EMPLOYMENT TRIBUNALS

Claimant: Mrs M Whalley

Respondent: Liverpool University Hospitals NHS Foundation Trust

Heard: Remotely (by video link) **On:** 4, 5, 6 and 7 January 2022

Before: Employment Judge S Shore
NLM Mrs L Taylor
NLM Mr D Mockford

Appearances
For the claimant: Mr J Searle, Counsel
For the respondent: Mr A Williams, Counsel

JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claims of discrimination arising from disability (contrary to section 15 of the Equality Act 2010 ("EqA")) fail.

2. The claimant's claims of indirect discrimination because of the protected characteristic of disability (contrary to section 19 of the EqA) fail. The respondent did not apply the PCPs alleged by the claimant.

3. The claimant's claims of failure to make reasonable adjustments (contrary to sections 20 and 21of the EqA) fail. The respondent did not apply the PCPs alleged by the claimant.

REASONS

Introduction

1. The claimant was employed as a Senior Occupational Therapist by the respondent from 5 September 2016 to 30 March 2020, which was the effective date of termination of her employment, following her resignation with notice. The claimant started early conciliation with ACAS on 11 June 2020 and obtained a conciliation

certificate dated 25 July 2020. The claimant's ET1 was presented on 25 August 2020. The respondent ("the Trust") is an NHS Trust that employs over 12,000 people.

2. The claimant presented claims of:

    2.1. Discrimination arising from disability (contrary to section 15 of the EqA);

    2.2. Indirect discrimination because of the protected characteristic of disability (contrary to section 19 of the EqA); and

    2.3. Failure to make reasonable adjustments (contrary to sections 20 and 21 of the EqA).

Law

3. The relevant law relating to the claims of discrimination arising from disability, indirect disability discrimination and failure to make reasonable adjustments is contained in sections 15, 19 and 20/21of the EqA:

15. Discrimination arising from disability

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.
The section 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.

19. Indirect discrimination

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.
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.

20. Adjustments for disabled persons
Duty to make adjustments

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.
The duty comprises the following three requirements.

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.

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.

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.

4. The provisions relating to time limits in EqA claims is set out in section 123 of that Act:

123. Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a)the period of 3 months starting with the date of the act to which the complaint relates, or
(b)such other period as the employment tribunal thinks just and equitable.
(2)Proceedings may not be brought in reliance on section 121(1) after the end of—
(a)the period of 6 months starting with the date of the act to which the proceedings relate, or
(b)such other period as the employment tribunal thinks just and equitable.
(3)For the purposes of this section—
(a)conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it.
(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a)when P does an act inconsistent with doing it, or
(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

5. We were referred to a number of precedent cases, which we considered and applied when appropriate:

5.1. **United First Partners Limited v Carreras** [2018] EWCA Civ 323
5.2. **Ishola v Transport for London** [2020] EWCA Civ 112;
5.3. **T-System Ltd v Lewis** UKEAT/0042/15;
5.4. **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2017] EWCA Civ 1008; and

5.5. **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305.

Issues

6. The issues (questions that the Tribunal had to find answers to) were agreed by the parties on the first morning of the hearing and supplied to the Tribunal. We agreed the list, although both we and Mr Searle felt that it could have been more succinct:

Time limit

In respect of each claim by the Claimant:

1. *When did the allegation that forms the basis of the Claimant's claim take place?*
2. *Is the Claimant's allegation part of conduct extending over a period? If so, when did that period of conduct end?*
3. *If the Claimant is alleging a failure by the Respondent to do something, when was that alleged failure by the Respondent? Specifically, when did the decision maker at the Respondent decide not to do the "something"?*
4. *Did the Claimant notify ACAS of Early Conciliation within 3 months less 1 (one) day of the allegation? If not, why not?*
5. *If the Tribunal concludes that there was conduct over an extended period, did the Claimant notify ACAS of Early Conciliation within 3 months less 1 (one) day of the end of the period of conduct? If not, why not?*
6. *If the Tribunal concludes that there was a failure by the Respondent to do something, did the Claimant notify ACAS of Early Conciliation within 3 months less 1 (one) day of the failure by the Respondent? If not, why not?*
7. *Is it therefore just and equitable for the Tribunal to extend time for presentation of the Claimant's claim?*

Indirect discrimination – workload / administration assistance

8. *Was there a PCP that the Claimant was required "to work without reduction in workload of an administrative nature or without sufficient administrative assistance"?*
9. *Would that PCP put employees with the Claimant's disability of dyslexia at a particular disadvantage compared to employees without the Claimant's disability? The Respondent accepts that the Claimant's disability of dyslexia might put her at a disadvantage with regard to the PCP compared to other employees required to carry out the same and/or a similar role.*
10. *Would that PCP put employees with the Claimant's disability of Hashimoto Syndrome at a particular disadvantage compared to employees without the Claimant's disability? The Respondent does not accept that the Claimant's disability of Hashimoto Syndrome might put her at a disadvantage with regard to the PCP compared to other employees.*

11. *Did the PCP put the Claimant at the particular disadvantage(s) alleged in paragraph 2(a)(i) of the Claimant's Further Particulars document, in September 2016 or at a point thereafter? Alternatively, did the Claimant have administrative support via clinical administrative staff, medical secretaries and/or use of a Dictaphone in 2018?*

12. *If the Tribunal concludes that the PCP did put the Claimant at the particular disadvantage(s) alleged, was it objectively justified? Specifically –*

    12.1. *Was there a reasonable expectation by the Respondent that employees will undertake some administrative duties of their own?*

    12.2. *Was that a proportionate means of achieving a legitimate aim of ensuring accurate record keeping by staff for clinical best practice?*

Indirect discrimination – data entry

13. *Was there a PCP that the Claimant was "required to complete significant data entry as part of her role"?*

14. *Would that PCP put employees with the Claimant's disability of dyslexia at a particular disadvantage compared to employees without the Claimant's disability? The Respondent accepts that the Claimant's disability of dyslexia might put her at a disadvantage with regard to the PCP compared to other employees required to complete significant data entry as part of their role.*

15. *Would that PCP put employees with the Claimant's disability of Hashimoto Syndrome at a particular disadvantage compared to employees without the Claimant's disability? The Respondent does not accept that the Claimant's disability of Hashimoto Syndrome might put her at a disadvantage with regard to the PCP compared to other employees*

16. *Did the PCP put the Claimant at the particular disadvantage(s) alleged in paragraph 2(a)(ii) of the Claimant's Further Particulars document, in September 2016 or at a point thereafter?*

17. *Alternatively, did the Claimant have assistance from Tine Kochai with data entry duties?*

18. *Further to 17 above, did the Claimant tell Lynn Jones in 2018 that she was content to undertake data entry duties?*

19. *If the Tribunal concludes that the PCP did put the Claimant at the particular disadvantage(s) alleged, was it objectively justified? Specifically –*

    19.1. *Was there a requirement for employees to undertake key elements of their role (as would be the case in requiring the Claimant to complete data entry)?*

19.2. Was that a proportionate means of achieving a legitimate aim of ensuring that the service an employee is employed to deliver is delivered?

Indirect discrimination – workload / working hours

20. Was there a PCP that the Claimant was required to "carry a workload which consistently required more than 22.5 hours work per week"?

21. Would that PCP put employees with the Claimant's disability of dyslexia at a particular disadvantage compared to employees without the Claimant's disability? The Respondent does not accept that the Claimant's disability of dyslexia might put her at a disadvantage with regard to the PCP compared to other employees.

22. Would that PCP put employees with the Claimant's disability of Hashimoto Syndrome at a particular disadvantage compared to employees without the Claimant's disability? The Respondent does not accept that the Claimant's disability of Hashimoto Syndrome might put her at a disadvantage with regard to the PCP compared to other employees.

23. Did the PCP put the Claimant at the particular disadvantage(s) alleged in paragraph 2(a)(iii) of the Claimant's Further Particulars document, in September 2016 or at a point thereafter?

24. Alternatively, was the Claimant not required to work in excess of her contracted hours and, when she did work additional hours, were they at her own request in return for additional pay?

25. Further to 24 above, was the Claimant's workload excessive considering her role and grade?

26. If the Tribunal concludes that the PCP did put the Claimant at the particular disadvantage(s) alleged, was it objectively justified? Specifically –

26.1. Was there a requirement for employees to occasionally work in excess of their contracted hours as required to deliver a service?

26.2. Was that a proportionate means of achieving a legitimate aim of ensuring that the service an employee is employed to deliver is delivered?

Indirect discrimination - training

27. Was there a PCP that the Claimant was "required to do and give training in addition to her regular workload"?

28. Would that PCP put employees with the Claimant's disability of dyslexia at a particular disadvantage compared to employees without the Claimant's disability? The Respondent does not accept that the Claimant's disability of

dyslexia might put her at a disadvantage with regard to the PCP compared to other employees.

29. *Would that PCP put employees with the Claimant's disability of Hashimoto Syndrome at a particular disadvantage compared to employees without the Claimant's disability? The Respondent does not accept that the Claimant's disability of Hashimoto Syndrome might put her at a disadvantage with regard to the PCP compared to other employees.*

30. *Did the PCP put the Claimant at the particular disadvantage(s) alleged in paragraph 2(a)(iv) of the Claimant's Further Particulars document, in September 2016 or at a point thereafter?*

31. *Alternatively, was the Claimant –*

    31.1. *Responsible for managing her own workload, and therefore able to reduce clinical workload accordingly if she felt it necessary to assist with delivering training?*

    31.2. *Required only to deliver training during contracted hours and/or days of work?*

    31.3. *Granted study leave for any occasions when she wished to attend training for herself?*

32. *Further to 31 above, did the Claimant offer to plan and deliver training packages in 2017 and 2018, therefore demonstrating that at the relevant time she was content to do so?*

33. *If the Tribunal concludes that the PCP did put the Claimant at the particular disadvantage(s) alleged in relation to delivery of training, was it objectively justified? Specifically –*

    33.1. *Was there a requirement for employees to deliver key elements of their role (as would be the case in requiring the Claimant to deliver training)?*
    33.2. *Was that a proportionate means of achieving a legitimate aim of ensuring that the service an employee is employed to deliver is delivered?*

34. *If the Tribunal concludes that the PCP did put the Claimant at the particular disadvantage(s) alleged in relation to receipt of training, was it objectively justified? Specifically –*

    34.1. *Was there a requirement for employees to ensure that they are sufficiently trained and 'up to date' in relation to ongoing professional development?*

    34.2. *Was that a proportionate means of providing a safe and effective service?*

Indirect discrimination – role / job description

35. *Was there a PCP that the Claimant was "required to work without having been provided with clear boundaries to the role" or that there was "application of a generic role description"?*

36. *Would such PCP(s) put employees with the Claimant's disability of dyslexia at a particular disadvantage compared to employees without the Claimant's disability? The Respondent does not accept that the Claimant's disability of dyslexia might put her at a disadvantage with regard to the PCP(s) compared to other employees carrying out the same and/or similar roles.*

37. *Would such PCP(s) put employees with the Claimant's disability of Hashimoto Syndrome at a particular disadvantage compared to employees without the Claimant's disability? The Respondent does not accept that the Claimant's disability of Hashimoto Syndrome might put her at a disadvantage with regard to the PCP(s) compared to other employees.*

38. *Did the PCP put the Claimant at the particular disadvantage(s) alleged in paragraph 2(a)(v) of the Claimant's Further Particulars document, in September 2016 or at a point thereafter?*

39. *Alternatively, were the Claimant's role and duties clearly defined in a job description provided to the Claimant in June 2016 and/or discussed with the Claimant in September 2016?*

40. *Further to 39 above, did the Claimant have an opportunity to raise any uncertainty in relation to her role and duties at appraisals in 2017, 2018 and/or 2019? If so, did the Claimant do so?*

41. *If the Tribunal concludes that the PCP did put the Claimant at the particular disadvantage(s) alleged, was it objectively justified? Specifically –*

    41.1. *Did the Respondent provide a general description with a summary of key duties and/or have an expectation that employees will be flexible in relation to additional duties not listed in the job description?*

    41.2. *Was that a proportionate means of achieving a legitimate aim of avoiding a proscriptive and/or list of specific duties in a job description, thereby potentially restricting what an employee may be required to do in their role?*

Indirect discrimination – workplace stress risk assessment

42. *Was there a PCP that the Claimant was "required to work without having been provided with workplace stress assessment(s)"?*

43. *Would that PCP put employees with the Claimant's disability of dyslexia at a particular disadvantage compared to employees without the Claimant's disability? The Respondent does not accept that the Claimant's disability of dyslexia might put her at a disadvantage with regard to the PCP compared to other employees.*

44. *Would that PCP put employees with the Claimant's disability of Hashimoto Syndrome at a particular disadvantage compared to employees without the Claimant's disability? The Respondent does not accept that the Claimant's disability of Hashimoto Syndrome might put her at a disadvantage with regard to the PCP compared to other employees.*

45. *Did the PCP put the Claimant at the particular disadvantage(s) alleged in paragraph 2(a)(vi) of the Claimant's Further Particulars document, in September 2016 or at a point thereafter? Alternatively –*

    45.1. *Was the Claimant off work due to sickness absence, thereby preventing a workplace stress risk assessment being carried out in late 2019 / early 2020?*

    45.2. *Did the Claimant resign, thereby meaning a workplace stress risk assessment was not necessary and/or not reasonable?*

46. *Further to 45 above, were the Claimant's working arrangements amended during her notice period in any event, in line with an agreement between the Claimant and Lynn Jones?*

47. *If the Tribunal concludes that the PCP did put the Claimant at the particular disadvantage alleged, was it objectively justified? Specifically –*

    47.1. *Did the Respondent provide stress risk assessments when an employee has returned to work and therefore only when the assessment is going to be worthwhile and/or effective?*

    47.2. *Was that a proportionate means of achieving a legitimate aim of avoiding misuse of time and resources by managers and/or the Respondent's Occupational Health department?*

Reasonable adjustments – administration

48. *Was there a PCP that the Claimant was required "to work without reduction in workload of an administrative nature or with sufficient administrative assistance"?*

49. *Did that PCP place the Claimant at a substantial disadvantage as alleged in paragraph 2(a)(i) of the Claimant's Further Particulars document, compared to a non-disabled comparator, in September 2016 or at a point thereafter? The Respondent accepts that the Claimant's disability of dyslexia might put her at a disadvantage with regard to the PCP compared to other employees required to carry out the same and/or a similar role, but does not accept that the Claimant's disability of Hashimoto Syndrome would put the Claimant at a substantial disadvantage.*

50. *Was an adjustment of "reducing the administrative burden of paperwork or else providing sufficient assistance" reasonable? If so, did the Claimant request such an adjustment?*

51. *Would an adjustment of "reducing the administrative burden of paperwork or else providing sufficient assistance" have made a difference?*

52. *Did the Claimant have administrative support from clinical administrative staff and/or medical secretaries? If so, was such support a reasonable adjustment in the circumstances?*

53. *Was the Claimant provided with a Dictaphone in 2018? If so, was provision of such equipment a reasonable adjustment in the circumstances?*
54. *Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant was likely to be placed at the alleged substantial disadvantage?*

Reasonable adjustments – data entry

55. *Was there a PCP that the Claimant was "required to complete significant data entry as part of her role"?*

56. *Did that PCP place the Claimant at a substantial disadvantage as alleged in paragraph 2(a)(ii) of the Claimant's Further Particulars document, compared to a non-disabled comparator, in September 2016 or at a point thereafter? The Respondent accepts that the Claimant's disability of dyslexia might put her at a disadvantage with regard to the PCP compared to other employees required to complete significant data entry as part of their role, but does not accept that the Claimant's disability of Hashimoto Syndrome would put the Claimant at a substantial disadvantage.*

57. *Was an adjustment of "providing assistance to complete data entry" reasonable? If so, did the Claimant request such an adjustment?*

58. *Would an adjustment of "providing assistance to complete data entry" have made a difference?*

59. *Was Tine Kochai able to assist the Claimant with data entry? If so, was such support a reasonable adjustment in the circumstances?*

60. *Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant was likely to be placed at the alleged substantial disadvantage?*

Reasonable adjustments – workload / working hours

61. *Was there a PCP that the Claimant was required to "carry a workload which consistently required more than 22.5 hours work per week"?*

62. *Did that PCP place the Claimant at a substantial disadvantage as alleged in paragraph 2(a)(iv) of the Claimant's Further Particulars document, compared to a non-disabled comparator, in September 2016 or at a point thereafter? The Respondent does not accept that the Claimant's disability of dyslexia and/or disability of Hashimoto Syndrome might put her at a disadvantage with regard to the PCP compared to other employees.*

63. *Was an adjustment of "providing a workload that a person with dyslexia and/or Hashimoto Syndrome could complete within 22.5 hours" reasonable? If so, did the Claimant request such an adjustment?*

64. *Would an adjustment of "providing a workload that a person with dyslexia and/or Hashimoto Syndrome could complete within 22.5 hours" have made a difference?*

65. *Was an adjustment of "providing a workload that any employee could complete within 22.5 hours" reasonable? If so, did the Claimant request such an adjustment?*

66. *Would an adjustment of "providing a workload that any employee could complete within 22.5 hours" have made a difference?*

67. *Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant was likely to be placed at the alleged substantial disadvantage?*

Reasonable adjustments – training

68. *Was there a PCP that the Claimant was "required to do and give training in addition to her regular workload"?*

69. *Did that PCP place the Claimant at a substantial disadvantage as alleged in paragraph 2(a)(iv) of the Claimant's Further Particulars document, compared to a non-disabled comparator, in September 2016 or at a point thereafter? The Respondent does not accept that the Claimant's disability of dyslexia and/or disability of Hashimoto Syndrome might put her at a disadvantage with regard to the PCP compared to other employees.*

70. *Was an adjustment of "allowing [the Claimant] to include the training to be given within her scheduled hours" reasonable? If so, did the Claimant request such an adjustment?*

71. *Would an adjustment of "allowing [the Claimant] to include the training to be given within her scheduled hours" have made a difference?*

72. *Was the Claimant granted study leave for occasions when she wished to attend training? If so, was study leave a reasonable adjustment in the circumstances?*

73. *Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant was likely to be placed at the alleged substantial disadvantage?*

Reasonable adjustments – role / job description

74. *Was there a PCP that the Claimant was "required to work without having been provided with clear boundaries to the role" or that there was "application of a generic role description"?*

75. *Did that PCP place the Claimant at a substantial disadvantage as alleged in paragraph 2(a)(v) of the Claimant's Further Particulars document, compared to a non-disabled comparator, in September 2016 or at a point thereafter? The Respondent does not accept that the Claimant's disability of dyslexia and/or disability of Hashimoto Syndrome might put her at a disadvantage with regard to the PCP compared to other employees.*

76. *Was an adjustment of "providing clear boundaries to the role to ensure [the Claimant] knew what she had to do and what she did not have to do" reasonable? If so, did the Claimant request such an adjustment?*

77. *Would an adjustment of "providing clear boundaries to the role to ensure [the Claimant] knew what she had to do and what she did not have to do" have made a difference?*

78. *Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant was likely to be placed at the alleged substantial disadvantage?*

Reasonable adjustments – workplace stress risk assessment

79. *Was there a PCP that the Claimant was "required to work without having been provided with workplace stress assessment(s)"?*

80. *Did that PCP place the Claimant at a substantial disadvantage as alleged in paragraph 2(a)(vi) of the Claimant's Further Particulars document, compared to a non-disabled comparator, in September 2016 or at a point thereafter during the course of her employment? The Respondent does not accept that the Claimant's disability of dyslexia and/or disability of Hashimoto Syndrome might put her at a disadvantage with regard to the PCP compared to other employees.*

81. *Was an adjustment of "completing a workplace stress assessment for those employees recommended to have one" reasonable? If so, did the Claimant request such an adjustment?*

82. *Would an adjustment of "completing a workplace stress assessment for those employees recommended to have one" have made a difference?*

83. *Was there an informal discussion between Lynn Jones and the Claimant in January 2020, and subsequent amended working arrangements? If so, were the informal discussion and/or subsequent amended working arrangements reasonable adjustments in the circumstances?*

84. *Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant was likely to be placed at the alleged substantial disadvantage?*

Reasonable adjustments / early retirement

85. *Was the Claimant put in a position with no choice but to take early retirement in order to safeguard her health? Did the Respondent require the Claimant to*

continue working without reasonable adjustments as alleged, resulting in her being put at a substantial disadvantage to the point where she could no longer work for the Respondent?

Discrimination arising from disability – administration

86. *Did the Respondent treat the Claimant unfavourably by a "failure to adjust her role to provide administrative assistance" in September 2016 or at a point thereafter?*

87. *Did the Respondent know (or be reasonably expected to know) that the Claimant was disabled?*

88. *If so, was a "failure to adjust her role to provide administrative assistance" because of something arising from the Claimant's disability of dyslexia and Hashimoto Syndrome, namely the Claimant's "inability to sustain or undertake her role without administration assistance"?*

89. *If the Tribunal concludes that a "failure to adjust her role to provide administrative assistance" was unfavourable treatment of the Claimant because of something arising from her disability, was it objectively justified? Specifically, was it a proportionate means of achieving a legitimate aim of ensuring accurate record-keeping by staff for clinical best practice?*

Discrimination arising from disability – workload

90. *Did the Respondent treat the Claimant unfavourably by a "failure to reduce the overall workload fit for a 22.5-hour post" in September 2016 or at a point thereafter?*

91. *Did the Respondent know (or be reasonably expected to know) that the Claimant was disabled?*

92. *If so, was a "failure to reduce the overall workload fit for a 22.5-hour post" because of something arising from the Claimant's disability of dyslexia and Hashimoto Syndrome, namely the Claimant's "inability to sustain or undertake her role without a reduction of workload or a job share"?*

93. *If the Tribunal concludes that a "failure to reduce the overall workload fit for a 22.5-hour post" was unfavourable treatment of the Claimant because of something arising from her disability, was it objectively justified? Specifically, was it a proportionate means of achieving a legitimate aim of ensuring that the service an employee is employed to deliver is delivered?*

Discrimination arising from disability – reasonable adjustments

94. *Did the Respondent treat the Claimant unfavourably by a "failure to provide reasonable adjustments both for her dyslexia and Hashimoto's" in September 2016 or at a point thereafter?*

95. *Did the Respondent know (or be reasonably expected to know) that the Claimant was disabled?*

96. *If so, was a "failure to provide reasonable adjustments both for her dyslexia and Hashimoto's" because of something arising from the Claimant's disability of dyslexia and Hashimoto Syndrome? The Claimant has not specified what the alleged "something arising from" is.*

97. *If the Tribunal concludes that a "failure to provide reasonable adjustments both for her dyslexia and Hashimoto's" was unfavourable treatment of the Claimant because of something arising from her disability, was it objectively justified? Please see sections 12, 19, 26, 33, 34, 41 and 47 above.*

Discrimination arising from disability - training

98. *Did the Respondent treat the Claimant unfavourably by a "failure to exclude the delivery of corporate training within the workload" in September 2016 or at a point thereafter?*

99. *Did the Respondent know (or be reasonably expected to know) that the Claimant was disabled?*

100. *If so, was a "failure to exclude the delivery of corporate training within the workload" because of something arising from the Claimant's disability of dyslexia and Hashimoto Syndrome, namely the Claimant's "inability to fulfil or sustain her role without the requirement to deliver corporate training being included as part of the reduced workload"?*

101. *If the Tribunal concludes that a "failure to exclude the delivery of corporate training within the workload" was unfavourable treatment of the Claimant because of something arising from her disability, was it objectively justified? Specifically, was it a proportionate means of achieving a legitimate aim of ensuring that the service an employee is employed to deliver is delivered?*

Discrimination arising from disability – stress risk assessment

102. *Did the Respondent treat the Claimant unfavourably by a "failure to undertake the stress risk assessment requested twice by Occupational health" in September 2016 or at a point thereafter?*

103. *Did the Respondent know (or be reasonably expected to know) that the Claimant was disabled?*

104. *If so, was a "failure to undertake the stress risk assessment requested twice by Occupational health" because of something arising from the Claimant's disability of dyslexia and Hashimoto Syndrome, namely the Claimant's "inability to continue in or sustain her role without a stress risk assessment being undertaken"?*

105. *If the Tribunal concludes that a "failure to undertake the stress risk assessment requested twice by Occupational health" was unfavourable treatment of the*

Claimant because of something arising from her disability, was it objectively justified? Specifically, was it a proportionate means of achieving a legitimate aim of avoiding misuse of time and resources by managers and/or the Respondent's Occupational Health department?

Remedy

106. If the Claimant has been unlawfully discriminated against as alleged, did it result in loss of earnings to the Claimant? Specifically, did the Claimant take early retirement as a result of alleged discrimination?

107. If so, how much loss of earnings can be attributed to the Claimant's early retirement as a result of alleged discrimination?

108. Has the Claimant taken reasonable steps to mitigate any loss of earnings? If not, by how much should any financial compensation in respect of loss of earnings be reduced by?

109. Did the Claimant's own conduct contribute to alleged discrimination and associated loss of earnings? If so, by how much should any financial compensation in respect of loss of earnings be reduced by?

110. If the Claimant has been unlawfully discriminated against as alleged, did she suffer injury to feelings as a result of the Respondent's actions?

111. If so, what Vento band applies to the Claimant's injury to feelings award?

7. As we did not find in favour of the claimant on any of her claims, we did not consider issues related to remedy. As we did not find that the respondent applied any of the PCPs contended for by the claimant and did not find that any PCPs should be added by the Tribunal, we did not consider any of the issues beyond the issue of the PCPs in respect of any of the discreet claims of indirect disability discrimination or failure to make reasonable adjustments.

Case History and Housekeeping

8. This case had been case managed on two occasions. On 18 November 2020, there was a private preliminary hearing by telephone before EJ Rice-Burchall that produced a case management order ("CMO") dated 18 November 2020, that was sent to the parties on 21 December 2020 [39-46]. Amongst the Orders was a requirement for the claimant to provide further information about her claims, as had been requested by the respondent. The further information related to the PCPs contended for, the "something" arising from disability and the unfavourable treatment. The further information was provided on 13 January 2021 and the respondent filed an amended response on 24 February 2021 [55-71].

9. EJ Rice-Burchall also listed this hearing, set out a timetable for this hearing, and required the parties to agree a list of issues.

10. The claimant submitted an amended set of further and better particulars on 27 May 2021 [72-78]. The respondent objected and EJ Leach considered the matter in chambers on 1 September 2021 before granting the claimant leave to amend [79-85]. The respondent filed further amended grounds of resistance on 18 October 2021 [86-101].

11. On the first morning of the hearing, we discussed the claims and issues with the parties. The timetable set by the CMO provided for time for the Tribunal to complete its reading. We had not been sent a list of issues, but we were advised that the issues were agreed. The respondent's solicitor submitted the agreed list of issues together with an agreed cast list and (later) and agreed chronology. All were useful.

12. The parties produced an agreed bundle, which ran to 683 pages. A supplementary bundle was produced by the claimant very late in the proceedings and was only submitted to the Tribunal in its final form on the first morning of the hearing. It ran to an additional 18 pages that concerned remedy. The bundles were numbered sequentially. If we refer to a pages in the bundle, the page number(s) will be in square brackets (e.g. [45]).

13. The claimant gave evidence in support of her claim. Her witness statement dated 23 November 2021 consisted of 141 paragraphs over 23 pages. The claimant also called Thomasina Afful as a witness. Ms Afful was the Equality, Diversity and Inclusion Lead for the respondent and produced a witness statement dated 23 November 2021 that consisted of 21 paragraphs over 5 pages.

14. The respondent called 2 witnesses who gave live evidence:

    17.1. Lynn Jones, who is the Therapy Manager in the Therapy department of the respondent. She was the claimant's line manager. Her witness statement dated 16 November 2021 consisted of 47 paragraphs over 16 pages; and

    17.2. Jules West, who is Associate Director of Research and Innovation for the respondent and dealt with the claimant's grievance. Her witness statement dated 24 November 2021 consisted of 27 paragraphs over 6 pages.

15. All the witnesses gave evidence on affirmation. All witnesses were cross-examined by Mr Williams and Mr Searle respectively. The Tribunal asked some questions of all of the witnesses. The representatives were offered the opportunity to ask re-examination questions of their witnesses.

16. At the end of the evidence on the morning of the third day of the hearing, the parties made closing submissions. Mr Williams produced written submissions, to which he spoke. Mr Searle made oral submissions. We considered our decision on the third afternoon and fourth morning of the hearing before delivering an oral judgment and reasons. The claimant requested written reasons. These written reasons may differ from the oral reasons given in some instances. As we have dismissed all the claimant's claims, there will be no remedy hearing.

17. The hearing was conducted by video on the CVP application, with the consent of the parties and with no real technical issues. We were mindful of the fact that the claimant has dyslexia and assured her that she could have as much time as she needed to read documents.

18. We should express our gratitude to Mr Searle and Mr Williams for the way in which they conducted the cases of their respective clients with skill and empathy.

Findings of Fact

19. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. This is particularly relevant in this case, as we heard and read a great deal of evidence that did not assist us to determine the issues in the claims.

Agreed Facts

20. There was a large amount of evidence in the case that was either expressly agreed or which was not challenged. We feel it would be useful to set out that evidence as findings of fact before moving to the areas of evidence that were in dispute:

    20.1. The claimant was employed as a Senior Occupational Therapist (a Band 7 post) by the respondent from 5 September 2016 to 30 March 2020, which was the effective date of termination of her employment following her resignation with notice.

    20.2. The claimant started early conciliation with ACAS on 11 June 2020 and obtained a conciliation certificate dated 25 July 2020. The claimant's ET1 was presented on 25 August 2020.

    20.3. The respondent is an NHS Trust that employs over 12,000 people.

    20.4. The claimant worked within the respondent's Therapy department. At all material times, her line manager was Lynn Jones, although there were periods when Ms Jones was absent from work or concentrating on other aspects of her role, which meant that the claimant was line-managed by other managers.

    20.5. The claimant's role was created in 2013 as a result of a joint initiative by the respondent's Therapy and HR departments. The role was meant to be a developing one that was focused on the Trust's own staff by providing occupational health ("OH") support for them more quickly than had previously been the case.

    20.6. The post was initially a full-time one. In 2015, the post was split into a job share and Jennifer Blackmore was appointed as the other half of

the job share. Ms Blackmore resigned in 2016, which created a vacancy for one half of the job share.

20.7. The job description for the job share was produced in the bundle [72-80]. It was suggested by the claimant that the job description was "generic". We will return to that suggestion. However, it was not disputed that the job description included the following terms:

20.7.1. Under 'Job Summary' – "To train and supervise Therapy staff..." [72];

20.7.2. Under 'Key responsibilities' – "To advise, assist and educate Trust managers, line managers, supervisors, HR Advisors and H&S team..." [73];

20.7.3. Under 'Key responsibilities' – "To manage waiting lists..." [73];

20.7.4. Under 'Managerial & Leadership' – "To work flexibly in delivering the Occupational Health Therapy service to meet the needs [or] demands of the service." [74];

20.7.5. Under 'Managerial & Leadership' – "Co-ordinate the effective day to day running of own service..." [74];

20.7.6. Under 'Clinical Governance / Quality' – "To be responsible for maintaining accurate and comprehensive patient treatment records..." [75];

20.7.7. Under 'Clinical Governance / Quality' – "To develop and undertake clinical audit." [75];

20.7.8. An entire section regarding education and training development [75].

20.8. The claimant applied for the job share role, which was advertised as being for 18.75 hours per week: half the full-time equivalent. She was interviewed and offered the job on the same day as the interview by telephone. The offer was confirmed in a letter dated 19 May 2016 [81-82].

20.9. At the end of her interview, the claimant advised the interview panel that she has dyslexia. The respondent accepted that the claimant has dyslexia; that she met the definition of 'disabled person' in section 6 of the EqA and that it had knowledge of the claimant's disability at all material times. It was agreed that there was a discussion about adjustments that the claimant may need at the interview.

20.10. It was also accepted by the respondent that the claimant also met the definition of 'disabled person' in section 6 of the EqA, as she was diagnosed with Hashimoto's disease. This a condition where the body's auto-immune system attacks the thyroid gland. The claimant agreed

that she first advised the respondent of this diagnosis in her email of 30 September 2019 [270-273]. The respondent accepts that it had knowledge of this disability from 30 September 2019.

20.11. It was agreed that the claimant had an exemplary career record and that she was a valued and effective member of the respondent's team. It was agreed evidence that she was an occupational therapy expert in the field of occupational health and had great experience in advising (and using) the Access to Work ("A2W") scheme.

20.12. On 8 June 2016, the claimant sought an increase in her hours to 22.5 hours. This was agreed and actioned, but on an informal basis: it was not confirmed as a change to the claimant's contract until 2019.

20.13. In June 2016, the claimant attended a pre-employment OH appointment. On 30 August 2016, A2W sought consent for a workplace assessment in respect of the claimant's dyslexia [102]. This was granted.

20.14. The claimant began work for the respondent on 5 September 2016.

20.15. The claimant had advised the respondent of strategies that she had developed to assist her to work effectively and manage the effect that dyslexia had on her ability to carry out some tasks.

20.16. We considered the oral evidence of Ms Jones that she may have placed too much reliance on the claimant's expressed experience and professional expertise in managing her dyslexia. However, we find the impact of that evidence to be limited because the evidence related to the period between 2016 and 2018 and we did not find that it indicated unlawful conduct on Ms Jones' part.

20.17. On 4 October 2106, A2W provided a report with recommendations [161]. On 6 October 2016, A2W granted approval for the Needs Assessment Report recommendations. In that situation, the employee must return a declaration within 4 weeks to receive the support recommended.

20.18. The claimant had a face-to-face Supervision meeting with Lynn Jones on 13 October 2016 [180]. The A2W application was discussed and there were two action points:

20.18.1. The claimant was to contact the A2W case manager to ask about the inclusion of hardware; and

20.18.2. The claimant was to feedback to Ms Jones with the answer to the A2W enquiry and then process all requirements.

20.19. On 15 November 2016, the claimant submitted a request for a laptop.

20.20. In her Supervision meeting with Ms Jones on 12 January 2017, the claimant reported that she had contacted the IT department and had put in a request for hardware. She now needed to request software. The claimant was to manage the reclaim of expenditure from A2W.

20.21. The claimant was appraised by Ms Jones on 29 June 2017 [193-201]. There is no note in the appraisal of any problems that the claimant raised about her work or working conditions.

20.22. Catherine Wallace was appointed to a Band 6 role on 7.5 hours per week to assist the claimant. Ms Wallace resigned in January 2019 and her departure caused the claimant some upset and stress about how she would be able to cope with her workload.

20.23. The respondent convened a series of meetings in 2018 to address perceived problems with the effectiveness of the A2W scheme.

Facts in Dispute

Time Points

21. In his closing submissions and during cross-examination of the respondent's witnesses, Mr Searle conceded that the thrust of the claimant's case were the incidents from January 2019, when Catherine Wallace resigned, to the way that the claimant's grievance was dealt with. Any matters raised that occurred before January 2019 were conceded to be background and, therefore, not part of the claimant's claims of discrimination, other than as background. We therefore find that any allegation of discrimination made by the claimant that precedes January 2019 is time barred, as they occurred more than three months before ACAS early conciliation started and no evidence was produced or submission made that matters before January 2019 were part of a continuing series of acts or that it would be just and equitable to extend time to permit any such claims to be heard.

22. We find that allegations made by the claimant in respect of events from January 2019 were all in time, as we find that they were part of a continuing series of acts. We make that finding because we took a broad brush approach to the claimant's claims and found that, whilst she returned to work in October 2019 and again in January 2020 to work that was very different to the substantive role she had performed before her absences because of ill-health, it was agreed that the respondent failed to provide a stress risk assessment for the claimant on her return and that state of affairs lasted until her employment ended.

PCPs

23. After determining the time points, we moved to the claims of indirect discrimination, then dealt with the reasonable adjustments claim and, finally, the discrimination arising from disability claim.

24. We started our consideration of each of the discreet allegations in the sections 19 and 20/21 cases by considering whether a PCP had been applied. The claimant's claims under section 19 and 20/21 of the EqA in respect of indirect discrimination

because of disability and failure to make reasonable adjustments require us to find that the respondent applied one or more provisions, criteria or practices practice which was discriminatory in relation to the claimant's disability and that:

24.1. The respondent applies, or would apply, it to persons with whom the claimant does not share the characteristic:

24.2. It puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it;

24.3. It puts, or would put, the claimant at that disadvantage; and

24.4. The respondent cannot show it to be a proportionate means of achieving a legitimate aim.

25. In considering the issue of PCPs, we were guided by the Court of Appeal decision in **Ishola v Transport for London** [2020] EWCA Civ 112 and the cases referred to therein. We also consider the Court of Appeal decision in **United First Partners Limited v Carreras** [2018] EWCA Civ 323.

26. We note that there is no definition of 'provision, criteria or practice' in the EqA and the decision as to whether something is a PCP is left to the Tribunal.

27. We consider that PCPs can be formal and informal practices of employers and includes work rules, policies and suchlike. There is no requirement for a PCP to be express or conscious.

28. In **Carreras,** Underhill LJ considered that in the situation where an employee who had been rendered 'disabled' following a cycling accident was first requested, then expected, to work long hours, this could amount to a 'requirement'. It was not necessary for the claimant to demonstrate that he had been coerced or expressly ordered to work in the evenings, and the state of affairs about which he complained could constitute a 'practice'.

29. We were also mindful of the words of Simler LJ in **Ishola**:

> *"In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."*

30. **Ishola** also made it clear that, although a one-off act could amount to a PCP, it was not necessarily one, and each of the words "provision, criteria or practice" carried the connotation of a state of affairs indicating how a similar case would be treated if it occurred again.

31. We also acknowledge that the Tribunal can substitute its own PCPs for those contended for by the claimant.

32. We were mindful of the fact that the claimant was represented by a trade union throughout the period from January 2019. We also note that she has been represented by solicitors and experienced counsel in these proceedings. We have noted that the claimant has a disability, dyslexia, that impacts on her ability to read and comprehend documents and to communicate effectively in writing. However, given the expert advice available to her, we make the general finding that the PCPs relied upon by the claimant are somewhat vague.

33. All of the claimant's PCPs are specific to her. Although a one-off act can amount to a PCP we find that none of the PCPs contended for carried the connotation of a state of affairs indicating how a similar case would be treated if it occurred again, because there was no evidence tendered to show such a state of affairs.

34. We have rejected all the claimant's PCPs contended for. We considered whether other PCPs were applied by the respondent, but found that none had.

35. Our specific findings are as follows.

Workload/Administrative Assistance

36. We find that the respondent did not apply a PCP that the claimant was required to work without reduction in workload of an administrative nature or without sufficient administrative assistance. We make that finding because:

    36.1. We find that the claimant was provided with adequate administrative support from early in, and thereafter, throughout her employment. When she raised the issue of administration support with Lynn Jones, she was provided with preferential access to administrative staff (including Gen Kerr), who were hand-picked because of their ability to work effectively with the claimant. We find that that this was not 'merely' levelling the playing field: it was providing a specific resource for the claimant that was not made available to her colleagues who did not have a disability.

    36.2. The claimant was provided with her own room for most of her working time, unlike her colleagues.

    36.3. We find that the claimant's assertion that she was in "admin heaven" in 2017 was a genuine reflection of her satisfaction with the provision provided.

Data Entry

37. We find that the respondent did not apply a PCP that the claimant was required to complete significant data entry as part of her role. We make that finding because:

    37.1. The allegation is very vague. The claimant's job description required her to complete data entry. We find that she fulfilled that part of the role without difficulty or complaint until 2019.

37.2. The evidence did not support the claimant's contention. The claimant's assertion is undermined by the agreed fact that she refused the help of two members of staff, who were offered to assist her with data entry. We find that to be inconsistent with the case put.

Workload/Working Hours

38. We find that the respondent did not apply a PCP that the claimant was required to carry a workload which consistently required more than 22.5 hours per week. We make that finding because:

38.1. We distinguish the facts of the claimant's case from those in **Carreras**. There was never a request of the claimant to work long hours that bled into an expectation that she would continue to do so. The claimant volunteered to work additional hours and gave evidence that she was put under no express pressure to continue to do so.

38.2. We find that the claimant had a balanced and realistic view of the impact that dyslexia had on her capacity to work and managed her workload successfully between 2016 and the middle of 2019. That period included times when the claimant asked to work additional hours and carried out the work successfully.

38.3. We find that it was the claimant who pushed for her hours to be increased to 22.5 before she even started work.

38.4. We accept that Ms Jones would discuss waiting lists with the claimant. We do not find that to be unusual or unreasonable for her to have done so: the claimant was employed to manage the service and was paid accordingly. We would have been more surprised if Ms Jones had not discussed waiting lists with the claimant. It was part of the claimant's job description [73] to manage waiting lists.

38.5. The claimant's evidence was not strong on the point. She accepted in cross-examination that she took TOIL for extra hours worked for most of her employment and did not provide corroborative evidence that showed that she was "consistently" required to work more than 22.5 hours per week.

38.6. We find that the claimant volunteered to work additional hours because she said as much in her email of 30 September 2019. We find that there was no hint of coercion, whether express or implied, upon the claimant to work more hours.

38.7. We find no evidence that there was a "toxic" atmosphere in the Therapy department as alleged by Mr Searle. We found that the evidence shows a cohort of staff and managers doing their best to provide a service in difficult circumstances. The claimant's complaint about communication with Ms Jones was not that the quality of communication was poor or inappropriate, but that Ms Jones was sometimes difficult to get hold of. Given the demands on Ms Jones' time, this is hardly surprising.

38.8. We reject Mr Searle's submission that it was somehow inappropriate for the respondent to point out that the claimant was complaining of overwork at a time when she was seeking to be involved in things that were not core or central to her role. We find that this was not an example of the claimant being criticised for seeking to exercise her right to get involved in such matters, but a realistic and valid point of evidence that it was not consistent for the claimant to be claiming to be overworked whilst seeking more 'work'.

38.9. We also do not find that it was unreasonable for the respondent not to look at the claimant's personal corporate inbox during her absence.

Training

39. We find that the respondent did not apply a PCP that the claimant was required to do and give training in addition to her regular workload. We make that finding because:

39.1. It was agreed evidence that the claimant was required to do training as CPD to maintain her professional qualification and that she was required to deliver training as part of her job description.

Role/Job Description

40. We find that the respondent did not apply a PCP that the claimant was required to work without being given clear boundaries to the role or that there was an application of a generic job description. We make that finding because:

40.1. The claimant accepted in cross-examination that the job description was not generic.

40.2. We find that the claimant's acceptance of the job description as being accurate only if caveated by the words "for a 37-hour post" was not supported by the evidence. We found the job description to reflect the role. In support of our finding, we note that the claimant never challenged the job description in the first three years of her employment. Her first complaint was in her email of 30 September 2019.

40.3. The service that the claimant headed up was evolving.

40.4. The SWOT analysis clearly shows that it was the claimant who was leading the service. We find that it must have been part of her role to define the role and boundaries of the service.

40.5. We find that the claimant gave answers to cross-examination questions that showed that she was pushing the boundaries by suggesting new areas to focus on.

Workplace Stress Risk Assessment

41. We find that the respondent did not apply a PCP that the claimant was required to work without being provided with a workplace stress risk assessment. We make that finding because:

    41.1. We acknowledge that the respondent was recommended to provide a Stress Risk Assessment by OH in 2019 and never did so.

    41.2. The claimant's union representative wrote to the respondent on 16 October 2019 [285]. In that email, she indicated that the claimant was fit to return to work, but could only do so if reasonable adjustments were put in place. That email made no mention of the requirement for a stress risk assessment, although a number of other concerns were raised.

    41.3. The claimant returned to work shortly afterwards.

    41.4. We cannot find that the claimant was required to return without a stress risk assessment, even using the guidance in **Carreras**.

    41.5. There was no evidence before us that the PCP contended for was a state of affairs that was likely to be repeated.

Early Retirement (relevant to reasonable adjustments only)

42. We find that the respondent did not apply a PCP that the claimant was put in a position with no choice but to take early retirement in order to safeguard her health, or that the respondent required the claimant to continue working without reasonable adjustments as alleged, resulting in her being put at a substantial disadvantage to the point where she could no longer work for the respondent. We make that finding because:

    42.1. The first finding we make is that this claim is an unfortunate attempt to create a constructive dismissal claim by the back door. It is exactly the scenario Simler LJ was referring to in **Ishola**, that we have quoted above.

    42.2. The PCP only applies to the claimant and there was no evidence that this scenario was a state of affairs that was likely to be repeated.

    42.3. We note that Mr Searle submitted that this was the crux of the case. It may be the factual nexus that the claimant says caused her to resign her employment, but we do not find that she has shown on the balance of probabilities that a PCP was applied as alleged.

Discrimination Arising from Disability

43. We agree with Mr Williams' submissions that the claimant's claims of discrimination arising from disability were "circular". It was a point that the Tribunal picked up during the hearing. We don't think that we can improve on Mr Williams' summation in his written submissions:

> *"In essence, what is pleaded [71F – 71G] is that the Respondent failed to provide alteration 'x' because the Claimant needed alteration 'x'. That does not accord with the Claimant's factual case, the evidence, or logic."*

44. In assessing whether the claimant was treated unfavourably, we were mindful of the absence of any requirement to make comparisons between the respondent's treatment of the claimant and its treatment of anyone else. We were guided by the case of **T-System Ltd v Lewis** UKEAT/0042/15:

> *"…unfavourable treatment is that which the putative discriminator does or says or omits to do or say which places the disabled person at a disadvantage'. However, it is a concept which, is distinct from a 'detriment', or 'less favourable treatment'. Rather, to assess whether something is 'unfavourable' there must be a measurement against 'an objective sense of that which is adverse as compared to that which is beneficial."*

45. We considered the words of Bean LJ in the Court of Appeal (later approved in the Supreme Court) in **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2017] EWCA Civ 1008:

> *"Shamoon is not authority for saying that a disabled person has been subjected to unfavourable treatment within the meaning of s 15 simply because he thinks he should have been treated better."*

46. Section 15 requires a two-stage approach, as explained by Langstaff P in the EAT case of **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305.

> *"The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."*

47. Addressing the list of issues on the claim, we make the following findings.

<u>Discrimination arising from disability – administration</u>

48. We find that the respondent did not treat the claimant unfavourably by a "failure to adjust her role to provide administrative assistance" in September 2016 or at a point thereafter? We make that finding because:

    48.1. As set out above, we found that the respondent did not fail to adjust the claimant's role to provide administrative assistance at any point after it provided named support from administration staff and other arrangements that went beyond merely "levelling up."

48.2. We therefore find that the provision of adequate administrative support was in place many years before January 2019.

48.3. Mr Searle conceded on behalf of the claimant that nothing before January 2109 was more than background.

49. Having made that finding, we make no further findings on this discreet claim.

50. Had we had to go on to consider whether a failure to provide support had arisen as a consequence of the claimant's dyslexia or Hashimoto's disease, we would have found that there was no connection between the unfavourable treatment and something arising from the claimant's disabilities. This was an entirely elliptical claim.

Discrimination arising from disability – workload

51. We find that the respondent did not treat the claimant unfavourably by a "failure to reduce the overall workload fit for a 22.5-hour post" in September 2016 or at a point thereafter?

52. We make that finding because:

52.1. As set out above, we found that the respondent did not fail to reduce the overall workload fit for a 22.5-hour post.

52.2. We therefore find that the basis of the claim was unfounded in fact.

52.3. Mr Searle conceded on behalf of the claimant that nothing before January 2109 was more than background.

53. Having made that finding, we make no further findings on this discreet claim.

Discrimination arising from disability – reasonable adjustments

54. We find that the respondent did not treat the claimant unfavourably by a "failure to provide reasonable adjustments both for her dyslexia and Hashimoto's" in September 2016 or at a point thereafter? We make that finding because we have already found that the claimant did not fail to make reasonable adjustments.

Discrimination arising from disability - training

55. We find that the respondent did not treat the Claimant unfavourably by a "failure to exclude the delivery of corporate training within the workload" in September 2016 or at a point thereafter. We make that finding because we have already found that the respondent did not fail to exclude the delivery of corporate training from the claimant's workload.

56. The claimant pressed for and voluntarily undertook training and there was nothing in the evidence that we saw that any employer would reasonably consider to indicate that the claimant was incapable of undertaking part of her contractual job description, as she had done without comment or complaint until September 2019.

57. Having made those findings, we did not consider any of the others relating to this discreet claim.

Discrimination arising from disability – stress risk assessment

58. We find that the respondent did not treat the Claimant unfavourably by a "failure to undertake the stress risk assessment requested twice by Occupational Health" in September 2016 or at a point thereafter.

59. This discreet claim was described by the claimant and her advisers very loosely. It mentions the request from OH for the stress risk assessment, the first of which was in August 2019, and then goes on to set a timeframe of "since September 2016".

60. We have found that the respondent did fail to undertake the stress risk assessment. We find that treatment to be unfavourable on applying the test of measurement against an objective sense of that which is adverse as compared to that which is beneficial per **T-System Ltd v Lewis** as quoted above. The claimant's duties at work on her two returns from ill health absence in October 2019 and January 2020 were agreed to be largely different from those she had undertaken before her absence.

61. We also find that her return was on a phased basis and involved no clinical work. Her second return coincided with her resignation on notice and in her notice period, she took large amounts of accrued holiday and only worked a few days in each of January, February and March 2020. Her working time was focussed on wrapping up her caseload. However, the risk assessment should still have been done and the respondent's failure was unfavourable to the claimant.

62. Moving to the second part of the test, hover, we find that the failure was not something arising in consequence of either of the claimant's disabilities. This discreet claim is, again, elliptical. The requirement for the risk assessment was the consequence of the claimant's disabilities (effectively the stress that the respondent accepted in evidence that she was under), but the respondent's failure did not arise in consequence of either of the claimant's disabilities.

Summary

63. This is a very unfortunate case. The claimant, who has many years good service in her chosen profession, is no longer employed and chose early retirement at the age of 55. We have a great deal of empathy with her situation.

64. Our reluctant conclusion is that the evidence shows that the claims which the claimant brought to this Tribunal were not in her mind at the time of the incidents that she now complains of. Whilst there is no requirement that a claimant should have claims in her mind at the time that the incidents later relied upon happened, the evidence in this case leads us to making the following findings:

    64.1. The claimant is an occupational therapy expert in the field of occupational health and had great experience in the field of reasonable adjustments and advising (and using) the Access to Work ("A2W") scheme.

64.2. She frequently advocated on behalf of clients using the service in matters relating to reasonable adjustments and A2W. We do not accept the claimant's evidence that she was unable to advocate on her own behalf as credible. We also find that the claimant was able to raise the issue of her dyslexia at interview and was able to engage in discussions about reasonable adjustments and A2W with the interview panel. We find that to be inconsistent with the claimant's stated position that she found it humiliating or embarrassing to raise matters related to her dyslexia. The contemporaneous documents support our finding and undermine the claimant's position.

64.3. The claimant's evidence of her attempts to bring issues relating to her dyslexia to the respondent's attention before her email of 30 September 2019 [270-273] can be broadly described as intimations or obtuse references. Her case was that the respondent should have picked up on these and actioned them as concerns about reasonable adjustments. We find that the written evidence, documents and oral evidence do not support the claimant's case on her situation between 2016 and 30 September 2019 and do not support the conclusion Mr Searle invited us to reach.

64.4. Even in her email of 30 September 2019, the claimant does not make an allegation of discrimination: her complaints are of her workload and working conditions, without linking either to her disabilities.

64.5. The claimant's resignation letter of 2 January 2020 [301] makes no reference whatsoever to her having been discriminated against as a reason for her resignation. We do not accept Mr Searle's submission that the claimant was too unwell to raise the issues.

65. The above findings and the evidence in general left us with the strong feeling that the claim had been constructed retrospectively

66. The respondent made a number of errors in the way that it managed the claimant, which is, at least in part, reflected by its own finding that three complaints made by the claimant were partially upheld in the grievance process, but we find that the errors were not errors borne out of disability discrimination.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
10 January 2022

Sent to the parties on:
25 January 2022

For the Tribunal Office: