EMPLOYMENT TRIBUNALS

Claimant: **Miss E Goodhead**

Respondent: **JC Bamford Excavators Limited**

Heard at: **Birmingham (by CVP)** **On:** **3, 4, 5, and 6 October 2023**
Panel deliberations:
3 November 2023

Before: Employment Judge Edmonds
Mrs J Malatesta
Mr E Stanley

Representation
Claimant: Mr L Bronze, counsel
Respondent: Miss W Miller, counsel

RESERVED JUDGMENT

1. The complaint of direct disability discrimination is not well-founded and is dismissed.

2. The complaint of indirect disability discrimination is not well-founded and is dismissed.

3. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

4. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

5. The complaint of disability related harassment is not well-founded and is dismissed.

6. The complaint of unfair (constructive) dismissal is not well-founded. The claimant was not unfairly dismissed.

7. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was a Programme Manager employed by the respondent from 3 June 2019 until 21 July 2022, when her employment ended due to her resignation with immediate effect. ACAS early conciliation commenced on 8 June 2022 and ended up 21 June 2022, with the claimant's claim form being submitted on 21 July 2022.

2. This case is essentially about whether the claimant's manager, Miss Laura Atkins, discriminated against the claimant in relation to her dyslexia in various ways and/or otherwise breached the implied term of trust and confidence in her general management of her and/or in imposing an informal performance improvement plan. The case is also about whether the way in which the claimant's later grievance was dealt with amounted to a breach of the implied term of trust and confidence and/or the last straw so as to entitle the claimant to resign in circumstances constituting constructive dismissal.

Claims and Issues

3. The claimant has brought claims for constructive dismissal, wrongful dismissal, direct disability discrimination, indirect disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and disability related harassment.

4. The factual and legal issues are lengthy and therefore, rather than repeat them here, they are set out at pages 57 to 75 of the Tribunal file used at the hearing (pages 69 to 87 electronically), and they are repeated in italics in so far as relevant in our Conclusions section below.

Procedure, documents and evidence heard

5. This hearing was scheduled to last for four days. Given the volume of issues to consider, it was agreed at the outset of the hearing that we would consider liability alone, with a separate remedy hearing being listed if the claimant was successful in any of her claims. We did however indicate that we would make findings as to whether there was a failure to follow the ACAS Code by either party in the event that the claimant was successful.

6. Again because insufficient time was available at the hearing itself, we agreed to reserve our Judgment and to provide written reasons to the parties. The Tribunal panel therefore met separately, on 3 November 2023, to reach its decision, and that decision has now been set out in these Reasons.

7. We heard evidence from the claimant on her own behalf, and from Miss Laura Atkins and Mr Matthew Niven on behalf of the respondent. All three witnesses

gave straightforward and candid evidence, and were prepared to make concessions when they felt it appropriate.

8. The hearing took place via the Tribunal's CVP video platform and we ascertained at the start of the hearing that the claimant would require additional breaks and time to be provided for her to process information. We also agreed that the claimant would not be required to read things out in public and that when taken to a text it would be read to her. It should be noted however that at one stage during the course of the hearing the claimant indicated that in fact she did find it difficult to have things read out to her and preferred to read things herself. We therefore accommodated the claimant's wishes at any given time as to how information was presented to her.

9. There was a Tribunal file of 544 pages. Unfortunately the paginated numbers on the documents did not match the electronic PDF numbering, and therefore where page numbers are quoted throughout these Reasons, we quote both the paginated number and the electronic number, in that order.

10. During the course of the hearing, the claimant withdrew certain of her allegations. This followed some cross-examination of the claimant where the claimant had quite properly accepted that certain of her allegations were not related to her disability. These withdrawn allegations are therefore not set out in our conclusions, however we note them by stating "withdrawn" so that the numbering in our conclusions continues to match the numbering in the List of Issues which was in the Tribunal's file.

11. We were provided with written submissions from both representatives, which have been very helpful to us in reaching our decision. Mr Bronze supplemented his written submissions with brief oral ones on behalf of the claimant, however Miss Miller relied upon her written submissions in full.

12. At the end of the hearing, Mr Bronze on behalf of the claimant suggested that the claimant would prefer the Reasons to be presented orally rather than in writing. However, having considered the representations of both parties, and given that there was insufficient time within the allocated window for hearing in any case, the Tribunal decided that it would provide written reasons as the Tribunal felt that it would be important for the claimant to have a written outcome so that she could digest it fully in her own time, given her disability and her stated difficulty in processing information quickly.

Facts

Background

13. The claimant was employed by the respondent, initially as a Project Manager and latterly as a Programme Manager, between 3 June 2019 until her resignation with immediate effect on 21 July 2022. At the time of her resignation her contractual notice period was three months on either side (page 150/162).

14. The claimant is dyslexic, and the respondent accepts that this amounts to a disability for the purposes of the Equality Act 2010 ("the EA 2010"). The claimant

sometimes refers to herself more generally as neurodivergent although this does not form part of her pleaded claim other than in relation to dyslexia. The claimant also suffers from migraines and we accept her evidence that these are at least in part caused by her having to have increased concentration when reading text due to her dyslexia, and/or exacerbated by stress in the workplace.

15. In August 2021 the claimant was promoted to the position of Programme Manager. During her interview for that role, at which Miss Laura Atkins (who was to become her line manager) was present, the claimant referred to her dyslexia but commented that one of her greatest achievements was overcoming it. We find that, generally speaking, although the claimant was open with the respondent that she had dyslexia, the impression she sought to give the respondent was that it did not impact her work and that no adjustments were required for her. Miss Atkins did offer to proof read documents if required however the claimant did not take Miss Atkins up on that offer save for on one occasion where she did request that Miss Atkins proof read her work.

16. No other potential adjustments were highlighted by either the claimant or respondent as neither party understood that any other adjustments were required. We say neither because, at that time, the claimant herself did not have a full understanding of the impact of her condition on her other than in relation to spelling. We accept that, with the benefit of hindsight, the claimant also takes additional time to process information and that her dyslexia impacts her in wider ways than simply with her spelling, however we find that the claimant only realised the full extent of her condition following a dyslexia assessment which took place in October 2022, after she left the respondent's employment (page 99/111). The claimant commented in evidence that since she had an independent assessment, she now had a better understanding of her disability, how an employer can support her and what reasonable adjustments she could request.

17. One comment which the claimant referred to on several occasions during her evidence is that her dyslexia is part of her personality, and therefore that if someone did not like her as a person, they must also therefore dislike her disability. Whilst we understand the point that the claimant was making, for the purposes of this claim we find that the claimant's disability was separate to her personality in the wider sense. It goes too far to say that if someone is disliked it automatically follows that it is related to the disability: the precise circumstances must be taken into account.

18. Programme Managers within the respondent generally manage two to three Project Managers (or, sometimes, apprentices and/or graduates). They would oversee around eight to ten projects at any one time. The other Programme Managers in the claimant's team were Rav Williams, James Price and Amy Greenwood. Amy Greenwood is also dyslexic and Miss Atkins will sometimes assist Ms Greenwood with proof reading documents as a result. When working on projects, each project will have "gates" which involve ensuring that certain tasks are completed by the date of the "gate", in order for the project to be moved forward to the next stage and/or completed.

19. From September 2021 the claimant reported to Miss Atkins, although they were not based at the same place of work. Miss Atkins had been on the interview panel that promoted her. Then, from around January 2022, there was a re-organisation within the department and the claimant's role was expanded (albeit still a Programme Manager role). She took on three factories under her new remit, and although we accept the respondent's position that this made sense given the nature of the projects that the claimant was handling, and that the number of factories is not necessarily indicative of the volume of workload, we also accept that the claimant's workload increased as a result of that re-organisation. She was also moved at the same time to Miss Atkin's place of work, and their desks were in close proximity to each other. Therefore, from January 2022 onwards she had far greater interaction with Miss Atkins and Miss Atkins supervised the claimant more closely.

20. In relation to their management styles, despite the fact that Miss Atkins and the claimant clearly did not approve of each other's approach (as we explain later in these findings), we find that there were in fact similarities between their styles of management. Specifically, they are both rather blunt and forthright in the way they communicate and expect their team to be able to deal with this: there is no "sugar-coating" in their communication style. Miss Atkins also had an expectation that her team would be quite self-sufficient: given that her team were well qualified engineering professionals, this would be a reasonable expectation to have, although in relation to the claimant specifically we note that she was relatively new to the Programme Manager level of seniority and appeared to have little experience of managerial roles and therefore we find that some allowances should have been made for that.

January 2022 onwards

21. It appears to the Tribunal that from January 2022, when the claimant's role expanded and she moved to Miss Atkins' place of work, the relationship between Miss Atkins and the claimant started to break down. Prior to 2022 we find that their relationship had been perfectly amicable. From January 2022 when the claimant's workload increased, we find that the claimant struggled with this and it affected her performance.

22. Within Miss Atkins' team, there were normal working hours of 8.30am to 5pm, however employees had the flexibility to start earlier and finish earlier, or start later and finish later if they so wished. Therefore, if the claimant started at 7am, she would be able to finish work at 3.30pm in theory. That said, we find that the role was generally high pressured and therefore that the claimant would work additional hours outside of her core working hours in order to complete the tasks assigned to her. We find that this was not because the claimant was dyslexic, but rather because of the general pressure both within the team and which the claimant placed upon herself, and the nature of both the industry sector and the role in question. We find that, as the claimant's workload got bigger, she started to struggle more and her dyslexia did potentially impact on her performance, however she did not advise the respondent that her dyslexia might be behind the issues she was facing. We find that Miss Atkins did not appreciate that the claimant's dyslexia was having any impact on the claimant, both because the claimant did not make her aware of her specific difficulties and also because the

claimant had not at any time made the respondent aware that she might have difficulties with anything other than proof reading. Miss Atkins would not have appreciated that the claimant being under time pressure could impact upon her dyslexia.

Matthew Wood

23. One of the Project Managers in the claimant's team was Matthew Wood, a senior project manager who was still in his probationary period. In late 2021 and early 2022, Mr Wood was underperforming in his role. We find that this created additional pressure for the claimant, who not only had to manage his underperformance but also seek to ensure that the projects he was working on did not suffer due to this.

24. On 24 January 2022 the claimant and Miss Atkins had an email exchange discussing Mr Wood's performance (pages 192/204). In this email, as well as making suggestions about how to create a development plan, Miss Atkins said "We need to show that he's been trained and now isn't competent". We find that this shows that Miss Atkins understands the types of matters to be included in a performance plan, and was providing help and support to the claimant to manage the situation and to assess whether or not Mr Wood had the capability to continue in his role. She is making clear what the claimant would need to show if she did wish to fail his probationary period (rather than instructing the claimant to fail that probationary period).

25. On either 28 January 2022 or 3 February 2022 Miss Atkins made the claimant aware that a complaint had been received from Matthew Wood about the claimant. The date of this meeting is unclear – the claimant recalls it as having been on 28 January 2022, however we were also taken to some handwritten notes (page 503/523) which suggest a meeting with Mr Wood took place on 3 February 2022. We cannot say for certain whether the claimant got the date wrong, or whether two separate conversations took place with Mr Wood on both dates (it is clear that some kind of meeting did take place on 3 February 2022), however we do not see it as relevant to the issues in the case. What is also clear is that Mr Wood made an allegation that the claimant had made inappropriate comments to him. Although Miss Atkins would have known that Mr Wood was not performing to the required standard at that point, and that this was being addressed with him (meaning that he might himself have felt ill will towards the claimant), the allegations were of a serious nature and therefore this would have been a valid cause for concern for Miss Atkins.

26. The claimant says that she was initially told by Miss Akins that the matter was to be taken forward formally the following week. The claimant says that this caused her distress over the weekend whilst worrying about what would happen next. Even if this was the case, we see no reason to criticise Miss Atkins for this: an allegation had been made and there was at least the possibility of it being dealt with formally. Miss Atkins acted correctly in raising it with the claimant: it would have been worse for her not to have said anything. We accept that this would have been unsettling for the claimant, however this is natural when issues such as this arise. Having the weekend to think things over would also have given the

claimant time to reflect, rather than springing what could have been a formal investigation on her the following week.

27. One of the complaints made about the claimant was that she had said "I don't give a fuck about relationships" to Mr Wood during one of their discussions. The claimant accepts that she said words to that effect: we find that this is not an acceptable way to speak to a direct report, particularly one who is struggling. We also understand that this comment was made in the canteen (page 503/523) which is even more inappropriate: in fact it is a common theme in this case that sensitive comments and/or conversations appear to have been made in public places. Another allegation made was that the claimant said that she "didn't choose you, just have to deal with you" to Mr Wood, however the claimant denies this. We find that this kind of comment appears to be consistent with her communication style with the team (later in these findings we refer to other comments made by the claimant), and that it seems to be linked to the comment which she does accept having made. Therefore on balance we find that it was said and that the impact of this would have been to give the impression to Mr Wood that she did not like him.

28. The claimant attended an informal meeting to discuss the allegations made by Mr Wood – she says that it was on 31 January 2022 however we are unable to say if this is correct or not given the discrepancy in the dates put forward for Mr Wood's complaint. Miss Atkins has no notes from this meeting (which supports its informal status). The meeting did however take place in a meeting room rather than in a public place which may have given the air of formality, particularly given that other conversations tended to happen in public as mentioned above. We again find nothing inappropriate in the way that Miss Atkins handled this discussion.

29. A few days later the claimant was informed that the matter was not being taken any further, because Mr Wood had chosen not to raise a formal complaint. From that point onwards, it appears that Miss Atkins became more involved in the management of Mr Wood, including sitting in on his performance meetings. Whilst the claimant is upset by this and saw it as Miss Atkins taking over, given the circumstances we find that this was a reasonable course of action for Miss Atkins to take in order to protect both Mr Wood and the claimant. For example, it was the claimant's case that Mr Wood's allegations were defensive because he knew that his own performance was not satisfactory and was worried he was failing his own probationary period. If that were true, then having Miss Atkins there to witness the meetings herself would protect the claimant in that Mr Wood would not be able to make false allegations and Miss Atkins could ensure that Mr Wood's performance was being addressed properly. This is particularly the case given that the claimant was still relatively new to role. The claimant says that Miss Atkins also sat in on other performance meetings with other members of the claimant's team: we feel unable to say whether or not this was the case based on the evidence before us however even if she did we find that she was entitled to do so and that it would have been motivated by making sure that the claimant's interactions were appropriate and offering support to her as needed.

30. At the time, the claimant did not make any allegation that the treatment she received in relation to Mr Wood was linked to her dyslexia, and in fact initially at

the Tribunal hearing she said that it was not (but that it was more generally linked to a hostile work environment). However she then clarified that she felt it was linked to her dyslexia and the way in which she processes information. We find that the claimant raised no concerns at the time and there was no information available to Miss Atkins to suggest that the claimant would have any difficulties in receiving information about Mr Wood's complaint in the way that it was presented to her.

January to February 2022

31. In late January / early February the claimant had a medical appointment and the claimant says that she was not permitted flexibility to attend the appointment. Although it was thought at one stage that the claimant was saying that she was not permitted time off work, during the hearing it was confirmed that the claimant's concern was that she was not permitted to work from home on the day of the appointment (the appointment being closer to home than to the workplace). Miss Atkins' evidence, which we accept, is that through the use of flexible working hours (with start and finish times being flexible provided that core hours are worked), this should enable employees to attend medical appointments at the start or end of the day without needing to work from home. At this stage, given the issues raised about the claimant, we can understand why Miss Atkins felt that it would be beneficial for the claimant to work from the office rather than at home whenever possible and therefore this seems to have a been a reasonable approach to take.

32. We should add that one point raised by the claimant in support of her assertion that Miss Atkins refused permission for her to attend medical appointments, was that she provided evidence that on at least one occasion (and the claimant suggested that this was not a one off) when she simply did not tell Miss Atkins about the appointment until after it had taken place and then retrospectively sought the time off so that Miss Atkins could then not refuse (page 253/265). In fact, however, what this particular exchange shows is that when the claimant did that Miss Atkins raised no objection whatsoever and there was no animosity shown (Miss Atkins said "no worries"). We find that, had Miss Atkins had any objection to the claimant attending her medical appointments, she would have had a greater objection to the claimant also not following policy and seeking permission in advance for this. Therefore, the fact that no objection was raised in fact demonstrates to us that Miss Atkins was not against the claimant attending such appointments (as she could quite properly have taken action against the claimant for failing to follow policy but chose not to do so).

33. Also around the same time, on 28 January 2022, Mr Hodgkinson of the respondent contacted the claimant to ask about some issues on one of the projects she was working on (pages 212/224). Mr Carver of the respondent also spoke to Miss Atkins about this issue. It related to a project that the claimant had run when a senior project manager – she had signed the project off as complete but in fact parts were not available so could not be ordered. The claimant had therefore signed it off to allow the project to pass through its gateway when it should not have been signed off. Mr Hodgkinson was (informally) complaining about this.

34. From this point onwards we find that Miss Atkins started to have concerns about the claimant – both in terms of her performance at work (for example given Mr Hodgkinson's concern referenced above) and also in her interactions with her team (for example the Mr Wood incident referenced above). We find that it was reasonable for her to have concerns, but equally note that the claimant was still relatively new to her role and therefore may have required support.

35. During this period however there were no regular structured 1:1 meetings with the claimant. Whilst it was put to us that this was not unusual, and we accept that Miss Atkins and the claimant would have had regular discussions about work given that their desks were in close proximity, we find that it would have been advisable for Miss Atkins to have had regular private discussions with the claimant both about workload and about other matters: this is particularly so given that by this time Miss Atkins was starting to have concerns about the claimant. Had these discussions happened, more support could have been provided to the claimant and it would have given the claimant an opportunity to open up more about what she needed to improve.

36. On 23 February 2022 the claimant had an email exchange with Mark Prince of the respondent about some concerns he had about the way the project team was working together (page 231/243). Whilst this was not a complaint as such, it clearly shows that Mr Prince had some concerns and the claimant's response was defensive and referred to "inflammable statements" which shows that she had taken it to be a complaint.

The 1 March Teams meeting

37. On 1 March 2022 the claimant attended a Teams call alongside Miss Atkins and various other individuals including directors and senior managers. At the meeting she was typing live into a shared screen and had difficulties with spelling one particular word (we find that to the extent the claimant says that this happened repeatedly, it was the repeated spelling of that one particular word). The claimant had typed this word into the screen incorrectly on a number of occasions, and we accept that her dyslexia may well have been the reason why she could not recall the spelling of that word. We find that the claimant was particularly sensitive about this, given that there were senior people on the call and she prided herself on not letting her dyslexia hold her back.

38. Miss Atkins spelt out the word in question during the meeting, dictating the spelling so that the claimant could type it out. The claimant says that this embarrassed her and that because of her difficulties in processing information, this did not in fact assist her, but Miss Atkins would not have known that as the claimant had never indicated that she had difficulties in that regard. From Miss Atkins' perspective, we find that she had identified that the claimant was having difficulties and sought to assist the claimant by giving her the spelling so that she was not repeatedly spelling it incorrectly live on screen, and so that the discussion could move onto the other matters to be addressed at the meeting. The fact that the claimant was having difficulty spelling the word was already obvious given that the claimant was in live presentation mode and therefore she did not draw attention to anything that was not already apparent.

39. The claimant has suggested that, rather than doing this in a public setting as she did, Miss Atkins could have spelt the word out in a private teams chat, however Miss Atkins in evidence rightly pointed out that the claimant's screen was in presentation mode and therefore that she may well not have seen any private message so this was the most effective way of getting the message to her in a speedy fashion. We find that it was done without malice and that in Miss Atkins' mind this was a minor spelling correct that she would not have dwelled on: the claimant has dwelled on it because she was particularly sensitive to the matter.

40. At one stage when giving evidence, the claimant accepted that Miss Atkins probably thought it was helpful but did not understand the impact of what she was doing, and that this was not a deliberate attempt to humiliate the claimant, but done because she did not understand the claimant's disability. The claimant also accepted that she had not told Miss Atkins what her specific needs were as they did not have that kind of relationship and in a leadership position she felt this was a sign of weakness. However later in evidence she changed her position and said that Miss Atkins was spelling the word out to harass her, and that she felt this because if it was not harassment, she would not have done it in public. We find that Miss Atkins was genuinely trying to help the claimant, as she felt that it would be better for the claimant to be given the spelling and then be able to move on, rather than leaving her to continue to struggle. We find that Miss Atkins would have done the same for any other employee who was repeatedly struggling to spell a particular word in the same environment. We also comment that the claimant had not indicated to anyone in advance of the live presentation that she was worried about her ability to spell words as she went through the presentation.

March to April 2022

41. The following day, on 2 March 2022, the claimant says that she was set an unrealistic target for the delivery of a particular project called Gate 8205. This related to an engine installation which was necessary to hit emission targets, and it was important to ensure that legal requirements were met before a cut off point after which the old engines could no longer be sold. It is accepted that this project was running late, and that if the target was not met it would be possible that there would be a "line stop". She said that she only had one day to turn it around and had to arrange childcare to do so – the tight timeframe being caused by the initial work having been done by Matthew Wood to a poor standard and it being the claimant's responsibility to sort the problem out. We accept that the claimant was expected to turn this piece of work around on a short deadline: this would no doubt have been annoying for her, but we find that there were genuine reasons why it needed to be completed on time (given the emissions targets) and it was part of her role to ensure that it was done satisfactorily given that it was Mr Wood's project and she was his manager. We find that the nature of the role is such that there will be occasions where employees are required to work under pressure and this was one such occasion. In addition, the claimant explained in evidence that in fact because she is neurodiverse she can work well under pressure. Therefore we are not satisfied that this presented any real difficulty for her other than potentially in respect of organising childcare.

42. On 3 March 2022 the claimant requested to work from home to attend a medical appointment relating to her migraines. The claimant says that she did not have enough time to get to the appointment without working from home (which was refused), however the appointment was in the evening and we refer to our comments above in relation to her earlier medical appointment about this.

43. On 16 March 2022 the claimant says that she had a meeting with Miss Atkins where she made Miss Atkins of the difficulties she was facing and the impact of her condition on her. She says that Miss Atkins made no effort to work through or discuss resolutions. Miss Atkins accepted in evidence that around this time they did have some kind of discussion due to the claimant having missed several deadlines and thinks that it was during this discussion that she first raised a possibility of removing one of the factories from the claimant's workload. We find that, either at this meeting, or around that time, consideration was given by Miss Atkins to the claimant's (and the rest of the team's) workload. We find that by considering removing a factory from the claimant and looking at workload more generally, Miss Atkins was seeking to support the claimant to manage her workload until things got back on track. The claimant was however upset by this suggestion as she saw it as a demotion of sorts, and she felt that her peers would have had their "gates" (i.e. deadlines) moved out if they needed more time, whereas she was not offered this. We find that sometimes "gates" could be moved out by a week or two, but that this was not always possible, and that on this occasion it was not.

44. We find that at this meeting Miss Atkins did raise her concerns about deadlines being missed. We find that, until this point, the claimant had not understood that she was not performing to a satisfactory level so she was taken aback by the points being raised with her. Whilst we accept that the claimant did not wish for a factory to be removed from her remit, we find that this was a supportive offer and not inappropriate. The claimant did not raise any suggestion that dyslexia was the cause of, or contributing to, her difficulties at this meeting. The claimant did raise that she was feeling anxious, which Miss Atkins would have put down to general anxiety about the claimant being told that her performance was not as it should be. Miss Atkins also raised with the claimant whether the claimant would want to take a step back (i.e. revert to her previous role). The claimant saw this as a sign of weakness but again Miss Atkins was just trying to ascertain what the claimant's thoughts were on the matter.

45. The claimant blames Mr Wood's underperformance for the difficulties she faced in her own role. Whilst that would have increased the pressure on the claimant, and it would have been difficult for her to manage being new to role herself, we find that Miss Atkins' concerns went beyond that and were more of a generalised concern that the claimant did not appear to be on top of things.

46. The claimant says that on 18 March 2022 she was criticised in relation to another project, called "Gate 2.5T", and that Miss Atkins made disparaging comments and intimidated that she was the reason the project had been rejected with no basis or fact to support this. The claimant was not able to articulate what exactly the disparaging remarks were, save that they were about her ability to pull the project together. In fact, Miss Atkins was on holiday on that date (page 240/252). The claimant says that Miss Atkins would still have had a voice even if on holiday

and not at the meeting (however has not been able to say who made the disparaging comments on Miss Atkins' behalf), and that by that time Matthew Wood had left the respondent and she was expected to do her own work as well as rectifying his. Based on the limited evidence available to us, on the balance of probabilities it has not been shown that disparaging remarks were made.

47. At some point in March 2022 (exact date unknown) the claimant attended an MRI scan which had been arranged because of her frequent migraines. Following this, during a discussion between Miss Atkins and the claimant, Miss Atkins referred to someone she had heard about who had an MRI scan and found out that he had only half a brain, despite having lived a normal life. The claimant says that this was made in direct reference to her MRI scan: we find that it was made in reference to a TV show that Miss Atkins had watched. We do accept that she made the comment because they were having a discussion about MRI scans in the context of the claimant just having had one (i.e. it was not a completely random comment) however we find that Miss Atkins was trying to make light conversation. The claimant took this comment to mean that Miss Atkins thought she had half a brain herself, but we do not accept that this is what Miss Atkins meant.

48. During the spring of 2022 (again, exact date unknown) the claimant tried to put a series of meetings into Miss Atkins' diary. There was no content in the invitation to explain exactly what the purpose of the meetings was, and we find that Miss Atkins rejected the invite (Miss Atkins denies this, but we accept the claimant's clear recollection of seeking to put the meetings into the diary). We find that Miss Atkins did not do so out of malice but because she did not understand the meetings' purpose and/or because she was unable to make some of the dates/times and therefore rejected the series. We do however find that it is unfortunate both that Miss Atkins and the claimant were not by that time having regular catch up meetings given the concerns about the claimant's performance, and also we find that it is unfortunate that there was no discussion between the two of them about what the purpose of the meeting was to try to ascertain if it was a sensible meeting series to have (and find an alternative timetable for it if so). There was a communication breakdown from both parties in the way that this was handled, which is especially the case given that their desks were close together and it would have been very easy for them to have a discussion about the matter. We find that Miss Atkins, as the claimant's manager, should have asked the claimant what the meetings were about instead of just rejecting them (particularly given the lack of regular 1:1 meetings between them at that time), and the claimant should have explained to Miss Atkins what the meetings were for and asked for an alternative time and/or for an explanation as to why they were rejected. It is worth noting that, from 26 April 2022, Miss Atkins did set up weekly 1:1s with each member of her team, including the claimant (page 283/295).

49. Around this time, Nikki Swann, an internal candidate who at that time worked on the shop floor at the respondent, had applied for a permanent role within the department and attended an interview for this. She attended wearing jeans and chewing gum, and was unsuccessful in her application. The claimant was given the task of providing feedback to Ms Swann about why she was unsuccessful,

which she did on 25 March 2022. In the claimant's own words she was "brutally honest" in that feedback, and in evidence she accepted that she was harsh and aggressive (but said that this was necessary because Ms Swann needed direct feedback due to having worked on the shop floor as she would brush off the feedback otherwise). She caused Ms Swann to break down in tears, and ultimately to be sent home from work due to how upset she was. The feedback was also given in public and witnessed by others in the department, who reported concerns about what happened to Miss Atkins. Miss Atkins spoke to the claimant about this and told the claimant that she had "questionable people skills". The claimant says that she also said she was a pain always causing noise but Miss Atkins denied this: we find that what was actually said was something along the lines of "I'm getting a lot of noise about you". We find that the claimant's behaviour, both in giving feedback in a public place and in the harsh tone of the feedback, was inappropriate, and it was right for Miss Atkins to address that with her. The fact that other witnesses raised the matter as a concern demonstrates how inappropriate the claimant's behaviour was, and that the claimant was demonstrating questionable people skills at that time.

50. The claimant agreed to apologise to Ms Swann, and did so, however it was later alleged to Miss Atkins' that when apologising the claimant had said "I thought I was getting a Ferrari and I've got a Skoda". The claimant denies this. We feel unable to determine exactly what was said by the claimant, however we find that Ms Swann did not perceive the claimant's apology as genuine, hence her raising further concerns with Miss Atkins.

51. On 8 April 2022 the claimant attended a priority meeting, which had been arranged to discuss workload around the team. The claimant says that Miss Atkins shook her head and tutted at this meeting because she felt that the claimant was ill prepared and not recalling information as quickly as required, which the claimant says was linked to her dyslexia. Miss Atkins denies this and suggests that it was actually one of the claimant's colleagues who was tutting, because the claimant was asking for more Project Manager support when the claimant already had more than the rest of the team. We find that it was indeed the claimant's colleague(s) who were tutting at this meeting because it was perceived that the claimant already had more support within her own team than her peers did. We accept that Miss Atkins may well also have been exasperated by this however we do not find that she tutted: Miss Atkins is by her nature a very direct person and we find that she would have been more likely to actually speak out than to sit there tutting. She would however have had sympathy for the claimant's colleagues. We also accept, as the claimant has said, that the claimant's colleague Rav Williams may well have seen what was going on and tried to move things on.

52. On 12 April 2022 Miss Atkins emailed the claimant (page 264/276) with a few suggestions for a piece of work that the claimant had shared with her. It was suggested by the claimant in her witness statement that this was an example of Miss Atkins correcting her spelling errors. However, on reading the email in question, it is not correcting spellings but wider issues with the document in question – for example, dates being wrong (which are more critical to be accurate than mere spellings) and the colour coding applied to show whether the project

is on track or not. We find that the colour coding in particular was a significant issue which needed raising as the wrong colour would imply that the project was on track when it wasn't, or vice versa. We therefore find that it was not only reasonable for Miss Atkins to raise these points with the claimant, but that she had to do so and would have done the same for any other member of her team who had made similar mistakes. It is possible that the claimant's dyslexia made her more likely to input the wrong date into the documents, however the claimant had not asked for assistance with proof reading those documents and regardless of the cause of the error, it needed addressing. In addition, the tone used by Miss Atkins is not improper and does not suggest any wrongdoing on the claimant's part, but is merely highlighting the inaccuracies to her so that she can correct them.

53. The claimant says that on 19 April 2022, in relation to an Executive QA presentation, Miss Atkins withheld information and/or delayed providing information to the claimant to make it harder for the claimant to complete projects. Miss Atkins was not sure when she prepared her witness statement which of two matters the claimant was referring to, however it was confirmed by the claimant in evidence that this related to was an Excavators NPIP update. On this occasion, Miss Atkins accepted that she had missed an initial email about this matter from her colleague, Mark Ireland, and therefore had not passed it onto the claimant – we find that this was inadvertent and that Ms Greenwood was also impacted in the same way by the delay. Once she realised that she had missed it, she passed it onto the claimant and at that point there was still plenty of time for the claimant to complete the piece of work required.

54. The claimant emailed Miss Atkins about the project on the afternoon of Friday 8 April 2022 and Miss Atkins had replied with corrections on Tuesday 12 April 2022. There had then been a further email from the claimant on the Thursday afternoon 14 April 2022: it was then Easter weekend and so the claimant and Miss Atkins were not at work on the Friday or Monday, and Miss Atkins then responded on the morning of 19 April 2022 (page 265/277) with further corrections. We find that Miss Atkins responded as soon as reasonably practicable and this still left the claimant with a number of days before her work needed to be completed. We accept that she would have had other work to do during this time but that is often the case and it was the claimant's responsibility to prioritise her work accordingly. The claimant did not raise any concerns about her dyslexia impacting her ability to complete the piece of work.

55. On 27 April 2022 the claimant's team won "team of the week" and each of the project managers was given a miniature trophy (which they would return to be given out to the next team of the week in due course). This was an informal team award that was given out regularly in the team, to recognise the work primarily of the Project Managers / junior members of staff. The claimant was upset not to be given the award herself, however we find that the focus was deliberately on the more junior members of the team as a way to incentivise and reward them, rather than Project Managers. It was not a deliberate slight on the claimant.

56. The clamant recalls that during a conversation between herself and Miss Atkins on 28 April 2022 Miss Atkins told her that she treats the claimant differently to other members of the team. During the later grievance investigation (to which we

turn below), Rav Williams commented (page 513/533) that Miss Atkins did have a different management style for each member of the team, that Miss Atkins could be quite blunt with the claimant but that she did not believe that Miss Atkins would treat the claimant negatively because of her dyslexia.

57. Miss Atkins did not recall saying that she treats the claimant differently but accepted that she might have said something along those lines, to indicate that she deals with each team member according to their own individual needs, strengths and weaknesses. We accept Miss Atkins' explanation, particularly in light of the comments made by Ms Williams, and have found nothing to suggest that Miss Atkins' would have made such a comment to suggest that she would discriminate against the claimant due to her dyslexia.

58. On 29 April 2022 the claimant was on a Teams call with Miss Atkins and a number of other people. During the call Miss Atkins felt that the claimant's breathing could be heard excessively through the microphone and she drew this to the claimant's attention. The claimant was upset by this however accepts that this comment did not relate to her dyslexia. We find that by this point the relationship between them was strained and the claimant was particularly sensitive to Miss Atkins' comments. Given that Miss Atkins' management style is direct, we find that she raised the matter in quite a blunt way, and that the claimant did take this personally. However, it is commonplace on Teams calls for there to be issues regarding sound quality and therefore we do not find anything out of the ordinary in the point being raised.

The IPIP

59. There was a 121 meeting between the claimant on either 29 April 2022 or 6 May 2022 (we suspect 6 May 2022 although we cannot be sure) where the claimant discussed how she was feeling with Miss Atkins. It was suggested to us that this conversation actually took place as part of the meeting about an informal performance improvement plan ("IPIP") on 9 May 2022 (to which we refer below) however we have seen from Miss Atkins comments in relation to the claimant's later grievance about this point (at page 418/434) that Miss Atkins has said that there was a 121 meeting "on Friday". We find that this conversation was separate to the IPIP and occurred on either the Friday immediately before or after 2 May 2022. During the meeting the claimant expressed that she was finding things difficult but did not specifically reference dyslexia. Miss Atkins offered to take some of the claimant's work off her and also said that she could refer the claimant to occupational health if the claimant wished. The claimant did not come back to request that referral. We also find that the claimant would have been aware of other supportive mechanisms available within the respondent, including the ability to speak to HR about any concerns (we note that the claimant appears to have been particularly friendly with one member of the HR team), however she also did not avail herself of those tools.

60. On 9 May 2022 the claimant attended a meeting with Miss Atkins, at which an informal performance improvement plan ("IPIP") was issued to her (page 298/310). The claimant indicated to Miss Atkins that she was finding things difficult and Miss Atkins said "this won't help then". Miss Atkins denies saying this however it was found to have been said during the later grievance investigations

by Mr Niven and on balance we believe it was said. We believe that this is reflective of the exasperation that Miss Atkins was feeling towards the claimant by this stage and is unfortunate, because given that she knew the claimant was struggling we find that Miss Atkins should have approached the conversation from a supportive perspective. We do not believe that the plan was thrown down aggressively as alleged, however this was not a wise way to introduce a performance plan and is further indicative of Miss Atkins' blunt management style. By this time we also find that the claimant was suffering from anxiety in relation to her work, not sleeping properly and vomiting because of this.

61. The IPIP raised a number of concerns and we address these in turn below. It was split into two parts (which we will call Parts A and B for ease): Part A related to the claimant's communications with others, and Part B related to the projects which she had worked on. The claimant asserts that Part B related to matters impacted by her dyslexia whereas Part A did not. We agree that Part A had nothing to do with the claimant's dyslexia: it was about the claimant's communications with others. Part B was about the claimant's performance more generally, particularly around delays to projects that she was working on. We find that those performance concerns arose because the claimant was overwhelmed by her workload and could not cope or keep on top of things. This was linked to her promotion in summer 2021 and further additional responsibilities which she took on from the end of 2021. We consider that the claimant's dyslexia is likely to have exacerbated her struggles and made it harder for her to stay on top of things given the increased pressure she was under, however was not the operative cause of them. We also note that the claimant did not raise her dyslexia as being the reason for her performance issues, did not highlight that a feature of her dyslexia was an impact to her short term memory or processing information, and did not request any adjustments to her role (to the contrary she reacted negatively to a suggestion that a factory could be removed from her workload).

62. Part A of the IPIP made the following allegations:

    a) That the claimant had typed "dick" into a Teams chat to the person it was aimed at, namely Mr Wood (the claimant accepting she had done this but accidentally). The IPIP had originally used the word "dickhead" but the claimant requested that it be changed to "dick" as that was the word she accepted that she used (this was the only change she requested to the IPIP). The claimant says that this had been discussed at the time and Miss Atkins had said "we've all done silly things". We find that it was not appropriate for the claimant to have typed "dick" in reference to Mr Wood, even if she did not intend him to see it: as his line manager, this was not professional.

    b) That she had told Mr Wood that her "8 year old could do better". Again we find that this is an inappropriate way to speak to a direct report and therefore a valid concern.

    c) That she had discussed an interviewee's salary expectations in the middle of the office. We find that this was naïve rather than being

deliberately inappropriate however the information was personal to that interviewee and should not have been discussed openly.

d) The interview feedback to Nikki Swann referred to above, which we have found was inappropriate.

e) That she had discussed CVs and applying for external jobs with other team members. We find that simply talking about applying for other jobs and/or your CV is not in itself inappropriate an/dor poor performance, however if done in a way to convey to the team that there is a problem in the team or workplace then that could be inappropriate depending on how it was said.

f) That the claimant's voice carried in the office so that other team members can hear when she "dresses down" members of her team. We find that this was not a criticism of the claimant's loud voice per se, but rather a criticism of the fact that she dressed her team down in earshot of other people. This was a valid concern (although not phrased clearly).

63. The claimant has quite rightly pointed out that the individuals involved in the allegations at Part A had not raised formal complaints against her. That is true, however that does not remove the respondent's obligation to ensure that the workplace is free from inappropriate conduct and therefore it was open to the respondent to nevertheless take those matters forward.

64. Part B of the IPIP related to the claimant's work itself and alleged:

a. Project 2.5T – that this had not yet returned to gate after 6 weeks, but should have done so after 2 to 3 weeks;
b. Gear Project – that this should have been delivered in August that year but had yet to go to Project Letter despite chasers from the engineering team;
c. Project 370X – that this had not yet been to a Gate 0 despite a direct request to do this in March;
d. 5 year plan – alleging the claimant had a lack of knowledge of what the global team are doing;
e. Exec meetings – alleging that the claimant needed too much support and should be running the meetings herself

We find that these were all valid performance concerns.

65. The IPIP was very poorly drafted and we can entirely see why the claimant was particularly upset by its contents. We find that:

a. The template itself is poor, although we accept that this was at that time a standard template within the respondent and therefore Miss Atkins cannot be blamed for this. We find it surprising that the standard template for development plans during the probationary period were detailed spreadsheets designed to elicit clear measurable objectives (as we were

shown in relation to Mr Wood at page 192/204), whereas this template (shown at page 298/310) simply invited the writer to input basic text with no real structure to facilitate SMART objectives.

b. Although we cannot fault Miss Atkins for using the standard template, we find it surprising that she did not herself think to add more SMART objectives to it, given that she herself had made the suggestion of using a development plan with Mr Wood (at page 192/204).
c. The focus of the IPIP is poor – the section on the performance gap runs to one and a half pages whereas the section on "what the employee is required to do now" is a small box. The IPIP reads like a document intended to criticise current performance, not explain and assist an employee to improve that performance.
d. In the box where Miss Atkins was supposed to fill in what support she would give the employee, she stated "*Esther is a Programme Manager and the majority of the requirements are expected and require no training. Esther should be a self starter coming from the base of a Senior Project Manager with 15 years Project experience".* In short, therefore, no support whatsoever was offered to her: the whole point of an IPIP should be to support the employee to improve. We would add that, although the claimant may have had a number of years of Project experience, she had only been a Programme Manager for less than a year.
e. The IPIP mixed professional and performance issues. Whereas Part B was about performance, Part A in fact were about professionalism and behaviour (albeit raising valid concerns in that regard).
f. Some of the matters raised in Part A were issues that had already been addressed with the claimant informally and, from the claimant's perspective, had been closed down. We do see the relevance of them, in that the issue is that the claimant's behaviours had not improved and there were ongoing causes for concern, however it would have been preferable to have separated out those matters that had already been addressed as background.

66. The claimant asserts that the IPIP was prepared with a view to starting the claimant's removal from the respondent's business. The respondent says that it was a genuine IPIP which raised genuine concerns, and that Miss Atkins' preference would have been for the claimant's performance to improve so as to avoid incurring recruitment costs in searching for a replacement. The Tribunal has considered this at some length and sees force in both arguments. However, on balance, we have decided that whilst the IPIP is unfair and does not set the claimant up to succeed in turning things around, this was not motivated by a desire to remove the claimant but was simply a poorly drafted IPIP written by a manager who was feeling frustrated at the claimant's behaviour, and reflective of poor management practice rather than underhand motive.

67. We find that the decision to use an IPIP at this stage was not inappropriate, and we recognise that there were genuine performance concerns in relation to the claimant. We also consider that, if Miss Atkins had wanted to remove the claimant

from the respondent, she could have chosen to treat the issues in relation to Ms Swann or other behavioural issues as gross misconduct, but she did not. The claimant had been told that there were concerns previously, but things had not improved. The IPIP was therefore an appropriate course of action. We have noted that the reaction from HR was surprise at Miss Atkins' decision to implement an IPIP (page 304/316) however that particular member of the HR team was friendly with the claimant (see comment above about the claimant having access to HR support for herself if she needed it) and also would not have had insight into her day to day work.

68. That said, the tone of the IPIP and the manner in which it was delivered to her was not appropriate, and was not supportive. We can understand why the claimant would have been upset by this.

69. In order to get feedback about the claimant, Miss Atkins had discussed the claimant's performance with some key stakeholders, namely Simon Shaw, Tim Barnett, Dave Carver and Pete Jowett. Although the claimant has suggested that this was inappropriate, provided it was done in a constructive manner (and we have no evidence to suggest that it was not), this was a proper course of action to ensure that there was sufficient feedback about the claimant's performance for the IPIP.

May 2022 after the imposition of the IPIP

70. There was an allegation raised that Miss Atkins had said that she had to step in with one of the claimant's team, Charlie Catallo, due to their broken relationship: the claimant says that this related to the hostile work environment that she was working in (but says that this did not relate to her dyslexia). However, Miss Atkins' evidence was that in fact the claimant and Mr Catallo had a good relationship and we accept that: Miss Atkins' directness is such that if they did not then she would say so. That being the case, we see no reason why Miss Atkins would have stepped in.

71. On 11 May 2022 Mr Carver emailed the claimant about whether or not the project 2.5T was ready for Gate: this was raising an issue but not raising a complaint.

72. On or around 12 May 2022, Miss Atkins "checked in" with the claimant's team to see how they were. Given the ongoing issues with the claimant, we can understand why the claimant has taken this negatively and as a slight on her, however we do not think that it was intended in that way or in any way related to the claimant's dyslexia.

73. The claimant says that on 13 May 2022 she explained to Miss Atkins the impact that her treatment was having on her, and the claimant asserts that Miss Atkins appeared to take pleasure from that. We find that Miss Atkins continued to be exasperated by the claimant at this time, and that may well have showed through in her facial expressions, but that this was not a sign that Miss Atkins was taking pleasure in the situation. Miss Atkins' personality is such that if there is an issue she will meet it head on and therefore she would have been more direct with the claimant.

74. One of the projects the claimant was involved in was called Excavator. There were Executive Excavator Review and Excavator Strategy reviews around the 18 and 20 May 2022, and the claimant believes that she was excluded from feedback and information which made it harder for her to do her job. We find that Miss Atkins was not deliberately excluding the claimant from anything, but rather was not bothering the claimant with what she saw as normal operational activity which the claimant did not need to focus on, so that the claimant could focus her time on improving her performance in other ways.

The claimant's sickness absence and grievance

75. On 23 May 2022 the claimant called in sick: this was the date the IPIP review was due to happen. For the first few days she self certified and then provided a fit note. The claimant has suggested that she continued to work from home whilst self certifying: whilst she may have done this, there was no requirement on her to do so.

76. On 24 May 2022 Miss Atkins moved a meeting from the Thursday to the Tuesday (i.e. two days earlier). At this point the claimant was off sick and therefore we find that Miss Atkins intended to cover the meeting in the claimant's absence. Miss Atkins was due to be on holiday on the Thursday (page 389/405) and therefore moved the meeting to accommodate her own diary: this was not targeted at the claimant or intended to cause the claimant stress or to have insufficient time to prepare: the claimant perceived it that way because by this time she is extremely sensitive because she feels that she is being targeted and is interpreting normal interactions negatively.

77. On 2 June 2022 the claimant raised a grievance (page 404/420) and provided a personal impact statement alongside it (page 402/418). In this statement she comments on how her dyslexia has never held her back. The key allegations in her grievance were that Miss Atkins had created a hostile working environment, which in part was attributed to her dyslexia. She said that she felt that Miss Atkins was trying to incite her resignation by publicly humiliating her, undermining her position and fabricating or embellishing incidents to cause maximum personal stress.

78. Because of the claimant's ill health, the respondent obtained a medical report as to the claimant's fitness to participate in the process, and it was confirmed that she could attend a meeting to discuss her complaint (page 406/422).

79. To support her grievance the claimant provided a chronology (pages 415/416 - 431/432). Mr Matthew Niven was appointed to hear the claimant's grievance and he used the chronology to create his own table where he also inserted the feedback received during his investigation on each point (pages 417/433). Mr Niven also prepared questions to ask the claimant (page 436/456).

80. The grievance hearing took place on 17 June 2022 (page 440/460). The claimant says that the notes were not accurate (page 472/492) however whilst not verbatim we find that they were generally accurate. During the hearing, Mr Niven recognised that the relationship with Miss Atkins is strained (at page 442/462).

81. During the grievance hearing the claimant was asked what outcome she wanted to see from it (page 473/493): we find that this was an invitation for the claimant to explain whether she wanted, for example, the performance process to be stopped, Miss Atkins to be disciplined, or some other resolution. At this stage, if the claimant felt that her need for reasonable adjustments had been ignored and she needed adjustments to her role, this was an opportunity for her to say so, however she did not.

82. Mr Niven also interviewed Miss Atkins in relation to the claimant's grievance, and took a note of that interview (page 509/529). Early on in the meeting, he asked Miss Atkins whether or not the relationship could be repaired. At this stage Miss Atkins had not been told the precise nature of the claimant's grievance so she answered honestly that needed to understand the specifics of the grievance. The question was asked again at the end of the meeting: by that time Miss Atkins had a greater understanding of the precise allegations made by the claimant and so felt able to say that the relationship could be repaired. During the course of the meeting she discussed the IPIP with Mr Niven. She also explained that the claimant had told her that overcoming her dyslexia was one of her greatest achievements, but that she had offered to proof read any documents if required.

83. In addition, Mr Niven spoke with Rav Williams, the claimant's colleague, but did not take notes from that meeting. It is unfortunate that he did not take a note of the meeting, however we accept that the meeting did take place and that this was a simple error on his part.

84. Mr Niven did not interview other members of management or the claimant's team. We find that there was no need for him to interview any of the senior leaders in the organisation such as Peter Jowett (engineering director), as they would not have had relevant information to provide. We find that it would have been preferable for him to have interviewed the claimant's peers Ms Greenwood and Mr Price to see what their perceptions of the relationship between the claimant and Miss Atkins were (and they could have commented on the specific allegation that Miss Atkins tutted at the claimant in a meeting), however given that he did interview Rav Williams we do not find this to have been a significant oversight. Mr Niven was otherwise thorough in his investigation. We would add that Mr Niven's overall attitude to the investigation seems to have been open and he is accepting that different people perceive things in different ways.

85. Mr Niven then prepared a discussion document (page 452/472), which he sent to HR (page 455/475). HR responded with some suggestions and enquired if he would be interviewing anyone else: we consider this to have been a standard question which they would ask when supporting on a grievance investigation. If they felt that anyone specific had been missed by Mr Niven, we consider that HR would have stated this explicitly. During the course of his interactions with HR, Mr Niven amended his findings slightly, to add in certain points, such as to recommend Miss Atkins undertake dyslexia training. We find that this shows that he was receptive to feedback and taking HR advice on board (however the decision remained his own).

86. The claimant's grievance was partially upheld (page 483/503). Before sending the written outcome to her, the claimant had been informed verbally of what the

broad outcome was to be. The claimant has said that she does not recall exactly what was said but that this differed somewhat from the eventual written outcome, which in her view "underplayed" the findings. We find that there was no fundamental difference between them, however we accept that in the verbal conversation it will have been positioned as a positive outcome that her grievance was partially upheld. We consider that the claimant therefore expected the written outcome to be largely in her favour, when in fact it was a balanced outcome with some elements in the claimant's favour and some not.

87. In relation to the grievance outcome itself, the specific findings were as follows:

    a) In relation to the allegation that there was a hostile working environment, this was partially upheld. It was found that Miss Atkins had not been sufficiently supportive of the claimant's anxiety and health issues (in that she acted correctly in offering Occupational Health support but that she had failed to work on their own relationship), and that she failed to escalate matters early enough. By this he meant that the behavioural issues in Part A of the IPIP were sufficiently serious that they should have been addressed earlier, and that they were in fact conduct matters rather than simple performance concerns. He was essentially finding that Miss Atkins had not made it clear enough to the claimant earlier on that these were serious matters. We agree with him.

    b) He found that the IPIP was not seeking to incite the claimant's resignation. Based on our findings relating to the IPIP earlier on, we agree.

    c) In relation to the claimant's allegation that she had been publicly humiliated in relation to dyslexia, Mr Niven approached his findings from the perspective that he accepts any person can feel how they want to feel about any given situation regardless of whether he agrees with those feelings. Therefore, he accepted that she felt humiliated, but this should not be taken to mean that he felt that she was in fact humiliated by Miss Atkins. He did find that Miss Atkins had been insensitive in his view in spelling a word out in a Teams chat, although the Tribunal would respectfully disagree with Mr Niven on that specific point.

    d) In relation to Miss Atkins undermining the claimant's position, he found that this had not occurred and that it was appropriate for Miss Atkins to have discussions with other managers to understand any issues with the claimant's performance, and we agree.

    e) In relation to the allegation that Miss Atkins had fabricated or embellished matters, he found that did not occur, and again we agree.

88. He made a number of recommendations as follows:

    a) That the IPIP be rewritten. The claimant has suggested that the IPIP should have been removed entirely, however we find that there were genuine concerns which needed addressing and therefore that would have been inappropriate. Whilst removing the IPIP would have alleviated the claimant's anxiety, it would have ignored the underlying issue which still

needed addressing and would not have assisted the claimant to improve in the long run. We find that the recommendation that the IPIP be re-written was a fair and reasonable outcome for the claimant: it acknowledged the clear deficiencies in the quality of it and would enable it to be turned into a more useful document which would enable her to seek to improve her performance to the required level.

b) That the claimant's anxiety should be discussed and understood. Again we find that this was a sensible recommendation.

c) That mediation take place. The claimant says that real mediation was not offered. However, given that the claimant did not in fact return to work before resigning, we are not clear as to the basis on which the claimant formed that view. Mediation appears to the Tribunal to be a sensible way forward.

d) That consideration could be given to the claimant changing role to facilitate a fresh start. The claimant says that it was wrong for the onus to be placed on the claimant for this, and says that consideration should have been given to moving Miss Atkins instead. We would note that the finding is not that the claimant should move role, merely that this is something that could be considered if she wished for this to happen. There has been no finding against Miss Atkins which would warrant requiring Miss Atkins to move role, and realistically it would also have been easier we believe for the claimant to move roles than Miss Atkins given their respective seniority.

e) That Miss Atkins support the claimant's activities but consider the impact of making suggestions for improvement in front of the claimant's team. Again, this seems sensible.

f) That Miss Atkins explore attending a dyslexia awareness course. We are disappointed to note that, as at the date of this hearing, Miss Atkins had still not done so. This appears to be because the claimant resigned (to which we turn below) and therefore she viewed it as no longer necessary. This is short sighted given that another member of her team also has dyslexia.

89. We would comment that it would also have been beneficial for Miss Atkins to have been sent on some kind of management training as an outcome of the grievance, as the findings against Miss Atkins relate to her management style. Notwithstanding that, however, overall we feel that Mr Niven's grievance outcome is well reasoned, fair and balanced. We find that this could have provided the claimant with a way to move forward within Miss Atkin's team.

90. The claimant did not appeal but instead resigned on 21 July 2022 (page 494/514) (although she drafted that resignation letter on 12 July). In her resignation letter she does not reference any alleged failure to make reasonable adjustments (although she said in evidence this was what she meant by "safeguarding measures", we do not accept this and we find that what she meant by this was that she felt unsupported and that it would be detrimental to her health to remain in the respondent's employment any longer). Her employment therefore came to an end on 21 July 2023.

Law

Disability Discrimination

Direct discrimination

91. Section 13 of the EA 2010 provides that:

    (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.

92. Section 23 of the EA 2010 goes on to provide that:

    (1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

93. In the House of Lords decision of *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285, ICR 337*, it was held by Lord Scott that "*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class"*. Whilst not strictly binding as a first instance decision, in *Ferri v Key Languages Ltd ET Case No. 2302172/04* it was held that the appropriate comparator was someone with the same work performance, temperament and approach to criticism as the claimant. It is permissible to compare the treatment of individuals in non-identical but not wholly dissimilar circumstances *Chief Constable of West Yorkshire v Vento [2001] IRLR 124, EAT*.

94. The test as to whether there has been less favourable treatment is an objective one: the claimant's belief that there has been less favourable treatment is insufficient. Likewise, the treatment must be less favourable, not merely different.

95. Where there is less favourable treatment, the key question to be answered is why the claimant received less favourable treatment: was it on grounds of race or for some other reason. As Mr Justice Linden said in *Gould v St John's Downshire Hill 2021 ICR 1, EAT:*

    "The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective…For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision…[and] the influence of the protected characteristic may be conscious or subconscious."

96. In *Nagarajan v London Regional Transport 1999 ICR 877, HL*, Lord Nichols said that

    "discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No

one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds…had a significant influence on the outcome, discrimination is made out"

97. Often there will be no clear direct evidence of discrimination on racial grounds and the Tribunal will have to explore the mental processes of the alleged discriminator and draw inferences. The claimant will need to prove facts from which a Tribunal could properly conclude that the respondent had committed an unlawful act of discrimination, and this can include the drawing of inferences. However, simply establishing a difference in status is insufficient: there must be "*something more*" (*Madarassy v Nomura International plc [2007 EWCA Civ 33* and *Igen Ltd v Wong [2005 ICR 931]*). Likewise, unreasonable conduct alone is insufficient to infer discrimination.

98. Subconscious or unconscious discrimination is prohibited and therefore it is necessary to consider not only the conscious thought process of the alleged discriminator but also the subconscious processes *(see for example Glasgow City Council v Zafar [1998] IRLR 36, HL, Nagarajan, above, and IPC Media Ltd v Millar [2013] IRLR 707)*.

99. A failure to investigate a complaint of discrimination can itself amount to race discrimination, if the reason why the complaint is not investigated is on grounds of race (*London Borough of Lewisham v Ms Chamaine Ellis UKEAT 62_00_2205*).

Indirect Disability Discrimination

100. Section 19 EA 2010 provides:

> (1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> (2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*
>
> (a) *A applies, or would apply, it to persons with whom B does not share the characteristic;*
>
> (b) *It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;*
>
> (c) *It puts, or would put, B at that disadvantage, and*
>
> (d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

101. It is for the claimant to show that there is a provision, criterion or practice ("PCP"), and that it disadvantages his group and him as an individual. It can be sufficient

if the individual can reasonably say that they would have preferred to have been treated differently.

102. If the individual can show that disadvantage then the respondent must show that it can objectively justify the treatment on the basis of it being a proportionate means of achieving a legitimate aim. In accordance with *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited) [2015] UKSC 15*, the PCP must be rationally connected to a legitimate aim, be no more than reasonably necessary to achieve that aim, and not be disproportionate.

103. In showing the group disadvantage, it is not necessary for the claimant to show the reason why (*Essop v Home Office (UK Border Agency) [2017] ICR 640*, but there must be a link between the PCP and the disadvantage. The disadvantage must apply not only to the claimant but also to the group with whom he shares the protected characteristic i.e. Greeks (*Gray v Mulberry Co (Design) Ltd [2020] ICR 715*.

104. The application of a PCP which gives rise to individual disadvantage is likely to also give rise to unfavourable treatment because of something arising in consequence of disability and a duty to make reasonable adjustments (*Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA)*.

105. A one-off act can amount to a PCP where there is an indication that it would be repeated if a similar situation arose in future (*Ishola v Transport for London [2020] EWCA Civ 112, CA)*.

106. Where the proportionality test is engaged, the treatment must be both a way of achieving the legitimate aim and a reasonable necessary means of doing so (*Homer v Chief Constable of West Yorkshire [2012] UKSC 15)*. The reasonable needs of the employer should be balanced against the discriminatory effect of the treatment, and consideration should be given to whether there is an alternative (less discriminatory) way for the employer to achieve their aim.

Discrimination Arising from Disability

107. Section 15 of the EA 2010 states that:

a) *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.

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

108. Unfavourable treatment means that the individual must have been put at a disadvantage, as explained in section 5.7 of the EHRC Code of Practice ("the Code"). Although the EHRC Code of Practice ("the Code") does not impose legal obligations and is not an authoritative statement of the law, it can be used in

evidence in legal proceedings and Tribunals must take into account any part of the Code that appears relevant (see paragraph 1.13).

109. Sometimes the disadvantage will be obvious, but sometimes it may be less so. Unfavourable treatment can still occur even if the person carrying out the treatment thinks they are acting in the disabled person's best interests. Although set out in relation to indirect discrimination, section 4.9 of the EHRC Code makes clear that the individual must be able to reasonably say that they would have preferred to be treated differently (i.e. their viewpoint must be a reasonable one and not an unjustified sense of grievance).

110. When deciding whether the unfavourable treatment arose because of something arising in consequence of disability, the subjective reason of the employer should be considered.

111. The unfavourable treatment must be in consequence of the something arising (*Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305*). The "something" must have a significant influence on, or be an effective cause of, the treatment (*Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT*).

Failure to Make Reasonable Adjustments

112. Section 20(3) of the EA 2010 provides that:

> *(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.*

113. Section 21 of the EA 2010 provides that:

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

114. The burden is on the claimant to show the application of a provision, criterion or practice, and the substantial disadvantage suffered. If that is done the burden shifts to the respondent to show that the adjustment in question was not reasonable. A one-off act can amount to a PCP where there is an indication that it would be repeated if a similar situation arose in future (*Ishola v Transport for London [2020] EWCA Civ 112, CA)*.

115. Paragraph 6.28 of the EHRC Code sets out some of the factors that might be taken into account when deciding what is a reasonable step: it is wise for the Tribunal to consider the factors although there is no duty to consider each and every one (*Secretary of State for Work & Pensions (Job Centre Plus) v Higgins*

[2014] ICR 341, EAT [58]). What is reasonable is considered objectively having regard to all the circumstances. The steps are:

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 or 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.

116. The test of reasonableness is objective and will depend on the circumstances of the case.

117. The duty to make reasonable adjustments will only arise if the disabled person is put at a substantial disadvantage. The purpose of the identification of a provision, criterion or practice is to identify the matter that causes the disadvantage (*General Dynamics Information Technology Ltd v Carranza 2015 ICR 169, EAT*) and this disadvantage must not equally arise in the case of someone without the claimant's disability (*Newcastle upon Tyne Hospitals NHS Trust v Bagley UKEAT/0417/11)*. It is for the claimant to show substantial disadvantage (*Bethnal Green & Shoreditch Educational Trust v Dippenaar UKEAT/0064/*15, and *Hilaire v Luton BC [2023] IRLR* 122. However, it is not necessary for the claimant to show that the disadvantage arises because of his disability, provided they have shown substantial disadvantage in comparison with persons without the disability (*Sheikholeslami v University of Edinburgh UKEATS/0014/17*).

118. In *Project Management Institute v Latif 2007 IRLR 579, EAT*, Mr Justice Elias (who was then president of the EAT) said:

In our opinion, the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement which causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not".

119. The test of reasonableness is an objective one (*Smith v Churchills Stairlifts plc 2006 ICR 524*). The Tribunal should look at the proposed adjustment from the point of view of both claimant and employer to make an objective determination of whether or not it would be a reasonable adjustment (*Birmingham City Council v Lawrence EAT 0182/16*). The Tribunal should also consider the business needs of the employer (*Griffiths v Secretary of State for Work & Pensions [2017] ICR 160, per Elias LJ*, and *O'Hanlon v Commissioners for Inland Revenue [2007] ICR 1359)*.

120. A key question when assessing reasonableness is whether or not the proposed adjustment would be effective in preventing the substantial disadvantage. There does not have to be a good or real prospect of the disadvantage being removed, it is sufficient if there would have been a prospect of the disadvantage being alleviated (*Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10*).

121. The duty to make reasonable adjustments will only arise if the respondent not only knows, or ought reasonably to have known, of the disability but also that the individual is likely to be placed at the substantial disadvantage.

Disability Related Harassment

122. Section 26 of the EA 2010 provides:

(1) A person (A) harasses another (B) if –

a. *A engages in unwanted conduct related to a relevant protected characteristic, and*

b. *The conduct has the purpose or effect of –*

i. *Violating B's dignity, or*

ii. *Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

(2) …..

(3) …..

(4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –

a. The perception of B;

b. The other circumstances of the case;

c. Whether it is reasonable for the conduct to have that effect.

123. In order to determine whether the conduct is related to the protected characteristic, it is necessary to consider the mental processes of the alleged harasser (*Henderson v General & Municipal Boilermakers Union [2016] EWCA*

Civ 1049). This may be conscious or unconscious: as stated by Underhill LJ in *Unite the Union v Nailard [2018] EWCA Civ 1203:*

"it will of course be liable if the mental processes of the individual decision-taker(s) are found (with the assistance of section 136 if necessary) to have been significantly influenced, consciously or unconsciously, by the relevant protected characteristic."

124. As set out in the Code, "unwanted conduct" can include "*a wide range of behaviour*" (at paragraph 7.7) and it is not necessary for the employee to expressly state that they object to the conduct (at paragraph 7.8).

125. When looking at the effect of harassment, this involves a subjective and objective test. The subjective test is to assess the effect that the conduct had on the complainant, and the objective test is to assess whether it was reasonable for the conduct to have that effect (*Pemberton v Inwood 2018 ICR 1291, CA*). A one-off incident can amount to harassment. However, it must reach a necessary degree of seriousness in order to amount to harassment (see for example *General Municipal and Boilermakers Union v Henderson [2015] IRLR 451, EAT*, where it was found that it would *"trivialise the language of the statute"* to find that there had been unlawful harassment on the facts of that case*).*

126. In relation to the subjective element, different individuals may react differently to certain conduct and that should be taken into account. However, as set out in *Richmond Pharmacology v Dhaliwal 2009 ICR 724* by Mr Justice Underhill (as he was then named):

"if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

Burden of Proof

127. Section 136 of the EA 2010 (burden of proof) states 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.

128. Put simply, the claimant must show facts from which the Tribunal could infer that discrimination took place, in the absence of other explanation. If the claimant cannot do that, the claim fails. If the claimant does show such facts, then the

burden shifts to the respondent to show that discrimination did not take place and that the treatment was in no sense whatsoever on the grounds of disability, on the balance of probabilities. Unreasonable treatment alone is insufficient to shift the burden of proof, but it may be evidence supporting an inference of discrimination in the absence of another explanation for the behaviour *Anya v University of Oxford and anor 2001 ICR 847, CA*.

129. In *Madarrassy v Nomura International [2007] ICR 867* CA, Mummery LJ stated that "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." However, there is often no direct evidence of discrimination and inferences can be drawn from the facts.

130. Although the burden of proof is a two stage test, there are cases where an Employment Tribunal can legitimately proceed directly to the second stage of the test (see, for example, *Laing v Manchester City Council and anor 2006 ICR 1519, EAT*).

Constructive Unfair Dismissal

131. Section 94(1) of the Employment Rights Act 1996 ("ERA 1996") states:

a) *An employee has the right not to be unfairly dismissed.*

132. Section 95 of the ERA 1996 goes on to state:

a) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if) –*

(a) ……

(b) ……

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

133. The employee must show:

a) A breach of the contract of employment. Unreasonable conduct alone is not sufficient (unless it amounts to a breach of the implied term of trust and confidence, as set out below).

b) The breach must be repudiatory. This means not just any breach of the contract, but one which goes to the root of it, in other words a breach of a fundamental terms of the contract (Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA). Discrimination will usually constitute a repudiatory breach of contract.

c) The employee must resign in response to the breach.

d) The employee must not delay their resignation so as to affirm the contract and be deemed to have waived the breach.

134. A breach of the implied term of trust and confidence will amount to a fundamental breach that goes to the root of the contract (*Morrow v Safeway Stores [2002] IRLR 9*). This is an objective test which was clarified in the case of *Malik v Bank of Credit and Commerce International SA [1997] ICR 606* where it was held that:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee".

Although in that case the wording used was "calculated **and** likely to…" this should not be taken to mean that a breach of the implied term of trust and confidence can only occur where the employer intended that to be so (see, for example, *Baldwin v Brighton and Hove City Council 2007 ICR 680, EAT* and *Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT*).

135. Where there are a series of acts, it will be sufficient for the employee to show that the final act was the "last straw" and that the cumulative effect of the acts was to breach the implied term of trust and confidence. The last straw has to contribute something to the breach, although it may be relatively minor and does not necessarily have to constitute unreasonable or blameworthy conduct in itself (*Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA)*.

136. It can be sufficient for the repudiatory breach to be only one of the factors relied upon in the employee's resignation (*Meikle v Nottinghamshire County Council 2005 ICR 1, CA*).

137. The way in which an employer deals with a grievance can amount to a repudiatory breach (*Logan v Celyn House Ltd UKEAT/0069/12)*.

138. If an employee gives the employer the chance to try to remedy the breach, that will not constitute delay so as to affirm the contract if they wait for the employer's response before resigning (*W E Cox Toner (International) Ltd v Crook 1981 ICR 823, EAT)*. In *Gordon v J&D Pierce (Contracts) Ltd [2021 IRLR 266, EAT*, it was held that the employee had not affirmed the contract by going through a grievance process.

Wrongful Dismissal / Breach of Contract

139. Section 86 of the ERA 1996 sets out the minimum notice required to be given by employers and employees to terminate their employment. If there is a contractual provision for greater notice, that will take precedence.

Conclusions

140. We address our conclusions by reference to the List of Issues which appeared at pages 57/69 of the Bundle. As outlined above, certain of the claimant's claims were withdrawn during the course of the hearing and therefore, so that the numbering of these Conclusions continues to align with that List of Issues for ease of cross-reference, we have indicated on each occasion where an

allegation was withdrawn. Having said that, because the claimant's claim for constructive dismissal relies upon an allegation that Miss Atkins discriminated against the claimant, we have found it necessary to reach our conclusions on the allegations of discrimination before turning to constructive dismissal. We therefore start with discrimination and then deal with other matters.

Direct Disability Discrimination

Did the respondent treat the claimant less favourably as follows?

If so, was it because of the claimant's disability?

1. *28.1.22: Informed the claimant that she was under investigation for a complaint made against her. There was no complaint against her*

141. We have found that there was a complaint made about the claimant by Matthew Wood, albeit an informal one. Consequently, Miss Atkins informed the claimant of this and that she was under investigation. However, we conclude that Miss Atkins would have acted in the same way towards any member of her team about whom a complaint had been received (even if informal), so as to make them aware of the issue: therefore the hypothetical comparator would have been treated in the same way. We see no connection between the claimant's disability and Miss Atkin's decision to inform the claimant that she was under investigation. Therefore there has been no less favourable treatment and the claimant has not shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. The burden of proof does not shift to the respondent to show that discrimination did not occur and the claimant's claim in this regard fails.

2. *3.2.22: Insisted on sitting in with the Claimant's reviews with individual team members*

142. Miss Atkins did, at the very least, sit in on reviews with Matthew Wood around that time. The context for this is that Mr Wood had raised a complaint about the claimant and the claimant was taking Mr Wood through a performance process despite being a relatively new manager herself. She had also previously had an email exchange with Miss Atkins about how to manage that performance process. In those circumstances, we find that it was understandable that Miss Atkins chose to sit in on that review and would also find it understandable if she sat in on other reviews at that time. We appreciate that the claimant has viewed this negatively, but it could be viewed as a supportive measure to ensure the claimant was receiving the support she needed and protect her from unfounded allegations being made against her.

143. The hypothetical comparator here would be another member of Miss Atkins' team who had been in role for a similar length of time and about whom an informal complaint had been received. We find that Miss Atkins would have treated that comparator in exactly the same way and further see no link to the claimant's dyslexia. Therefore there has been no less favourable treatment and the claimant has not shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. The burden

of proof does not shift to the respondent to show that discrimination did not occur and the claimant's claim in this regard fails.

3. 28.2.22: the claimant attempted to build her relationship with Laura Atkins by arranging 1:1 meetings with her. She refused to attend them.

144. We have found that the claimant did attempt to set up some meetings, which Miss Atkins declined. The reason for declining the meetings was because she did not understand the meetings' purpose and/or because she was unable to make some of the dates/times. Whilst we have also found that it would have been advisable for there to have been 1:1 meetings, and for the parties to have discussed the matter further, we conclude that Miss Atkins actions in simply declining the meeting series and not having put in place her own 1:1s at that stage was simply reflective of Miss Atkins' management style and was not a personal reflection on the claimant. We therefore conclude that Miss Atkins would have treated a hypothetical comparator in the same way and furthermore we cannot see any link between the treatment and the claimant's dyslexia. Therefore there has been no less favourable treatment and the claimant has not shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. The burden of proof does not shift to the respondent to show that discrimination did not occur and the claimant's claim in this regard fails.

4. 1.3.22: comments about the claimant's spellings – pointing out spelling mistakes on numerous occasions

145. This occurred on one particular occasion, on 1 March 2022, at a meeting at which the claimant was doing a live presentation. The claimant was having clear difficulties with spelling that particular word, in front of a number of people including directors and senior managers. Having seen the claimant struggle to spell the word, Miss Atkins tried to assist the claimant by spelling it out loud for her. This was done in our view as a supportive measure and in order to enable the meeting to move on, and we have found that it would not have been possible for this to have been addressed privately given the live presentation mode. The claimant herself in evidence accepted at one stage that Miss Atkins probably did not mean anything by it.

146. The hypothetical comparator would be another employee who was in presentation mode and struggling to spell a particular word on several occasions. Miss Atkins would have corrected their spelling in the same way, and Mr Nivens confirmed in evidence that correcting spellings was a normal part of working life at the respondent. Therefore there has been no less favourable treatment and the claimant has not shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. The burden of proof does not shift to the respondent to show that discrimination did not occur and the claimant's claim in this regard fails.

5. Withdrawn

6. 3.3.22: denial of ad hoc requests for flexible working to accommodate medical appointments

147. We have found that there was no refusal to allow the claimant to attend medical appointments. Whilst the claimant was not permitted to work from home, this was on the basis that she would still have sufficient time to get to the appointment from the workplace given that the appointment was not until the evening and the respondent's policy means that employees could be flexible about starting early / finishing early in any particular day if they so wished.

148. As well as relying on the hypothetical comparator, the claimant has also said that she relies on Amy Greenwood as a comparator. Although she was not aware of this at the time that she specified her comparator, it is now known that Amy Greenwood is herself dyslexic (and that Miss Atkins was aware of this). Showing differential treatment to Ms Greenwood would therefore not assist the claimant (although we would add that the claimant has not in fact presented any evidence which shows that Ms Greenwood was treated any differently to herself).

149. We conclude that Miss Atkins would treat anyone who was in materially the same circumstances (i.e. with a medical appointment later in the day, and about whom concerns had been raised which meant that there was a clear benefit to having them in the office for closer supervision purposes) would have been treated in the same way. There has been no less favourable treatment and the claimant has not shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. The burden of proof does not shift to the respondent to show that discrimination did not occur and the claimant's claim in this regard fails.

    7. *16.3.22: meeting with Laura Atkins to explain about impact her actions were having on the claimant. Laura Atkins made no effort to work through or even discuss resolutions.*

150. We have found that a meeting did take place around this time, and that Miss Atkins raised concerns about the claimant missing deadlines at that meeting. We consider that the claimant was taken aback at this meeting as she had not realised prior to this point that there were issues relating to her performance. However, we have not found that Miss Atkins made no effort to work through or discuss resolutions. The claimant also did not reference her dyslexia at this meeting.

151. This meeting would naturally have been stressful and upsetting for the claimant given that she was not aware that Miss Atkins had concerns about her performance previously. In addition, we anticipate that Miss Atkins may have been "to the point" in her manner of presenting the issues to the claimant, as that is her management style. However, we consider that she would have treated any other employee about whom she had concerns in the same way and therefore the hypothetical comparator would have been treated in the same way. We also consider that the claimant has not identified any grounds on which the treatment of the claimant appears to be related in any way to the claimant's dyslexia, given that the claimant accepts that she did not inform Miss Atkins that her dyslexia was having any impact on her at that time.

152. Therefore, there has been no less favourable treatment and the claimant has not shown facts from which the Tribunal could decide, in the absence of any other

explanation, that discrimination has occurred. The burden of proof does not shift to the respondent to show that discrimination did not occur and the claimant's claim in this regard fails.

8. 18.3.22: Gate 2.5T project. Laura Atkins made disparaging comments and intimidated that the claimant was the reason the project was rejected with no basis or fact to support this

153. During the hearing, the claimant was unable to explain what the nature of the disparaging comments were or in what way they were because of her disability. Furthermore, Miss Atkins was in any case on holiday on that date. In those circumstances, the claimant has not shown any less favourable treatment and has not satisfied the first stage of the burden of proof. The claimant's claim in this regard fails.

9. (Undated): Following the claimant's return to work after an MRI scan due to her ongoing migraines, Laura Atkins stated "People with half a brain can still have great lives" and then laughed

154. We have found that this comment was made, but that it was in the context of describing a television programme which Miss Atkins had seen. The reason that Miss Atkins mentioned the TV programme was indeed because the claimant had told Miss Atkins about her own MRI scan, however this was simply Miss Atkins attempting to make general conversation about the topic by sharing what she thought was an interesting anecdote. We do not consider that it was specifically intended to indicate any viewpoint as to the claimant's prognosis or size of brain. The hypothetical comparator would be another employee who was going for an MRI scan for any reason and we conclude that Miss Atkins would have had the same conversation with that individual. Therefore, there has been no less favourable treatment and the burden of proof does not shift to the respondent.

10. 8.4.22: At a priority meeting called by Laura Atkins she shook her head and tutted disparagingly at the claimant for not responding quickly enough to her questions

155. We have found that this did not happen.

11. Withdrawn

12. 19.4.22: Executive QA Presentation: withholding information or delayed handing over information to make it harder for the claimant to complete projects

156. We have found that Miss Atkins had genuinely and inadvertently missed the original email about this matter. However, once she discovered the email she did allow sufficient time for the work to be completed, and we note that Ms Greenwood was also impacted similarly. She replied to requests for information promptly (factoring in weekends and bank holidays).

157. Whilst the delays did impact the two dyslexic employees in the team, we consider that this is not sufficient to demonstrate less favourable treatment or to shift the

burden of proof to the respondent to show that discrimination did not happen. It is clear from the evidence that any delays were due to either Miss Atkins' error (which would have been made regardless of who was working on the project) and/or the weekends/bank holidays (which would again apply regardless of who was working on the project). Therefore the hypothetical comparator would have been treated in the same way. There has been no less favourable treatment, the burden of proof does not shift to the respondent to show that discrimination did not occur and the claimant's claim in this regard fails.

13. Withdrawn

14. 28.4.22: Laura Atkins stated to the claimant that she treats her differently to others in the team

158. By this we have found that Miss Atkins meant that she considers every individual's circumstances and therefore does treat everyone in the team differently. We have taken into account the comments made by Rav Williams in the grievance investigation about how Miss Atkins would treat people differently, but that they did not believe this was related to dyslexia. Overall, we conclude that Miss Atkins does treat the claimant differently, as she does every member of the team, and that she would have made that comment to anyone in the team.

159. We also consider that, whilst the claimant has taken this comment to be a negative one, it can also equally be interpreted in a positive way. It can be said to be a good thing for managers to adopt a different style with each member of the team, to ensure that this factors in their own personal performance levels, approach and ways of learning. We do not consider it to be less favourable treatment. We also do not consider that this relates to the claimant's disability.

160. Therefore, there has been no less favourable treatment and the claimant has not shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. The burden of proof does not shift to the respondent to show that discrimination did not occur and the claimant's claim in this regard fails

15. Withdrawn

16. 2.5.22: During a 1:1 with Laura Atkins, the claimant told her the impact her behaviour was having on the claimant. Laura Atkins did not make any attempts to work out how to resolve this.

161. We have found that this meeting took place, but that it was on either 29 April 2022 or 6 May 2022. At that meeting the claimant did inform Miss Atkins of how she was feeling, but we have not found that she indicated that this in any way related to her dyslexia.

162. We have also found that Miss Atkins had offered to reduce the claimant's workload by taking a factory off her, which would amount to a potential way to resolve some of the claimant's issues. She also offered to refer the claimant to Occupational Health (which the claimant did not take forward). Therefore it is not correct to say that Miss Atkins did not attempt to resolve things.

163. We also conclude that Miss Atkins would have reacted in the same way to a non-disabled member of her team and that the hypothetical comparator (who would also have had performance and behavioural issues) would therefore have been treated in the same way. There has been no less favourable treatment and the claimant has not shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. The burden of proof does not shift to the respondent to show that discrimination did not occur and the claimant's claim in this regard fails

    17. 9.5.22: Laura Atkins started an informal performance improvement relying on inaccurate criticisms of the claimant's performance; namely (1) accusations of investigation against the claimant; (2) complaints from previous employee (3) accusations of other colleagues raising complaints against the claimant; (4) accusation that the claimant's voice carries across the office loudly and that she is louder than others. The claimant had already stated that she was not sleeping and Laura Atkins told her "this won't help then" and threw the performance plan on the table for the claimant to read.

164. We have found that this did happen, save that the performance plan was not thrown down onto the table and that the criticisms were not inaccurate.

165. We have considered whether Miss Atkins would have treated a non-dyslexic person who was underperforming both behaviourally and in relation to their core workload in the same way. We conclude that the commencement of the informal performance process was appropriate and that Miss Atkins would have done the same for any member of her team who was underperforming / about whom she had behavioural concerns in that way. We conclude that there has been no less favourable treatment in this regard.

166. However, we also conclude that the comment "this won't help then" was directly targeted at the claimant. We do not believe that Miss Atkins would have made the same comment to another member of her team who was underperforming and about whom she had behavioural concerns: the comment made reflects the frustration she felt at the claimant specifically. This comment does therefore amount to less favourable treatment.

167. We therefore turn to the question as to whether the claimant has shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. At this stage, the claimant had not asserted that any of the concerns raised about her were linked to her dyslexia. Whilst we can see that there can on occasion be a link between dyslexia and poor performance, in this case Miss Atkins would not have appreciated this given the claimant's comments at interview that she had overcome her dyslexia and the claimant's failure to draw Miss Atkins' attention to any of the difficulties she now says that she was having in that regard. In addition, the performance concerns were about the claimant's behaviour and ability to meet deadlines, and therefore on the face of it there was no obvious connection to her dyslexia.

168. We also consider that Miss Atkins' frustration with the claimant was due primarily due to the behavioural concerns (which we have seen no evidence to suggest

were linked to dyslexia and in fact the claimant said in evidence that they were not). In these specific circumstances, we conclude that the claimant has not shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. The burden of proof does not shift to the respondent and the claimant's claim in this regard fails.

18. Withdrawn

19. Withdrawn

20. 13.5.22: the claimant explained to Laura Atkins the impact her treatment of the claimant was having. Laura Atkins appeared to take pleasure in the claimant's suffering.

169. We have found that whilst Miss Atkins was exasperated by the claimant at this time, this was not a sign that Miss Atkins was taking pleasure at the situation. We have therefore found that this allegation as pleaded did not occur.

21. 18.5.22 and 20.5.22: 1. Laura Atkins purposely and wilfully excluded the claimant from feedback and information she needed to do her job, specifically in relation to the Executive Excavator Review and Excavator Strategy Review follow up

170. We have found that the claimant was not purposely and wilfully excluded, but rather than Miss Atkins took on certain work to assist the claimant so that she could focus on other matters. We conclude that Miss Atkins would have done the same for any member of her team who was struggling to meet deadlines and/or about whom she had performance concerns. Therefore, there was no less favourable treatment and the claimant has not shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. The burden of proof does not shift to the respondent and the claimant's claim in this regard fails.

22. 24.5.22: 1. Laura Atkins moved sessions that the claimant leads from Thursday to Tuesday to increase the pressure on the claimant whilst she was off sick and did not tell the claimant directly: the claimant found out from a team member

171. We have found that at this stage, the claimant was off sick and that Miss Atkins, in anticipation that she herself would need to conduct these sessions, moved them to accommodate her own diary commitments (pre-booked leave). Miss Atkins would have done the same in respect of any member of her team who was off sick. Therefore there was no less favourable treatment and the claimant has not shown facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. The burden of proof does not shift to the respondent and the claimant's claim in this regard fails.

172. Therefore, for all the reasons set out above, the claimant's claim for direct disability discrimination must fail.

<u>Indirect disability discrimination</u>

1. Did the respondent discriminate against the claimant by applying a provision, criterion or practice ("PCP") which is discriminatory in relation to the claimant's disability, dyslexia?

a. What was the alleged PCP relied on? The requirement to spell accurately and/or review information quickly.

173. We conclude that, given the nature of the respondent's business, there was in certain circumstances a requirement to spell accurately and/or review information quickly. Where work was being completed privately, an employee could take the time to review that work or ask someone to proof read it, however the claimant's role did involve some live amendments being made on Teams and presentations to wider groups and in those situations there would be a requirement to spell accurately and/or review information quickly.

2. Did, or would, the respondent apply the PCP to other persons with whom the claimant does not share the characteristic / same disability?

174. It would, as this would be a requirement for all employees in the claimant's role (along with various other roles within the respondent).

3. Did, or would, the PCP put, persons who share the same disability of dyslexia as the claimant at a particular disadvantage when compared with persons with whom the claimant does not share those characteristics / the same disability?

a. The claimant alleges the disadvantage is that due to her disability it takes her longer to spell accurately and review information

175. We conclude that, in this particular circumstance, it does place dyslexic persons at a particular disadvantage. However, we conclude that this is only in relation to the live presentations that employees would have to carry out on occasion, as for non-live presentations / other work there would be sufficient time for the employee to review and check their own work or ask someone else to assist them with that task.

176. The claimant was put at that disadvantage on that one occasion, on 1 March 2023.

4. Can the respondent show that it was a proportionate means of achieving a legitimate aim?

5. What is/are the legitimate aims relied upon?

a. The business expects that employees will be able to organise their work to meet internal and external deadlines

b. The business expects all work completed to be accurate / as accurate as possible first time (including the use of the spellcheck and grammar check tools available) in order to contribute to the commercial success of the business and to avoid further work to be done in correcting errors and/or unnecessary delays

177. We find that the first of the legitimate aims relied upon is not relevant to the specific scenario of live presentations. In relation to the second alleged legitimate aim, we conclude that this is a legitimate aim for the respondent as the nature of the respondent's business is such that accuracy is important and the nature of the claimant's role was such that she would present to senior managers and directors, where again accuracy would be important and if errors were made due to inaccurate information being provided, this could have consequences for the completion of projects on time (for example if dates were recorded incorrectly).

178. We next turn to the question of proportionality. Did the respondent do no more than was reasonably necessary to meet that legitimate aim? In all other scenarios, such as presentations being sent by email, there was time available for work to be checked and corrected, or for an individual to seek assistance. In the scenario of live presentations however, a solution needed to be found immediately. Here, Miss Atkins read out the spelling to the claimant, trying to assist her when she was struggling. If the claimant had raised a concern before the live presentation about the possibility of a spelling issue, then other solutions could have been explored, such as someone else leading the presentation. However, in reality, we are not confident that the claimant would have welcomed this, given that she felt pride in her role and was upset at the idea of work being removed from her more generally.

179. In circumstances where no concern has been raised by the individual, there is a genuine need for presentations to be worked on live, there is no obvious mechanism to reach the claimant privately during the presentation, and the claimant's manager assisted the claimant by spelling the word for her, we find that there was a proportionate means of achieving a legitimate aim. Therefore the claimant's claim for indirect disability discrimination fails.

<u>Discrimination arising from disability</u>

1. *The respondent has conceded that it knew that the claimant was a disabled person.*

2. *Was the claimant treated unfavourably?*

3. *Was this unfavourable treatment because of something arising in consequence of their disability?*

4. *Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?*

5. *What is the legitimate aim relied upon?*

Claimant alleges acts of unfavourable treatment are as follows (where allegations were withdrawn during the hearing we have indicated this):

i. *Informed the claimant that she was under investigation for a complaint made against her. In fact, as far as the claimant is aware, no complaint had been made 28.1.22*

180. As set out above, an informal complaint had been made and the claimant was informed of this. Whilst we have found that this was appropriate, we must conclude that it was also unfavourable treatment as we have no doubt that the claimant was upset by this information.

181. The claimant says that in respect of this allegation the "something arising" was her inability to spell accurately and/or work at speed processing information quickly. However, we conclude that this had nothing to do with the informal complaint raised against the claimant which related to her behaviour towards Mr Wood, and not her dyslexia or the impact of it on her. Therefore the unfavourable treatment was not because of something arising in consequence of her disability. The claimant's claim in this regard therefore fails.

ii. Insisted on sitting in with the claimant's reviews with individual team members 3.2.22

182. We have concluded that Miss Atkins did sit in on reviews with individual team members, as a result of the complaint that was received in relation to Mr Wood and because the claimant was taking Mr Wood through performance management at the time. We conclude that this was not in fact unfavourable treatment at all as it would protect the claimant from unfounded allegations and ensure that the performance management process was carried out correctly.

183. If we are wrong on that, the claimant again says that in respect of this allegation the "something arising" was her inability to spell accurately and/or work at speed processing information quickly. However, we conclude that this had nothing to do with Miss Atkins' decision to sit in on reviews. Therefore the unfavourable treatment was not because of something arising in consequence of her disability. The claimant's claim in this regard therefore fails.

iii. The claimant attempted to build her relationship with Laura Atkins by arranging 1:1 meetings with her. She refused to attend them. 28.2.22

184. We have addressed our conclusions above in relation to this factual allegation. The claimant clearly wanted Miss Atkins to attend these meetings and therefore her rejection of them was unfavourable treatment.

185. Here, the claimant again says that the "something arising" was her inability to spell accurately and/or work at speed processing information quickly. The reason why Miss Atkins rejected the invitations was because she did not understand their purpose and/or because she was unavailable, therefore the unfavourable treatment was not because of her inability to spell accurately and/or work at speed processing information quickly. The claimant's claim in this regard therefore fails.

iv. Comments about the claimant's spellings – pointing out spelling mistakes on numerous occasions. 1.3.22

186. We have found that Miss Atkins did correct the claimant's spelling during a Teams live presentation on 1 March 2022. As to whether this amounted to unfavourable treatment, in reality we believe that this was intended to be a

supportive measure, however we accept that the claimant felt aggrieved at this and therefore that she viewed it as unfavourable treatment.

187. The claimant says that the "something arising" in this case was again the inability to spell accurately and/or work at speed processing information quickly. In this scenario, we agree that this was something arising in consequence of the claimant's disability and that the unfavourable treatment was because of that.

188. We therefore turn to whether the respondent has justified its treatment of the claimant as a proportionate means of achieving a legitimate aim. The legitimate aims relied upon by the respondent are

    a) Completing work accurately / as accurately as possible first time (including the use of the spellcheck and grammar check tools available) in order to contribute to the commercial success of the business and to avoid further work to be done in correcting errors and/or unnecessary delays; and

    b) Providing appropriate supervision to ensure the proper performance of employees in their roles.

189. We reiterate that the specific context in which we have found that spellings were corrected was a live presentation to directors and senior managers. We conclude that the above were legitimate aims, as it was important that documents were accurate and that the meeting focussed on the core issues being discussed (therefore it was appropriate to try to move the meeting forward). The nature of the respondent's business is such that accuracy is important, as outlined earlier above.

190. We next turn to the question of proportionality. Did the respondent do no more than was reasonably necessary to meet that legitimate aim? As explained earlier, in the context of a live presentation an immediate solution needed to be found to enable the meeting to move forward. Miss Atkins could not privately contact the claimant as she was in the middle of the presentation with her screen in presenting mode. The claimant had not indicated in advance that she would be uncomfortable with having spellings correctly in this way or made any suggestion for an alternative mechanism for this. We conclude that reading out the spelling on this occasion was a proportionate means of achieving that legitimate aim, noting that on other occasions where not in live presentation mode Miss Atkins could seek to correct any spellings on a more private basis or the claimant could take time to proof read them herself. Therefore there was a proportionate means of achieving a legitimate aim and this claim fails.

    v. Withdrawn

    vi. Meeting with Laura Atkins to explain about impact her actions were having on the claimant. Laura Atkins made no effort to work through or even discuss resolutions. 16.3.22

191. We have found that the meeting which took place around this time was a meeting where Miss Atkins had raised concerns about the claimant missing deadlines, which the claimant had been taken aback by as she had not understood that

there were issues with her performance previously. We conclude that the content of the meeting would amount to unfavourable treatment, however we do not agree that Miss Atkins made no effort to work through or even discuss resolutions. We also conclude that although the claimant would have been anxious at that meeting and it would have been stressful for her, she did not suggest in any way that any concerns about her performance were connected to her dyslexia.

192. The claimant says that the "something arising" was again her inability to spell accurately and/or work at speed processing information quickly. In reality however, we conclude that the "something arising" was the claimant missing deadlines. We do not consider that the reason that the claimant missed deadlines was a consequence of her dyslexia but rather that she was not on top of her workload. We have found that the claimant's dyslexia was not the operative cause of her workload difficulties however we have acknowledged that it would have exacerbated her difficulties. Therefore, in some indirect sense, the unfavourable treatment was because of something arising in consequence of disability.

193. However, it is entirely appropriate for an employer to raise with any employee any issues as to missing deadlines, and there was no formal (or even informal) action taken at this stage. The claimant did not raise any suggestion that she was encountering any issues relating to her dyslexia and if she had done we think that Miss Atkins would have addressed that appropriately. Therefore, we conclude that raising this issue with the claimant for discussion was a proportionate means of achieving a legitimate aim, namely to ensure that deadlines were not missed and support employees to improve their performance. In raising the concerns informally at this stage, the respondent did no more than reasonably necessary to meet their legitimate aim: ignoring the issue would not have achieved the legitimate aim. In addition, by explaining the issue, this gave the claimant the opportunity to say that her dyslexia was causing her difficulties if this was the case: she did not do so.

vii. Gate 2.5T project: Laura Atkins made disparaging comments and intimated that the claimant was the reason the project was rejected with no basis or fact to support this 18.3.22

194. The claimant was not able to articulate what the disparaging comments were and Miss Atkins was on holiday on that date. This allegation therefore fails.

viii. Following the claimant's return to work after an MRI scan due to her ongoing migraines, Laura Atkins stated "People with half a brain can still have great lives" and then laughed (undated in earlier allegations, although listed as 3.4.22 in the List of Issues here)

195. We conclude that this was certainly not intended to be unfavourable treatment, but was what Miss Atkins thought was an interesting anecdote. We recognise that unfavourable treatment may occur event though the instigator had no intention to treat someone unfavourably, however for it to constitute unfavourable treatment the employee's belief that they have been put to a detriment / unfavourable treatment must be reasonable. In this case, we find that it was not.

196. Even if we are wrong on that point, the claimant says that the "something arising" in this case was migraines. We have accepted that the claimant's migraines could be exacerbated by her dyslexia, in that she would need to have increased concentration when looking at documents on screen, along with being exacerbated by stress.

197. We therefore turn to whether the unfavourable treatment was because of the migraines. Whilst there is an indirect link, in that it was because the claimant had an MRI scan (which was linked to her migraines) that the topic came up, the comment itself was not made because of the claimant's migraines, but rather because the topic of MRI scans had come up and Miss Atkins wanted to share what she saw as an interesting fact. We consider that this is too remote to constitute unfavourable treatment because of something arising in consequence of dyslexia.

198. Therefore the claimant's claim in this regard fails.

ix. At a priority meeting called by Laura Atkins she shook her head and tutted disparagingly at the claimant for not responding quickly enough to her questions 8.4.22

199. We have found that this did not happen as alleged. The claimant's claim in this regard must therefore fail.

x. Withdrawn

xi. Withdrawn

xii. Laura Atkins stated to the claimant that she treats her differently to others in the team – 28.4.22

200. As explained above, we have found that this comment means that each individual's circumstances and needs are taken into account (so, for example, that appropriate support can be provided based on individual needs). It does not mean that Miss Atkins' treats the claimant unfavourably because of her disability. We conclude that this does not amount to unfavourable treatment.

201. We also conclude that Miss Atkins' approach was due to her management style more generally, and was not because of the claimant's inability to spell quickly and/or work at speed processing information quickly. The treatment was therefore not because of something arising in consequence of disability. The claimant's claim in this regard therefore fails.

xiii. Withdrawn

xiv. During a 1:1 with Laura Atkins, the claimant told her the impact her behaviour was having on the claimant. Laura Atkins did not make any attempts to work out how to resolve this. 2.5.22

202. As outlined above, this meeting took place on either 29 April 2022 or 6 May 2022, and Miss Atkins did offer to reduce the claimant's workload by removing a factory,

and offered a referral to Occupational Health as a mechanism to try to resolve the situation. Therefore the allegation did not occur as alleged as Miss Atkins did attempt to work out how to resolve this.

203. In any case, in relation to the way in which Miss Atkins treated the claimant more generally, this was not because of the claimant's inability to spell accurately and/or work at speed processing information quickly.

xv. Laura Atkins started an informal performance improvement relying on inaccurate critcisms of the claimant's performance; namely (1) accusations of investigation against the claimant; (2) complaints from previous employee (3) accusations of other colleagues raising complaints against the claimant; (4) accusation that the claimant's voice carries across the office loudly and that she is louder than others. The claimant had already stated that she was not sleeping and Laura Atkins told her "this won't help then" and threw the performance plan on the table for the claimant to read. 9.5.22

204. The imposition of the IPIP was clearly unfavourable treatment. The claimant says that the "something arising" was again her inability to spell accurately and/or work at speed processing information quickly. Here, we note specifically that the claimant is referring to the issues addressed in Part A of the IPIP (rather than Part B), which are behavioural in nature rather than performance issues as such. These allegations did not arise out of the claimant's inability to spell accurately and/or work at speed processing information quickly (and the claimant quite correctly confirmed in evidence that they did not). Therefore the claimant's claim in this regard must fail.

205. We have found that the performance plan was not thrown down onto the table. In relation to the comment "this won't help then", we have found that this was said in this way because of Miss Atkins blunt management style. We do not consider that it was said because of the claimant's inability to spell accurately and/or work at speed processing information quickly. Therefore again this claim must fail.

xvi. Withdrawn

xvii. Withdrawn

xviii. The claimant explained to Laura Atkins the impact her treatment of the claimant was having. Laura Atkins appeared to take pleasure in the claimant's suffering 13.5.22

206. We have found that this did not occur as alleged.

xix. Laura Atkins purposely and wilfully excluded the claimant from feedback and information she needed to do her job, specifically in relation to the Executive Excavator Review and Excavator Strategy Review follow up 18.5.22 and 20.5.22

207. We have found that this did not occur as alleged.

xx. Laura Atkins moved sessions that the claimant leads from Thursday to Tuesday to increase the pressure on the claimant whilst she was off sick and did not tell the claimant directly: the claimant found out from a team member – 24.5.22

208. Whilst Miss Atkins did move these sessions, we have found that this was because the claimant was off sick and was to accommodate Miss Atkins' own diary as she would need to carry out these sessions in the claimant's absence. The treatment was therefore to ensure that the claimant's work was covered and was not unfavourable treatment.

209. In any case, the treatment was not because of the claimant's inability to spell accurately and/or work at speed processing information quickly, but rather because of Miss Atkins' diary commitments and the claimant's sickness absence. Therefore the claimant's claim in this regard fails.

210. The claimant's claim for discrimination arising from disability has therefore not succeeded.

<u>Failure to make reasonable adjustments</u>

i. The Respondent has conceded that it knew that the claimant was a disabled person.

ii. Did a provision, criterion or practice of the respondent put the claimant at a substantial disadvantage in comparison to persons who are not disabled?

a. What provision, criterion or practice does the claimant rely on? The requirement to spell accurately and review information quickly

211. We conclude that there is a requirement to spell accurately and review information quickly in relation to live Teams presentations. In other situations, there is a requirement to spell accurately however there would usually be time for an individual to proof read their document (or to request that someone else assist with this, as Amy Greenwood sometimes did). Other than in live Teams presentations, we have not found any particular requirement to review information quickly.

iii. What is the substantial disadvantage that the claimant alleges that they were put to as a result of the alleged failure(s)? The claimant alleges the disadvantage is that due to her disability it takes her longer to spell accurately and review information.

212. In assessing whether there was a substantial disadvantage, we bear in mind that the claimant prided herself openly on having in her mind overcome her dyslexia and we consider that she prided herself on not needing adjustments relating to her dyslexia.

213. In relation to the live Teams presentation in March 2022 which we have addressed above, this was the only occasion when this issue had to be addressed "in the moment" during the live Teams presentation. We consider that particular issue, which we have addressed above in more detail, was no more

than minor and therefore any disadvantage suffered was not substantial. Had this been a regular occurrence, that could have been a substantial disadvantage (and in that scenario the respondent might have explored whether any adjustments were required with the claimant if she had raised a concern about this): however we have concluded that this only happened once.

214. More generally, the respondent's requirement that spellings are generally accurate would place the claimant at a substantial disadvantage in that she was less likely to be able to spell words correctly on the first attempt.

iv. Did the respondent fail to take such steps as were reasonable in all the circumstances of the case, for it to have to take in order to avoid the disadvantage?

a. What reasonable steps does the claimant allege the respondent should have taken? Respondent to allow the claimant more time to review her spellings and any information provided. Further and/or in the alternative, any adjustment the Tribunal deems reasonable.

215. The claimant would have had spellcheck on her computer. In addition, the claimant could have asked a colleague, including Miss Atkins, to proof read documents for her: we heard that this was something that Amy Greenwood sometimes did because of her own dyslexia and Miss Atkins had offered this to the claimant. The claimant did so on one occasion but generally chose not to do so.

216. The claimant also generally had time to review her spellings: she would for example send draft reports to Miss Atkins in advance and Miss Atkins would provide comment. There were plenty of opportunity for corrections to be made, either through the claimant reviewing her work herself or through Miss Atkins reviewing it.

217. We also note that the claimant did not identify any adjustments that she wanted or needed during her employment. Whilst the duty to make reasonable adjustments rests with the respondent, we do feel that this indicates that the claimant herself did not want any particular adjustments to be made for her (and wanted to give the impression that her disability did not hold her back). We also consider in this circumstance that the respondent could not reasonably have been expected to know that the claimant would be placed at the disadvantage.

218. Although in relation to live Teams presentations we have already concluded that any disadvantage was not substantial, if we are wrong and it was, then we consider that Miss Atkins was making a reasonable adjustment by spelling the word for the claimant during the meeting.

219. There was no failure to make reasonable adjustments on the respondent's part.

<u>Disability related harassment</u>

Did the respondent engage in unwanted conduct related to disability.

Did that conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

In deciding whether conduct has the effect outlined above, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

The claimant says the unwanted conduct was as follows:

i. Informed the claimant that she was under investigation for a complaint made against her. There was no complaint raised against her to the best of her knowledge. 28.1.22

220. We have concluded that the claimant was informed that she was under investigation, but that there was an informal complaint raised against her. This was unwanted conduct, however it did not relate to the claimant's disability in any way. This allegation therefore fails.

ii. The claimant attempted to build her relationship with Laura Atkins by arranging 1:1 meetings with her. She refused to attend them. 28.2.22

221. Again this happened, and was unwanted conduct because the claimant had sought to put these meetings in the diary. However, again, the reason why Miss Atkins rejected the invite was not related to the claimant's disability: it was related to her not understanding the purpose of the meeting and/or her other diary commitments. This allegation therefore fails.

iii. Comments about the claimant's spellings – pointing out spelling mistakes on numerous occasions. 1.3.22

222. There was one meeting where spelling mistakes were pointed out. We accept that, although done with the intention of assisting the claimant, it was unwanted conduct from the claimant's perspective.

223. The conduct did relate to the claimant's ability to spell accurately which was linked to her dyslexia. It does therefore relate to the claimant's disability.

224. Miss Atkins' aim in correcting the spelling was to support the claimant and enable the meeting to move forward, and not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her. We accept that it did however have that effect. The claimant's perception was that she saw the correction of her spelling as unhelpful and humiliating in front of senior colleagues. However, taking into account the circumstances of the case, this was a live Teams presentation where there was no obvious alternative mechanism to alert the claimant to the correct spelling and it was important that the word was spelt correctly and that the meeting moved forward. We conclude that it was not reasonable for the conduct to have that effect given that it was an isolated incident. The claimant's perception is extreme and the claimant herself said at one stage that she thought Miss Atkins was trying to be helpful. We also note that Mr Niven explained that others have their spellings corrected. We do

not conclude that the conduct reached a sufficient degree of seriousness in order to constitute harassment. The claimant's claim in this regard therefore fails.

iv. Withdrawn

v. Meeting with Laura Atkins to explain about impact her actions were having on the claimant. Laura Atkins made no effort to work through or even discuss resolutions. 16.3.22

225. This meeting was about Miss Atkins' concerns that the claimant was missing deadlines as outlined above. The content of the meeting would have been unwanted, although we have not found that Miss Atkins made no effort to work through or even discuss resolutions.

226. We have also found that the concern related not to the claimant's dyslexia but rather to the claimant having missed certain deadlines, which we have found was because the claimant was not on top of her workload more generally. This was not related to her disability and the claimant's claim in this regard fails.

vi. Gate 2.5T project: Laura Atkins made disparaging comments and intimated that the claimant was the reason the project was rejected with no basis or fact to support this 18.3.22

227. We have found that this did not happen as alleged.

vii. On the claimant's return to work following one MRI scan, Laura Atkins stated "People with half a brain can still have great lives" and then laughed (undated)

228. We have found that this comment was made, and the context for it was set out above. Although it was intended to be an interesting anecdote, we accept that from the claimant's perspective it was unwanted. As to whether it related to the claimant's disability, in reality it related to the fact that the claimant had attended an MRI scan (which was the context for the conversation), which in turn was related to migraines, which in turn were linked in some way to the claimant's disability. The link is remote, but we accept there is a link to the claimant's disability and so it was related to her disability, albeit not because of it.

229. The comment did not have the purpose of violating the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her: it was intended to be an amusing comment about someone else who had an MRI scan, rather than any suggestion about the claimant herself. However, we accept that it did have that effect as the claimant perceived the comment to be offensive.

230. Looking at all the circumstances and whether it was reasonable for the comment to have that effect, we find that it was not. It was an innocent conversation and it was not reasonable for the claimant to make the (significant) leap to assuming that Miss Atkins was insinuating that she herself had half a brain. Therefore the claimant's claim in this regard must fail.

viii. At a priority meeting called by Laura Atkins she shook her head and tutted disparagingly at the claimant for not responding quickly enough to her questions 8.4.22

231. We have found that this allegation did not occur as alleged.

ix. Withdrawn

x. Laura Atkins would withhold information from the claimant and change the dates of important sessions that the claimant was due to lead to put her under further pressure: April/May 2022

232. We have found that this did not happen. There was an inadvertent slight delay in giving information on one occasion however sufficient time still remained to complete the piece of work, this was not deliberate on Miss Atkins' part and did not relate to the claimant's disability.

xi. Withdrawn

xii. Laura Atkins stated to the claimant that she treats her differently to others in the team 28.4.22

233. Whilst we have found that a comment to this effect was made, and accept that in the claimant's mind such comment was unwanted, it was unrelated to the claimant's disability and would have been said to any person in Miss Atkins' team. The comment was intended to convey that Miss Atkins treats everyone differently so as to meet their individual needs (not their disability related needs, but their needs more generally).

234. Even if this did relate to the claimant's disability, the claimant's case is essentially that she should have been treated differently by Miss Atkins because of her dyslexia, and that she was not, and therefore in this regard we would conclude that even if the comment had the effect of violating the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her, it was not reasonable for the conduct to have that effect in all the circumstances of the case.

xiii. During a 1:1 with Laura Atkins, the claimant told her the impact her behaviour was having on the claimant. She did not make any attempts to work out how to resolve this. 2.5.22

235. We have found that a discussion did take place albeit on a slightly different date as outlined above, but that the claimant did not refer to her dyslexia at that meeting. We have also found that Miss Atkins did offer to remove work from the claimant to ease her workload and offered to refer her to Occupational Health, therefore it is not the case that Miss Atkins did not make any attempts to work out how to resolve this. Therefore this allegation did not occur as alleged. We also do not conclude that any treatment of the claimant at this meeting was related to her disability.

xiv. Providing an inaccurate performance improvement plan 9.5.22

236. Whilst we have found that the IPIP had a poor tone and presentation, we have not found that it was inaccurate. We consider that the matters raised in the IPIP were valid concerns, albeit not handled as well as they could have been. Therefore this allegation did not occur as alleged.

xv. Withdrawn

xvi. The claimant explained to Laura Atkins the impact her treatment of the claimant was having. Laura Atkins appeared to take pleasure in the claimant's suffering 13.5.22

237. We have found that this allegation did not occur as alleged.

xvii. Laura Atkins moved sessions that the claimant leads from Thursday to Tuesday to increase the pressure on the claimant whilst she was off sick and did not tell the claimant directly: the claimant found out from a team member – 24.5.22

238. As explained previously, this was not done to increase the pressure on the claimant but rather because the claimant was off sick, Miss Atkins reasonably anticipated that she would need to conduct these meetings in the claimant's absence and Miss Atkins was due to be on leave herself on the date on which the meetings were originally scheduled.

239. The conduct appears to have been unwanted by the claimant however we see absolutely no basis for the conduct to have been unwanted (and it would not be reasonable for the claimant to have felt harassed by this conduct). This did not relate to the claimant's disability and therefore the claimant's claim in this regard fails.

240. The claimant's claim for disability related harassment therefore fails.

<u>Constructive dismissal</u>

Was the respondent in repudiatory breach of the implied term of trust and confidence by reason of:

i. Laura Atkins bullied the claimant, undermined her and continuously discriminated against her whilst she was the claimant's line manager.

241. We have concluded that Miss Atkins did not discriminate against the claimant whilst she was her line manager. We also conclude that she did not undermine her and did not bully her. Whilst we do criticise the contents of the IPIP and whilst we do also consider that Miss Atkins' management style was not always conducive to supporting the claimant to improve her performance, this did not amount to bullying but rather to what we find to be an overly blunt management style. In fact, we also conclude that Miss Atkins should have taken action earlier to manage the issues set out in Part A of the IPIP (i.e. she failed to recognise the severity of the issues quickly enough): i.e. rather than finding that Miss Atkins raised those matters unfairly, we conclude that she did not raise them sufficiently formally which led the claimant to fail to understand the severity of her actions.

ii. The respondent failed to adequately support the claimant and/or resolve the situation in the grievance outcome and recommendations.

242. Addressing the grievance outcome first, we consider that the grievance outcome was fair and reasonable, and was supportive in nature. We are surprised that the claimant has interpreted the grievance outcome negatively as we have found it to be a well reasoned and impartial outcome, which partially upheld some of the claimant's allegations. In particular, to the extent that the IPIP was poorly drafted, it recognised this and made recommendations for that to be resolved. It was not appropriate for the grievance to have recommended that the IPIP be discontinued entirely (as the claimant wished) because the matters that formed the basis for the IPIP were of genuine (and understandable) concern to the respondent: in fact the criticism in relation to Part A (which we share) is that those matters should have been escalated sooner.

243. We recognise that the claimant, following her verbal discussion shortly prior to receiving the written outcome, may have been inadvertently given the impression that the grievance outcome was more in her favour than was actually the case, however we do not see this as a significant failing on the respondent's part. We also note that the grievance outcome and recommendations made a number of suggestions for how matters could be resolved. Whilst the claimant may not have welcomed the suggestion of mediation or a new role for example, they were valid suggestions for the claimant to consider and there was nothing in the outcome that suggested that Miss Atkins was an inappropriate person to remain as the claimant's manager, particularly if Miss Atkins took on board the feedback provided. In addition, the claimant had the opportunity to appeal that outcome but chose not to do so.

244. We find it unfortunate that the claimant has interpreted the grievance outcome so negatively, as in our view it presented a real opportunity for the claimant and Miss Atkins to reset their relationship, to have a frank and honest discussion about any adjustments the claimant might desire in her role and to find a way to move forward. We understand that the claimant did not think that the IPIP was fair, however the underlying issues did need to be addressed and were valid concerns, and Mr Niven addressed the elements that were unfair by recommending that it be rewritten.

245. Looking next at whether the respondent failed to adequately support the claimant more generally. Whilst we do not consider that the respondent failed to support the claimant in relation to her disability, we do consider that the respondent failed to support the claimant more generally due to the manner of the interactions between Miss Atkins and the claimant. For example, it would have been advisable for Miss Atkins to have had more regular catch ups (through 1:1s or otherwise) with the claimant – both generally and especially once she started to become concerned about the claimant's performance.

246. We also conclude that Miss Atkins did not take appropriate steps to recognise that the claimant was becoming distressed by the performance concerns that were being raised by her and to (a) adopt a more sympathetic manner in dealing with the claimant and (b) discuss with the claimant what support she could provide the claimant to help her to improve and understand what was required of

her (noting for example that the IPIP simply said that the claimant should understand the requirements of her role). The working relationship between them was strained, and this contributed to that. We would note however that equally we consider that the claimant was not always open with Miss Atkins about how she was feeling and what she felt she needed to thrive in her role. In short, the relationship between the two was strained and they both had a role to play in that.

247. However, whilst there were shortcomings in the support provided to the claimant, we conclude that there was no repudiatory breach of the implied term or trust and confidence. The claimant has not shown that the respondent had, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. Miss Atkins' management style was blunt and her treatment of the claimant somewhat clumsy in certain respects, but it did was not calculated or likely to destroy or seriously damage trust and confidence. In addition, the nature of the industry and role in which the claimant worked is a pressurised one in which there are important deadlines and targets to meet and this cannot be avoided. We would add that the claimant was relatively friendly with a member of the respondent's HR team and could have gone to that person for support if she did not feel that Miss Atkins was supporting her appropriately.

Did the claimant's resignation arise from one breach of a "last straw" in a series of breaches and if so did that last straw contribute to the breach of trust and confidence in a manner that was more than trivial? The claimant contends that the final straw was the inadequate way the respondent dealt with her grievance with particular reference to the grievance outcome.

248. We agree that the claimant's resignation occurred because she was unhappy with the grievance outcome. However we have concluded that the manner in which the respondent dealt with the grievance and/or the grievance outcome was not in fact inadequate.

249. It is fair to say that the grievance investigation was not entirely perfect, as is often the case with internal investigations: it is rare to see one where no criticism whatsoever can be levelled at the grievance hearer. On this occasion for example, it would have been prudent for notes to have been taken of the interview with Rav Williams, and he did not interview Ms Greenwood or Mr Price. However, we see these as minor, trivial, issues in an otherwise thorough and well reasoned grievance investigation and outcome. We do not consider that his contributed to a breach of contract on the respondent's part: the claimant's core concern was that she felt Miss Atkins was raising concerns about her behaviour and performance which were not valid: but that was not the case. The reason why the claimant resigned was not because her colleagues had not been interviewed, but because the IPIP would remain in place and there was no finding that Miss Atkins had bullied her.

Did the claimant resign without delay thus affirming the breach?

250. The claimant resigned approximately two weeks after receiving the grievance outcome. Although we were shown that she prepared the draft resignation letter

on 12 July 2022 and did not submit her resignation until 21 July 2022 this is not a significant period of time when considered in the round and we do find that the claimant resigned without delay after receiving the grievance outcome. However, as outlined above we have not found the grievance outcome to be a repudiatory breach and/or a last straw in a series of breaches which contributed to a breach of trust and confidence in a way that was more than trivial.

251. Therefore, for all of the above reasons, the claimant was not constructively dismissed. We would however wish to add that we have found that the way in which the claimant was treated was not without fault: the performance concerns were not handled appropriately with her and the relationship between herself and Miss Atkins was certainly strained. However, this was in our view insufficient (either on its own or when viewed collectively with other allegations) to constitute a breach of the implied term of trust and confidence.

Wrongful dismissed / breach of contract

252. The claimant chose not to work her notice period and (particularly given our finding that she was not constructively dismissed) can have had no entitlement to be paid for her notice period. This claim must fail.

Conclusion

253. For all the reasons set out above, the claimant's claims do not succeed. By way of final observations, we would add that this is an unfortunate case, where relationships have become strained on both sides due to neither party communicating clearly and supportively with the other. We consider that if either party had set out clearly to the other what their exact concerns were at an earlier stage, matters could have been resolved. In addition, both Miss Atkins and the claimant have on occasion communicated in a blunt and/or inappropriate way (in Miss Atkins' case, with the claimant and in the claimant's case, with other members of her team as set out in Part A of the IPIP). To be clear however, Miss Atkins treatment of the claimant, whilst inappropriate on occasion, was not sufficient to breach the implied duty of trust and confidence (either individually or as a last straw) and was not discriminatory.

Employment Judge Edmonds

Date 13 December 2023