Neutral Citation Number: [2025] EAT 82

Case No: EA-2024-000095-LA

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 June 2025

**Before** :

**JUDGE STOUT**

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**Between :**

**MR HARRY STEDMAN**

**Appellant**

**- and -**

**HAVEN LEISURE LTD**

**Respondent**

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**Patrick Halliday** (instructed by **Advocate**) for the **Appellant**
**Bianca Balmelli** (instructed by **Walker Morris LLP**) for the **Respondent**

Final Hearing
Hearing date: 22 May 2025

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# JUDGMENT

## SUMMARY

## DISABILITY DISCRIMINATION (12)

The claimant has diagnoses of Autism Spectrum Disorder (ASD) and Attention Deficit Hyperactivity Disorder (ADHD). He brought claims of disability discrimination against the respondent. At a preliminary hearing, the Employment Judge determined that he was not disabled within the meaning of section 6 of the Equality Act 2010 (EA 2010).

**Held, allowing the appeal and remitting to a fresh Tribunal:-**

In considering whether someone has a disability within the meaning of section 6 of the EA 2010: (i) it is sufficient if the claimant has a mental or physical impairment that has a substantial (more than minor or trivial) adverse effect on just one day-to-day activity; (ii) the Tribunal must not weigh what a claimant cannot do against what they can do, either with reference to a single activity or generally in relation to all day-to-day activities; and, (iii) in judging whether the adverse effect is substantial, the comparison is between the claimant as they are and as they hypothetically would be without the impairment. The Tribunal had made a number of errors as a result, in part, of failing to apply those principles. Although it was not perverse for the Tribunal to have concluded in this case that the claimant was not disabled, it was perverse for it to have done so on the basis of the facts it found and for the reasons that it gave.

Further (*obiter*), a diagnosis of ASD or ADHD is not to be regarded only as constituting the 'impairment' for the purposes of section 6; the diagnosis reflects a clinician's opinion as to the extent to which that individual's functioning differs to the 'norm' and accordingly is also a relevant factor for the Tribunal to take into account when considering whether the impairment has a 'substantial adverse effect'.

**JUDGE STOUT:**

## Introduction

1. The appellant was the claimant below. The respondent operates caravan holiday and leisure parks across the UK. The claimant made an application to the respondent for employment as an Animation Host which was not ultimately successful. He made a claim to the Employment Tribunal of disability discrimination in relation to the respondent's handling of his application.

2. The case was listed for a preliminary hearing before Employment Judge Postle on 7 November 2023 to decide whether the claimant has a disability within the meaning of section 6 of the Equality Act 2010 (EA 2010). The claimant has diagnoses of Attention Deficit Hyperactivity Disorder (ADHD) and Autism Spectrum Disorder (ASD).

3. By a judgment sent to the parties on 21 December 2023, an Employment Judge decided that the claimant did not have a disability within the meaning of section 6 of the EA 2010, and the claimant appeals against that judgment. Permission was granted by HHJ Auerbach at a rule 3(10) hearing on 12 February 2025 at which the claimant was represented by Mr Patrick Halliday of counsel under the ELAAS scheme. Mr Halliday represented the claimant again at this hearing. The respondent was represented by Ms Balmelli of counsel.

## The grounds of appeal

4. There are four grounds of appeal as follows:-

   a. Ground 1 - The decision that the claimant did not have a disability was perverse in light of the contents of Professor Fox's report which confirmed his diagnosis of autism and ADHD;

   b. Ground 2 - The Judge erred in failing to recognise the following matters amounted to substantial adverse effects on the claimant's ability to carry out normal day-to-day activities, or at least in failing to consider whether their effect was sufficiently

"substantial" to meet the statutory test under section 6(1)(b):

i. difficulty forming friendships (as per [22] of the Tribunal judgment);

ii. inability to use public transport when crowded ([9], [24]);

c. Ground 3 - The Judge erred in failing to accept (alternatively, failing to reach factual findings on) the following matters set out in the claimant's disability impact statement (quoted at [5]), and accordingly failing to decide whether those matters had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities:

i. The claimant struggled to remember things and had difficulty concentrating;

ii. The claimant excluded himself from social activities;

iii. The claimant struggled to interact and communicate with colleagues and customers.

d. Ground 4 - The judge erred by focussing on what the claimant can do, rather than what he cannot do or can do only with significant difficulty, by relying on the facts that:

i. The claimant performs in public, forms social relationships and visits friends ([22]), rather than his social difficulties referred to above;

ii. The claimant has completed a degree and BTEC examinations ([22]), rather than his memory and concentration problems referred to above;

iii. The claimant can use public transport when not crowded ([24]), rather than his inability to use public transport when crowded.

## The law: (i) the approach of the EAT

5. Under section 21 of the Employment Tribunals Act 1996 an appeal to the Employment Appeal Tribunal lies only on a question of law.

6. As helpfully summarised in the judgment of the Court of Appeal in *R (Iran) v SSHD* [2005]

EWCA Civ 982 at [9], and as relevant to the present appeal, errors of law include: i) making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters"); ii) failing to give reasons or any adequate reasons for findings on material matters; iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters; iv) giving weight to immaterial matters; and, v) making a material misdirection of law on any material matter.

7. Perversity is a high hurdle. Mummery LJ's observations in the Court of Appeal in *Yeboah v Crofton* [2002] IRLR 634 at [93] –[94] still set the standard: there must be *"an overwhelming case … that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and law, would have reached*", such as where the Tribunal misunderstood the evidence in a way that led it to *"make a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence"*. As Mummery LJ cautioned in that case: *"…no appeal on a question of law should be allowed to be turned into a rehearing of parts of the evidence by the Employment Appeal Tribunal"*. However, a decision will be perverse if a Tribunal has *"failed to make a finding of fact as to which there was uncontroverted evidence"*: *Ellett v Welsh Products Ltd* EAT/652/82 (Browne-Wilkinson J (P) (as he then was), presiding).

8. In scrutinising the judgment of the Employment Tribunal, I must read the judgment fairly and as a whole, without focusing on individual phrases or passages in isolation and without being hypercritical: see *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672 at [57]. The Employment Tribunal is not required to express every step of its reasoning but only to set out sufficient reasons to enable the parties to see why they have lost or won and that no error of law has been made. It is not an error of law to fail to mention a particular fact in the judgment; what is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. That case also makes the point (at [58]) that where the Employment Tribunal has correctly stated the law, the Employment Appeal Tribunal should be slow to conclude that it has misapplied it.

## The law: (ii) disability and section 6 of the Equality Act 2010 (EA 2010)

9. Section 6 of the EA 2010 provides:

> **6 Disability**
> (1) A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
> (2) A reference to a disabled person is a reference to a person who has a disability.
> (3) In relation to the protected characteristic of disability—
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
> (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
> (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
> (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
> (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
> (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
> (6) Schedule 1 (disability: supplementary provision) has effect.

10. Section 212(1) of the EA 2010 defines "substantial" as "more than minor or trivial".

11. By paragraph 2(1) of Schedule 1, the effect of an impairment is long-term if: (a) it has lasted for at least 12 months; (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.

12. The Government has issued "Guidance on matters to be taken into account in determining questions relating to the definition of disability" (2011) under section 6(5) of EA 2010 (the "Guidance"). Provisions in the Guidance must be taken into account by tribunals insofar as they are or appear to be relevant to any questions arising in proceedings: see paragraph 12 of Schedule 1 to EA 2010. However, as HHJ Tayler held in *Elliott v Dorset County Council* [2021] IRLR 80 at [62],

if there is any tension between the Guidance and the statute, the statute must prevail.

13. The Equality and Human Rights Commission has also issued an Employment Statutory Code of Practice ("the Code") in the exercise of its powers under section 14(1) of the Equality Act 2006, which Tribunals must take into account in any case in which it appears to be relevant (section 15(4)). HHJ Tayler's observation in *Elliott* about the precedence of the statute must apply equally to the EHRC Code of Practice.

14. In *Goodwin v Patent Office* [1999] ICR 302, the Employment Appeal Tribunal (Morison J presiding) analysed the predecessor provision to section 6 of the EA 2010 into four components, [1999] IRLR 4 (at 6–7), [1999] ICR 302 (at 308 B–C):

> '3. Section 1(1) [of the Disability Discrimination Act 1995] defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a tribunal to look at the evidence by reference to four different conditions.
> (1) **The impairment condition**
> Does the applicant have an impairment which is either mental or physical?
> (2) **The adverse effect condition**
> Does the impairment affect the applicant's ability to carry out normal day-to-day activities …, and does it have an adverse effect?
> (3) **The substantial condition**
> Is the adverse effect (upon the applicant's ability) substantial?
> (4) **The long-term condition**
> Is the adverse effect (upon the applicant's ability) long-term?

15. Morison J in *Goodwin* noted that the different elements could overlap and cautioned against 'disaggregation'. In *Elliott* HHJ Tayler gave guidance as follows at [18]:

> **The 'disaggregation' point is important. The legal mind tends to split statutory provisions into components, as Morison J started his analysis by doing; but there is a risk that this may be at the cost of maintaining an overview. Often the components can only properly be analysed by seeing them in the context of the provision, and statute, as a whole. This can be particularly important if some of the components are conceded, or not significantly disputed. It is necessary to consider the basis of any concession to be able to properly analyse the components that are in dispute. For example, it might be admitted that there is an impairment, but it will be difficult to apply the adverse effect, substantial and long-term conditions unless the nature of the impairment that has been conceded is clear. Similarly, it is not possible to properly analyse whether an**

> **impairment results in a substantial adverse effect on day-to-day activities, without knowing what the day-to-day activities are.**

16. The fourth element (long-term effect) is not in issue in this case and I say no more about it.

17. As to the first element of mental or physical impairment, it is well established (as it is put in paragraph [7] of the Code) that: "There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause". As such, the consideration of whether an individual has a mental or physical impairment shades into consideration of the second requirement as to whether there is an adverse effect – something is not an impairment unless it 'impairs', i.e. unless it has at least *an* adverse effect.

18. As to the second element of adverse effect on day-to-day activities, it is well established that normal day-to-day activities includes normal workplace activities: see *Elliott* at [52]-[53]. The claimant in this case draws attention to the paragraphs in the Guidance that confirm that day-to-day activities include examples such as "shopping, reading and writing … watching television … travelling by various forms of transport … taking part in social activities … [and] interacting with colleagues": see D3.

19. As to the third element that the adverse effect be substantial, the Guidance emphasises that the focus should be on what an individual cannot do, or can do only with difficulty, rather than on the things that he or she can do (B9). This principle is well established in the case law too: see *Goodwin v Patent Office* [1999] ICR 302 at 308H to 309G and *Elliott* ibid at [21]-[23]. In *Ahmed v Metroline Travel Limited* [2011] EqLR 464, Cox J gave further guidance as to how Tribunals should approach the task of analysing the evidence in such cases:

> **46. Ms Kochnari is correct in submitting that, under the DDA, the Tribunal must focus upon what a Claimant cannot do. I accept therefore that, as a matter of principle, it will be impermissible for a Tribunal to seek to weigh what a**

> **Claimant can do against what s/he cannot do, and then determine whether s/he has a disability by weighing those matters in the balance.**
>
> **47. However, I am not persuaded that this Tribunal fell into error in approaching the matter in that way. Each case will, of course, depend on its own particular facts, and there will sometimes be cases where there is a factual dispute as to what a Claimant is asserting that he cannot do. In such circumstances I agree with Mr Dyal that findings of fact as to what a Claimant actually can do may throw significant light on the disputed question of what he cannot do. This, in my view, was such a case.**

20. A further important point of principle on which the parties in this case agree is that it is also impermissible for a Tribunal to seek to 'weigh up' a claimant's ability to carry out one type of day-to-day activity against their ability to carry out another type of day-to-day activity. This is one respect in which adhering too literally to the wording of the statute may in fact lead a Tribunal into error. The statute refers to "substantial adverse effect on … day-to-day **activities**" in the plural. It can thus be read either as requiring that a claimant's impairment has a substantial adverse effect on more than one day-to-day activity, or that a Tribunal should consider all day-to-day activities in order to consider whether, overall, the impairment has a substantial adverse effect. Neither approach is correct. The latter falls foul of the principle discussed above that the Tribunal must not weigh what a claimant cannot do against what they can do, while the former reading was roundly rejected by the Employment Appeal Tribunal in *Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591 (Langstaff P presiding). At [24], Langstaff P held that a claimant could satisfy the definition of disability even if only one activity of day-to-day living were affected. The parties in this case agree that is a correct statement of the law, and I agree with the reasoning in *Aderemi* on this point.

21. The claimant in this case draws attention to the Appendix to the Guidance which contains an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. These include: "Difficulty using transport; for example … as a result of a mental impairment"; "Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships"; and "Persistent distractibility or difficulty concentrating". The claimant also

points to what the Guidance says about adverse effects on a person's "ability to understand human non-factual information and non-verbal communication such as body language and facial expressions" (D17), such as a man disabled by virtue of Asperger's syndrome (a diagnostic term previously used for a form of autism), because he "finds it hard to understand non-verbal communications such as facial expressions, and non-factual communication such as jokes" (page 41, after D17). The Guidance also gives the example of a disabled individual with ADHD causing inability to concentrate: see page 12 (after A13).

22. A final point of principle that is of importance in this case is one that emerges from the consideration that was given by HHJ Tayler in *Elliott* to the statement in paragraph 8 of Appendix 1 to the EHRC Code of Practice that, "The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people." If I may venture to summarise the conclusion HHJ Tayler reached at [46]-[51] of the judgment, it is that the question of whether an adverse effect is substantial is to be judged applying the terms of the statute and is a question of fact. The statute requires that the Tribunal consider whether the adverse effect of an impairment on a person is the same compared with the position of the same person without the impairment (see in particular [43]). It does not require a comparison with any particular pool of non-disabled people, and is certainly not to be judged by reference to deviation from the 'average' abilities of a member of the adult population (see [40] and [46]). Borrowing the example Mr Halliday gave at this hearing, if playing tennis were a day-to-day activity, a professional wheelchair tennis player with a mobility-related physical disability would satisfy the definition of disability as regards the activity of playing tennis even though their tennis-playing abilities far exceed those of an average adult because, if they did not have a mobility-related disability, they would likely play even better.

23. HHJ Tayler did not, however, consider that the sentence in paragraph 8 of the Code of Practice

was wholly unhelpful. In seeking to judge whether or not a difficulty is "substantial", it may be relevant to consider whether the nature of the adverse effect goes "beyond the normal differences in ability which might exist among people", but (if I may 'gloss' what HHJ Tayler says at [46] in *Elliott*), that can only be by making a notional comparison between the claimant and a cross-section of people of similar general cognitive ability to the claimant who do not have the impairment. In any cross-section of people of similar general cognitive ability who do not have an 'impairment', there will be differences in their ability to carry out specific day-to-day activities. The point that the Code of Practice seeks to make is that differences of that sort may be considered 'minor or trivial' for the purposes of the statute. If, however, the effect of the impairment on a claimant's ability to carry out one or more day-to-day activities goes beyond that normal degree of variation, then its effects may be considered 'substantial' for the purposes of the statute. Like HHJ Tayler, though, I emphasise that it is the words of the statute that must be applied: the comparison is between the claimant with the impairment and as they hypothetically would be without the impairment. Paragraph 8 of the Code of Practice merely provides a way of gauging what might be regarded as 'minor or trivial' in this context.

## Relevant background and the Tribunal's decision

24. The Tribunal had before it a bundle of documents that included the claimant's Impact Statement, a letter from the claimant's GP regarding a referral for an autism assessment, an extract from the claimant's GP notes and what the Tribunal at [3] described as "a brief Report from a Professor Fox who is a Consultant Psychiatrist confirming a diagnosis of Adult ADHD"; at [18] the Tribunal added that the report also confirms a diagnosis of ASD.

25. On the face of that report (which was produced on 29 October 2023, shortly prior to the Employment Tribunal hearing), those diagnoses were made following the application of psychometric tests, including the Wender Utah ADHD (on which the claimant had scored "74, needing only 46 for diagnosis"), and the Copeland Checklist (against which the claimant "met the

criteria for ADHD") and the Ritvo (on which the claimant scored "33 out of 42, needing only 13 for diagnosis"). The report from Professor Fox does not explain what the Ritvo is, but the parties agree that it is a scale to assist in the adult assessment of autism.

26. At the hearing, the Tribunal heard oral evidence, which the Tribunal records at [4] as 'confirming the contents of his Impact Statement'. At [5] the Tribunal notes that the Impact Statement set out difficulties with forming friendships, with remembering lists for shopping, difficulties in concentration affecting reading, writing or watching long programmes, difficulties using public transport and not being able to drive due to lack of focus, not taking part in social activities and struggles interacting and communicating with colleagues, although the claimant said he could 'overall' 'mask' his disabilities.

27. The Tribunal in its judgment goes on to set against the Impact Statement what the claimant said in oral evidence. This included the following: that the claimant during 2018 undertook a Business Studies Degree ([6]); that he did well at school obtaining the equivalent of three A* 'A' Levels, a BTEC qualification and a number of 'O' Levels ([7]); that he was 'able to concentrate and has good coping strategies' ([7]); that he 'has friends although he does take a long time to form a friendship' and 'when performing he is very sociable but outside of that he can be shy' ([7]); that he had never had any driving lessons or taken a Driving Test ([8]); that he uses public transport but avoids transport that is overcrowded because 'he feels he is somewhat claustrophobic' ([9]); that he has had Speaking Therapy and Relationship Counselling which he arranged himself ([10]).

28. The Tribunal at [11]-[17] gives itself self-directions as to the law about which no complaint is made by the claimant on this appeal.

29. The Tribunal's conclusions on the issue of whether the claimant has a disability within the

meaning of section 6 of the EA 2010 are set out at [19]-[25].

30. At [19] the Tribunal accepts that the claimant 'clearly has a mental impairment' on the basis of the autism and ADHD diagnoses. The Tribunal then asks itself whether that impairment has an adverse effect on his ability to carry out normal day-to-day activities, reminding itself that "the focus must be on that which the claimant maintains he cannot do as a result of this impairment".

31. At [20] the Tribunal states that, based on the claimant's Impact Statement, his difficulties with normal day-to-day activities appear to be "what one might expect from somebody who is not disabled carrying out such activities, such as shopping, dealing with a break up and forming friendships".

32. At [22], the Tribunal notes that the claimant "clearly is a social person, he performs in public, he forms social relationships albeit sometimes with some difficulties and he visits friends". The Tribunal continues by finding that he "may have overstated his issues with reading, writing and concentration", given his school and university successes.

33. At [23], the Tribunal found that the claimant had overstated his difficulties with driving because he had not even tried driving.

34. At [24], the Tribunal concluded that the claimant "has no problems with Public Transport other than if they are overcrowded".

35. At [25], the Tribunal concluded that, taking all matters into account, it was clear that the claimant's disability does not have a substantial impact on his normal day-to-day activities and that he accordingly did not meet the definition of a person with a disability for the purposes of section 6 of the EA 2010.

## The grounds of appeal

*Complaints about the grounds of appeal / amendment application*

36. Ms Balmelli for the respondent made a number of complaints about ground 1 of the appeal. She pointed out that, contrary to paragraph 3.8.6 of the 2024 EAT Practice Direction, the grounds do not state the order being sought if the appeal succeeds. She submitted that, contrary to paragraphs 3.9.2 and 3.9.4 of the Practice Direction, the grounds failed to set out full details of the matters relied on in support of the perversity argument or to specify whether the perversity was that: (a) no reasonable tribunal could have the conclusion reached by the employment tribunal on the basis of the findings of fact it made, and/or (b) no reasonable employment tribunal could have made the findings of fact that the employment tribunal made on the basis of the evidence.

37. After some argument at the hearing, it was clarified that Ms Balmelli accepted that, permission having been granted, she could not seek to 'strike out' the appeal for these reasons. She further accepted that these defects had been remedied in Mr Halliday's skeleton argument, but submitted that the skeleton argument enlarged on the original grounds of appeal to such an extent that an application to amend was in fact required. She submitted that if an application to amend was made, it should be refused because the respondent had been 'taken by surprise' in the skeleton argument, if it had known the claimant's case earlier, it might have conducted the proceedings differently, even perhaps seeking the judge's notes of evidence in case there was more in the notes that bore on the appeal.

38. Mr Halliday submitted that no application to amend was required. The skeleton argument had provided further particulars of the perversity, not any new grounds of appeal. If permission to amend was required, his application would be that the respondent had had the amendment in writing in the skeleton argument two weeks prior to the hearing, there was no prejudice to the respondent of granting the amendment, while refusing it would not allow the claimant properly to argue his grounds of appeal. He submitted reference to the judge's notes of evidence was not necessary to deal with the

appeal.

39. In my judgment, no application to amend is required in respect of the matters at [24]-[26] of Mr Halliday's skeleton argument. The respondent is right in principle to identify that ground 1 of the appeal does not comply with the requirements of the Practice Direction. However, permission to amend the ground in those terms was given by HHJ Auerbach in the Order sealed on 14 February 2025. In accordance with the usual practice in the Employment Appeal Tribunal when permission to amend has been given, paragraph 4 of HHJ Auerbach's Order gave the respondent 14 days to apply to vary or discharge the order permitting the amendment and/or for consequential directions. That was the time at which objection to the amended ground should have been raised, or further particulars sought, but the respondent did not make any such application. Instead, the respondent included its complaints about the grounds in the Respondent's Answer filed 14 days later.

40. Ground 1 of the appeal is dealt with by the claimant in four short paragraphs in Mr Halliday's Skeleton Argument ([24]-[27]). Inevitably, those paragraphs are an expansion of the one-line ground of appeal on which permission was granted, but in my judgment, the first three paragraphs are clearly simply further particulars of the ground of appeal on which permission was granted. The ground of appeal was that "the decision the C did not have a disability was perverse in light of **the contents** of Professor Fox's report which confirmed his diagnosis of autism and ADHD" (emphasis added). Paragraphs [24]-[26] of Mr Halliday's skeleton argument in my judgment simply identify the contents of the Fox Report on which the claimant relies. The respondent could have asked for those particulars earlier, and the claimant should have provided them earlier, but they are still in character further particulars of the ground of appeal on which permission was granted. The respondent had them two weeks prior to the hearing in the skeleton argument and was able to deal with the arguments at this hearing. There is no unfairness in the claimant being able to rely on those further particulars.

41. The point made at [27] of Mr Halliday's skeleton argument is, to my mind, in a different category. The paragraph begins with the sentence, "Alternatively, it was perverse of the Tribunal, in concluding that Mr Stedman was not disabled, to fail to take account of these aspects of the Fox Report". That seems to me to be a different ground of appeal to that on which permission was granted: rather than being a 'pure' perversity argument, it is an argument that there was a failure to take into account relevant factors. The difference between the two points is implicitly acknowledged by Mr Halliday's use of the word "Alternatively", and in grounds 2 and 3 this type of 'alternative' argument was set out in the grounds on which permission was granted. Strictly speaking, therefore, it seems to me that permission is required to add the argument set out in [27] of Mr Halliday's skeleton argument. However, Ms Balmelli did not see it as such: she viewed the content of [27] as being no different in this respect to the content of [24]-[26].

42. Despite Ms Balmelli's position, given the view I have taken of the nature of the argument identified in [27], I have considered whether permission should be given to amend to include that argument in the appeal. I take account of the principles in *Khudados v Leggate* [2005] IRLR 540. An application to amend could have been made earlier, but it was not made because it was not recognised that an amendment was required. Although I disagree with that view, I have sympathy with it, especially given that neither party considers the argument in [27] should be dealt with any differently to [24]-[26]. This would be the second amendment to the grounds in this appeal, but it is a very minor amendment. There is a very close relationship between the argument in [27] and the ground on which permission was granted: it simply restates the same substantive points relied on for a 'perversity' argument as a 'failure to take into account relevant factors' argument. The respondent had the 'amendment' in writing in the skeleton argument two weeks in advance of the hearing and has been well able to deal with it at this hearing. In short, the prejudice to the claimant of not having the argument considered on its merits outweighs the prejudice to the respondent.

43. I therefore grant permission to the claimant to rely on [27] of Mr Halliday's skeleton argument. No permission is required for [24]-[26], which are covered by HHJ Auerbach's grant of permission.

*Ground 1*

*Mr Halliday's submissions*

44. Ground 1 is that the decision that the claimant did not have a disability was perverse in light of the contents of Professor Fox's report which confirmed his diagnosis of autism and ADHD, or alternatively that the decision perversely failed to take account of the contents of the Fox Report.

45. Mr Halliday accepts that a diagnosis of autism does not always mean that the test for disability is met, but does submit that the Tribunal in failing to conclude that the claimant had a disability failed to make findings of fact for which there was uncontroverted evidence in the form of Professor Fox's report. He relies on *Kapadia v London Borough of Lambeth* [2000] IRLR 699 at [24] and [29] for the submission that Tribunals should accept uncontradicted medical evidence unless they have good reason not to do so.

46. He submits that the Fox report contained medical evidence the effect of which was that the impact of Mr Stedman's autism and ADHD on his ability to carry out daily activities was substantial. In particular, he submits that the Fox report was evidence that Mr Stedman had longstanding difficulties with social interaction, related to struggles to interpret signs and see other people's points of view and that he is inattentive, has brain fog and cannot focus. Mr Halliday submits that there could be only one answer as to whether those effects were 'substantial'.

47. Alternatively, Mr Halliday submits that it was perverse of the Tribunal to fail to take account of these aspects of the Fox report. He relies on [16] of *Kapadia* where the Court of Appeal, quoting

from the judgment of the EAT which it upheld, observed that it was *"wholly impermissible"* to disregard uncontested medical evidence. Here there was social isolation, difficulty reading signs, struggling to see other people's point of view, inattention, brain fog, and being fidgety.

48. Mr Halliday pointed out that the Judge does not refer to the contents of the Fox report in its judgment, when in fact, as there was no contrary evidence, the Tribunal should have accepted those parts of the report the claimant relies on.

49. In answer to my questions about what the judge ought to have understood about the content of Professor Fox's report given that it contains no explanation about what autism or ADHD are, and does not identify that Ritvo is a tool used in diagnosing autism, Mr Halliday submitted that any judge ought to know at least that autism is a condition which has significant effects on social interaction, and that ADHD has significant effects on ability to concentrate.

*Ms Balmelli's submissions*

50. Ms Balmelli submits the Tribunal's decision was not perverse because having a diagnosis of autism or ADHD does not automatically mean that someone is disabled for the purposes of section 6 of the EA 2010. She submits that Professor Fox's diagnoses were only relevant to the question of whether the claimant had a mental impairment and were rightly treated by the Tribunal as such. The diagnoses, she submits, said nothing about adverse effect on day-to-day activities.

51. She submitted that it would not have been appropriate for the Tribunal to take 'judicial notice' of what an autism or ADHD diagnosis means, because these conditions manifest differently in different people and in different contexts. She submits that the claimant is 'cherry-picking' from Professor Fox's report. She submits that none of what is in Professor Fox's report is medical evidence of the sort that the Tribunal had left out of account in *Kapadia*; it is not an expression of expert

opinion by Professor Fox, or if it is, it is based on what the claimant told Professor Fox and which he has taken 'at face value'. In contrast, the Tribunal found that there was a credibility issue with the claimant and considered that he was overstating his difficulties.

52. Ms Balmelli further submitted that it could not be said that the judge had left the Fox Report out of account because he referred to it. The judge at [5] also expressly took into account the claimant's Impact Statement and the judge was right to focus on that evidence, which the claimant advanced to the Tribunal, rather than on the matters that he told Professor Fox and which are recorded in Professor Fox's report.

*My conclusions*

53. Professor Fox's report takes the form of a letter from Professor G C Fox (Consultant Psychiatrist / Professor of Psychiatry) to the claimant's GP. It is not in the form of an expert report prepared for a Tribunal. It does not acknowledge any duty to the court, it gives no detail of Professor Fox's *curriculum vitae*, it does not explain what the psychometric tests were that he applied, or provide much explanation for the diagnoses that are set out in the "Opinion" section other than that the claimant "is a 24-year-old man with a history of neurodiversity and disruptive difficulties and emotional difficulties". Otherwise, it contains an account of what the claimant, his mother and sister told the consultant about the claimant's difficulties at school, socially and emotionally, including aggressive incidents and the police being called out "40 times".

54. Other than the bare fact of the diagnoses of autism and ADHD, I do not consider that the report itself contains any 'uncontroverted' findings of fact or medical evidence that the Tribunal was bound to accept. This case is nothing like *Kapadia* where what the Tribunal failed to accept was the uncontroverted medical evidence that the claimant was in a state of psychological breakdown at a particular point in time. The respondent is also right that, insofar as the report details matters the

claimant reported to Professor Fox: (a) the report was only as reliable as the claimant; (b) it was a matter for the Tribunal to assess the reliability of the claimant; and (c) the Tribunal was right to focus on the evidence that the claimant put forward in his Impact Statement rather than what he and his mother had told Professor Fox. In adversarial proceedings, it is for the claimant to put before the Tribunal the evidence of his difficulties with day-to-day activities. While the Tribunal needed to take account of the contents of the Fox Report, it was not for the Tribunal to select material from that to supplement what the claimant had chosen to put forward in his Impact Statement as the difficulties relied on for the purposes of the claim. In any event, what the claimant said about those difficulties did not become 'incontrovertible' simply by dint of being recounted to Professor Fox.

55. I also do not consider that the argument that the Tribunal perversely failed to take into account these aspects of the Fox report is meritorious. The Tribunal referred to the Fox Report in its decision. The Tribunal is not obliged to refer to the content of every item of evidence in its decision. In this case, as it was reasonable for the Tribunal to focus in its reasons on the claimant's Impact Statement rather than the Fox report for the reasons I have already given, I am not prepared to infer from the absence of reference to the detailed contents of the Fox Report that the Tribunal left that content out of account.

56. It follows that this ground of appeal fails. However, there is an argument made by the respondent in responding to this ground of appeal that I still need to deal with as follows:-

*The significance of a diagnosis*

57. Although I have dismissed ground 1 of the appeal, I need to say something about Professor Fox's diagnoses of autism and ADHD. In responding to this ground of appeal, at [15] of her skeleton argument, Ms Balmelli submitted that the Tribunal was right to consider the claimant's diagnoses as being relevant only to the question of whether the claimant has a 'mental impairment' and not to the

question of substantial adverse effect. I am not convinced that is what the Tribunal in this case did, but if it did that would have been the wrong approach.

58. The parties are in agreement that, just because someone has a diagnosis of autism or ADHD, it does not mean that they are disabled within the meaning of section 6 of the EA 2010. I agree. Ms Balmelli is also right that autism and ADHD manifest in different ways in different people. However, it would in my judgment be wrong for a Tribunal to proceed on the basis that the fact of diagnosis was irrelevant to the question of 'substantial adverse effect'.

59. While I do not expect all judges to be familiar with the international diagnostic criteria for autism and ADHD, all judges should be familiar with the Equal Treatment Benchbook, and also with the principle that a diagnosis (in broad terms) reflects a clinical judgment that someone is significantly different from the norm as regards the area of functioning covered by the diagnosis. The Disability glossary to the Equal Treatment Benchbook provides a lot of information about autism, including explaining that "To have a diagnosis of autism a person will have difficulties with social communication and integration, and will often demonstrate restricted, repetitive patterns of behaviour, interests or activities." Equivalent information is included in relation to ADHD.

60. Where a Tribunal has before it evidence of a clinical diagnosis of autism or ADHD, accordingly, then (unless there is some reason to doubt the reliability of that clinical judgment), the Tribunal must take that diagnosis into account not just as evidence that someone has a condition or impairment, but as evidence as to the impact of that impairment. The diagnosis means they have been judged by a clinician to have significant (i.e. clinically 'more than minor or trivial') difficulties with the areas of functioning covered by the diagnosis.

61. It does not, of course, follow that the Tribunal must accept the clinician's view as answering

the disability question under the Act. The Tribunal still needs to consider what it was that led the clinician to make the diagnosis in the claimant's case, and to make findings about the claimant's ability to carry out day-to-day activities. If the claimant is not a reliable narrator, that may undermine any clinical opinion that is based on the claimant's account. However, as regards something like social interaction and communication, if a clinician has judged a claimant's difficulties in that respect to be significant enough to merit a diagnosis of autism, a Tribunal will need to engage with that view in its reasons when dealing with the question of 'substantial adverse effect'.

*Ground 2*

*Mr Halliday's submissions*

62. Ground 2 is that the judge erred in failing to recognise the following matters amounted to substantial adverse effects on the claimant's ability to carry out normal day-to-day activities, or at least in failing to consider whether their effect was sufficiently "substantial" to meet the statutory test under section 6(1)(b): (a) the findings that the Tribunal had made about difficulty forming social relationships at [7] and [22]; (b) the findings that the Tribunal made about inability to use public transport when crowded at [9] and [24].

63. The Tribunal made findings of fact to this effect, but then went on to conclude that these effects were not "more than minor or trivial". Mr Halliday submitted this conclusion was perverse. Alternatively, he argued that the Tribunal had failed to assess whether the difficulty in using overcrowded transport is "substantial". Likewise with social difficulties, the Tribunal has not assessed what the extent of the difficulty is. Mr Halliday submitted that what the judge says at [20] about the claimant not having "any difficulty other than perhaps what one might expect from somebody who is not disabled carrying out such activities, such as shopping, dealing with a break up and forming friendships" is not sufficient – the statutory question does not ask whether the difference between Mr Stedman and others in the population is substantial, but requires a comparison between his likely

level of functioning with and without the impairment.

*Ms Balmelli's submissions*

64. Ms Balmelli submits that the ground of appeal on which permission was granted was not a 'perversity' ground and that Mr Halliday is again impermissibly expanding the grounds of appeal. She submitted that as this was not a 'perversity' ground of appeal this ground, which challenges the Tribunal's findings of fact, could not succeed. She accepted that as a matter of law it would suffice if the claimant experienced a substantial adverse effect on even one day-to-day activity. She submitted that, reading the judgment fairly and as a whole, the judge has found that none of the activities meet that threshold in the claimant's case. She submitted that the judge had at [20] applied the proper approach because he had applied the approach in paragraph 8 of the EHRC Code of Practice of considering whether the claimant's difficulties went "beyond the normal differences in ability which may exist among people". In oral argument, she added that in this case the judgement was also consistent with the statute and with HHJ Tayler's decision in *Elliott.*

65. Regarding the claimant's difficulties with public transport, she submitted that his evidence in his Impact Statement was that he struggles with public transport when it is crowded, not that he is unable to use it, and that at the hearing he had said this was a result of claustrophobia not the result of his autism or ADHD. She submitted it was open to the Tribunal to find that he had overstated his position.

*My conclusions*

66. I reject the respondent's submission that Mr Halliday has impermissibly expanded this ground of appeal into a "perversity" appeal. Although the ground on which permission was granted did not include the word "perversity", it did state that the "the judge erred in failing to recognise" that the specified matters amounted to substantial adverse effects in the light of its own findings of fact.

"Perversity" is just one species of error of law and it was, or ought to have been clear, that the nature of the error of law raised in ground 2 was at least in part a perversity challenge.

67. Turning to the substance of the ground, in my judgment, the Tribunal has erred in law in the respects identified by the claimant in this ground of appeal. It seems to me that the errors have arisen as a result of a failure by the Tribunal to keep in mind three of the legal principles I have identified when setting out the law above, i.e.: (i) that the comparison required by the statute is between the claimant's abilities as they are with the impairment and as they would hypothetically be without the impairment; (ii) that it suffices if the claimant experiences a substantial adverse effect on ability to carry out just one day-to-day activity; and (iii) it is not permissible to weigh up a claimant's ability to carry out one day-to-day activity against another day-to-day activity in order to arrive at some overall assessment of ability to carry out day-to-day activities generally. Had the Tribunal kept those principles in mind, it would have been less likely to commit the errors that have been identified by the claimant in this ground of appeal.

68. In particular, so far as ability to form social relationships is concerned, the Tribunal appears at [7] and [22] to accept that the claimant has difficulties forming friendships, but at [20] states that these difficulties, taken compendiously with his difficulties with shopping and break-ups, are only "what one might expect from somebody who is not disabled". It seems to me that the claimant is right to say that those findings cannot sit together; in the absence of any further analysis or reasons, the Tribunal is in substance saying both that the claimant has difficulties and that he does not; that is perverse, but I would not go so far as to say that the only possible conclusion in this case was that the claimant does have "substantial" social difficulties. The claimant's Impact Statement lacked detail, the Tribunal found the claimant in some respects not to be a convincing witness, the Fox Report relied heavily on the claimant's self-report. All these factors mean that it is not inevitable that a Tribunal properly directing itself in law would be bound to conclude that the claimant is disabled for the

purposes of the EA 2010.

69. However, what is perverse is for the Tribunal to have reached that conclusion on the facts that it found and for the reasons that it gave. In this respect, it is important to note that part of the error in the reasoning is that the Tribunal does not say that the claimant has 'overstated' his social difficulties: the findings that the claimant has 'overstated' his case relate to reading, writing and concentration ([22]) and driving ([23]). Further, the comparison at [20] with the non-disabled incautiously takes the approach in paragraph 8 of the EHRC Code of Practice without apparently heeding what HHJ Tayler in *Elliott* said about that. The Tribunal has failed to undertake the comparison required by the statute as to the claimant's likely functioning with and without the impairment.

70. As to the claimant's difficulties with public transport, the Tribunal at [9] and [24] made findings that the claimant has difficulties with public transport if it is overcrowded, apparently accepting his oral evidence that he "avoids" public transport if it is overcrowded. The judge appears to have taken the approach that a difficulty with overcrowded public transport is by definition not a substantial difficulty, but if that is what he concluded, he has not explained why he reached that conclusion. On the face of the judgment, the reasoning is perverse: again, a difficulty is identified which is simply treated as not being a difficulty without any explanation.

71. It is no answer to this point to say, as the respondent does, that the claimant's difficulties with public transport stem from 'claustrophobia' rather than autism because: (a) I do not read the Tribunal as having made such a finding; and (b) the claimant had explained in his Impact Statement that his difficulty with sharing confined spaces with people was "due to my autism and the social anxiety it creates", so the Tribunal could not rationally have concluded that the claimant's difficulties were attributable solely to claustrophobia rather than autism.

72. Ground 2 therefore succeeds.

*Ground 3*

*Mr Halliday's submissions*

73. Ground 3 is that the Judge erred in failing to deal with a number of matters in the claimant's disability impact statement which the Tribunal had actually quoted at [5] of the decision, failing to address whether those matters had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, including: (a) the claimant struggled to remember things and had difficulty concentrating; (b) the claimant excluded himself from social activities; (c) the claimant struggled to interact and communicate with colleagues and customers.

*Ms Balmelli's submissions*

74. Ms Balmelli again complains that Mr Halliday is seeking to run a challenge to a finding of fact without bringing a perversity appeal, but submits that the Tribunal has done enough by including the matters in the Impact Statement in the judgment and then going on to make adverse credibility findings in respect of the claimant. She submits that the Tribunal did not have to deal with every point in its judgment and it is clear why the judge concluded that there was no substantial impact on any of the claimant's day-to-day activities. She further argues that the claimant's evidence was that his difficulties in taking part in social activities were due to his social anxiety rather than autism or ADHD so there was no error in the Tribunal failing to conclude that these difficulties were a substantial adverse effect of his autism.

*My conclusions*

75. In my judgment, ground 3 succeeds on Mr Halliday's third and fourth points, but not on the first two for the following reasons:-

    a. The claimant's evidence was that his memory difficulties related to shopping and a

need to use lists when shopping; in my judgment, the Tribunal dealt with this sufficiently at [20] in saying that the claimant's difficulty with shopping was the sort that one might expect from somebody who is not disabled, since it is undoubtedly the case that using lists for shopping is very common. If the Tribunal had not made the error (identified in Ground 2) of comparing the claimant with non-disabled people generally, this reasoning would have been adequate, given the very 'thin' nature of the claimant's evidence in relation to his shopping difficulties;

b. As to difficulty concentrating, the Tribunal has dealt with this at [22], concluding that the claimant's difficulties may have been overstated given his academic achievements. There has not therefore been a failure to deal with the point, as alleged in ground 3, so this part of this ground fails. However, I observe that the Tribunal's reasons on this point seem to me to be inadequate for reasons similar to those identified in grounds 2 and 4, in particular that the comparison needs to be between the claimant with and without the impairment and what he can do should not be set against what he cannot. It is trite that many people with autism and ADHD will perform above-average in examinations; it does not follow, however, that they would not have done significantly better if they did not have those impairments;

c. As to the claimant's evidence about excluding himself from social activities, the Tribunal could in principle legitimately deal compendiously with its consideration of the claimant's social skills generally, but only if its reasons demonstrated that the claimant's evidence in that respect had been taken into account. As it is, the reasons do not do that: I agree with Mr Halliday that this is an additional reason why the Tribunal's reasoning in relation to social activities is perverse. Without specifically addressing the claimant's evidence about not often taking part in social activities, the Tribunal could not rationally conclude that he was not substantially disadvantaged in relation to social skills. In this respect, the respondent's submission that 'social

anxiety' is a different impairment unconnected to the claimant's autism is hopeless: the connection should be obvious to anyone, and it is obvious from the claimant's Impact Statement where he explains that his autism 'creates' social anxiety;

d. As to his struggles to interact and communicate with colleagues and customers, the same points may be made: the Tribunal could not rationally conclude that the claimant's autism did not have a substantial adverse effect on the daily activity of social interaction and communication without addressing this evidence.

76. Ground 3 therefore succeeds in part.

*Ground 4*

*Mr Halliday's submissions*

77. Ground 4 is that the judge erred by focussing on what the claimant can do, rather than what he cannot do or can do only with significant difficulty, by relying on the facts that: (a) the claimant performs in public, forms social relationships and visits friends [22], rather than on his social difficulties; (b) the claimant has completed a degree and BTEC examinations [22], rather than his memory and concentration problems; and (c) the claimant can use public transport when not crowded [24], rather than his inability to use public transport when crowded. Mr Halliday submits that the Tribunal just weighed up what the claimant can do against what he cannot, rather than using evidence of what he could do to judge what he could not do.

*Ms Balmelli's submissions*

78. Ms Balmelli for her part submitted that there is no error in the Tribunal's approach. *Ahmed v Metroline* (see above) permits the Tribunal to make findings about what a claimant can do in order to inform the judgment of what he cannot do, and this is exactly what the Tribunal has done here.

*My conclusions*

79. In my judgment, this ground of appeal also succeeds.

80. So far as the daily activity of social communication and interaction is concerned, the Tribunal at [22] has weighed the claimant's difficulties in the balance against the respects in which he is "a social person" who "performs in public". It has not used these facts to conclude that he does not have the social difficulties he claims: indeed, as already dealt with above, it has not dealt with all of the claimant's evidence about his social difficulties, but has reduced them to a compendious "some difficulties" with forming social relationships. These "some difficulties" are then weighed by the Tribunal against what the claimant can do in order to conclude that the difficulties are not substantial.

81. I reject the respondent's contention that there was a general 'credibility issue' with the claimant's evidence. That is not my reading of the judgment. As already noted, there is no general finding that the claimant's evidence lacks credibility, just that his evidence was 'overstated' as regards difficulties with reading, writing and concentration and driving.

82. So far as the claimant's difficulties with memory and concentration are concerned, my observations above apply: the Tribunal has weighed his relative success in examinations against his claimed difficulties rather than considering what impact those difficulties actually had.

83. Finally, as to public transport, the error is also clear: the Tribunal has simply weighed the claimant's ability to use uncrowded public transport against his difficulties with crowded public transport and decided accordingly that the difficulty is not substantial.

## Conclusion and disposal

84. The appeal is therefore allowed.

85. The parties were provided with a draft of this judgment and invited to make written submissions on disposal. They agree that the decision of the Employment Tribunal must be set aside and the matter remitted to the Employment Tribunal to determine afresh whether or not the claimant is disabled within the meaning of section 6 of the EA 2010. The claimant submits that remission should be to a different Tribunal, the respondent submits that remission should be to the same Tribunal.

86. Applying the principles in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763, I consider that remission should be to a fresh Tribunal. This is necessary because, although not all the grounds of appeal succeeded, I do consider that the judge's decision in this case may properly be categorised as "totally flawed" for the reasons I have identified in my judgment. While there are no doubts about the judge's professionalism, the reality is that it would be difficult for anyone, having previously formed a firm view of the merits of a case such as this, to approach it on a totally fresh basis. However, that is what is required. The hearing before the Employment Tribunal will be the same length and need to consider the same evidence whether it is remitted to the same or a different Tribunal. Remission must therefore be to a new Tribunal.