



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr Gary Nelson

AND

Respondent

Achieve Together Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin

ON

22, 23 and 24 July 2024

EMPLOYMENT JUDGE N J Roper

MEMBERS

Mr I Ley
Ms S Long

Representation

For the Claimant: In person

For the Respondent: Mr D Jones of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims of disability discrimination are not well-founded, and they are all hereby dismissed.

RESERVED REASONS

1. In this case the claimant Mr Gary Nelson claims that he has been discriminated against because of a protected characteristic, namely disability. The claim is for discrimination arising from disability, because of the respondent's failure to make reasonable adjustments, and harassment. The respondent concedes that the claimant is disabled, but it contends that there was no discrimination.
2. Adjustments for the Claimant:
3. The claimant requested the provision of a notetaker to assist him to record the evidence given during the hearing. The Tribunal Service was not in a position to provide a notetaker, and the claimant was unable to provide a friend to assist. He was concerned that he might be at a disadvantage because of his disability in not having access to notes of the evidence as it was given. We therefore allowed the claimant's request for him to record the proceedings himself, following his agreement that the recording would be used for his private purposes only, as an adjustment for his

- disability. Both parties will have the right if they wish to access a full transcript of the proceedings in due course, as explained at the end of this Judgment.
4. We also reassured claimant that he was able to take regular breaks during the hearing if he thought that this would assist. In addition, at the claimant's request the end of the evidence we afforded him sufficient time to reconsider the evidence by replaying his recording to assist him in preparing his closing submissions.
 5. The Evidence and Credibility:
 6. We have heard from the claimant. For the respondent we have heard from Mr Colin Jull, Ms Tracey Parrock and Mr Scott Hemming.
 7. There were a number of occasions upon which the claimant's evidence was vague and inconsistent, and in addition it was not consistent with the contemporaneous documents in the agreed bundle of documents before us. Furthermore, there were a number of complaints raised about the claimant's conduct by a variety of staff which the claimant continued to assert were all dishonestly fabricated. He effectively asserts that there was a conspiracy of former managers and colleagues who have colluded in fabricating complaints in order dishonestly to manufacture his dismissal for conduct related reasons, when he says the real reason for his dismissal was because he was disabled. This is a serious allegation of gross misconduct against a number of former colleagues and managers, without a shred of evidence to support it. This affected the claimant's credibility. On the other hand, the evidence which we have heard from the respondent's witnesses was measured and sensible, and entirely consistent with the contemporaneous documents before us. For these reasons whenever there was a dispute between the evidence of the claimant and that of the respondent, we preferred the respondent's version of events.
 8. Bearing in mind the above, we found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
 9. The Facts
 10. The respondent company Achieve Together Ltd is a registered care provider in the West of England. It owns and operates Highdowns, which is a residential home in West Cornwall for adults with autistic spectrum conditions, moderate to severe learning disabilities, and complex needs ("the Home"). The Registered Manager at the Home at the relevant times was Mr Colin Jull, from whom we have heard. The structure of staff in the Home is one of volunteers, Support Workers, Senior Support Workers (referred to as "Seniors"), Deputy Managers, and the Registered Manager. They refer to their service users as People We Support. Given the disabilities of their various service users is not surprising to find that the staff are sympathetic and supportive to those with disabilities.
 11. The claimant is Mr Gary Nelson. He was employed by the respondent as a Support Worker from 28 December 2022. He did not survive his probationary period and was dismissed on 10 May 2023. The respondent says that this was because of the claimant's conduct during his short period of employment.
 12. The claimant is a disabled person by reason of a speech and language impairment which the claimant describes as similar to dyslexia. He has had this impairment since childhood, and it has an adverse effect on his speech and pronunciation. This effect is substantial in the sense that it is more than minor or trivial. Nonetheless the claimant was computer literate and able to use computers and IT support, and he had his own Amazon tablet.
 13. The claimant applied for the position of Support Worker with the respondent at the end of October 2022. The claimant supplied a detailed written CV setting out his career history, which included his experience working as a graphic designer, illustrator and print finisher and page layout designer. It confirmed that he had been educated to degree level, and that he had a BA honours degree in Graphic and New Media Design. He also had experience in the horticultural industry. Under the heading Skills, the

- claimant set out a long list of his skills and aptitudes including: "Computer literate, Microsoft Office and Adobe."
14. Mr Jull interviewed the claimant on 4 November 2022. The claimant explained to Mr Jull that he had a learning disability. Mr Jull noted that the claimant was disabled but he can recall no further information being discussed at that stage. They did however discuss the respondent's induction process and the requirement to undertake training which included both general training for CQC requirements, a more specific training tailored to the respondent. Mr Jull offered the claimant employment, and this was confirmed in a letter dated 28 November 2022. This offer letter made it clear that the claimant would be required to complete some e-learning courses within the first five days of employment covering five modules (safeguarding adults, fire awareness, health and safety, first aid, and MCA), and to complete Care Certificate e-learning over the first 12 weeks. The claimant's employment was also subject to a probationary period.
 15. The claimant was engaged to work part-time, and generally worked two shifts per week. The claimant commenced his first shift as a Support Worker with the respondent at the Home on 28 December 2022. Mr Jull and the claimant exchanged emails about training on 3 and 4 January 2023. Mr Jull wrote: "if you haven't yet, then you should receive an email from Access Workspace - this will give you the credentials to sign up for your online training and also to attend any webinar face-to-face training that you either book yourself or I have booked you on. You can also download the app Access Learning once you've set up your log in and complete e-learning and attend training via your phone. You need to complete all e-learning by the end of your three months induction ... You do get paid for completing e-learning at home so please ensure your training hours are inputted onto the rota." The claimant replied: "I don't own or use a smart phone nor a suitable tablet either so unable to access the "app". So do I access the online training using a computer instead and when and where then do I do these online training etc?" Mr Jull replied: "You can do your training at work, you can either come in on a day off and get paid to complete it, or when time is allowing on shift, a Senior or Manager can set you up on a laptop/desktop to get this completed."
 16. Mr Scot Hemming, from whom we have heard, is a Senior who worked at the Home. He was responsible for the claimant's induction which he completed whilst the claimant shadowed him. He explained the requirements of the job and his duties and answered any questions which the claimant had. He explained that there was a need to fill in daily diaries for the service users which the respondent supported because this was a legal requirement. The claimant suggested that he would struggle with this because of his disability, but without going into any further detail. In order to support the claimant with completing these daily diaries Mr Hemming arranged for Seniors to sit down with the claimant in the office so that they could write up the relevant notes as the claimant dictated them. The claimant later suggested that the Seniors were not happy with this arrangement and asked if he would be able to type up the notes instead. There was no objection to this, and Mr Hemming helped to ensure that the claimant had access to the three desktop computers and between two and three laptops which were available to use artwork at any one time.
 17. Mr Hemming also helped the claimant with regard to the mandatory learning requirements. He assisted the claimant to log into the respondent's computers and to set up his e-learning. He remained in the room with the claimant so that if he needed assistance, he would be able to explain a section or give more detail. The various training modules contain written information and videos, and employees are able to work through these at their own pace. The e-learning modules contain all the information required to complete the test, and it was possible to take the test as many times as was needed.
 18. Mr Hemming recalls that there were only a few occasions when the claimant actually attempted to do the e-learning which he was required to undertake. He would have time set aside to do it but usually declined, and on a number of occasions walked away from the training once it got to the test section. In addition, a number of colleagues

reported to Mr Hemming that the claimant had told them that he would not complete the e-learning, and that he had no intention of attending any webinars. These webinars are small group sessions held virtually where the training is delivered by an individual to the other participants. The claimant continued to decline prompts from various Seniors to complete his training.

19. Mr Hemming also had other issues with the claimant's conduct and dealt with a number of complaints from colleagues, and he witnessed other examples of unacceptable conduct by the claimant. These included making personal comments about the weight of other staff members and some service users; the way he communicated with female staff; making inappropriate advances towards the Deputy Manager Stephanie Beard-Morby; and speaking to service users about growing marijuana on the respondent's grounds.
20. Miss Tracey Parrock, from whom we have heard, was another Deputy Manager at the Home at the time. These various conduct issues had been fed back to her, and by email dated 24 January 2023 she sought advice from the respondent's HR department. That email was copied to Mr Jull and Ms Beard-Morby. She stated: "I'm raising some concerns regarding Gary Nelson and suitability for the role of Support Worker. He completed his two-week induction process ... During his time here we have several concerns raised regarding his conduct such as his lack of interaction with the people we support, unable to follow direction, rudeness and refusal to complete paperwork ... He continually refuses to complete as he "has a disability". Unfortunately, he won't disclose his disability and checking his paperwork nothing has been declared. He appears to be very opinionated regarding our PWS diagnoses ... Gary refuses to complete any paperwork. When asked by staff and myself his response is "I don't write so I can't do them". When asked why, his response is "my disability" ... He has invaded personal space of other staff members leaving them very upset and unsettled ... Due to the staff complaints which have been raised in supervisions and refusal to meet basic tasks in his job description I don't feel he fits the requirements of the support worker role."
21. Subsequently on 24 January 2023 there was an incident in a cottage at the Home when a service user assaulted the claimant by lunging at him and hurting his face.
22. On 7 February 2023 another member of staff then reported in writing a further incident namely that the claimant had been verbally aggressive to Janet, a Senior on duty. He stated: "he was verbally aggressive ... he was repeatedly asked to step back and give personal space, he argued with her about the legalities of lateral flow testing and would not allow her to explain.
23. On the same day (7 February 2023) the Deputy Manager Ms Beard-Morby reported another incident of insubordination by the claimant by email to HR. She stated that the claimant "refused to look after the key or work with the PWS due to a previous incident. I asked if he would clean the cottage, but he said no as it involves being around the PWS he had an incident with. I asked about completing daily diaries and he said he doesn't do them due to his disabilities. He will not work anywhere else in the cottage or support the other PWSs that live there".
24. There was then a Probation Review Meeting on 16 February 2023 which the claimant attended with Miss Naomi Paul (a Supervisor), and Miss Parrock (who took notes). Ms Paul asked the claimant to explain his learning disability so the respondent could ensure that they were in a position to offer effective support. She asked the claimant whether he had a specific "health condition". The claimant refused to answer and complained that the respondent was not allowed to ask him these questions. He became aggressive, but Ms Paul remained calm. Ms Paul tried to explain on a number of occasions that the respondent wanted to be able to help him, but they needed to understand his needs. There had been no detailed information given during the recruitment phase, and Ms Paul wanted the claimant to explain the nature of his disability and how it affected him at work. This was effectively the main aim of the meeting. There was certainly no intention on the part of Ms Paul or Miss Parrock to cause any upset or offence to the claimant. On the contrary, they were re trying their

- reasonable and responsible best to ascertain the true position in order to help and support the claimant.
25. Ms Paul also asked the claimant about his conduct, and she raised the matter of how the claimant spoke to some of the service users. Two particular instances were referred to. On one occasion the claimant had referred to a service user with schizophrenia as “mental” and that that person “shouldn’t be here”. Another service user had dementia and the claimant said that they “should be in an old peoples’ home”. The claimant was informed that this kind of language was inappropriate.
 26. Ms Paul sent an email on 27 February 2023 to HR, copied to Mr Jull and Miss Parrock, confirming the content of the meeting. She confirmed that she had reassured the claimant that the training tests are not timed based on that there was no time limit on them. She also confirmed that the claimant did not specify his disability and “refused to show us a report that describes his disability as he felt this was intrusive.” She concluded: “I feel that even with further support GN will struggle with the full aspect of the role and the understanding required to ensure that people we support are safeguarded. His lack of transparency around his disability will make it difficult for Colin to implement any further reasonable adjustments as GN appears to be unsure of what these would be for him within the role.”
 27. Following this meeting the respondent arranged for the claimant to be able to use a laptop so that he could type up his daily notes so that they could then be printed off and put in the relevant daily books. Despite asking for the laptop, and being provided with it, the claimant then refused to use it when it was made available. He again said that this was because of his learning disability. They therefore reverted to the system where he dictated to others what he had done, so that they could write it up. In addition, Ms Paul also made arrangements for supervisors to attend and support the claimant with his training needs, but he refused to engage. Mr Hemming also continued to try to help with training, but again the claimant refused to engage. The claimant’s conduct towards other members of staff remained a concern, and particularly the female staff, because he made inappropriate comments including asking them to go on dates.
 28. On 23 February 2023 Ms Beard-Morby reported another concern that the claimant had told a service user that he did not need new curtains because they would be a fire risk and would burn too quickly. This caused the service user a great deal of distress.
 29. On 7 April 2023 the claimant emailed Mr Joel requesting a private meeting. He stated that: “the subject of the matter is indirect discrimination - Equality Act 2010 ... As this about myself, training and other important matters. Will explain at the meeting.” Mr Jull agreed, and arranged the meeting for 18 April 2023, and informed the claimant that a representative from HR would be present because of the subject matter, to which the claimant agreed. Mr Jull also emailed the management team on 12 April 2023 asking for feedback ahead of a probation review meeting which was pending for the claimant.
 30. The meeting took place as arranged. The claimant raised concerns about training, Mr Jull reassured him there was no time limit in place to complete the training, and it was not possible to fail the training, and that the claimant would continue to receive support to undertake it. The claimant also complained about the daily diaries and explained the trouble he had writing with poor spelling and poor grammar. He complained about the arrangement under which she was being helped by someone else to write diaries by claiming this had been agreed without discussion. Mr Jull confirmed that recording and reporting was a legal requirement and invited the claimant to suggest any other ways in which he could continue to be supported. The claimant complained that he considered the meeting with Ms Paul and Miss Parrock to have been offensive and had raised malicious accusations against the claimant, including that he had mocked a service user. He complained that they had asked to see a report from a specialist in connection with his condition.
 31. Mr Jull explained that if any employee had a health condition that it would obviously be beneficial for the respondent to know the diagnosis in order to assess how best to support that employee. The respondent remained ready and willing to implement any necessary adjustments. However, as confirmed in a subsequent email on 21 April 2023

- to HR, Mr Jull reported: "I've had a chat with Gary about being referred to Occupational Health and he has stated that doesn't agree with it as there is nothing wrong with his health. I tried to explain that he has expressed that he has a disability and that how he feels the support that we have given is not sufficient enough, and that OH will help him with this to ensure we support him and implement the correct measures ... I really feel that Gary is not working with us and is becoming quite problematic in the service, especially after the statement received in my previous email along with all the other concerns."
32. On 21 April 2023 Mr Jull also received another message of complaint from a staff member which Mr Jull understood to be about the claimant (the claimant disputes this). This employee reported: "just need to tell you about a disturbing incident that happened to me this morning, the new guy, I can't remember his name, came up to me in the kitchen and whispered that I'm an untrustworthy person for talking about him behind his back ..."
 33. On 24 April 2023 Mr Jull also had another conversation with the claimant about the possible referral to Occupational Health. He followed his previous email to HR on 21 April 2023 with confirmation that the claimant was continuing to refuse to allow the referral to Occupational Health, and he asked HR how to proceed.
 34. On 30 April 2023 there was then the incident at the Home where the claimant became aggressive and confrontational with Janet Thornton. This incident caused so much concern and distress to service users and other members of staff that Ms Paul was telephoned, and she was called to the Home to deal with the incident.
 35. On 2 May 2023 an incident occurred where the claimant entered the bathroom of a service user whilst he was naked in the shower which caused distress to the service user.
 36. By letter dated 2 May 2023 the claimant then raised a formal grievance which was headed: "Indirect Discrimination - Equality Act 2010", and which was addressed to the respondent's Chief Executive Officer. This letter ran to just over 11 closely typed pages, and which complained of lack of support in respect of the claimant's disability.
 37. On 9 May 2023 Mr Jull wrote to the claimant to invite him to a Probationary Review Hearing on 10 May 2023 to discuss unprofessional conduct in the workplace. The letter made it clear if the claimant's performance and conduct during his probationary period was deemed to be unsatisfactory then that could result in his immediate dismissal. At that time the complaints against the claimant in respect of his conduct included (but are not limited to) the following matters.
 38. At the very early stages of his employment Miss Parrock had occasion to reprimand the claimant informally about his inappropriate use of language. One service user suffered from schizophrenia, and the claimant described that person as "mental", and one who "shouldn't be here". Another service user had dementia, and the claimant commented that they "should be in an old peoples' home". Other female colleagues did not wish to be left alone with the claimant because they found him to be intrusive, and he would ask them to go on dates. Miss Parrock was sufficiently concerned about the claimant's attitude to fear that there was a real risk that a service user might come to harm in the claimant's care.
 39. There was one incident on 30 April 2023 which was reported by Janet Thornton to the deputy manager Stephanie Beard-Morby on 3 May 2023. The claimant had stood over Janet Thornton by pointing his finger at her and acting aggressively and speaking very loudly. This altercation was witnessed by others, including Kai Allen, who heard the altercation which went on for more than 20 minutes. Mr Allen was very concerned because service users were clearly becoming upset, and he called a manager for support. After this incident had concluded, the claimant approached Mr Allen and sat opposite him, and stared aggressively, and accused Kai Allen of "dobbing him in".
 40. Mr Allen that also reported an earlier incident when the claimant discussed growing marijuana on the respondent's site with a service user and on another occasion the claimant had point-blank refused to support a service user by refusing to make any food at teatime. He also reported that the claimant had offended a transgender service

- user by telling them that they were a woman, and not accepting that they were a man, and refusing to acknowledge that this was inappropriate and offensive, even after the position had been explained.
41. Ms Parrock reported that the claimant had just simply refused to allow his photograph to be taken to be placed on the “who’s who board” of staff members so that service users can identify them.
 42. The Deputy Manager Stephanie Beard-Morby are also reported that the claimant had acted inappropriately by asking her out on a date and then making her feel uncomfortable with inappropriate comments about her dress. She also reported that when she tried to help the claimant to complete his daily diaries, he had simply refused and declined to say what he had done with the service users. Mr Hemmings had also reported that a service user had complained that the claimant had entered his room while he was naked in the shower, and he had frightened that service user. The claimant had also made a number of inappropriate personal comments about female staff members’ weight, and also the weight of some service users. In addition, the claimant had informed other members of staff that he intended to refuse to attend any webinar training even though he knew he was required to do so. Mr Hemming also gave evidence that he had witnessed similar behaviour to the complaints raised above by other members of staff and these numerous complaints could not be said to be either malicious or fabricated.
 43. The respondent’s training systems and records are all computerised, and the system enables them to check whether or not their employees have completed the necessary training. The claimant asserts that he completed at least 15 hours training in his own time, but we find that that is not true. It is clear from the respondent’s records that as at 18 March 2023 the claimant had only ever undertaken two training sessions, which he had not completed: the first on 13 February 2023 had only lasted 44 seconds, and the second on 14 February 2023 lasted for five minutes and seven seconds. An internal email dated 16 March 2023 included the records of training completed by all the respondent’s employees. This confirmed that the claimant had completed 0% of the required training. There was only one other employee who had also failed to complete any of the required training, namely Shane Webber. He failed to survive his probationary review and his employment was terminated.
 44. Mr Jull was unaware that the claimant had raised his formal grievance to the Chief Executive Officer. He decided that the claimant had not passed probationary period and decided to terminate his employment. Mr Jull wrote to the claimant by letter dated 10 May 2023 to confirm that the claimant had not met the standards which the respondent requires for employees in his position. He specifically referred to three areas: “(i) professional conduct and attitude in the workplace and concerns of behaviour in front of the people we support; (ii) complying with the company’s service training needs so as to be able to fulfil the job role effectively; and (iii) refusal of support from the management team and company to enable you to conduct your role effectively and input proportional reasonable adjustments.” He confirmed that the claimant’s employment was terminated with immediate effect on 10 May 2023, but that payment would be made in lieu of notice together with any accrued annual leave.
 45. The claimant commenced the early conciliation process with ACAS on 12 May 2023 (Day A), the Early Conciliation Certificate was issued on 23 June (Day B). The claimant presented these proceedings on 5 July 2023.
 46. Having established the above facts, we now apply the law.
 47. The Law
 48. This is a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 (“the EqA”). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from a disability, failure by the respondent to comply with its duty to make adjustments, and harassment.
 49. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental

impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.

50. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this 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.
51. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first and third are relevant in this case, namely that 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, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. The third requirement in section 20(5) is also potentially relevant in this case, namely a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid. A failure to comply with these requirements is a failure to comply with a duty to make reasonable adjustments. A person discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
52. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
53. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
54. We have considered the cases of Environment Agency v Rowan [2008] IRLR 20 EAT; Newham Sixth Form College v Sanders EWCA Civ 7 May 2014; Archibald v Fife Council [2004] IRLR 651; Sheikholeslami v University of Edinburgh [2018] IRLR 1090; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; Royal Bank of Scotland v Ashton [2011] ICR 632 EAT; Project Management Institute v Latif [2007] IRLR 579 EAT; Pnaiser v NHS England [2016] IRLR 170 EAT; Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14; City of York Council v Grosset [2018] IRLR 746 CA; Sheikholeslami v University of Edinburgh [2018] IRLR 1090; Robinson v Department for Work and Pensions [2020] IRLR 884; Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] IRLR 306 SC; Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564 Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v the Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry [2011] EWCA Civ 769; Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT; Unite the Union v Nailard [2018] IRLR 730 CA. We

take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

55. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015) (“the ACAS Code”).
56. The Issues to be Determined:
57. The claimant’s claims to be determined by this Tribunal were agreed at a case management preliminary hearing and set out in the Case Management Order of Employment Judge Volkmer dated 17 January 2024 (“the Order”). The claimant’s claims were limited to two claims, namely an alleged failure to make adjustments, and harassment related to the claimant’s disability, which were set out in an Agreed List of Issues in that Order. There was then a number of contested applications between the parties, which resulted in a further case management preliminary hearing on 3 June 2024 before Regional Employment Judge Pirani. By an order dated 3 June 2024 the claimant was permitted to include the act of dismissal in his list of allegations of harassment. At this hearing Counsel for the respondent Mr Jones volunteered that it seemed in the interests of justice to note that this claim relating to dismissal was more properly pursued as a claim for discrimination arising from disability under section 15 EqA. The respondent did not oppose an amendment to that effect that provided that the respondent was not precluded from giving evidence on its defence of justification to the extent that one was necessary.. We agreed that it was in the interests of justice to allow that amendment, and we thank the respondent for that concession. We deal with each of these claims in turn.
58. The Claimant’s Disability:
59. An unusual aspect of this claim is the claimant has preferred at all times not to disclose the name of his disability, and he has refused to engage with the respondent’s attempts to discuss the nature of his disability and any resulting disadvantage which the respondent wished to address in order to support the claimant. In any event what we do know is that the disability relied upon by the claimant is a speech and language impairment which he describes as being similar to dyslexia. For the reasons explained in our findings of fact above, we find that at all material times the claimant suffered from a physical or mental impairment which had a substantial and long-term adverse effect on the claimant’s ability to carry out normal day to day activities, which include speech and concentration. There was a substantial adverse effect because it was more than minor or trivial, and there was a long-term effect because it had lasted for at least 12 months.
60. The respondent has conceded that the claimant was a disabled person by reason of the impairment relied upon at all material times (from 28 December 2022 until 10 May 2023). We agree with that concession, and we so find. The respondent does not concede that it knew, or ought reasonably to have known, that the claimant was a disabled person at the material time, nor that the claimant suffered any substantial disadvantage by reason of that disability.
61. Harassment:
62. Turning now to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B’s dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator’s intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).
63. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: “In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a

tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (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 other circumstances - subsection (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.

64. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunal's 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." Similarly, Langstaff P emphasised in Betsi at para 12: "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 ..."
65. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: "one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."
66. On the question whether conduct is "related to" a protected characteristic, in Unite the Union v Nailard the Court of Appeal explained that the words "related to" in section 26 EqA encompass both actions which are "caused by" the protected characteristic, and those "associated with" the protected characteristic.
67. The claimant pursues five claims of harassment. The first four of these all relate to the meeting with Ms Paul and Ms Parrock on 16 February 2023, and the first and the third are closely linked. The allegations are as follows: (i) and (iii) the respondent refusing to accept that the claimant had a learning disability; and not allowing the claimant to describe the effect of his disabilities in the workplace; (ii) referring to the claimant's disability as a "health condition" rather than a disability (the respondent accepts that the term "health condition" was used); (iv) Ms Paul told the claimant that an unnamed colleague had accused him of mocking a resident's disability which was a false allegation. The fifth act of harassment relied upon is the act of dismissal. We deal with each of these five allegations in turn.
68. The first and third allegations are (i) and (iii) the respondent refusing to accept that the claimant had a learning disability; and not allowing the claimant to describe the effect of his disabilities in the workplace.
69. We reject these allegations as quite simply being untrue. We find that the opposite was the case. Ms Paul and Miss Parrock accepted that the claimant had a learning disability, and encouraged the claimant to explain the effect which it had on him for the simple reason that they wished to do their responsible best to support the claimant in meeting any challenges which he might face.

70. The second allegation is (ii) referring to the claimant's disability as a "health condition" rather than a disability (the respondent accepts that the term "health condition" was used).
71. The claimant appears to have taken umbrage that his learning disability was referred to as a "health condition", on the basis that this is an offensive comment because the claimant was not suffering from ill health. We consider that to be an unnecessary and unreasonable overreaction. The context was that Ms Paul and Miss Parrock wanted to explore with the claimant the effect that his condition had upon him in order to support him as best they could. There was certainly no intention on the part of either Ms Paul or Miss Parrock to upset the claimant or to cause any offence. Given the claimant had only offered very sparse information about his impairment, and he had declined the opportunity of discussing the matter with him so as to advise on potential adjustments, it was entirely appropriate for the respondent to explore the position in this way. Applying Grant and Betsi, we do not accept that the statutory definition of harassment is met by way of this conduct, and even if the claimant perceived this to have been the case, it was not reasonable for him to have done so.
72. The fourth allegation is (iv) Ms Paul told the claimant that an unnamed colleague had accused him of mocking a resident's disability which was a false allegation. In the first place Ms Paul did make this comment, but we have no hesitation in rejecting the contention that it was a false allegation. We reject this assertion as well as being factually incorrect.
73. The fifth act of harassment relied upon is the act of dismissal. Whereas we accept in principle that the act of dismissal could meet the statutory definition of harassment, in this case we have found that the act of dismissal did not relate to the claimant's disability. There is no medical evidence, or any other persuasive evidence, to suggest that the claimant's conduct, including his refusal to engage in training and accept support from others, was conduct which was related to his disability. Put simply, we find that there was no link between the claimant's speech and language impairment and the conduct for which he was dismissed. This fifth alleged act of harassment cannot therefore be harassment related to the claimant's disability.
74. For these reasons the claimant's claims of harassment related to his disability are not well-founded and they are hereby dismissed.
75. Discrimination Arising from Disability s15 EqA:
76. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links ... the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
77. In City of York v Grosset, the Court of Appeal made it clear that s15(1)(a) EqA requires investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did the "something" arise in consequence of B's disability?
78. When considering the first issue, the "something" needs to be merely a more than trivial part of the reason for the unfavourable treatment: Sheikholeslami v University of Edinburgh. In Robinson v Department for Work and Pensions the Court of Appeal emphasise the importance in a section 15 EqA claim of considering the thought

processes of the putative discriminator, and also that “but for” causation does not suffice. The question of what amounts to “unfavourable” treatment was considered by the Supreme Court in Williams v Trustees of Swansea University Pension and Assurance Scheme. Lord Carnwath suggested that a relatively low threshold of disadvantage suffices to trigger the need for justification under section 15 EqA [at para 27].

79. In Basildon & Thurrock NHS Foundation Trust v Weerasinghe the EAT held that the fact that unfavourable treatment might be loosely related to a person's disability, or the context in which the disability was manifested, is not the same as showing that the treatment was the result of something arising out of the person's disability.
80. In this case the act of unfavourable treatment relied upon by the claimant, namely his dismissal, clearly did take place. Applying City of York v Grosset, we consider the two distinct causative issues: (i) did A treat B unfavourably because of an (identified) “something”? and (ii) did the “something” arise in consequence of B's disability. We find the claimant was dismissed because of his conduct. This was the identified “something”. However, we unanimously reject the suggestion that the identified “something”, namely the claimant's conduct, was something which had arisen in consequence of the claimant's disability. There is no medical evidence, or any other persuasive evidence, to suggest that the claimant's conduct, including his refusal to engage in training and accept support from others, was conduct which was “something arising” from his disability. Put simply, we find that there was no link between the claimant's speech and language impairment and the conduct for which he was dismissed.
81. For these reasons we unanimously conclude that the claimant's claim for discrimination arising from disability is not well-founded, and it is hereby dismissed.
82. Reasonable Adjustments
83. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in Environment Agency v Rowan. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer; (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.
84. Environment Agency v Rowan has been specifically approved by the Court of Appeal in Newham Sixth Form College v Sanders - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.
85. It is the essence of the duty to make reasonable adjustments that it requires the disabled person to be treated more favourably (as a result of their disability) than the non-disabled. They may need special assistance to compete on equal terms – per Lady Hale at para 47 of Archibald v Fife Council.
86. There is no requirement to show that the disability caused the substantial disadvantage, merely that the PCP caused a substantial disadvantage to the disabled person as compared to those who are not disabled. This comparative aspect of the reasonable adjustments provision was described by Simler J in Sheikhholeslami at para 48: “It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP ... There is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances”

87. It is incumbent on a claimant to show the duty to make reasonable adjustments has arisen and there are facts from which it could be reasonably inferred, absent adequate explanation, that it has been breached. That requires (i) the showing of both substantial disadvantage (to show that the duty has arisen), and (ii) evidence of some apparently reasonable adjustment that could have been made (the issue of breach) see Project Management Institute v Latif.
88. The reasonableness of adjustment is an objective question – see Royal Bank of Scotland v Ashton. What is important is that the adjustment(s) chosen by the employer address the disadvantage and not that it is the claimant's preferred solution. As confirmed by the EAT in Linsley v HMRC: "An employer is not required to select the best or most reasonable of a selection of reasonable adjustments, nor is it required to make the adjustment that is preferred by the disabled person. The test of reasonableness is an objective one: see the case of Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220 at [44] in which it is said that "so long as the particular adjustment selected by the employer is reasonable it will have discharged its duty". It is also crucial for the Tribunal to ensure that in making this assessment it keeps in mind the particular disadvantage relied upon given the requirement for there to be correlation between the disadvantage in question and the steps taken to alleviate that disadvantage (Linsley at para 31).
89. In this case the claimant relies on two PCPs, and the respondent concedes that these were PCPs, and that it operated them. The first PCP is a requirement that a Support Worker must undertake job specific training relevant to their role by completing online "e-learning" courses including timed online tests. (This is referred to as the "Training PCP"). The second PCP is a requirement to complete daily written records relating to the care and support provided by a Support Worker to the vulnerable adult they are supporting (the "Daily Record PCP").
90. The substantial disadvantage relied upon by the claimant compared to someone without his disability is as follows. For the Training PCP, the claimant says that he found it difficult to understand the training, and that he could not understand the questions and the relevant tests. He was not able to proceed as quickly as required by the timing set for the tests. For the Daily Record PCP, the claimant struggled to identify the correct words, grammar and spelling and had poor handwriting.
91. The adjustments which the claimant says should have been put in place to avoid this disadvantage are respectively (the Training PCP) providing the claimant with in-person training with more time for tests; and (the Daily Record PCP) allowing him to complete daily written records electronically (on a laptop or PC).
92. The respondent denies that it knew or could reasonably have been expected to know that the claimant had his disability. The claimant asserts that he told the respondent at his interview Mr Jull that he had a learning disability. He says that he did so again at a further meeting with Mr Jull on 18 April 2023. Meanwhile at the meeting on 16 February 2023 with Ms Paul and Miss Parrock, the claimant says he discussed his disability.
93. The respondent also denies that it had any knowledge of any substantial disadvantage caused to the claimant. The claimant certainly told the respondent at his interview with Mr Jull how his disability affected him at his workplace. He says that he did so again at the further meeting with Mr Jull on 18 April 2023. He also says that the meeting on 16 February 2023 with Ms Paul and Ms Parrock that he attempted to explain the effect of his disability, but that they did not allow him to do so.
94. Our findings are as follows. In the first place we find that the respondent did know that the claimant was a disabled person. The claimant informed Mr Jull during his interview that he was disabled by reason of a learning disability. It is also apparent from the fact that the claimant has some difficulty with speech. He also confirmed that he was disabled at the meeting on 16 February 2023.
95. With regard to the first PCP (the Training PCP), the substantial disadvantage relied upon is that the claimant says that he found it difficult to understand the training, and that he could not understand the questions and the relevant tests. He was not able to proceed as quickly as required by the timing set for the tests. We reject that assertion,

- and we find that the Training PCP did not put the claimant to any substantial disadvantage by reason of his impairment. This PCP is a requirement that a Support Worker must undertake job specific training relevant to their role by completing online "e-learning" courses including timed online tests. We have found that the claimant was sufficiently computer literate and perfectly capable of attending and listening to online e-learning and webinars. Although the tests were timed, there was no penalty for failing to complete them within the suggested time, and they could not be failed, and they could be taken as often as necessary using up as much time as was needed. We do not accept that the statutory duty to make adjustments had arisen in this case.
96. Even if we are wrong about that, and the claimant suffered the substantial disadvantage he relies upon (in the sense that it was more than minor or trivial), the respondent had already put in place adjustments which would have ameliorated this disadvantage. The claimant had access to both desktop and laptop computers. Mr Hemmings would login the claimant and set up the e-learning modules for him. He remained with the claimant to provide assistance and was able to explain any questions. The simple truth is that despite these adjustments the claimant made it clear to colleagues that he did not wish to complete any e-learning and had no intention of attending the webinars. We do not accept that the statutory duty to make adjustments arose in this example, but even if it did, the respondent did put in place such adjustments as were reasonable.
97. The second PCP is the Daily Record PCP. This is the requirement to complete daily written records relating to the care and support provided by a Support Worker to the vulnerable adult they are supporting. The substantial disadvantage relied upon is that the claimant struggled to identify the correct words, grammar and spelling and had poor handwriting. We find that this substantial disadvantage did arise in this case, in the sense that it was more than minor or trivial, and we also find that the respondent was on notice of this, not least because the claimant told them. The statutory duty to make such adjustments as were reasonable did therefore arise in these circumstances.
98. However, we accept the evidence of the respondent and Mr Hemming in particular, that the respondent made such adjustments as were reasonable. The claimant shadowed Mr Hemming for his induction and Mr Hemming explained to him all the requirements of the job and the duties. The various inductions included an explanation for the need to fill in the daily diaries for service users because that was a legal requirement. When the claimant explained that he was struggling with this because of his disability, he received the appropriate support. The claimant's Senior Support Workers would sit down with the claimant in the office and would write up the relevant notes as the claimant dictated them. When the claimant asked if he could type the notes instead, he was provided with access to the relevant IT equipment by way of an auxiliary aid. We reject the claimant's assertion that the respondent failed to make such adjustments as were reasonable to ameliorate any disadvantage caused by this Second PCP.
99. For these reasons we unanimously find that the claimant's claim that the respondent failed to make reasonable adjustments, is not well-founded and it is hereby dismissed.
100. In conclusion therefore we find that none of the claimant's claims for disability discrimination are well-founded, and they are all hereby dismissed.
101. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 1 and 57; the findings of fact made in relation to those issues are at paragraphs 10 to 45; a concise identification of the relevant law is at paragraphs 48 to 55; how that law has been applied to those findings in order to decide the issues is at paragraphs 59 to 100.

Employment Judge N J Roper
Dated 25 July 2024

Judgment sent to Parties on

29 August 2024

Jade Lobb

Public access to employment tribunal decisions

Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>