Neutral Citation Number: [2022] EWHC 1588 (Admin)

Case No: CO/1858/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2022

Before:

MR JUSTICE COTTER

- -

Between:

THE QUEEN
(on the application of CHRISTINA EFTHIMIOU

Claimant

- and -

THE MAYOR AND COMMONALTY AND CITIZENS OF THE CITY OF LONDON

Defendant

- -
- -

Zoe Leventhal QC and Katy Sheridan (instructed by Leigh Day) for the Claimant
Clive Sheldon QC and Patrick Halliday (instructed by the Comptroller and City of London Solicitor) for the Defendant

Hearing dates: 23 & 24 February 2022 and further written submissions 4th March 2003

- -

Approved Judgment

Mr Justice Cotter:

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Mr Justice Cotter:

Introduction

1. By a claim filed on 24th May 2021 the Claimant challenges the lawfulness of the Defendant's charging policy for swimming at Kenwood Ladies' Pond.

2. The Claimant's case is that the Defendant, in adopting and refusing to revise an updated charging policy on 24 February 2021 (effective from 1st April 2021) has breached its duty to make reasonable adjustments for disabled persons such as her under sections 20, 21 and 29 of the Equality Act 2010 ("Ground 1"). It is argued that the policy places disabled people at a substantial disadvantage in accessing swimming at the ponds on Hampstead Heath. Also that the Defendant has failed to take such steps as are reasonable to reduce or avoid the disadvantage, despite various requests and suggestions having been made by the Claimant and others. It is argued in the alternative that the charging policy constitutes indirect discrimination against those who have disabilities under section 19 of the Act ("Ground 2") and/or under Article 14 ECHR read with Article 8 ECHR and/or Article 1 of the First Protocol ("Ground 3").

3. Permission was granted on Grounds 1 and 2 on 2nd August 2021 by Peter Marquand sitting as a Deputy Judge of the High Court. He refused permission on the third ground and the application for permission was renewed at the hearing.

Facts

The Ponds

4. There are three bathing ponds at Hampstead Heath; the Kenwood Ladies' Bathing Pond, the Highgate Men's Bathing Pond and the Mixed Bathing Pond.

5. The Kenwood Ladies' Pond has been used by women swimmers since 1925. Of the three bathing ponds, it has historically had the greatest degree of accessibility for disabled swimmers, with level access, an accessible toilet and shower, and a hoist in the pond. In the year 2019/20 there were 655,000 recorded visits to the Ladies' Pond.

The Parties

6. The Defendant manages the Heath as the sole trustee of the Hampstead Heath Charity ("the Charity"). The relevant history was explained by Mr Justice Stanley Burnton in **R (Hampstead Heath Winter Swimming Club) v London Corporation** [2005] EWHC 713 (Admin) [2005] 1 W.L.R. 2930:

> "7. Hampstead Heath has been in public ownership since the 1871 Act, although its area has been supplemented subsequently. The Corporation of London came to manage Hampstead Heath as a result of the abolition of the General London Council. The Heath and the functions previously exercised by the GLC in relation to it were transferred to the corporation by the London Government Reorganisation (Hampstead Heath) Order 1989 (SI 1989/304). The order required the corporation to appoint the Hampstead Heath Management Committee "for the purposes of giving advice on, and implementing, the City's policies and

> programmes in relation to the heath lands". The committee must have at least 18 members, of whom at least six must be neither council members nor employees of the corporation. The order also required the appointment of a consultative committee.
>
> 8. The functions transferred to the corporation included those set out in the Ministry of Housing and Local Government (Greater London Parks and Open Spaces) Provisional Order 1967. They included the provision and maintenance of outdoor bathing places, the enclosing of such places and the preclusion of entry by unauthorised persons and in the interests of the safety of the public. That order was subsequently confirmed by a similarly entitled 1967 Act. 9. The corporation also has power to provide recreational facilities, and in particular swimming pools, under section 19 of the Local Government (Miscellaneous Provisions) Act 1976. The provision of recreational facilities involves their management, and decisions as to who is to use them, when and under what conditions."

7. The Charity's objective is the preservation of the Heath for the recreation and enjoyment of the public. As trustee of the Charity, the Defendant owes duties to act in the Charity's best interests and in accordance with its objectives, and to manage the Charity's resources prudently. The Charity's financial resources are constrained. It incurs substantial costs in conserving the Heath, and providing a range of services and facilities (including an athletics track, an education centre, children's facilities, a bowling green and a lido). In the financial year 2019/20, its expenditure (£9,851,312) exceeded its income (£9,628,345).

8. The Charity's income comes from three main sources: (a) the Hampstead Heath Trust Fund (an endowment for managing the Heath made in 1989) and returns on its investment; (b) funding from the Defendant's 'City's Cash' fund (which is used for various purposes beneficial to the public, extending far beyond the Heath); and (c) income from charitable activities, which consists principally of income from fees charged.

9. There is significant pressure on those funding sources. Recently the Hampstead Heath Trust Fund, and the amount of distributable income it may provide, have been adversely affected by the coronavirus pandemic. The 'City's Cash' fund has been running with growing operating deficits in recent years and in financial year 2021/22, the Defendant has sought to make 12% savings on all services funded by it, including its contribution to the Charity. The Charity therefore needed to achieve additional savings of £526,000.

10. The Claimant, who is in her late 50s, is disabled due to rheumatoid arthritis, chronic obstructive pulmonary disease ("COPD") and depression. She is in receipt of Employment and Support Allowance (ESA), Personal Independence Payment (PIP) and other benefits. She swims regularly at the pond (about 3 times a week or more) and has been doing so for 3-4 years. She explains in her witness statement that swimming is the best exercise for her condition and that:

> "...the ponds have become a large part of my therapy. Swimming in the ponds has become something that I rely on to help me

> mentally, emotionally and physically. Since swimming in the ponds, my mood has improved, my immune system has been boosted as I have not been ill as frequently, I feel better in myself and am in less pain. The impact on my long-term illnesses is huge as I do not need to take as much pain relief as I was previously taking."

11. Her GP confirmed that:

> "over the years [the Claimant] has frequently spoken about how she finds regular cold-water swimming of enormous benefit to her mental and emotional wellbeing and in turn this has helped her manage her chronic pain conditions more effectively and with much less reliance on pharmacological agents."

12. As a result of the charges introduced, the Claimant has faced significant difficulty in meeting the cost of swimming, as she explained in her evidence. In October 2020, she was unable to afford the cost of a concession season ticket when she wanted to purchase one. She has had to borrow and ask for contributions from friends and family in order to be able to do so. She is also unlikely to be able to afford one again in the future when it comes for renewal.

Charging at the ponds

13. Until 2005, swimming at the Ponds was free of charge.

14. In 2005, the Defendant introduced a 'self-policing' charge of £2 per swim, with a £1 concessionary rate, along with an annual payment scheme. There were machines at which payment could be made. It appears many, if not most, visitors did not pay. Such is a well-recognised problem suffered by many "honesty" schemes. Under this system, costs were more than ten times higher than revenue. The substantial costs of operating the Ponds include paying for lifeguards, rescue equipment, water testing, aerators, upkeep of the facilities and maintenance of the Ponds themselves (which are man-made rather than natural structures).

15. On 7th January 2020, the Defendant initiated a "Swimming Review", one objective of which was to "secure the long-term sustainability of the Hampstead Heath swimming facilities" in the light of exceptional 2018 and 2019 summer seasons and a fatality at the Highgate Men's Bathing Pond in summer 2019. Factors to be taken into account were stated to be:

    (a) Health & Safety Executive advice following the death of a swimmer in June 2019 at the Highgate Men's Bathing Pond;

    (b) Fulfilling responsibilities and the duty of care towards visitors, lifeguards and wider Heath staff.

    (c) Responding to increasing demand for cold water swimming on the Heath.

(d) Ensuring facilities are inclusive and welcoming to a diverse range of visitors.

(e) Establishing a clear and fair charging structure that is consistent with the subsidies for recreation and sport across the Heath to ensure the financial sustainability of the swimming facilities.

16. Following the review, officers presented the Management Committee with various options for increasing revenues from ticket sales.

17. On 11 March 2020, the Management Committee decided to overhaul charges ("the 2020 Charging Policy"). It ended 'self-policing' of charges, introducing compulsory charges enforced by Heath Rangers. It raised session prices and decided that there should be a concessionary rate discount (available to those with a Freedom Pass, those with a Disability Identification Card, those receiving Jobseekers' Allowance, students and under-16s) of 40%. This was in line with the general concessionary discount for other Heath facilities, itself set through benchmarking against comparable service providers.

18. The changes were subject to a one-year freeze on season ticket prices (in respect of which there was a 50% concessionary rate). Under the 2020 Charging Policy, ticket prices for adults were £4 for a session ticket, £66 for a 6-month season ticket and £125 for a 12-month season ticket; the corresponding concessionary prices were £2.40, £33 and £66 respectively.

19. Officers had forecast that, at these new prices, annual income from the Ponds would be £618,000, compared with forecast annual operating costs of £1,061,000, i.e. that there would still have to be a substantial 42% subsidy for swimming at the ponds.

20. In September 2020, the Defendant also formalized a policy of free access to the Ponds for any carer accompanying a disabled swimmer. The concessionary rates were also extended to anyone in receipt of state welfare benefits.

21. Short documents entitled "Test of Relevance: Equality Analysis" were prepared on or around 24th February and 11th March 2020; these documents concluded that a full equalities impact assessment ("EIA") was not required. Further documents dated 1st and 30th July 2020 and 28th August were to the same effect.

22. The 2020 Charging Policy met with vociferous opposition from the Kenwood Ladies Pond Association ("KLPA"). On 27 October 2020, KLPA (through its solicitors, Leigh Day, who are also the Claimant's solicitors), sent a pre-action letter to the Defendant, threatening a judicial review of the 2020 Charging Policy. The concern expressed was that the price increases would mean many local people would be excluded from using the Ponds and that:

> "women, the elderly, disabled swimmers and certain ethnic and religious minorities …would be disproportionately affected by these changes"

and that:

> "The support scheme is wholly inadequate to provide fair and inclusive access to those on low incomes and with disabilities."

So the complaint was that a number of people who had low incomes would be adversely affected by the increased and compulsory charges and that the payment concessions were inadequate.

23. On 10th November 2020, the Defendant responded, rejecting the KLPA's proposal for a review and for adjustments to the relevant charging scheme, and setting out its position. It denied that it was subject to the public sector equality duty on the basis of Article 2 of the 1989 Order (relying on section 150(4) EA and Schedule 18). It was stated that the Defendant would continue to have due regard to the equality impacts on those with protected characteristics when considering future changes. It also explained that:

> "The [Defendant's] Open Spaces Department has committed to a further review of Concessions – any charges would be applied from April 2022."

and further that

> "the Superintendent has committed to a full review of the 2020/2021 Swimming Season in summer 2021."

24. KLPA did not issue proceedings. Between 28th December 2020 and 16th January 2021, it conducted a survey concerning the impact of the 2020 Charging Policy on swimmers. 600 people responded. It is not known how many swimmers attend the ponds each year (as opposed to the number of visits by swimmers; there were 655,000 recorded visits) so the statistical strength of the sample is unknown. The results of that survey can be summarised as follows:

    a. The 2020 charges have "affected the affordability of swimming" at the ponds for 58% of the respondents;

    b. Of those, 25% said they could no longer afford to swim, 26% said they could not afford the upfront cost of a season ticket, and 9% had been helped by family or friends to buy one;

    c. As to the specific effect on swimmers with disabilities, around 73 of 600 respondents (12%) identified as disabled. 46 of those respondents (63% of that cohort) stated that their ability to afford swimming had been affected by the charges. Fifteen respondents were disabled and on disability benefits; and all save one said that their ability to afford swimming had been affected by the charges: 93%. This compares with a significantly lower overall percentage of those without disabilities whose ability to afford charges had been affected: 237/600; 46%.

25. It is the Claimant's case that the survey evidences a disproportionate impact on affordability in respect of those who are disabled, and particularly for those who are disabled and on disability benefits.

26. On 25 January 2021, KLPA emailed the Defendant with a 'summary' of the survey results. It did not provide the Defendant with the full survey data as now relied upon in these proceedings. The covering email complained about the affordability of the new charges.

27. On 24 February 2021, the Management Committee decided to retain the 2020 Charging Policy, subject to a 1.3% price increase in line with inflation. It also confirmed the end to the one year "freeze" on season ticket prices

28. A further "Test of Relevance: Equality Analysis" was undertaken on 25 February 2021, as part of the annual charging review. It is not clear whether the Management Committee had this before it when making its decision to approve the charges on 24 February 2021. It concluded that no full analysis was required. A second version also dated 25 February 2021 identifies a positive impact on the protected characteristic of disability because of the maintaining of the accompanying carer exemption. No other detail is given, and no data or monitoring is set out.

29. Under the revised charging policy challenged in this claim, ticket prices for adults are £4.05 for a session ticket, £66.85 for a 6-month season ticket and £125.62 for a 12-month season ticket; and corresponding concessionary prices are 40% lower, i.e. £2.43, £40.11 and £74.97 respectively. Concessionary rates apply to:

    a. Under 16s;

    b. Students;

    c. Over 60s;

    d. Those on Job Seekers Allowance, in receipt of Universal Credit or in receipt of the Personal Independence Payment or with a Disabled Card.

30. Those under 16 and over 60 are eligible for free morning swims from 7am until 9:30am. Carers can also accompany a swimmer for free (i.e. one carer can accompany a swimmer – carers are not eligible for a free swim in general). There is no free swimming session for disabled people and/or those on low incomes.

31. It is the Defendant's case that ticket prices remain "cheap", relative both to the Ponds' operating costs (swimming at the Ponds continues to be heavily subsidised) and to comparable swimming facilities elsewhere (all of which are more expensive).

32. In setting the revised charges the Management Committee had regard to:

    (a) A benchmarking' study of comparable facilities in and around London. That study set out that the prices at the Ponds are cheaper than those of all of the Ponds' comparators; and that only two of the Ponds' comparator facilities offer concessionary discounts, with lesser discounts (of 36% and 20%) than those provided at the Ponds;

    (b) the requirement that all departments make 12% savings in the financial year 2021/22;

    (c) the unfairness to other 'open spaces' (which were all under huge income pressures) of voting against price increases.

33. In the process of challenging the charging policy the Claimant, and the KLPA before her, suggested adjustments which it has been said would ameliorate the disproportionate impact on disabled people. These were:

(a) complete concessions for disabled people alternatively some other discount greater than 40%, further;

(b) a direct debit system which would allow season ticket holders to pay in instalments;

(c) the provision of a hardship or support fund.

Issues

34. The questions for determination before the court in relation to the charging policy can be briefly set out.

(a) Has the Defendant failed to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010?

(b) Is the charging policy indirectly discriminatory (contrary to section 19 of the 2010 Act and Article 14 taken with Article 8 and/or Article 1 of the First Protocol of the European Convention on Human Rights)?

Evidence

35. The Claimant provided two statements in support of her claim. She also relied on statements from Dr Ruth Hallergarten (chair of KLPA), Mary Powell (Vice chair of KLPA), Ann Griffin, Natalie Bennett, Oremie Bidwell, (each a Pond user with a disability/disabilities), Ben Nathan and Christopher Smith (both users of the Male Pond with disabilities), Lisa Rose, Hayley Jarvis (head of physical activity at Mind), Michael Tipton (a Professor of Human and applied physiology) and Martin Jones (a dietician and diabetes specialist and a user of the Men's Pond) as well statements from her solicitor Kate Egerton.

36. The evidence establishes that other disabled users of the ponds (male and female) report similar physical and/or mental benefits to those set out by the Claimant. Dr Ruth Hallgarten, GP and Chair of KLPA Committee, stated:

> "It is my view that there is a significant benefit of cold-water swimming to people's physical and mental health, especially for those swimmers living with a chronic long term medical condition and/or disability. In particular, it is my experience that chronic pain from inflammatory arthropathies and fibromyalgia can be soothed by swimming in cold water and pain relief can be felt for many hours after swimming."

37. The evidence of the benefits of pond access to disabled swimmers is congruent with the wider evidence on the relationship between cold-water swimming and disability, both physical and mental. Ms Jarvis of Mind, the UK's leading mental health charity, referred to a clinical trial from 2021 on the impact of cold-water swimming on mental illness. The trial found that cold water swimming was associated with significant reductions in the severity of anxiety and depression. Professor Michael Tipton explained that physiological changes occur acutely during cold water immersion, and repeated bouts of cold-water immersion develop adaptive responses in humans which may impact upon indices of health. These benefits can accrue to those with

inflammatory conditions with a range of long-term health conditions associated with chronic pain, and depression.

38. The Defendant relied upon the statement of Mr Gentry, who has been a member of the senior management team at Hampstead Heath for over 16 years, more recently as the acting superintendent. He explained that the Heath is one of London's most popular green spaces with extensive sports and recreational facilities including an athletics track, education centre, extensive children's facilities, tennis courts, a bowling green, a grade II listed lido and the Ponds. He explained funding issues and the sources of income which can be used for the maintenance and running of the Heath's facilities. He explained that while some subsidisation of recreational activities on the Heath is possible, there are limits to those subsidies because funding is not limitless. Accordingly an increased allocation in funding to one activity would need to be balanced with a corresponding reduction in another area; this at a time when all services are being asked to make 12% deduction within the financial year. He also pointed out that the Ponds are man-made and require regular maintenance and monitoring. As well as conserving the physical integrity of the Ponds and the surroundings it is necessary to maintain water quality through regular testing and the use of aerators. Another substantial cost is the provision and training of lifeguards and other staff who are always available on hand to assist less able swimmers. Following the implementation of advice from the Health and Safety Executive following on from the fatality in the summer of 2019 expenditure on the Ponds rose from £747,000 in 2018/19 to £1,061,000 for 2020/21.

39. Mr Gentry stated:

> "Charging users for access to sporting and recreational facilities is a long-standing and recognised practice at Hampstead Heath as it is at other public open spaces. That practice is fundamentally fair as it requires a financial contribution from users benefiting from facilities and services, instead of requiring their enjoyment to be subsidised entirely by others."

40. Under section 19 of the Local Government (Miscellaneous Provisions) Act 1976 and articles 7 and 10 of the Greater London Parks and Open Spaces Order 1967, there are statutory powers to provide and charge for a great variety of recreational facilities. Specifically, in relation to swimming, there may be provision of indoor and outdoor pools, staff and ancillary facilities either with or without charges. Mr Gentry explained that in February 2005 the Management Committee agreed a self-policed charge of £2 to swimming at the bathing ponds, with £1 concessions for children, students, those over 60, disabled people and those unemployed. He set out that:

> "These daily charges remained frozen for the next 15 years (although season tickets did increase slightly in price) in contrast to the fees and charges for all other recreational facilities on the Heath, such as the hire of sports pitches and tennis courts, swimming in the Lido etc."

and

> "the management committee felt that self-policing had been shown not to work over the previous 15 years, with a very low

> level of compliance from swimmers, and it had no confidence that voluntary payments would raise the necessary income for the Charity… In view of the financial shortfall in the meeting the running costs, mandatory charging was the only viable solution for the future of these well-loved facilities, and to ensure there was no reduction in opening times."

41. This evidence establishes that there has been a system of charging for access to the ponds for many years with a 50% concessionary discount for groups including those who are disabled and those who are unemployed. The major differences brought about by the new charging policy were that charges were policed and increased. As for the former it is difficult to see how it could legitimately provide a foundation for any complaint, let alone a discrimination claim, as the charges should have been paid in any event for many years. As for the argument that there should be no charges it would seek to return to the position of pre-2005 when disabled people used the facility for free. For the last fifteen years disabled people have paid to swim. Mr Gentry explained:

> "the management committee noted that charges had not increased in 15 years and considered that it was better to bring them up to a realistic level in one go, rather than have them reviewed and significantly changed again in a year's time. A phased approach was felt to be unnecessary and unfair as there was already an annual review process for other fees and charges. It was noted that swimming venues across London charged more and the costs being proposed were considered to be reasonable. Benchmarking against other similar open water facilities indicated that following the increases the adult day price at the bathing ponds would still be the cheapest amongst the comparators, taking into account proposed rises elsewhere."

42. In respect of the concessions Mr Gentry stated:

> "the general concessionary rate is benchmarked against other comparable service providers from time to time along with specific fees and charges. I believe that the reason a concessionary rate is offered to disabled customers in particular is to encourage participation, rather than a recognition that they have a low income, as people who are on a low income are already catered for by the separate concession for those on state benefits,"

43. When addressing the argument that there should be a complete concession for disabled swimmers Mr Gentry set out that this would cost the charity "tens of thousands of pounds per year, which would be a further significant reduction in its finances" and also that:

> "if the charity were compelled to take this step then it would inevitably have to review its concessions for other groups, and other activities, resulting in a further potential reduction in its finances…. More generally, the corporation would inevitably have to review the concessions across its other open spaces, and

> possibly for entirely unrelated services. In that case it would be impossible to quantify the total potential cost and, again it might be necessary to reassess whether certain facilities and services could be maintained at all."

44. Mr Gentry also addressed an argument that there should be a direct debit facility. He explained;

> "whilst corporation officers did consider the introduction of monthly direct debit payments for season tickets at the bathing ponds this was discounted because of the additional cost and potential for lost revenues. Direct debit options would inevitably increase the charity's costs, by requiring the administration of a direct debit system: and would give rise to debt collection and bad debt costs in relation to individuals whose payments cannot (because of cancellation of their direct debits, or lack of funds) be collected by direct debit. The scope for individuals to stop paying after initially swimming cheaply on a season ticket would also undermine the swimming charging model, whereby casual swimmers buying session tickets subsidise more regular swimmers who have season tickets."

The Claimant's case

45. The Claimant pursues three grounds of judicial review:

i) Ground 1: that the Defendant has failed to make reasonable adjustments to its charging policy contrary to sections 20 and 21 of the Equality Act 2010;

ii) Ground 2: that the charging policy is indirectly discriminatory contrary to section 19 Equality Act 2010.

iii) Ground 3: the charging policy discriminates against disabled people contrary to Article 14 ECHR taken with Article 8 and/or Article 1 of Protocol 1 ("A1P1").

46. Under Ground 1 Ms Leventhal QC submitted that the court must:

i) identify the provision, criterion or practice ("PCP") which is said to put the disabled person at the substantial disadvantage;

ii) determine whether the PCP in fact puts disabled persons at a substantial disadvantage;

iii) assess whether the relevant body took such steps as it was reasonable to take to avoid the disadvantage.

47. She submitted that the relevant PCP was the Charging Policy "without the concessions (adjustments that do not apply to everyone are removed at the PCP stage)". Next that the PCP plainly put disabled people at a disadvantage. A disabled swimmer in 2020 was 17% more likely to be "affected" by the increased charges than a non-disabled swimmer, and 46% more likely to be affected if both disabled and on disability benefits. A more recent 2021 survey had consistent results; a disabled swimmer was 16% more

likely to be affected than a non-disabled swimmer and 30% more likely to be affected if both disabled and on disability benefits. These were not *"modest"* differences but substantial ones.

48. The Claimant's evidence explained how her own financial difficulties, which are directly related to her disability, have impacted her ability to access the ponds. The Charging Policy affects her more significantly than it would if she were not disabled. The Claimant's evidence was supported by others in a similar position, also unable to swim, or facing significant barriers to doing so, by reason of the financial consequences of their disability. Ms Leventhal QC also relied upon what she referred to as

> "a substantial body of statistical evidence demonstrating that disabled people, of all types, are significantly more likely to live in absolute and relative poverty, be un or underemployed, and have extra costs associated with their disability."

49. The Claimant identified relevant and reasonable adjustments which Ms Leventhal QC argued could be made to avoid the disadvantage, namely:

    (a) a reduction in concessionary rates (although it was unclear before oral submissions by what amount; and there was a reluctance to give an explanation as to what would be an acceptable charge; presumably because any charge; even £1 a swim would be unaffordable for some) or complete concessions for disabled people, returning the position to that pre 2005;

    (b) a direct debit system which would allow season ticket holders to pay in instalments;

    (c) the provision of a hardship or support fund (this argument fell away during submissions).

50. As regards the second ground which alleges indirect discrimination, Ms Leventhal QC submitted that there is no need for proof of the *reason why* the PCP (which for this purpose is the charging policy it its entirety) puts the affected group at a disadvantage, only that there is a causal connection between that provision, and the disadvantage suffered. The burden then shifts to the Defendant to justify the measure. To be justified, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* reasonably necessary in order to do so. Cost alone could not justify a PCP which is *prima facie* discriminatory. 'Costs plus' (such as factors of needing to balance the books or requiring a contribution to the running of a service) may be a legitimate aim, but this does not end the justification inquiry. She also argued that it was not correct to use as a comparator a non-disabled swimmer on a low income as the Court should not draw comparator pools in a way which is self-defeating.

51. As for the third ground, the Defendant is required in the exercise of its public functions to act compatibly with Convention rights: section 6 Human Rights Act 1998. That includes the obligation to secure the enjoyment of Convention rights without discrimination (Article 14 ECHR). There are four elements of a discrimination claim under Article 14. There must be (i) a difference in treatment within the ambit of a substantive Convention right; in this case the Claimant relied on Article 8 and/or A1P1 (ii) of persons in analogous situations (iii) that does not pursue a legitimate aim or (iv)

where there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The Defendant's case

52. It is the Defendant's case that heavily subsidised prices including a 40% discount for disabled swimmers cannot possibly give rise to unlawful disability discrimination. No decided case has ever found that "service providers" are required by the Equality Act 2010 to provide goods and services at a discounted price to disabled persons (let alone that a pricing scheme which offers a substantial discount to disabled persons gives rise to unlawful disability discrimination). Nor does the relevant statutory Code of Practice from the Commission for Equality and Human Rights ("EHRC") contain any such suggestion. On the contrary, EHRC guidance says in terms that service providers

> "can charge [disabled service users] the same as they charge other people".

53. The Claimant must establish that the relevant disadvantage is suffered "because of disability". If and insofar as some disabled swimmers cannot afford tickets for the Pond, they suffer that disadvantage because of impecuniosity, not disability. The Claimant is seeking reasonable adjustments in respect of poverty, not disability.

54. Further the charging policy is plainly "justified". It is a proportionate means of achieving a legitimate aim (section 19(2)(d)). The costs of operating the Ponds (e.g. lifeguard costs) are very substantial, and the low prices for swimmers mean that the Defendant operates them at a substantial loss; swimming is subsidised. The prices in the charging policy are designed:

    (i) to allow swimming to continue at the Ponds in a safe and financially sustainable manner;

    (ii) to achieve fairness, by requiring the swimmers who enjoy the Ponds to make a financial contribution (rather than having their swimming entirely subsidised by others);

    (iii) to limit the diversion of limited resources away from conservation and protection of the Heath, and the provision of other sports and recreational activities on the Heath.

55. Since the charges are justified, they do not give rise to indirect discrimination (either under section 19 or Article 14); and (in relation to section 20) it would not be 'reasonable' for the Defendant to 'have to' reduce charges for disabled swimmers even further (let alone to eliminate them entirely).

56. The Claimant's argument that disabled persons have less money, and that charging them to access a service therefore gives rise to unlawful discrimination, if it were correct, would apply to a vast range of "service-providers" (whose statutory definition covers providers of services, goods and facilities: section 31(2) the Equality Act 2010 ("EA 2010")), who are, by section 29 of EA 2010, required not to discriminate. It would mean that a vast range of service-providers would be required to provide goods, services and facilities to disabled persons for free, or for very substantially reduced prices; and that, since most businesses charge the same prices to disabled and non-disabled customers, standard business practices are giving rise to endemic unlawful

discrimination across the UK. Charging the same prices to purchasers of goods, services and facilities must be justified, and therefore lawful; a fortiori, a charging policy which offers a 40% discount to disabled users cannot give rise to unlawful disability discrimination.

The Legal Framework

57. The Equality Act 2010 protects people from discrimination in the workplace and in wider society. The relevant provisions for this case are as follows;

> "Section 6 Disability
>
> (1) A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.
>
> (3) In relation to the protected characteristic of disability—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability."

58. Section 15 of the Equality Act addresses discrimination arising from disability:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

59. Indirect discrimination is addressed by section 19 of the Equality Act in these terms:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> (3) The relevant protected characteristics are—
>
> …
>
> disability;
>
> …"

60. Section 20 sets out the duty to make adjustments:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to —

(a)removing the physical feature in question,

(b)altering it, or

(c)providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a)a feature arising from the design or construction of a building,

(b)a feature of an approach to, exit from or access to a building,

(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d)any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column."

61. Section 21 states:

> "(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

62. Section 29 concerns the provisions of services. It provides;

> "(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—
>
> (a) as to the terms on which A provides the service to B;
>
> (b) by terminating the provision of the service to B;
>
> (c) by subjecting B to any other detriment.
>
> (3) A service-provider must not, in relation to the provision of the service, harass—
>
> (a) a person requiring the service, or
>
> (b) a person to whom the service-provider provides the service.
>
> (4) A service-provider must not victimise a person requiring the service by not providing the person with the service.
>
> (5) A service-provider (A) must not, in providing the service, victimise a person (B)—
>
> (a) as to the terms on which A provides the service to B;
>
> (b) by terminating the provision of the service to B;
>
> (c) by subjecting B to any other detriment.
>
> (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.
>
> (7) A duty to make reasonable adjustments applies to—
>
> (a) a service-provider (and see also section 55(7));

> (b) a person who exercises a public function that is not the provision of a service to the public or a section of the public."

63. I turn to the Claimant's grounds.

Ground 1

64. The Claimant argues that the Defendant has failed to make reasonable adjustments to its charging policy contrary to sections 20 and 21 of the Equality Act 2010.

65. A service provider must not, in providing a service, discriminate against a person as to the terms on which it provides the service; see section 29 (2) (a) EA 2010). 'Discrimination' for the purposes of section 29 includes the duty to make reasonable adjustments (section 29(7)) and the duty not to indirectly discriminate (sections 25 (2) (c) and 19).

66. The Equality Act 2010 contains a reverse burden of proof provision. In any proceedings relating to a contravention of the Act the initial burden to prove facts from which it could be decided there is a breach lies on the Claimant. Once this is done, the burden switches to the Defendant.

67. The duty to make reasonable adjustments is set out in section 20 of the Act. The duty imposes three requirements (s.20 (2)). The relevant requirement for the purposes of this claim is set out at s.20 (3):

> "the first requirement, is where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. "

68. Under s.212 (1) "substantial" means "more than minor or trivial". A failure to comply with the duty will constitute unlawful discrimination (s.21 (1) and (2) EA 2010).

69. There are three stages to the Court's inquiry in this case (see **R (VC) v SSHD** [2018] EWCA Civ 57 [2018] 1 WLR 4781 at paragraph 147):

    i) Firstly to identify the provision, criterion or practice ("PCP") which is said to put the disabled person at the substantial disadvantage;

    ii) Secondly to determine whether the PCP in fact puts disabled persons at a substantial disadvantage;

    iii) Thirdly to assess whether the relevant body took such steps as it was reasonable to take to avoid the disadvantage.

70. Ms Leventhal QC submitted that the PCP is the Defendant's charging regime for swimming at the Ponds (so does not include concessions) and includes the following five key factors:

    a. The overall high level of the charges, bearing in mind the historical and unique context of the ponds;

b. the compulsory nature of the charges;

c. the lack of an affordable concession scheme for those with disabilities with a low income (£2.40 per swim and no complete exemptions at given times, as with under 16s and over 60s);

d. the disproportionately high increase of concessionary season ticket charges;

e. the inability to spread out the costs of season tickets for disabled people or people on low incomes via payment by instalments.

71. Ms Leventhal QC submitted that the Defendant's charging regime clearly puts the Claimant and other disabled people at a substantial disadvantage compared to non-disabled people. As KLPA's survey statistics show, disabled people are disproportionately "affected" by the unaffordability of the scheme (64% of disabled people compared with 46% of non-disabled people). She argued that this is likely to be because disabled people are much more likely to be on a lower income and therefore find it much more difficult to pay these charges.

72. In support of the submission that there was a failure to take reasonable steps to avoid the disadvantage Ms Leventhal QC relied upon the suggestions to which I have already referred; in order they are:

a. grant complete concessions to disabled swimmers;

b. put in place lower concessionary one-off or season ticket charges which are "genuinely affordable";

c. provide an option for monthly direct debits for concessionary season tickets so the cost can be spread out.

73. Ms Leventhal QC did not specifically argue for free swimming for disabled people out of peak times (such as are available for the over 60s and under 16s). Rather she prayed it in aid of an argument that the Defendant had taken steps to cater for the needs of other specific groups; so could take steps to assist disabled swimmers.

74. She submitted that the proportion of disabled swimmers within the total user group was low (circa 12% on the KLPA survey); yet the effect of the increase in charges was disproportionately high.

75. Ms Leventhal QC also argued that a lack of monitoring "points towards breach"**.** It is an important part of the duty under the 2010 Act to ensure that appropriate monitoring and analysis is carried out. Without monitoring, "it cannot be fully understood why the use of priorities is not working and where, and what must be done about it"; see **R (DMA and others) v SSHD** [2020] EWHC 3214 (Admin) [2021] 1 WLR 2374 (at paragraph 309).

76. On behalf of the Defendant Mr Sheldon QC submitted that:

(a) the charging policy did not put disabled persons at a substantial disadvantage in comparison with persons who are not disabled;

(b) it would not be reasonable for the Defendant to have to provide an even larger discount to disabled swimmers, or to charge them nothing at all, as the Claimant says it must.

77. Mr Sheldon QC conceded that disabled persons may benefit from using the ponds. However, so do non-disabled persons in equal measure; exercise, cold water, the natural environment and socialising at the Ponds are beneficial for non-disabled persons, as well as disabled persons. The Claimant has not put forward evidence that disabled persons are uniquely benefitted by swimming in the Ponds, such that charging is inherently detrimental to disabled swimmers as compared with non-disabled swimmers.

78. Further the charging policy is reasonable as:

(i) Charging all users for access to sporting and recreational facilities in public open spaces is a longstanding and recognised practice both in the Heath and nationwide. That practice is fundamentally fair.

(ii) It requires a costs contribution from service users benefitting from facilities and services instead of requiring their enjoyment of those facilities and services to be subsided entirely by others.

(iii) The charges at the Ponds are modest. They are lower than any of the fees charged at comparable facilities

(iv) The discounts already offered to disabled swimmers are very substantial. Most comparable facilities do not offer any concessionary rates. Those that do offer concessions do so at a lesser discount than that available at the Ponds.

(v) The charges are already set at a level by which swimming at the Ponds is substantially subsidised by the Charity.

(vi) The more swimming is subsidised, the less funding is available to support other facilities and activities across the Heath. This was a key consideration for the Management Committee in deciding to adopt the 2020 Charging Policy, and to maintain it (with increases mainly based on inflation) in February 2021.

(vii) The logical conclusion of the Claimant's case is that service-providers cannot lawfully make charges to disabled people. That position is clearly unarguable.

79. Mr Sheldon QC also submitted that the financial sustainability of the very low season ticket prices offered by the Defendant relied on the administrative economies of a single up-front payment and the lack of "bad debt". Direct debits would inevitably increase the Defendant's costs, by requiring administration of a direct debit system; and it would give rise to debt collection/ bad debt costs in relation to individuals whose payments could not be collected (because of cancellation of their direct debits, or lack of funds) by direct debit. The scope for individuals to stop paying after initially swimming cheaply on a season ticket would also undermine the swimming charging model, whereby casual swimmers paying £4.05/£2.43 per swim subsidise more regular

swimmers who have season tickets. In those circumstances, it was not reasonable for the Defendant to have to introduce payment for season tickets by monthly direct debits.

Analysis

80. The Equality Act 2010 covers discrimination in respect of a range of protected characteristics including disability. The essential principle is that people with protected characteristics should not be discriminated against when using any service, provided publicly or privately, whether that service requires payment or not. People who have a disability are protected because of this characteristic against a failure to make reasonable adjustments. The policy of the Act is to ensure, so far as reasonably practicable, that the access enjoyed by disabled people approximates to that enjoyed by the rest of the public i.e. reducing socio-economic inequalities. The purpose of the duty to make reasonable adjustments is to provide access to a service as close as is reasonably possible to get to the standard normally offered to the public at large. It is important not to lose sight of this fundamental principle when considering whether a service provider has discriminated against disabled people as compared with those who do not have that relevant characteristic.

81. The duty to make adjustments under section 20(3) of Equality Act 2010 arises only if a PCP puts a disabled person

> "at a substantial disadvantage ... in comparison with persons who are not disabled."

82. The Act states that the disadvantage must be substantial, which is defined as more than minor or trivial. The burden of establishing it is on the Claimant.

83. The first step is to identify the PCP. As Ms Leventhal QC submitted when doing so it is necessary to remove any relevant adjustment made in respect of disability (which is subsequently considered as separate step). In the present case this requires removal of the 40% concession for disabled people. However, removal of that adjustment still leaves a 40% concession for those on a wide range of benefits including the Claimant, as she receives a relevant benefit. So the PCP is the application of the charging structure with a 40% discount for all those on low income. This is what all people of low income have to pay; disabled or not (entitlement to benefits has been taken to axiomatically equate to limited financial means regardless of why the person is in receipt of benefits). Ms Leventhal QC submitted that the fact that the PCP already included a 40% discount made no difference to the claim as advanced. I cannot accept that submission. When it is recognised that the PCP is the charging rate with a 40% discount for those of limited income; the Claimant's case which was that:

> "the charging regime discriminates against disabled people a significant proportion of which are of limited income"

can be reframed as

> "the charging regime which includes a 40% discount for those of limited income discriminates against disabled people; a significant proportion of which are of limited income".

If this is taken as the proposition then it becomes necessary to consider why, if the barrier to access is having limited income i.e. purely financial, those who are disabled (taken generally) suffer a substantial disadvantage in comparison to people who are not disabled. If the problem is solely a lack of personal income to pay the charge, why does it matter if a person is disabled or not?

84. Looked at another way a concession has been given for all those of limited income, whatever their circumstances, meaning that the elderly, women, disabled people and those of ethnic groups who are on low incomes/of limited means are catered for. The Claimant's case is that those who are disabled should get a greater concession than all of those within these other groups, as parity with non-disabled people on low income/of limited means puts disabled people on low income/of limited means at a substantial disadvantage. The obvious problem with this argument is that the reason for having low income/limited means is irrelevant to the financial barrier faced by a person (as is the fact that a higher proportion of disabled people have lower income/limited means than those who are not disabled as 100% of people on lower/income limited means, as defined by being on benefits, get the concession). The Claimant's argument offends the principle of ensuring socio-economic equality and gives disabled people (many of whom will not be on a low income) preferential treatment over all others on low income. In my judgment the Court must be careful not to allow the 2010 Act to be used so as to achieve the direct opposite of what it was enacted to achieve.

85. I should make three matters clear.

86. Firstly, no argument was advanced that all those on benefits should only face no, or a lower, charge.

87. Secondly, the Claimant's argument is that charges should be reduced or removed for all disabled people regardless of whether they are on benefits or not i.e. whether of limited means or wealthy; which appeared to me to be a perverse result.

88. Thirdly, Ms Leventhal QC conceded that the argument advanced by the Claimant could equally well have been run by a disabled man in relation to the Men's Pond or a man or a woman in respect of the Mixed Pond. So the fact that this claim involves the Ladies' Pond takes matters no further.

Substantial disadvantage

89. In my judgment the fundamental difficulty faced by the Claimant in advancing her claim is that there is a requirement, or "hurdle", built into the section in that the substantial disadvantage has to arise because of the disability. The duty to make adjustments arises in relation to people who are at a substantial disadvantage because they are disabled in comparison with persons who are not disabled.

90. The link between a PCP and groups who are on a low income was considered **in** **R (Adiatu & another) v Her Majesty's Treasury** [2020] EWHC 1554 (a case not cited in argument before me). The Claimants challenged, inter alia, the rate of statutory sick pay ("SSP"). The Claimants argued that women and BAME workers were more likely to be low-paid and to have limited financial resources with no access to occupational sick pay, and so that the low rate of SSP meant that a disproportionate number of women and BAME members of the workforce would feel compelled to go to work when they were suffering symptoms of coronavirus or should be self-isolating. They could not

survive on SSP alone. The Claimants submitted the rate of, and requirements for entitlement to SSP, were not justified and were indirect sex and race discrimination.

91. Lord Justice Bean and Mr Justice Cavanagh set out at paragraphs 140-141:

> "The Claimants submit that the PCP is the rate itself. Mr Collins QC says that, given that female and BAME employees are disproportionately represented in the lowest earning groups, they are disproportionately likely to be unable to have the resources to manage with such a low income, and are accordingly disadvantaged by the rate of SSP (either losing income or going to work when they ought not to do so). This disadvantage is exacerbated, in the case of BAME workers, in light of their poorer outcomes for coronavirus.
>
> In our judgment, this argument is misconceived. The rate of SSP is not a PCP which places certain categories of employees at a particular disadvantage. The classic PCP which does so is a requirement that must be satisfied in order for persons to qualify for a particular opportunity or benefit, such as a height requirement in order to be permitted to join a police force, or the requirement to be a full-time worker in order to qualify for a pension. These examples place women at a particular disadvantage because women are less likely than men to be tall, and are more likely to be part-time workers (because of child-care responsibilities). The rate of SSP is not a barrier or gateway in this sense. It is a sum that is paid, in exactly the same way, to everyone who receives SSP, regardless of their protected characteristics. It does not place women or BAME employees at a particular disadvantage: everyone is treated the same."

And at paragraph 149 that:

> "In our judgment, the Defendant is right to submit the Claimants do not rely upon any disadvantage that is caused by the rate of SSP itself. Rather, they rely upon an alleged disadvantage, the absence of other financial resources, which is not caused or related to the rate of SSP in any way. This does not turn the rate of SSP into a PCP which places women or BAME employees at a particular disadvantage…"

Whilst the claim in **Adiatu** concerned indirect discrimination (ground 2 in this case); the reasoning is equally applicable to the section 20 (3) requirement that the PCP puts a disabled person at a substantial disadvantage when compared to non-disabled people. Mr Sheldon QC's submission was that the first ground falls at this initial hurdle as the Claimant cannot establish a substantial disadvantage arising from the PCP. All those on a low income/limited means have a 40% concession to reflect limited budgets. It does not place disabled people at a particular disadvantage: everyone is treated the same. There is no difference in aim, or result, between a disabled person on benefits with £10 disposable income a week after "necessities" and a non-disabled person on

benefits with £10 disposable income after "necessities" as regards being able to pay the charges.

92. In support of his argument Mr Sheldon QC relied upon the statutory code of practice produced by the Equality and Human Rights Commission "Services, Public functions and Associations" which states at paragraph 5.10 that:

> "What is a disadvantage?
>
> "Disadvantage" is not defined by the Act. It could include denial of an opportunity choice, deterrence, rejection or exclusion. The courts have found that "detriment", a similar concept, is something that a reasonable person would complain about, so an unjustified sense of grievance would not qualify."

He also relied on guidance published on the Commission's website which states

> "Even if the person or organisation charges other people for a service, such as delivering something, if the reason they are providing the service to you is as a reasonable adjustment, they must not charge you for it. But if you are using the service in exactly the same way as other customers, clients, service users or members, then they can charge you the same as they charge other people." *(underlining added*).

93. Mr Sheldon QC submitted that the second statement is directly contrary to the Claimant's argument in this case and evidences what the reasonable person would take as a starting point. Put simply Mr Sheldon QC's argument is that the Claimant has, objectively speaking, only an obviously unjustified sense of grievance which is not actually based on discrimination by virtue of disability. When considering payment for a public leisure facility no reasonable person would argue that one group of people with limited means should be favoured over another solely by virtue of *the reason why* they are of limited means; it is the fact that they are reliant on benefits that matters when considering disposable income. The argument becomes even less attractive when the result would be that all disabled people would get free swimming or face a lower charge regardless of whether they were of limited means or not.

94. In my judgment the first letter sent by Leigh Day on behalf of KLPA reveals that the reality is that the KLPA (including the Claimant), want to freeze the charges at a level which places the Ponds in an anomalous position as regards public facilities (or, given the Claimant's primary submission, turn the clock back to a time before 2005 when there were no charges). The credo is that nobody should be denied access to the Ponds because they cannot afford it.

95. It is within reasonable Judicial knowledge that, sadly, as a general concept, relative poverty when measured purely in terms of income is experienced at a higher rate amongst a variety of definable groups including the elderly, single parents, women[1],

[1] The Claimant's witness Lisa Rose stated "the raise in concessions is discrimination and impacts groups of people who need the space most like women and disabled people".

minority ethnic groups and also certain regional populations[2]. Some but not all such groups are defined by protected characteristics as identified under the 2010 Act. The effect of the increased charge on a range of groups was the issue identified in the letter before action; disabled people were not identified as the sole category adversely affected. In my view this illuminates the difficulty with the Claimant's case. She now argues for preferential treatment when compared to these other groups. Her claim is essentially a challenge based on her limited means, a feature widely present in society, and, causally, wholly unrelated to the Defendant's charging structure. Impecuniosity however caused, resulting in a difficulty in paying increased fees is at the heart of this claim. Once this is appreciated this difficulty faced by the Claimant in establishing a substantial disadvantage to her as a disabled person caused by the PCP can be readily understood.

96. Faced with the difficulties set out above Ms Leventhal QC sought to rely on two factors to support an argument that disabled people on benefits suffer a greater disadvantage than non-disabled people on benefits. In my judgment they do not address the fundamental problem that any barrier caused by the charging structure is purely financial and all those on low income are treated equally. However I shall briefly consider them.

97. The first argument which Ms Leventhal QC advanced was that benefits levels (set as protective income levels and intended to reflect what are considered necessities) are disproportionately less effective for disabled people given extra expenditure faced by those who are disabled with the result that they will find paying the increased charge even more difficult and "less affordable".

98. The first difficulty with that argument is that it ignores the availability of additional benefits payable because of disability i.e. specifically to meet the additional expenditure arising from disability.

99. The second difficulty, which applied to the Claimant's submissions generally across the 3 Grounds, is that once one moves away from a hard-edged test/definition of limited means/in poverty etc with easily applicable objective criteria, significant difficulties arise as subjectivity enters the fray. As I pointed out during submissions, "impecuniosity" and "affordability" are multifactorial concepts which are difficult to define/identify in the context of the inability to pay for a service. Ms Leventhal QC conceded that affordability was a "slippery concept". Difficulty paying for a service, whatever it be, is a result of the interplay of income and expenditure in an individual household given individual choices. Ms Leventhal QC relied heavily on two surveys which showed that more disabled people than non-disabled have "struggled" to pay the fee. However, each survey was a collection of subjective analyses without further detail and was not based on any set income levels (as most benefits are) or ability to pay for a set range of commodities/services so as to allow comparative measurement, given that people have different views as to what are essential goods/services and priorities for

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[2] Since the 1970s the Ministry of Housing, Communities and Local Government and its predecessors have calculated local measures of deprivation in England. This reveals concentrations of deprivation in large urban conurbations, areas that have historically had large heavy industry manufacturing and/or mining sectors (such as Birmingham, Nottingham, Hartlepool), coastal towns (such as Blackpool or Hastings), and parts of east London.

expenditure. They were also conducted during a pandemic when income patterns and /or reliance on benefits are likely to have significantly affected the results[3]. In my view the survey results (as opposed to wider evidence based on separate criteria) must be treated with considerable caution and are of limited assistance. Satisfying Mr Micawber's condition of happiness depends on the nature and extent of expenses. How does a survey factor in property ownership, savings or choices to spend money on alcohol or cigarettes or even to run a car? Many people may have a deficit each month after choosing to incur what others would consider unnecessary expenditure. Whilst the Claimant has given an account of her position, what others consider as "struggling" will cover a very wide spectrum of views as to what costs must be covered. There is an obvious difficulty in identifying an ill-defined, subjective secondary feature said to be more prevalent amongst a group with a protected characteristic.

100. The second argument was that swimming in the Ponds provided a physical and mental benefit which was a component part of coping with, or alleviating the symptoms arising from, a disability (generally) so an inability to afford it put disabled people at a significant comparative disadvantage. I have considered the Claimant's evidence on this issue (summarised at paragraphs 36 and 37 above) with considerable interest and have no doubt that cold water swimming has mental and physical benefits for many Pond users; disabled or not. It is why people have been swimming from beaches and in rivers, lakes and ponds for millennia. I accept (as recognised within the Defendant's swimming review) that there has recently been an increased, recent perception "that its good for you" generally and hence an increase in popularity. I also accept that it has a particular advantage for the Claimant. However, it remains essentially a leisure activity which benefits the vast majority of people who engage in it, to a greater or lesser degree (as many leisure and sporting activities do). I accept Mr Sheldon QC's submission that the Claimant has not established that disabled persons generally (who will have a very wide range of disabilities) are sufficiently benefitted by swimming in the Ponds, as compared with non-disabled swimmers, to mean that they are suffer a substantial disadvantage if access is reduced or prevented by cost.

101. In my judgment, Mr Sheldon QC is correct and the charging structure does not place a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Ground 1 fails to clear this hurdle. Any disadvantage suffered by those with a disability in paying a fee for a service by reason of "limited means" (this being a complex multi-factorial concept and difficult to assess other than by a set criterion such as being in receipt of benefits), is not caused by the protected characteristic of disability, rather it is caused by the limited means. Even recognising a low bar for the statutory threshold, I do not believe that a reasonable person would think otherwise and believe that a legitimate grievance existed.

102. The Claimant makes a specific complaint about the requirement to make a one-off payment (as opposed to payment by instalments) for season tickets. Mr Sheldon QC submitted that it was "absurd" to contend that this disadvantages disabled persons "in comparison with persons who are not disabled", and that the disadvantage is "because of disability". In my judgment this is also not related in any material way to disability

[3] The December 2021 survey had a specific question about whether the pandemic had affected income; with a significant proportion of responses indicating that income had reduced as a result.

for the reasons which I have set out. Many people, disabled or non-disabled, may prefer to spread the cost and to pay by instalments.

103. If I were mistaken in this analysis and a duty is engaged under section 20 then the next step would be to consider reasonable adjustments. Given the detailed arguments advanced I shall set out my findings on the issue.

Reasonable adjustments

104. Ms Leventhal QC submitted that the Claimant, and the KLPA before her, had suggested various adjustments to the charging policy which would ameliorate the disproportionate impact on disabled people. These include: (a) a reduction in concessionary rates or complete concessions for disabled people; (b) a direct debit system which would allow season ticket holders to pay in instalments; and (c) the provision of a hardship or support fund.

105. Once a potential reasonable adjustment has been identified by a Claimant, the burden of proving that such an adjustment was not a reasonable one to make shifts to the Defendant. This requirement endures notwithstanding that the Defendant has already made some adjustments. In assessing the issue of reasonable adjustments the following principles apply:

(a) What it is reasonable for a particular service provider to do depends on all the circumstances of the case and will vary according to the type of service provided, the nature of the service, its size and resources.

(b) Service providers are given an appropriate amount of latitude.

(c) Service providers are not required to fundamentally alter the nature of the service provided.

(d) Where there is an adjustment that the service provider could reasonably put in place which would remove or reduce the substantial disadvantage, it is not sufficient for the service provider to take some lesser step.

(e) The cost of making an adjustment may be relevant to its reasonableness. However a bald assertion, with no more, that an adjustment will be too expensive will not suffice. Some assessment of the cost of the relevant adjustment is required to discharge the duty.

(f) Although the reasonable adjustments duty is one of outcome, rather than procedure, where there has been inadequate consultation, engagement and/or monitoring meaning that there has been a failure to identify or properly consider a potential adjustment or set of adjustments, this will weigh against the Defendant and in favour of the reasonableness of said adjustment.

106. The Claimant identified what were said to be relevant and reasonable adjustments that could be made to avoid the disadvantage, specifically:

i) Lower or complete concessionary charges for all disabled swimmers. Ms Leventhal QC prayed in aid of this adjustment the fact that the Defendant has offered concessions to numerous other groups (for example, free swims at

certain times for under 16s and over 60s, schools and charities supporting migrant and refugee children) and has stated it *"welcome[s] feedback on underrepresented groups and organisations, who would benefit from free and discounted swimming*". Also she relied on the fact that some other local authorities do offer complete concessions to some groups, as seen in the Defendant's price benchmarking report, for example, in Hackney, residents who are aged under 18 and over 60, disabled or a carer, can swim for free at several leisure centres all year round.

ii) A direct debit system for disabled season ticket holders which would enable the costs to be spread out throughout the year. Ms Leventhal QC submitted that such an adjustment was plainly reasonable. She submitted that the Defendant had undertaken to consider this step in the consultation process, but no evidence of consideration or proposed cost has been forthcoming. Also other clubs and activities on the Heath have raised it as a possibility to ameliorate financial inaccessibility. Further and very importantly the Defendant already operates a direct debit scheme for rent, business rates and council tax in its capacity as a local authority and annual membership for the tennis courts on the Heath (which is administered by a third party) can be made by direct debit.

iii) A hardship or support fund. Such an adjustment was argued to be reasonable because it was in fact a proposal of the Defendant's own at the early stage of decision making. It was expressly relied upon in the March 2020 decision as a mitigation against the effects of a charging regime:

> "The Open Spaces Department is currently undertaking a review of Concessions and this will include the consideration of a support fund to ensure the Open Spaces facilities remain financially inclusive."

During submissions this argument was not advanced with any conviction as it was recognised that was not a viable reasonable adjustment to advance given the obvious difficulties in setting (by requirement) a funding level and also the criteria for a discretionary scheme (before consideration of the costs of administration). I need not deal with it further.

107. Given that the Claimant had raised two adjustments Ms Leventhal QC submitted that the burden of showing why the suggested adjustments were not reasonable had shifted to the Defendant. She also argued that the Court should pay little regard to what she described as the Defendant's "hyperbole" that to allow this claim:

> "would mean that a vast range of service providers were required to provide goods, services and facilities to disabled persons for free, for very substantially reduced prices based on individual means-testing; and that, since most businesses charge the same prices to disabled and non-disabled customers, standard business practices are giving rise to endemic unlawful discrimination across the UK."

108. Ms Leventhal QC submitted that this argument should be rejected for several reasons. Firstly, there was, and is, nothing radical about a public authority, providing services on open land held on trust for the public, making reasonable adjustments for disabled

people. Secondly, there is nothing in the Equality Act 2010 to suggest charges are excluded from its remit. Thirdly, the Act does not require a service provider to fundamentally alter the nature of the services it provides. Fourthly the argument ignores the uniqueness of the service provided; "the ponds are unique facilities".

109. During submissions I asked Ms Leventhal QC to clarify three issues.

110. The first was what the Claimant meant by "a lower charge". As I have set out where an adjustment could reasonably be put in place which would remove or reduce the substantial disadvantage, it is not sufficient for the service provider to take some lesser step. So what adjustment was proposed? It appeared to me that any reduction which left some charge in place would still leave swimming unaffordable to some disabled people (given their individual views as to what is affordable). Ms Leventhal QC submitted that it was not for the Claimant to say what the reduced charge should be. Perhaps not surprisingly given how long it was in force as a concessionary charge (although ignored by many if the not the majority of Pond users) she made reference to a £1 fee. It was clear to me that the main focus of the Claimant's case was securing free swimming for all disabled people (regardless of their finances) rather than obtaining some limited further concession, almost on an arbitrary basis, which would help only an unidentified percentage of the group.

111. Secondly, whether it was argued that a reasonable adjustment which should be in place was to allow free swimming at certain quieter times e.g. before 9.30am. There is a concession in place at the Ponds for those over 60 and under 16. Such a concession had been in place at the Lido since 2007/08 and had been funded nationally between 2008 and 2010 as an Olympics legacy initiative to get more older people active and provide young people with sporting opportunities. Ms Leventhal QC had not advanced free swimming for disabled people before 9.30am as a specific adjustment that should be in place in her skeleton argument[4] and it was clear that she did not believe that an adjustment of this nature was an adequate response to the disadvantage. She submitted that it may be appropriate if the hours were substantially extended. However this would simply equate to free swimming.

112. Thirdly, I asked why what was repeatedly referred to as the "unique" nature of the ponds was relevant to the issues before the Court. Save for indoor pools of like size (and even then location will play a part) it appeared to me any public swimming would be at a unique venue. Surely the case was solely about the cost of swimming? Much was made of the peaceful nature of the surroundings and the fact that it was a "women only" space. However, as I have already set out the arguments in this case would apply pari passu to the men's and the mixed ponds. Ms Leventhal QC had no real response to my question and in my judgment the "uniqueness" of the women's ponds adds nothing to the arguments advanced.

113. Mr Sheldon QC's submissions in respect of reasonable adjustments can be summarised as follows:

[4] There was a reference to the fact that "The Defendant has offered further or complete concessions to numerous other groups (for example free swims for under 16s and over 60s and charities supporting migrant and refugee children" in support of the argument that lower or complete concessionary charges for disabled swimmers was a reasonable adjustment; see skeleton paragraph 44.

(1) Charging for all users for access to sporting and recreational facilities in public open spaces is a long-standing and recognised practice (although the Ponds had free access to all swimmers before 2005).

(2) The practice is fundamentally fair. It requires a cost contribution from those who use the facilities/services. It would be intrinsically unfair for a particular benefit to be subsidised completely or disproportionately by others. Further subsidisation of swimming would reduce the funding available to other facilities and activities across the Heath. This was a key consideration for the Management Committee in setting prices in March 2020 and February 2021. The Charity faces considerable funding pressures. It has been seeking ways to cut expenditure.

(3) The charges at the ponds are modest and benchmarking against other similar open water facilities shows them to be lower than any of the fees charged at comparable facilities.

(4) The charges are already set at a level by which swimming at the Ponds is substantially subsidised by the Charity.

(5) The Defendant has already made a very substantial discount available to disabled swimmers regardless of financial means. The 40% discount is aligned with the general concessionary rate available on the Heath and at other open spaces managed by the Defendant, which has itself been set through benchmarking against other comparable service providers. Most comparable facilities do not offer any concessionary rates. As to those that do, they offer lesser concessions than those available at the Ponds.

(6) The discounts provided to all disabled swimmers are the same as those offered to non-disabled swimmers with limited financial means (i.e. those on state welfare benefits). It would not be reasonable to require the Defendant to charge disabled swimmers with lower incomes even less than non-disabled swimmers with limited means.

(7) The Claimant proposes the removal/ further reduction of charges for all disabled persons. However many disabled swimmers will be comfortable financially, and some will be wealthy. It is clearly not reasonable to require the Defendant to charge even less to such disabled persons. That would entail superior access to the Ponds for disabled swimmers, which is not the policy of the legislation.

(8) Although it is not possible to give a precise estimate of how much it would cost the Charity to provide a complete concession for disabled swimmers, this would certainly cost the Charity "tens of thousands of pounds per year".

(9) If the Charity were to be compelled to remove or reduce charges for disabled people it would inevitably have to consider an equivalent step for other activities, resulting in a further potential reduction in its income (which could not reasonably be assessed in detail).

114. The first point which requires emphasis is that the duty to make reasonable adjustments is owed to disabled people *generally*. It is not simply a duty that is weighed in relation to each individual person who wants to access the service e.g. the Claimant.

115. The Equality Act Statutory Code of Practice states at paragraph 7.29:

> "the duty to make reasonable adjustments places service providers under a responsibility to take such steps as it is reasonable, in all circumstances of the case, to have to take in order to make adjustments. The Act does not specify that any particular factors should be taken into account. What is a reasonable step for a particular service provider to have to take depends on all the circumstances of the case. It will vary according to:
>
> - the type of service being provided
> - the nature of the service provider and its size and resources; and
> - the effect of the disability on the individual disabled person."

116. The question of the reasonableness of an adjustment is an objective one for the courts to determine.

117. I have carefully considered the impact of the increased charges on the Claimant and other disabled users of the ponds. I also bear in mind that an unknown number of people who are not of limited means could qualify as disabled.

118. There has been no free swimming at the ponds for any group (save for before 9.30 for those over 60 or below 16) for seventeen years. Despite this the Claimant now says, in effect, that it is a requirement under the 2010 Act that disabled people, whether impecunious or wealthy, should swim without charge. It is a proposition which, if correct, would apply to the provision of a wide range of services by this Defendant and many others.

119. I accept as correct the proposition that as a general principle, charging for leisure facilities is fundamentally fair and reasonable. It requires a cost contribution from those who use the relevant facilities/services to recognise that the provision of the service has a cost to the provider. Also, it is a choice to use a particular leisure facility and it would be intrinsically unfair and unreasonable for swimming to be subsidised completely or disproportionately by the users of other facilities. Many other facilities will be of considerable benefit to those of limited means and/or with a disability. The report by Mind "Get Set to Go Programme Evaluation Summary [2014-2017]" sets out that getting active can have a positive impact on physical health and can also reduce the risk of depression by up to 30%. NICE guidelines state that physical activity should be one of the first interventions recommended by doctors for mild to moderate depression. It can also reduce anxiety and stress, combat low mood and increase self-esteem. So it is strongly arguable that any recreational activity may help with mental and physical disability. In my judgement it is unrealistic to expect any service provider to make a judgement between the relative health benefits of particular forms of activity.

120. Objectively assessed the charges at the ponds are modest and the process of benchmarking an entirely reasonable way to allow comparison with access to open swimming elsewhere. This process shows the fees at the Ponds to be lower than any of the fees charged at comparable facilities. This is because they are heavily subsidised

which is clearly a very relevant feature when considering the adjustments proposed by the Claimant; all of which will come with significant additional cost.

121. The benchmarking report of January 2021 identified seven open water swimming locations with the charges for an open water swim ranging from £5 to £8 as opposed to the £4 charged for access to the ponds. A concession price was offered by only two of the six providers, and there was no evidence of a free swim offer available in any of the open water venues. I indicated during submissions that I was not familiar with any of the sites. Given the reference by Ms Leventhal QC to both the unique nature of the Hampstead Ponds and also free swimming in Hackney's swimming pools, I considered the first site on the list; West Reservoir. It is located in the London Borough of Hackney, and provides open water swimming "in a picturesque corner of Woodberry Down". It does not operate any form of concession and is run on behalf of the Council by a charitable social enterprise delivering leisure, health and community services. Ms Leventhal QC submitted that none of the sites were properly comparable with the Ponds. If one takes away the ability to sunbathe (this being free at the Ponds) and swim in a female only environment, which are irrelevant to the legal issues in this claim, then it is necessary to concentrate on the open water swimming facility. In this respect I see no significant difference between Hackney West Reservoir (although it is noted that it mainly caters for open water swimmers who wish to train) and the Ponds. No doubt users of the reservoir's waters consider it provides as many health benefits and as much an oasis of calm as Hampstead's Ponds and they do not benefit from any concessions. Consideration of the approach of other comparable service providers can properly form part of the assessment of the reasonableness of an adjustment which would, in effect, set a service provider apart. However, I recognise that consideration should also be given to the possibility that all the other providers are failing to comply with duties under the Equality Act.

122. The charges for use of the ponds were frozen for many years. In my judgment this anomaly led to an expectation of, in effect, special treatment of the Ponds as a facility which was, and would be, objectively very difficult to justify. The new charging regime brings the Ponds up to date with, and properly within, a fair financial scheme for all of the Heath's facilities. Although the charges are relatively (and comparatively with other sites) modest the increase has been significant for all Ponds users. This was a direct consequence of, objectively, years of undercharging. I also have little doubt that what has come as an even more significant change is the introduction of a realistic system of fee collection. It is clear that many, if not the majority of, Ponds users chose not to pay the charges which were in force.

123. The Defendant's officers forecast that the 2020 Charging Policy would attract revenues of £618,000, against forecast running costs of £1,061,000, i.e. a subsidy of approximately 40%. In the event, in financial year 2020/21, total expenditure on the Ponds was actually £966,983, and income of only £367,649 was generated from charges, representing a subsidy of 62%. These figures must be taken in conjunction with the fact that the Charity faces considerable funding pressures. The Defendant is seeking 12% savings on all services funded by the 'City's Cash' fund, and the Charity needs to achieve additional savings of £526,000.

124. It is against this financial background that the adjustments sought must be considered. The reality is that any loss of income cannot be simply "absorbed"; there would be a

funding consequence either within the provision of the Ponds facility or elsewhere. This is different to simply arguing, without more, that an adjustment would cost too much.

125. As Mr Gentry set out a complete concession for disabled swimmers would cost the charity "tens of thousands of pounds per year, which would be a further significant reduction in its finances". He also explained that if the charity were compelled to take this step then it would have to review its concessions for other groups, and other activities, resulting in a further potential reduction in its finances. So it is not just simply a question of the impact on the Ponds' profit and loss in terms of loss of income, but also the impact on the income from other services. He added that there would inevitably have to be a review of the concessions across its other open spaces, and possibly for entirely unrelated services. In that case it would be impossible to quantify the total potential cost. It might be necessary to reassess whether some facilities and services could be maintained at all. I accept what Mr Gentry has stated as entirely reasonable and realistic. I do not view it as an exaggeration. It would be wholly artificial to view the effect on the financial ledger for the Ponds in a bubble. That is not how the Charity does and should work and the previous period when the Ponds' finances appear to have been somewhat under the radar was not objectively justifiable. I cannot properly proceed on the basis that the financial implications of free access at the women's Pond could be hived off from the other repercussions when considering the reasonableness of the adjustment. I reject the submission that the uniqueness of the Women's Pond is in any way an answer to this proposition. Once this is appreciated, and the somewhat precarious financial position at the Ponds is taken into account, it quickly becomes apparent that it is not just the direct and immediate loss of tens of thousands of pounds (which itself would be sufficient to make the provision of free swimming to all disabled swimmers an unreasonable adjustment to impose given the disproportionate impact on the provision of this and other services) but a potentially huge and widespread loss of income.

126. As for the Claimant's alternative suggestion that the 40% concession should be increased; the obvious question is by what degree? I agree with Mr Sheldon QC's submission that neither the Court nor the Defendant could realistically conclude that some other particular percentage is more reasonable than 40%. If the fee were to be set at £1 it might satisfy the Claimant but not another disabled person of limited means; particularly if on the wrong side of Mr Micawber's equation. As Lord Justice Elias set out in **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160 at paragraphs 77-78, where there is no obviously appropriate adjustment which would remove a disadvantage suffered by disabled persons, and an adjustment would therefore be arbitrary and, probably to a degree invidious, a court is fully entitled to take the view that it cannot provide a sound basis for concluding that an adjustment is reasonable. That is the view that I take.

127. Finally, on the issue of a reasonable adjustment to remove or lower charges at the Ponds as I have already set out the EHRC has never suggested that the law imposes any requirement to charge less to disabled customers; on the contrary, it has said in terms that that service providers "can charge [disabled service users] the same as they charge other people".

128. As for the provision of a direct debit option as I have set out Mr Gentry addressed the costs associated with and drawbacks of its introduction and use in his statement. The idea was mooted and discounted because of the additional cost and the obvious potential

for lost revenue. As for the argument that Mr Gentry is being pessimistic in his belief that it would facilitate much reduced payment by some users, given that so many users chose not to pay fees over many years I accept his analysis as reasonable. In reality some people would swim for a few months in the summer and then cancel the direct debit order. In my view the costs and downsides are such that this could not be required as a reasonable adjustment. As an additional point if direct debit was introduced at the Ponds by virtue of disability the measure would have to be considered and potentially implemented at a range of other facilities which do not currently have it.

129. Accordingly, I am satisfied that the Defendant has established that it has not failed to make reasonable adjustments.

130. In arriving at the conclusions set out above I have born in mind Ms Leventhal QC's submissions about the lack of monitoring and more detailed assessment. As Mr Justice Elias (as he then was) stated in **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664, there is no separate and distinct duty of reasonable adjustment to consult as to what an adjustment might be. Ultimately the focus must be upon substance, and not process. In the circumstances of this case the argument that the Defendant could have performed more "monitoring" of disabled swimmers does not have any impact on the end result.

Ground 2

131. It is the Claimant's case that the charging policy is indirectly discriminatory contrary to section 19 of the Equality Act 2010.

132. Indirect discrimination may occur when a service provider applies an apparently neutral provision, which puts persons sharing a protected characteristic at a particular disadvantage. For indirect discrimination to take place three requirements must be met:

a) the service provider applies the relevant provision, criterion or practice to everyone in the relevant group;

b) that provision, criterion or practice puts people who share the particular service user's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic;

c) the service provider cannot show that the provision, criterion or practice is justified as a proportionate means of achieving a legitimate aim.

133. It was not in dispute that the PCP for the purposes of indirect discrimination is the charging policy taken in its entirety. Ms Leventhal QC submitted that the PCP puts those with whom the Claimant shares a protected characteristic, what Ms Leventhal QC described as "a combination of mental and physical disabilities", at a particular disadvantage. The suggestion that it is not possible to infer from the evidence before the Court that others who have the same type of disability as the Claimant (the combination of mental and physical disabilities) are also at a particular disadvantage was incorrect. There was substantial evidence that the charging policy did just that. The Defendant, by its own failure to monitor, has failed to produce any alternative evidence.

134. Ms Leventhal QC accepted that the charging policy has a legitimate aim of achieving financial sustainability. However, it was not a proportionate means of achieving that

legitimate aim. To be proportionate the Defendant had to explain why that aim could not be achieved without a disproportionate impact on disabled people. The Defendant has not even attempted to do this, nor could it, given its failure to monitor the impact.

135. Mr Sheldon QC repeated his submissions in respect of Ground 1 as regards the lack of any comparative disadvantage, substantial or particular, arising from the charging policy. He also submitted that the claim for indirect discrimination must fail because the Claimant has provided no evidence that the Charging Policy "puts, or would put, persons with whom [she] shares the particular characteristic [that is: her particular disability] at a particular disadvantage when compared with persons with whom [she] does not share it" (section 19(2)(b) of EA 2010 Act).

136. The evidence submitted by the Claimant about disability and income and/or affordability of the charging policy is generic and does not relate to her particular disability as required by EA 2010 Act.

137. Further the aims were plainly legitimate. They did not offend the principle that the saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim. The rationale behind the policy and the surrounding financial circumstances and potential impact of income reduction had been set out in detail.

Analysis

138. In an indirect discrimination claim there is no need for proof of the reason why the PCP puts the affected group at a disadvantage, only that there is a causal connection between that provision, and the disadvantage suffered. Ms Leventhal QC relied on **Essop v Home Office** [2017] UKSC 27 for this proposition.

139. In **R (Adiatu) & another -v- Her Majesty's Treasury** [2020] EWHC 1554 Lord Justice Bean and Mr Justice Cavanagh set out at paragraphs 148 and 149 that:

> "The Claimants rely upon the judgment of the Supreme Court in *Essop v Home Office* [2017] UKSC 27. The claim in *Essop* concerned an assessment process for promotion in the Civil Service which resulted in lower pass rates for BAME candidates than white candidates. No-one knew why. In *Essop*, the Supreme Court made clear that if the PCP caused a particular disadvantage for those with a protected characteristic, it was not necessary for the court or tribunal to go further and identify why this is so. Baroness Hale gave the example that there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage (judgment, paragraph 24). However, Baroness Hale also made clear that the law of indirect discrimination was intended to prohibit PCPs which caused the particular disadvantage: see paragraph 26. At paragraph 25, Baroness Hale said that:
>
> > "….the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect

> discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."
>
> In relation to the rate of SSP, there is no "hidden barrier". *Essop* is not authority for the proposition that something places those with protected characteristics at a particular disadvantage because their circumstances, unconnected with the PCP, are less favourable than those of others. In our judgment, the Defendant is right to submit the Claimants do not rely upon any disadvantage that is caused by the rate of SSP itself. Rather, they rely upon an alleged disadvantage, the absence of other financial resources, which is not caused or related to the rate of SSP in any way. This does not turn the rate of SSP into a PCP which places women or BAME employees at a particular disadvantage.."

140. I would respectfully agree with this analysis, and for the reasons set out above in relation to Ground 1 I do not accept that the necessary casual connection exists i.e. that the PCP, a flat charge for all, puts people who share the particular service user's protected characteristic at a particular (or substantial) disadvantage when compared with people who do not have that characteristic. The root problem is a lack of disposable personal income, which is unconnected to the PCP and the disabled and non-disabled (who all receive a concession if on benefits) are equally affected.

141. Accordingly Ground 2 must also fail. I will briefly deal with the other issues raised in respect of this ground.

142. Mr Sheldon QC argued that the Claimant had provided no evidence that the charging policy "puts, or would put, persons with whom [she] shares the particular characteristic [that is: her particular disability] at a particular disadvantage when compared with persons with whom [she] does not share it" (section 19(2)(b) of EA 2010 Act). I agree. Given the lack of a causal connection with disability generally it is difficult to see how a specific type of disability (the Claimant's particular disabilities are rheumatoid arthritis, chronic obstructive pulmonary disease and depression) could be in a materially different position.

143. I also see the force in Mr Sheldon QC's submission that if the Claimant's argument upon indirect discrimination was correct it could apply equally to other user groups (e.g. BAME or female users) who could establish that they had a greater proportion of members with limited finances. The logical conclusion would be that a range of groups should pay no fees. It could also apply pari passu to the provision of many other services to groups with a higher proportion of financial hardship, such as gas and electricity for domestic heating. Ms Leventhal QC had referred in her submissions to a recent Parliamentary briefing paper which set out that 44% of individuals with relative low income live in a family where someone is disabled and that "cost is a significant barrier for disabled people to participate in everyday life on an equal footing to non-disabled people". Mr Sheldon QC submitted that the reason claims were not brought on this basis was because it was recognised that "this is the way the economy works" and reasonable people would not believe that it would give rise to a legitimate claim under the 2010 Act to pay no (or a lesser) fee for such services solely based on membership of any group with a higher proportion of people with limited means. It appeared to me that **Adiatu** was, taken broadly, a claim of the type Mr Sheldon QC envisaged would not be brought. It was; but was unsuccessful, and in my respectful view, rightly so.

144. For the avoidance of doubt, I should add that I reject Ms Leventhal QC's submission that the correct comparator is not non-disabled people of limited means/ on benefits. She argued that the court should not draw comparator pools in a way which is "self-defeating" (because the other pool also suffers discrimination or hardship). The issue in this claim is "affordability" and the non-disabled people on benefits are effectively in the same position as disabled people on benefits. The comparator group is obviously correct and the fact that it defeats the Claimant's argument does not mean that it can somehow be avoided.

145. I am also satisfied that the charging policy is a proportionate means of achieving a legitimate aim. As I have set out the charging policy is part of an overall financial structure which covers the provision of a wide range of public services; both on and off the Heath. In some discrimination cases the costs of a measure can be seen in isolated terms, but that is not the case here as the Claimant's arguments, if correct, apply to all the Defendant's services which are open or provided to disabled people.

Ground 3

146. Permission was refused on this ground on the papers and Ms Leventhal QC renewed her application.

147. It is the Claimant's case that Article 14 has been infringed when read with A1/P1 or Article 8.

148. Article 14 provides:

> "Prohibition of discrimination
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status."

149. Article 8 provides:

> "Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

150. A1/P1 provides, in relevant part:

> "Protection of property

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

151. There are four elements of a discrimination claim under Article 14. There must be:

(i) a difference in treatment within the ambit of a substantive Convention right;

(ii) of persons in analogous situations;

(iii) that does not pursue a legitimate aim; or

(iv) where there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

152. The analysis of indirect discrimination under Article 14 works in much the same way as the analysis of indirect discrimination under the Equality Act 2010 set out above, save that Article 14 takes a less technical approach to comparators.

153. As to ambit, Ms Leventhal QC's submissions were as follows:

(i) In respect of Article 8, **Zehnalová and Zehnal v. The Czech Republic** (2002) App No 38621/97 establishes that where inaccessibility affects a disabled person's life *"in such a way as to interfere with her right to personal development and her right to establish and develop relationships with other human beings and the outside world"* such that there is a *"special link between the access to the* [service] *in question and the particular needs of her private life"* then a lack of accessibility can fall within Article 8. In this case there is such a direct link. The ponds are an important part of the Claimant's therapy; she relies on them *"mentally, emotionally and physically"* and has reported the benefits of accessing them to her GP over numerous years. They allow her to manage her chronic pain conditions more effectively. Access to the ponds is not, for example, mere access to a beach on holiday.

(ii) In respect of A1P1, a charging policy that requires a contribution from service users (that the state, via the Defendant, imposes under a power, rather than a duty) may fall within the ambit of A1P1, see generally **R (SH) v. Norfolk County Council** [2020] EWHC 3436. For example, contributions towards the collection of taxes fall within A1P1. In **NKM v. Hungary** [2013] STC 1104, the ECtHR said *"the court further reiterates that the levying of taxes constitutes in principle an interference with the right guaranteed by [A1P1] and that such interference may be justified…however, this issue is nonetheless within the court's control"*. Although the Pond charges are not directly compulsorily imposed (like taxes), they are an essential service for the Claimant to accept as part of her health (as was the case in **SH**). Further, the effect of the charging scheme impacts on the Claimant's financial resources and plainly falls within the ambit of A1P1 as a result.

154. Mr Sheldon QC submitted that the claim does not fall within the ambit of either Article 8 or Article 1 of Protocol 1 ("A1P1") to the ECHR, and so no Article 14 challenge can be brought. Also the test for indirect discrimination under Article 14 is essentially the same as that under section 19, and it fails in the present case for the same reasons (i.e the Charging Policy does not have a disparate adverse impact on disabled swimmers; and, in any event, it is justified as a proportionate means of achieving a legitimate aim).

Analysis

155. Article 14 is not a free-standing provision relating to discrimination, but only applies where an applicant can show that their circumstances fall within the ambit of one of the Convention rights.

156. I accept Mr Sheldon QC's submission that the claim does not fall within the ambit of either Article 8 or A1P1. Indeed the converse is not arguable with a realistic prospect of success.

157. Article 8 is broad, but I see no realistic argument that it applies to the Claimant on the present facts. In **Zehnalová and Zehnal v The Czech Republic** the first applicant was physically disabled. A large number of public buildings and buildings open to the public in her home town were not equipped with access facilities for people with disabilities (people with impaired mobility). She asserted that she was unable to enjoy a normal social life allowing her to deal with her everyday problems in a dignified manner and to practise her profession. The Court ruled that a complaint about public buildings with architectural barriers to the disabled fell outside the ambit of Article 8, even for the purposes of an Article 14 claim; "*The Court considers that Article 8 of the Convention cannot be taken to be generally applicable each time the first applicant's everyday life is disrupted*". The Charging Policy in the present case presents no physical barriers to disabled swimmers who want to access the Ponds and cannot fall within the ambit of Article 8.

158. As for A1P1 the mere fact that the Claimant is required to pay for a service, which is not a welfare or social care service does not bring the claim within A1P1. 74.

159. Even if either Article 8 or A1P1 was engaged for the reasons which I have set out above, there is no detrimental difference in treatment between the Claimant and persons in analogous positions. The Charging Policy does not have "disproportionately prejudicial effects" on disabled swimmers.

160. Thirdly, in any event, for the reasons already explained with respect to Grounds 1 and 2, the charging policy pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

161. I refuse the renewed application for permission on Ground 3.

Conclusion

162. For the reasons set out above the claim fails. I leave it to Counsel to agree an order.