this particular subsection applies, can only be the period when the Claimant is back at University and in receipt of the Retainer (i.e. from September 2018 to May 2019) and yet this is referred to as a circumstance in which "*his employment is terminated*". Further, reference is made to the definition of wages under the ERA in the context of description of the retainer payments, which would be indicative of an intention that the Claimant is to be regarded as continuing in the employment of the Respondent, at least for these purposes.
135. The Retainer Agreement was poorly drafted and does indeed indicate that the employment contract/relations would continue during the Course however, the Tribunal accept that this was not what the Respondent intended and this is not what the Claimant understood. Further, the Retainer Agreement is not consistent with other documents including the exit interview where the Claimant confirmed his understanding that this had been a one year contract now brought to an end because he was returning to University or the letter thanking him for his contribution "*whilst you have been with us*" and attaching his P45 confirming 14 September 2018 as the date his employment ended.
136. The Claimant accepted the graduate role and understood that returning to the Respondent was dependent on completing his studies and further, doing so successfully.
137. The confusion over how he was paid the retainer, the Tribunal find on a balance probabilities was an oversight. It coincided with change in the Finance Department and payroll being moved online. Ms Jones identified the payments as akin to 'sponsorship' payments in her email to Mr Hoe and copied to the Claimant.
138. The Tribunal find that the arrangements was a sponsorship arrangement, and it is not unusual for a sponsorship arrangement to require repayment of the monies if the individual elects not to work for the company at the end of it or for a period of time. That is a commercial arrangement which does not give rise of itself, to an employment relationship. What the respondent had done was draft an agreement which did not reflect what both parties understood the arrangement to be.
139. In any event, we now turn to the other elements of an employment relationship and what was happening in practice during the disputed period;

Personal performance.

140. It is the essence of a contract of service that an individual undertakes to supply his or her services personally: ***Express and Echo Publications Ltd v Tanton***. The terms of the contract of employment in place during the placement required the personal performance of the Claimant. He was not required to provide any service, personally or otherwise during the disputed period.

Mutuality of obligation.

141. During the disputed period it is not in dispute that there was no requirement that the Respondent to provide any work and no requirement that the Claimant accept and perform work. In fact, there was an understanding that during the disputed period, the Claimant would perform no work at all for the Respondent. The Claimant was free if he wished to work for another company, even a direct competitor during this period while at University. There were no restrictions on his activities. The Claimant's counsel herself suggested that the strongest argument was not around employment status but the existence of an 'arrangement'.

Control.

142. The Claimant was not under the control of the Respondent during the disputed period. There was no obligation to provide work and no obligation to perform it and indeed no work was ever offered and therefore there was nothing to control. Further, the Respondent did not restrict his activities in any way.
143. If there was a contract in place during the disputed period, it was not one which required the Claimant to provide his personal service, there was no mutuality of obligation and there was no control. Important indicators that a relationship is one of employer and employee.
144. With respect to the surrounding circumstances, the Tribunal conclude that the intention of the parties was that there was no ongoing employment relationship during the disputed period, only a commercial agreement to pay a retainer or sponsorship fee to the Claimant, which he may have to repay in certain circumstances.
145. The Claimant was paid the retainer in error as wages and deductions were made in error. He was not paid for any leave of sickness or holiday during that period. He was not provided with any company equipment. He was not required to represent himself as employed by the Respondent. How he was paid in the circumstances, does not make this relationship into one of employer and employee.
146. The submissions that the Claimant did not dispute the date of termination In the P45 because he had already received payslips with the retainer referred to as salary, is not only evidence not given by the Claimant as the reason, but further the P45 was sent to him by letter of 25 September 2018 (page 61), his first payslip was not until December 2018. Therefore this as an explanation, does not stand up to the mildest of scrutiny.
147. Further, the Retainer Agreement did not provide for payment of pension contributions and the Claimant does not allege that he had any expectation when accepting the retainer that the Respondent would pay and make deductions into the pension scheme. That was not the arrangement in place as at the date his placement ended and he does not allege otherwise.
148. The Tribunal consider that the Claimant did not understand or intend the employment contract to continue during the disputed period but has since sought to take advantage of poor drafting on the part of the Respondent and errors in the administration of the payroll and alleged an understanding, including 'purported' 'shock' at receiving his P45, which the Tribunal do not consider credible. His Line Manager the Tribunal accept, made comments about not getting a leaving present because eh was expected to return, that the Tribunal find is the sort of comment it may reasonably be expected from a manager expressing support and encouragement and the Tribunal do not accept that at the time the Claimant saw it as anything other than that. It is not alleged that his manager said he would not getting a leaving present because he was still an employee of the company.
149. Even, if the Tribunal accepted that the way the retainer was paid alters the position and gave rise to an employment relationship when coupled with the terms of the Retainer Agreement, the first payslip was not generated until December 2019, prior to that the Claimant was paid the retainer for October and November 2018 into his bank account. He does not allege that he had any expectation that he would be paid through the payroll prior to December 2019, and thus continuity would be broken. If that method of payment (along with the terms of the Retainer Agreement) give rise to an employment contract, being a gap of more than one week from the 14 September 2018 would break continuity (sections 210 – 219 ERA) and continuous service from December 2018 to 29 July 2020, would not meet the requirement for two year service pursuant to section 108 ERA in any event.

150. **The Tribunal conclude that the Claimant was not an employee from 15 September 2018 until the 2 June 2019.**

Arrangement

151. In terms of whether there was an arrangement in place within the meaning of section 212 ERA, while the wording of the Retainer Agreement creates objectively some ambiguity, the Tribunal conclude (from documents such as the P45, the Claimant's own end of year Placement Report and exit interview), the Claimant had understood that the placement was for a fixed period of 1 year and although there was a prospect of a graduate post, this was not guaranteed and conditional upon obtaining his degree.
152. The Retainer Agreement did not provide for payment of salary or for the payment of pension contributions and the Claimant does not allege that he had any expectation when accepting the role and starting back at University in September 2018, that the retainer would be referred to as salary, that he would have NI deducted or that the Respondent would pay and make deductions into the stakeholder pension scheme. That was not the arrangement in place as at the date his placement ended on 14 September 2018.
153. Counsel for the claimant submits that the Claimant did not complain about the P45 giving a termination date of 14 September 2019 because he had received payslips showing payment of salary however, not only was this not the evidence which the Claimant gave but the P45 was sent under cover of letter dated **25 September 2018**, and he would not receive a payslip until **December 2018**. The Tribunal do not accept that explanation. And conclude that finding he knew the purpose of a P45, he did not raise this because this reflected his understanding. The Claimant was prepared to raise matters of concern to him, because he raised the issue of non-payment of the retainer.
154. The Claimant the Tribunal concludes, left the respondent's employment in September 2018 understanding that he was no longer an employee, that is confirmed by what he wrote in his exit interview and his end of Placement Report. He was the Tribunal find, told by his Line Manager that there was no leaving present as he would be returning, but the Tribunal find that the Claimant did not understand or otherwise it was not reasonable for form the view, that this to meant that he remained employed, only that his Manager had faith in his ability to pass his degree and expressing his confidence and hope that he would return to start the graduate role .
155. The Tribunal conclude that the Claimant has taken advantage of the error the Respondent made in the administration of the retainer fee, to attempt to argue that there was an understanding that he remained employed for that purpose, which is not the Tribunal conclude, accurate or on a balance of probabilities, a genuine belief on the Claimant's part.
156. The Retainer Agreement was entered into in May 2018. Even if the Claimant understood by the terms of the Retainer Agreement that his employment was continuing for the purposes of payment of the retainer sums, by September 2018 he was issued with the P45 confirming that his employment terminated had 14 September 2018. Further, in his exit interview, which was after the date of the Retainer Agreement, he had completed a form referring to the termination of his employment. Even if the Tribunal were persuaded that the way the retainer was administered through the pay roll and the deductions which were made, gave rise to an arrangement (considered alongside the Retainer Agreement wording) whereby the Claimant was regarded as continuing in the employment of the Respondent, as set out above, the first payslip was received at the end of December 2018 . An arrangement must be in existence before, or arise '*contemporaneously with*', the relevant weeks of absence from work during which there is no contract of employment, if it is to preserve continuity: **Welton v Deluxe Retail Ltd t/a Madhouse 2013 ICR 428, EAT**. An arrangement cannot be retrospective and therefore the Claimant would **not** in any event have accrued two years' service as at July 2020, if such an arrangement/understanding was only in place from December 2018 (after a break of more than one week).

157. In any event, there must be a *meeting of minds*, and the Tribunal conclude that there was no such intention on the part of the Respondent for the Claimant's employment to continue, accepting the evidence of Ms Jones and the documents which are supportive her evidence (including the P45 and the documents from the exit interview).
158. The only arrangement in place, was that the Claimant would receive a retainer payment which he may have to repay in certain circumstances and not the Tribunal conclude, an arrangement that he was absent from work in circumstances such that, by arrangement, he was regarded as continuing in the employment of his employer for that purpose of the payment of that retainer or any other purpose (o such other purpose having been identified by the Claimant or in submissions).
159. **The Tribunal find therefore that the Claimant was not continuously employed for a period of 2 years as required to by section 108 (1) Employment Rights Act 1996 ("ERA") pursuant to an arrangement under section 212 (1)(c) ERA.**
160. The Tribunal now turn to the claim of disability discrimination and the issues pertaining to that complaint;

Disability Discrimination

Findings of fact – relevant to issue of disability

161. On accepting the post of Placement Civil Engineer the Claimant was sent a letter dated **3 July 2017** (pages 47- 48) and at the foot of the letter the Claimant was asked whether he was aware of any medical condition that may affect his ability to carry out the duties and responsibilities of the role; the Claimant did not indicate whether or not he had such a condition. He simply did not indicate either option.

Diagnosis of ADHD until June/July 2020.

162. The Claimant sought advice from a doctor in around June 2020, not because of any deterioration in his condition but because according to his undisputed evidence, he was sent a questionnaire about ADHD by a friend and on filling it in decided to seek some medical advice. He had not received any indication from any medical professional prior to this that he may have ADHD.
163. The Claimant's undisputed evidence is that the doctor then presented him with a number of questionnaires. The Tribunal was not presented with the questionnaires or the Claimant's answers. The Claimant's undisputed evidence was that he completed the questionnaires and was then referred to a specialist in Nottingham. Although the Claimant was a little confused during the hearing about who the specialist was, he ultimately gave evidence that he believed the specialist was Dr Obinna Ihezue (the Claimant had known him by a shortened version of his first name; "Obe") who he saw in person prior to 17 July 2020 and thereafter had telephone consultations with him. The Claimant in response to questions from the Tribunal gave evidence that he had seen Dr Ihezue about a week or so prior to the 17 July 2020. Dr Ihezue informed him that he was diagnosing ADHD and that he could start medication for the condition.
164. The Claimant informed the Tribunal and that he had requested his medical records for the purpose of this hearing but had not been provided with any document recording the physical meeting with Dr Ihezue prior to 17 July 2020. There is however a letter from Dr Obinna Ihezue, Speciality Doctor from Adult Mental Health Services, Nottinghamshire Healthcare NHS Trust dated 28 August 2020 (page 93) following a telephone appointment on 17 July 2020, which refers to a Diagnosis of ADHD.

165. The Respondent does not dispute however that the Claimant has the impairment of ADHD and the Tribunal find on a balance of probabilities, that the Claimant received this diagnosis on or around 17 July 2020. It is not clear from the medical records presented during this hearing, whether the diagnosis was given on the telephone appointment on 17 July 2020 or prior to it.
166. The Claimant's evidence is that he informed his manager of this diagnosis on **10 July 2020**, that however is disputed.
167. Given the absence of any documents relating to the physical attendance with Dr Ihezue and the importance of the date of actual diagnosis potentially to the issue of knowledge and in light of the fact that establishing the precise date of diagnosis is not necessary for the purposes of today's hearing, the Tribunal makes no finding on the precise date of diagnosis because it does not wish to bind the Tribunal at the final hearing with a finding of fact on that issue.
168. The Claimant gave evidence under cross examination that there are three different categories of ADHD; hyperactivity without attention deficit, attention deficit and hyperactivity or attention deficit without hyperactivity. In answer to questions from the Tribunal, the Claimant gave undisputed evidence that he had not been diagnosed in line with those different categories, because such a diagnosis is not routinely given in the UK.

Description of effects

169. Within the Particulars of Claim, the Claimant asserts that his impairment had the following substantial adverse effects;
- a. *Having a short attention span and being easily distracted*
 - b. *Appearing forgetful or losing things*
 - c. *Being unable to stick to tasks that are tedious or time consuming*
 - d. *Appearing to be unable to listen to or carry out instructions; and*
 - e. *Having difficulty organising tasks*
170. The Claimant has produced a Disability Impact Statement (page 28 – 30). His evidence is that as long back as he can remember, he has experienced inattentiveness and finds it difficult to determine how long a task will take him, particularly when it is a new task or complex. He also complains of suffering disorganised thought processes which cause him to lack urgency and that he struggles to complete or prioritise work when he is interrupted or assigned a new task and that he is easily distracted. He complains of a short attention span and complains of losing or misplacing things. He also complains that he struggles to check or improve written work because he reads what he thinks is on the page rather than what is written down when he has been working on the same document for a while.
171. The claimant also complains that he finds it difficult to listen to and understand instructions particularly when given in a disorganised way, for example when he is unable to ask questions or process the information in a way he can interpret. He complains that he misses details when given large amounts of information.
172. The Claimant also complains that he struggles when people talk fast or the speech is disjointed and as a result he often interrupts people before they have finished talking.
173. The Claimant also complains of "*inattentiveness and impulsiveness*" and excessive worrying and sleepless nights and that it can often feel like "*walking through mud*" trying to complete normal tasks. Under cross examination about the sort of tasks he was referring to, the Claimant stated this may affect would the work he was doing as an engineer; for example when designing a pile which involves mathematical equations and geological problems, normal for his work.

174. The Claimant under cross examination gave evidence that how long a task takes him depends on his state of mind and his environment. Under re- examination he went on to clarify that he would struggle if he had 3 projects at once and all of them had small changes that needed to be made. He would also struggle if the team was changing around him or the person he could normally approach for support or assistance changed and he would be anxious about approaching them for help and would put off for hours or even for a week, depending on what the person is like, if they are known to be difficult to approach or whether that particular day he was feeling confident.
175. The Claimant under cross examination confirmed that he can complete large assignments and that in terms of finding new tasks daunting, prior to working with the Respondent he did not have practical experience in the industry but he confirmed that he was able to complete some complex tasks while working for the Respondent with help on others.
176. Under cross examination the Claimant confirmed that he spent 3 years at University and undertook assignments as part of his course, some were practical but most were written assignments. The University did not diagnose ADHD and no adjustments were made for that condition. However, he gave evidence that adjustments were made for dyslexia, a condition he alleges he also has. The Claimant however does not rely on dyslexia for the purposes of this claim and that condition was not mentioned in his impact statement and no application has been made to amend the claim. There is no mention of dyslexia in any of the medical information produced.
177. The Claimant under cross examination gave evidence that during the 1 year placement with the Respondent he did miss some deadlines, but failed to provide details to the Tribunal of what the time limits were, what he was required to produce and how much longer it had taken him to produce the work and indeed, with respect to any specific examples, what he alleges caused the inability to meet that deadlines. The Claimant also conceded that other students on other placements had also missed deadlines. He did not address how his performance in that respect, compared to theirs.
178. The Claimant also complains in his statement of evidence about forgetting or losing things. Under cross examination he gave evidence that this may include keys, he may put them down and forget where they are but will subsequently find them. He gave undisputed evidence that the propensity to forget things is effected by stress and when he is outwith his normal routine. The Claimant did not provide specific examples of occasion when he lost his keys and how long it had taken him to remember where he had put them.
179. The Claimant was asked a number of questions under cross examination about what he could do and confirmed by way of example that he can clean a house, take someone shopping, feed himself and read. However that cross examination was of limited assistance to the Tribunal. Although the Tribunal is required to make an overall assessment of the effects on day to day activities, it must concentrate on the activities the Claimant cannot do or which take him longer to do or with difficulty, and not what he can do.

Medication

180. Between **July and August 2020** the Claimant gave evidence that he began taking medication namely Methylphenidate Hydrochloride (**MH** ;10 mg in the first week, increasing to 20mg in week 2, 30mg in week 3 and 40mg in week 4. He was also taking Concert XL at 18mg for 2 weeks and 27mg for the next 8 weeks.
181. Under cross examination the Claimant could not recall from which date he started taking medication other than that it was sometime in July 2020 when he was no longer working for the Respondent. He could not recall whether he was still employed at the time but not actually attending work.

182. That he was prescribed Methylphenidate is confirmed in the later from Dr Ihezue of the 28 August 2020 (page 93), in which he refers to it being safe (following a normal ECG) for the Claimant to start Methylphenidate Titration regime. It also confirms the prescription for 10mg for 7 days and then an increase every week until 40 mg. and a referral back in to the clinic in 2 months.
183. The Tribunal therefore accept the Claimant's evidence on a balance of probabilities that he was prescribed this medication and with no evidence to rebut the Claimant's evidence on this point, that he also took the medication as prescribed.
184. The Claimant's evidence is that he stopped taking MH due to excessive heart palpitations and stopped taking Concert XL due to extreme mood changes.
185. Under cross examination the Claimant gave evidence that his attention span increased as a result of the medication and improved his quality of life but he stopped taking the medication when he began experiencing heart palpitations when taking 30 mg. When taking a dose of 10 and 20mg he had experienced increased heart rate and eye twitching. The Claimant accepted under cross examination that the Doctor's opinion was that the side effects of eye twitching was stress induced but *heightened by the medication*. The Claimant under cross examination gave undisputed evidence that he stopped the medication probably the day after he experienced the heart palpitations, probably the 15 August 2020.
186. The letter from Dr Ihezue of the 17 July 2020 refers to; "*side effect profile and monitoring.*" .
187. There is also a letter from Dr Ihezue dated 28 August 2020 (page 95) which is after the relevant period but which comments on the effects as described by the Claimant during the relevant period. It refers to medication Methylphenidate 40 mg and reports that the Claimant ;

"... in the first week of starting tablets, he noticed that he was able to do simple tasks for 4 hours and after that with difficulty. He noticed an exacerbation of eye twitching and leg tapping which he acknowledges had been happening prior to starting Methylphenidate. In the second week, he felt more effective for 6 – 8 hours with increased focus. He was able to pick up on mistakes unlike never before. His girlfriend noticed therapeutic benefits too. Sadly, he feels his work people started getting nasty and he began to engage the services of his lawyer. He also started noticing palpitations.

By third week , Samuel came under immense pressure from his old employers and this coincided with an increase in eye twitching , increased awareness of an increase in heart rate . By the fourth week, he started noticing a reduction in his anxiety levels, better focus, re- started going to the gym and participated better in household chores sadly the palpitations accrued more frequently and he became concerned about his blood pressure though did not given an account of whether he measured it or not.

I have informed him that from what he has explained it appears he has been having somatic symptoms of anxiety (palpitations, twitches, leg tapping) which are stress induced due to issues at work however these have become heightened by his medication.."

Tribunal Stress

188. Dr Ihezue recommends a change from immediate release Methylphenidate to slow/modified formulation of the drug
189. The Tribunal accept the Claimant's evidence under oath, that there were positive effects of the medication and on a balance of probabilities accept his evidence supported by the report of the 28 August 2020, that without medication he would struggle to maintain concentration on a task for as long as 4 hours. He referred to

tasks he would struggle with which were complex or tedious and gave specific example of a concentrating on a job application.

190. The Tribunal accept the Claimant's evidence on a balance of probabilities, that he stopped the medication not because he failed to improve his concentration and quality of life but because of the side effects.
191. The claimant under cross examination gave evidence that he did not start Concert XL medication until sometime after stopping the *Methylphenidate* however he also asked to be taken off this medication due to its side effects.
192. The Claimant's evidence is that medication helps but does not 'cure' ADHD and the Tribunal accept his undisputed evidence on this point and about the side effects he experienced from taking the medication.
193. Although the evidence of Dr Ihezue post- dates the relevant period, it comments on the improvements in his symptoms since taking the medication and is supportive of the Claimant's account of the impact on his concentration of the condition prior to taking medication.
194. There is no other medical evidence which deals with the effects of ADHD specifically on the Claimant.
195. The Claimant's evidence is that that the ADHD affects most aspects of his life. He gave an example of being able to complete a job application while taking medication but without struggling to concentrate for long enough to complete it.
196. The Claimant confirmed in cross examination however, that he had sat examinations and passed his degree with a 2:2. He had to sit a 2 hour examination for his degree which he accepted was complex but gave evidence that he did 'wander' off i.e. lose concentration at times, however he had the benefit of 30 minutes extra time as an adjustment for dyslexia.
197. The Claimant in response to a question from the Tribunal, gave evidence that his problem with sleepless nights would occur if he was staying in a new place or under a degree of pressure at work. Sleepless nights were not he conceded, 'usual' for him and that there were certain triggers unrelated to ADHD i.e. stress.
198. The Claimant also gave evidence that it can be hard to understand what a person is trying to 'get at' and that he needs simple and clear instructions and can find it difficult interacting with people but provided no specific examples of when this had happened and what the nature of the instructions were..

Letter 24 March 2021

199. The Claimant produced a letter from the Birmingham and Solihull Mental Health NHS Foundation Trust dated 24 March 2021 (page 99 – 101) from Ms Elcock, Service Lead and Advanced Nurse Practitioner. It refers to an appointment with the Claimant on 24 March 2021 and current treatment of Lisdexamfetamine.
200. The Claimant under cross examination gave undisputed evidence that he is now taking Lisdexamfetamine, the dose he is taking is now as at the date of the hearing 50mg, increased from 30mg. He has been taking it for possibly 6 months. His condition now is not directly relevant, however the Claimant was able to maintain concentration during this hearing and as it is not disputed that the effects of his condition have not changed since the relevant period, his presentation during this Tribunal hearing is something which the Tribunal is entitled to take into account. The Claimant in response to questions from the Tribunal gave evidence that the medication he is now taking helps with his attention span and focus and means he is able to focus on one task at a time and that he does not feel like he is "*fighting himself*" when he is carrying out a task. It

allows him to concentrate on the detail and focus on the task for a longer period of time.

201. The letter of the 24 March 2021, explains that the 25 plus ADHD service is a specialist service commissioned to assess, diagnose, treat and review ADHD and that;

“ The treatment of ADHD is about improving concentration and focus, reducing hyper activity and impulsivity .”

202. The letter of the 24 March 2021 states that it ; *“...relates to a confirmed diagnosis of attention deficit hyperactivity disorder “* however the Claimant accepted under cross examination that the content of the letter of the 24 March 20201 otherwise is not specific to him, it provides general information about ADHD;

“ADHD is a common mental health disorder that starts during child development but frequently persists throughout adolescence and into adult years. Common symptoms include inattention, distractibility, disorganisation , over activity, restless , impulsiveness and mood liability; and these may lead to considerable criminal and psychosocial impairments”

203. The letter of the 24 March 2021 also goes on to list examples of symptoms generally arising from the condition and the Claimant in re- examination gave evidence that he experienced the majority of the symptoms and in explaining the degree of impact using a scale of 1 to 10 (with 10 being very serious), gave evidence that the symptoms he experienced he rated as above 5, somewhere in the region of 7 to 8 most days . The symptoms he identified as ones he experienced were;

- *The impact of untreated ADHD from childhood may have affected their mental health and well-being, how they make decisions and it can also affect their relationship with other.*
- *It could affect how they manage their emotions and their activities of daily living.*
- *They can sometimes appears to be rigid and finds change challenging.*
- *They would benefit from the understanding of others who are sympathetic to their anxieties due to their diagnosis of ADHD*
- *They may have difficulties in building and maintain relationships, trusting others or understanding their or other’s emotions or reading situations appropriately*
- *They may appear blunt or abrupt which may be misunderstood or cause offence when none is meant; this maybe verbal or written*
- *They may need support to aid their planning and organising*
- *The work should be around their strengths and less about their weaknesses*
- *Given them space so they do not feel overwhelmed and avoidant and allow them to select and approach elements of the work as small independent tasks, using distraction and hyper- focus to their advantage.*

204. The Claimant did not however provide examples to enable the Tribunal to make an assessment for itself of the extent of the impact; he did not for example provide actual examples of when he had been blunt and this had caused offence or difficulty in building relationships.

Performance during his work with the Respondent : 20 September 2017 to 14 September 2018

205. It is not in dispute that the Claimant performed very well during his placement so much so that as Ms Jones described in her statement of evidence, he was a candidate identified as having the potential to justify further investment in their training.

Placement Report: 3 November 2017

206. There was a Placement Report completed and signed by the Claimant's supervisor Mr Rogers following a meeting with the Claimant and his visiting tutor on 3 November 2017 (page 57) .
207. The ratings he received are out set out above at paragraph 44.
208. A rating of very satisfied with his verbal communications skills would not appear consistent with the impact he describes on his ability to understand instructions.
209. During this period the Claimant was not taking medication which may have ameliorated the effects.
210. However, the Tribunal also note that where the Claimant scored lower, only a score of satisfied, was in the areas where the Claimant asserts he is most affected by the ADHD i.e. self-management, written communication and sense of urgency

Placement Year Report

211. A report was produced by the Claimant at the end of the placement (page 66 – 70). The Claimant described himself as having a high level of responsibility during the placement and being consistently challenged. The work he was involved with were projects focused on piling solutions and pre- construction phase activities. His work as he described it in this report, was work in the design department with his main role being pile design, including producing CAD drawings and 6 months into the placement, he started undertaking preliminary estimating work;

“Because I was working for a small company , I was consistently challenged and pushed to learn new concepts and design procedures and as a result had a high level of responsibility within the company”.

212. The report was verified by Ms Jones on 3 October 2018 as a fair representation of the work he performed.
213. Under cross examination Ms Jones gave evidence that the Claimant was not asked again whether he had a disability when he returned to the Graduate post because; *“ there was nothing to think anything was untoward, he was very successful in his placement”*

Performance during 3 June 2019 to 29 July 2020.

214. The Claimant does not allege that there was any change in the effects of his condition on his normal day to day activities, when he returned to work in June 2019 from when he had worked during the placement. He does not allege that there had been a deterioration in his symptoms over that period of time although his evidence under oath is that his symptoms become worse during stressful periods.
215. The evidence under oath of Ms Jones is that the Claimant was unsuitable to the more demanding full time role.
216. The Respondent's case as pleaded is that the Claimant performed poorly during his graduate role; including that while at a site piles were installed in wrong places, as project engineer it is alleged he communicated poorly. On another project, it is asserted that the Claimant failed to order cages in time or in the correct manner and was repeatedly late to site.
217. The Respondent also complains that while working on a project at Durham Train Station , the Claimant failed to submit crucial construction information at the end of the project and his late submissions of work caused a delay in payment.

218. While working on a project at Bromford in April 2018, the Respondent alleges that the Claimant failed to adequately respond to management and clients and he needed prompting to produce work which resulted in complaints from the client .
219. Ms Jones gave evidence under cross examination that his performance as a graduate was not to the level he produced in the placement year; that there was an issue about him completing tasks assigned to him and a failure to respond to support or guidance

Termination

220. The letter terminating the Claimant's employment dated 20 July 2020 (page 90) states that the decision had been made by Mr Rogers his Line Manager and Mr Proctor his previous Line Manager, that the Claimant was "*not fit for our Company*" and the issues with his capability were described thus;

*"Despite many discussions with you over some months **about your focus on the accuracy of your work, completing fully tasks** assigned you (which led to issues with projects and our customers, some of which have resulted in considerable costs to the Company), arriving late at projects and your tendency not to face problems raised with you..."*

Tribunal Stress

221. In a follow up letter dated 29 July 2020 (pager 91) the Respondent describes the issues with his capability as follows;

*"We have found a pattern on negligence of your duties, **failure to follow direct reasonable instructions, to meet instructed time deadlines.**" Tribunal Stress.*

222. His performance during his placement does not appear consistent with his performance as a Graduate Civil Engineer, however Ms Jones described the work as; "*more demanding*".
223. On a balance of probabilities, the Tribunal accept the oral evidence of the Claimant about the impact of ADHD on his activities. He was candid when accepting for example that sleeplessness was effected by his mood or stress and that it was not '*usual*' or that when losing items, he finds them again, or that other students on placements also missed deadlines or that he was able to sit examinations and complete assignments for his University course.
224. There is a paucity of medical evidence in this case that deals with the effects of his condition, despite the orders that were made at the preliminary hearing and the fact that the Claimant has legal representation.
225. The Tribunal has to consider whether based on the limited medical evidence it has on the specific symptoms and effects the Claimant experienced and the reason behind the diagnoses of ADHD and the reason why medication was prescribed, it is able to form an accurate picture of the nature and extent of the Claimant's difficulties.

Findings on Effects

226. The Tribunal have when weighing up the evidence to reach a finding on a balance of probabilities about the effects of the Claimant's condition of ADHD, taken into account the apparent inconsistency with the Claimant's ability , without adjustments for ADHD, to take GCSE examination and A Levels and achieve grades which enabled him to take an engineering degree and attained a degree in what is a technical and challenging field. However, the Tribunal also take into account that the Claimant has not alleged that he was unable to complete an examination and that he was given extra

time because of dyslexia and the Tribunal on a balance of probabilities, accept his evidence that he would lose concentration.

227. The Tribunal have also taken into account the report of Dr Ihezue about the management of his condition, the fact that Dr Ihezue recommended medication with serious side effects to improve his quality of life and which improved his concentration and ability to focus such that he could concentrate on “ simple tasks” (the Claimant gave an example pf a job application) for 4 hours. The Tribunal also take into account the Respondent’s own evidence that the Claimant performed, poorly during his graduate role and the description of the issue with his capabilities i.e. not meeting deadlines and communication issues, would appear consistent with the effects he describes of his condition which is also consistent with the description of Ms Elcock of the common effects of ADHD.
228. The Tribunal is required to concentrate on what the Claimant cannot do rather than what he can do and the examples of tasks he accepted he could do, were not inconsistent with the effects of which he complains. The fact that he can shop or cook a meal does not assist the Tribunal in determining whether he struggled to concentrate and to what degree, on tasks for example.
229. The Tribunal do not accept the Respondent’s contention that issues with concentration are due to his maturity. There was no evidence to support that proposition and the Claimant’s evidence which is accepted, is that with medication he finds he can concentrate, and it improves his concentration.
230. The Tribunal considers that it is in a position taking into account all the evidence, including the Claimant’s oral evidence, the various documents set out above and the Respondent’s own observations of the issues with the Claimant’s performance, on a balance of probabilities to find that the effects of the disability at the relevant time were (and for at least 12 months prior to the start of the relevant period), as follows;
- A difficulty retaining focus on the completion of tasks particularly those which are complex or tedious for as long as 4 hours including for example completing job applications.
 - A difficulty in maintaining focus on the task in hand, even if that has a more urgent deadline because the Claimant becomes distracted including by other tasks.
231. The Tribunal conclude that the effects the Claimant suffered, without the medication, were consistent during the relevant period and the Claimant had experienced those effects for a number of years prior to the start of the relevant period.
232. The Tribunal does not consider that it is able to make a finding about the extent of the impact on the Claimant’s propensity to put objects down and forget temporarily where they are because of the lack of detailed evidence about how often this happened and how long it would take the Claimant to locate the items. The Tribunal is not able to arrive at any meaningful understanding of the impact of this effect.
233. The Tribunal does not consider that it is able form an accurate picture and to make a finding about the extent of the impact in terms of difficulty in understanding verbal instructions unless they are given in an organized and clear manner and difficulty understanding people when they talk quickly or their speech is disjointed. No specific examples were given of when the Claimant had experienced such difficulties and what the nature of the instructions where or in the extent and nature of the unclear speech was. This was not an example of the symptoms identified in the 24 March 2021 letter.
234. We also take into account the Claimant’s oral evidence about the difficulty he has checking his own work and the obvious and surprising errors for a university student, in the application document for a placement (page 110) however, the Claimant has given

evidence that he has dyslexia but failed to explain to what extent those difficulties were a result of that condition, rather than ADHD. Therefore the Tribunal do not consider that it is able to make findings that problems with reading and proof reading large documents is due to the conditions of ADHA rather than dyslexia.

235. On the evidence available to it, the Tribunal do not find that the ADHD had an impact on the Claimant's ability to sleep. He accepted that suffering sleepiness nights was not usual, and this would happen because of his mood or environment, neither of which he accepted were related to ADHD.
236. It is for the Tribunal to determine whether the effects set out above in paragraph 228 are substantial, applying the law to these findings.

Submissions on disability

Respondent

237. The Respondent concedes in its submissions that the Claimant has an impairment namely ADHD and that it was likely to have lasted 12 months as at the relevant period and that the only issue in dispute is therefore whether the impairment had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities during the relevant period.
238. The Respondent submits that the Claimant does not allege that his condition had worsened by June 2019 (and nor does the Respondent assert this). It is submitted that the Claimant did not display the symptoms he now seeks to rely on. His ability was such that the Respondent offered him employment. The Claimant it is submitted prior to June or July 2019, had not displayed symptoms serious enough for him to consider himself to be disabled, he had not spoken to any medical practitioner prior to that.
239. Counsel refers to para 55 **Royal Bank of Scotland v Morris 0436/ 2010 EAT**
- 55. The burden of proving disability lies on the claimant. There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in Morgan v Staffordshire University [2002] ICR 475 this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" (see para. 20 (5), at p. 485 A-B); and it was held in that case that reference to the applicant's GP notes was insufficient to establish that she was suffering from a disabling depression (see in particular paras. 18-20, at pp. 482-4). At case management discussions on 3 October 2008 and again on 10 July 2009 the question of obtaining a report from an independent expert on a joint basis was discussed; but the Claimant made it clear that he wished to rely simply on the contents of the reports to be found in the disclosed documents. ...*
240. The Respondent submits that there is no evidence that before July 2019 the Claimant was suffering with the symptoms he described, there is a sliding scale of effects of this condition and the Claimant admitted that he needed some form of diagnosis to be sure he had ADHD.
241. The Respondent submits that in his explanation of symptoms the Claimant gave an indication that symptoms were not connected to ADHD but to stress and the Tribunal should not link the symptom of ADHD and stress.
242. The Claimant had accepted that sleepless nights was not 'usual' for him and was linked to stress. He did not allege that his mood, which may impact on his sleepless nights, was itself connected to his ADHD.
243. The Claimant referred to also having dyslexia which he does not seek to rely on in this case. The Respondent submits there is an overlap between dyslexia and ADHD, the Claimant said he read slower and was afforded extra time in his University

examinations because of this, and the Respondent submits that issues with his reading may be linked to his dyslexia and not ADHD.

244. The Claimant's employment ended on 29 July 2020 and he was not able to confirm he was on medication prior to this date.
245. The Claimant has provided it is submitted, no medical evidence about the symptoms he experienced. The 24 March 2021 letter deals only with the generic symptoms of ADHD with no reference to his specific symptoms.
246. The Respondent submits that given the specific nature of the case and that the symptoms he complains, were ongoing since childhood, he has managed to; pass GCSE examinations, A levels and completed an engineering degree course with no adjustments for ADHD. He was able to meet deadlines to complete these examinations and courses and thus the Respondent argues on the evidence there is no substantial adverse effects.
247. The issues he has with his attention span, the Respondent submits arise because of the nature of the tasks, which he describes as being complex or tedious.
248. In conclusion the Respondent submits that he Claimant is a man in his early 20s, he finds normal tasks like '*walking through mud*' but counsel submits that where tasks are tedious it is not unusual for a '*young person*' in particular to find routine tasks not enjoyable and that such a feeling is not due to ADHD but even if it is related to ADHD, it is minor when taking into account the tasks he can perform; tidying his home, shopping, undertaking a University course etc.

Claimant's submissions – disability

249. The Claimant made reference to the authority of **Goodwin** and the guidance set out by the EAT.
250. Counsel submits that although a person can carry out tasks does not mean that the Claimant is not impaired. Further, counsel referred to the Claimant's evidence that carrying out everyday tasks was like '*walking through mud*' and although he could complete them it was not easy to do so and his evidence should be sufficient to persuade the Tribunal that the effects meet the definition of substantial.
251. Counsel submits that there is a casual link between the impairment and the adverse effects he suffers in his day to day activities and that he suffers effects not only in relation to his professional life but his home life such as not remembering where he had put his keys.
252. In terms of his performance during the placement, counsel submits that the tasks the Claimant was 'likely' doing under the placement were very different tasks expected from a Graduate Engineer and it was 'likely' that the Claimant was able to manage adverse effects at work until he returned as graduate and was faced with new tasks and expectations. Those with disabilities counsel submits, develop coping mechanisms and his were not sufficient when he returned in June 2019.
253. The Tribunal enquired of counsel what the coping mechanisms were as the Tribunal could not recall the Claimant giving evidence specifically on this point. Counsel informed the Tribunal that "*he did not refer to any coping mechanisms*" however counsel invited the Tribunal to infer that it is likely person with a recognised condition is likely to employ them to fulfil certain tasks and adopt them, albeit counsel then commented that it is not for the Tribunal to speculate on what coping mechanisms he may have used when no evidence that he employed any has been presented, however counsel argues that just because the Respondent did not notice he had difficulties does not mean he was not disabled.

254. Counsel also submits that it is worth noting that the Respondent did not carry out any further appraisals with the Claimant after May 2018 therefore there is no evidence the Claimant was not suffering prior to the date the Respondent asserts .
255. Counsel for the Claimant submits that in response to the point made by the Respondent, there is no evidence the Claimant could not perform tasks because of his maturity, the Claimant's evidence is that he could not do so because of the ADHD and there is no evidence that the effects have anything to do with his age.
256. Counsel referred to the fact that the Claimant was prescribed medication and that there would have been a weighing up by the doctors of the side effects as against the benefits of the medication and that medication was prescribed that has serious side effects which indicates that the medical practitioners considered the risks were outweighed by the benefits to assist the Claimant cope with the effects of his condition.
257. Counsel also refers to the effects the Claimant identified from the generic list in the letter of the 24 March 2021 and his assessment of their severity of their impact on a day to day basis.

Legal Principles - Disability

258. The definition in section 6(1) Equality Act 2010 (EqA) is the starting point for establishing the meaning of 'disability. The supplementary provisions for determining whether a person has a disability are set out in Part 1 of Schedule 1 to the EqA.
259. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') under S.6(5) EqA. The Guidance does not impose any legal obligations in itself but courts and tribunals must take account of it where they consider it to be relevant para 12, Sch 1, EqA and **Goodwin v Patent Office 1999 ICR 302, EAT.**
260. The Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) ('the EHRC Employment Code'), which provides some guidance on the meaning of 'disability' under the EqA and this also does not impose legal obligations but must be taken into account where it appears relevant to any questions arising in proceedings.
261. The Equality Act 2010 contains the definition of disability and provides:

Section 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.

Section 212 : General Interpretation

- (1) “substantial” means more than minor or trivial.

Schedule 1 sets out supplementary provisions including:

Part 1: Determination of disability

2. Long-term effects

- 2 (1) The effect of an impairment is long-term if—
- (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.
- (2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
- (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.
- (4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

5. Effect of medical treatment

- (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.
- (5) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

PART 2 GUIDANCE

Preliminary

10 This Part of this Schedule applies in relation to guidance referred to in section 6(5).

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.

The ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) (‘Guidance’)

262. Relevant provisions which I have considered include the following and I have emboldened certain parts which I consider to be particularly pertinent;

A13

A young man has Attention Deficit Hyperactivity Disorder (ADHD) which manifests itself in a number of ways, including exhibitionism and an inability to concentrate. The disorder, as an impairment which has a substantial and long term adverse effect on the young person’s ability to carry out normal day – to day activities, would be a disability for the purposes of the Act.

...

However, he would be protected in relation to any discrimination that he experiences in relation to the non excluded effects of his condition, such as inability to concentrate...

Section B Meaning of ‘substantial adverse effect’

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1).

B2. The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete an activity.

The way in which an activity is carried out B3.

*Another factor to be considered when assessing whether the effect of an impairment is substantial is the way in which a person with that impairment carries out a normal day-to-day activity. **The comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment.***

Cumulative effects of an impairment B4.

An impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could

result in an overall substantial adverse effect.

Effects of behaviour B7.

B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation.

It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do or can only do with difficulty.

Effects of treatment B12.

The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, **the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'**. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs.

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. **Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect.** If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

The following example is given in the guidance:

A person with long-term depression is being treated by counselling. The effect of the treatment is to enable the person to undertake normal day-to-day activities, like shopping and going to work. If the effect of the treatment is disregarded, the person's impairment would have a substantial adverse effect on his ability to carry out normal day-to-day activities.

B16. **Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement.** It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect. For example, a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics. **This cures the impairment and no substantial effects remain.**

B17. However, if a person receives treatment which cures a condition that would otherwise meet the definition of a disability, the person would be protected by the Act as a person who had a disability in the past.

Meaning of 'likely' C3.

The meaning of 'likely' is relevant when determining: issues including whether an impairment has a long-term effect (Sch1, Para 2(1), see also paragraph C1) and how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour (Sch1, Para 5(1), see also paragraphs B7 to B17).

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

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, **preparing written documents, and keeping to a timetable** or a shift pattern.*

Adverse effects on the ability to carry out normal day-to-day activities D11.

This section provides guidance on what should be taken into account in deciding whether a person's ability to carry out normal day-to-day activities might be restricted by the effects of that person's impairment. The examples given are purely illustrative and should not in any way be considered as a prescriptive or exhaustive list.

D12. In the Appendix, examples are given of circumstances where it would be reasonable to regard the adverse effect on the ability to carry out a normal day-to-day activity as substantial. In addition, examples are given of circumstances where it would not be reasonable to regard the effect as substantial. In these examples, the effect described should be thought of as if it were the only effect of the impairment. Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability 38

Appendix

An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

*Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the substantial adverse effect of the impairment on normal day to-day activities is long term. In the following examples, the effect described should be thought of as if it were the **only** effect of the impairment.*

[the following examples appear relevant to this case]

- *Difficulty understanding or following simple verbal instructions.*
- *Persistent and significant difficulty in reading or understanding written material where this is in the person's native written language.*
- *Frequent confused behaviour, intrusive thoughts, feelings of being controlled or delusions.*
- *Persistent distractibility or difficulty concentrating.*

*An illustrative and non- exhaustive list of factors which, if they are experienced by a person, it would **not be** reasonable to regard as having a substantial adverse effect on normal day to day activities.*

- *Inability to fill in a long, detailed, technical documents, which is in the person's native language, without assistance.*
- *Inability to concentrate on a task requiring application over several hours*

Case Authorities

263. The time at which to assess the disability is the date of the alleged discriminatory act: ***Cruickshank v VAW Motorcast Limited 2002 ICR 729 EAT.***
264. ***Goodwin v Patent Office 1999 ICR 302 EAT***; The EAT set out guidance on how to approach the determination of the issue of disability.
265. In ***All Answers Ltd v W 2021 IRLR 612, CA***: tribunal must focus on the date of the alleged discriminatory act. ***McDougall v Richmond Adult Community College 2008 ICR 431, CA***
266. The impairments do not need to be related or interact with each other for their combined effect to be considered: ***Ginn v Tesco Stores Ltd EAT 0197/05.***

Focus on what activities the Claimant could not carry out

267. The Tribunal has reminded itself that the focus is not on what the Claimant could do but what activities he could not carry out or with difficulty as reinforced by the ***Ahmed v Metroline Travel Ltd UKEAT/0400/10***: Mrs Justice Cox observed as follows;

"In order to constitute an adverse effect it is not the doing of acts which is the focus of attention but rather the ability to do or not do the acts."

44. *She relies, in addition, on the decision of the EAT in Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19 , where Nelson J stated as follows:*

"Whilst it is essential that a Tribunal considers matters in the round and makes an overall assessment of whether the adverse effect of an impairment on an activity or a capacity is substantial, it has to bear in mind that it must concentrate on what the Applicant cannot do or can only do with difficulty rather than on the things that they can do. This focus of the Act avoids the danger of a Tribunal concluding that as there are still many things that an applicant can do the adverse effect cannot be substantial."

Normal day to day activities

268. The Guidance emphasises that the term 'normal day-to-day activities' is not intended to include activities that are normal only for a particular person or a small group of people. Account should be taken of how far the activity is carried out by people on a daily or frequent basis.
269. ***In Goodwin v Patent Office 1999 ICR 302, EAT***, The EAT stressed that the enquiry is focused on normal daily activities, not on particular circumstances.
270. ***The EAT in Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522, EAT***, concluded that 'normal day-to-day activities' must be interpreted as including activities relevant to professional life. It accordingly held that taking high-pressure examinations for the purpose of gaining promotion constituted a 'normal', if irregular,

everyday activity. The EAT' gave guidance on the phrase 'normal day-to-day activities', emphasising that the phrase is to be given a broad definition that can include irregular but predictable activities that occur in professional life. The Appeal Tribunal also suggested that if there was any ambiguity about this conclusion, it was also predicated by the ECJ's decision in *Chacón Navas v Eurest Colectividades SA 2007 ICR 1, ECJ*. This required domestic courts and tribunals to give a meaning to day-to-day activities which encompasses the activities that are relevant to participation in professional life.

Substantial

271. In determining whether an adverse effect is substantial, the Tribunal must compare the claimant's ability to carry out normal day-to-day activities *with the ability he or she would have if not impaired*. **Paterson v Commissioner of Police of the Metropolis 2007 ICR EAT**: The employment tribunal in the Paterson case acknowledged that the claimant's dyslexia was disadvantageous to him in comparison with his rivals for the post of superintendent. However, in comparison with 'the ordinary average norm of the population as a whole', the tribunal considered that the dyslexia had no more than a minor or trivial impact on his day-to-day activities.
272. Allowing the claimant's appeal in Paterson, the then President of the EAT, Mr Justice Elias, emphasised that, in assessing an impairment's effect on a claimant's ability to carry out normal day-to-day activities, the correct comparison is *between what the claimant can do and what he or she could do without the impairment*.
273. **Paterson** suggests, it is necessary that tribunals consider, first and foremost, whether an adverse effect is 'substantial' in the light of the statutory definition: the Guidance and Code are strictly supplementary.
274. The Tribunal has reminded itself of the words of Mr Justice Elias in **Paterson**:

66. *In our judgment, the appellant's submission is correct. We would have reached that conclusion simply taking domestic law on its own without any reference to the decision in Chacón . In our view carrying out an assessment or examination is properly to be described as a normal day to day activity. Moreover, as we have said, in our view the act of reading and comprehension is itself a normal day-to-day activity. In any event, whatever ambiguity there may be about that, in our view the decision of the ECJ in Chacón Navas is decisive of this case.*

67. *We must read s1 in a way which gives effect to EU law. We think it can be readily done, simply by giving a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment. Since the effect of the disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life.*

68. *More fundamentally, in our view Ms Padfield's approach to establishing whether there the disadvantage was substantial is misconceived. In our judgment the only proper basis, as the Guidance makes clear, is to compare the effect on the individual of the disability, and this involves considering how he in fact carries out the activity compared with how he would do if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross section of the population, then the effects are substantial.*

69. *It follows that this ground of appeal succeeds. Once the Tribunal had accepted that the appellant was disadvantaged to the extent of requiring 25% extra time to do the assessment, which is what Dr Biddulph considered appropriate, then it inevitably followed that there was a substantial adverse effect on normal day-to-day activities.*

70. *We are reinforced in this conclusion by the implications of the contrary view. The purpose of the legislation, at least in part, is to assist those who are disabled to overcome the disadvantages which stem from a physical or mental impairment. The approach suggested by Ms Padfield and adopted by the Tribunal does not achieve that. Take the case of someone who has all the skills to be a highly successful accountant, but lacks manual dexterity. This may require that he or she should be given longer to do the relevant examinations. It would surely be no answer and would be wholly inconsistent with the purposes of the legislation, simply to say that that individual was not disadvantaged when compared with the population at large and*

therefore no obligation to make the adjustment arose. Yet as Ms Padfield accepted, that is the logic of her position.

Tribunal Stress

275. In **Elliott v Dorset County Council EAT 0197/20** His Honour Judge Taylor comments on Paterson as follows;

45. *Elias J further stated at paragraph 68:*

“ ... In our judgment, the only proper basis, as the Guidance makes clear, is to compare the effect on the individual of the disability, and this involves considering how he in fact carries out the activity compared with how he would do if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial.”

46. *I consider that the key additional point that Elias J makes is that the guidance reminds us that there will be some variation in ability amongst people that are minor or trivial. In the phrase “a cross section of the population” I do not consider the word “population” means everyone in the UK (including, if one took an absurdly pedantic approach to the comparison in **Paterson**, babies and those who have never had the opportunity to learn to read or write). I also do not consider that the term “a cross section of the population” means some average of all people in the population (rather like Le Corbusier’s Modulor), but to a broad cross-section of “people” (the word used in the Guidance) **broadly similar to the Claimant, other than that they do not have the alleged disability. One might imagine it as a rough and ready cross-section of the population taken at approximately a claimant’s level.***

Tribunal Stress

Conclusions and Analysis

Normal day to day activities

276. The adverse effects of the ADHD on the Claimant’s activities, as set out above in its findings, includes difficulty retaining focus on the completion of tasks particularly those which are complex or tedious for as long as 4 hours including for example completing job applications and difficulty in maintaining focus on the task in hand, even if that has a more urgent deadline because the Claimant becomes distracted including by other tasks,.
277. The Guidance makes it clear that the term ‘normal day-to-day activities’ does not include work of a particular form because no particular form of work is ‘normal’ for people in general. However, *para D3 above in the Guidance specifically includes; “day-to-day activities are things people do on a regular or daily basis”* and includes; *reading and writing, having a conversation.* The guidance also provides that this can include what it terms as **“general work-related activities”** such as; **“preparing written documents and keeping to a timetable...”**.
278. The Effects relate to concentration and the Tribunal conclude, that this is a normal day to day activity. Reading long complex or tedious documents and focusing on these for at least 4 hours (including by way of example a job application) and having to concentrate on one task to meet a deadline, are the Tribunal conclude applying **Paterson v Commissioner of Police of the Metropolis** activities relevant to professional life and fall within that broad definition that can include irregular but predictable activities that occur in professional life.

Substantial Effects

279. In terms of what may be considered a substantial adverse effect the Guidance also give as an example of persistent *distractibility or difficulty concentrating.*

280. The Guidance also provides that it would **not be** reasonable to regard as having a substantial adverse effect on normal day to day activities; an inability to fill in a *long, detailed, technical document*, which is in the person's native language, without assistance or inability to concentrate on a task requiring application *over several hours*.
281. The Tribunal has reminded itself however that the statutory definition takes precedence over the Guidance and Code and that substantial means more than *minor or trivial* (section 212 EQA) and should be applied without any additional gloss. The Guidance and Code are strictly supplementary.
282. The examples of what may be considered substantial set out in Appendix 1 of the Guidance, are also examples based on those effects being the only effect. It is important to consider whether the effects on more than one activity, when taken together, could result in an overall substantial adverse effect.
283. Further, it is also relevant to consider not only what the Claimant can or cannot do but also the time taken by him to carry out a normal day-to-day activity (Guidance B2). The Tribunal take into account, in terms of the impact on the Claimant's concentration and ability to focus on his work, the time it takes him to complete a task. The Respondent's reasons for terminating the Claimant's employment included issues with the late submission of work and failure to meet deadlines and we accept the Claimant's evidence that with medication he could focus and work for as long as 4 hours on a task which he otherwise could not do.
284. In most professional jobs, the Tribunal consider, there is a common requirement to meet reasonable deadlines and to be able to retain focus to work on a document or task for 4 hours, which may be complex or tedious, without being distracted to such a degree that deadlines are not met and the work is not completed.
285. The Tribunal consider that in most professional occupations, whether lawyer, accountant or engineer, the ability to stay focused on a written task including tasks which are complex or tedious, is common and to do so for at least 4 hours, which would be the equivalent of working on one task from the start of a working day (9am) to lunchtime.
286. The Tribunal conclude that when comparing the difference in the way the Claimant carries out the tasks of concentrating and focusing on written tasks in particular, when comparing with how he would be able to carry those activities when those effects are managed with medication, that difference is more than minor or trivial.
287. The Claimant was prescribed medication following diagnosis, and while the focus is on the condition as at the relevant time the Claimant's undisputed evidence is that the condition remained the same, and the medical practitioner considered that despite serious side effects, it was appropriate to prescribe medication to assist with the management of ADHA. The report of the 28 August 2020 recorded that with the medication the Claimant could do *simple tasks now for 4 hours*. The example the Claimant gave was the preparing of a job application, which with medication he could concentrate on and finish. Although not a daily occurrence for most people, for most people at some point completing a complex or lengthy application whether for jobs or otherwise, is the Tribunal conclude a 'normal day-to-day activities', giving the phrase a broad definition that can include irregular but predictable activities that occur in professional life: **Paterson v Commissioner of Police of the Metropolis 2007**
288. The effects of the ADHD on the Claimant were such that they placed a limitation on the Claimant's ability to effectively participate in professional life on an equal basis with other workers. The Tribunal conclude that considering how he in fact carries out the activities compared with how he would do if not suffering the impairment, that difference is more than the kind of difference one might expect taking a cross-section of the population, **broadly similar to the Claimant**, who do not have the alleged disability: **Elliott v Dorset County Council EAT 0197/20**

- 289. The Respondent's own evidence was that the Claimant was not able to carry out the demanding role of a graduate and the Tribunal considers that the difference in the way he was able to carry out the relevant day-to-day activities at the relevant time, was more than minor or trivial, when compared to other university graduates seeking to secure a professional graduate post.

- 290. **The Tribunal therefore conclude that the Claimant was a disabled person within the meaning of section 6 of the EqA throughout the relevant period.**

Employment Judge Broughton

Date: 26 January 2022

Sent to the parties on:

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For the Tribunal:

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