



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MORTON
Ms A Boyce
Mr W Dixon

BETWEEN:

Ms A K Suniar

Claimant

AND

Hounslow & Richmond Community Healthcare NHS Trust

Respondent

ON: 16 – 20 January 2023

Appearances:

For the Claimant: In person
For the Respondent: Ms T O'Halloran, Counsel

Judgment

It is the unanimous judgment of the Tribunal that the Claimant's claims of:

1. direct race discrimination under s13 Equality Act 2010, ("Equality Act");
2. discrimination arising from a disability under s15 Equality Act;
3. failure to make reasonable adjustments under ss20-21 Equality Act; and
4. victimisation under s27 Equality Act;

are not well founded and are dismissed.

Written reasons produced in response to a request from the Claimant

Introduction

1. By a claim form presented on 5 January 2021 the Claimant brought claims against the Respondent of direct race discrimination, victimisation, failure to make reasonable adjustments and discrimination arising from a disability. All of the claims were resisted by the Respondent.
2. The hearing took place in person over five days, with the last day being used by the Tribunal to reach its decision. The Tribunal gave an oral decision at the end of that day and the Claimant asked to be sent its reasons in writing.
3. The decision was reached after hearing evidence from the Claimant and from the three Respondent witnesses, Felice Fisher, Julie Hale and Susan Newman. All of the parties had produced witness statements and there was a bundle of documents consisting of 2058 pages. Any references to page numbers in these reasons is a reference to page numbers in that bundle.
4. A number of adjustments were made in consultation with the Claimant to accommodate her dyslexia. These included allowing to use software that read documents aloud to her during the hearing and to use her own copy of the bundle that she had tabulated in a particular way. The Claimant also suffers from anxiety and depression and she was given breaks at regular intervals or when she requested them. From time to time was given assistance by the Judge in formulating the questions she wished to put to the Respondent's witnesses.

The issues for the hearing

5. The issues had been agreed between the parties at a time when the Claimant had legal representation and were recorded as the agreed issues by EJ Balogun at a case management hearing on 7 February 2022. At the start of the full hearing the agreed issues were amended to reflect the fact that the Respondent had accepted that the Claimant was disabled at the relevant time and that it had had knowledge of her disabilities. The Respondent did not however concede that it knew or ought reasonably to have known that the Claimant would have been placed at a substantial disadvantage by the PCPs set out in the list of issues. The list of issues was amended accordingly and is reproduced at the end of these reasons.
6. The essence of the Claimant's disability discrimination complaint was that she had been held back in her career development by failures on the part of the Respondent to recognise that she had a disability and to make adjustments that would have helped her develop faster.
7. The Claimant primarily relied on dyslexia as a disability. However, she also alluded to anxiety and depression. In delivering its oral judgment at the end of the hearing the Tribunal did not make explicit reference to anxiety or depression, although it

had had all of the conditions relied on by the Claimant in mind when it was reaching its decision. The Claimant raised this at the end of the hearing and the Tribunal then wrote to the parties to confirm that it when it produced its written reasons it would include reference to the Claimant's mental health. The parties were asked to confirm, with reasons, whether they had any objection to this course of action. The Respondent was also asked to clarify the extent of its concession as regards the Claimant's disability. According to its written submissions, the Respondent had conceded that the Claimant was a disabled person at the relevant time by reason of dyslexia, stress and anxiety. The Respondent was asked to clarify whether it intended to extend its concession to include depression. It confirmed that it did, by email to the Tribunal, copied to the Claimant, on 3 February 2023. The Claimant did not send a response to the correspondence from the Tribunal or the Respondent and these written reasons have been produced accordingly.

Findings of fact

8. The Tribunal made the following findings of fact on the balance of probabilities on the basis of the witness evidence and documents presented to us.
9. The Claimant has been employed by the Respondent since 27 November 2017 and was still in its employment at the time of the hearing. As we learned from Ms Newman's evidence, the Trust employs junior Physiotherapists and Occupational Therapists to join a rotation, with each rotation lasting for six months. Placements are provided in teams across the Trust, enabling rotational staff to learn skills across a variety of clinical settings. The Claimant joined the Trust on 27 November 2017 as a Band 5 Rotational Occupational Therapist. The Claimant's first three rotations, lasting 16 months in total, were outside of the Trust (in WMUH and West London NHS Trust). Her first rotation at the Trust was in the in-patient unit at Teddington Memorial Hospital ("TMH"). She then rotated to the Community Recovery Service ("CRS") in September 2019.
10. The Claimant raised the fact of her dyslexia with the Respondent at the time of her recruitment in October 2017. She attended an occupational health appointment which resulted in a short report certifying her as being fit to take up the appointment. She provided the occupational health clinician with a copy of an educational psychologist's report from 2003, but not with a copy of a later, 2014 report, prepared during her time at Brunel University (page 154). An email from her future manager, Sukhinder Johal on 9 November 2017 (page 189) shows that Ms Johal thought the Claimant was fit to start work and was reassured by the report of mild dyslexia (as the occupational health clinician interpreted it – we did not see a reference to mild dyslexia in the report itself) and the Claimant's own account of her coping strategies. There were no reports, she said, of her having experienced difficulties due to dyslexia in her previous placements. There was no evidence provided to the Respondent that the Claimant was suffering from anxiety and depression at this point.
11. We did not hear evidence from Ms Johal but it was the Claimant's case that there had been no meeting between her and Ms Johal at the time and that in her view Ms Johal had not paid sufficient attention to the contents of the 2003 report. It seemed clear to us that there must have been some communication between Ms

Johal and the Claimant at the time because Ms Johal could not otherwise have known that “Miss Suniar is very transparent about her dyslexia and will inform supervisors she has VDU aids and glasses to aid her” and would not have been able to surmise that she had implemented the recommendations of the 2003 report and that these were “well embedded”.

12. We find that if Ms Johal had engaged with the detail of the 2003 report she might reasonably have been expected to conclude that the Claimant might struggle with aspects of the job that required a considerable amount of written work. This was an important point because it was the Claimant’s case that Ms Johal had not engaged with the issue properly and had she done so, she would have realised at a much earlier stage in the Claimant’s employment that she needed additional adjustments to be able to perform her role properly. However, it is also clear from the email that the Claimant had reassured Ms Johal that she had put in place various coping strategies. By this stage in her career the Claimant had amongst a number of other accomplishments completed a degree, which would indicate to anyone reading the report that she had in fact embedded her coping strategies with some success. The Claimant did not moreover disclose the 2014 report which gave a more detailed account of how she had struggled when dealing with the demands of an advanced academic course. It was the Claimant’s own view that the recommendations of that report were not relevant to her employment and that was the explanation she would later give to Ms Fisher for not having disclosed it earlier. If the Claimant herself did not see the relevance of the 2014 report at the time, we find it difficult to see how it would have been reasonable to expect a recruiting manager to deduce that further enquiries ought to be made about the kind of support the Claimant might need. Ms Johal was entitled to rely on the Claimant’s own assurances and the evidence that she had in fact been coping with the demands of her career to date. We return to that point in our conclusions. However we also note this passage from supervision notes on 3 December with Ms Fisher: “Felice asked Amar why some of these adjustments had not been considered when she first joined the trust/ started working as an OT and also why Amar didn't feel they would translate over to qualified practice. Amar explained that she had provided OH with her report when she first started, but that she also felt she had managed in other workplaces and this would be no different when working as an OT. She also felt she had fallen back into old workplace habits as she knew she had succeeded in past roles”. This passage reinforces our point – that what the Respondent knew at the point of recruitment, was limited by what the Claimant chose to tell it or herself thought was relevant.
13. The fact that the Claimant was experiencing difficulties did not really emerge until she moved to the TMH on 1 April 2019. She reported to Ms Johal and their working relationship became difficult as it became clear that the Claimant’s work was not meeting the standards set out in the applicable competency framework. Page 240 onwards shows that there was a discussion in mid-June about the need for the Claimant to meet the standards set out in the competency framework applicable to Band 5 OTs. It is clear from this correspondence that Ms Johal and Ann Murray, who had a co-ordinator role for the Band 5 OTs, met with the Claimant to discuss her performance, review it against her objectives and put in place various measures to support her. We therefore find as a fact that even though Ms Johal had not at that point made an explicit link between the Claimant’s dyslexia and her

performance, she was alive to the fact that the Claimant needed additional support and put a number of steps in place. The steps in question are set out on page 242 and included a reduction in caseload and the postponement of the discharge dates of some patients to enable the Claimant to reach the required standard in the discharge process. We find that the analysis given to the Claimant's performance against the required standards was detailed and supported by examples (page 245). There is also evidence that the Claimant was resistant to receiving feedback despite the fact that some of her decisions indicated to Ms Johal that her practices were not entirely safe (page 252). At the same time Ms Johal became aware that her management style might not be entirely effective with the Claimant and Ms Newman, who had overall responsibility and supported the team managers, became involved and suggested a revised communications style (page 253). Around the same time Ms Murray investigated whether there had been similar concerns about the Claimant's practices during her previous rotations and produced a list of challenges and strengths (pages 250-251) which indicated that the issues Ms Johal had been encountering were not entirely new.

14. On 8 July 2019 there was an objectives meeting between the Claimant, Ms Johal and Ms Murray at which there was an express reference to the Claimant's dyslexia and an acknowledgement of the fact that she might need additional time to write notes and preferred working in a quieter environment. We find that this meeting would have presented the Claimant with an opportunity to ask for further support by way of the kind of equipment and adjustments she had had at University, to help her in her role, but she did not do so.
15. On 5 August Ms Johal took the decision to further reduce the Claimant's case load as a result of concerns about risk assessment and discharge planning (page 268). It was clear that she had some concerns about the level of support that the Claimant required and the impact this was having on the other Band 5 OT in the team. She had nevertheless taken the decision not to subject the Claimant to formal monitoring of her sickness absence in order to limit the amount of stress on the Claimant. At that time the Claimant continued to have a reduced caseload that was supervised in part by Ms Johal and in part by Nicole Allsopp.
16. On 19 August there was an exchange of emails between MS Johal and Ms Newman Ms Johal described her difficulties in managing the Claimant (page 283) in the knowledge that the Claimant had raised some concerns directly with Ms Newman. Ms Newman replied suggesting that the supervision of the Claimant be undertaken by Ms Allsopp. She described the Claimant in this email as not easy to manage and expressed the view that her behaviour and clinical performance might become confused. She asked for a follow up meeting if the Claimant was not getting through her work at a better rate in a month's time. The arrangement was described at page 310 – the Claimant would be clinically supervised by Ms Allsopp with nominal line remaining with Ms Johal for the remainder of that rotation. It is noteworthy that Ms Allsopp had no caseload of her own at this juncture and devoted the entirety of her time to supporting the Claimant. The Claimant remained concerned about the way that Ms Johal had managed her however to the extent that she raised a grievance about it in November.
17. Ms Allsopp worked with the Claimant from 20 August to 30 September at which

point the Claimant rotated to CRS and began to be supervised by Ms Fisher. At a meeting with Ms Allsopp on 11 September 2019 it was noted that the Claimant had spoken with occupational health and the counselling service and had her first appointment on 12 September. The Tribunal was given little context or explanation as to why this referral was needed but we surmised that the Claimant's difficulties in her previous rotation may have contributed to a decline in her mental health. Referral to occupational health and the provision of counselling were however appropriate steps to have taken, in the absence of any evidence that anything else was needed. On 20 September Ms Allsopp also referred the Claimant to occupational health as follows: "Please can Amar be reviewed with regards to fitness to work – She is noted to have difficulty with carry over, stress, fatigue and concentration" (page 364).

18. On 27 September, just before the rotation started, the Claimant met with Ms Fisher and Ms Allsopp and it was decided that an informal capability process was needed. This was an application of the Respondent's capability policy (page 105). There were ongoing issues with communication, knowledge and terminology, use of outcome measures, case formulation, clinical reasoning and use of equipment (page 375) . The reasons for this were also discussed and the Claimant said that in addition to having had difficulties with Ms Johal the field of work was significantly different from what she had been used to previously and she was more often working without team support, out in the community. She alerted Ms Fisher to her poor mental health at the time and mentioned a bereavement. There was a discussion of expected standards followed by a discussion of reasonable adjustments that might be needed in light of the Claimant's dyslexia. It was agreed that the option of readback software would be explored and that the Claimant was to let Ms Fisher know if the environment was too noisy. Again this was an opportunity for the Claimant to say that she needed more equipment support, but she did not do so. We note that she still had a significantly reduced caseload of two patients at this point.
19. Ms Fisher spent the next few weeks supervising and observing the Claimant and concluded that there were ongoing problems with her performance. By the time of a supervision meeting on 29 October, Ms Fisher started to look in great detail at why the Claimant was continuing to struggle, given that "Amar has actively attempted to action all the feedback that has been given; she has attempted to change the way she does aspects of her assessment based on feed back in supervision, but Felice is observing that aspects of the assessment are missed and certain problems are not being assessed or picked up. Amar accepted this." Ms Fisher looked to the Claimant's previous experience for an explanation and the fact that she might not have been able in those settings to develop the broad assessment skills required in this rotation. Ms Fisher described in her evidence the crucial role of activity analysis in the work of an OT and the fact that the Claimant was still not meeting the required standard in this core skill. It was agreed that Ms Fisher would start to directly observe all assessments and give feedback during the assessment. The tone of the notes of the meeting (pages 414-417) was collaborative and supportive.
20. On 30 October at a supervision meeting the Claimant sought Ms Fisher's support to participate in a reverse mentoring programme for BAME employees (as it was

described). Ms Fisher declined to give her support on the basis that the Claimant needed to focus on building her core competencies and it would not be appropriate to commit to such an initiative at the time. Despite that the Claimant submitted an expression of interest on 3 November (page 985). In doing so she acknowledged that her supervisor had not supported the applications but that she would seek the support of Ms Newman. Ms Newman had been made aware of the request by Ms Murray and expressed her support for Ms Fisher's approach (page 983). When she became aware that the Claimant had applied nevertheless, she sought the advice of HR and then met with the Claimant to explain to her why it was important that she complied with management instructions. She issued an improvement notice under the Respondent's disciplinary process (pages 995-996). The issuing of the notice formed part of the grievance the Claimant raised in July 2011 and as a result of the grievance panel's findings was eventually removed from the Claimant's record.

21. On 6 November Ms Fisher had a further meeting with the Claimant and discussed with her the impact of her dyslexia on her performance. The Claimant disclosed at this session the extent of the adjustments she had had in place at University and gave further detail of how her dyslexia was affecting her day to day including increased fatigue and the impact on how she received information on how she organised her thoughts. Ms Fisher suggested an assessment via Access to Work and occupational health which the Claimant agreed to think about. At the next meeting on 12 November the Claimant said that she had nothing to lose by exploring her dyslexia in the context of her work and Ms Fisher reiterated that it might be having an impact on how she applied her knowledge and organised information. It would be supportive to know if further adjustments were needed. The Claimant said she was open to an OH referral and to approaching Access to Work. By this stage the Claimant's caseload was 4/5 against a normal CRS caseload of 15-30. The situation was reported to Ms Newman on 13 November (page 429) who expressed a concern that the role would be hard for the Claimant to achieve safely, even with adjustments, but that the Respondent needed to support the Claimant as much as it could. In her evidence Ms Newman did question whether she ought to have expressed that view, but she had been concerned at the time about the wide range of issues the Claimant was facing. In the Tribunal's view her frankness about this added credibility to her evidence. She went on her evidence to express in an entirely authentic way how pleased she was that the Claimant has in fact gone on to reach the required level of competence.
22. Ms Fisher fed back details of the discussion to colleagues on 12 November (page 430) and sought a meeting as the Claimant's six week period of informal monitoring was coming to an end. The upshot was that the period was extended for another 6 weeks at the next review meeting on 19 November. There was a further detailed discussion of adjustments such as provision of a room in which the Claimant could process her thoughts out loud and the provision of dictation software. The Claimant was asked to produce the 2014 assessment report (432-435).
23. The Claimant raised a grievance about Ms Johal on 26 November (page 451) by way of a detailed email to Ms Newman. Ms Johal responded in detail (page 454). The Claimant reviewed these comments and eventually on 10 February wrote to Ms Newman (page 561) confirming that she did not want to spend any more time

on the grievance and did not want a grievance meeting to take place so that she could focus on her own learning and development.

24. The Claimant continued to be equivocal about whether she needed reasonable adjustments at all (page 494) but she did make the application to Access to Work by 2 December (464 and 518). Occupational health was also contacted and produced a report endorsing the steps being taken (page 499). There was also a summary of the OH clinician's discussion with the Claimant at page 496 which recorded the Claimant's embarrassment at having to discuss her condition of dyslexia at work. There were some further discussions about the provisions of dictation software in the period running to the end of December. A meeting then took place on 30 December (page 511) at which she was told of the decision to pause the informal capability process and to suspend her participation in clinical work until Access to Work had reported.
25. We find that in the period during which the Claimant was working in CRS the Respondent supervised her closely but empathetically, worked with her to identify the support she needed to succeed in the role, implemented numerous adjustments to assist her and acted speedily, appropriately and transparently to identify the support she needed and take expert advice once it emerged that her dyslexia was likely to be having an impact on her performance. We also find that this process was led by the Respondent as a result of Ms Fisher's own observations, against a certain measure of resistance by the Claimant and unwillingness on her part to acknowledge the role that dyslexia was potentially playing in her underachievement.
26. Pending the access to work assessment the Claimant continued to be supported by the provision of additional software such as Mind View and read aloud function on Word (page 546). She was also managed by Ms Fisher in a supportive manner, with Ms Fisher going to considerable lengths to devise ways of helping the Claimant when she reported that she was finding a research task difficult (page 540) and agreeing to allow her to undertake some CPD (page 546). The Access to Work assessment was produced on 27 January 2020 (page 549). The Access to Work Grant materialised on 14 February. The Claimant continued to have regular supervision during this period and Ms Fisher devised a plan for her to return to clinical work once the Access to Work recommended kit was in place (page 621). This would include a resumption of the informal capability process whilst the Claimant worked with the benefit of the recommended adjustments. The Claimant was not happy that the process would be resumed and asserted on 3 March that she regarded herself as competent. The Tribunal did not think that that was a realistic self-assessment and could find no fault with the way that the process had been conducted or explained to her. Ms Fisher gave her details of her union representative but in her mail to Ms Newman expressed her frustration with the Claimant's approach.
27. On 27 February 2020 the Claimant made a request for a referral to the mental health team via the Access to Work adviser, stating that she was feeling stressed and anxious at work (page 606). At page 640 there was an Access to Work MHSS Support Plan following a meeting with the Claimant on 23 March. The document records the Claimant's wish that the referral to MHSS be kept confidential and not

disclosed to the Respondent. The report notes that the Claimant was being made anxious by the ongoing management of her performance, which she regarded as inappropriate. At the Claimant's own request the Respondent was unaware of this intervention by MHSS, which was supporting the Claimant with fortnightly calls.

28. The Access to Work recommendations were implemented progressively over the next few weeks. There was a delay in relation to the software order as the voice recorder had been discontinued and there was a query about the dragon software. The Claimant's union rep confirmed with her that the installation of the software could take a while (1054). It was reordered on 2 April, despatched on 16 April and installed on 22 April. The Claimant agreed to do training on 1 May and the training was completed by 15 June. The Tribunal did not consider these delays to be significant – quite the contrary. We considered it remarkable that everything was in place as quickly as it was, particularly considering the pressures placed on the NHS by the onset of the pandemic.
29. There was then a hiatus in the management of the Claimant's performance. The pandemic meant that the HR processes and individual supervision provided to her needed to be suspended and she was redeployed to a PPE role. Her time in that role did not form part of the issues before the Tribunal.
30. The Claimant raised a grievance during this period (page 764) which was initially, but unsuccessfully, dealt with by an informal resolution meeting and ultimately dealt with by Ms Hale who delivered the outcome on 18 January 2021 (1308), after this claim was submitted. The Claimant did not in fact complain to the Tribunal that any aspect of the handling of the grievance amounted to race or disability discrimination and based on the evidence we did see we found nothing to criticise in the Respondent's handling of the grievance.
31. The Claimant does however complain about the handling of her return to her role as an occupational therapist in September 2020. Specifically she complains that she was not offered a return to work assessment. We find that that was not the case. There was a return to work interview form at page 832 and a return to work plan at page 829. The plan was then revised after the intervention of the Claimants' union representative, and the period during which she was expected to demonstrate improvement was extended to six weeks from the original four weeks (page 850). Ms Newman sent a summary of the agreed revised plan on 23 September to Claire Miller and others (page 873). There would be a lead in training period during which there would be no competency assessment and the assessment would restart on 5 October for 4 weeks. By this stage all the adjustments recommended by Access to Work were in place.
32. As regards the Claimant's mental health and conditions of anxiety and depression, she sought a referral to occupational health by email to Ms Newman on 27 July 2020 (page 753) and she was signed off from work with work related stress on 25 August. It is not clear whether Ms Newman herself actioned the request for a referral, but the Claimant had referred herself to occupational health for counselling by 11 August 2020, a fact mentioned in her grievance (page 768). It was clear that she was unwell at the time and the extent to which that was the case was set out in an email to Tracy Bambgoye on 21 September (page 884) although we note that

her six week absence from work had in part resulted from a condition of RSI that developed while she was redeployed to work on PPE.

33. The informal meeting took place in relation to the grievance on 3 September, following which the Claimant wrote a summary of agreed actions to, amongst others Ms Newman. It included the following passage:

“Emotional Health & Well-being at work:

I stated feeling dissatisfied at work; feeling excluded during the pandemic, undermined, dealing with drop in self-esteem and confidence as result of indirect/direct discrimination since being removed off the clinical role and developing RSI in the PPE role. I felt not being valued and cared for in the Trust as well as expressed not feeling comfortable with working with Ann Murray and Felice Fisher as a result of decision taken and their approach not suiting my style of working. Also, additional anxiety of returning to the CRS team and questioning after this experience. You reported every employee being a value at HRCH and appreciated staff stepping up to do the PPE role during the pandemic, and I would have a tailored plan which compliments my style as an OT and feel respected so that I can be true to my identity/career change - Try to be positive. Sue, also reported that the 'Awareness Training on Neurodiversity' had helped in the teams learning and had better understanding on Neurodiverse personalities, strengths and weaknesses.

o Plan:

- Phased return to work to build myself up again back into a clinical role following knock in confidence.**
- I can report to Jackie Hunt to manage my Health & Wellbeing at work and challenges of working with FF and AM.**
- I will continue with OH counselling**
- I will be assessed by OH physiotherapist following PPE work**
- I will continue to have Mye Coaching**

I still feel anxious of returning to work and have sought support from the Engagement and Wellbeing Manager of the Trust. I have given her consent to contact HR and yourself. She is impartial to this process and any bias.”

In the Tribunal’s judgment this summary is indicative of the Claimant having been able to discuss her mental health with the Respondent in advance of her return to work as an occupational therapist, as a result of which a number of steps were put in place to support her and were sustained over a period of time.

34. We find that the adjustments set out at paragraph 33 were made in response to all of the difficulties the Claimant was experiencing at the time of her return to work. We find that her mental health was the Claimant’s dominant concern at this point in the chronology, which is unsurprising as she had been away from clinical practice for an extended period and had been redeployed as a result of the pandemic at a critical juncture in the management of her dyslexia. That would inevitably have caused her to feel anxious about returning to work, particularly as the capability process was still in place at that time and she would therefore be resuming a process that had been the source of distress and anxiety to her for the previous 12 months.
35. It was clear to the Tribunal that the Respondent accepted that its initial proposal for the Claimant’s return to clinical practice was not appropriate. Following the intervention of the Claimant’s union representative (page 858) it accepted that the original plan should be adjusted and extended to take account of what the Claimant

could realistically be expected to achieve in the first few weeks after her return and the impact that her return, and the way it was managed, was likely to have on the Claimant's mental health (pages 882-884).

Submissions

36. Ms O'Halloran produced helpful written submissions on the law and evidence which were sent to the Claimant in advance so that the Claimant had time to read and reflect on them before making her own submissions. She was given some preparation time to enable to do this and she provided the Tribunal with a clear summing up of her case at the end of the hearing.

The legal framework

37. The relevant provisions of the Equality Act provide as follows:

38. **Direct discrimination:** Section 13 Equality Act prohibits direct discrimination. Under s 13(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The circumstances of the claimant and the chosen comparator must be the same or not materially different. S 4 Equality Act sets out the protected characteristics. These include disability and race.

39. **Discrimination arising from disability:** Section 15 Equality Act provides as follows:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

40. **Duty to make reasonable adjustments:** The duty to make reasonable adjustments arises under section 20 and Schedule 8 Equality Act. Section 20, subsections (3) to (5) imposes on the Respondent a duty with three possible requirements:

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled,

to take such steps as it is reasonable to have to take to provide the auxiliary aid.

41. **Victimisation:** Section 27 Equality Act provides:
- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
 - (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
42. It is also relevant to consider the law on the burden of proof which is set out in section 136 of the Equality Act. In summary, if there are facts from which the tribunal could decide in the absence of any other explanation that the Claimant has been discriminated against, then the tribunal must find that discrimination has occurred unless the Respondent shows the contrary. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in *Igen v Wong and others* [2005] IRLR 258 confirmed by the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246. In the latter case it was also confirmed, albeit applying the pre-Equality Act wording, that a simple difference in status (related to a protected characteristic) and a difference in treatment is not enough in itself to shift the burden of proof to the Respondent; something more is needed.
43. There is also extensive case law relevant to the issues in the case. The principles were summarised in Ms Halloran's submissions, which included reference to a large number of cases. The Tribunal took into account all of the relevant authorities including, in relation to reasonable adjustments, *Environment Agency v Rowan* [2008] ICR 218, *Project Management Institute v Latif* [2007] IRLR 579, in relation to the reason for treatment alleged to be discriminatory *Nagarajan v London Regional Transport* [1999] IRLR 572, in relation to discrimination arising from disability under s15 Equality Act *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090, *O'Brien v Bolton's St Catherine's Academy* [2017] ICR 737 and *City of York Council v Grosset* [2018] IRLR 746. We refer to some other authorities specifically in these reasons.

Issues in the case

44. Failure to make reasonable adjustments [section 20 and 21 EqA 2010]
- a. It was conceded by the Respondent that the Claimant was a disabled person by reason of dyslexia, anxiety and depression and that the

Respondent had knowledge of disability at the relevant time.

- b. It was accepted that the Respondent had a provision, criterion or practice of requiring staff to score 4 or below in all six domains of its competency framework (“the First PCP”).
- c. Did the First PCP put the Claimant to a substantial disadvantage compared to non-disabled employees, in that she was subjected to the capability process because of her performance?
- d. Did R know or could it reasonably have been expected to know that the PCP placed C at a substantial disadvantage?
- e. If so, did the Respondent fail to make reasonable adjustments in respect of the following:
 - i. Failing to make reasonable adjustments prior to placing the Claimant on an informal capability process – paragraph 1 of Grounds of Claim under “The Claims” heading. The Claimant was informed that she was to be placed on an informal capability process on 27 September 2019. This was an on-going failure until software equipment was installed on 22 April 2020 and training was completed on 15 June 2020.
 - ii. Failing to provide software in a timely manner– paragraphs 2 and 3 Grounds of Claim under “The Claims” heading. The equipment was not installed until 22 April 2020 and training took until 15 June 2020 to be completed.
 - iii. No consideration to other reasonable adjustments such as increased supervision and/or extra time for paper consolidation which was protracted and on-going paragraph 4 of Grounds of Claim under “The Claims” heading. These matters were not considered on 11 July 2019 when issues were first raised or at the meeting on 27 September 2019 when the informal capability process commenced nor were they considered during the period from 30 December 2019 to 7 September 2020 which was the period of time that clinical duties were not carried out by the Claimant.
- f. Did the restarting of the paused capability process amount to a continuation of the (above) PCP commenced in September 2019 (“the Second PCP”)?
- g. Did the Second PCP put the Claimant to a substantial disadvantage compared to non-disabled employees? – para 5 of the Grounds of Claim under “The Claims” heading.
- h. Did R know or could it reasonably have been expected to know that the PCP placed C at a substantial disadvantage.
- i. If so, did the Respondent fail to make reasonable adjustments in respect of

the following:

- i. Failure to conduct a return to work assessment on 8 September 2020 – paragraph 4 of Grounds of Claim under “The Claims” heading
 - ii. b. Failure to adjust the timeframe set for the capability process having regard to the length of time it had been ongoing and paused on 30 December 2019 and when it was adjusted, the time frame still being insufficient – paragraph 5 of Grounds of Claim under “The Claims” heading
 - iii. Failure to make adjustments regarding return to work on 8 September 2020 – paragraph 5 of Grounds of Claim under “The Claims” heading.
- j. Did the Respondent have a provision, criterion or practice of not allowing applications of staff to the BAME reverse mentoring programme in the event of a candidate being subject to ongoing informal capability (“the Third PCP”)?
- k. If so, did the Third PCP put the Claimant at a substantial disadvantage compared to non-disabled employees?
- l. Did R know or could it reasonably have been expected to know that the PCP placed C at a substantial disadvantage.
- m. If so, did the Respondent fail to make reasonable adjustments in respect of the refusal to allow the Claimant to enter into the BAME reverse mentoring programme on 30 October 2020? – paragraph 6 of the Grounds of Claim under “The Claims” heading.

45. Discrimination Arising From Disability [section 15(1) EqA 2010]

- a. Did the Respondent treat the Claimant unfavourably in respect of the following:
- i. Decision to place her on an informal capability process on 27 September 2019 before making reasonable adjustments – para 7 of the Grounds of Claim under “The Claims” heading.
 - ii. Removal of the Claimant from her clinical duties on 31 December 2019 which was on-going up to her return to her clinical duties on 7 September 2020 – para 7 of the Grounds of Claim under “The Claims” heading.
 - iii. Refusal to allow the Claimant to enter into the BAME reverse mentoring programme on 4 November 2020 by Sue Newman of the Respondent – para 9 of the Grounds of Claim under “The Claims” heading.
- b. If so, was the reason for the said unfavourable treatment because of something arising in consequence of disability? The “something arising” is the failure to perform in her role.

- c. If so, can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim (as set out at para 35 of the Grounds of Response)?
46. Direct race discrimination [section 13 EqA 2010]
- a. Was the Claimant treated less favourably in respect of the Respondent's decision to discipline her on 5 November 2020 regarding her application for the BAME reverse mentoring programme?
 - b. If so, was this treatment because of the Claimant's race?
 - c. The Claimant relies on a hypothetical comparator.
47. Victimisation [section 27 EqA 2010]
- a. Was the Claimant subjected to unfavourable treatment than others in respect of the Respondent's decision to discipline her regarding her application for the BAME reverse mentoring programme on 5 November 2020?
 - b. Was the said treatment because the Claimant made a protected act in the form of her grievance dated 11 August 2020?
48. Time Limits [section 123 EqA 2010]
- a. Has the Claimant presented her claims to the Tribunal within three months of the acts of discrimination complained of? [section 123(1)(a) EqA 2010]
 - b. If not, should the acts complained of be treated as part of discriminatory conduct? [section 123(3)(a) EqA 2010]
 - c. If not, is it just and equitable in all the circumstances for the Tribunal to extend time for submission of the Claimant's claim(s)? [section 123(1)(b)]
49. Remedy
- a. Is the Claimant entitled to a declaration or declarations?
 - b. Is the Claimant entitled to compensation for financial losses and injury to feelings arising from unlawful discrimination?

Conclusions on the issues

50. We acknowledge that the hearing was a difficult experience for everyone involved and that it takes courage for an individual claimant to go through a hearing of this kind without support. It was clearly upsetting for the Claimant at times and the Tribunal acknowledged that it would be further upsetting for the Claimant that it had not been able to uphold any of her complaints. The Tribunal was persuaded by the Respondent's case, the documentary evidence and by the Respondent's

witnesses who were empathetic, well prepared, and credible, including by their willingness at times to question their own past decisions, which is uncommon in tribunal proceedings.

51. Turning to the list of issues, we reached the following conclusions, although have in places departed from the order in the list. It is clear that the Respondent applied the first PCP to the Claimant and that the Claimant was at a substantial disadvantage in meeting the performance criteria because of her disability of dyslexia. However for the reasons set out at paragraphs 10 and 11 of these reasons in our judgment the Respondent did not know and could not reasonably have been expected to know at the time that it commenced performance management of the Claimant in September 2019, that her dyslexia was playing a role in her underperformance. It is notable that even in December 2019 the Claimant was seeking to downplay the role of dyslexia on her performance. As the Respondent submitted, it was not reasonable for the Respondent to know what the Claimant did not know or was not willing to acknowledge.
52. As regards the Claimant's mental health, the Claimant did raise this with Ms Allsopp and Ms Fisher in September 2019 and it was recorded that she was receiving counselling at the time. There was however no formal diagnosis of anxiety or depression at any stage of the period to which the Claimant's claims relate. In particular we found that there was nothing to alert the Respondent to the possibility that more formal support or measures in addition to counselling might be needed in respect of the Claimant's mental health in September 2019 or that anxiety and depression might be contributing to her underperformance. In the Tribunal's judgement, the Claimant's mental health was inextricably bound up with her struggles to meet the Respondent's required standards of skill and competence and that being subjected to relatively high levels of management supervision and a formal capability process is likely to provoke anxiety, as it appears to have done in this case. The issues that the Claimant was dealing with were therefore interdependent and the anxiety and depression were in our judgement primarily a by-product of the measures that the Respondent was taking to manage the Claimant's performance.
53. To the extent that the duty to make reasonable adjustments did arise in relation to the Claimant's dyslexia and mental health conditions, in our judgment the Respondent clearly discharged that duty at all stages of the Claimant's employment. We have recorded a series of supportive measures put in place by Ms Johal including reducing the Claimant's workload significantly, postponing discharge dates for patients, and deciding not to start a sickness absence management process in order to avoid placing further stress on her. Ms Allsopp put aside the entirety of her own caseload whilst she was supervising the Claimant, a measure described by Ms Newman as very unusual and which would have had a knock-on effect on the Claimant's senior colleagues. Thus, if the duty had arisen prior to the Claimant being placed on informal capability process - which the Respondent disputed, we find that the Respondent did what was reasonable in the circumstances to obviate the disadvantage of which it was aware.
54. As regards the suggestion that there was an ongoing failure (paragraphs (a) and (c) of the list of issues) we also reject that contention. Ms Fisher, supported by Mrs

Newman, made strenuous efforts to support the Claimant and was quickly alert to the possibility that after several months in the role with no improvement, some explanation was called for and the Claimant's dyslexia may be playing a part. We do not think that it was reasonable to expect the Respondent to have deduced that sooner, given the facts set out above. From that point in time she took all reasonable steps to ascertain the nature of the disability and to seek appropriate support and expert advice from Access to Work to enable reasonable adjustments to be put in place. She did so despite the fact that the Claimant continued to be reluctant to accept that her dyslexia was affecting her ability to meet competency standards and indeed in March 2020 sought to argue that she was now competent, with no grounds for that suggestion. As regards anxiety and depression, we have noted that the Claimant's poor mental health in the period prior to the pandemic was bound up with the fact that her dyslexia was necessitating performance management. It did not therefore operate as a separate and distinguishable cause of the treatment that the Claimant was complaining about. The Claimant did not moreover always make it clear to the Respondent that she was seeking support for her mental health – in February 2020 she did not want the Respondent to know that she had sought a referral to mental health services via Access to Work. To the extent that there was at that time a duty to make adjustments in relation to depression and anxiety however, we find that this was discharged by the Respondent by means of the measures put in place to support the Claimant in relation to her dyslexia – once that condition was addressed it was likely that an improvement in the Claimant's mental health would follow. There was no evidence that the Respondent knew, or ought to have known at this time that the Claimant's mental health was putting her at a particular disadvantage compared to non-disabled colleagues or that there were any further specific measures concerning her mental health could have been put in place to alleviate any such disadvantage.

55. Ultimately however the effectiveness of the measures has been demonstrated by the fact that the Claimant did eventually reach the required competency standards of her role and remains employed the Respondent as an occupational therapist.
56. As regards the complaint that the delay in implementing the Access to Work recommendations amounted to a failure to make reasonable adjustments, we reject that contention on the facts. We did not consider that there was any unreasonable delay looking at the circumstances in the round and as noted, considered that the speed with which the recommendations were ordered and implemented was remarkable in the circumstances prevailing at the time.
57. As regards the resumption of the informal capability process in September 2020 we did not consider that that PCP placed the Claimant at a substantial disadvantage compared to non-disabled employees as we consider any non-disabled employee who was on a capability process that had had to be interrupted for valid management and organisational reasons such as those that pertained in this case, would have been treated in exactly the same way (paragraph 7 list of issues). That is the case irrespective of whether the Claimant says it was dyslexia or anxiety and/or depression that was placing her at a disadvantage at that time.
58. As regards paragraph 8 of the list of issues, even if the duty to make reasonable adjustments was in place at that point, the complaints set out are not made out on

the facts. There was a return to work assessment and a return to work plan, the timeframe for them was adjusted as requested by the Claimant under advice from her union representative and various other measures were put in place including counselling via occupational health, Mye Coaching and physiotherapy. In our view that timeframe was not insufficient as the Claimant suggested and it is not clear how it would have been reasonable to extend it further. Again there is a long list of adjustments that were made on the Claimant's return to work including a permanent end target of an 80% patient case load, health and wellbeing reviews and the provision of a quiet room – that of a senior manager, Jill McCartney. These measures supplemented all the Access to Work recommendations that were in place by then and were measures that addressed both the Claimant's dyslexia and her mental health conditions, which, as we have already observed, were bound up together.

59. The Respondent set out in its submissions a list of eighteen adjustments put in place by a succession of managers of the Claimant. To the extent that we have not expressly referred to them we find on the evidence that all of these measures were attempted, some proving more effective than others. The following are set out by way of example:

- a. Provision of test patients to practise using new software so as to build confidence and then start increasing the numbers of patients (page 609);
- b. Provision of clinical skills training sessions and time to embed new equipment / software and training into clinical practice (pages 712, 725) once a week;
- c. Decision to manage the Claimant's sickness absence informally to minimise stress and anxiety (page 585);
- d. Ms Fisher and Ms Newman attended Genius Within Training with the Claimant to improve their understanding of dyslexia to support her (page 691).
- e. Very high levels of supervision from Nicole Allsopp, Ms Fisher and others, significantly above an ordinary Band 5 OT. Ms Fisher often worked outside of her working hours to accommodate the level of support required to adequately supervise the Claimant, at times working until midnight (page 1061 and Ms Fisher's unchallenged evidence).

60. Turning to the refusal to permit the Claimant to participate in the reverse mentoring programme, we find that this did not place the Claimant at a disadvantage compared to a non-disabled employee who was being subjected to performance monitoring and needed to meet core competencies. The duty to make reasonable adjustments did not therefore arise. It did however represent unfavourable treatment for a reason rising from her dyslexia, which was the cause of her underperformance and s15 Equality Act was therefore engaged. However, the measure was objectively justified as it fulfilled the legitimate aim of supporting the Claimant to arrive at the necessary standards to enable her to perform her core function as an occupational therapist and thus for the Trust to deliver the safe

standard of patient care that was its core objective.

61. We find that there was no evidence whatsoever that the Claimant's race played any part in this decision. Nor did it play any part in Ms Newman's decision to issue the Claimant with an improvement notice in relation to what the Respondent regarded as a failure on her part to comply with the instruction of her manager, Ms Fisher, that it was not the right time for her to participate in the programme. The reason why the improvement notice was issued was that the Claimant had disobeyed a management instruction. The suggestion that the Claimant's race played a part in the Respondent's handling of this issue was fanciful. The burden of proof did not shift to the Respondent and the claim of direct race discrimination fails on the facts.
62. Nor was there a shred of evidence that the decision not to allow the Claimant to participate on the mentoring scheme had anything to do with the Claimant having raised a grievance on 12 August 2020, which the Claimant relies on as a protected act. That too was a fanciful suggestion. The claim of victimisation therefore fails on the facts.
63. This leaves two allegations from the list of issues. The first is that placing the claimant on an informal capability process amounted to discrimination arising from a disability. We consider that it is debatable that the process, which was aimed at supporting the Claimant to improve was in fact unfavourable to her, but applying the test in *Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065, HL and *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337, HL (albeit that these cases are authorities on the meaning of 'detriment' rather than 'unfavourable treatment') and the EHRC Employment Code's guidance as to the relatively low threshold of disadvantage required to engage S.15, we can see that from the Claimant's perspective this would have felt like unfavourable treatment. We considered that that was a reasonable perception, particularly as performance management may have a tendency to provoke or intensify anxiety. However, the measure was clearly justified as a proportionate means of achieving a standard of safe clinical practice amongst the Respondent's occupational therapists, a matter on which the Respondent must be allowed a large measure of discretion.
64. As regards the allegation that declining the Claimant's request to participate in the reverse mentoring programme amounted to discrimination arising from disability, Mrs Newman was clear in her evidence that the Claimant would have been able to apply to participate at a later date, so that the decision was proportionate on that basis, but that she really need to be able to focus on becoming a safe and competent occupational therapist. She gave credible evidence that she honestly felt that the Respondent wanted to support the Claimant to get off the capability procedure, which it had been doing over a period of time so that she could become an autonomous practitioner. There was no other way of achieving that - she could not do it "partially" as Mrs Newman put it. The measure was therefore objectively justified and the claim does not succeed.
65. Given that none of the Claimant's complaints have succeeded it is not necessary for us to consider whether she brought her complaints within the statutory time limit or whether, if she did not, it would be just and equitable to extend time.

Employment Judge Morton
Date: 23 February 2023