



EMPLOYMENT TRIBUNALS

Claimant: Ms S McWilliams

Respondent: (1) Angelo Gordon Europe LLP; (2) Michael Diana; (3) Joanna Gooch; (4) Tilman Von Hertzberg; (5) Thomas Rowley; (6) Jennifer Kiernan; (7) Allison D'Ottavio

OPEN PRELIMINARY HEARING

Heard at: London Central Employment Tribunal (by CVP)

On: 5 October 2022

Before: Employment Judge Brown

Appearances

For the claimant: Ms I Ferber, Counsel

For the respondent: Mr C Rajgopaul, Counsel

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The Judgment of the Tribunal is that:

- 1. The Claimant was not a disabled person at the relevant times.**

Preliminary Hearing

1. This preliminary hearing was originally listed to consider:

- 1.1 Whether the claimant is a disabled person within the meaning of section 6 Equality Act 2010 ("EA") : From the date of her first allegation (May 2021)

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- until her dismissal (8 December 2021), was the Claimant disabled by reason of asthma, and oral allergy syndrome?
- 1.2 The claimant's application to amend the claim to add an allegation that the first respondent unreasonably failed to comply with the ACAS code of practice on disciplinary procedures;
 - 1.3 Whether the Tribunal has jurisdiction to hear the claims against the sixth and seventh respondents, who say they are citizens of the United States and that they live and work in the USA; and
 - 1.4 Any further case management of the claims, as may be required.
2. At the start of the hearing, the parties indicated that the claimant's amendment had been agreed. The parties had also agreed that the jurisdictional issue relating to respondents 6 and 7 will be determined at the final hearing, because it requires a factual enquiry which is best conducted at the same time as hearing the evidence in the substantive claim. Respondents 6 and 7 do not submit to the jurisdiction pending determination of the jurisdiction issue.
 3. The only matter for determination at this hearing was therefore whether the claimant was a disabled person at the relevant times. The claimant says that she is disabled by virtue of the following impairments:
 - 3.1 Asthma; and
 - 3.2 Oral allergy syndrome.
 4. The claimant presented a claim against the respondents on 28 April 2022. She brought claims of direct discrimination, discrimination arising from disability, indirect discrimination, failure to make reasonable adjustments, and harassment.
 5. The claimant was employed by the first respondent from 1 September 2020 to 8 December 2021 as an administrative assistant, whose duties included providing personal assistance to the second respondent. The respondents defend the claims. The first respondent is a regulated investment firm. The first respondent is the employer of the second, third, fourth and fifth respondents. The sixth and seventh respondents are said to be employed by Angleo Gordon & Co LP, a limited partnership registered in the United States.
 6. I heard evidence from the Claimant, having read her 2 statements: a disability impact statement dated 31 August 2022; and a further witness statement dated 29 September 2022. There were photographs of the claimant's face and neck. Both parties referred to NHS web pages relating to the Claimant's conditions. The claimant's medical notes were contained in a Preliminary Hearing Bundle. Page references in these reasons refer to that Bundle.
 7. Both parties provided written submissions, which I read.

Findings of Fact

8. The Respondents contended that the medical notes did not support the Claimant's account of her symptoms. Having heard the Claimant's evidence and considered all the relevant documents, I made the following findings of fact.

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9. The Claimant subjectively believes that she has asthma and that she has oral allergy syndrome. She believe that she needs medication and to avoid foods to control the symptoms of her conditions. However, her medical notes do not support her subjective beliefs.
10. I found the following facts.
11. The Claimant was born on 25 February 1979. Her claim relates to the period 1 September 2020 to 8 December 2021.
12. She told the Tribunal that she has asthma and oral allergy syndrome. She gave evidence that she takes regular over the counter anti-allergy medication. She also gave evidence about her life being severely affected by her allergies. For example, at paragraph [56] and [61] of her statement she said, “ I tend to avoid most restaurants and bars because of my allergies. This is because of flowers and plants present, but also because I cannot risk the chance of another person eating an item that I am allergic to nearby me, i.e. bananas, avocados, melons etc. Going to a restaurant or bar can be a very uncomfortable, and potentially life-threatening, experience for me.”... “I cannot go to the gym as that is a place that people frequently eat bananas.”
13. She told the Tribunal that, “If I don’t take an antihistamine every day and if I come into contact with any allergens, I will have various allergic reactions and I will become very ill. I will become itchy and break out with urticaria (hives) on my body in various areas, my lips will swell, my face will swell, my eyes will swell and become inflamed and watery, my throat will swell up and I will have difficulty breathing, which will result in an asthma attack as I cannot get enough air. I will become panicked and wheezy. I will have a severe migraine. I will become disorientated and depending on how bad it gets and if I go into full anaphylactic shock because the severity of the allergen to me, I will be hospitalised or I could die. Depending on the severity of the attack, I would have to take time off work until my symptoms subside if I was fortunate enough to have been taken to hospital, but as stated before, I would be at severe risk of death dependent on the allergen.”
14. However, it appeared that the Claimant’s evidence was not supported by the available medical evidence. Furthermore, the Claimant confirmed in evidence that she has never gone into anaphylactic shock. Furthermore, she has never been hospitalised because of her asthma.

Asthma

15. On the medical evidence, since the Claimant’s childhood, there is no evidence of any test having confirmed the Claimant has asthma in adulthood.
16. Her GP notes show the Claimant having been prescribed inhalers previously: there is an entry for a repeat prescription for Ventolin on 30 May 1990, p497, followed by a change of prescription from Ventolin Syrup to Ventodisk on 23 July 1991, p636. The GP notes show Salbutamol (Ventolin), being prescribed to Claimant for asthma, on 18 July 2013, 17 November 2014, 14 December 2015, 1 June 2017, 18 April 2018, 6 March 2019, 24 April 2019, 5 August 2019, 13 January 2022, 8 February 2022, 25 April 2022, and 25 July 2022, pp 432 - 433.

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17. These prescriptions appeared to be repeat prescriptions and were apparently given without any GP appointment.
18. On 20 December 2006, p462, a letter from Dr Alexandra Nanzer to the Claimant's GP said that the Claimant, " ... reports mild asthma for which she has not been taking any inhalers." On 9 October 2002 a letter from Dr Rajakulasingam, Consultant Physician and Honorary Lecturer, to the Claimant's GP said, " It seems she has mild seasonal asthma symptoms but no history of perennial asthma." P455.
19. The Claimant moved GP Practice to her current GP in 2012. At p410 the Claimant's current GP records list "active problems." There is no reference to asthma.
20. There is no note of any consultation with a GP to discuss asthma or to review the need for medication for asthma in the last 10 years.
21. The Claimant has never been prescribed a "preventer" inhaler for asthma and she has never had an asthma attack requiring medical treatment. She has not discussed her asthma with a doctor in 10 years. There is no medical evidence of any need for her to take Ventolin in adulthood.
22. The Claimant told the Tribunal that she suffers from headaches linked to asthma but there was no medical evidence to support this.
23. There are a number of entries relating hay fever in the GP notes.

Oral Allergy Syndrome

24. Regarding the Claimant's oral allergy syndrome, the Claimant says that this relates to eating fruit and vegetables. The medical notes show that the Claimant underwent a number of tests in relation to her allergies. She relied on letters from doctors at allergy clinics as setting out her symptoms.
25. A letter, setting out the Claimant's account of her reported symptoms, at p,717, on 9 January 2007, said, "She tells me that since she has stopped the antihistamine prior to the skin prick test she developed generalised pruritus. Skin prick testing showed a positive result for grass pollen, cat and celery but [not?] the expected banana or avocado. I have therefore requested RAST testing for bananas. Nevertheless listening to the patient's symptoms and the way she describes the rash the most likely diagnosis remains urticaria. It is often very difficult to find a causative agent. In terms of management it is important to avoid anything that may worsen urticaria such as heat, alcohol or for example aspirin containing analgesics. Antihistamines reduce itching and rash in most people but may not relieve it completely. As Ms McWilliams experiences symptoms on a regular basis we would recommend she take antihistamines regularly but to change every 6 months to a different type. For severe flares we recommend steroids."
26. Other letters setting out the Claimant's account of her symptoms were: at p716, a letter to the Claimant's GP from Homerton Hospital Department of Respiratory Medicine, on 30 April 2007; at p714, a letter to the Claimant's GP from Homerton

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Hospital Department of Respiratory Medicine, on 11 September 2007; p712, a letter to the Claimant's GP from Dr Rajakulasingam, a consultant in the Department of Respiratory Medicine at Homerton University Hospital, on 9 October 2007; p67, a Note in Clinical History Sheet, from 28 August 2008; p697, a letter to the Claimant's consultant at Homerton Hospital from Mr Williams, Consultant Nurse in Allergy, on 28 August 2008; p701, a letter to the Claimant's GP from Mr Williams, Consultant Nurse in Allergy, on 4 September 2008; p69, a letter to Amy Wilson, Dietician at Homerton Hospital, from Mr Williams, Consultant Nurse in Allergy, from 17 February 200; a p689, a letter from Mr Williams, Consultant Nurse in Allergy, "To Whom it May Concern", from 6 April 2009.

27. The letters particularly referred to the Claimant's reports of an allergic reaction to bananas.
28. In particular, at p716, in a letter to the Claimant's GP from the Homerton Hospital Department of Respiratory Medicine, on 30 April 2007, headed with the diagnosis "Recurrent urticarial rash with angioedema secondary to food allergies", Veronica Smith, SPR, said, "Shona is still getting a rash and facial and throat swelling on a regular basis despite the regular antihistamine and says that even being in the same room as somebody eating a banana will bring her out in a rash and make her throat start to swell and that the allergen is quite difficult to avoid particularly as people don't believe that she has this allergy".
29. Further, at p714, in a letter to the Claimant's GP from Homerton Hospital Department of Respiratory Medicine, on 11 September 2007, headed with the diagnosis "Recurrent urticarial rash with angioedema secondary to food allergies", Dr Joseph Sembatya said, "Currently she still gets recurrent rashes on the hands, face and occasional sensation of swelling in her throat which seems to be mainly triggered by people who are eating or who have eaten bananas".
30. In addition, at p712, a letter to the Claimant's GP from Dr Rajakulasingam, a consultant in the Department of Respiratory Medicine at Homerton University Hospital, on 9 October 2007, stated: "Unfortunately with this history she now has significant oral allergy syndrome to multiple fruits and other allergens including pistachio, banana, apple, strawberry, tomato, kiwi and a few others. Her main problem is the banana allergy as even the smell of it seems to trigger reactions on a daily basis and therefore she now relies on taking antihistamine on a daily basis. I do not think there is much else one can do in order to help her with this particular banana allergy".
31. At p67, a note in a Clinical History Sheet on 28 August 2008, stated, "Banana episode / Bananas were being eaten in next door room – pt developed itchy throat, weals on hands and wrists. / Antihistamine not effective – took prednisolone as supplied by us in case of severe reaction".
32. However, I decided that, on a true reading of these letters, they set out how the Claimant reported her symptoms to the treating doctors and health professionals, not what the tests actually showed about her allergic responses.
33. In extended skin tests administered to the Claimant on 19 December 2006 there was no weal from bananas, but a weal from grass pollen measuring 7 x 6 mm and

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one from a “tree mix” of 9 x 6 mm on p735. Otherwise, there was a weal of 2 x 2 mm from carrots, alone p. 736.

34. All other foods, including orange, apple, banana, peach, kiwi, lemon, tomato, peanut, hazelnut, brazil nut, walnut, celery, almond, potato and soybean produced no allergic weal at all.
35. In repeated extended skin tests administered to the Claimant on 5 January 2007, the Claimant had a 3 x 3mm weal from the negative control – and the same result for orange, apple, banana, peach, kiwi, lemon, tomato, peanut, hazelnut, brazil nut, walnut, almond, potato and soybean. She had a slightly larger weal for celery and carrot, at 5 x 4mm and 4 x 3 mm respectively. She had an 8 x 4mm weal for grass pollen and a 4 x 3mm weal for “tree mix”. P732.
36. A letter dated 9 January 2007, p717 recorded that “skin prick testing showed a positive result for grass pollen, cat and celery but [not] the expected banana or avocado. I have therefore requested RAST testing for bananas.”
37. The letter indicated that there was a negative allergic result for everything other than grass pollen, cat and celery.
38. RAST testing results on 5 January 2007, p734, showed that the Claimant’s result for bananas was 2, and for avocado was 3, where 0 was negative, and the scale went up to 6.
39. The parties provided evidence regarding RAST testing. It appeared that RAST testing measured IgE levels in the blood. If IgE levels in the blood are high, this supports a diagnosis of allergy. Very low levels of IgE rule out allergy. It appeared that RAST testing of levels 2 and 3 were positive, but not strongly positive.
40. It was notable that, despite numerous negative skin test results in early January 2007, later that year, on 9 October 2007, p712, in a letter to the Claimant’s GP from Dr Rajakulasingam, a consultant in the Department of Respiratory Medicine at Homerton University Hospital, on 9 October 2007, stated: “Unfortunately with this history she now has significant oral allergy syndrome to multiple fruits and other allergens including pistachio, banana, apple, strawberry, tomato, kiwi and a few others. Her main problem is the banana allergy as even the smell of it seems to trigger reactions on a daily basis and therefore she now relies on taking antihistamine on a daily basis. I do not think there is much else one can do in order to help her with this particular banana allergy”.
41. I concluded that the Claimant appeared to be telling her doctors that she had allergic reactions to a wide range of foods which had not been borne out on the skin prick testing earlier the same year.
42. During her investigations at allergy clinics in 2006 - 2009 the Claimant was prescribed various anti-allergy medications on the following dates: 16 May 2006 – Neoclarityn, Chlorpheniramine); (30 April 2007 – Neoclarityn, Chlorpheniramine, Cetirizine), p716; 11 September 2007 – Cetirizine, Prednisolone, Chlorpheniramine, p714; 17 February 2009 – Grazax, Cetirizine, Prednisolone, p692.

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43. I noted a letter to the Claimant's consultant at Homerton Hospital from Mr Williams, Consultant Nurse in Allergy, on 30 September 2009, p686, which stated: "We discontinued the above patient's Grazax sublingual immunotherapy treatment in July following its failure and also the number of minor but irritating side effects she was experiencing. I am struggling to find any additional or alternative treatment that may help her in the future".
44. It appeared that, after this, treatment by the allergy clinic was discontinued and the Claimant was not re-referred to it by her GP. It appeared that her Neoclarityn, Chlorpheniramine, Cetirizine and Prednisolone prescriptions were not renewed thereafter for her allergies.
45. The Claimant's GP notes from 18 July 2013 state: "History: Has Oral Hypersensitivity Syndrome [another name for Oral Allergy Syndrome] so cycles different antihistamines / ...Comment: 1. Try Sudafed, steam inhalation, nasal sprays for congestion / 2. Aware to come back if requires a different antihistamine." It was not clear from where the GP obtained this information, other than from the Claimant herself. The GP notes indicated that it was open to the Claimant to come back for further consultation, but it appears that the Claimant did not before her employment with the Respondent.
46. The GP notes showed that the GP prescribed the Claimant Prednisolone on one occasion on 5 August 2019, p432.
47. Her GP notes from 29 September 2011 stated: " Note not working now as handicapped by her banana allergy which allergy unit were unable to solve", 632.
48. On 22 February 2022 her GP notes recorded "Oral allergy syndrome ... she advised us of this 22/2/22 as not in notes" p434.
49. On all the evidence, I concluded that, while the Claimant underwent substantial allergy testing and treatment in 2007 - 2009, the skin test results showed no reaction to banana. Further RAST testing produced a positive result for banana and avocado, but not a strong positive. Nevertheless, medical investigation and treatment for allergic reaction to banana and other foods stopped in 2009 and the Claimant was not thereafter prescribed medication to treat it, or to prevent allergic reactions.
50. On all the evidence, I decided that the Claimant had no allergic reaction to most foods and some allergic reaction to banana, avocado and carrot, but not a strong reaction. She does not require medication to control her symptoms in relation to her reactions. She has had such little medical treatment in relation to her alleged oral allergy symptoms in recent years that this condition was not recorded in the GP medical notes of the GP she has been with since 2013.
51. The Claimant produced photographs of her having a flushed face after being on a train and in a building where bananas were being eaten. I accepted that the Claimant had a flushed face on those occasions, but I did not find that the flushing was caused by exposure to bananas or other food allergens. The medical evidence did not support this. The Claimant strongly believes that she is allergic to bananas and foods- it is possible that her emotional reaction to her beliefs causes flushing. There are other possible causes of flushing of a face.

52. The GP and hospital notes do refer at a number of points to Rhinitis/Allergic Rhinitis. The Claimant clearly had a significant allergic reaction on the skin prick tests to grass pollen and “tree mix”.
53. Her GP notes under the heading “Significant: Past” include a note dated 9 March 2022, repeated more fully at p415, “Allergy testing done / - positive for tree, weed, grass, wheat” At p 413, her GP notes from 28 March 2022 state: “History: blood tests (see consult 22/2/22) also show allergies – she wonders if could have immunotherapy again. We do not have clinic letters from when had in 2005. Addendum – does eat some wheat but not lots (so negative coeliac test may not be fully meaningful) as ?reactions to it – allergy testing shows allergy to this as well as birch, grass, mixed tree and mixed weed.”

Law

54. By s6 Equality Act 2010, a person (P) has a disability if –
- 54.1 P has a physical or mental impairment, and
 - 54.2 The impairment has a substantial and long term adverse effect on P’s ability to carry out normal day to day activities
55. The burden of proof is on the Claimant to show that he or she satisfies this definition.
56. *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011), brought into effect on 1 May 2011.
57. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.
58. *Goodwin v Post Office* [1999] ICR 302 established that the words of the s1 DDA 1995, which reflect the words of s6 EqA, require the ET to look at the evidence regarding disability by reference to 4 different conditions:
- 58.1 Did the Claimant have a mental or physical impairment (the impairment condition)?
 - 58.2 Did the impairment affect the Claimant’s ability to carry out normal day to day activities? (the adverse effect condition)
 - 58.3 Was the adverse effect substantial? (the substantial condition)
 - 58.4 Was the adverse effect long term? (the long term condition).

Adverse Effect on Normal Day to Day Activities

59. Section D of the 2011 Guidance gives guidance on adverse effects on normal day to day activities.

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60. D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food., travelling by various forms of transport.
61. Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.
62. D22 states that an impairment may not directly prevent someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse long term effect on how he carries out those activities, for example because of the pain or fatigue suffered.
63. The Tribunal should focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she is able to do – Guidance para B9. *Goodwin v Patent Office* 1999 ICR 302, EAT stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.
64. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect - *para 5(1), Sch 1 EqA*. This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent - para B13 Guidance.

Substantial

65. A substantial effect is one which is more than minor or trivial, *s 212(1) EqA 2010*. Section B of the Guidance addresses “substantial” adverse effect.
66. It would not be reasonable to expect a disabled person to give up normal day to day activities which exacerbate their symptoms, Guidance B8.

Long Term

67. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

The Claimant's Beliefs

68. In *Primaz v Carl Room Restaurants Ltd t/a Mcdonald's Restaurants Ltd* [2022] IRLR 194, the EAT held (overturning the Employment Tribunal's decision) that the Claimant (who had epilepsy and vitiligo and took steps to avoid what she believed, following research, to be triggers) had failed objectively to prove the necessary causal relationship for the purposes of the EA between her conditions and the restrictions she imposed on her day-to-day activities. HHJ Auerbach held,

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[26] ... The tribunal in the present case was also right in principle to highlight at [68] the significance of the difference between generalised material relating to medical conditions, and material in relation to a particular individual that is the product of direct investigation of their condition and/or the expert assessment of primary clinical evidence specifically relating to them..

[58] ... Where the complainant has or had a particular physical or mental impairment, the tribunal must ask in accordance with s 6(1)(b) whether that impairment has a substantial and long term adverse effect on their ability to carry out normal day to day activities. There are two related points to note. Firstly... the issue raised here is one of causation. Did the impairment have the requisite effect? Secondly, the requisite effect must be on the ability to carry out normal day to day activities.

[59] ... The relevant adverse effect must have been properly found to have been caused by the epilepsy and/or the vitiligo...

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

[67] Firstly, to be clear, I do not think that it would always follow that, because the complainant has taken a decision to refrain from a particular activity on account of their impairment, such a decision will in every case, as it were, break the chain of causation. That would not be so where, for example, the complainant was following sound medical advice that indulging in the activity would, indeed, risk or cause some harmful exacerbation or reaction of their condition. But in a case of that sort, the underlying basis of causation would be established by the evidence that, objectively, the impairment does affect the ability to engage in that activity. But in a case such as the present, where the claimant relies purely on their own belief, but there is no evidence accepted by the tribunal that they are right in what they believe, causation cannot be established by that particular route... [69] In the present case, the tribunal found that there was what lawyers would call 'but-for causation'. Had the claimant not had epilepsy and/or vitiligo, she would not have formed the beliefs and, hence, would not have refrained from the activities. But it seems to me that the tribunal's reasoning stops there. What it has not considered is whether the facts were sufficient to support the conclusion, not just that there was 'but for' causation, but that either of these impairments had the requisite material causal effect on the claimant's ability to carry out the activities in question, in the sense required by s 6...

[73] Ultimately, I do not think the fact that the claimant acted in accordance with her own case and beliefs could be regarded as sufficient properly to make good the chain of causation, so as to establish that the epilepsy or the vitiligo had the requisite effect as required by s 6. It is clear that specific medical evidence needs to be adduced if a claimant is seeking to rely upon 'deduced effects' (i.e. what the effects would be in the absence of medical treatment/other measures under paragraph 5 of schedule 1 EA)."

Deduced Effects

69. The Court of Appeal held in *Woodrup v London Borough of Southwark* [2003] I.R.L.R. 111 at [13]: "In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under paragraph 6 of the schedule [i.e. the predecessor to paragraph 5 of Schedule 1 EA] should not readily expect to be indulged by the tribunal of fact. Ordinarily... one would expect clear medical evidence to be necessary.
70. The EAT (Underhill J) held in *Royal Bank of Scotland v Morris* UKEAT/0436/10/MAA at [61], deduced effects are "just the kind of question on which a tribunal is very unlikely to be able to make safe findings without the benefit of medical evidence"..

Discussion and Decision

Asthma

71. It was not clear from her medical notes whether the Claimant has asthma in adulthood. Asthma is not mentioned as an active problem in her GP records. If she does have asthma, then, on the facts, it is mild and has not led to prescription of a preventer inhaler. The Claimant has not had an acute asthma attack requiring treatment. While the Claimant has obtained repeat prescriptions for Ventolin, she has not had any discussion with a GP in the last 10 years about this and there is therefore no record of a GP advising that she requires this for her asthma.
72. Further, there was no medical evidence before the Tribunal about the deduced effect on the Claimant's alleged asthma if she did not take a Ventolin inhaler. I did not find, in the absence of medical evidence, that she would suffer any particular adverse effect, as a result of asthma, on her ability to carry out normal day to day activities if she did not take Ventolin.
73. I did not accept the Claimant's evidence about any adverse effect of asthma on her day to day activities. I found the Claimant's evidence not to be supported by the available medical evidence.
74. On the facts, I concluded that, if the Claimant does have the physical impairment of asthma, it had little or no adverse effect on her ability to carry out normal day to day activities at the relevant times, from 1 September 2020 to 8 December 2021.

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75. Regarding her alleged oral allergy syndrome, the Claimant's medical records are somewhat unclear. The Claimant does suffer from allergic rhinitis and has been consistently shown to be allergic to grass in skin prick tests.
76. On 22 February 2022 her GP notes recorded "Oral allergy syndrome ... she advised us of this 22/2/22 as not in notes" p434.
77. Letters from doctors at the Homerton Hospital in 2007 to the Claimant's GP did refer to a clinical diagnosis of oral allergy syndrome, for example on 9 October 2007, p712.
78. I therefore accepted that the Claimant does have the physical impairment of oral allergy syndrome.
79. However, I did not accept the Claimant's evidence about her symptoms of oral allergy syndrome, or about her need to avoid restaurants, or gyms, or about her need to take medication to control her oral allergy syndrome.
80. The Claimant underwent allergy testing in 2007 – 2009. She had some allergic response to celery, carrot, avocado and banana on some tests. She did not have allergic reactions to each of these things on other tests. She was consistently allergic to grass, however.
81. On RAST testing, the Claimant was allergic to avocado and banana. Her result was not strongly positive.
82. On all the evidence I decided that the Claimant had no allergic reaction to most foods and some allergic reaction to banana, avocado and carrot, but not a strong reaction.
83. I noted that the Claimant had not continued to be prescribed medication to control her allergies after she was discharged from the allergy clinic at the Homerton hospital in 2009.
84. She has had such little medical treatment in relation to her alleged oral allergy symptoms in recent years that this condition was not recorded in the 2022 GP medical notes until the Claimant informed the GP of her previous diagnosis.
85. I found the Claimant's evidence regarding her symptoms to be unreliable. In her witness statement she appeared to imply that she was at regular risk of anaphylactic shock, "If I don't take an antihistamine every day and if I come into contact with any allergens, I will have various allergic reactions and I will become very ill. I will become itchy and break out with urticaria (hives) on my body in various areas, my lips will swell, my face will swell, my eyes will swell and become inflamed and watery, my throat will swell up and I will have difficulty breathing, which will result in an asthma attack as I cannot get enough air. I will become panicked and wheezy. I will have a severe migraine. I will become disorientated and depending on how bad it gets and if I go into full anaphylactic shock because the severity of the allergen to me, I will be hospitalised or I could die."
86. However, in cross examination, she confirmed that she had never gone into anaphylactic shock. As I have stated, the medication to control allergic reactions

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which had been prescribed to her during investigations into her allergies in 2006 – 2009 was not continued.

87. The Claimant gave evidence that she bought over the counter antihistamine medication. There was no evidence to support this.
88. I did not accept, in the absence of medical evidence, that she required antihistamine every day (or at all) to prevent any of the symptoms of allergic reaction she described in her witness statement. I referred to *Woodrup v London Borough of Southwark* [2003] I.R.L.R. 111 and *Royal Bank of Scotland v Morris* UKEAT/0436/10/MAA.
89. I was unable to find, on the balance of probabilities that the Claimant has any significant symptoms of oral allergy syndrome. I did not find that oral allergy syndrome had any adverse effect on her ability to carry out normal day to day activities. Even taking the alleged asthma and oral allergy syndrome together, I did not find that these had more than a trivial adverse effect on her ability to carry out normal day to day activities.
90. I accepted that the Claimant believes she has allergic reactions to foods, including bananas. I accepted that she avoids many day to day activities as a result. However, I did not accept that, objectively, her impairments affect her ability to engage in any activity, *Primaz v Carl Room Restaurants Ltd t/a Mcdonald's Restaurants Ltd* [2022] IRLR 194,
91. The Claimant clearly does suffer from allergic rhinitis. That may lead to her experiencing of the symptoms she has described. However, Rhinitis and Allergic Rhinitis are not pleaded impairments; and, in any event, the Equality Act 2010 (Disability) Regulations 2010 provide at Regulation 4(2) that “the condition known as seasonal allergic rhinitis shall be treated as not amounting to an impairment.”
92. I concluded that the Claimant was not a disabled person at the relevant times.

**Employment Judge Brown
14 November 2022**

Sent to the parties on:

15/11/2022

For the Tribunal Office: