IN THE MANCHESTER EMPLOYMENT TRIBUNAL ('ET')

CLAIM NOS: 2407553/2021
2401493/2022

BETWEEN:

MR. R. WAGENER **Claimant**

and

THE CABINET OFFICE **Respondent 1**

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS **Respondent 2**

POST JUDGMENT REQUESTS

OF THE CLAIMANT

General

1. Judge Aspinall heard the parties to the above claim on 10-13 July 2023 inclusive and delivered her reserved judgment on 12 September 2023.

2. The Claimant requests that the Tribunal provides full written reasons for all of its conclusions, both factual and legal, in accordance with point 30 of *The Employment Tribunals Rules of Procedure 2013.*

3. The Claimant also requests that the Tribunal reconsiders its judgment, in accordance with point 71 of *The Employment Tribunals Rules of Procedure 2013*, taking into account the further points and questions raised in the detailed comments below. (The numbers here relate to the paragraphs in the Tribunal's judgment. The references in square brackets relate to the document numbers of the final bundle, except where stated otherwise.)

4. As there were no stenographic services, the Claimant requests copies of all handwritten notes made by Tribunal members during the hearing, redacted where necessary, in accordance with section 45 of the *Data Protection Act 1998.*

5. Finally, as the matter is in the public domain, the Claimant would ask the Tribunal to rectify the inaccuracies relating to the Claimant that are mentioned below, in accordance with section 46 of the *Data Protection Act 1998,* particularly those that accuse him of mendacity.

Commentary

First Page – The reference to a hearing in chambers on 16 August 2023 is not understood.

2. The Claimant was diagnosed with type 1 diabetes as a 16-year-old boy in March 1978.

2. This summary paragraph should also refer to his diagnosis of ME/CFS, as the Claimant gave this as the ultimate reason for his decision to retire on 30 April 2021.

2. It was not the Claimant's contention that, *'not achieving the full benefit of the pay deal on his pension'* was itself discrimination. The discrimination was the refusal to make the reasonable adjustments to negate the impacts of his disabilities, which prevented him from otherwise accessing those pension benefits.

3. Judge Doyle ruled against the Claimant's reconsideration request on 22 December 2022. The decision was sent to the parties on 6 January 2023. The Claimant appealed to the EAT against this decision on 3 February 2023 and receipt of this was acknowledged on the same day.

4. The statement that the indirect claim only lies against HMRC is a little misleading. The ET1 claim of 13 June 2021 against the CO also mentions indirect discrimination. Unfortunately, this was omitted from the list of issues, due in part no doubt to the Claimant's ME/CFS related 'brain fog' at the time.

6. The Claimant chose not to do so, as the judge warned him that she would have to arrange a lengthy adjournment and consider a costs order against the Claimant if he chose to do so. It is unclear why this would have been necessary, given that both Respondents operated by reference to the same set of PCPs.

7. The phrase here, '*the something arising his section 15 complaint*' does not make grammatical sense. The paragraph needs to explain what did not make sense in the Claimant's claim and why.

14. This is inaccurate. The Claimant said that the records from which the summary was created were maintained contemporaneously on a daily basis. The Claimant did not share them until recently, because he only came across them by accident shortly before the date of the hearing. He had no idea that he had retained a copy of this in one of his archived E-mails.

15. The Claimant objects to the pejorative tone of these comments. He also does not see the point of these comments. 'Do you see that?' is a closed question that requires a 'yes/no' answer, presumably to confirm that they are both looking at the same document. Witnesses are required to answer the question put to them, and if the Respondents' advocate wanted to know the answer to another question, she could easily have asked.

16. The Claimant did not argue that 'the pay freeze amounted to indirect age discrimination', but rather that the freezing of progression pay led to indirect age discrimination, a conclusion endorsed by the case of C Heskett v The Secretary of State for Justice, the day after the Claimant's own case alleging the freezing of progression pay led to indirect age discretion was struck out.

17. This says that the Claimant *'was offered the opportunity to make supplemental comment to his statement, but preferred to do that in response to questions'*. This is false. The Claimant was denied the right to examination in chief and told he could not even look at the notes he had prepared, which contained the questions he would have had put to him by a legal representative.

17. The Claimant was content that he was able ultimately to make most of the points he originally wanted to make, but the approach of the judge took threw him off balance. This, together with the brain fog that people with ME/CFS sufferer from, meant he did not deliver his evidence as cogently and coherently as he would have liked to.

17. A further procedural irregularity arose, because the Respondents' representative was allowed to introduce fresh points after the Claimant's re-examination about the mathematical impact of his pension rises since retirement. Ms Ling was then allowed to cross examine the Claimant for a second time. The judge allowed this, saying that 'the truth was more important than procedure'. This sentiment, however, is conspicuous by its absence in the constant, almost slavish references back to the defectively written list of issues, instead of simply basing the Tribunal's judgment on the facts of the matter and the Claimant's closing submissions.

18. The first sentence here implies that this statement was new evidence presented by the Claimant, implying that it was some kind of change of mind from his previous position. It wasn't. The Claimant simply answered a hypothetical question from the judge, along the lines of, 'Would you have carried on working until 31 May 2023 if you had not had ME/CFS?' When it was suggested by the Respondents' advocate that this was new evidence that was not on his witness statement, the Claimant replied that the Tribunal's directions in drafting witness statements were to limit them to facts, and hypothetical scenarios were not 'facts'.

18. As regards the second sentence, the Claimant explained that he could not mention ME/CFS in his letters before the middle of April 2021, as he had not received a diagnosis of ME/CFS until that date. He then did not feel he could mention it in his reminder and the ET1 to Michael Gove, as he had not led on this issue in his first letter. On reflection, the Claimant admitted that this was a mistake. However, it was not true that ME/CFS was not the actual 'straw that broke the camel's back', so to speak.

The Claimant said that every CCM (Customer Compliance Manager) in the Liverpool office knew of his ongoing health problems, including his new manager, Mark Beadles, with whom he met every week throughout his last year, as Mark was the manager of the CCMs.

The Claimant also said that two days before his final day in work (29 April) he also had a Teams meeting with one of the SCS Assistant Directors, Elaine Povey. She asked him if his poor health was a big reason for him retiring at 60. The Claimant confirmed it was the thing that prevented him from carrying on, as he didn't feel he could provide valuable service anymore. The judge objected that Mark Beadles and Elaine Povey were new names and so new evidence. The Claimant said that was untrue. He had mentioned them to the Respondents before. In the case of Elaine Povey, he said he had mentioned the possibility of calling her when they were discussing the number of witnesses that might be involved.

18. Line 11 cites the fact that ME/CFS was not mentioned in the Claimant's 2018 ET claim. This is frankly an absurd comment, as the Claimant had no ME/CFS symptoms until 2020 and only received the ME/CFS diagnosis in April 2021!

18. This concludes that, as the Claimant originally intended to retire at 60, because of the life-shortening effects of type 1 diabetes, that this must have been the sole reason for his retirement in 2021. This is simply a *non-sequitur.* As the Claimant explained, he originally intended to retire at 60, but when he received the 13.56% three-year pay offer in February 2021, this gave him very seriously pause. He then thought he would have to carry on working for the good of his family. It was only his ongoing poor health and the confirmation in mid-April that these symptoms were due to an incurable long-term illness that would not get better anytime soon, that made him conclude he would simply not be able to carry on working full-time for another two years.

20. The point of all of these observations appears to be to say, "there was nothing wrong with the Claimant and no evidence of the alleged 'brain fog'". The Claimant in his evidence said that he was going through a better spell at the moment. This is very common with ME/CFS, which is characterised by some big highs but even bigger lows, often described as 'boom and bust' symptoms. The worst 'busts' or flare ups are often called 'crashes', which are frequently brought about by a new infection. The Claimant tried to explain this a bit further, but the judge intervened to say that the Tribunal were very knowledgeable about disabilities and didn't require his help.

21. The Claimant disputes that Ms. Martin gave her evidence in a straightforward way. She answered questions very obliquely, forcing the Claimant on more than one occasion to press her for an answer to the actual question he had put to her. This prompted to judge to reprimand the Claimant for being 'aggressive'. The Claimant does not accept that asking someone to answer the question is being aggressive. He also thought then, as now, that the judge should have intervened to ask her to confine her answers to the question that was put to her.

21. The judgment is defective here, because it completely fails to pick up any of the many issues that were brought out by the Claimant during cross-examination, in particular that:

(a) she applied a test of 'special circumstances' when her guidance told her to apply what appears to be a higher hurdle of, 'exceptional circumstances';

(b) she argued these phrases were synonymous, but gave no evidence for this assumption;

(c) she accepted the Employer's Guidance didn't say that it applied to ex-employers, but could not say why it then applied to the Claimant who was an ex-employee;

(d) she couldn't recall the dates of the several high-level discussions she had with Peter Spain, and could not explain why no notes were taken by either party, given the sensitive and litigious nature of the issues involved;

(e) she didn't consult with the pensions lead, Colin Henem; seek medical advice before deciding on the Claimant's medical conditions; speak to the Claimant's manager, Mark Beadles about his ill health; or approach the Treasury, as required by the guidance, when considering a request under 2.24 that she regarded as 'novel';

(f) she did not include the enhanced probability of the Claimant's death in service into her costings, which would arise from the Claimant working on until he was 62, but admitted this would have to be taken into account at some stage;

(g) she could not explain how her final decision could have been made on 1 June 2022 (when she sent the report to her managers), ~~given~~ when the ET3 containing virtually identical wording was submitted a day earlier;

(h) she said that she had no concerns about the Claimant's sick leave, but when asked indicated that she had no idea what the sick leave triggers were for putting a member of staff on 'report', something that could have ultimately led to his dismissal;

(i) she acknowledged that she had misread a report the Claimant had sent her about the life expectancy of type 1 diabetics, which meant that she picked up a figure of 85, which actually related to non-diabetics;

(j) she acknowledged that the life expectancy figure of 69 given by the Claimant was also the average life expectancy figure of 69 in the most recent article (December 2022) on the subject [**729**];

(k) she said in her report that she would have refused the request anyway, as it did not relate to recruitment or retention [**410, 411**], but then contradicted this in her witness statement by saying that she could not say that, '*… rule 2.24 could never be used for anything other than recruitment and retention';*

(l) she acknowledged that she had not even read~~,~~ 4.3 of the Service & Pay Guidance, headed 'Added Years Granted on Resignation' [**223**], which followed on from the section she had applied, which indicated that rule 2.24 could be applied in some circumstances when someone left employment;

(m) she insisted that reasonable adjustments were limited to helping people to stay in work, but could not explain the existence of separate reasonable adjustment provisions in section 61 Equality Act for occupational pensioners;

(n) she could not explain how reasonable adjustments to pension rights that would make them more attractive would not also make earlier retirement more attractive, which would have the opposite effect of keeping people in work, contradicting her assertion in (m) above;

(o) she could not explain how the Claimant would not be 'substantially disadvantaged' if he was forced to buy additional years (24d of her witness statement), whilst healthy comparators were able to carry on working until they were 62, or how such an imposition would not infringe point 85 of the Explanatory Notes to the EA, which reminded employers and others that –

…it would never be reasonable for a person bound by the duty to pass on the costs of complying with it to an individual disabled person.

(p) she did not explain why in relation to her concerns about setting a precedent (24e of her witness statement), she did not consider all of the four circumstances that the Claimant had argued, when taken together, amounted to 'special circumstances' for the purposes of rule 2.24, namely:

(i) having a life-shortening disability that affected only 0.5% of the population;
(ii) the unprecedented freezing of progression pay for 8 years immediately after his promotion;
(iii) having a further, seriously incapacitating, long-term disability, i.e., ME/CFS; and,
(iv) receiving a once-in a lifetime pay offer and pay reforms that took effect just after he retired.

(q) she acknowledged that progression pay had never been frozen like this for as long before;

(r) she accepted that the number of legal challenges this triggered was unprecedented. (As well as the Claimant's 2018 claim, the case of *Mort & Ors v HMRC (ET 2410596-99/13)* in April 2014, and ARC's 2016 action in McNeil & Ors v Commissioners for HMRC [2019] EWCA Civ 1112)); and,

(s) she acknowledged that the 13.56% pay offer was by far the largest she had ever seen – others, she said, were usually in the region of 1% or 2% per annum.

22. This paragraph completely fails to report all of the evidence elicited by the Claimant on cross-examination, in particular Mr. Henem:

(a) agreed life expectancy was an integral part of an actuary's pension scheme calculations;

(b) could not explain why the Treasury could not finance adjustments agreed under rule 2.24, when it did this routinely for end-of-year deficiencies (point 8 of his witness statement);

(c) had no breakdown of the figure of 13.6% relating to disabled staff and therefore could not say how many of those staff had reduced life expectancies (the most common disabilities relate to mobility, sight and hearing issues that have no impact of life expectancy);

(d) acknowledged that rule 2.24 and rule 3.4 of the Employer's Guide refer to different people and different sets of criteria;

(e) acknowledged that the wide ambit of rule 2.24 had not been changed by Parliament, as required by section 2(11) of the Superannuation Act 1972 [**115**],

(f) accepted it did not say anywhere in the Pension Scheme rules that the years added in rule 2.24 were limited to earnings up to the last day of service;

(g) agreed that rule 2.24 still allows to Minister to regard the added years, '*as accruing evenly over the period from the date of entry into the Civil Service until the pension age or over such other period as the Minister may specify';*

(h) contended that the underlined phrase related to the added years, not the calculation of pensionable earnings, even though it makes no difference to what period the years are attributed unless it is to identify the pensionable earnings relating to those periods;

(i) accepted, however, that grammatically there was nothing in the phrase, 'such other period' to limit it to 'past periods' or 'such other period up to the last day of service';

(j) acknowledged there was nothing explicit in rule 4.2 of this Service & Pay Guidance to say that it related to rule 2.24, but argued that's how it had always been understood;

(k) suggested that 4.3 of the Service & Pay Guidance headed 'Added Years Granted on Resignation' [**223**] did not relate to rule 2.24, but perhaps to an out-of-date pension scheme rule, but he also accepted that he was not sure and had no evidence this was the case;

(l) agreed that the 3 examples at point 28 of his witness statement were the only instances of rule 2.24 being requested and applied in the last 25 years;

(m) accepted that his statement about the size of the Claimant's pension and lump sum would have had no bearing on any decision to grant ill-health retirement, contrary to point 39. of his witness statement;

(n) agreed that the Claimant could not have applied for ill-health retirement, as he was in his 60th year when he received his diagnosis of ME/CFS, and ill-health retirement only allowed years to be added to take someone up to their normal retirement age, which, in the Claimant's case, was 60;

(o) accepted that the Claimant might have been treated 'unfavourably' as a result of how the scheme rules worked (44. of his witness statement), but could not explain why this would not amount to discrimination given that the unfavourable treatment arose from a disability; and,

(p) acknowledged that rule 2.24 contained a wide discretion that had to take into account 'individual circumstances' contrary to the contentions he made at 45. of his witness statement.

23. The Claimant said that he was a senior Customer Compliance Manager (CCM), a role which gave him responsibility for all of the UK tax affairs of the world-wide groups of several multi-national entities.

24. The Claimant was 16 when he was diagnosed with type 1 diabetes.

24. In 2012, the Claimant calculated his life expectancy to be 70, compared with the national average for men at the time of 78.

Page 16 onwards

The paragraph numbering has all gone awry here, as the last paragraph before the lengthy quotation was 30. on page 11. As a result, numbers 23. to 30. appear twice. For ease of reference, the numbers below follow the numbering in the judgment from page 16 onwards, but place the duplicated numbers in italics to help avoid any confusion.

24. The Claimant was not absent for 'pandemic reasons' and did not have COVID at any stage before he retired. The Claimant explained to the Tribunal that the sickness absence process in HMRC required a manager to draw up a document on return to work, capturing the dates and reasons for the absence to discuss with the member of staff on their return to work. The staff member was then asked to sign the document to record that he/she agreed the accuracy of its contents. The Claimant explained that his then manager, Chris Gavin, never asked him to do this. As a result, the Claimant did not necessarily accept any of the descriptions that appeared on the EHR system.

The Claimant said he never checked how his absence had been described in EHR, as Chris Gavin was a very experienced manager, and he trusteed him to get it right. He had also had not pressed the point about maintaining a proper audit trail, as he was unwell and didn't want to fall out with his manager over a paperwork issue.

24. The Claimant was also off sick on 24 April 2020, but this has been omitted from the EHR record for reasons the Claimant cannot explain. The Claimant also pointed out that EHR was wrong in saying that the 18 May 2020 to 3 June 2020 was 12 days. It was a 13-day period, as weekends and bank holidays had to be counted for sick-leave purposes.

24. The Claimant's daily records, which the Tribunal declined to look at, show that he also had part days off sick between 8 and 26 June, amounting to a further 4.49 days.

Periods with Sickness Absences	Days
8 June - 24 June 2020	4.29
26 June 2020	0.20
8 Dec 2020	0.19
14 Dec to 18 Dec 2020	1.24
29 Dec -31 Dec 2020	3.00
6 Jan - 15 Jan 2021	1.11
19 Jan - 22 Jan 2021	0.41
26 Jan - 29 Jan 2021	0.30
3 Feb - 8 Feb 2021	0.44
25 Feb - 26 Feb 2021	0.20
Totals	**11.39**

24. The Claimant also had to take the part days shown as sickness absences, which were recorded by the Claimant each day on the workbook (copy below), a copy of which was shared with the Respondents before the final hearing.

Daily time records

As well as being sent to his manager as an E-mail attachment each month, the details from this daily workbook were reported to his manager each week via Large Business's (LB) Time Recording System TRS). Every manager in LB also received a monthly data pack showing how staff time had been spent, both on a team and individual basis. If HMRC has deleted the TRS records, then it is guilty of prematurely deleting personal data, an offence under the DPA.

27. The Claimant does not accept that it was 'widely understood' that a three-year pay deal would be agreed. No evidence to that effect was provided at the hearing, but even if it were widely understood, this would say nothing about the amounts involved or the stagger of the percentage uplifts over each year in that period.

29. Not tests were undertaken to show the Claimant had a viral infection.

30. There are multiple references in the judgment to the Claimant saying to his GP that <u>he thought</u> he had 'turned the corner' in December 2020. As explained at point 20. above, people with ME/CFS experience many 'false dawns' and on a regular basis. They mean little, if anything, however. The headaches and dizziness mentioned here, however, do strongly suggest the Claimant still had whatever he was suffering from, and these are classic symptoms of ME/CFS.

31. The Claimant did not 'understand' there was a 13.56% pay offer; the offer document he was sent told him this in black and white.

35. The Claimant was <u>not</u> assessed by Dr. Beadsworth. He was assessed by one of his registrars, Dr. Hicks [**774-775**].

36. It was Dr. Hicks' letter, <u>not</u> Dr. Beadsworth's letter.

41. This letter also said that its authority to act on behalf of the Minister was based upon *the Carltona principle*, an argument that was abandoned as being incorrect by the Respondent's barrister at the PHR on 17 November 2022.

46. The Claimant has never heard of a 'Mike Beard'. The Claimant said his personnel manager until March 2021 was Chris Gavin, who retired about a month before the Claimant. He was superseded by Mark Beadles, who was also the work manager of the Liverpool CCMs throughout the Claimant's last year of service. The Deputy Director, Matt Blake, worked in Manchester and had virtually no interactions with the Claimant. He also clearly knew little about what the Claimant was doing, because Ms. Martin's report said that he had described the Claimant as being a Corporation Tax Specialist!

46. It is not true that the Claimant first informed HMRC that he had ME/CFS in October 2021. He told his manager, his CCM colleagues, the Assistant Director and all of the colleagues he worked with that he had the condition shortly after he received the diagnosis. The Claimant said this very clearly in his oral testimony on more than one occasion.

46. This refers to Ms. Martin's assessment of the Claimant's calculation of his life expectancy. Her report referred to the following statement: *Amongst those who are currently 65 years old, the average man can expect to live until 83 years old and the average woman to live until 85 years old [**634-635**].*

During cross examination, the Claimant pointed out Ms Martin that these were the national averages for the whole population (not just type 1 diabetics), which were based upon figures provided by the ONS.

The Claimant then pointed out that the following pages of this report [**635** - **636**] went on to look at the position for diabetics. Here the article cited a 30-year study by the University of Pittsburgh that was concluded in 2012, which gave 69 as the average life expectancy for a type 1 diabetic who was born after 1965.

As Ms Martin acknowledged that she had not read the Pittsburgh report or even the abstract to it, the Claimant pointed out to her that the average age of 69 related to people *diagnosed* (not born) after 1965. The Claimant was diagnosed in 1978, so the average age of 69 related to him.

The Claimant pointed out that there had been no more detailed reviews of the life expectancy of type 1 diabetics since the Pittsburgh report, a fact confirmed by an article in December 2022 [**729**]. This referred to the Pittsburgh Report and gave the mean life expectancy for a type 1 diabetic as being 68.5 years as follows (with emphasis added):

<u>Recent</u> estimates of the reduction in life expectancy caused by type 1 diabetes vary from 7.6 to 19 years. Life expectancy estimates for individuals with type 1 diabetes in these reports ranged from approximately 65 years of age to 72 years of age.

The Claimant went onto to point out that as the average figure of 68.5 years included women, who lived 3-4 years longer than men, the average life expectancy for a man with type 1 diabetes was probably about 67. The Claimant thought his blood sugar level control was better than most, but at 8.1 mmols it was not great and strokes in his family indicated to him that his original estimate of 70 had to be reduced, so he revised it to 69. The Claimant put it to Ms. Martin that his estimate was an entirely reasonable one in the circumstances. She didn't reply to this.

The Claimant said that the accuracy of his life expectancy calculation, however, was not the key issue here. The important point was that all of the reports on the life expectancy of type 1 diabetics concluded that they were significantly reduced. The Claimant said that word 'substantial' was defined by section 212(1) Equality Act as 'more than minor or trivial'. The judge intervened at this point to stop the discussion here, telling the Claimant that they 'didn't need him to tell the Tribunal what the law meant'.

46. Ms. Martin's comments about there being no OH referral or report and no application for ill-health retirement are frankly absurd. The Claimant received his diagnosis of ME/CFS in the middle of April 2021, as Dr. Hicks letter of 7 April [**774-775**] was sent to him by second-class post. There was therefore no time between then and his retirement to make an OH report or referral. He also could not seek ill-health retirement as he was in his 60th year, so no years could ever be added in respect of ill-health retirement according to HMRC's own guidance [**755**].

48. The Claimant didn't see Ms. Martin's report dated 31 May 2022 until 22 May 2023, when it was sent to him via Egress with the bundle mentioned in Mr. Leonard's E-mail of that date. The Claimant then responded in detail to its erroneous claims on 26 May 2023.

The date of 31 May 2022 relates to the date that HMRC filed its grounds for defence, which repeats verbatim the main points made in Ms. Martin's report, the day before it was allegedly finalised and sent to her managers!

49. As stated at 21(a) above, Ms. Martin applied a test of 'special circumstances', not 'exceptional circumstances'.

104. The Claimant did not say that the rules of the scheme disadvantaged him. He argued that it was the Respondents' failure to exercise the discretion they had under rule 2.24 (one of the rules of the Pension Scheme) that led to him being disadvantaged.

105-107. This résumé captures very little of what the Claimant said in his 11-page closing submission and says nothing about the legal arguments he advanced.

106. This is incorrect. On the last day when final submissions were made, the Claimant said he was exhausted and felt dizzy and faint and asked for some latitude from the judge. The judge began by using the analogy of frogs and lily pads to emphasise the need to demonstrate causality. The judge said that the Claimant's written submission was defective in a number of areas, in particular on page 9, where he equated 'disadvantage' with 'disability'. The Claimant apologised for this, but reminded the judge that ME/CFS could create a lot of 'brain fog' even on good days.

106. The Claimant then clarified his position regarding causality as follows:

(a) his disabilities meant that he could not carry on working beyond 30 April 2021;
(b) as a result he lost about £15k in his lump sum and £5k in annual pension (the 'disadvantage');
(c) the Respondents refused to exercise the only discretionary power (2.24) that could rectify this;
(d) this was caused by their refusal to apply 2.24 except for recruitment or retention purposes;
(e) this practice discriminated against anyone of retirement age who was forced to leave for disability-related reasons earlier than they would have liked to.

107. The Claimant did not mention *Heskett* in relation to cost issues. He cited *Seldon v Clarkson Wright and Jakes*, and quoted the statement that, 'budgetary considerations ...could not in themselves constitute a legitimate aim…' ([2012] UKSC 16, point 46).

110. Between April and June had 27.29 days off sick according to TRS, as summarised by the Claimant in the document he submitted to the Tribunal on the first day of the hearing:

Dates	Days
6 April to 9 April 2020	4.00
24 April 2020	1.00
11 May - 15 May 2020	5.00
18 May 2020 - 3 June 2020	13.00
8 June - 24 June 2020	4.29
26 June 2020	0.20

This represented about 42% of the 65 working days during that period, as evidenced by the document embedded at point ***24*** above.

114. This states that the Claimant, *'had prepared a Disability Impact Statement which did not address ME.'* This is incorrect. The Disability Impact Statement he provided on 28 January 2023 includes a separate section giving full details of the impact on ME/CFS on his normal day-to-day

activities in paragraphs 30. to 37. Amongst other things, this provides details of the following impacts during the period from June to December:

30/06/2020	31/10/2020	Attempts to return to moderate exercise regime. Each attempt resulted in cold/flu like symptoms, malaise and nausea, which forced Claimant to discontinue these activities.
01/11/2020	23/11/2020	Further attempts to return to exercise routine, consisting of around 30-40 minutes of press-ups, sit-ups and chin-ups.
24/11/2020	09/12/2020	Head 'swimming' followed by a very bad headache that didn't respond to paracetamol or Ibuprofen. Two weeks in bed with regular headaches, acute malaise, and debilitating bouts of nausea. Claimant continued to eat as usual, however, and attempted a phased return to work on 7 December. Claimant went off sick again on 9 December, as symptoms returned with a vengeance.

Regular exercise is an important part of normal day-to-day activities, particularly for a type 1 diabetic. For diabetics, it is part of the carbohydrate-insulin-exercise triangle instilled into them from diagnosis onwards. It is also vital to maintaining good circulation and avoid nerve damage, the common long-term issues arising from type 1 diabetes. It had been part of the Claimant's daily routine for 42 years. The Claimant was also very fit before April 2020 and undertook some quite strenuous calisthenics in the morning and evening every day.

During cross-examination, the Claimant said that from April 2020 he felt ill all of the time; it was just a matter of degree. The worst symptom was post-exertional malaise (PEM). He was very fit before this year, but now he could not perform even a handful of chin ups without repercussions.

The Claimant was asked about his exercise regime during the period from 1 -23 November 2020. The Claimant said he worked well within his previous boundaries, and the 30-40 minutes involved a lot of stretching and relaxation exercises, peppered with some press-ups, sit-ups and chin ups, but only a handful. Despite this, he very soon started to suffer from bad PEM, usually 2-3 days afterwards.

The Claimant concedes that the phrase 'two weeks in bed' could be a little misleading, if read in isolation. It was actually 12 days between 25 November and 6 December 2020, as stated in the sick leave summary he shared with the Respondents, because the annual leave he took on 4 December and the weekend that followed were largely spent in bed as well. When he attempted to return to work on 7 and 8 December, however, he immediately had to go off sick again.

During cross-examination the Claimant repeatedly said that this was not the extent of the impacts on his day-to-day activities either. On most days when he *was* able to work, he had to take extended bed rests during the day, in the evening and at weekends. Doing this effectively gave him no life at all outside of work. Point 33. of the Claimant's Disability Impact Statement also says: *Despite this, during the whole of the year to April 2021 the Claimant continued to feel ill and frequently had to retire to bed at the weekend and after work in the evening.*

The Claimant also stated that PEM was not solely caused by physical exertion. Flare ups in symptoms were also caused by concentrated mental exertion, anxiety and emotional upset, and during his final year in work his mother was constantly admitted to A&E (about 15 times) with dangerously high blood pressure and heart failure symptoms.

114. This concludes that during the period from June to December 2020 the health impacts the Claimant reported were not 'substantial'. It is true that there were only 11.49 days shown as sick leave on the Claimant's daily time records at ***24.*** above, which is about 9% of the working days during that period. It might be argued that this is 'minor' or 'trivial', but when the amount of time the Claimant had to spend in bed during the day, in the evenings and at weekends is taken into account, it is hard to see how such a conclusion could be tenable, particularly when the emotional and mental impacts of this are also taken into account. In addition, the sick leave is still near to 10% and below 5% is generally regarded as 'trivial' in law.

115. There has been no such thing as 'normal working time' in HMRC for several years. Particularly during COVID, staff were allowed to complete their work during any part of the day and/or weekends, as long as they met time and delivery targets. The latter practice triggered several staff concerns at the time, as many would find their inbox quite full first thing on Monday morning!

The Claimant did have to spend several hours (OED, 'more than two, but not many') each day in bed on most days of the week. The Claimant does not understand why the Tribunal appears to effectively be accusing him of lying about this, despite it having no evidence to the contrary.

The Claimant would refer the Tribunal to point **30**. above in relation to his statement that he appeared to have 'turned the corner' in December 2020. It is also unclear why the Tribunal's judgment keeps referring to this assessment, when after events showed that he had clearly not turned the corner; it was just another 'false dawn'.

As an aside, one wonders how the Tribunal would have treated the MP, Dehenna Davison, who recently said she had to retire from her post as an MP due to migraine problems. Would they have told her that many people can carry on working with headaches? The only evidence of the severity of her symptoms would have come from what she told doctors, as there is no medical test that can be performed that can tell a physician you how severe the migraines are. As in cases of ME/CFS, doctors can only ever capture what the patient tells them. However, a Tribunal, particularly one like this one, could easily just dismiss all of this and say, 'we don't believe you'.

Such a tribunal should ask itself one key question~~s~~, 'why would they not carry on working if they could, particularly when, as in the Claimant's case, a once-in-a lifetime pay offer was on the table?' The only reasonable and rational answer to this would be, 'they stopped work because they had to'. The Claimant invited the Tribunal to come to this conclusion in his own case at the end of his closing submission. They appeared to have just ignored this.

116. The opening sentence here says: '*The Tribunal finds that the claimant did not send details of his long rest periods to his line manager at that time.'* This so-called 'finding' is yet another accusation that the Claimant was lying, and it once again is based upon no evidence whatsoever.

The Claimant did send his records to his manager, Chris Gavin every month, as he stated. After doing this for several months, his manager said that he didn't need to see these spreadsheets, he assumed because his manager received the monthly TRS data pack mentioned at point 27. above. However, the Claimant said he wanted to carry on doing so, as it showed his manager how his time was being allocated in greater detail.

As regards the monthly TRS data-pack, these were disseminated to all managers in the LBNW Region. As well as capturing the names of people who had not completed TRS each week, the

packs gave details of time spent in various areas, including sick leave both on a team and individual level. So, Chris Gavin would, or at least, should have been aware of the details the Claimant was recording on TRS, which was a mirror image of the daily records mentioned at 24. above, as the Claimant clearly stated during cross-examination on day one of the hearing.

The Claimant and his manager also had several discussions about this, albeit in general terms. As stated by the Claimant during cross-examination, his manager's response was simply to say, 'just do what you can and don't worry about it'. As the Claimant then said, his manager did not follow many of the sick procedures he was meant to, which was perhaps not that surprising, if only because both of them were approaching retirement. They had also known each other well for decades, and his manager knew the Claimant was far more likely to make himself ill from overworking than 'swing the lead'. In addition, the final year of the Claimant's service also coincided with the height of the COVID pandemic, when managers were encouraged to take a more relaxed approach to sick leave generally.

116. The statement that *'he had expected his manager to record them (his rest periods)'* is false and betrays a complete misunderstanding of the processes in HMRC. Sick leave had to be recorded by the manager on a human resources system for booking leave of all kinds, called EHR. By contrast, TRS was a bespoke LB system for capturing how staff spent their time when they were <u>not</u> on leave. Managers also did not have to capture fractions of days that were less than 0.5 of a day on EHR, so the Claimant did not at any stage expect his manager to translate the details he was given from TRS to EHR. His manager knew when the Claimant had taken more than half a day sick, and there was then a discussion between both of them about the sickness absence in real time. Strictly speaking, there should have been some agreed paperwork regarding this, but this was not done for the reasons explained at ***24.*** and **116**. above.

116. The Claimant would further point out that none of the procedural contradictions alleged here were put to him by the judge, the Respondents' barrister or any of the Tribunal members. It seems entirely impermissible in law to draw negative conclusions that only arise from one's failure to ask relevant questions: 'absence of evidence is not evidence of absence'. If the Tribunal had asked about these matters, the Claimant would have had the opportunity to provide the information he has now given above.

118. The Claimant actually had 2.46 days off due to illness in the 3 months to 31 March 2021, plus 1.27 days due to related medical appointments. The 3.73 days was only 6% of the 64 days available for work, but over 5% is generally regarded as being more than 'trivial' as mentioned at point **114** above.

In addition, the Claimant continued to have to return to bed regularly in the evenings and at weekends, just so he could get through the working week. The Claimant performed well at work, but only because he worked around the clock, as a result of the rests he had to take. He knew, however, as he said during the hearing, that this was not something that he could sustain for another two years without it breaking his health completely.

In view of this, the conclusion by the Tribunal that the Claimant, *'was able to work as normal and carry on his home life'* is a completely baseless assertion. No-one at the hearing had any knowledge of the Claimant's home life apart from him. This is, in effect, another accusation that the Claimant was lying, an attempt by the Tribunal to replace sworn evidence with groundless suspicion and gratuitous assumption.

119. This repeats the statement that the Claimant's Disability Impact Statement does not contain anything about ME/CFS. This is a very bizarre thing to assert repeatedly when the document in question contains a whole section on the subject, so a copy is now provided below.

20230128 Disability Impact Statement

119. This paragraph goes onto say that, in addition, no evidence about the day-to-day impact of ME/CFS was provided by the Claimant in (a) his oral evidence or (b) his witness statement. Both assertions are demonstrably false. As regards (a), for this to be true, it would require one to assume that the Respondents' barrister failed to ask the Claimant anything about the impact of ME/CFS on his day-to-day life!

As regards (b), this referred to ME/CFS, but then cross-referenced to the Disability Impact Statement, which provided full details of the impacts the condition had on his day-to-day existence. The Claimant saw no need to repeat details in one witness statement that were already contained in the other.

In addition, on page 2 of his closing submission document, a copy of which was shared with the Tribunal, and the Respondents, the Claimant said (italic numbers relate to the list of issues):

*As regards ME/CFS, the specialist confirmed the Claimant had this impairment on 7 April 2021 [**1.2.1**]. ME/CFS had had a 'substantial adverse effect' on his daily activities, as he had frequently found it impossible to work for more than two hours a day without feeling ill, and often had to recuperate in bed during the day, in the evenings and at weekends. Despite this, he still had to take 44.39 days off work during the final financial year before he retired [**1.2.2**]. After this, the Claimant received medical treatment, including 1-2-1 counselling, but found this had little effect on his condition [**1.2.3 & 1.2.4**].*

120. This is yet another unfounded accusation of mendacity, namely that the Claimant lied when he said he had told his manager about having ME/CFS. The Claimant definitely told Mark Beadles, his new manager, of the condition shortly after his diagnosis.

The Claimant also did not say that he told his manager this '*on or around 27 April 2021'*; it would have been much earlier, namely the first Monday CCM meeting after he received the diagnosis letter. The date of 27 April 2021 relates to a Teams meeting held between the Claimant and one of the Assistant Directors in Liverpool, Elaine Povey. As the Claimant stated during his oral testimony, she asked the Claimant if his poor health was a significant factor in him deciding to retire at this time. He replied that it was. He felt he could no longer continue and if he tried to, he would be cheating HMRC, as he would no longer be able to provide valuable service.

122. The Claimant has explained his failure to include ME/CFS as a factor in the first ET1 of 13 June 2021 in point **18** above. It was an aberration not to include this, caused in part no doubt to the brain fog that plagues people who suffer from ME/CFS. However, the Claimant's many absences from work in 2020/21 and the diagnosis of a specialist doctor, who attributed those episodes to ME/CFS, remain hard facts that cannot simply be ignored.

In addition, the oversight of not basing an argument on ME/CFS was rectified in the ET1 the Claimant sent to HMRC. The First Respondent was then made fully aware of this before long, as the Cabinet Office (CO) clearly played a critical role in HMRC's decision-making, as evidenced by the several meetings with Mr. Spain and the subsequent referrals to the CO for advice, all of which are mentioned in Ms. Martin's witness statement.

123. Things did get worse in September 2021, but the Claimant was much better then than he was in November to December 2020, when his symptoms made him feel so unwell that he was unable to even get out of bed for 12 days (see ***24***.), and when he attempted to go back to work for two days, he immediately felt too unwell to carry on and had to go off sick for another 5 days in bed (including the weekend).

As a result of the Tribunal's faulty analysis, the judgment here tries to make out a case ~~out~~ for saying that ME/CFS in the Claimant followed a linear descent from May 2020 to September 2021 and beyond. As the Claimant said, ME/CFS does not behave in this way. It follows repeated cycles often described as 'boom and bust' patterns, followed by 'turned the corner' feelings, which sadly turn out to be 'false dawns' (see points **20, 30** and **115** above). Lots of patients feel some improvement in their ME/CFS conditions after two years, but the worst year is always their first.

Looking back over that first year with Dr. Hicks [**774**], the Claimant characterised the impact that ME/CFS had had on his work, as follow: '*He has struggled to return to his work as a tax manager due to being overly tired, finding it difficult to concentrate and episodes of headaches and dizziness'.* This should sound 'substantial' to any fair-minded person.

The Claimant in summary said that, as a result of his poor health, he had to take 44.39 days off sick in his last financial year of service, equivalent to about 1 day or 20% of every week for the whole of the working year, after deducting annual leave and bank holidays. In addition, to even turn in the amount of work he did, the Claimant was forced to retire to bed several hours on most days and he still felt ill all of the time.

The Claimant fails to see how this can be anything other than substantial. Even if one concluded that things were worse in September 2021 (which is incorrect), it does not follow that the debilitating effect of ME/CFS were not 'substantial' at any time before then.

123. This paragraph also contains inaccuracies that exaggerate the situation in September 2021. The comments here appear to be based on the only medical report in this month, which is at [**457**]. This says absolutely nothing about, *'headache and malaise that lasted two days after exertion'*. What usually happens is that PEM arises as a delayed reaction, often occurring 2-3 days after the exertion. This was common for the Claimant and the PEM he experienced could then last for several days or even weeks.

125. This paragraph states that, **'***the claimant had not raised his ME/CFS ill health as an issue at work during 2020 nor at all prior to his retirement on 30 April 2021. He had not requested occupational health referral and had not asked for any adjustments.'*

There is a very good reason why the Claimant did not mention ME/CFS in 2020, as explained on more than one occasion above: the Claimant did not receive a diagnosis of ME/CFS until the middle of April 2021! For the same reason he was unable to mention it in his letter to Boris Johnson of 25 June 2020 and Michael Gove on 1 March 2021.

It is also false to say that the Claimant did not raise the issue of ME/CFS with colleagues at work. There were weekly Teams meetings for all CCMs and at these the Claimant told his fellow CCMs and their (and his own) manager, Mark Beadles, (not Mike Beard?) that he had been diagnosed as having ME/CFS. As stated at points 17 and 121 above, the Claimant also had a meeting with an Assistant Director and CCM, Elaine Povey, (who attended the CCM Teams meetings) at which they discussed the Claimant's ongoing health issues.

There was no time between the middle and end of April 2021 to obtain a response to an OHP referral. Moreover, from his own extensive experience, both as a senior manager and as a recent member of the SLT, he knew that there were no easy Grade 6 jobs – they probably don't exist – and, as the major bread-winner in the family, the Claimant could not afford to consider the only other kinds of conceivable adjustments, namely those involving some form of part-time working.

126. The Tribunal needs to explain the significance of this point. HMRC clearly knew about the Claimant's ME/CFS in October 2021, because he told them about it as being one of the key reasons for him retiring early. And HMRC still refused his request to adjust his added years by 25 months.

HMRC advanced no evidence regarding what they could and might have done for the Claimant to enable him to carry on working. The only way he could have done this would have been by letting the Claimant work much reduced hours, but treating him as still working full-time and disregarding all of the sick-leave trigger points he would have otherwise failed. In all his 37 years of experience, the Claimant never witnessed HMRC showing any of its employees this kind of latitude. It would have been extremely divisive in any set of circumstances. But to allow a senior officer this kind of breathing space, just so he could secure the benefits of a once-in-a-lifetime pay deal, would be very divisive indeed.

Several times in witness statements and in this judgment it has been said that the Claimant could have carried on working. This is false. In addition, the mere ability to carry on working is not an Equality Act test. It is HMRC's test for granting ill-health retirement.

In this case, if the Claimant had somehow been able to force himself to work in a demanding, stressful, high-level role for two years, it would potentially have irremediably damaged his health; increased his stress levels significantly; quite possibly reduced his life expectancy yet further; left him with very little quality of life; deprived him of any real work-life balance; and, perhaps even led to his dismissal due to his, by then, egregious sick record. This would clearly have placed the Claimant at a 'substantial disadvantage' compared with healthy colleagues, who could have continued working without any of these issues and obstacles. This, the Claimant would argue, is what needs to be considered under the Equality Act.

At the hearing HMRC repeatedly stressed the importance of not rewarding staff for not working. Reductions in the Claimant's hours whilst treating him as still working full-time, would clearly have been completely at variance with this principle. Any OHP referral, therefore, even if the Claimant had undertaken this and deferred his retirement, would have been doomed to failure.

128. Ms. Martin did not consult Mr. Henem at any stage, but did not explain why she did not do so (see **21(e)**). She decided instead to meet with Mr. Spain in the CO, but neither of them kept any minutes and she had no idea of the dates or even the number of meetings they had.

135. The judge's summary is only accurate in relation to the actions, and the Claimant maintains there is nothing in his ET1 claims that is at variance with this summary. However, the Claimant also said during submissions that it had become clear during cross-examination that the key offending PCP was the practice by both Respondents of only applying rule 2.24 to 'recruitment and retention' issues. The Claimant argued that this was prejudicial to him and to disabled people generally, where they were unable to carry on working as a result of their disability and the ill-health retirement rules did not apply to them.

136. It should also be remembered here that the Claimant was ill with ME/CFS throughout, a condition which frequently causes brain fog. Why, in these circumstances, one might ask, and knowing all of the facts of the claim, did an experienced judge and barrister go along with an obviously defectively form of words, something which they knew could only ever serve to harm the case of a sick and unrepresented claimant?

138. The CO refused to exercise the free-standing discretion their minister had by virtue of rule 2.24. This essentially was the end of the matter. There is therefore a clear causal link between this decision and the Claimant not receiving the adjustments he had sought from their minister.

The CO's contention that it made no decision at this stage, but merely deferred doing so, ignores the underlying reality. This reality was that the CO refused to exercise its discretion and simply told the Claimant to jump through a meaningless procedural hoop, knowing full well from the outset that they would never endorse such a request, with or without HMRC's support, as the claim did not relate to recruitment and retention. That was what Mr. Spain clearly told Ms. Martin, which is why she stated in her report that, regardless of the impact of Claimant's disabilities, ~~that~~ there were no 'special circumstances' for the sole reason that the claim did not relate to 'recruitment or retention' **[411, 412]**

Ms. Martin tried to row back from that position in her witness statement, by saying at 24b: '*I did not feel the position was definitive and that rule 2.24 could never be used for anything other than recruitment and retention'.* That, however, flatly contradicts the contemporaneous evidence of her report, which is that she sought advice from Mr. Spain, who told her the rule was limited to 'recruitment and retention' per 4.2. of the Pension Guidance.

Ms. Martin then parroted this advice in her report, not even pausing to read the following section of the Pension Guidance, 4.3. [**223**], which related to people leaving employment. She also did not seek medical advice before making a decision on medical matters; speak to the Claimant's manager to clarify how ME/CFS had affected his life and performance; or, approach the Treasury, as required for any claim that was considered to be 'novel' in nature.

Ms. Martin did not consider these matters too deeply, because it was a foregone conclusion from the outset that the claim would be rejected. Why? Because it didn't relate to 'recruitment or retention'. The Equality Act didn't even get a look in.

140. As explained in relation to point **135**. above, the offending PCP here was the practice of refusing to grant adjustments of this kind except in cases of 'recruitment and retention'. This lay behind the actions of both parties. It is not clear why the Tribunal cannot regard this as the relevant PCP, simply because it wasn't articulated properly in an obviously defective list of issues.

It is clear from the fact that the Tribunal had altered some of the key statutory phrases in the list of issues, (point **8** of the judgment), and the fact that the judge said here that she was prepared to modify the PCP, that the Tribunal was not tied down to confining its attention to the original list of issues in arriving at its decision.

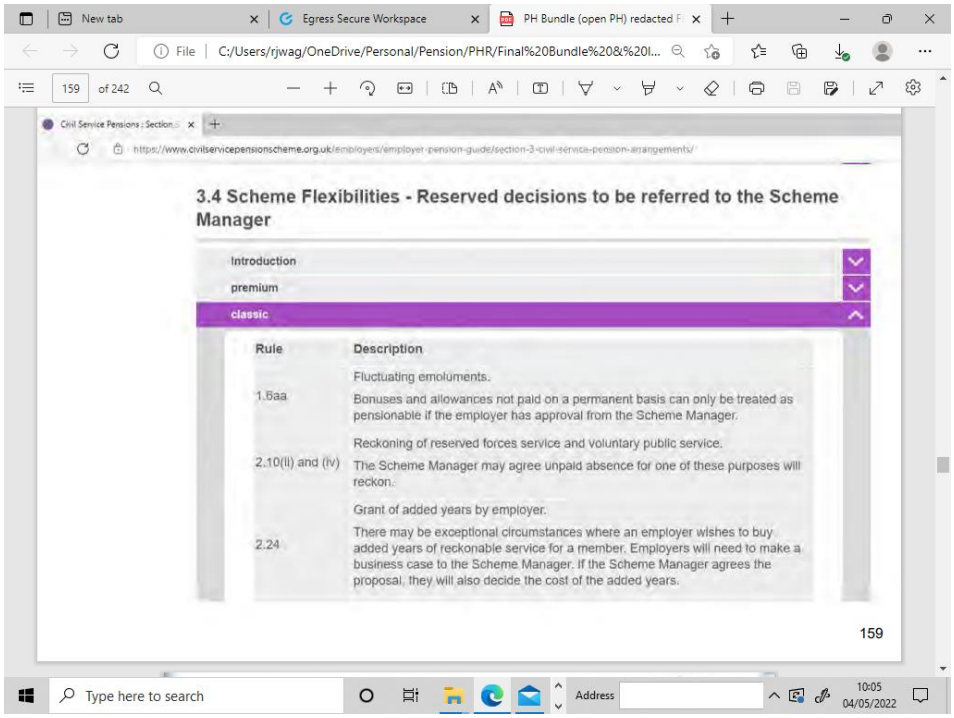
Nor can the Claimant see anything in the guidance for Employment Tribunals that requires them to do this. The Tribunal's overriding duty is to find facts and then apply the law to those facts, not apply the law to an erroneous list of defectively articulated misunderstandings. Here, rule 41 of *The Employment Tribunals Rules of Procedure 2013* states:

The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.

In view of this, the Claimant invites the Tribunal to review its decision about the correct PCP, namely the clearly stated practice by both Respondents that they would not apply rule 2.24 to cases other than those relating to recruitment or retention. This is also not being requested after the hearing, as might be suggested; the Claimant stated this clearly, and on more than one occasion, during his closing submissions (see **106(d)** above).

141. This is not true. The CO knew that HMRC's discretion was limited to 'recruitment or retention', because that is what, according to the CO, their guidance said and the CO had the ultimate discretion throughout. Batting it back to HMRC meant that that was the end of the matter. The CO could have granted added years, as they had a wider discretion than HMRC, as the CO ~~which~~ had no limiting factors relating to recruitment and retention; applied a lower evidential hurdle of 'special circumstances'; and required no contributions from any employer. By creating the pretence of referring the claim back to HMRC, they effectively signed its death warrant.

144. The guidance to which the Tribunal refers here relates to employers who wish to grant added years (extract below on the next page):



Neither this guidance specifically, nor the guidance as a whole, applied to the CO, as the Claimant was not one of its employees. Rule 2.24 is a discretion granted by Parliament to the Minister for the Civil Service, and it makes no requirement for employer support of any kind. In addition, HMRC was not the Claimant's employer at the time of his claim and both parties acknowledged that there was nothing in the Employers' Guide to say that it applied to ex-employees.

If the Tribunal wishes to reject this contention, the Claimant maintains that it needs to explain why it chooses to do this when providing its detailed reasons. The practice of going back to an employer or, in this case, an ex-employer, was something the CO chose to do, not something it had to do by law.

The argument that not doing this here would have created a dangerous precedent is untenable. Any claimant would still have to demonstrate that there were 'special circumstances'. In the Claimant's case, what he claimed to be 'special circumstances' at 23. of his Witness Statement are, taken together, so rare as to be virtually unrepeatable, viz. :

(i) a life-shortening disability that affects only 0.5% of the population;
(ii) the unprecedented freezing of his progression pay for 8 years;
(iii) a seriously incapacitating long-term disability that stopped him working after 60; and,
(iv) receiving a once-in a lifetime pay offer that largely took effect just after he retired.

145. Mr Henem also said that the added years could not go beyond 60 years of age, except in one unusual set of circumstances that did not relate to rule 2.24. Furthermore, the 40-year rule he mentioned did not affect the Claimant at all, as he requested that just over 2 added years to his 37.5 years of service.

In cross-examination, however, Mr. Henem admitted that there was nothing in the Pension Scheme rules to say that one could not add years to take someone's deemed service beyond the age of 60.

During cross-examination, the Claimant put it to Mr. Henem that the CO through its Minister also had the power to interpret rule 2.24 as it saw fit. It was not bound by any guidance it had given to employers. Here, the Claimant referred Mr. Henem to rule 1.14 of the Pension Scheme rules, which said: *'Any question under the scheme shall be determined by the Minister, whose decision on it shall be final'.*

146. Contrary to what this paragraph says, the Claimant was entirely consistent in what he requested which was, as set out in his ET1s. This asked for his added years to be increased by just over 2 years, taking the numerator to something like 39.6 years (37.5 + 2.1). He never asked for 43 years of service, which would have been pointless under his scheme, which is limited to 40 years of service, as stated in point **145** above.

The Claimant also did not ask *'to be in the position he would have been in for pension if he had had his 31 May 2023 salary at 30 April 2020' (*presumably a typing error for 2021*).* He simply wanted his pension and lump sum to be calculated as if he had worked until 31 May 2023.

The Tribunal then concludes: *This was firstly not something the Scheme allowed and secondly Mr Hennem said would have given the claimant something that a non-disabled person retiring on that date would not have been entitled to.*

The first assertion here is false. There is nothing in the Civil Service Pensions Scheme rules that says that pay could never be calculated by reference to a pay agreement that applied in part in the future. Mr. Henem acknowledged this during cross-examination.

The Claimant also put it to him that the plain words of rule 2.24 were very wide and did not preclude pensionable earnings being calculated by reference to the future, as it says that the added years can be attributed to 'such other period as the Minister may specify' (see **22 (i)** above).

Mr. Henem said this phrase related to identifying the period to which the added years of service were attributed. The Claimant does not disagree, but doing this of necessity also identifies the pensionable earnings from that period that would then have to be taken into account in working out the revised pension and lump sum. Furthermore, there is nothing in the plain words of rule 2.24 to restrict the phrase, 'such other period' to the past or to future periods, but only up to the date of retirement.

146. This paragraph also cites with approval Mr. Henem's further objection to granting the adjustments that the Claimant sought, namely that, *'it would have given the claimant something that a non-disabled person retiring on that date would not have been entitled to.'* That, frankly, is absurd. All reasonable adjustments relating to the disabled (apart from those affecting buildings, like ramps) give the disabled something to which non-disabled people are not entitled. The purpose of the Equality Act, as the name suggests, is to create 'equality' not 'uniformity'!

147. The Claimant was aggrieved by the freezing of *progression* pay by George Osborn in 2013, not by the general pay freeze, which he perfectly understood. The freezing of progression pay was illegal, as employees had a contractual right to it under long-standing 'custom and practice' provisions. It was also found to give rise to indirect age-related discrimination in C Heskett v The Secretary of State for Justice.

However, the Claimant's case was not based solely upon some kind of moral crusade, as this paragraph suggests. It was based on the fact that he could no longer work and the plain words of rule 2.24 gave the CO the power to provide a remedy for this by enhancing the pension rights he lost because he was unable to carry on working.

148. The Equality Act is not solely concerned with helping disabled employees to stay in work. There are many separate provisions relating to occupational pension schemes from sections 61-63 of the Equality Act onwards. These protect all of the 'members' of those pension schemes, not just those who are still in employment. If those rules were solely about enabling disabled pension scheme members to stay in work, then occupational pension members who had retired would have no rights under these provisions at all. The Claimant does not accept that this is what *O'Hanlon* is saying, as this case relates to sick pay, not pension rights. It also predates the Equality Act.

In addition, if it were true that the Equality Act was solely about trying to enable disabled employees to stay in work, then the arguments in the case of *Swansea University Pension and Assurance Scheme Trustees v Williams* could never have proceeded, as they related to a member of an occupational pension scheme who had already retired. No such arguments along *O'Hanlon* lines were put in that case. Why? Because they are totally irrelevant. All members of occupational pension schemes have rights under the Equality Act, retired and unretired.

In cross-examination, the Claimant put it to Ms. Martin that if the rights under the Equality Act relating to disabled occupational pensioners were solely concerned with helping them to stay in work, then there would be an obvious logical problem. The problem is this. Any 'reasonable adjustments' to the pension scheme rights of disabled employees would improve those rights and therefore make them more attractive. If they made their pension package more attractive, however, then that would also make retirement more attractive and, in many cases, enable disabled employees to retire sooner rather than later.

It should be obvious that this is pulling members of staff away from employment and nudging many towards retirement. So rather than serving to keep disabled employees in work, reasonable adjustments to pension rights will often have the oppositive effect. Just as an attractive remuneration package encourages people to take up employment, so an attractive pension package encourages older people to retire sooner rather than later. This disproves the proposition that the Equality Act is solely concerned with helping disabled people to stay in work, because improving their pension rights will often have the opposite effect.

150. The Claimant would not have been put in a position of 'betterment' any more than a disabled person who retired on ill-health grounds with 20 years of added years. In addition, the Claimant was not better off. He lost over two years of pay, because he was no longer capable of remaining in employment. He therefore had to use a large chunk of his lump sum to pay off his mortgage and his wife had to return to full-time employment.

153. By refusing to grant the pension adjustments the Claimant sought, the CO left him with only one alternative to obtaining the pension benefits he sought: he would have to work on until 31 May 2023. There is a clear causal link, therefore, between the CO's refusal, and the imperative of carrying on in full-time employment, if the Claimant was to ever secure the pension benefits he was seeking. This is what the list of issues was trying to capture.

153. The Claimant was not offered an opportunity to re-phrase his section 15 claim, but he believes it is clear what he was saying from his ET1s and the closing submissions he made. At the outset of those submissions, he set out, at the request of the judge, what he believed the causal links were. What he said is set out in **106** above.

The Tribunal here seems concerned solely with phrasing rather than the truth, with appearance rather than reality, contrary to the obligations placed upon it by rule 41 of The *Employment Tribunals Rules of Procedure 2013* (see **140** above). Why ask the Claimant to clarify his contentions and then effectively ignore them? And why ~~cite~~ at point **137** cite the following judicial guidance and then ignore it?

The Tribunal had regard to the Claim Forms and Response, to the Equal Treatment Bench Book and the obiter of Ms Justice Simler in Sheikholeslami regarding the "mischief" that a reasonable adjustment claim is intended to address and decided to support the claimant to precisely define his complaint so that his substantial disadvantage was having to go to HMRC for a business case and funding and then not getting their support so he did not get the added years.

In the final analysis, it appears to the Claimant that the Tribunal was solely concerned with a cross-word puzzle of word games, rather than the realities of the situation, which were patently clear to all from the outset. As point **137** of the judgment acknowledges, the Respondent would not have been disadvantaged by any late re-framing of the issues: '*It was clear that the respondent had understood this to be his case and was not in any way disadvantaged by the support afforded to an albeit experienced litigant in person'*. The Respondent's concern, of course, is just to win, by 'hook or by crook'.

For the record, the Claimant had never attended an Employment Tribunal final hearing in his life before. And to the above phrase, 'litigant in person' should be added the words, 'a disabled' litigant in person, and also one whose disability of ME/CFS led to a fair amount of brain fog before and during the hearing. In these circumstances, does the Tribunal itself not have a legal obligation to take this into account and make 'reasonable adjustments' in the Claimant's favour that go beyond the standard legal requirements of *Sheikholeslami?*

154. The mere *act* of 'batting back' was not the Claimant's concern; it is what this meant in reality (see point **141** above). The Tribunal's point about the guidance here has already been covered by point **144** above.

156. The points about the guidance in **144** apply equally to the CO. That guidance did not apply to the CO, as it was guidance to employers and the Claimant was never an employee of the CO. The guidance for employers was one thing; the Claimant's independent approach to the CO under 2.24 is quite another.

As regards the issues relating to intentionality are concerned, point **61** of the judgment cites the following passage from *Pnaiser (*with emphasis added):

> *(b)….An examination of the conscious* ***or unconscious thought processes of A is likely to be required****, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too,* ***there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least***

a significant (or more than trivial) influence on the unfavourable treatment, *and so amount to an effective reason for or cause of it.*
(c) ***Motives are irrelevant****.* ***The focus of this part of the enquiry is on the reason or cause of the impugned treatment*** *and A's motive in acting as he or she did is Case No: 2407553-21 simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. ..*

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, ***the causal link between the something that causes unfavourable treatment and the disability may include more than one link.*** *In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, ***for the "in consequence test" to be satisfied, the connection can be a relatively loose one."***

Here, the Claimant maintains that the refusal to grant the added years adjustments he sought led inexorably to a substantial loss of pension rights, because he was unable to carry on working due to his disabilities. This has been stated plainly by the Claimant from his ET1s onwards, and has only become misrepresented by a badly framed list of issues. Perhaps understandably, the Respondent wants the Claimant to be 'hoist with his own petard', but the Tribunal has a wider responsibility to get at the real truth of the matter (see **140** and **153** above).

This point in the judgment goes on to say, *'The conscious thought process was to apply the Rules and Guidance.'* According to the case law the Tribunal itself has cited, however, this only identifies one reason; it fails to look at others reasons and causes, including 'unconscious' ones. It remains the case, however, that by tying its hands to guidance that relates to employers (not to itself), the CO chose to further circumscribe the application of rule 2.24 solely to cases relating to 'recruitment and retention', thereby excluding disabled people who needed to retire earlier than they would otherwise have wanted to. There is a clear causal link here between this 'treatment' and the disadvantage the Claimant suffered, namely the loss of material pension scheme benefits.

157. The CO's 'treatment' was the refusal to exercise its discretion under rule 2.24. The effect of this decision was that the Claimant would be forced to work until 31 May 2023 to obtain the pension benefits that he was seeking. This was 'unfavourable' treatment, because the Claimant's disabilities prevented him from doing this.

As stated above, the CO's claim that it was actually deferring its decision by, as the judge put it, 'batting him back to HMRC' was quite simply a charade, however, because the CO knew the claim was a complete non-starter and it soon convey~~ed~~ this HMRC as well. The CO therefore prevented the claim from being successful right from the very outset.

157. The Respondent argued that the 'treatment' was the Pension Scheme rules, a contention they advanced so they could argue that the Claimant was seeking 'betterment'. The Claimant had, they contended, received a pension and lump sum under the Pension Scheme rules and his complaint was that he had not received enough. This, they argued, fell foul of the decision in *Swansea University Pension and Assurance Scheme Trustees v Williams*, where it was held that 'less favourable' did not mean 'unfavourable'.

In submissions, the Claimant made two points against this argument. The first was that the Claimant had sought relief under the auspices of a widely worded discretion (rule 2.24) within the Pension Scheme rules, and it was held in *Buchanan v Commissioners of Police of the Metropolis* [**Authorities 421, 422**] that (with emphasis added), '*…where a policy or procedure allowed a significant amount of discretion in its application,* it *would be the treatment which would have to be justified*'.

The 'treatment' for the purposes of section 15, therefore, is the treatment the Claimant received in relation to the discretionary powers in rule 2.24. Here, the Claimant argued that, as he had requested a significant amount of relief under this discretion, but received nothing, this amounted to unfavourable treatment. One couldn't, after all, argue that 'treatment' in section 15(1)(b) meant the discretion in rule 2.24, but the treatment in (1)(a) related to all of the rights under the entirety of the Pension Scheme rules!

The Claimant submitted that his circumstances were also completely different from those of the pensioner in *Swansea University Pension and Assurance Scheme Trustees v Williams.* There the Claimant had received some very large benefits, courtesy of the pensions scheme's discretionary powers, under which he was able to retire early on ill-health grounds, receive his pension straight away and receive more than 28 ~~years in~~ added years! By contrast, the Claimant was given nothing.

The Claimant also pointed out that the *Williams* case had to be regarded as a 'fact and degree' decision, as it would otherwise be capable of an obvious *reductio ad absurdum*. For example, one could not argue that if *Williams* had received say £10 instead of the benefits mentioned above that this would have been something positive, and so would have to be classed as 'favourable' treatment; hence, his complaint under section 15 could be dismissed as a claim for 'betterment'. This is clearly absurd. A derisory offer is an insult and unfavourable treatment.

The fact is that *Williams* does not seek to define 'unfavourable'. It does not tell us what 'unfavourable' is; it simply provides an example of what it is not. Given its provenance, it is tempting to define 'unfavourable' as anything negative in nature, such as a fine or an eviction, as in the case of *Lewisham v Malcolm* that led to the formulation of section 15 in the first place.

Tempting as this might be, the fact remains that the word 'unfavourable' is not defined in the Equality Act. Its meaning must therefore follow its ordinary dictionary definition, modified, if necessary, by the context. Here, page 1938 of the 2010 OED (therefore written at the same time as the Equality Act) provides two definitions:

(a) *expressing or showing a lack of approval or support*; and
(b) *likely to lead to an adverse outcome.*

Completely refusing the Claimant's request shows a complete lack of 'support', and it led inexorably to the 'adverse outcome' of depriving him of a significant amount of pension benefits. It was therefore 'unfavourable treatment' on both counts.

158. The Claimant said early on in proceedings that if he had not been suffering with ME/CFS symptoms, he would have carried on working until 31 May 2023 and, as he put it, 'taken the hit on his diabetes'. That, however, does not mean that there is no 'discrimination arising' in relation to his diabetes as well.

Here, the treatment is the refusal to grant the added years under the discretionary powers contained within rule 2.24. As pointed out in his closing submissions, the corollary of this is that the Claimant had to, either –

(a) work on until he was 62, and reduce his expected retirement time by 22.2% (2/9); or

(b) retire at 60 to obtain a decent number of years of retirement and so forfeit some very major pension scheme benefits.

Both bring about very 'unfavourable' results for the Claimant, which 'arise' as a direct consequence of the Claimant's disability of being a type 1 diabetic.

The Claimant did not assert that he could not have carried on working on as a type 1 diabetic. His point was that this gave him a very 'unfavourable' outcome, which arose as a direct 'consequence' of the Respondent's refusal to grant him the pension adjustments he sought. This unfavourable outcome arose, because his type 1 diabetes 'substantially' reduced his life expectancy.

159. The Claimant has provided ample evidence on sworn testimony that he was unable to carry on working in a demanding, full-time role as a Grade 6 for another two years, due solely to the impact of his ME/CFS symptoms on every area of his life. The Tribunal has provided no evidence that this was not the case, and its 'finding' is based upon mere suspicion that the Claimant was lying when he said (the references relating to the points above):

(a) he would have carried on working to 31 May 2023 had it not been for ME/CFS symptoms (**18**);
(b) he spent several hours in bed most days just to get through the working week (**115**);
(c) he sent his daily time records to his manager every month, which were captured on TRS (**116**);
(d) those records showed sick absences of 44.39 days in the year to 31 March 2021 (**116**); and,
(e) this approach was unsustainable, however. because of the damaging impact it was having on his whole life (**118**).

The Tribunal is, of course, under no obligation to accept what witnesses say at face value, and there is nothing inappropriate, in theory, in concluding that a witness is lying. However, there has to be some evidential basis for this, such as internal contradictions in the witness's testimony or evidence from other sources that is more credible, e.g., because it is more contemporaneous or because it is supported by more than one source or witness.

None of these factors exist here. The Tribunal is therefore simply arriving at a decision based upon groundless suspicions. The Claimant is a devout, practising Christian and regards these statements as a serious slur on his good character, which, if placed in the public domain, will force him to challenge them.

160. Here the Tribunal seeks to relegate his own evidence regarding the impact of type 1 diabetes on his life expectancy to the realm of personal 'beliefs', his decision to retire being (allegedly) a purely financial one that was unrelated to any disability. These are not findings; they are unfounded accusations.

The Claimant provided ample evidence of the 'substantial' impact of type 1 diabetes on life expectancy, providing a report in December 2022 that gave the average life expectancy as 68.5 (see point **45** above).

The Tribunal then goes onto misquote Dr. Weston's statement [592], referring to him as saying that, *'it is not possible to reach a conclusion about life expectancy in an individual case of Type 1 diabetes'.* He said nothing of the kind. What he actually said, with emphasis added was that, *'the increase in mortality is <u>difficult</u> to quantity for an individual'*. However, he also went on to say in relation to the Claimant's detailed calculations, '*I see no reason to contradict his reasoning*'.

It is again untrue to say as the Tribunal asserts here that the Claimant had not revisited his 2012 Mortality Assessment. His Disability Impact Statement shows that he had examined his average blood sugar levels since 2012, full details of which were provided in evidence. He also reviewed all of the most recent literature on life expectancy to arrive at a revised figure 69, which now took into account ~~of~~ the incidence of strokes in his family.

As regards attaining the age of 60, it is true, of course, that as some type 1 diabetics die before this age, taking one's current age into account would improve life expectancy. However, as most diabetics clearly die after this age, the statistical impact of doing this would be small.

However, the Tribunal is missing the point here. Whatever the Claimant's actual life expectancy is, the fact remains that type 1 diabetes 'substantially' reduces the life expectancy of all sufferers, as the reduction on any analysis amounts to several year, as sizeable chunk of any person's retirement. It is therefore clearly a lot more than 'minor' or 'trivial'.

Early on in the hearing the judge tried to dismiss this issue altogether, saying that lots of people have reduced life expectancy because of their weight or their drinking or smoking habits. The Claimant had to intervene to remind the judge that unlike type 1 diabetes, these were not disabilities!

161. This point begins by saying that other people with type 1 diabetes might have different beliefs about life expectancy, and may take different career choices about their retirement, including ill-health retirement.

The Claimant fails to see the relevance of any of this. The statistical facts about the life expectancy of someone with type 1 diabetes are well documented and were well evidenced by the Claimant during proceedings. What individual diabetics believe is irrelevant.

The Claimant also doubts any type 1 diabetic would be looking to enhance the probability of them dying at work! Furthermore, ill-health retirement is not an option just because someone has type 1 diabetes. The test for ill-health retirement is that a person is so ill that they cannot undertake any work at all. Ill-health retirement also wasn't an option that could be considered by the Claimant in any event, because he was in his 60th year~~s~~ at the time (see point **46.** above).

As explained in point **158**. above, any choice by a type 1 diabetic would place them at a substantial disadvantage compared with a non-disabled person, because they would either have a much reduced retirement and pension receipts, or they would lose out in terms of salary, and, in this case, the very significant pension benefits that flowed from a once-in-a-lifetime pay agreement.

The final sentence is yet another complete *non sequitur*. The fact that the Claimant paid close attention to the financial implications of his decisions, does not mean that it was not his disabilities that caused him to make his final decision. How could one conclude otherwise, when the Claimant lost so much 'financially' by retiring at 60, forfeiting large salary increases and the resulting pension benefits? The truth is that the Claimant shot himself in the foot financially, with the result that he had to use a good chunk of his lump sum to pay off his mortgage and his wife had to return to full-time work. The Claimant explained all of this during cross-examination and added that he had felt a huge amount of guilt about this, and still does.

The Claimant also explained how, for two whole months before he finally decided to retire, he agonised over the decision about when he should retire. It was his ongoing poor health and then the diagnosis of ME/CFS that eventually tipped the scales in the direction of retiring at 60. Once again, the Tribunal is simply choosing to reject the Claimant's testimony and replace it with their own unevidenced assumptions about what he was thinking.

162. The Tribunal here states in relation to 'legitimate aims' that, '*There was little focus on this part of the case in cross examination or in submission.'* This is another falsehood. The Claimant's submission paper contains 2-3 pages on legitimate aims, which are captured below:

Submissions re Legitimate Aims.pdf

Apart from the untenability of some of these aims, the Claimant's main contention was that all the Respondent had done in relation to justification was to list some aims. However, it had done nothing to prove that these aims were legitimate - (some appeared to be purely about cost) – or, as required by the legislation, to '*show that the treatment [was] a proportionate means of achieving'* those aims. No statistical evidence was provided to show that the alleged impacts were real rather than imagined, and no evidence was offered regarding alternative ways of tackling the concerns that these points allegedly raised, e.g., by simply tightening up the guidance or perhaps the wording of rule 2.24.

The Respondents' main contention was that agreeing to the Claimant's request would have created a serious precedent. The evidence provided by the Respondents was limited to the fact that 13.6% of Civil Servants were disabled and the potential issue of life expectancy among this group of people. However, no breakdown of this disabled group was provided to show how many of the disabled staff had substantially reduced life expectancies as a result of their disabilities.

The Respondents could have provided anonymised OHP and other internal data to provide a breakdown of this group of 13.6%. This would no doubt have confirmed that most of the disabilities had absolutely no impact on life expectancy and instead related to hearing, sight and mobility problems. Alternatively, the Respondents could have applied the national % averages for all disabilities that substantially reduced life expectancy and applied that to its own statistics to obtain a weighted mean.

The Claimant maintains that doing this would have produced very low figures for disabilities that have substantially reduced life expectancies. For example, type 1 diabetes, still only affects about 0.5% of the UK population.

However, this is not the end of the matter, because, as pointed out at **21(p)** and **144** above, the Claimant's contention that his circumstances amounted to 'special circumstances' for the purposes of rule 2.24, does not rely solely on life expectancy. It is based upon the combination of four factors, which, if taken together, would be extremely rare circumstances indeed.

In addition, it is worth stressing, as the Claimant did during submissions, that rule 2.24 is entirely discretionary in nature. Any claim would therefore stand or fall on its own facts, so it is hard to see how any individual claim could create a precedent of value to someone else. These claims are also very rare, with only three in the last 25 years. So the argument that adding 25 months to the Claimant's pensionable service would have opened the floodgates to further claims, is as fanciful as it is fictitious.

162. The judgment here also states that agreeing adjustments of the kind the Claimant sought would favour disabled people over the non-disabled, or favour people with type 1 diabetes over those who did not have the condition. This is a very bizarre reason for refusal. All reasonable adjustments of this kind give something to the disabled that others do not have. This is done to create a more level playing, replacing uniformity with equality. Those who were not in the Claimant's position did not need the adjustments he sought; they could simply carry on working. And by so doing they would earn £10,000s more than the Claimant in salary. So, at the end of the day, the Claimant would still have been financially disadvantaged compared with people who did not have his disabilities.

165. The Claimant does not understand the point being made here, so perhaps this could be clarified. Employers' Guide 3.4 contains a 'rule' relating to circumstances where employers wish to grant added years to an employee. The Claimant can see nothing inapposite in referring to it as a 'rule'.

166. This says that, '*The claimant's complaint was that the respondent should have adjusted what it considered to be "exceptional circumstances" to fit his case.'* This is false on two counts.

Firstly, HMRC's decision-maker, Ms. Martin, actually applied the test of 'special circumstances' (which appears in rule 2.24) [**406** et seq.]. She explained in cross-examination that she did this because she saw this phrase as being synonymous with the term 'exceptional circumstances' in the Employers' Guide at 3.4 (see **21(a)** above).

Secondly, it is false to say that the Claimant was asking HMRC to go beyond the ambit of its guidance. The Claimant's contention throughout was that the four contributary factors amounted to 'special circumstances', as clearly stated above at **21(p)** and **144** above, as well as 23(a) of his witness statement. The Claimant saw 'exceptional circumstances' as a higher hurdle, but as HMRC regarded the two phrases as synonymous, it cannot be argued that he was asking HMRC to go against the guidance in question.

167. This is incorrect again on the 'exceptional circumstances' point.

171. This is incorrect again on the 'exceptional circumstances' point. The decision document was also a 'report' not a 'letter'. The Claimant was never sent a copy of this report until it was sent to him a year later via Egress in preparation for the final hearing (see **48** above).

172. The statement that, '*the claimant had not specified these figures*' is incorrect. The Claimant provided detailed calculations for his revised lump sum and pension in his ET1 [**37**], together with the additional cost of meeting his request.

173. This says that, *'Ms Martin took into account the only medical report provided by the claimant which was dated 7 April 2024 and confirmed the ME/CFS diagnosis*.' The date should, of course, read 7 April 2021, but it is worth adding that this also confirmed he had type 1 diabetes, and the Claimant also provided HMRC with the most recent medical evidence regarding its impact on life expectancy. In addition, HMRC did not request any further medical evidence and Ms. Martin sought no medical advice, despite clearly having no expertise in this area of her own.

174. This sentence does not make grammatical or logical sense, '*She took into account in her determination that he could need meet the CO special circumstances test that he would not be continuing in work, he had already retired.'*

174*.* This goes on to say with references added: '*It was her view that (a) reasonable adjustments are to support people to remain in work who otherwise could not do so. She also considered that (b) he could have worked on to 31 May 2023 or (c) bought the added years himself.'*

In relation to (a), the Claimant put it Ms. Martin In cross-examination that this was wrong for the reasons given at **148** above. She gave no response to this, other than to say that she did not accept that improving the pension rights of disabled people nearing retirement would make it less likely for them to remain in work. However, she did not explain how she came to this conclusion.

As regards (b), this assertion was based upon no evidence or medical advice whatsoever. In cross-examination the Claimant asked Ms. Martin why she did not believe the Claimant when he said he was at the end of his tether and could no longer work. She gave no answer. (She would presumably have dismissed Dehenna Davison's claim out of hand as well – see **115** above).

In relation to (c), in cross-examination, the Claimant read out this section of Explanatory Note 85 to the Equality Act, which said –

…it would never be reasonable for a person bound by the duty to pass on the costs of complying with it to an individual disabled person.

The Claimant put it to Ms. Martin that by suggesting he should have forked out more money to buy added years amounted to her passing on the costs of complying to him. She denied this, but again didn't explain why she thought this. It is, however, a conclusion that cannot be avoided.

175. The points about favouring disabled employees are covered at **162** above, and the precedent related issues are covered at **144** and **162** above.

177. *The Tribunal found anyone who was not supported with a business case and funding whether disabled or not would suffer the same disadvantage of not getting the added years.* Once again, the Tribunal is championing uniformity over equality (see **146** and **162** above).

178. This point is covered in **166** above.

179. It is very hard to conclude that 'cost' was not a primary reason for Ms. Martin's decision, when the very first thing she and Mr. Spain did was to work out the cost! As regards precedents, these would only ever be a problem if collectively (a) they cost too much, and (b) even the wide

discretionary powers in 2.24 didn't enable the CO to refuse them. Given the points made above regarding the risks of setting a precedent (see **162**), it is hard to see how either (a) or (b) could arise, let alone both of them.

180. It is clear that merely possessing a non-discriminatory reason for a decision does not mean it is not susceptible to challenge. The issues of motives, reasons and causes in relation to section 15 is covered by point **156** above. The rulings cited here make it clear that there can be several reasons or causes; the discrimination-related issue does not need to be the main one; and the chain of causality can also be quite a loose connection.

As regards section 19 and 20, the PCP in question only needs to put a disabled person at a 'substantial disadvantage' for it to amount to discrimination. The reasons for so doing will only avoid a charge of 'illegal discrimination', if it can be shown that the PCP was a 'proportionate means of meeting a legitimate aim'. And the 'aim' or 'reason' for the PCP will only be 'proportionate' if it is reasonable and balanced, and could not have been addressed in a less discriminatory way.

Here, the Tribunal has not considered whether Employers Guide 3.4 is reasonable. The fact that it has only given relief to three employees in 25 years, none of whom was disabled would suggest that the application of 'special circumstances' is being applied in an extremely restricted and prejudicial way.

This is also confirmed by the fact that in her decision Ms. Martin firmly ruled out any adjustments under Employers Guide 3.4 unless it helped them with their recruitment and retention. So, no help then for disabled people who are unable to carry on working!

184. As stated in 180 above, it is not necessary to show that the disability related reason or cause was the 'paramount factor'. It was clearly a factor, as the Claimant said he could not carry on working due to one of his disabilities, and HMRC reviewed the medical information relating to his disabilities in arriving at their decision. They did so, however, without taking any medical advice, talking to his manager or approaching the Treasury. They did this, because from the outset they had, of course, completely ruled out giving any help to people leaving work due to a disability, because doing so would not have supported recruitment or retention. Nevertheless, the disability issues affected, and are affected by, the decision.

185. This says that, *'…not being able to work through to 31 May 2023, did not arise in consequence of his disability.'* It is not clear to which 'disability' this assertion relates, but it is clearly contradicted by the numerous pieces of evidence provided by the Claimant, e.g., the 44.39 days of sickness absence, and taking bed rest several hours on most days just to get through the working week (e.g., **118** above).

186. This repeats several inaccurate and inapposite comments made earlier in the judgment, which are covered below in order of their appearance.

(a*) The claimant has not established in relation to either diabetes or ME/CFS that he could not have worked on to 31 May 2023.*

The Claimant never sought to show that diabetes physically prevented him from working until 31 May 2023. He stated that doing so placed him in an invidious position due to the substantial impact diabetes had on his life expectancy (see **158**. above).

As regards ME/CFS, the Claimant reminded the Tribunal that only the individual in question can say what they are suffering and what they are capable of doing. Doctors' records merely capture what the patient tells them. In this case, the Claimant said, both during oral testimony and during final submissions that he was at the end of his tether and could not carry on working. He had taken 44.39 days off work sick in the year to 31 March 2021, and had to take bed rest for several hours on most days, just to get through the working week. He said that if he had tried to carry on in a demanding, full-time job for over two years, it would have broken his health, raised his stress levels through the roof, given him no quality of life or work-life balance and possibly reduced his already significantly reduced life-expectancy yet further.

The are two problems with the Tribunal's position. Firstly, it refuses to accept this testimony, but puts forward no evidence that it is not true or might not be true. Secondly, it appears to be adopting the stance that a disabled person who is suffering intolerably has to carry on working, come what may. As well as being inhumane, it is hard to see how this accords with the fundamental principles of the Equality Act.

(b) *He had good attendance and performance, he had not told HMRC about his ME/CFS until after his retirement.*

Sick leave of 44.39 days in 12 months is not good attendance. Had it not been for COVID and the fact that both he and his manager were nearing retirement, he would have been placed on formal review under the Management Poor Attendance (MPA) procedures.

It is also false to say the Claimant had not told HMRC about ME/CFS until after his retirement. The details of what he said to colleagues and his manager, Mark Beadles, are set out above at points 18, 120 and 125. The details of what he said to one of Assistant Directors, Elaine Povey, is covered at points 17, 120 and 125.

(c) *He had not asked for OH referral or any reasonable adjustments to accommodate any emerging symptoms of ME/CFS in April 2021.*

This is correct, but as he had only received his diagnosis 2-3 weeks before he retired, there was no time in which to do this.

One might argue that the Claimant could have halted his retirement plans to explore what 'reasonable adjustments' might be on offer. However, there was literally nothing that could have been offered that would have helped the Claimant. From his own extensive experience, both as a senior manager and a recent member of the SLT, he knew that there were no easy Grade 6 jobs around - they probably don't exist. And as the major breadwinner in the family, he could not afford to consider the only other kind of adjustment, i.e., one that involved part-time working.

It is interesting in this context that not once did Ms. Martin offer any suggestions about what they could perhaps have offered the Claimant in terms of reasonable adjustments so that he could have remained in work. The only suggestion that was made over the four days of the tribunal hearing was that he could have worked part-time. As stated above, this was a non-starter for financial reasons. His wife earned little and they still had a mortgage to pay.

(d) *He [the Claimant] told the Tribunal that he had done the sums and worked out what his financial position would be if he applied for early ill health retirement and if he worked on to 31 May 2023 on a part time basis.*

This is a work of pure fiction. The Claimant never said either of these things. He could not have applied for ill-health retirement, because he was 60 (see 17, 120, 125 above), so he never gave this a first thought, never mind a second one! He also never thought about working part-time, because the drop in income would have been far too steep for his family to be able to 'make ends meet'.

(e) *His decision making was financial and did not arise out of an inability to work for either or both diabetes or ME/CFS reasons.*

As stated above at point **161**, this is a *non-sequitur*, as it is perfectly possible to undertake something for more than one reason. It is also an untenable conclusion to come to, when the effect of the Claimant's decision to retire at 60 had such a negative impact on his finances, forcing his wife to work full time and forcing them to use a good chunk of the Claimant's lump sum to repay the mortgage. The Tribunal's conclusion is effectively saying that the Claimant retired at 60 because he wanted to shoot himself in the foot financially!

(f) *He was undoubtedly unwell and had his diagnosis of ME/CFS on 1 April 2021 by telephone consultation but the claimant worked in April and did not, the Tribunal found, tell his managers that he was too unwell to work. He took no sick leave and there were no performance issues.*

The diagnosis was made in a letter of 7 April and the Claimant received it on or around 12-13 April, as it was sent second class and there were postal delays at the time due to COVID. The Claimant did tell his manager, however, and an Assistant Director, as stated many times (see (b) above).

The Claimant did also have some time off sick in April 2021. The only records for April 2021 that the Claimant has retained extend to 23 April 2021 (copy below). However, these record 1.54 days sick out of the 18 net days, after deducting annual leave and bank holidays, i.e., 9% of his net time. This is fewer than his average absences over the last year of service, due no doubt to the fact that the Claimant was running down to retirement and there were very few, if any, work pressures in that month.

Time Records April 2021

187. This concludes that, **'***Neither his ill health nor alleged inability to work on to the end of the payment period on 31 May 2023 caused Ms Martin not to support him, not to consider his case an exceptional circumstance.'*

That is incorrect. Section 15(1) only requires a Claimant B to show that *A treats B unfavourably because of something arising in consequence of B's disability.* Here, the Claimant was seeking added years, because he could not carry on working due to his disabilities. HMRC refused to support the request for added years, because they were not prepared to use rule 2.24 to assist people leaving the Department. Understandable though this might have been in other cases, in this case the need to stop working was something 'arising' from the Claimant's disabilities.

188. This point erroneously repeats the earlier point that, '*There was little focus on this part of the case in cross examination or in submission.'* This is refuted by the evidence provided by 162 above. And again, it is not enough to just list aims you think are legitimate as the Tribunal has

done here. The legislation requires one to show that they are legitimate and demonstrate that they are a proportionate means of meeting that ~~a~~ legitimate aim. The Respondent made no attempt to do either of these things.

188. The Tribunal has a problem with its suggestion that HMRC applied the wrong test of 'special circumstances'. Firstly, it must mean that 'special circumstances' and 'exceptional circumstances' are not synonymous, contrary to what Ms. Martin said in cross-examination (**21 (b)** above).

Secondly, this creates a contradiction in the Respondents' case. The Claimant has argued all along that 'exceptional' was a stronger intensive than 'special', which, if true, would mean that HMRC would had to apply a higher hurdle than CO when considering a claim that was referred to it. This cannot make an ounce of practical sense. You cannot apply a higher-hurdle test firstly, as that would prevent you from ever applying a lower-hurdle test later on in the process.

194., 195. As acknowledged in point **193** of the judgment, for the purposes of section 19 et al., the Equality Act requires there to be 'no material difference' between the comparators, other than the protected characteristic, which section 5 explains means the particular disability in question. The Claimant has two disabilities, so each of these needs to be considered separately.

The comparator group for the purposes of type 1 diabetes would have to exclude anyone who had a substantially life-shortening disability, as the claimant argued during submissions. Anyone outside the group of people with that kind of disability would enjoy a much smaller reduction in retirement and pension receipts in relative terms, if they worked on until 31 May 2023. For the Claimant two years represented 22% of his retirement and pension receipts (2/9), but for someone with an average life expectancy of say 80, this would be only 10% of their retirement.

The comparator group for the purposes of ME/CFS would have to exclude anyone who did not have this or a similar condition that meant they were no longer able to work. It is not clear if this would be an acceptable group, however, as it appears to be defining a disability entirely in terms of the disadvantage that arises from it. If the group were confined to people with ME/CFS, however, this would also be problematic, as this encompasses a broad range of symptoms of vastly different severities, which can also vary significantly over time. The Claimant was quick to acknowledge these difficulties during his final submission.

Here, the requirement to remove all other material differences, means that Pool A is too wide, as it is insufficient for the comparators to just to be retiring at the same or a similar time as the Claimant. They would also need to be of retirement age, so that they, like the Claimant, could not apply for ill-health retirement.

In addition, there would have to be no material difference in their position on the pay scale. If comparators were on their maximum pay, for example, the pay offer in February 2021 would have made very little difference to their pension benefits. This is important, as it is the impact on the Claimant's pension benefits, due to him being kept near to the bottom of his pay scale for 8 years, that is the reason he requested added years to be calculated by reference to the February 2021 pay offer.

201. If the comparator groups are drawn up as indicated in point **194, 195** above, then there must be a disadvantage to the Claimant and other members of his groups. They would either be unable to access the pension benefits in question, due to the way the PCP operated, or, in the case of

type 1 diabetes, they would only be able to do so by suffering a far more significant impact on their retirement and pension receipts than comparators. The comparator groups, by contrast, would be able to work on to 31 May 2023 or retire at 60, with much less impact in relative terms on the length of their retirements and the amount of pension they received before they died.

These results also directly spring from the way in which the PCP operates. In practice, as confirmed by both Respondents, the PCP rules out years being added under rule 2.24, except in cases involving retention or recruitment. Those members of staff who needed to leave the Department would include far more people with life-shortening disabilities or debilitating ME/CFS symptoms, so the PCP would have an adverse effect on a much higher percentage of disabled people than those seeking to retire for other reasons. These points were made during exchanges with the judge, when she asked the Claimant about this during submissions. It is disappointing, therefore, that, yet again, important evidence and contentions have simply not been captured and properly considered in the Tribunal's judgment.

202. The quotation from the Claimant here had nothing to do with comparators; the comment in question was made in relation to the potential concern that admitting his claim might set a dangerous precedent and open the floodgates to further claims relating to rule 2.24.

In addition, the Claimant *did* provide statistics regarding the number of people in the UK with type 1 diabetes and ME/CFS. In his submissions document he said:

As regards the disability factors, type 1 diabetes affects about 0.5% of the population and the Claimant believes that no other disabilities foreshorten life expectancy to this extent. ME/CFS involves even fewer people in the UK, affecting only about 0.3% of the population.

The Respondents' figure of 13.6% covers all disabilities and the analyses the Claimant saw as a member of the SLT, which included working on a department wide Equality Act problem solve, indicated that the vast majority of people in this group had disabilities relating to sight, hearing or mobility. No breakdown was provided by HMRC to confirm this during the hearing, but if the Civil Service is broadly representative of UK society as a whole, then the number of Civil Servants with type 1 diabetes and ME/CFS should both be less than 1% of the total.

203. Ms Martin is quoted here as saying that acceding to the Claimant's request would set a dangerous precedent that would, *'allow anyone leaving service during a payment period of a pay deal to potentially claim added years to put them in the position they would have been in if they had worked through the payment period.'* This is clearly false. It would not allow anyone to make a claim under rule 2.24, as they would have to meet the stringent test of showing that their claims involved 'special circumstances'.

203. *The Tribunal was satisfied on her oral evidence that a non-disabled or otherwise disabled than with Type1 diabetes/ CFS would have experienced exactly the same application of the exceptional circumstances test and decision-making outcome as the claimant/a person with the claimant's disability.*

Once again, the Tribunal appears here to be championing uniformity rather than equality. The fact is that a non-disabled person would not be put in this position in the first place, because they would have choices, unlike someone whose disability meant they could no longer work.

The judge argued that a comparator with a terminally ill spouse might wish to retire at 60 to take care of that spouse. Having a terminally ill relative, is, of course, a 'material difference' for the purposes of section 23(1) of the Equality Act, so this is an invalid point. In addition, the Claimant pointed out that such a person would still have had choices, including hospice care, home help and perhaps working at home. Someone with debilitating ME/CFS symptoms, who could no longer carry on working, would not have any choice but to stop working.

204. The Claimant did not have to adduce data, as the Respondents had already done that. There were four applications for added years in the last 25 years. Three of these related to recruitment/retention and these were agreed, and one, the Claimant's, related to added years on leaving the Department, which was rejected.

So, 75% of the claims were accepted and these all related to recruitment and retention and 25% were rejected, which related to leaving the Department. Of the total claims, then, none of the 75% that were accepted involved disabilities. By contrast, the 25% that did seek assistance due to the impacts of disabilities were rejected.

205. This is another finding with no facts or reasoning behind it.

206. Disabled people couldn't be incentivised to leave before their scheme retirement age by appealing to rule 2.24, as this still required them to demonstrate that 'special circumstances' were involved. Being one of the 13.6% disabled people would clearly not be sufficient to do this on its own. Moreover, if someone was unable to carry on working due to a disability 'before their scheme retirement age', they would be able to request ill-health retirement, which would be a much more straightforward, and therefore much more likely, route for them to take.

207. This says that the, '*Pension Scheme Rules set out the categories of application for added years and there was a category for recruitment and retention.'* The Pension Scheme rules do not say this; the Pension Guidance refers to this at 4.2. However, the next section in this guidance also contains a section on granting added years for people leaving the Department [**223**].

When asked about this last point, Ms. Martin said that she did not read that far in the Pension Guidance, no doubt because the CO had not set it as required reading! Mr. Henem said he thought section 4.3 did not relate to rule 2.24 at all, but to an old rule that no longer applied. He acknowledged that he wasn't sure about this, however, and couldn't explain why section 4.3 had not been rescinded a long time ago if that were the case. Those two responses really tell one quite a lot about how well the Claimant's request was handled from start to finish!

Robert Wagener
The Claimant

25 September 2023