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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100139/2019 (V)

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Held via CVP on 10 and 11 January 2022

Employment Judge McManus

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Miss S Mutter

**Claimant
Represented by :-
Mr M Fulton
(Representative)**

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Turning Point Scotland

**Respondent
Represented by:-
Mrs Mohammed
(Solicitor)**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the claimant was not a disabled person during the relevant period for the purposes of the Equality Act 2010.

The claims under the Equality Act 2010 in reliance on the protected characteristic of disability (only) are therefore dismissed.

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REASONS

Introduction and Background

1. The claimant has raised claims of unfair dismissal, breach of contract, redundancy payment and alleged discrimination on the grounds of the

protective characteristics of disability and sex. There have been a number of Preliminary Hearings in this case for the purpose of case management. The issue of whether the claimant was a disabled person in terms of section 6 of the Equality Act 2010 (“the Equality Act”) was to be determined as a preliminary issue at this hearing.

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2. The Note issued following the PH which took place in June 2021 set out my decision on the claimant’s application for strike out of the response, and my decision on further procedure. The claimant sought to appeal my decision not to strike out the response. On 22 March 2021, the Employment Tribunal office received correspondence from the EAT office that the claimant had appealed against a Registrar’s Order which refused the initial appeal as it had been submitted out of time and that the appeal against the Registrar’s Order had also been dismissed by Lord Fairley. The ET proceedings were progressed after the expiration of the 42 day period within which the claimant could seek leave to appeal to the Court of Session. That application was not substantively considered by the EAT, on the basis that it had been made out of time.

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3. In my Note issued following the PH in June 2021, I set out the position with regard to further procedure in this case, and my reasoning for that. This included the following, under the heading ‘**Medical Information re Question of Disability Status**’:-

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“85. Following *Lambrou v Cyprus Airways Ltd*, I considered alternatives to strike out. In doing so, I have taken into account the essence of the claimant’s application for strike out, being her concern around disclosure of medical evidence to the respondent and the respondent’s representative. I have considered those concerns in light of the claimant’s position that it is no longer possible to have a fair hearing in these proceedings.

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86 The progress of the claimant’s claims of disability discrimination now require a determination by the Employment Tribunal on whether the claimant has the protected characteristic of

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disability. The issue of disability status is a live one. Medical evidence is often necessary for an Employment Tribunal to make the findings necessary to determine whether a claimant has the protective characteristic of disability. As set out by then President of the EAT, Mr Justice Underhill, in *Royal Bank Of Scotland plc v Morris EAT 0436/10*, particularly in a case involving mental impairment such as anxiety or depression, there may be insufficient evidence before the Tribunal for it to draw any conclusions on essential elements of the definition of disability, including the duration or likely duration of the impairment relied upon. In that case, the EAT held that on the evidence before the Employment Tribunal, where there was no explicit evidence on the duration or likely duration of the impairment relied upon, no safe inferences could be drawn from the fact of medication being prescribed for six months. That case was in respect of proceedings brought under the Disability Discrimination Act 1995, prior to the Equality Act 2010 coming into force, but the principles set out there remain relevant. The EAT observed there that :-

“while in the case of other kinds of impairment the contemporary medical notes or reports, even if they are not explicitly addressed to the issues arising under the [DDA] give a Tribunal a sufficient evidential basis to make common sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance.”

87. There are cases where Employment Tribunals have found that the claimant is disabled as defined by the Equality Act without expert medical evidence e.g. in *Bennett v English Provender Co Ltd and another ET Case No 1604740/12*, where the claimant had been ordered to disclose GP records, but failed to do so,

5 instead bringing a GP letter that provided some details. In that
case the claimant had not given details of any disabilities when
she had completed a pre-employment health questionnaire for
the respondent, and had said she had no condition requiring
regular medication. Notwithstanding these facts, the
Employment Tribunal there accepted the claimant's evidence
that she had substantial difficulties with day-to-day activities that
involved bending her knee, such as walking up and down stairs,
standing up from a sitting position and getting in and out of the
10 bath. It was found that she was disabled as defined by the
Equality Act 2010.

88. Following the decision of the Northern Ireland Court of Appeal
in *Veitch v Res Sky Group Ltd 2010 NICA 39, NICA*, the
presence or absence of medical evidence presented before the
Employment Tribunal does not then necessarily mean that the
15 Tribunal will be unable to reach a proper conclusion on the
question of whether a claimant's impairment has a long-term
adverse effect on his or her ability to carry out normal day-to-
day activities, but the presence or absence of medical evidence
may be a matter of relevance to be taken into consideration
when deciding what weight should be put on the claimant's
20 account of the difficulties caused by his or her impairment. The
NI Court of Appeal there held that the absence of medical
evidence may become of central importance in considering
whether there is evidence of long-term adverse effects arising
from an impairment, and frequently, in the absence of such
evidence, a Tribunal would have insufficient material from
25 which it could draw the conclusion that long-term effects had
been demonstrated.

89. In *City Facilities Management UK Ltd v Ling EAT 0396/13*, the
claimant had been dismissed on grounds of capability following
a lengthy absence on account of depression and anxiety and
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5 the Employment Judge there took the view that he required expert medical evidence to decide whether the claimant was disabled. The claimant was not in a position to pay for a consultant psychiatrist report. Having regard to the overriding objective of enabling Tribunals to deal with cases justly, and in particular the need to ensure that the parties were on an equal footing, the Judge ordered a medical expert report to be obtained at the employer's expense. The EAT held that that evidence was not necessary because the burden of proof was on the claimant to establish that she was disabled. In that case, the claimant's position was that she would give evidence on the impact of her condition on her ability to carry out normal day-to-day activities, and she had supplied a copy of her GP records to the Employment Tribunal.

15 90. Medical records are often important evidence in establishing disability status. In *Rayner v Turning Point & ors EAT 0397/10*, His Honour Judge McMullen, QC, commented that a GP treating a condition such as depression over a long period of time is in a very strong position to give an authoritative view of materials relevant to the assessment of disability, and sometimes may be in a better position than a consultant examining a claimant on one occasion only. In that case the EAT concluded that the Employment Judge was under no duty proactively to seek further medical evidence, nor did the overriding objective require the employer to help support a weak claim by paying for an expert's report.

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30 91. Even where there is a jointly instructed medical expert, ultimately the issue of whether a claimant has a mental impairment that amounts to a disability in terms of the Equality Act 2010 is one for the Employment Tribunal to determine (*McKechnie Plastic Components v Grant EAT 02824/08*).

92. In *GCHQ v Bachaus*, referred to above, (which was determined on the 2004 Employment Tribunal Procedure Rules and the Disability Discrimination Act 1995, but is nonetheless still relevant to the present case) the EAT held that the ET in that case should have applied the test in *Lane v Willis* [1972] 1 WLR 333 and that if it had done so it would have concluded that the respondent, given the issues in the case, could not properly prepare its case without expert evidence and was significantly disadvantaged without the opportunity to obtain such evidence. In *GCHQ v Bachaus*, (at para 27 – 33) there was consideration by the EAT of the guidance laid out in *De Keyser v Wison* [2001] IRLR 324 at 330 and its application to that case. The EAT said:-

“27. Guidance has been given by the Appeal Tribunal as to the procedure to be adopted for obtaining expert medical evidence in cases under the Disability Discrimination Act 1995: see *De Keyser v Wison* [2001] IRLR 324 at 330. The guidelines laid out in *De Keyser* always repay careful study.

28 *In the first place, as De Keyser shows, the parties should consider carefully whether expert medical evidence is required and consider with the Tribunal whether it should be admitted: see guideline (1) in De Keyser.*

29 *In this case, it is plain that both parties considered whether expert medical evidence was required. Both thought that it was; the claimant first intended to instruct the treating psychiatrist, but then went to Dr Bowers, a consultant psychiatrist not involved in his treatment; the respondent from November 2011 intended to instruct a psychiatrist; the Tribunal considered the question of expert evidence with the parties and gave directions for its provision.*

30 *De Keyser then explains the two methods by which expert evidence may be obtained.*

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31 *Firstly, there may be a joint expert report. This means a report parties agree the letter of instruction to the expert and the identity of the expert; or, in default of agreement, the Tribunal fixes the contents of the letter of instruction and the identity of the expert having heard submissions from the parties. This is, as De Keyser makes plain, the preferred course.*

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32 *Secondly, however, each side may instruct their own expert. If this course is taken the parties are not required to agree, or the Tribunal to settle, the letter of instruction. Neither are the parties required to agree, or the Tribunal to settle, the identity of the experts. Generally speaking, each side is entitled to choose the expert it wishes to instruct, so long of course as the expert is in an appropriate discipline. In this case, the Tribunal permitted Mr Bacchus to choose from one of three names put forward by GCHQ. That was a more favourable order than Mr Bacchus was entitled to expect, given that the order was not for a joint expert. He was entitled to, and did, choose his own expert. GCHQ was entitled to do the same. Quite exceptional reasons would have been required before Mr Bacchus could properly veto GCHQ's choice of expert: the Tribunal was, we think, plainly right to say that no such reasons existed here.*

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33 *It is, we think, too late to return to the beginning now and adopt what would, with hindsight, have been a sensible course on both sides: the instruction of a joint expert with a jointly agreed letter of instruction. The parties have moved on; even when his first choice proved unacceptable to him.*

5 *Mr Bacchus again instructed his own expert to provide a report and GCHQ attempted to do the same, but was met with Mr Bacchus's rejection of the experts put forward. The question for the Tribunal was what is to be done in the light of Mr Bacchus's refusal to cooperate?*

10 34 *Traditionally in the civil courts sanction for non-cooperation by a claimant with the obtaining by respondent of a medical report on his condition was a stay. The relevant principles of law which the court should apply when considering an application for a stay of proceedings, unless a claimant submitted to a medical examination by a specialist instructed by a defendant were set out in the judgment of Sachs LJ in Lane v Willis 1972 1 WLR 333. He said:*

15 *"The principles upon which a court should, in aid of obtaining a medical examination of one of the parties to the action, act when deciding whether to take the somewhat strong course of staying the action if a medical examination is not afforded, are by now clear. An order for a medical examination of any party to an action has been well said to be an invasion of personal liberty. Accordingly, it should only be granted when it is reasonable in the interests of justice so to order. When the refusal of a medical examination is alleged to be unreasonable, the onus lies on*

20 *the party who says it is unreasonable and who applies for the order to show, upon the particular facts of the case, that he is unable properly to prepare his claim or defence without that examination."*

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30 35. *The remedy granted in the civil courts and stay reflects the consideration that the court has no intention of placing a claimant under penalty of contempt if he does not submit to medical examination. But the stay granted can and will be*

permanent if the claimant does not submit to medical examination within the timescale laid down, or (if an extension is applied for) such extension as is reasonable.

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36 *In the recent case of Abegaze v Shrewsbury College of Arts and Technology 2010 IRLR 238 - an employment case – Elias LJ set out what we regard as no more than a different route to the same conclusion: he proposed ‘a ‘unless order’ requiring the claimant to present himself for examination by a certain date, with the consequence that his case would be struck out for non-compliance if he refused or was otherwise uncooperative (para 51).*

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37 *We consider that whichever remedy granted the test laid down in Lane v Willis is apposite. The party applying for the order must show that he is unable properly to prepare his defence without the examination and it must be reasonable - as it usually will be if that test is met - to make the order in the interests of justice.”*

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93. Having regard to the principles set out above in *GCHQ v Baccus*, and in line with my obligations in terms of the overriding objective in Rule 2, I now make Orders as set out below in respect of further procedure, and, in particular, the obtaining of expert medical evidence.

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94. Given the nature of the impairments relied upon by the claimant in respect of both physical impairment and mental impairment, I am satisfied that without relevant medical evidence from an appropriate expert, there is a likelihood that the Tribunal would not have the necessary evidence to make findings in fact and reach a determination on whether the claimant has the protected characteristic of disability. I take into account that the claimant has provided an impact statement and a letter from her GP. There has been previous discussion with parties on the

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instruction of a medical expert. The respondent had previously agreed to meet the cost of instructing an expert and the costs of the claimant attending for examination. That was in relation to attendance at one examination.

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95. Both parties have an obligation under Rule 2 to cooperate with each other and with the Employment Tribunal. I consider it to now be appropriate in these circumstances for there to be single expert reports. In this case, it is not too late for that route. No party has yet obtained an expert report. The letter from the claimant's GP does not address the relevant questions. A single expert is an expert who is appointed by both parties on a joint basis. Given that the claimant relies on disability status in respect of both a physical and a mental impairment, it is appropriate for there to be a single expert appointed in respect of the physical impairment and another single expert in respect of the mental impairment. The single, jointly appointed expert in respect of the physical impairment relied upon by the claimant should be a consultant surgeon who advises on patients' requirement for breast reduction surgery and carries out such surgery. The single, jointly appointed expert in respect of the mental impairment relied upon by the claimant ((i.e. a consultant psychiatrist who can report on the diagnosis and effect of the claimant's anxiety state.).

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96. In all these circumstances, I consider that the single experts who are jointly instructed should have no particular link to either party, i.e. should not be either the claimant's treating physician or the respondent's occupational health provider. Lists of consultants in Scotland with suitable expertise are readily available on the internet. On application of the obligation on both parties under Rule 2 to cooperate with each other and with the Employment Tribunal, I consider that the cost of instructing both joint experts, including travel costs for any examination of

the claimant, should be split equally between the parties. Given all the circumstances in this case, I am now directing the terms of the letters of instruction to the single experts, as set out below.”

5 4. In that Note I then set out the explicit terms of the letter of instruction to the consultant surgeon and the consultant psychiatrist.

5. Also in that Note I issued Case Management Orders, in the following terms:-

10 (i) “By **1 November 2019** the respondent’s representative will provide the claimant with a list of three Consultant Psychiatrists for the purpose of the instructed psychiatrist then examining the claimant, and the claimant’s medical records, for the purpose of providing to both parties and to the Employment Tribunal a medical report in the term set out in this PH note.

15 (ii) By **1 November 2019** the respondent will provide the claimant with a list of three Consultant Surgeons who have experience in assessing suitability for breast reduction operations and carrying out breast reduction operations, for the purpose of the instructed consultant surgeon then examining the claimant, and the claimant’s medical records, for the purpose of providing to both parties and to the
20 Employment Tribunal a medical report addressing the following questions:-

25 (iii) By **15 November 2019**,the claimant will inform the respondent’s representative of the name of the consultant psychiatrist from the list of three provided by the respondent which the claimant agrees to be instructed to prepare the jointly instructed report, on the basis that the instructed expert will examine the claimant and review her medical records, and that the copies of the claimant’s medical records from the time of commencement of the claimant’s employment with the
30 respondent on 16/08/2013 to date will be sent directly to that agreed joint expert, such disclosure being made on the basis of those medical

records being treated as sensitive personal data, strictly private and confidential, and disclosed only as they relate to these Employment Tribunal proceedings.

5 (iv) By **15 November 2019**, the claimant will inform the respondent's representative of the name of the consultant surgeon from the list of three provided by the respondent which the claimant agrees to be instructed to prepare the jointly instructed report, on the basis that the instructed expert will examine the claimant and review her medical records, and that the copies of the claimant's medical records from the
10 time of commencement of the claimant's employment with the respondent 16/08/2013 to date will be sent directly to that agreed joint expert, such disclosure being made on the basis of those medical records being treated as sensitive personal data, strictly private and confidential, and disclosed only as they relate to these Employment
15 Tribunal proceedings.

(v) Within 7 days of the claimant providing the respondent's representative with the name of each expert to be instructed on a joint basis, the respondent's representative to send a letter of instruction to that expert, in the terms set out in this Order.

20 (vi) That within 7 days of the claimant agreeing to which Consultant Psychiatrist and Consultant Surgeon should be instructed for the purpose of these joint reports, that the claimant arrange that copies of the claimant's medical records from the time of commencement of the claimant's employment with the respondent (16/08/13) to date will be
25 sent directly to that agreed joint expert, such disclosure being made on the basis of those medical records being treated as sensitive personal data, strictly private and confidential, and disclosed only as they relate to these Employment Tribunal proceedings (on the basis that all of the claimant's medical records from the time of
30 commencement of her employment with the respondent do so relate). The claimant's medical records include records from her GP, her

treating Consultant Surgeon in respect of her breast reduction operation, and any attendances at Occupational Health.

IMPORTANT INFORMATION ABOUT ORDERS

5 (1) Any person who, without reasonable excuse, fails to comply with a requirement imposed under Rule 31 [requirement to disclose documents or information] of the Employment Tribunals (Constitution and Rules of Procedure 2013 is liable on summary conviction to a fine of up to £1,000.00 under section 7(4) of the Employment
10 Tribunals Act 1996.

(2) Failure to comply with an Order may result in the whole or part of a claim or response being struck out at or before the hearing or a costs or preparation time order.

15 (3) A party may apply to the tribunal to vary or set aside an Order but must do so before the period for compliance with the Order has expired.”

6. Prior to that PH in June 2019, the respondent had requested that an Unless Order be issued on the claimant with regard to the instruction of medical
20 report. I did not issue an Unless Order and set out the following with regard to further procedure:-

25 “101. The case will now be listed for a Hearing to determine the issue of disability status only. The question of the respondent’s knowledge of any such disability status is reserved for the Final Hearing.

102 Orders issued in this note are issued under Rule 31 of the Procedure Rules. No Unless Order is presently issued under Rule 38. In consideration of the relevant authorities, as set out
30 above, if it is the position of the claimant that she will not comply

5 with the Orders set out in this PH Note, but she wishes to progress her claims brought under the Equality Act 2010 in reliance of the protected characteristic of disability, and in the event that the respondent maintains their position on the claimant's disability status and insists on being able to instruct a relevant medical expert, I shall hear both parties' submissions on whether an Unless Order should be granted under Rule 38. The effect of non-compliance with an Unless Order if then granted under Rule 38 in terms of the Order now issued in this Note would be strike out of the part of the claimant's claims brought in reliance of the protected characteristic of disability.

10 113 Date Listing letters will be issued to allow the PH on disability status to be fixed taking into account the availability of parties, their representatives and both jointly instructed expert witnesses.

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6. Neither party subsequently applied for any Order.
 7. This PH had been scheduled to take place in person. On 8 December 2021, the claimant's representative requested that the PH take place via CVP because of the Covid 19 pandemic and her own circumstances. The respondent's representative expressed her preference for the hearing to be in person. The claimant's representative expressed concern at further delay should the hearing be postponed. In further correspondence, both parties were asked for further information on their respective positions, to be submitted by noon on 24 December 2021, failing which the hearing would be converted to take place via CVP. No further correspondence was received by the Tribunal office from either party by that time and the in person hearing was converted to take place via CVP.
 8. A Case Management Order had been issued requiring parties to liaise to lodge a Joint Bundle. This was not lodged by the timescale required in the Order.
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9. The claimant was represented by her partner, who is not legally qualified. The respondent's representative is legally qualified. I had regard to the overriding objective in Rule 2 of the Tribunal Rules of Procedure and sought to ensure equity between the parties by providing explanations about the procedure.

5 **Preliminary Discussions**

10. It was confirmed that the only issue to be determined at this hearing was whether at the relevant time the claimant has disability status in terms of the Equality Act 2010. The question of the respondent's knowledge of any such disability is to be determined at the Final Hearing.
- 10 11. The respondent's representative accepted that the Joint Bundle ought to have been lodged earlier. Proceedings were adjourned for a short time to enable the Joint Bundle to be shared on the Document Upload Centre.
12. It was confirmed that the claimant relies on disability status with regard to both a physical and mental impairment. The claimant relies on macromastia and the requirement to have breast reduction surgery. Her position is that that condition caused her chronic back and shoulder pain and had mental effects, including anxiety.
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13. It was confirmed that the only medical reports being relied upon are a report from Mr Romics (Consultant Oncoplastic Breast and General Surgeon) dated 14 September 2019 and a report from the claimant's GP dated 5 September 2019. No expert report is being relied upon in respect of mental impairment specifically, i.e. from a physiatrist or psychologist. The claimant's representative confirmed that they had noted the position as set out in the Note following the PH in June 2021 re reliance on expert medical evidence and had decided to proceed in reliance on the report from Dr Romics and the letter from the GP.
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14. The Joint Bundle ran to 202 pages. The documents in that Bundle are referred to herein by their page number (JB1 – JB202). The Bundle included redacted extracts from the claimant's GP records. Most of the documents on the Bundle were not referred to in evidence.
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15. The claimant had previously provided an impact statement, in response to an Order. That response was at JB68 – JB69.
16. It was noted that the relevant period had been identified as from 15 January 2018 until 15 March 2019. That period had been identified with regard to the period within which the alleged discrimination is claimed to have taken place, as set out in the claimant’s Response to the Order at JB68 – 69.
17. Evidence was heard from the claimant only, who gave her evidence on affirmation. Following her evidence in chief, there was cross examination, questions from me, and re-examination.
18. It was agreed that both representatives would prepare skeleton written submissions and that these would be exchanged and sent to the Tribunal by 9.15am on 11 January 2022.
19. It was noted that the Equality Act Guidance would be relevant to the decision on disability status and that the representatives may wish to refer to this in their submissions,

Relevant law

20. Section 6 of the Equality Act provides a definition of “disability” as follows:
- (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.
21. S212(1) of the Equality Act provides that “substantial” means more than minor or trivial.
22. Schedule 1 of the Equality Act gives further details on the determination of a disability. For example, Schedule 1 para 2(1) provides that the effect of an impairment is long term is it has lasted for at least 12 months, is likely to last

for at least 12 months or is likely to last for the rest of the life of the person affected.

23. Para (5) provides that 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 measures are being taken to correct it and but for that, it would be likely to have that effect.
24. The Tribunal must take into account Statutory Guidance on the definition of Disability (2011) which stresses that it is important to consider the things that a person cannot do, or can only do with difficulty (B9). This is not offset by things that the person can do. This is also confirmed in *Aderemi v London and South Eastern Railway Ltd* 2013 ICR 391. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc. (Guidance D2 – D7).
25. The burden of proving disability lies with the claimant. There is no rule of law that the burden can only be discharged by adducing first hand medical evidence. In *Morris v Royal Bank of Scotland* UKEAT/0436/10, the EAT held that the existence or not of a mental impairment was very much a question for qualified and informed medical opinion. The EAT held that the particular nature of mental impairments required more than just the provision of medical notes. The issues would often be too subtle to allow it to make proper findings without expert assistance. It might be a pity if that was so but it was inescapable given the real difficulties of assessing in the case of mental impairment, issues such as likely duration, deduced risk and risk of recurrence.
26. *J v DLA Piper* set out the test at paras 41 – 46 and describes the distinction between clinical depression and reactive depression.
27. Following *Morgan and Staffordshire University* [2002] IRLR 190, the occasional use of terms such as “anxiety” “stress” and “depression, even by

medical professionals will not amount to proof of a medical impairment, still less its proof at a particular time.

28. In dealing with these proceedings I took into consideration the relevant guidance in the Equal Treatment Bench Book, in particular Chapter 3 on Physical Disability and Chapter 4 on Mental Disability.

Issues

29. None of the elements of the definition of disability were conceded. Therefore the Tribunal has to determine the following issues:

- Did the claimant have a mental and /or physical impairment?
- If so, did such impairment(s) have an adverse effect on her ability to carry out normal day to day activities?
- If so, was that effect substantial (as in more than minor or trivial)?
- If so, was the effect long term?

Findings in fact

30. The Tribunal makes the following findings in fact:

31. The claimant suffered with problems arising from her breast size, proportionate to the rest of her body (macromastia). These issues began when the claimant was 15 and increased until the claimant underwent bilateral breast reduction surgery on 26 January 2018.

32. The claimant's macromastia affected her confidence and caused her embarrassment in social situations, particularly when meeting new people for the first time. When working for the respondent, the claimant required to attend daily meetings, often in mainly male environments. The claimant felt self-conscious about her macromastia. She wore scarves to hide her shape. She hunched. The claimant had difficulty finding clothes which fitted her. This caused her upset. She would often cry to friends and family. She felt anxious, particularly about meeting new people for the first time. She had low self-

esteem. The pain and additional weight from her macromastia affected the claimant's ability to do high impact sport. She had chronic back and shoulder pain. The claimant took paracetamol painkillers every week, but not every day, for this chronic pain. The pain affected the claimant's ability to stand or sit for extended periods of time. She required to change her position to make herself more comfortable.

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33. The claimant's GP records record her attendances mentioning back pain (among other symptoms which are not alleged by the claimant to be related to her macromastia) in February 2010, June 2010 and May 2011. The records of those appointment do not mention the pain being related to macromastia. The GP records show that the claimant attended her GP on 23 June 2017, reporting '*several years of concern*' about the macromastia. The record of that visit records that the claimant reported that this caused '*upper back pain, worse after a long day at work*'. It records the claimant reporting feeling self-conscious before male colleagues and having low mood. No medication or talking therapy treatment was prescribed or recommended. The claimant's GP carried out an examination and referred her to Mr Laszlo Romics (Consultant Oncoplastic Breast and General Surgeon), with a view to breast reduction surgery. The referral letter (as referred to by Dr Romics in his report dated 14 September 2021) documented chronic back pain and shoulder pain. There was no documentation in that referral of any effect of mental impairment.

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34. The claimant felt embarrassed about her macromastia and did not think that anything could be done to alter her situation. As the effects on her worsened, the claimant summoned up the courage to speak to her GP about the situation in June 2017. The claimant was surprised to then be told that medical treatment could be an option for her. She felt validated in respect of the effects which the macromastia caused her.

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35. The claimant was examined by Dr Romics on 9 September 2017. She was assessed as having a legitimate need (as stated in GP report dated 5 September 2019) and had bilateral breast reduction surgery carried out on 26 January 2018. Dr Romics' letter of 14 September 2021 records that a

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'substantial amount of breast tissue had been removed from both sides and therefore she underwent a significant reduction'. The claimant understands that 2lbs of tissue was removed.

5 36. Following her consultation with Dr Romics and the assessment of her clinical presentation as being suitable for surgery, and prior to the surgery, the claimant was anxious about undergoing the procedure. Dr Romics had discussed with her the risks and benefits of surgery. The claimant considered that the surgery would change her *'whole quality of life'*. Only a few months had elapsed from the time when she had first consulted her GP to the surgery date. The claimant was anxious about undergoing what she considered to be a *'life changing thing'*. The claimant consulted her GP about this anxiety. The GP records record that the claimant was prescribed medication (Propranolol) for this anxiety from October 2018 until March 2019. The letter from the claimant's GP of 5 September 2019 states that that medication was continued *'due to stress at her workplace due to receiving warnings for taking time off to recover from her surgery'*.

20 37. Following her recovery from the surgery, the claimant's self-confidence, mood and self-esteem increased. She sat up straight rather than hunching. She felt that a weight had been lifted from her shoulders. She found trying on clothes a pleasure and was delighted at being able to easily find clothes to fit her new body shape. She was able to exercise and began participating in high impact sports. She began running and doing boot camp classes four times a week.

25 38. The claimant worked in social care and had an understanding of disability issues and the definition of being a disabled person. In internal job applications made to the respondent, the claimant did not indicate that she considered herself to be a disabled person.

Observations on the evidence

39. The claimant gave her evidence in a straightforward manner.

30 40. The claimant's evidence was that her macromastia affected her confidence and caused her embarrassment in social situations, particularly when

meeting new people for the first time. There was however a lack of evidence in respect of the extent of the limitations which that caused to her. The claimant said *"I worked in social care. There's a lot of male environments. I was always conscious of what I would be wearing. I was embarrassed, self-conscious on a day-to-day basis."* Her evidence was that she would often cry to family and friends about the situation. The claimant's evidence before me was not entirely in line with her impact statement. In her evidence, the claimant did not mention any issues with sleeping. She did not mention any avoidance of social events. The claimant's response to the order (impact statement) set out:-

"I had constant pain and hunching to contend with throughout my day and affected my sleep. I was unable to exercise properly and I felt shamed by looks that I often got. I was often unable to find clothes that fit properly and those that did I had to choose carefully to cover up at work. I would avoid going to social events. My impairments were constant throughout the day and affected me throughout many of my day to day tasks, such as standing or sitting for long periods of time, or conversing with others. The impairments were as mentioned both progressive so the long term adverse effect would have been increasingly impactful."

41. There was no medical evidence on any diagnosis of a mental impairment, or on the extent of any mental impairment or any psychological effects of the macromastia. I had set out in the Note following the PH in June 2021 that evidence from medical reports was likely to be important in this case. The claimant's representative's position in his submissions was that the claimant had chosen not to obtain a medical report on any mental effect, on the basis that those effects are no longer present, given that the surgery has corrected the underlying condition. That position does not take into account the skilled basis on which professionals undertake reporting on such circumstances. I was then hampered by the lack of expert evidence. Redacted medical records were produced. I took into account the claimant's evidence before me, her response to the Order (impact statement), the GP report dated 5

September 2019, the letter from Dr Romics dated 14 September 2021 and the redacted GP records. The onus of proof is on the claimant.

42. I considered it to be significant that the report from Dr Romics states that in the referral letter from the GP there was no documentation about mental impairment. Neither Mr Romics nor the claimant's GP spoke to their reports at the Hearing and there was no explanation for there being no mention of any mental impairment in the referral letter.
43. The claimant's evidence was "*I just really struggled when buying new clothes. It was always a nightmare. Nothing suited me or was too big. It was a daily struggle. I'd wear scarves to disguise or hide my chest, to try to minimise the look / appearance.*" Her evidence was that her ability to sit and stand for extended periods was limited because of her macromastia. There was no evidence on the extent of those limitations. The claimant's evidence was that her surgery was "*life changing*" and that it "*changed my whole quality of life*".
44. I placed significance on the claimant's evidence on the changes since her breast reduction surgery. The claimant did not say in her evidence that there was any change to her participation in social activities since the surgery. Her evidence was "*Once I recovered from the surgery, I felt more confident. I could sit up straight. Literally there was a weight lifted from my shoulders. The surgeon said he had removed 2lbs. If you can imagine, that's like carrying two bags bag of sugar. Trying on clothes was exciting. I was able to exercise. Now I go to boot camp four times a week and do lots of high impact exercise, like running. Before I couldn't do that because of the pain and weight. Mentally I felt very self-conscious because of the proportions of my body.*"
45. The claimant's position in her evidence on the effects of her macromastia was not challenged in cross examination. The cross examination was mainly in respect of various applications for internal vacancies within the respondent's organisation which the claimant had applied for. The respondent relied on the claimant not having considered herself to be a disabled person when making these applications, and the claimant's awareness of disability issues.

The claimant's position on that was that it '*took a lot*' for her to discuss her experience with her GP and that once she had done that it had made her realise the extent of the effects and that something could be done about it. I considered that explanation to be credible and plausible. The respondent's representative relied on there being no evidence of any effect on the claimant's ability to carry out her job (the test is of course with regard to the claimant's day to day activities).

Submissions

46. Both representatives prepared written submissions. These were exchanged on the morning of 11 January. Time was given for each representative to consider the other's written submission, then each representative gave oral submissions, including comment on the other party's position. It was noted that in both representative's submissions, they sought to rely on matters on which there had been no evidence before the Tribunal. It was explained to the representatives that my decision must be taken on the basis of the evidence before me.

47. The claimant's representative's position was the claimant's macromastia had had both physical and mental effects. In his submissions, the claimant's representative relied on the physical impairments being "*back pain, shoulder/neck pain, physical hunch, fatigue, inability to lose weight (based on inability to exercise freely)*". In respect of mental impairment, the reliance was on "*persistent/consistent anxiety, stress, low mood, overly self-conscious, substantial social embarrassment.*" Reliance was placed on the GP records. It was submitted that the need for significant correctional surgery to avoid life-long pain and anguish is of '*utmost prominence*' when considering the issue of disability status. It was submitted that the impairments were "*significant enough to cause effects out-with the "norm"*". Reference was made to the Equality Act 2010 Guidance. It was submitted that the effects were cumulative; had a combined effect; and were deemed to be likely be progressive, with reliance on the content of the GP report.

48. Not all of what was said in the claimant's representative's submissions was supported in evidence. There was no evidence on the extent of the limitation on standing or sitting. There was no evidence of any difficulty getting dressed. Reliance was placed on the claimant's problems choosing clothes to wear, her anxiety and the physical pain. It was submitted that the GP record of the claimant's report that she often felt worse after a long day at work was consistent with the claimant's evidence before the Tribunal that the effects were "*constant*" throughout a typical day as well as "*draining*".
49. I did not accept the claimant's representative's submission that the claimant had '*mentioned avoiding social situations which may have exasperated her anxiety*'. The claimant did give evidence of difficulties she felt in social interactions, particularly meeting new people, but she did not say in evidence that she had therefore avoided any social interactions. It was her evidence that she required to meet people, often male, in the context of her work duties, and that that caused her to feel uncomfortable. There was no evidence that she took steps to avoid such meetings. The claimant's representative's submissions confirmed that the claimant had interacted with new people '*almost every day in her line of work*'. Reliance was placed on the claimant having to avoid exercising due to pain and embarrassment and these factors contributing to her low mood, in a '*vicious cycle*'. Reliance was placed on the claimant crying often as a result. It was submitted that '*the level of this was not normal*' and that removing the impairments resulted in these effects being removed from Shauna's day-to-day life.
50. In relation to the effects being long term, reliance was placed on the GP records noting back pain in 2010. It was submitted that the effects were progressive and would have continued had the surgery not been carried out. The claimant's representative's submissions were that since her surgery, the claimant no longer suffers with either mental or physical symptoms from these impairments, has no more physical pain, is now able to exercise 4 times a week, feels a lot more confident, and can choose and wear clothes much more freely/normally. It was submitted that the impairments and/or effects would have got worse or lasted for a lifetime should the claimant not have

been given correctional surgery and that the conditions were progressive. Reliance was placed on a significant amount of breast tissue having been removed. It was submitted that without the significant corrective surgery, the impairments and their effects would likely have progressed. Reliance was placed on the claimant not believing that there was anything that could be done about her situation and her position that it took a lot of courage to approach this subject with her GP.

51. Both representatives made reference was made to the statutory Guidance.

52. It was the claimant's representative's submission that it was not considered that it would be beneficial to appoint external professional reports for the purpose of this tribunal because the claimant believed that anyone assessing her now would not be in a position to get a correct picture, as the symptoms do not exist anymore. It was submitted that only the GP, the surgeon, and the respondent's Occupational Health at the time of operation were able to assess her physically and mentally. It was the claimant's position in evidence that she had not been examined by Occupational Health.

53. In summary, the respondent's representative's position was that the claimant had not brought sufficient evidence to show that the extent of the effect of the macromastia was so substantial that she met the definition of a disabled person in term so the Equality Act 2010. She accepted that she had not challenged the claimant's evidence on the extent being '*life changing*'. She placed reliance on the claimant's evidence being that there was an effect on the clothes she chose to wear (not on carrying out the activity of shopping) and on her ability to partake in high impact exercise. It was submitted that high impact sport was not a normal day to day activity. It was submitted that the impact on the claimant's day to day activities was not substantial. It was submitted that there was no evidence of the condition being progressive. Reliance was placed on there being no diagnosis of a mental impairment. The respondent's representative submitted that the condition was not long term. Her position was that at the point when the claimant had her surgery, she did not meet the statutory definition of disability.

54. The respondent's written submissions mentioned *Tesco v Tenant* UAEAT/0167/19/00 and *Goodwin v Patent Office* but did not direct me to any particular passage in either authority.

Decision

5 55. The claimant had relied on having both a physical and mental impairment, and having disability status in respect of each. Her representative's position was that the cause of both the physical and mental impairments was the claimant's macromastia.

10 56. While noting that the focus is on the statutory definition, I had regard to the statutory Guidance on matters to be taken into account when determining questions relating to the definition of disability. I considered this Guidance in its entirety. I make reference below to paragraphs in the Guidance which I considered to be particularly relevant.

15 57. On consideration of the Guidance (B4 – B6), I approached the question of disability status on the basis of consideration of the cumulative effects which the macromastia had on the claimant, and her ability to carry out day to day activities. I took this approach because the root of all of what was relied on was the claimant's macromastia and because there was no evidence before me of any diagnosis of any mental health condition. I took into account
20 *Morgan and Staffordshire University* [2002] IRLR 190, and that the occasional use of terms such as "anxiety" "stress" and "depression", even by medical professionals will not amount to proof of a medical impairment, still less its proof at a particular time. I took into account the distinction between reactive depression and clinical depression, as described in *J v DLA Piper*. Although
25 in the claimant's representative's submissions he referred to the claimant being '*depressed*' that was not supported by any medical evidence of a diagnosis of depression, reactive or otherwise.

30 58. It was not contested that the macromastia had an effect on how it been the claimant feel. There was no evidence before me of diagnosis of any mental health condition. There was no medical report on the psychological or

psychiatric effect, or of any separate mental health condition. The GP report refers to *'low mood and anxiety'* and that the claimant *'reported feeling very self conscious about her appearance'*. I took into account that the GP report sets out that the claimant had not seen her GP about low mood until June
5 2017. I noted that the claimant was treated with medication for anxiety in the period immediately prior to her surgery. The claimant's evidence was that that was connected to anxiety at undergoing the surgery itself.

59. Although I accept that the effects of the claimant's macromastia worsened up to the time of her surgery, I did not accept the claimant's representative's
10 submission that that was a progressive condition, in term so the Equality Act 2010. It was not progressive in the sense that a condition such as Multiple Sclerosis or Motor Neuron Disease is, where it is known that that condition will progress to a different stage or stages.

60. I addressed each issue I required to consider in coming to my decision.

15 *Did the claimant have a physical or mental impairment?*

61. I took into account the statutory guidance at A3. I noted that with regard to the question of whether the claimant was a disabled person at the relevant time, the consideration should be on the effect(s) of the impairment(s), rather than the condition itself. The claimant's condition of macromastia was an
20 impairment. I then had to consider the effect that impairment had on the claimant's day to day activities.

62. There was not sufficient evidence before me to support a conclusion that the claimant had a mental impairment. It was the claimant's position that the mental impairment relied on was as a result of the macromastia. I considered
25 that to be significant. In all the circumstances the correct approach was to consider the cumulative effects of the macromastia.

63. The claimant had the physical impairment of macromastia. I then considered the effects of that impairment.

Did that impairment have an adverse effect on her ability to carry out normal day-to-day activities?

5 64. Turning to the effect of that impairment on the claimant's ability to carry out day to day activities, I noted the terms of the Statutory Guidance that I should focus not on what the claimant could do but what she could not do or only do with difficulty.

10 65. On the evidence before me, I accepted that the claimant's macromastia had an adverse effect on her day to day activities, as set out in the findings in fact. The macromastia caused the claimant to have chronic back and shoulder pain. It caused her to hunch. She experienced low mood, anxiety and low self-esteem. It affected her confidence. It caused her to feel self-conscious and embarrassed. She felt embarrassed in social situations, particularly in mainly male environments and when meeting people for the first time. She wore scarves to hide her frame. She had difficulty choosing clothes which fitted and she felt comfortable in. That caused her upset. The claimant
15 cried to family and friends about the effects of the macromastia. She required to change position when sitting or standing for extended periods. She was unable to participate in high impact sports because of the pain and weight of the macromastia.

20 *Was that effect substantial?*

66. This is the key question in this case. I noted the position set out at B1 of the Guidance and section 212(1) of the Equality Act 2010. I noted that that what has to be considered is the effect on normal day to day activities.

25 67. My consideration of this question was hampered by the lack of medical evidence. I had set out in the Note following the PH in June 2019 that medical evidence from appropriate experts can be important in the determination of disability status, particularly where mental impairment is relied upon. The claimant and her representative had chosen not to instruct an expert on the mental / psychological effects of her macromastia.

68. A substantial effect is one which is '*more than minor or trivial*'. The concentration is on what the claimant could not do rather than what she could do. I placed little weight on the respondent's representative's reliance on the claimant being able to undertake her work duties. The test is with regard to normal day to day activities. These was no evidence before me on the duties required of the claimant in her role with the respondent, other than the claimant's evidence with regard to attending meetings. There was no evidence that her chronic pain caused any limitations beyond ability to do high impact sports. I accepted the respondent's representative's submission that there was no evidence of the claimant having any mobility difficulties. There was no evidence of the claimant having any difficulties with lifting or other such physical activities.

69. There was little evidence on the extent of the effect on her social interactions. Although the impact statement contains the sentence "*I would avoid going to social events*" the claimant did not speak to that in her evidence before the Tribunal. There was no evidence before me on the extent of any such avoidance. The claimant was asked open questions about the effects on her and did not mention avoidance of social events. I considered that if the extent of any avoidance had been significant, then the claimant would have mentioned that in her evidence before me. Although she described difficulty in choosing suitable clothes for social events, and her feelings of anxiety, low self-esteem, embarrassment, etc., she did not say that she had avoided going to any events because of her macromastia. I considered that to be significant. The effects of anxiety, low mood, low self-esteem, self-consciousness, embarrassment. and low confidence were psychological effects. There was little evidence, and no expert report, on the extent of those effects on the claimant's normal day to day activities.

70. I have no doubt that the claimant's macromastia had an effect on her. That effect was phycological in respect of causing her anxiety, low mood, low self-esteem and high self-consciousness. There were also physical effects of chronic back and shoulder pain. The fact of those effects was not disputed. In terms of her clinical presentation, it is not disputed that she was assessed

as having a legitimate need for bilateral breast reduction surgery and that a significant amount of breast tissue was removed. In these circumstances, I did not accept the respondent's representative's submission that the effects were '*no more than anyone else who had a specific hang up about their body*'.

5 I considered that to be inappropriate language and did not accept the premise, in circumstances where the claimant's clinical legitimate need for the surgery was not disputed. I did not accept the respondent's representative's reliance on the surgery being '*elective*'. The fact that a surgery is elective does not of itself mean that there is not a clinical need for
10 the surgery to take place. I had to consider the extent of the effects on her normal day to day activities.

71. I noted the respondent's representative's reliance on the claimant being able to carry out her work duties without difficulty. The consideration of the substantial effect is in respect of day to day activities, not work activities. I
15 accepted the respondent's representative's submission that there was no evidence to support the claimant's representative's submission that the claimant had difficulty dressing.

72. I took into account the claimant's evidence in respect of the extent of painkillers taken for her chronic pain.

20 73. There was no evidence of any adverse effect on the time taken by the claimant to carry out any activities (Guidance B2). The evidence on the way in which activities were carried out (Guidance B3) was that the claimant wore clothes to cover her shape, hunched and altered her position when standing or sitting for (unspecified) lengthy periods.

25 74. I took into account B6 of the guidance and the cumulative effects of condition. I considered whether taken together the effects of the claimant's macromastia amounted to the impairment having a substantial adverse effect on her carrying out normal day to day activities. Although the examples in the Guidance are not an exhaustive list, I had regard to the extent considered in
30 those examples to be a substantial effect. On the evidence before me, the cumulative effect of the claimant's macromastia was not in line with the effects

in those examples. I took into account the claimant's evidence that the surgery was '*life changing*'. There was no expert report on the psychological effects and the improvement in the claimant's social interactions since the surgery. There was not sufficient evidence before me to conclude that those effects were substantive in the sense set out in the Guidance.

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75. I placed significance on, and was guided by the EAT's decision in *Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522, EAT*. In that case, the EAT (the President of the EAT, Mr Justice Elias, as he then was, presiding) emphasised that, in assessing an impairment's effect on a claimant's ability to carry out normal day-to-day activities, a tribunal should not compare what the claimant can do with what the average person can do. I considered that to be important with regard to the claimant's representative's submission on the '*norm*'. Rather, the correct comparison is between what the claimant can do and what he or she could do without the impairment. Referring to what is now para B1 of the Guidance, Elias P observed that in order to be substantial '*the effect must fall outwith the normal range of effects that one might expect from a cross section of the population*', but '*when assessing the effect, the comparison is not with the population at large... what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired.*'

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76. Although the claimant's evidence that her surgery was '*life changing*' was compelling, I had to consider the extent of the evidence which supported that position. Following *Paterson* I compared the claimant's ability to carry out normal day-to-day activities with the ability she would have if not impaired. Unusually, I was able to do this literally in this case, because the evidence was that the surgery stopped the effects of the impairment. I therefore placed significance on the claimant's evidence on her life after the surgery. I considered it to be significant that the claimant's evidence on what was life changing was her ability to find and choose clothes which fitted her and her ability to participate in high impact sports and her higher confidence. I took into account the decision of the EAT in *Elliott v Dorset County Council EAT*

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0197/20, which had considered *Paterson*. I noted that I should focus on the statutory definition and on whether the effect on day to day activities was minor or trivial. I sought to identify the day-to-day activities, including work activities, that the claimant could not do, or could only do with difficulty. The only activity which the claimant said in evidence that she could not do because of her macromastia was high impact sport. There was a lack of evidence on the day to day activities which she could only do with difficulty

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77. Both representatives relied on B7 of the Guidance. I took this into account. I accepted the respondent's representative's submissions that there was no evidence that the claimant had difficulty doing shopping. The claimant's difficulty with regard to shopping was in choosing clothes which she felt suitable and comfortable. I considered the evidence on the claimant choosing to wear scarves at work. I considered that to be a coping strategy, as referred to in B7. There was no suggestion in evidence that the claimant's chronic back pain or other effects of the macromastia led to her having any mobility difficulties, other than in relation to time standing and sitting.

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78. I took into account B9 of the Guidance. The claimant's evidence was that her macromastia affected her confidence and caused her embarrassment in social situations, particularly when meeting new people for the first time. There was however a lack of evidence in respect of the extent of the limitations in social interactions which that caused to her. I noted the claimant's representative's comments on the respondent's representative's submissions and that his position was that the claimant '*was a good worker but in her mind she was doing it with difficulty*'. There was a lack of evidence on the extent of any such difficulties.

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79. I was hampered by the lack of medical evidence. I took into consideration the decision of the Northern Ireland Court of Appeal in *Veitch v Res Sky Group Ltd 2010 NICA 39, NICA*, what I had set out in the June 2019 PH Note re. the likely importance of medical records. I took into account the inconsistencies between the claimant's response to the order (impact statement) and her evidence before me (with regard to any limitations on

social interactions and effect on sleep). For these reasons, and on consideration of the Guidance, on balance, I decided that the cumulative effect of the macromastia on the claimant's normal day to day activities was not substantial. Without supportive expert medical evidence and without any evidence of the extent of limitation on social interactions, there was insufficient evidence before me to lead me to conclude that the effect on the claimant's normal day to day activities was substantial.

Was the substantial adverse effect long term?

80. Notwithstanding my decision above, I considered that the effects of the claimant's macromastia were long term. The claimant's evidence that she had suffered the effects of her macromastia since aged 15, until the corrective surgery at aged 27 was not disputed in cross examination. The claimant's GP records record that when the claimant attended her GP about the issue in June 2017 she reported '*several years of concern*'. Although there was insufficient evidence for me to conclude that the cumulative effects were substantial, within the meaning of the Act and the Guidance, the effects were long term, having lasted or be likely to last at least 12 months, had it not been for the reduction surgery. Had the claimant not had that surgery, the cumulative effects of the macromastia would have continued, to at least the extent suffered by the claimant at the time she first consulted her GP about the issue in June 2017. Having regard to the Equality Act 2010 Schedule 1 para 5 and the Guidance at A16, had there been sufficient evidence before me to conclude that the cumulative effects of the impairment (macromastia) on the claimant's normal day to day activities was substantial, then in the period after the reduction surgery, the claimant would have been a disabled person in terms of the Act with regard to any discrimination because of that past disability. I however accepted the respondent's representative's submission that as at the time of her surgery the effect of the impairment on the claimant's day to day activities was not substantial. There was simply not enough evidence before me to conclude otherwise and the onus of proof is on the claimant.

Further procedure

81. The claims under the Equality Act 2010 for discrimination because of the protected characteristic of disability are dismissed because the claimant has not proven that she met the definition of disability in terms of that Act.
- 5 82. The claims under the Equality Act 2010 based on the protected characteristic of sex proceed, as do the claims for unfair dismissal, breach of contract and redundancy payment.
83. Date listing letters will now be issued to fix the Final Hearing on these remaining claims. In their responses, parties should provide information on
10 the witnesses they intend to call at the Final Hearing on these claims.
84. Parties' representatives should now liaise to seek to agree the List of Issues for determination by the Tribunal at this Final Hearing. If either party considers that a further PH for the purpose of case management is necessary prior to this Final Hearing, they should write to the Tribunal setting out their
15 reasons for this request.
85. Case Management Orders will be issued separately in respect of exchange of documents and other preparations for the Final Hearing.
86. It is noted that the previous position was to await the decision on disability status before any participation in Judicial Mediation. Both parties should
20 inform the Tribunal if they wish to now participate in Judicial Mediation.

25 **Employment Judge: C McManus**
Date of Judgment: 19 January 2022
Entered in register: 21 January 2022
and copied to parties