Case Number: 3200066/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms H Robinson-Smith-Hunte**

Respondent: **Department for Work and Pensions**

Heard at: **East London Hearing Centre (by CVP)**

On: **6, 7, 8, 9, 10, 15, 16, 17 June and 2 September 2022**

Before: **Employment Judge Jones**
Members: **Mr P Quinn**
Ms A Berry

Representation
Claimant: Mr B Supiya (Lay representative)
Respondent: Ms Cummings (Counsel)

JUDGMENT

The complaint of disability discrimination has failed. The complaint is dismissed.

REASONS

1 This was a complaint of disability discrimination. The Claimant remains employed by the respondent. Her claim was of a failure to make reasonable adjustments and of discrimination arising from disability.

2 There was an agreed list of issues. Those can be found at the end of these reasons, in the section entitled *'Applying law to facts'*

3 This claim was issued in 2018. There was an aborted final hearing in 2019 but since then, there has been a number of delays in getting this matter on for trial due to the personal circumstances of various witnesses, representatives and delays caused by the Covid-19 coronavirus pandemic.

Evidence

4 The Tribunal had an agreed bundle of documents. In addition, both parties

submitted additional documents at the start of the hearing. Ms Gregorian also submitted additional documents during the hearing. The Tribunal had witness statements from all the witnesses who attended to give evidence. We also had an additional witness statement from Ms Maillou for the Claimant, who did not attend the hearing to give evidence.

5 The Claimant gave evidence on her own behalf and we also heard from:

- her colleague, Ms B Sharma,
- and from Terry McLoughlin, who had given her support over the years and was the London disabled staff network chair between 2003 – 2011 and an active member of the JCP national disabled staff network.

6 For the Respondent we heard from:

- Neesha Mehta, the Claimant's line manager between September 2015 – July 2016;
- Janet Reeves, who is employed by Electronic Data Systems as the Accessibility Software Client Services Operations Lead. She was known within the Respondent as the '*Dragon'* lady and seen as having expertise with that software;
- Tim Sykes, Senior Systems Engineer also employed by Electronic Data Systems which is contracted by the Respondent to provide live support to DWP staff via its DWP IT contract;
- Sean Parnell, Accessibility Manager and Team Leader of the DWP Accessibility Management Team; and
- Susan Gregorian, who at the time was a Senior Release Manager for the Respondent's Digital Business Supporting Systems Team.

7 The Tribunal made the following findings of fact from the evidence presented in the hearing. We have only made findings on those matters that are related to the issues that we have to determine.

Findings of fact

8 The Claimant began her employment with the Respondent in 1988. During the period covered by this claim, the Claimant worked as a Decision Maker. The Respondent concedes that the Claimant has both physical and mental conditions which make her a disabled person for the purposes of the Equality Act 2010.

9 In 2006, the Claimant had carpal tunnel surgery to both wrists. Following surgery, the Claimant continued to experience discomfort and was assessed as requiring reasonable adjustments at work. She was provided with Dragon voice recognition software due to her inability to use a keyboard and mouse, without severe difficulty. In 2007, the Claimant was provided with Dragon version 10.

10 Sometime in the early noughties, one of the Respondent's employees created a case database called DMACR which they used for their work. This was shared with colleagues. The original creator and their colleagues created slightly different versions of the database to suit their own needs. This database had not initially been created by the respondent. Because of all the person variations each caseworker made to the database, there was, at one point, approximately 90

versions of DMACR in existence, within the Respondent.

11 This was unsustainable because, should any issue arise, the Respondent did not have any service arrangement with anyone to troubleshoot or maintain DMACR. This meant that it was also not secure. It was an Excel program which caused other difficulties and lastly, it had not been accessibility tested. After some time, the person who created the program ceased to be employed by the department. This created further difficulties.

12 In order to resolve some of those issues while making use of the good parts of the DMACR database, the Respondent declared an amnesty and collated all the versions of DMACR that were in existence. The Respondent then entered into a contract with a company called Cap Gemini and gave them the task of revising DMACR and making it one uniform program that all of the Respondent's employees could use.

13 We find that the Respondent is committed to providing its employees with the most up-to-date software to enable them to do their jobs efficiently. It is not and would not have been in the Respondent's interest to give its employees software that prevents them from doing their jobs or makes their job more difficult. Dragon is considered the best voice recognition software available.

14 In order to maintain and improve the user experience, as well as ensuring that the Respondent's technical estate remains secure, it has to run a continuous hardware/software upgrade program. In 2014, Windows XP was approaching its expiry and as such would not continue to be supported by Microsoft. As such, the respondent could not continue to guarantee security of its data stored on the system. The Respondent had to upgrade to Windows 7 for security and user experience reasons. All users, including the Claimant had to be moved from Windows XP to Windows 7. Dragon was compatible with Windows 7.

15 Internet Explorer 6 (the browser offering included in Windows XP) had to be upgraded to Internet Explorer 9 (IE9) as that also became insecure. IE9 was part of Windows 7. Dragon had to be upgraded to the most stable and secure version to work with Windows 7. Dragon version 10 was incompatible with Windows 7.

16 As a result, during 2013, the Respondent upgraded all Dragon users on their estate to Dragon version 12. This update included improvements such as faster response times; more accuracy; improved/faster correcting and editing; and voice shortcuts. Sometime in 2013, the Claimant was upgraded to Dragon V12.

17 In 2013 Cap Gemini produced their version of DMACR, which was then put through accessibility testing. A copy of the DMACR accessibility test was in the bundle of documents at page 125. It was done in September 2013. Accessibility testing means that the Respondent checked that the program/database/equipment it proposes to use can be used and/or accessed by employees with physical and/or mental disabilities. If the accessibility testing revealed that any adjustments needed to be done to make the program or database more accessible to those employees, the Respondent would make those adjustments or ensure that the company contracted to create the program made the necessary adjustments to make it so.

18 In addition, the Respondent has specific technical support for users of assisted software (referred to in the hearing as AS users). We find that the Respondent only issued Dragon software to employees who were AS users.

19 We heard from Mr Parnell who headed up the 'Red Team', which was a team of specialists supporting AS users and their use of technology across the Respondent's estate. There was also an 'A Team', which was a quick response unit within the Red Team. Chris Felton was part of Mr Parnell's team.

20 Whenever an AS user raises an issue with software it would be flagged and the work on resolving the problem would be transferred to the Red team to manage.

21 The DMACR accessibility test showed that at the date that the report was produced, the program had been tested and there were some issues that remain unresolved. In an email dated 5 December 2013, Chris Felton identified 3 areas where DMACR had not passed the accessibility test. He referred to sections 4.2, 4.5.2 and 5 of the report as highlighting work that needed to be done before the program would be accessible. The Tribunal is aware that the words '*pass'* and '*fail'* are inadequate to describe a much more complicated and involved process and that they do not take into account the many nuances that exist between those words. On receipt of Mr Felton's email, Mr Fitton responded to say that he would follow up the issue and get back to him. The issues flagged up were minor.

22 On 19 December 2013, Cap Gemini visited the Claimant at work, at her desk to investigate the issues that she was having when using Dragon version 12 and DMACR to do her work.

23 During the meeting, the Claimant's problems with Dragon and DMACR were discussed and were noted in an email from Mr Dinwoodie to Martin Fitton and Janet Reeves, among others. In the email dated 10 January 2014, which was forwarded to the Claimant; Mr Dinwoodie noted that the Claimant was having difficulties using various functions in Dragon with Firefox. He stated that when she used Internet Explorer 6, the experience was better.

24 The Citrix environment was introduced to the Respondent's systems in 2016 but we find that AS users were not required to use Citrix for their day-to-day work. The Citrix icon was on their machines and would have been visible on their screens. It was used for authentication processes when any user turned on their machine. Citrix provided the Respondent with security. However, AS users were not required to use Citrix for any of the applications that they had to use in order to perform their job tasks. The Respondent agreed that Citrix was not compatible with Dragon. However, as AS users were not required to click on the Citrix icon on their screens in order to do their work, Citrix should therefore not have caused the Claimant any difficulty.

25 The Claimant used OPSTRAT and possibly LMS. They were both software that were over 10 years old and were on their way out. OPSTRAT had been accessibility tested but before Mr Parnell became accessibility lead.

26 On 28 January 2014, Cap Gemini attended a meeting with the Respondent's senior officers and reported on their visit to the Claimant in December. There was in the bundle and email from Martin Fitton which summarised that meeting and the conclusions they reached.

27 The minutes show that they discussed the ways in which the Claimant and her colleagues were affected by the interactions between DMACR, Dragon, Firefox and IE9. Mr Dinwoodie from Cap Gemini reported back to the meeting on the issues the Claimant raised with him. However, IE6 was no longer in use as the Respondent had migrated to IE9. The Respondent's solution for the Claimant's while she waited for IE9 to be adopted, was to use workarounds and to continue to use IE6 as it was better than using Firefox. Ms Reeves' evidence was that Dragon could be used with Firefox, but it was a much better experience to use IE6 and even better with IE9.

28 During her evidence in the hearing, the Claimant appeared to be sceptical about the effectiveness of workarounds, but it was not her evidence that she had tried them and that they had failed. The Claimant was also advised on a number of occasions to use MouseGrid which was another way to use the Dragon software. We got the impression that she did not like these solutions and did not consider them to be adequate, but it was not her evidence that they were unsuccessful in getting around the issues she experienced.

29 We find it likely that although the DMACR had been accessibility tested there were some outstanding matters that needed to be resolved, as noted in the accessibility report. Mr Dinwoodie informed the meeting that the items listed in section 2 of the remediation plan in the accessibility report had been completed by 28 October 2013. That was the date on which DMACR went live. There was only one further fix to be delivered at a later date. The items remediated from the list in the accessibility report were those classed as of high or medium priority.

30 The DMACR program was signed off by the Respondent's Benefits Director in February 2014 as by that time, the outstanding matters have been resolved. The sign off document that we saw in the hearing had been drafted by Chris Felton. We find it likely that he supported the sign off of DMACR at that point and it is also likely that he considered that the issues he raised in his email of 5 December 2013 had since been addressed.

31 In June 2014, the Respondent's '*Transformation Desktop Build'* was rolled out in the Claimant's office to everyone, apart from AS users. Transformation included a revision of all the hardware supplied to employees as well as the software they were required to use. It was precipitated by the need to move from Windows XP to Windows 7. Windows XP was not going to be supported by Microsoft after a certain date and therefore needed to be upgraded. At this time, the Respondent also began using Internet Explorer 9 (IE9). However, as IE9 had not at that stage been accessibility tested, it was not provided to the AS users. This meant that the AS users had to continue using Firefox as their browser.

32 The Respondent established a Dragon Support Group which allowed Dragon users to share their experiences with the software and solutions to problems. This was mainly an online forum to which members of staff could add

their comments. The Claimant was a frequent contributor on the forum. We were not told what percentage of Dragon users posted on the forum.

33 The Respondent also provided a quick response technical support service called Technow where all employees, including AS users, could submit any problem they were experiencing with the technology that they had to use and get answers and advice from tech staff. This would usually be low-level problems as more complex problems might require more than a telephone call, such as a visit to the office or access to the user's machine. Members of staff were expected to log an incident each time something happened and to close the incident once it had been resolved.

34 Whenever an AS user raised an incident on the Technow service, those were flagged and referred to the Red Team, managed by Mr Parnell. Technow was run by an external IT contractor. They monitored the reported incidents and if they saw that there were multiple incidents concerning the same matter, those would be converted into a '*problem'*. Upwards of 3 complaints were considered a multiple. In such a case, a problem manager would be appointed, and that person would let the service provider of the software, such as Cap Gemini know about the problem. The problem manager will assemble a team to work on the problem, including to investigate it and try and find a solution. The intention would be to find a permanent fix to the problem and where that was not possible, to find a workaround.

35 During that process, the Respondent would keep in touch and liaise with the user who first flagged the problem. It was also possible that a visit to the user's workstation may be considered necessary to assess the situation and try to resolve issues in real time. An observation visit would allow the senior tech managers to see in real-time what the user is doing, how they are using the software and what might actually resolve the issue. This process provides an audit trail from the moment the incident is reported to it being resolved. It also allows the Respondent to request scripts to be developed for first-line support staff to use so that they are able to address the issue, should it ever arise again with another member of staff. The first-line response technicians at Technow who pickup incidents on the telephone or on the service were not the most qualified IT technicians. They were troubleshooters who addressed the low-level complaints submitted to that service. They did so from their own knowledge, assisted by scripts prepared by senior managers, and by referrals to senior managers, when required.

36 The Claimant's personal desktop transformation happened on 21 April 2015, which enabled her to have Internet Explorer 9 (IE9) on her machine. We find that it was expected that this would enable her to be able to use Dragon version 12 more successfully with DMACR. From then, she should not have needed to use Firefox even though the icon continued to be on her screen. She should have been using IE9, DMACR and Dragon which were all compatible with each other.

37 In May 2015, the Claimant reported different problems to the Respondent but again they related to Dragon's ability to communicate with DMACR. In particular, she complained about issues with the phonetic alphabet and that various commands and pulldown menus were not working properly. The Claimant's correspondence led to Janet Reeves' decision to visit the claimant at her desk to see if she could help. On 18 May, she sent the Claimant an email to let her know of her intention to visit. That does not mean that the Claimant received

or read it, but we find that it was sent.

38 On the morning of the visit, 1 June 2015, Miss Reeves telephoned the Claimant to let her know that she was in the building and would visit her during her lunch break. Miss Reeves was in the building training another user on using Dragon. Rather than having an hour lunch break, the user she was training requested a 30 minute lunch break which meant that there was less time for Miss Reeves to have lunch, see the Claimant and attempt to resolve her issues and return to the other user.

39 Miss Reeves went down to the Claimant's workstation to see her soon as she was able. It is unlikely that the Claimant recognised her as they had met only once before. It is also unlikely that the Claimant gave her manager prior notice of Miss Reeves' visit as correspondence from her manager in the bundle seemed to suggest otherwise. However, when she attended the Claimant's office the Claimant showed her what was wrong, and Miss Reeves gave her a number of workarounds to address those problems. Miss Reeves also left the Claimant with notes of those workarounds which she wrote out on Post-it notes so that the Claimant could stick them on her screen, for ease of reference.

40 We find it likely that Miss Reeves was anxious and feeling pressured during the visit because, as a diabetic, she knew that she only had half hour to address the Claimant's problems and have something to eat, all before she resumed her Dragon training with the other user.

41 We find that although neither the Claimant nor Miss Reeves were happy with the way this visit went, neither of them complained about the other at the time. Miss Reeves' email on the following day to the Claimant contained a complete recap of all the workarounds she gave the Claimant. She addressed the issue with the drop-down menus, advised the Claimant to use *'spell mode'* with NINO rather than '*normal mode'*, and to dictate actual dates rather than use a pop-up calendar. Those were the issues that the Claimant raised with her. She advised the Claimant to come back to her with any remaining issues. That email should have assisted the Claimant as she could have printed it off and kept it on her desk to refer to so that she could use the workarounds as she needed. The Claimant's email in response was equally positive and gave no hint of her being upset or anything other than pleased with the way the visit went. Even when Ms Reeves was asked by the Claimant's line manager to explain what happened on 1 June, there was no complaint in Ms Reeves' detailed email to the manager.

42 In her email Ms Reeves confirmed that she had not been able to see the issue with the Dragon Correction Menu so had logged it as an incident and told the Claimant that an engineer would soon be getting in touch to address that particular issue. She noted that the performance of DMACR appeared to be an improvement with IE9 on the Claimant's transformed desktop to that of Firefox on Windows XP.

43 Ms Reeves was not connected to CapGemini and therefore had no loyalty to the company. If there was a difficulty with DMACR that could not be resolved, it is likely that she would have pointed that out. She was also not one of the Respondent's employees. She was therefore able to speak independently of both.

44 In her response to Ms Reeves' email the Claimant indicated that she had tried the workarounds and that some worked. She also stated that she felt that she needed some training since some commands were responding differently following her transformation. We heard nothing more about this in the hearing. She did not mention in any of the emails to Ms Reeves that the workarounds that she gave her required her to use her hands.

45 Over the period covered by this case, the Claimant was referred to occupational health on a number of occasions. We had copies of all the occupational health reports in the bundle of documents for the hearing. Some of those reports contained recommendations of adjustments for the claimant.

46 On 6 July 2015, the Claimant was given a first written warning for her attendance. The Claimant had raised a grievance regarding her trigger points in a separate grievance over the respondent's decision on the credits awarded to enable her to attend therapy sessions. We did not hear much evidence on these topics and noted that they are not in the list of issues. What we can say is that the Claimant appealed against the written warning and eventually, in a decision dated 20 November 2015, her appeal was upheld, and the warning was revoked.

47 In August 2015, the Claimant made a post on the Respondent's assisted technology/Dragon Support group thread that the problems with her IT at work had contributed to her feeling suicidal. It was not until sometime later that this post was flagged up as serious and urgent by those monitoring the forum. It was not brought to Mr Parnell's attention until October. As a result, Mr Parnell together with the Respondent's IT and AS support teams and HP, (as the service provider), liaised to arrange a meeting at the Claimant's workstation to see how they could address her continuing IT issues, in real time.

48 As the head of the AS Red Team, Mr Parnell coordinated the planning of the meeting. There were a number of emails in the bundle between people at Cap Gemini - who were responsible for DMACR, HP - who were looking after Dragon, and the Respondent; setting up a meeting. The Claimant was included in those communications, as was her line manager. Emails were sent to her by Chris Felton and Martin Fitton about this meeting. Alan Brown spoke to the Claimant and she and her manager agreed that the meeting date was convenient for them. We therefore find that the meeting was not arranged in secret.

49 Once a meeting date was set, Miss Gregorian emailed everyone on 2 November to inform them that any further liaison should be directed to Mr Parnell rather than having 7 people emailing the Claimant about it. Ms Gregorian referred in her email to this being a *'sensitive situation*' because of concerns about the Claimant's mental health.

50 As part of his preparation for the visit, Mr Parnell arranged for a new desktop box to be sent to the Claimant's office so that it would be handy, if it was needed during the visit, to address any of the issues that the Claimant had with her software or hardware. Ms Mehta remembered the desktop box being delivered to the office, that it had been addressed to the claimant and that it was stored there. Mr Parnell also considered that the Claimant may benefit from enhanced memory on her hard drive. He considered that a BIOS enhancement would have that effect and organised to have that ready, in case it was required.

51 We find that in organising and preparing for the meeting, the Respondent, mainly through Mr Parnell, wanted to consider every possible tool at its disposal that could be used to assist the Claimant to overcome the issues she was having with the database and the software she had to use.

52 There was some confusion as to whether or not the Respondent did the BIOS enhancement. We find it unlikely that it was done. The Respondent did not use the new desktop box, during the visit. It was kept in the office in case it was needed in future.

53 During the visit to the Claimant's workstation on 10 November 2015, the Respondent picked up a number of matters that were unrelated to software but which it considered would assist the Claimant's overall experience of working with the software that she was required to use to perform her job duties. For example, the Respondent decided that the Claimant needed a bigger monitor and a new headset which would cancel out the surrounding sounds, thereby enabling her to hear/be heard more clearly. Other problems were identified, some were addressed on the day and some were addressed over time. Although there is a dispute between the parties about what happened with the Claimant's system over the lunchtime break, during the day of the meeting, we find it likely that her system froze while everyone was out at lunch. There was no evidence that the Respondent or any of its contractors remotely controlled the claimant system or deliberately enhanced it before or during the meeting and then reduce its capacity after the meeting, as was suggested by the Claimant.

54 In October 2015, the Claimant's line management passed to Ms Mehta. Ms Mehta was not an IT specialist and was only introduced to Dragon software when she became the Claimant's line manager. At the time she took over her line management, the Claimant was on sick leave. It was not clear to Ms Mehta what were the Claimant's work targets.

55 The evidence showed that employees in the Claimant post would be expected to make 7 decisions in a working day. As a trade union representative, the Claimant's expected output was reduced by 40% which would then mean that she was required to make 4.2 decisions in a day. When the Claimant was due to return to work, Ms Mehta was aware that the Claimant had been off sick with mental health issues and before she went off sick, she had been having difficulties with her software. In the circumstances, Ms Mehta considered that it would not have been reasonable to set the Claimant any targets before meeting with her and making an assessment of the number of days/hours that had been lost because of her IT issues. After having a conversation with the Claimant's senior managers, Ms Mehta concluded that it would be unreasonable to set a target and therefore no target was set at the end of 2015.

56 For a period of approximately 7 months after taking over the Claimant's line management, Ms Mehta did not put any targets on the Claimant. This was between October 2015 and May 2016. During that time, she offered the Claimant support. The feedback she got led her to believe that everything was fine with the claimant. There were no complaints in that period. Ms Mehta's intention was to move to imposing a target of 4 decisions per day on the Claimant for a period of one month after which the target would be reviewed and if needed, she could reduce it to 3. She intended to monitor the Claimant performance over the period

of a month and then decide what would be most appropriate target to ask her to meet. Ms Mehta considered that this might be an appropriate way to manage the Claimant because the Claimant had not raised any issues related to software or her equipment for some time. During her line management of the Claimant, whenever the Claimant requested time off to attend medical appointments or therapy sessions, Ms Mehta approved those requests.

57 In February 2016, the timeout issue with DMACR was resolved for all staff.

58 Ms Mehta met with the Claimant at the beginning of May 2016. The Claimant told her that she had continued to experience problems in the previous 8 months but had not reported them to her or to anyone else.

59 Once she became aware that the Claimant was still facing problems with her IT, she advised the Claimant to do what she could and log the problems that she had with the IT and that it would all be considered when the Claimant's performance was assessed. She would not assess the Claimant's performance in isolation but would take into account the difficulties the Claimant faced with IT.

60 Ms Mehta did not doubt that the Claimant experienced difficulties with her equipment.

61 During her conversations with the technicians at Technow, the Claimant was told by a tech support person that she needed a 64-bit workstation to solve her problems. However, this advice was incorrect. The Claimant requested a 64-bit machine from Mr Parnell. In a response dated 17 May 2016, Mr Parnell told the Claimant that at that time, Dragon required a 32-bit machine and could not exist on a 64-bit machine. We accept that evidence. This was a detailed response to the Claimant's queries. He advised her to if she chose to move to a 64-bit machine she would lose Dragon and be forced to use the Windows 7 ease of access screen reader. He told that her that he would not personally recommend her taking that route as he believed Dragon to be the 'best in breed'. He also advised her that Firefox was not Dragon version dependent and that she should not be using it.

62 Mr Parnell advised the Claimant that there was no evidence from what he knew from the breadth of incidents across the Respondent, that the slow running that she had identified was due to Dragon. However, as she had raised it with him and he had been involved in trying to resolve her issues from his level, he had decided to get this looked into further. He told her that he had commissioned a piece of work to fully analyse the root cause of her issues. He flagged up that it could be a number of factors, such as her PC being slow and unresponsive, external noise, user speaking too quickly and all of the above collectively working to cause issues. He stated that the results would be fed into the new desktop transformation project.

63 In October 2016, the Claimant attended a variety of jobs for job shadowing as the Respondent were considering moving her to a different post because of the difficulties she continued to experience with the software. We find it likely that the Claimant did not take up any other roles offered to her. The Respondent arranged for her to shadow the Business Support role, which would have been open to her had she wanted to take it up. She stated that she would only take the Business Support officer role if she was given a 64-bit machine, which the Respondent had

already decided was not necessary to perform the role and would not have been compatible with Dragon. There had not been any assessment that such a machine was required in order to do the Business Support role. Ms Mehta confirmed that had the Claimant expressed an interest in any of the jobs she shadowed, she would have discussed it with her senior management team, and it was very likely that the move would have been organised.

64 By email dated 16 November 2016, the Claimant was told that she could not have Dragon version 10 on her machine as the whole estate had to be on the same version of Dragon, which at the time was version 12. At the time, Dragon were getting ready to roll out version 13. On 1 December 2016, the Claimant raised a grievance about the conduct of Red Team and Janet Reeves on their visit to her workstation. She alleged that her problems with the IT systems meant that as a disabled employee, she was not getting her full reasonable adjustments. She also alleged that she was being victimised for raising issues and that she had been threatened with disciplinary action because she had raised issues. She made complaints against Janet Reeves and Sean Parnell.

65 The Claimant ignored the respondent's requests that she should close the DMACR application following each case that she completed. Mr Parnell's unchallenged evidence was that her failure to do so meant that it was likely that she would be timed out of it while using another program. Also, by not closing the application, the application would retain previous case data in the memory, which could cause supplementary problems by providing case data in the drop-down menu. The Claimant refused to accept this and refused to follow the guidance that would have ensured that the problem stopped happening.

66 Mr Sykes confirmed that the Respondent replaced the Claimant's PC on two or three occasions to assist her with the issues that she was having. The Respondent advised the Claimant on things that she could do with her environment to address some of the problems that she was having with Dragon. The Respondent did not dispute that she was having issues but did not consider that the only solution was to allow her to have Dragon v 10 on her machine. Mr Sykes remembered the Claimant being advised that having an oscillating fan near to her was hampering Dragon's ability to hear what she was saying and that may have affected its accuracy. She was advised that external noise needed to be kept to a minimum and that her voice pitch and tone needed to be kept constant so that Dragon could hear her and respond. The Claimant perceived that the Respondent's technical advisers were suggesting that she was incompetent, but we find that they were simply giving her advice on addressing the problems that she had presented to them and from their observations of her work environment.

67 Ms Gregorian's evidence was that as far as she was aware, there were no Dragon/DMACR issues across the group. In 2015, in preparation for the visit to the Claimant's workstation, she asked Ms Goward whether the Respondent was seeing incidents reported of issues between Dragon and DMACR. Ms Goward said that there had not been any incidents reported since 2013. It is likely that that is a reference to the Claimant's incident which resulted in CapGemini visiting the Claimant in December 2013.

68 Apart from the Dragon users email thread, the support offered by Technow and the Red Team, Ms Goward and Ms Gregorian would meet on a monthly basis

to identify any ongoing issues that had arisen so that any trends could be spotted and addressed.

69 The Respondent confirmed that there were 600 Dragon users across the estate and that although there were issues, they were many and varied. There were emails in the bundle from the Dragon support group raising issues with Dragon, but none were about issues with Dragon's ability to work with DMACR and instead concerned issues such as hardware and other programmes. The Respondent did not have the same people having the same problems.

70 The Claimant did not tell the Tribunal when she considered she had been threatened with disciplinary action. There was no complaint of victimisation before us in this case.

71 Although the Claimant makes accusations of discrimination, victimisation, bullying and harassment in the grievance, she did not set out the factual basis for those allegations. Although she used those words, the grievance did not provide any details or describe what actions or omissions the Claimant considered amounted to discrimination, victimisation, bullying and harassment.

72 The grievance failed. The Claimant was notified that the investigator concluded that none of the issues had been found to have happened as described.

73 On 18 August 2017, the Claimant appealed against that decision. The appeal failed and she was notified of the decision on the appeal on 7 November 2017.

74 At the start of this hearing the Claimant stated that her problems with Dragon at the Respondent were ongoing to the present day. The Claimant was informed that the Tribunal could not hear any complaints about matters that have occurred subsequent to the issue of these proceedings. We heard no evidence on the allegations relating to the period post November 2017.

75 The Claimant contacted ACAS on 12 December 2017 to begin the conciliation process. Her ACAS certificate was issued on 13 December 2017. The Claimant issued her ET1 claim on 13 January 2018.

Law

Time limits

76 The Tribunal was conscious that time limits in employment Tribunals must be strictly applied. The complaints that we had to consider in this case were all of disability discrimination. The Respondent conceded that the Claimant had been a disabled person throughout the period relevant to this claim.

77 Section 123 of the Equality Act 2010 states that complaints of discrimination may not be brought after the end of the period of three months starting with the date of the act to which a complaint relates, or such other period as the Tribunal thinks just and equitable. For the purposes of the section, conduct extending over a period is to be treated as done at the end of the period and a failure to do something is to be treated as occurring when the person in question

decided on it. The Tribunal has a discretion to extend time where discrimination complaints have been issued outside the statutory time limits, but that discretion can only be applied where the Claimant has shown that it would be just and equitable to do so.

78 The Claimant issued her claim on 13 January 2018. The Claimant's early conciliation certificate is dated 13 December 2017. The Respondent submitted that any allegation prior to 13 October 2017 should be considered to have been issued outside of the statutory time limits. The Respondent submitted that the Tribunal should consider the date on which it was confirmed to the Claimant that the adjustments she wanted such as returning to Dragon v10, would not be given as the date from which time should start to run. The Respondent submitted that all of the Claimant's complaints were out of time, unless it was decided that they were part of a continuing act. The Respondent also submitted that it was not just and equitable to extend time in this case.

79 If any allegations were out of time, the Tribunal would have to consider whether it could be said that there was *"an act extending over a period"* rather than a succession of unconnected or isolated specific acts as the Respondent submitted. The Tribunal was aware of the principles set out in the case of *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96. The effect of *Hendricks* is that a Claimant would not have to show that the incidents referred to in the claim indicate some sort of general policy or practice but rather that they are inter-linked, are discriminatory and that the Respondent is responsible for the continuing state of affairs. The court stated that Tribunals should focus on the substance of the complaints and whether the Respondent *"was responsible for an ongoing situation or continuing state of affairs. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, from which time should begin to run from the date when each specific act was committed"*.

80 If there is no continuing act the Tribunal would consider whether the Claimant had shown that it was just and equitable to extend time to enable it to make judgments on some or all of the complaints.

81 In the case of H*utchinson v Westward TV* [1977] IRLR 69 it was held that the words '*just and equitable'* give the Tribunal discretion to consider any factor which it judges to be relevant. In the case of *Robertson v Bexley Community Centre* [2003] IRLR 434 the Court of Appeal held that *"time limits must be exercised strictly in employment cases, and there is no presumption that a Tribunal should exercise its discretion to extend time on a 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the Claimant to convince the Tribunal that it is just and equitable to extend time 'the exercise of discretion is the exception rather than the rule''*.

82 In *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 EWCA Civ 640, the Court of Appeal made the following points: -

- The reference to (such other period as the Employment Tribunal thinks just and equitable) indicates that Parliament chose to give the Tribunal the widest possible discretion;

- There is no prescribed list of factors for the Tribunal to consider in determining whether to use its discretion. However, factors which are almost always relevant to consider (and are usually considered in cases where the Limitation Act is being considered) are the length of and the reasons for the delay and whether the delay has prejudiced the Respondent.

- There is no requirement that the Tribunal has to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the Claimant's favour.

- It was also said in that case that there are 2 questions to be asked when considering whether to use this discretion*: 'the first question …… is why it is that the primary time limit has not been met; and insofar as it is distinct the second question is (the) reason why after the expiry of the primary time limit the claim was not brought sooner than it was'.*

83 The Tribunal was also aware of the principles set out in the case of *British Coal Corporation v Keeble* [1997] IRLR 336 and section 33 of the Limitation Act 1980.

Disability Discrimination

84 The Claimant had 2 complaints of disability discrimination: discrimination arising from disability and failures to make reasonable adjustments.

Discrimination arising from disability

Section 15 of the Equality Act 2010 states that:

> "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."

85 The way in which a Tribunal should approach section 15 claims was set out by Simler J (then President) in the case of *Pnaiser v NHS England* [2016] IRLR 170 as follows: -

(a) The Tribunal should first identify whether there was unfavourable treatment and by whom.

(b) The Tribunal must then determine what caused the impugned treatment, or what was the reason for it. The focus is on reason in the mind of the alleged discriminator at this point;

(c) The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant or more than trivial influence on the unfavourable treatment, and so amount to an effective reason or cause of it;

(d) Motive is irrelevant;

(e) The causal link between the "something" that causes unfavourable treatment and the disability may include more than one link. The more links in the chain of causation, the harder it will be to establish the necessary connection. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator;

(f) The knowledge required is of the disability only, and does not extend to knowledge of the 'something' that led to the unfavourable treatment;

(g) It does not matter in which order these are considered by the Tribunal.

86 What is unfavourable treatment? For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably' or put at a disadvantage. The definition of discrimination arising does not involve any comparison with a non-disabled person; it requires unfavourable treatment, not less favourable treatment. (See also *Griffiths v Secretary of State for Work & Pensions* [2015] EWCA Civ 1265). Persons may be said to be treated unfavourably if they are not in as good a position as others generally would be.

87 We considered the case of *IPC Media Ltd Millar* [2012] IRLR 707 in which it was held that the employment Tribunal has to consider whether the proscribed factor operated on the mind of the alleged discriminator – whether consciously or unconsciously – to a significant extent. The Tribunal would need to identify the person whose mind is in issue and who, in an appropriate case – becomes A above.

88 Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a *"proportionate means of achieving a legitimate aim".* It is an objective test and the burden of proof is on the employer. The Respondent must produce evidence to support their assertion that the treatment was justified and not rely on mere generalisation. We considered the case of *Chief Constable of West Yorkshire Police v Homer* [2012] ICR 704 in which Baroness Hale JSC gave guidance on objective justification, noting that in order for a measure, or treatment to be proportionate it *"has to be both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so"*. Treatment which is appropriate to achieve the aim but goes further than is reasonably necessary in order to do so may be disproportionate.

89 The Tribunal should not simply review the employer's reasons applying a margin of discretion, but must carry out a "*critical evaluation"* and determine for itself whether, objectively, the means used are proportionate to any legitimate aim, balancing the detriment to the Claimant against the legitimate aim and considering whether that aim could have been achieved by less detrimental means (*Allonby v Accrington and Rossendale College and others* [2001] ICR 1189). The Tribunal should make its own objective assessment of the relevant facts and circumstances, having regard to the employer's reasonable business needs,

business considerations and working practices.

Failure to make reasonable adjustments

90 Section 20 EA imposes on the employer a duty to make adjustments where a PCP (provision, criterion or practice) of the employer puts a disabled person at a substantial disadvantage in relation to relevant matter, in comparison with persons who are not disabled. Section 20(2) provides that the duty comprises the following three requirements.

91 Subsection (3) The first requirement (the one relevant to this case) 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 were not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. The employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

92 Section 212(1) EA defines a substantial disadvantage as something that is more than minor or trivial. An employer who fails to comply with the relevant requirement(s) has failed to comply with the duty to make reasonable adjustments and discriminates against that disabled person.

93 In the case of *Project Management Institute v Latif* [2007] IRLR 579 the EAT decided that the Claimant must show evidence from which it could be concluded that there was an arrangement or a PCP causing a substantial disadvantage and that there was some apparently reasonable adjustment which could have been made. If the Claimant does this the burden shifts. Once the burden has shifted, the claim will succeed unless the employer is able to show that it did not breach the duty.

94 We considered the case of *Griffiths v Secretary of State for Work & Pensions* [2015] EWCA Civ 1265. In that case the Court of Appeal confirmed that a failure to comply with the section 20 duty to make reasonable adjustments amounts to an unlawful act of discrimination. The section 20 duty required affirmative action in certain situations. (see also *Archibald v Fife Council* [2004] ICR 9454 HL and the Equality and Human Rights Commission Code of Practice on Employment (2011) para 6.2). This was not about expecting the Claimant to have to set out particular obligations that she had asked the Respondent to address (although in this case the Claimant did do so) but a duty on the employer to take reasonable steps to remove the disadvantage.

95 The Court stated that in order to engage the duty to make reasonable adjustments, there must be a PCP which substantially disadvantages the appellant when compared with a non-disabled person. *Griffiths* concerned the application of a sickness management procedure and the correct formulation of the PCP was held to be that the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That was the provision breach of which may end in warnings and ultimately dismissal. Therefore, a disabled employee whose disability increases the likelihood of absence from work on ill-health grounds, is disadvantaged in more than a minor or trivial way. That

group of disabled employees whose disability results in more frequent and perhaps longer absences will find it more difficult than non-disabled employees to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it. The Court also referred to the judgment in *Archibald* where the substantial disadvantage was that the employee was at risk of dismissal. The purpose of the reasonable adjustment was to prevent the terms of her contract from placing her at that substantial disadvantage.

96 We looked at the case of *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10/JOJ in which it was stated that if there is a real prospect of an adjustment removing a disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one; but that does not mean that anything less than a real prospect would not be sufficient to make the adjustment a reasonable one.

97 In the case of *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ. 640 CA the Court of Appeal held that the duty to comply with a reasonable adjustment requirement under section 20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.

Provision, Criterion or Practice (PCP)

98 The Claimant relied on 3 PCPs as set out in the list of issues and below. The Respondent denied that the PCPs relied on by the Claimant fit the description of PCP in the law.

99 The Respondent also disputed that the Claimant experienced substantial disadvantage by the application of these PCPs.

100 The question for us was objectively, whether the employer had complied with its obligations. It will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments. *Tarbuck v Sainsburys Supermarkets* [2006] IRLR 664.

101 The EAT in *Secretary of State for the DWP v Alam* [2010] IRLR 283 outlined the questions to be asked as follows: - (i) Did the employer know both that the employee was disabled and that his disability was likely to affect him in the manner set out in the Act. If the answer is not then, (ii) ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in the Act.

102 The Tribunal was assisted by the *Equality and Human Rights Commission Code of Practice on Employment (2011) (CoP)*. An employer must do all it can reasonably be expected to do to find out whether an employee has a disability which places him at a substantial disadvantage. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially *(CoP paragraph 5.15).* Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and

implement reasonable adjustments (*CoP paragraph 5.20*).

103 If an employer has failed to make a reasonable adjustment which could have prevented or minimized the unfavourable treatment, it will be very difficult for it to show that the treatment was objectively justified. *(CoP para 5.21).* Even where an employer has complied with a duty to make reasonable adjustments in relation to the disabled person, they may still subject a disabled person to unlawful discrimination arising from disability. This is likely to apply where, for example, the adjustment is unrelated to the particular treatment complained of *(CoP para 22).*

104 The duty to make reasonable adjustments is an objective duty which therefore does not depend on the employer's subjective decision as to whether or not it considered that it was under a duty or as to the steps that could be taken. The Code of Practice at paragraph 68 suggests the following factors may be taken into account:

(a) Whether taking any particular steps would be effective in preventing the substantial disadvantage;
(b) The practicability of the step
(c) The financial and other costs of making the adjustment and the extent of any disruption caused;
(d) The extent of the employer's financial and other resources;
(e) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
(f) The type and size of the employer

Burden of proof

105 The burden of proving a discrimination complaint rests on the employee bringing the complaint. However, it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also, because it relies on the drawing of inferences from evidence. Section 136 of the Equality Act 2010 was introduced to address that and follows on from the cases of *Igen v Wong* and other authorities dealing with shift in the burden of proof. Section 136 provides that:

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

The burden of proof provision applies to all the Claimant's complaints.

106 In the case *Laing v Manchester City Council* [2006] IRLR 748, Tribunals were cautioned against taking a mechanistic approach to the proof of discrimination in following the guidance set out above. In essence the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination. The Tribunal can consider all evidence before it in coming to the

conclusion as to whether or not a Claimant has made a prima facie case of discrimination (see also *Madarassy v Nomura International plc* [2007] IRLR 246).

107 In every case, the Tribunal has to determine why the Claimant was treated as she was. This will entail, looking at all the evidence to determine whether the inference of unconscious or conscious discrimination can be drawn. As Lord Nicholls put it in *Nagarajan "This is the crucial question"*. It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

108 Inferences can also be drawn from surrounding circumstances and background information. The Tribunal must consider the totality of the facts.

109 The Tribunal will now set out its judgment in relation to each item in the list of issues in the case. The list of issues was agreed at the start of the hearing and referred to throughout. It is also reproduced at pages 956 – 959 of the hard-copy of the hearing bundle. The paragraph titles and headings set out below follow those in the list of issues.

Applying law to facts

1. Jurisdiction – Time limits

Time points

110 The Claimant's ACAS certificate was issued on 13 December 2017. This claim was brought in the employment Tribunal on 13 of January 2018. Therefore, we judge that all of the complaints dated before 13 October 2017 are out of time. Did the Tribunal have jurisdiction to consider them?

111 Firstly, we considered whether the Claimant's allegations form part of a continuing act. We concluded that the Claimant had been managed by different managers during the time period covered by the case. It was difficult for us to tell whether the problems she complained of with IT at the end of the period (2017) under consideration were the same problems that she first raised in 2013. The issues were headlined the same as they related to the workings of the Dragon version 12 with DMACR but they related to different aspects of the software, for example, drop-down menus or phonetic alphabet were issues 2015 but not thereafter.

112 The Claimant raises historic allegations of discrimination regarding IT provided to her by the Respondent although at the time, she did not raise those issues as allegations of discrimination. She simply complained about being given equipment that did not perform well.

113 In November 2016 she was finally told that she could not have Dragon version 10 reinstalled on her machine. In May 2016 she was told that she could not have a 64-bit machine.

114 The Claimant had Ms Mehta as her manager in 2016 on her return from sick leave but someone else took over her line management at the end of the period. Ms Mehta had not managed her before 2016. The complaints of discrimination arising from disability are all dated from 2013 up to the date of the issue of the claim.

115 The one constant throughout this period is that the Claimant's complaints were of the suitability and usability of Dragon and DMACR software to her, as a disabled employee. She complained about different managers, different decisions as set out above, over the years. It was not clear to us what the specific issues were with Dragon but generally, she complained that she had difficulty using it with DMACR and Firefox.

116 Given that all her complaints were about the usability and suitability of Dragon and DMACR to her, it is our conclusion that on balance, the allegations in this case potentially form part of a continuing act and that we can consider the Claimant's allegations as part of a continuing act up to November 2017.

2. Disability Discrimination

117 The Respondent conceded that the Claimant was a disabled person for the purposes of the Equality Act 2010. We therefore did not have to make a judgment on this aspect of the case as it was already conceded.

Failure to make Reasonable Adjustments (Equality Act 2010 sections 20 and 21)

118 A PCP is a provision, criterion or practice. The Claimant relies of 3 matters that she contends were PCPs. The Respondent denied that they were PCPs.

Item 4 of the list of issues: Do they amount to PCPs?

119 The first PCP the Claimant relied on was follows:

a. *Making costly, licensing and policy decisions that have progressively made Dragon NaturallySpeaking ('Dragon') less functional. The problems have escalated and become progressively more extreme and chronic.*

Did the Respondent apply this PCP?

119.1. The Respondent provided the Claimant with Dragon version 10 and then subsequently this was upgraded to Dragon version 12. It is our judgment that Dragon creates updates to make the system work more efficiently and to increase functionality. Dragon upgrades bring more functionality and an improved work interface for the respondent's staff. It is the best in class and the Respondent ensures that everyone has the best software available in order to be able to do their work.

119.2. It is our judgment that the Dragon update to version 12 did not make it less functional as Mr Supiya stated repeatedly in the hearing. We have very little detail in the hearing as to how the Claimant says that Dragon was made less functional and we were not told exactly what the problems were. Drop down menus were mentioned as was a timeout

issue but those were resolved during the years covered by the case. It is likely that the Claimant used DMACR with Firefox, which was an incompatible operating system, for a short time before she was transformed in April 2015. In the interim, she was given workarounds to address any issues that she was having but we were not told if she used them or if they worked. Also, although she was not required to and indeed had been told not to, it would appear that she continued to use Citrix. If those were the problems she experienced, they were not due to Dragon being made less functional.

119.3. The Respondent transformed the Claimant's desktop and introduced DMACR as part of its continuous software/hardware upgrade programme. The Respondent is committed to ensuring that its technical estate remains secure and up-to-date. The move from Windows XP to Windows 7 was necessary as Microsoft would not continue to maintain it. The Respondent had no choice but to upgrade to Windows 7. There was no evidence in the hearing that there was any other option if it wanted to keep the data secure and to ensure that it could secure support. Dragon was compatible with Windows 7 and was the best in class as a voice assisted software. The Claimant did not suggest that there was a better voice assisted software that should have been used.

119.4. It is our judgment that the Respondent did not make costly licensing and policy decisions that made Dragon less functional. We do not know what that meant as we did not have any evidence on the cost of the licensing of Dragon, as opposed to any other software. We did not have evidence that could lead us to conclude that the Respondent made costly policy decisions related to Dragon. Also, there was no evidence in the hearing that could impugn the Respondent's policy decision to always provide the best and most up-to-date software to its staff.

It is therefore our judgment that this was not a PCP that the Respondent applied.

120 The second PCP the Claimant relies on is as follows:

b. Failing to acknowledge the changes the Respondent has made removing disability compliance by changing the version of Dragon from version 10 to version 1

120.1. It is our judgment that the Respondent did not remove disability compliance from Dragon. The Respondent also did not change version of Dragon from version 10 to version 12. The Respondent upgraded from version 10 to version 12 when Dragon issued an upgrade. This was in keeping with the Respondent's commitment to provide its employees the most up-to-date software available. The upgrades of software are supported by the creators and serviced. This means that the Respondent would be able to get support if there were any issues with it.

120.2. If they continued with out-of-date software, they would not be supporting their staff properly and would be potentially jeopardising data from users

as if the database crashed or otherwise had issues, they would not be able to get support in dealing with it and data could be lost. It is likely that out-of-date software would be more vulnerable to malware. The most up-to-date software is in keeping with the Respondent's commitment to provide the best equipment to its staff. In this case, that would be Dragon version 12 until updated further. Dragon is specifically provided by the Respondent to its AS users to assist them in doing their work. It is an adjustment to assist AS users rather than to hamper their performance.

120.3. It is also unclear what the Claimant meant by the *phrase 'the failure to acknowledge changes'* being a PCP. The Respondent did not change Dragon. The Respondent did not remove disability compliance from Dragon. We had no evidence of that. The Respondent was aware that the upgraded version of Dragon would be different to the version that it replaced. Whenever Dragon produced an upgrade, the Respondent provided it to its staff to enable them to work effectively and efficiently. It is also our judgment that disability compliance was not removed from Dragon. Dragon was disability compliant.

It is our judgment that the Respondent did not apply this PCP.

121 The third PCP the Claimant relies on is as follows:

c. Introducing Decision-Maker and Appeals Case Recorder (DMACR) created for the first time that outside contractor, CapGemini. The Claimant uses DMACR exclusively to perform her job. The Respondent introduced the application nationally, reporting for months that it had been fully accessibly proved and tested, when it was not.

121.1. It is our judgment that when DMACR was first created by a member of the Respondent's staff it was makeshift and although it served its purpose, once it was more widely distributed among colleagues, it became unreliable and needed to be made secure. This would have been a database containing personal information of benefit recipients and therefore would have needed to be secure.

121.2. DMACR needed to be more organised and put on a more secure footing and the Respondent needed to organise a servicing agreement for it. DMACR was created by an outside contractor. The Respondent chose to engage CapGemini to create the program based on the original design. In our judgment, upgrading DMACR was necessary and in keeping with the Respondent's policy of securing the best software available for staff which can be regulated, made secure and safe with benefits recipients' data.

121.3. It is also our judgment that the Respondent did conduct accessibility testing on DMACR once CapGemini produce their version. It was fully accessibility tested in 2013 when the Claimant started using it but there were some remedial works that needed to be done on it. By February 2014, when it was signed off by the Benefits Director, DMACR was fully accessibility compliant. By that time, all issues identified by the WCAG during the accessibility testing in September 2013 had been complied

with.

121.4. The Claimant had to use DMACR to do her job.

121.5. It is this Tribunal's judgment that although what happened is not entirely or accurately captured by 2.c of the list of issues, the Respondent introduced DMACR to the Claimant before all remedial work had been done.

It is therefore our judgment that the Respondent applied part of the third PCP as set out in item 2.c of the list of issues.

Item 5 of the list of issues asks the following: If so, do they put the Claimant at a substantial disadvantage compared to people without her disabilities? What is that disadvantage?

122 It is our judgment that only AS users were provided with Dragon software. This was an adjustment to assist them in performing their job duties.

123 There was no evidence that the issues the Claimant faced with using Dragon and DMACR were due to the same remedial issues highlighted in the WCAG accessibility testing of DMACR in September 2013.

124 It is also judgment that from our findings, it is likely that the problems the Claimant experienced was because she used Firefox as her browser with DMACR and Dragon when she should have been using Internet Explorer 6 and later, Internet Explorer 9.

125 Due to accessibility testing, Internet Explorer 9 was not released to AS users until April 2015, as part of their transformation. In the interim, the Claimant was advised to use MouseGrid and shown other workarounds, which she did not want to do use or considered to be inadequate solutions to her problems. She did not tell us that she had used the workarounds and that they failed. Janet Reeves provided the Claimant with support and with detailed workarounds that would have enabled her to successfully use Dragon with DMACR, if she had followed them.

126 From April 2015 the Claimant would have been able to use Internet Explorer 9 with DMACR and Dragon version 12. Before that, she could use IE6 or continue to use the workarounds that she had been shown, which included using MouseGrid. In the ten months between transformation in June 2014 and the Claimant being transformed in April 2015, the Claimant was given the Respondent's best solutions to enable her to use them and produce her work. The Claimant refused to follow the workarounds that she was given as she considered that they were not adequate. We did not hear evidence that she had tried them and found them to be unsuccessful.

127 The Claimant was advised to use new commands and workarounds to get around the fact of any issues with DMACR for the short period of time before she was given IE9.

128 It is our judgment that Dragon was compatible with DMACR and that there were not wholesale problems being highlighted by AS users with using the two

systems. DMACR had been fully accessibility tested and by February 2014, when it was signed off, all minor remedial work had been completed.

129 The Claimant did not tell us what the substantial disadvantage was that she suffered because she was expected to use DMACR exclusively to perform her job. She was not disciplined or performance managed because she failed to make a certain number of decisions in a day. She continues to do the same role.

130 Also, there was a long period of time when she was managed by Ms Mehta when the Claimant did not tell the Respondent that she continued to experience problems and they assumed that they had been resolved after the Respondent's visits to her desk and Ms Reeves' visit. The Respondent was not to know that she had continued to have issues with Dragon/DMACR.

131 Taking all the above into consideration, it is therefore our judgment that the Claimant did not suffer substantial disadvantage compared to people without her disabilities during the short period between her being given DMACR and IE9 being installed on her machine. It is also our judgment that she did not suffer substantial disadvantage after IE9 was installed on her machine. We did not have evidence that she suffered substantial disadvantage following the introduction of DAMCR.

Item 6 in the list of issues states as follows: Did the Respondent know, or could it reasonably be expected to know, that any PCPs it had put the clamant at that disadvantage?

132 It is our judgment that the Respondent was aware that the Claimant was having problems with her IT equipment and software. The Respondent made strenuous efforts to assist the Claimant and to solve her problems. Senior officers and contractors attended the Claimant's workstation to assist her and to solve her problems. Work arounds were suggested. The Claimant dismissed them, but we did not have evidence that they failed or that she was unable to follow them.

133 The workarounds suggested by Ms Reeves were dismissed because they were on Post-It notes, not because they failed. The Claimant failed to persuade us that she suffered disadvantage to her simply because Ms Reeves' suggested workarounds or that she had been disadvantaged because they were written on Post-It notes. Also, Ms Reeves followed up her visit with a detailed email setting out again all her suggestions for working around the issues the Claimant presented to her. Therefore, the Claimant did not just have the Post-It notes. She also had the detailed email which she could have printed off and had to hand on her desk so she could follow the suggestions stated in it.

134 Taking all those facts into consideration, it is our judgment that the Respondent's decisions to upgrade to Dragon version 12 and to give the Claimant DMACR to use before she had IE9 did not put her at a substantial disadvantage.

135 It is therefore our judgment that the duty to make reasonable adjustments did not arise.

136 Of the suggested adjustments in the list of issues we would also make the following judgments.

Item 7 of the list of issues: the Claimant lists what she considered to be reasonable adjustments to remove the substantial disadvantage that she faced. Where they reasonable adjustments?

a. Allowing the Claimant to keep using Dragon version 10

137 It is our judgment that it would not have been a reasonable adjustment to allow the Claimant to keep using Dragon version 10. This would not have worked. Dragon version 10 was not supported by its creators as they had introduced version 12.

138 The Respondent would not have been able to get support for the software package and without that support, would have been hampered in upkeeping it or troubleshooting any issues that came up. It would also not be able to secure the data in it.

b. Providing the Claimant with an alternative to Citrix

139 The Claimant did not have to and was not required to use Citrix. The issue of an alternative to Citrix is not relevant to this claim. Citrix may have been on her machine and used for authentication purposes when she turned on her machine, as it was across the Respondent's intranet but the evidence was that she was not required to use it as part of any of the applications that she used on a daily bases. Therefore, it is our judgment that the issue of an alternative to Citrix did not arise.

c. Building a bespoke computer for the Claimant with a 64-bit processor, rather than a 32-bit processor

140 It is our judgment that Dragon only worked on a 32-bit machine. Dragon was provided to disabled staff as an adjustment. As the Claimant's disabilities meant that she could not use the keyboard and mouse, Dragon was suitable for her as she could operate the systems with spoken commands. That made it particularly suitable for her.

141 Also, the Claimant had been told by a junior tech advisor that she needed a 64-bit machine. This person had not been to see the Claimant or her machine. They had assisted her with an issue over the telephone. That advice was not from an expert and not given after a full assessment of the Claimant's workstation. It therefore cannot take precedence over the expert opinion of Mr Parnell, Mr Sykes and Ms Reeves and the others who attended the claimant's workstation for live assessment meetings.

142 It is our judgment that it would not have been a reasonable adjustment for the Respondent to provide the Claimant with a 64-bit processor. It was not possible, and it is unlikely that it would have solved her issues.

d. Providing the Claimant with a job role that did not require her to use 'legacy applications' such as LMS, OPSTRAT and DMACR

143 We did not hear evidence of the Claimant's use of LMS or OPSTRAT. We did hear a lot of evidence of her use of DMACR.

144 The Respondent arranged for the Claimant to shadow the business support officer role. They arranged for the Claimant to do job shadowing and to consider other roles that she could perform. However, the Claimant did not express any interest in the role. If she had expressed an interest, it is our judgment that Ms Mehta would have ensured that she was placed in the job.

145 The Claimant was still in her post as at the date of the hearing and there had not been any disciplinary issues raised by the respondent, even after the end of the period considered in this case.

146 It is therefore our judgment that the duty to make reasonable adjustments did not arise as the Claimant did not suffer a substantial disadvantage. Also, it is our judgment that the suggested adjustments were not reasonable and/or would not have alleviated any disadvantage that the Claimant experienced.

3. Disability Arising in Consequence of Disability

Item 11 on the list of issues. The Claimant contends that she has been subjected to the following treatment, for the following reasons.

> *11(a) From 11 June to date, Ms Chana and subsequent managers required the Claimant to use Dragon v12 and onwards, which she contends was not compatible with the Respondent's software. The reasons the Claimant alleges she was subjected to that treatment was i) the inability of the Claimant to fulfil her job role as a result; and ii) performance pressure from her manager.*
>
> *Item 12 - Was the Claimant subjected to this alleged unfavourable treatment?*

147 It is not clear what is meant by this. The Respondent did not make the Claimant use Dragon v 12 because she was unable to fulfil her role or because of performance pressure from her manager.

148 It is our judgment that the Claimant was given Dragon v12 as it was the latest upgrade of the Dragon software. Dragon has been updated since. The Respondent is committed to providing its employees with the most up-to-date software available to enable its employees to do their jobs. The latest, up-to-date software ensures security of data, support for staff and efficiency. It is not in the Respondent's interests to have unproductive employees.

149 In addition, the Respondent has a number of teams and officers dedicated to supporting disabled employees to perform their jobs. The Respondent purchases software which addresses the needs of AS users so that they can also perform their jobs. The Claimant was supported to get the best use out of the software and hardware provided.

150 It is our judgment that the Claimant was given Dragon software to use. It is also our judgment that there was no evidence that the Claimant was put under performance pressure by her manager. We did not hear about performance targets from Ms Chana. That was not covered in the Claimant's evidence and the

Respondent's witnesses were not asked about it. We had no evidence that the Claimant was unable to fulfil her job role.

151 The Claimant was therefore not subjected to the alleged unfavourable treatment. Being given Dragon software was not unfavourable treatment.

> *11(b) From 21 October 2013 to date, Ms Reeves ignoring the problems the claimant was encountering with Dragon v 12 and required her to use ineffective workarounds which required the use of her keyboard and mouse. The reason that the Claimant alleged that she was subjected to this treatment was the need to use the software due to her disability.*
>
> *Item 12 – Was the Claimant subjected to this alleged unfavourable treatment?*

152 Ms Reeves did not ignore the problems that the Claimant identified with Dragon when she visited her. She took those on board and suggested workarounds that the Claimant could adopt.

153 She put those on Post-It notes for the Claimant and on the following day, she sent the Claimant a detailed email setting out exactly what she could do to address the issues that had been identified. She did not ignore the Claimant or the problems that she had flagged up. Ms Reeves' email did not list any actions that required the Claimant to use her keyboard and mouse to operate. They were all commands that were voice activated, which made sense as Dragon is a voice activated software.

154 In her further and better particulars document, the Claimant refers to the HR team, Red team and HP of refusing to acknowledge what the real issues are, not responding, directly undermining her attempts to resolve them, and carrying out character defamation stating that she is incompetent. In our judgment, the Claimant has failed to prove that the Respondent chose to undermine her and sabotage her efforts to work. The Respondent did not conspire with HP, CapGemini and Dragon to defame her character. If someone told her to turn off a fan or some other practical solution, it is unlikely that this would be defamation of character. It was in the Respondent's and its partners' interests that the Claimant became a productive member of staff. The Respondent carried out every adjustment as it was advised. The Respondent attended at the Claimant's workstation, with its partners, to try to assess the problem/s and to address them in real time. Dragon and CapGemini also conducted separate visits to the Claimant's workstation. The Respondent wanted to resolve the issues.

155 We were not told which of the workarounds were ineffective. The Claimant wanted the Respondent to allow her to return to Dragon v10. It is likely that she would not accept any other solution to the issues that she encountered with the software and so she did not give any credence or have any confidence in the workarounds that were suggested to her by Ms Reeves and others.

156 It is our judgment that she was fixed on the idea of returning to Dragon v10 and being given a 64-bit machine and she would not be swayed from those ideas, regardless of what she was told. She was provided with workarounds and she was aware of the MouseGrid but we were not sure whether she used them.

157 It is our judgment that requiring her to use workarounds until she was transformed and given IE9 was not unfavourable treatment and was not discriminatory.

> *Item 11(c) on 4 November 2017, an HR appeal officer dismissing the Claimant's appeal without proper consideration of its merits, and instead supporting previous decisions in order to protect the respondent. The reason that the Claimant stated that she was subjected to this treatment was that the grievance was about disability-related matters.*
>
> *Item 12 - Was the Claimant subjected to the alleged unfavourable treatment?*

158 The Claimant did not give evidence on the appeal in her witness statement and none of the Respondent's witnesses were asked about this. There was no reference to the appeal in the hearing or in her witness statement.

159 As far as we can tell, the grievance appeal was considered, and a decision made. The Claimant's grievance appeal failed. However, we did not have evidence that the Claimant's appeal was dismissed because of something arising from the claimant's disability.

160 It is our judgment that the Claimant's complaints fail. The Claimant had issues with using Dragon and DMACR, but it was not clear why that happened in the period covered by this claim.

161 It is our judgment that the Respondent's officers and its partners – CapGemini, HP and Dragon – took the Claimant's complaints seriously and attempted to resolve them.

162 We did not find any facts from which we could infer that the Respondent had treated the Claimant unfavourably because of her disability or because of something arising from her disability. The duty to make reasonable adjustments did not arise because the PCPs that she relies on in this case were not PCPs and/or they did not cause the Claimant substantial disadvantage.

163 It is unfortunate that the Claimant has had difficulty in operating Dragon with DMACR. However, the complaints of disability discrimination that she brought in this Tribunal are not well founded and they are hereby dismissed.

Employment Judge Jones
Dated: 7 November 2022