EMPLOYMENT TRIBUNALS

Claimant: **Mr T. Shevlin**

Respondent: **John Wiley and Sons Limited**

Heard at: **East London Hearing Centre** **On: 11-12 January 2024**

Before: **Employment Judge Massarella**
Members: **Ms T. Jansen**
Mr S. Woodhouse

Representation
Claimant: Represented himself
Respondent: Mr M. Bignell (counsel)

REASONS

Oral judgment and reasons having been announced at the hearing, and written judgment sent to the parties on 15 January 2024, and written reasons having been requested by the Respondent in an email of 25 January 2024, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

Procedural history

1. The claim form was presented on 28 July 2023, after an ACAS early conciliation period between 31 May 2023 and 12 July 2023. The Claimant complained of disability discrimination and 'unfair treatment at work'.

2. In the claim form the Claimant referred to an incident at a meeting with his manager, Ms Roycroft, to discuss his end of year review rating and wrote as follows:

> 'I had not seen or discussed the comments with Becs, while these comments were overall positive, there was unprofessional comments regarding my spelling which was very hurtful. I took this very personally as I have Dyslexia. I did not feel my disability was impacting my job performance as it was never discussed with me, and I manage it as best as I can. I felt hurt and disappointed that I did not have an opportunity to discuss these comments or show the reason for my spelling mistakes with Becs as the was no follow-up discussion. I can only hope this comment regarding my "messy work", or my very clear but manageable disability would not have impacted my end of year performance rating. Despite this, I decided not to raise it as I was leaving the business anyway.'

3. In its response, the Respondent denied discrimination. The Claimant admitted that he had never informed anyone at the Respondent, including his manager or HR, about a disability. To the extent that that his manager referenced typos in his performance rating, it was for his personal development.

4. A preliminary hearing for case management took place before EJ Volkmer on 19 October 2023. She clarified the issues. The Claimant confirmed that his discrimination claim related solely to Ms Roycroft's comments in the end of year review. The disability relied on was dyslexia. There were two claims: one of discrimination because of something arising in consequence of disability; the other of harassment related to disability; the issue of disability was still live, as was the question of knowledge of disability.

5. The Judge recorded the following:

> 'There is reference in the Claimant's claim form to various other incidents which took place which he characterised as unfair treatment. I asked the Claimant whether these were relied on as part of the disability discrimination claim, and he confirmed they were not. I explained to the Claimant that there was no legal basis for a complaint of unfair treatment, particularly in circumstances where the Claimant did not have two years' service with the Respondent.'

6. By letter dated 16 November 2023, the Claimant wrote that he wished to seek:

> 'an amendment to the wording regarding my disability in the list of issues. As detailed in my medical reports, my disability falls under the category of neuro diversity, specifically ADHD with dyslexia traits. I wish to clarify this for the Tribunal, as these conditions are all covered under the same neuro diversity umbrella and the Equality Act 2010 as a mental impairment.'

7. By letter dated 17 November 2023, the Respondent objected to the amendment. By letter dated 15 December 2023, EJ Gardiner directed that the amendment application would be determined by the Employment Tribunal conducting the final hearing.

The hearing

8. We had an agreed bundle of over 300 pages and witness statements from the Claimant and Ms Rebecca Roycroft (vice president, global engagement and client operations). The size of the bundle was disproportionate for a single allegation of discrimination; we told the parties that we would only read documents to which we were taken in cross-examination.

9. At the beginning of the hearing, Mr Bignell (Counsel for the Respondent) told the Tribunal that, in light of a medical report which the Claimant had produced, the Respondent accepted that the Claimant was a disabled person by reason of ADHD alone, but it did not accept that there was a causal connection between his ADHD and the making of spelling or grammar errors (i.e. what the Claimant described as 'dyslexia traits'), nor did it accept that the Respondent had actual or constructive knowledge of the Claimant's disability.

10. On the first day, the Tribunal read the statements and a helpful opening skeleton argument which Mr Bignell had prepared; we then heard evidence from the two witnesses. Mr Bignell cross-examined the Claimant in some detail; the Claimant

had prepared written questions, which he sensibly kept focused on the central issue. At the end of his questions, I prompted him to ask some further questions, to make sure that he had put the core issues to Ms Roycroft.

11. We then heard closing submissions: the Claimant had prepared a short, written document, which we read carefully, and which he supplemented with brief oral submissions; Mr Bignell addressed us orally, working carefully through the legal and factual issues. We are grateful to them both for ensuring that the evidence and submissions were completed within one day.

12. On the morning of the second day, the Tribunal deliberated and reached its judgment. The parties attended at 2 p.m., when an oral judgment and reasons were given.

Findings of fact

13. The Tribunal makes the following unanimous findings of fact on the balance of probabilities.

14. The Respondent is a UK subsidiary of John Wiley & Sons Inc., a publishing company with its principal place of business in the United States. The Respondent provides tactical training to young people, geared towards specific technical jobs, and aims to place them with some of the world's largest financial institutions, technology companies and government agencies.

15. The Claimant has ADHD. He did not disclose this to the Respondent at any point during his employment. He did say - but not until after the alleged act of discrimination and in the course of a grievance procedure - that he had dyslexia, and that was the impairment initially relied on in this case. He does not now assert in these proceedings that he has dyslexia, rather that he manifests what he calls 'dyslexia traits', as a result of his ADHD.

16. The Respondent has policies in place prohibiting harassment, discrimination and bullying; it has procedures in place to facilitate complaints about such conduct, which can be made to a manager, to HR, or through a confidential telephone hotline.

17. The Claimant commenced employment on 30 May 2022 as a senior HR operations manager. Initially he reported to Mr Thomas Seymour (senior director, HR). In November 2022, he began reporting to Ms Roycroft. The Claimant had already discussed with Mr Seymour his wish for promotion and an increased salary and continued to raise the matter when Ms Roycroft began managing him.

18. Ms Roycroft was supportive and, although she did not think he was ready for promotion, she did agree that his salary should be increased. We were taken to an email dated 25 April 2023, in which she advocated on his behalf for a substantial pay rise, which was duly awarded. We note that this email postdates the date on which she inserted the comments which the Claimant now alleges amounted to harassment and had the purpose of subjecting him to a hostile work environment.

19. From time to time, the Claimant made errors of spelling and grammar in written documents. On one occasion he sent out a job description to an external candidate, which contained so many errors that Ms Roycroft recalled it and redrafted it before sending it out again.

20. Ms Roycroft conducted a mid-year review in February 2023. In the document recording Ms Roycroft's conversation with the Claimant, she made the following comment:

> 'one final note which is a small thing but needs a bit of focus is avoiding shorthand/rushed notes in Teams channels or emails when there are two broad groups. There are often a lot of typos which can seem messy.'

21. The Claimant saw that document; he did not complain about it, let alone allege that it was a discriminatory comment. He said he felt 'too humiliated' to do so. We think that improbable, given his acceptance of the feedback which we refer to below. We also note that the Claimant did not allege discrimination in relation to this comment as part of this case, which is surprising given its similarity to the later comment in respect of which he did allege discrimination.

22. The time came for Ms Roycroft to conduct the end of year review for her team. She agreed the approach she would take with the team; this departed slightly from the usual procedure; her aim was to give the team greater opportunity to discuss the review before she submitted it. She proceeded by inviting the Claimant to submit his own assessment first, which he did on 23 March 2023; there was then a meeting on 28 March 2023, at which his comments were discussed. At that meeting Ms Roycroft told the Claimant that his self-assessment did not correctly reference/address the company values. The Claimant asked her to retrieve it so that he could submit an amended version; she agreed.

23. At that meeting she raised her concerns again about the Claimant's spelling and grammar. In the amended version of his comments, which he submitted on 4 April 2023, the Claimant wrote this:

> 'taken on feedback on when constructing and delivering emails, to be more mindful and spellcheck and also grammar.'

24. Once she received this amended version, Ms Roycroft inserted her own assessment on 4 April 2023, which was glowing and full of praise for the Claimant's work (for example, 'he is such an excellent colleague, hard-working, diligent and always keen to get things fixed'). It resulted in a rating of 'achieved'. She submitted the document on the same date for finalisation and calibration, which took place centrally.

25. We find that the Claimant's account in his witness statement of how this process unfolded, in which he is highly critical of Ms Roycroft, is incompatible with the contemporaneous documents to which we were taken. There is no evidence, as the Claimant now suggests, that he was dissatisfied at the time with the way the process was conducted, or that Ms Roycroft failed properly to carry out her side of the process at any point. Specifically, the Claimant alleged in his witness statement that Ms Roycroft added the comments he regards as offensive after

his resignation. She did not: once she had submitted the review for finalisation, she had no further input into it.

26. In the review document, and in response to the specific question 'what could the colleague have done differently to achieve or exceed their goals?', Ms Roycroft wrote this:

> 'When Thomas is very busy he has a tendency to rush the work which he is doing, which can culminate in typos in emails, use of capitals when they shouldn't be as well sentences that don't make sense. As his manager I am generally okay with this, as I know it is because he is super busy and is rushing to get onto the next thing. However I don't think this is good for his personal brand when dealing with stakeholders from across the globe as it can be seen as messy work.'

27. Those are the comments which the Claimant alleges amounted to disability arising discrimination and harassment related to disability.

28. Ms Roycroft has dyslexia. She suspected that the Claimant might also have dyslexia. After she had submitted the end of year review, at a one-to-one meeting on 2 May 2023, Ms Roycroft told the Claimant that she had dyslexia and asked him whether it was something that he had considered being tested for. The Claimant simply said that he did not have dyslexia and the conversation ended. He did not tell her that he had ADHD or that he believed that any issues with spelling or grammar were a consequence of his ADHD. The Claimant acknowledged that, before June 2023, he did not make any form of disclosure about a disability to anyone within the Respondent organisation. When he did disclose it, he disclosed dyslexia not ADHD.

29. There was no suggestion by the Claimant that Ms Roycroft should have made further enquiries about the reason for his errors, and certainly no suggestion that she should have referred him to occupational health. In the circumstances, the Tribunal thinks it would have been inappropriate for her to do so, given the Claimant's unequivocal denial that he had dyslexia and the relatively minor nature of the criticism.

30. On 4 May 2023, the Claimant resigned on notice, his last working day to be 26 July 2023. He had already secured another job. The Claimant suggested in his written closing submissions that his resignation was prompted by Ms Roycroft's comments in the mid-year review. We think that unlikely. There is no evidence that the Claimant was upset at the time by the comments in the mid-year review; he did not complain about them, and later said that he would take the comments on board and address them.

31. We note that the Claimant gave a different explanation in his witness statement, in which he wrote that he resigned 'after not receiving any feedback from Ms Roycroft regarding my role review benchmark data or end of year comments'.

32. We think the most likely explanation for the Claimant's resignation is that the lack of an immediate prospect of promotion within the Respondent organisation prompted him to look elsewhere for career advancement, and that he was successful in his search.

33. The Claimant received the end of year review on 9 May 2023. He did not complain about the comment which he now characterises as discriminatory. He went on holiday. He did not raise it when he returned on 23 May 2023.

34. He did raise a complaint about Ms Roycroft on 25 May 2023, but it was about a different matter altogether (her handling of his leaving the business). The email makes no reference to comments in the end of year review. He sent another email on 30 May 2023 raising a formal grievance, which also did not mention comments in the end of year review.

35. It was not until a document on 1 June 2023 that there was any reference to the end of year review. In that document, providing further details of the grievance, he mentions 'unprofessional comments regarding my spelling which was very hurtful, I took this very personally as I have dyslexia.' The Claimant accepts that this was the first time he mentioned any form of impairment. In the same paragraph he said: 'I did not have an opportunity to discuss these comments or share the reason for my spelling mistakes with [Ms Roycroft] as there was no follow-up discussion.' As will be apparent from our earlier findings that was misleading: Ms Roycroft had raised the issue in the middy-ear review; she had discussed it at the meeting during the end of year review and at a meeting on 2 May 2023; she had specifically asked the Claimant if dyslexia might be an issue and he had denied it.

36. The Claimant attended a grievance hearing on 2 June 2023. There was a brief mention of the end of year review comment in that meeting, but the Claimant accepts that he said that it was not the 'crux of the grievance'. In cross-examination the Claimant accepted that it was difficult for him to maintain that the end of year review comment caused him the extreme level of distress he now describes when it was barely mentioned in the documents generated during his employment, especially given that he had said that it was not the crux of his grievance.

37. Ms Roycroft attended a meeting about the grievance on the same day. The note of that meeting records her repeating that she thought the Claimant might be dyslexic.

38. Probably because of the Claimant's reference at the meeting to the comment not being the crux of his grievance, it was not dealt with in the grievance outcome. If the Claimant had thought that was a material omission, the natural thing to do would have been to make it one of his grounds of appeal. He did not mention it in his appeal letter. He did raise it verbally at the meeting and again asserted (wrongly, as we have already found) that there had been 'no discussion' between him and Ms Roycroft about the issue of errors.

39. The Claimant deals at length in his witness statement with the events after his resignation. We do not need to go into them in any detail in this judgment because there are no claims of unlawful conduct in relation to them. We were taken to some documents from that period, which were relevant only to the extent that they cast light on the single act of alleged discrimination; we have already referred to them.

The law

Discrimination arising from disability: s.15 EqA

40. S.15 EqA provides as follows:

> **(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

41. The correct approach to a claim of this sort was considered by the Court of Appeal in *City of York Council v Grosset* [2018] IRLR 746 *per* Sales LJ (at para 36 onwards):

> **'36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.**
>
> **37. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" ...**
>
> **38. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something" ….'**

42. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant influence on the unfavourable treatment, and so amount to an effective reason for it (*Pnaiser v NHS England* [2016] IRLR 170 *per* Simler J at [31]).

43. The Code of Practice offers the following explanation of what is meant by 'something arising in consequence of disability' for the purposes of s.15 EqA:

> **[5.9] The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.**

44. The meaning of 'unfavourable treatment' was considered by the Supreme Court in *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2019] ICR 230 (at para 27):

> **'… in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.'**

45. As for the knowledge requirement in S.15(2) EqA, while the statute does not require knowledge of the precise diagnosis of the disability in question, it does require knowledge (actual or constructive) of the facts constituting the disability. In other words, that the individual is suffering from a physical or mental impairment which has substantial and long-term adverse effects on his or her ability to carry out normal day-to-day activities (*Pnaiser* at [69]).

46. It is then necessary to look to the employer's defence of justification. S.15(1)(b) EqA provides that the unfavourable treatment may be justified, if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question must be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (*Allonby v Accrington & Rossendale College & Others* [2001] ICR 1189 CA).

47. Justification requires the Tribunal to conduct an objective balancing exercise between the discriminatory effect and the reasonable needs of the employer (*Ojutiku v Manpower Services Commission* [1982] ICR 661 CA *per* Stephenson LJ at 674B-C, and *Land Registry v Houghton & Others* UKEAT/0149/14 at [8-9]). It will be relevant for the Tribunal to consider whether any lesser measure might have achieved the employer's legitimate aim (*Naeem v Secretary of State for Justice* [2014] ICR 472).

48. The time at which justification needs to be established is the point when the unfavourable treatment occurs (*Trustees of Swansea University Pension and Assurance Scheme v Williams* [2015] ICR 1197 EAT at [42]). When the putative discriminator has not considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification, although the test remains an objective one (*Ministry of Justice v O'Brien* [2013] UKSC 6 at [47-48]).

<u>Harassment related to disability</u>

49. Harassment related to disability is defined by s.26 EqA, which provides, so far as relevant:

> **(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.**
>
> **…**
>
> **(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.**
>
> **(5) The relevant protected characteristics are—**
> **…**

> **disability**
> **…**

50. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

51. The Court of Appeal in *Pemberton v Inwood* [2018] ICR 1291 gave guidance on the correct approach to these provisions (*per* Underhill LJ at [88]):

> **'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'**

52. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered (in the equivalent context of the formulation in s.3A Race Relations Act 1976) by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 *per* Underhill P. at [22]:

> **'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'**

53. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at [47] held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

54. He further held (at [13]):

> **'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.'**

55. The EAT in Betsi Cadwaladr University Health Board v Hughes [2014] UKEAT/0179/13/JOJ at [12], referring to Elias LJ's observations in Grant, stated:

> **'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

Conclusions

The Claimant's disability

56. The Claimant describes his disability as 'ADHD with dyslexia traits'. In his application to amend his claim, he asserted that this was confirmed by the medical reports. In fact, there is only one medical report, dated 5 November 2023. The assessment was carried out by Dr Letizia De Mori (psychologist/neuropsychologist) on 31 October 2023.

57. The Respondent does not dispute that the Claimant has ADHD; it does not dispute that he made spelling and grammatical errors. The dispute is as to whether there was any causal connection between the two; whether there is sufficiently cogent evidence that the errors were as a result of, or connected with, an aspect of, or a consequence of the Claimant's ADHD.

58. Dr De Mori's report concludes that the Claimant has ADHD, but not that he had a condition or impairment called 'ADHD with dyslexia traits'. There was no finding or conclusion that the Claimant had dyslexia or any traits of dyslexia, which in this case we understand to mean the making of spelling or grammatical errors. We considered whether there was any other evidence.

59. The Claimant deals with the question briefly in an email of 17 November 2023, providing further information to the Tribunal. This email simply makes an assertion that a stressful environment had an impact on his 'day-to-day brain function', which in turn caused him to make 'minor errors in identifying grammar errors or typos, affecting my typing and reading skills'.

60. The Claimant also deals with it briefly in his witness statement, asserting that:

> 'my ADHD manifests as hyper brain activity. Due to the stigma surrounding ADHD, I'm hesitant to label myself as such in a professional setting. However, those who work with me may notice that I make spelling errors, which are unintentional but still a result of my ADHD. To make it easier to attributable disability, I use the term dyslexia instead'.

61. We went back to the medical report to see if there was cogent evidence to confirm the causal connection asserted by the Claimant between ADHD and spelling/grammatical errors or cogent evidence that the errors were connected with a mental impairment. We note that the Claimant had commissioned this report specifically for the purposes of these proceedings. We assume that the Claimant explained that purpose to Dr De Mori. We note as follows.

    61.1. In the summary of the account given by the Claimant to Dr De Mori there is no reference to the Claimant having said that he made spelling or

grammar errors, let alone that he thought that this was an aspect of any disability. He did say that, as a child, he had had 'a hard time learning to read at school, often has problems academically, gets nervous or afraid to take exams', but there was no specific reference to spelling or grammar.

61.2. The Claimant mentioned 'having family members with difficulty in spelling, dyslexia and dyspraxia'. That is the only reference to dyslexia in the whole report. Dr De Mori does not diagnose the Claimant as having dyslexia or traits of dyslexia.

61.3. Dr De Mori concluded that the Claimant's reading, comprehension, sentence composition and word reading was average.

61.4. Her overall conclusion was that 'the language and communication modalities were shown to be in line with his chronological age, even if on some occasions the comprehension was not functional, but with the right support it was better.'

61.5. The Claimant pointed to a passage in the report in which Dr De Mori stated that 'Thomas shows some symptoms of inattention. This may cause academic difficulty or difficulty at work and affect daily activities'. This generalised comment does not identify spelling or grammar as a particular issue.

61.6. In cross-examination, the Claimant accepted that nowhere in the body of the report or in its conclusions did Dr De Mori concluded that the Claimant's spelling or grammatical errors were a result of his ADHD.

62. This was the only medical evidence that was put before us. The Claimant did not disclose any other records. His explanation was that they were in Ireland and that he had not had time to access them within the timeframe of the proceedings. We were sceptical about that. It appeared to us that, for whatever reason, the Claimant had chosen not to access or rely on any earlier medical records. We infer that he made that choice because they either did not exist or were unlikely to support the case as he now puts it in these proceedings.

63. We consulted the Equal Treatment Bench Book, in case there was anything in it which might assist us. There is a section on ADHD, but the bench book reminds the reader that it is 'an introductory overview for the purpose of considering reasonable adjustments and should not be relied on as a medical analysis'.

64. We record that we did not observe any signs in the Claimant's conduct of the proceedings that he has a significant difficulty with spelling or grammar, either orally or in writing.

65. Having regard to all the evidence before us, we are not satisfied that the Claimant has shown that, in his case, the making of spelling and grammatical errors was caused by his ADHD or was a direct or indirect consequence of it or any other mental impairment. The Claimant clearly believes that there is a causal link but, in our judgment, he has not discharged the burden on him to prove that link in the context of these proceedings.

Knowledge of disability

66. The Claimant accepted that no one in the Respondent organisation, including Ms Roycroft, knew or could reasonably have known that he had ADHD.

67. He still contended that Ms Roycroft had constructive knowledge of it.

68. The most that can be said is that Ms Roycroft was concerned about the spelling and grammar errors made by the Claimant and suspected that he might have dyslexia; she did not know whether he had it or not; he denied that he did. She later repeated her concern that the Claimant may have dyslexia in the course of the grievance procedure.

69. Suspicion is not knowledge. In circumstances where the Claimant explicitly denied that this was an issue for him, we have concluded it would not have been a reasonable step for her to make an occupational health referral.

70. In any event, the Claimant does not assert that he has dyslexia; the disability relied on by him is ADHD. The Claimant says that his spelling and grammar errors were an aspect of his ADHD. It appears that he is arguing that because Ms Roycroft knew about the errors, and because he believes the errors were a result of the ADHD, she had constructive knowledge of the disability. That argument must fail because we have already concluded that the Claimant has not discharged the burden on him to show that his spelling and grammar errors were connected with his ADHD or any other impairment.

71. Consequently, and for that reason alone, the Claimant's claim of disability arising discrimination under section 15 of the equality act must fail, because a claim of that sort requires the alleged discriminator to have actual or constructive knowledge of the disability relied on by the Claimant, which Ms Roycroft did not have.

72. Similarly, because we have concluded that the errors of grammar and spelling were not related to the Claimant's ADHD, any comments about those errors cannot logically be related to the Claimant's ADHD. For that reason alone, the Claimant's claim of harassment related to disability under section 26 of the equality act 2010 must fail.

73. For completeness, and if we are wrong in our conclusions that no causal link is been established between the disability and the errors, we go on briefly to consider the other limbs of each of the two causes of action.

74. Dealing first with the disability-arising claim, we have concluded that the making of the comments did not amount to unfavourable treatment. Firstly, the comments were not in any way false or inaccurate. It is not in dispute that the Claimant had repeatedly made significant presentational errors in documents. He had agreed to take the feedback on board and address it.

75. Secondly, the comments were made in the context of a template question specifically designed to elicit comments about flaws or weaknesses in performance. The making of spelling and grammar errors in professional documents is, self-evidently, a weakness. Ms Roycroft explicitly stated that she did not have a problem with it herself, but that it might be perceived negatively by external stakeholders. That is obviously true. We are satisfied that Ms

Roycroft's intention or purpose in making the comment was exclusively directed at assisting the Claimant to improve and to eliminate a relatively minor weakness in his performance; she was trying to head off potential problems which might arise for the Claimant. In the context of a glowing appraisal, the making of this single observation, cannot in our judgment be regarded as adverse treatment. If, as he now says, the Claimant felt 'devastated, hurt and profoundly upset … humiliated and ashamed' as a result of the comments, we consider that that response, and that sense of grievance, to be unjustified having regard these anodyne comments. In our judgment, there was no unfavourable treatment.

76. We have already concluded that the Claimant has not shown that the errors arose in consequence of his disability.

77. If we are also wrong about that, we are satisfied that the making of the comments was in pursuit of the two legitimate aims which the Respondent relied on; and that the making of the comments was reasonably necessary to achieve them. If a manager cannot be explicit about a weakness in performance, there is a risk that an entirely well-meant warning will not be taken on board by the employee.

78. Insofar as the Claimant was offended by the comment, and assuming for a moment (contrary to our conclusions above) that the comment was discriminatory, we simply do not accept the Claimant's account of the discriminatory impact on him. We think it is exaggerated. He had not previously objected or reacted negatively in any way to the raising of these concerns. If it was the word 'messy' which offended him, any offence was minor and was outweighed by the reasonable business needs of the Respondent to ensure that communications sent outside the business were properly presented.

79. As for the claim of harassment related to discrimination, we are prepared to accept that the comments were 'unwanted' from the Claimant's perspective: most employees would prefer not to have weaknesses pointed out.

80. It follows from our conclusions above that the Claimant's suggestion that it was Ms Roycroft's purpose to violate his dignity or subjecting him a hostile, intimidating, degrading or offensive environment ('the proscribed environment') has no foundation in reality. The purpose of the comments was to remind him of an area in which he needed to improve to progress in his career.

81. As for whether the comments had the prescribed effect, we remind ourselves of the observations made in the authorities. The EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 *per* Underhill P. at [22], quoted above (substituting 'disability-related' for 'racially slanted').

82. It will be will be apparent from our conclusions above that we do not accept that the Claimant's subjective reaction to seeing the comment was as serious as he now says. Even if we are wrong about that, and the Claimant was deeply humiliated and offended by the comments, viewed objectively, we consider it was not reasonable for the comments to have that effect; if that was his reaction, it was an unreasonable overreaction.

83. In short, Ms Roycroft's comments do not begin to approach the very high threshold for harassment.

84. For all these reasons, the Claimant's claims of disability discrimination are not well-founded and are dismissed.

Employment Judge Massarella
Date: 22 February 2024