THE EMPLOYMENT TRIBUNALS

Claimant: **Olivia Tilley**

Respondent: **Barnwood Trust**

Heard at: **By CVP**

On: **3 -7 February 2025 and 26 February 2025 (in Chambers)**

Before: **Employment Judge Beever**
Mrs D England
Mr M Cronin

Representation:

Claimant: **in person**
Respondent: **Helen Hogben, Counsel**

RESERVED JUDGMENT AND REASONS

1. The claimant's claim that the respondent failed to make a reasonable adjustment in respect of its practice of leaving sensitive documents open and viewable to staff is well founded and succeeds.

2. In all other respects, the claimant's claims of unlawful disability discrimination are not well founded and are dismissed.

REASONS

1. By an ET1 presented on 28 April 2023, the claimant brought claims for disability discrimination which were identified by EJ Roper on 7 November 2023 [61] as claims of discrimination arising from disability (section 15), failure to make a reasonable adjustment (section 20 and 21) and harassment (section 26).

2. The Claimant is a disabled person within the meaning of section 6 of the Equality Act 2010. This is not disputed by the Respondent. The Claimant has relied on a number of conditions. At a Preliminary Hearing on 1 May 2024 [102], EJ Smail noted that there was sufficient admission of disability so that the matter did not require a preliminary issue.

3. Also, at the Preliminary Hearing on 1 May 2024, and following consideration of the Claimant's further particulars and an application to amend by the Claimant, EJ Smail identified the issues that the Tribunal was required to determine at the Final Hearing. Those appear at [111-114].

4. The Final Hearing (and these Reasons) dealt with liability only.

The Issues

5. Both parties confirmed at the outset of the Final Hearing that the list of issues as identified by EJ Smail was an agreed list. The Tribunal explained that it was a "roadmap" that it would follow in its deliberations following the conclusion of evidence and submissions.

6. Accordingly, the issues that the Tribunal is required to determine are:

1.Discrimination Arising From Disability (s 15 Equality Act 2010)
1.1 Did the respondent treat the claimant unfavourably by:

1.1.1 Allegation 2: On two occasions which were on or about 21 December 2022 and 11 January 2023 Nicola Mosley the claimant's manager made a sound of aggravation and pulled a face expressing annoyance when she knew that the claimant's disability would pose an obstacle to the completion of the task assigned to the claimant and would be the cause of an error; and

1.1.2 Allegation 3: On or about 9 January 2023 the claimant's manager Nicola Mosley had a document entitled "Concerns Re Liv" open on her screen which was in the claimant's line of vision. This referred to the claimant who became distressed and no apology was offered. This PCP relied upon is the respondent's practice of leaving sensitive documents open and viewable to staff; and

1.1.3 Allegation 4: On or about 20 February 2023 Sally Byng posted a message on the whole team chat to the effect "can't believe I'm missing this as well as [other employee name withheld] which is bad diary management (in the context of diary management being the claimant's responsibility); and

1.1.4 Allegation 5: On a continuing basis from at least November 2022, the claimant's manager Nicola Mosley instructed the claimant not to include a link to join meetings remotely when sending invitations to those meetings. This was a practice which did not support inclusivity and prevented others from accessing the meetings remotely when they needed to do so.

1.1.5 Allegation 6: refusing Katrin Brown to act as a disability buddy in connection with epilepsy.

1.1.6 Allegation 7: refusing or failing to act upon the Claimant's request for Dragon Dictate Software, first asked for in January 2023.

1.2 Did the following things arise in consequence of the claimant's disability?
1.2.1 Slowness in processing information
1.2.2. Occasional disordered work.
1.2.3 Having epileptic seizures (an ambulance was called on 30 or 31 January 2023 and 8 February 2023).

1.3 Was the unfavourable treatment because of any of these things which are said to have arisen from the claimant's disability?

1.4 Was the treatment a proportionate means of achieving a legitimate aim?

1.5 In that event the Tribunal will decide in particular:

1.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims; and
1.5.2 Could something less discriminatory have been done instead; and
1.5.3 How should the needs of the claimant and the respondent be balanced?

1.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? If so, from what date?

2.Failure to make reasonable adjustments (s 20 Equality Act 2010)
2.1 A "PCP" is a provision, criterion or practice. Did the respondent have or apply the following PCPs:

2.1.1 PCP 1: (Allegation 3): On or about 9 January 2023 the claimant's manager Nicola Mosley had a document entitled "Concerns Re Liv" open on her screen which was in the claimant's line of vision. This referred to the claimant who became distressed and no apology was offered. This PCP relied upon is the respondent's practice of leaving sensitive documents open and viewable to staff; and

2.1.2 PCP 2: (Allegation 5): On a continuing basis from at least November 2022, the claimant's manager Nicola Mosley instructed the claimant not to include a link to join meetings remotely when sending invitations to those meetings. This was a practice which did not support inclusivity and prevented others from accessing the meetings remotely when they needed to do so. This PCP 2 relied upon is the respondent's practice of dissuading employees from attending meetings remotely.

2.1.3 PCP 3: (Allegation 6) Refusing or failing to provide a disability buddy.

2.1.4 PCP 4: (Allegation 7) Refusing or failing to supply Dragon Dictate word recognition software.

2.2 Did the respondent apply the PCPs to the claimant?

2.3 Did the respondent apply the PCPs to persons with whom the claimant did not share the same protected characteristic (disability), or would it have done so?

2.4 Did the PCPs put persons with whom the claimant shared the characteristic, at a particular disadvantage when compared with persons with whom the claimant did not share the characteristic?

2.5 Did the PCP put the claimant personally at that disadvantage in that: (a)PCP 1 the claimant's disability but that she was much more sensitive to the sight and consideration of such material; and (b) PCP 2 the claimant was unable or not encouraged to work remotely when this would have accommodated her disability. (c) PCP 3: she needed an epilepsy buddy explaining to colleagues the nature and effect of epilepsy. (d) PCP 4: she needed Dragon Dictate to provide grammatical order to her work.

2.6 Was it reasonable for the Respondent to make the adjustments sought?

3.Harassment Related to Disability (s 26 Equality Act 2010)

3.1 Did the respondent do the following things:

3.1.1 Allegation 1: On or about 20 December 2022 Jenny Curtis said in a meeting in the claimant's presence "I'm looking forward to being thin again", which was not criticised or remedied by the CEO Sally Byng; and

3.1.2 Allegation 2: On two occasions which were on or about 21 December 2022 and 11 January 2023 Nicola Mosley the claimant's manager made a sound of aggravation and pulled a face expressing annoyance when she knew that the claimant's disability would pose an obstacle to the completion of the task assigned to the claimant and would be the cause of an error; and

3.1.3 Allegation 4: On or about 20 February 2023 Sally Byng posted a message on the whole team chat to the effect "can't believe I'm missing this as well as [other employee name withheld] which is bad diary management (in the context of diary management being the claimant's responsibility).

3.1.4 Allegation 6: the claimant was refused/not provided with a disability buddy.

3.1.5 Allegation 7: the claimant was refused Dragon Dictate.

3.2 If so, was that unwanted conduct?

3.3 Did it relate to the claimant's protected characteristic, namely her disability?

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

3.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7. Regarding these issues as identified above, the claims do benefit from further explanation. Properly analysed, the claimant's claims are based on 7 central allegations of fact. This is why there are references within the list of issues to "Allegation" numbers. In respect of each of those 7 central allegations, different heads of claim may be applicable. For ease of reading, the Tribunal has abbreviated the relevant allegation as [**A1**] within these reasons. Similarly for ease, where reference is made to a witness statement, the abbreviation of name and paragraph number is as [OT/1] and the hearing bundle reference is as [35].

Disability

8. The respondent accepts that the claimant is a person with the disability of epilepsy and that the claimant informed the respondent of this during the interview process on 4 October 2022. The respondent also accepts that the claimant is a person with the disability of Functional Neurological Disorder (FND) and that it had knowledge of this disability as of 12 October 2022, as the claimant disclosed it in pre-employment emergency contact form.

9. The claimant also contends that she has a condition which has indicators of ADHD although she has no formal diagnosis. The respondent accepts that the claimant had informed it of this potential diagnosis at a meeting on 9 January 2023 although the respondent does not formally accept that it amounted to a disability for the purposes of this claim. The notes of the meeting on 9 January 2023 are at [274], at which the claimant described to the respondent her neurodivergent symptoms. See also the claimant's disability statement at [58] where the claimant describes difficulties in processing information, in following conversations with overlapping voices, sensory overload, light and sound sensitivity, difficulty in concentration and distraction resulting in challenges in preparing minutes and completing complex tasks. This was not the subject of significant cross-examination. No label or diagnosis is required for the purposes of section 6 of the Equality Act 2010. The Tribunal finds that the claimant was at all material times a disabled person by reason of neurodivergency and that the respondent was aware from 9 January 2023.

10. The respondent accepts that the claimant has an eating disorder. The respondent also accepts that this amounts to a disability. The medical evidence seen by the Tribunal indicates that the diagnosis obtained by the claimant changed recently. In December 2024, the claimant was diagnosed with Otherwise Specified Feeding and Eating Disorder (OFSED). For reasons set out below, the Tribunal finds that

the respondent was not aware and could not reasonably have been aware of the claimant's eating order disability before 9 January 2023.

11. Following an CMO direction, the claimant provided at [70] details of how she contended her disability was related to the allegations, which the Tribunal now records as follows:

    Allegation 1: Functional Neurological Disorder and Epilepsy
    Allegation 2: Functional Neurological Disorder and Epilepsy
    Allegation 3: ~~Eating disorders (Avoidant Restrictive Food Intake Disorder and Anorexia)~~ Functional Neurological Disorder
    Allegation 4: Functional Neurological Disorder and Epilepsy, Neurodivergent conditions
    Allegation 5: Functional Neurological Disorder and Epilepsy, Neurodivergent conditions
    also adding, in the course of the Final Hearing:
    Allegation 6: Epilepsy
    Allegation 7: Epilepsy, Functional Neurological Disorder, ADHD.

12. During cross-examination of the claimant, it was apparent that the claimant believed that she had made an error in identifying her eating disorder as relevant to Allegation 3. Having heard respective submissions from the parties, the Tribunal permitted the claimant to contend that the relevant disability was instead FND. This was not in the nature of an amendment but a clarification of her case and it enabled the Tribunal to deal with the claimant's case more appropriately. Similarly, in the Hearing, in relation to Allegation 6 and 7, the claimant outlined the relevant conditions without objection from the respondent. The Tribunal was content to deal with the claimant's case as recorded above.

The Evidence

13. The Hearing was listed for 5 days as per the CMO in this case. The claimant requested reasonable adjustments for the purposes of the Final Hearing which were accommodated by the Tribunal. These included the provision of breaks.

14. Both the claimant and Mrs Hogben, counsel for the respondent, were diligent in assisting the Tribunal to manage this Hearing in accordance with those directions and the requested reasonable adjustments so that the Hearing could be concluded within the allotted time. In the event, there was insufficient time to deliver an oral decision with reasons and it was necessary to reserve judgment. These are the written reasons of the Tribunal's deliberations.

15. The tribunal heard oral evidence from the claimant and from the claimant's witness, Mrs Katrina Brown (KB). The tribunal also heard oral evidence from the respondent's witnesses: Mrs Nicola Mosley (NM), Chief Operating Officer, Ms Jennie Curtis (JC), Head of People, and Ms Sally Byng (SB), Chief Executive Officer. All witnesses were cross examined. For ease, each witness will be referred to herein by their

initials. Both the claimant (representing herself) and the respondent's representative provided helpful written closing submissions and made closing oral submissions. There was an electronic bundle of documents numbered to 535 pages which was placed before the tribunal.

16. Both the bundle and the parties' respective witness statements exceeded the size directed by the Tribunal in its case management order. The purpose of such orders is the effective management of allocated time for the Final Hearing. Documentation which exceeds the directed size results in the Tribunal needing extra reading time which then limits the parties' time in front of the Tribunal and puts at risk the determination of the claim within the allotted time. In this case, the Tribunal permitted the parties to proceed; however, adherence to directed page and word count limits is an important feature of fair allocation of resources among all those seeking access to the Tribunal.

17. The tribunal made its findings of fact having regard to all of the evidence and did so on a balance of probabilities.

18. In assessing evidence relating to this claim, we have borne in mind the guidance given in Gestmin SGPS v Credit Suisse (UK) Ltd [2013] EWHC 3560; that research shows that human memories are fallible and memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. The process of going through tribunal proceedings can create biases in memories. The judge in Gestmin said, "*above all it is important to avoid the fallacy of supposing that because a witness has confidence in her or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth*".

The Facts

Background

19. The claimant is a disabled person within the meaning of section 6 of the Equality Act 2010. The claimant has epilepsy, which was diagnosed in 2017, and Functional Neurological Disorder (FND) diagnosed in 2020 and which is likely to be a complication of the claimant's epilepsy. The claimant's condition causes her to be liable to seizures and claimant needs to exercise care in managing her epilepsy. FND is a condition which in the claimant's case has a relapsing and remitting pattern causing recurrent symptoms to the claimant including impacting her mobility, her cognitive function and resulting in neurodivergent qualities. The Tribunal has found that the claimant has neurodivergent symptoms and also an eating disorder, which was latterly diagnosed as OSFED in December 2024.

20. On 1 November 2022, the claimant was engaged to work for the respondent as an executive assistant. The claimant's line manager was NM. The claimant's role also encompassed governance matters (e.g relating to Trustee Board meetings) and so

the claimant also reported to SB. The claimant's responsibilities included providing NM and SB with administrative support. This extended to tasks such as preparing for Board meetings, typing up minutes of meetings (such as leadership meetings and Board meetings), planning team events, booking meetings and other commitments into calendars, and distributing paperwork. The claimant's job description is at [162].

21. The respondent Trust is a charity working with people, communities and organisations throughout Gloucestershire supporting disabilities and mental health conditions. As of September 2024, it employed 35 employees, including a diverse workforce in respect of physical and mental conditions [NM/4]. The Hearing bundle references that the respondent has a range of equality, diversity and inclusion policies including flexible working, mental health and well-being and an employee assistance programme policy.

22. The respondent is based at Overton House, which are business premises in Cheltenham. The working conditions of its employees varied. NM for example, was office-based. SB, on the other hand, was infrequently in the office given her requirement to meet various stakeholders and to pursue the aims of the respondent in building and maintaining community relationships. KB, the claimant's witness, was not office-based as her work required her to be mobile, and she would typically attend the office on 1-2 times per week.

23. The claimant typically worked in the office environment and on occasions worked from home. The evidence indicates that whenever the claimant requested to work from home, including for example on account of disability or illness or recovery from illness her request was granted. That said, the claimant had raised the potential of working from home at the outset of her employment in October 2022 and the respondent had indicated that the role was office-based given its administrative need to support the respondent's senior managers. There was no structured working from home arrangement afforded to the claimant although, as above, the claimant did work ad hoc from home and this was treated supportively by the respondent.

<u>Employment at the Respondent</u>

24. The claimant attended an online first stage interview for the prospective executive assistant role at the respondent on 26 September 2022. This was attended by NM and JC. A second stage interview took place on 4 October 2022, attended by NM and SB. During those interviews, the claimant disclosed that due to having epilepsy she was unable to drive, and the respondent removed the job description requirement to drive as a result. The claimant was also provided with an adjustment for additional time to complete her assessment and the claimant acknowledges that at the second interview NM and SB and had patiently waited for her as she needed to pause during her answers to questions raised.

25. At interview, the claimant requested that she should be allowed to make audio recordings of meetings that needed to be transcribed and also to work remotely in order to help manage her conditions. The respondent did not at that stage (but did at a later stage) allow for audio recording of meetings. The respondent did not formally

agree to remote working as the role was said to be essentially office-based, providing administrative office support to NM and SB.

26. The respondent did recognise the claimant's need for support in the form of "epilepsy buddies" and alongside the claimant the need to inform relevant team members of the claimant's condition so that there would be appropriate knowledge and support.

27. On 12 October 2022, the claimant completed a payroll and emergency contact form [166] and provided it to JC. The form disclosed that the claimant's long-term conditions included epilepsy and FND.

28. The claimant intended to start work on 1 November 2022, but for health reasons, her first day of work was 18 November 2022. The intended induction programme needed to be modified as neither SB nor NM were in the office on the claimant's rescheduled start date. The claimant's induction was with JC, and the claimant sat next to JC. Their interaction included discussion of reasonable adjustments that were required for the claimant. JC is an experienced Head of People, who understood the obligations of an employer towards disability and the obligation of reasonable adjustments. The claimant (to her credit) was at pains to emphasise during her questioning of JC that JC had been very supportive towards the claimant throughout her employment.

29. For example, the claimant informed JC that she had previously used "Trello" (a task list memory aid) which assisted in her memory difficulties (FND). It was agreed that the claimant should speak to Rosie Branney (RB), the respondent's facilities manager, to pursue further. In the event, after further discussions, a dynamic spreadsheet was adopted [409], which followed on from a later return to work meeting on 7 December 2022. NM and SB had visibility of the spreadsheet and so could (and did) offer further support and assist the claimant in task management and prioritisation.

<u>"Liv's Buddies"</u>

30. During her induction, the claimant had informed JC that, in respect of her epilepsy, having "buddies" was important to her: this was described by the claimant as relating to people who would be physically present in the office when she was and who would understand her condition and her risks and be able to help if required for example in the event of the seizure.

31. JC committed to at least one senior manager being in the office workplace when the claimant was present. The claimant expressed her gratitude to JC for this as it meant that she would be likely to have safe working conditions in the office environment. As above, although there was no structured working from home arrangement, the claimant did on an ad hoc basis work from home, including at her request when she was unwell or otherwise needed to, and typically also on a Friday in any event.

32. The proposal for "buddies" was progressed shortly thereafter. By agreement, the claimant set up a Microsoft Teams group, which she named "Liv's buddies". The group included the claimant and also NM, SB, JC and RB. Its purpose was for the claimant to communicate where she was working and to flag any relevant circumstances including if she was unwell and/or if she was needing to or intending to work from home. See [233] for group messaging and the chain of communications.

33. The supportive and communicative nature of the group chat is clearly evident. For example, on 5 December 2022, the Claimant wrote, "*I'm heading home a bit earlier than planned as I think I can feel something coming on. I'll message in here again to let you know I'm back*" to which, on that occasion, NM promptly responded "*great thanks for letting us know*". Also, for example, on 19 January 2023, the claimant wrote "*just so you all know – I'm in the LGF room as its more comfortable lighting for my eyes*", to which the claimant received two "thumbs up" emoji reactions.

34. The claimant later (on 20 January 2023) wrote "*hi all I added Dan Jacques to the chat as he is specially trained in epilepsy and seizure first-aid*" (DJ) to which the response was, again, two "thumbs up" emoji reactions.

35. In OT/17, the claimant states that, "*I needed to have approval before adding anyone to the chat*". When asked further about this in evidence, the claimant acknowledged that the respondent never took issue with her adding to the group. In the above example, the claimant said that after she had spoken to DJ, she had "*checked in with JC to make sure it's appropriate… It was my understanding to check-in first*". The claimant acknowledged that she did not recall any specific conversation with the respondent that meant that she needed to have approval. The supportive nature of the group chat did not lend itself to a requirement that the claimant in some way needed the approval of the respondent. At the same time, it is understandable that the claimant might want to "check-in" with JC. It suggests good communication. However, that does not imply that approval was needed. The Tribunal is satisfied that approval was not needed, either from JC or the respondent generally.

36. On 5 December 2022, the claimant shared within the "Liv's buddies" group chat that she had had a focal seizure that day but would still be coming into the office and distributed a document "Liv's seizure types" document so that the group would have a better understanding of her condition, how to notice and act on an emerging situation.

37. The claimant alleges that she was refused /not provided with a disability buddy (**A6**). Given the above context, that is an allegation inconsistent with the existence of "Liv's Buddies". The allegation was an amendment first raised by the claimant in April 2024 and added by permission of EJ Smail in May 2024. This time delay was, the claimant explained, because she had spoken to KB in November 2023 and discovered information from KB at that point. It related to a conversation that KB had in which the claimant was not involved.

38. KB was a co-worker who did not work directly with the claimant. She was however an ex-army medic. It transpired that KB had epilepsy-specific knowledge, although it is unclear the extent to which anyone at the respondent was aware of such specifics.

39. KB's evidence was that in November or December 2022, she had a conversation with JC "and/or" (see witness statement) RB. When questioned, KB did not recall which of the two it was, although when told that JC did not recall any such conversation, KB thought that it was probably RB. The conversation related to the need for the claimant to have support in the workplace in the event of a seizure. A conversation of this type may well have occurred because KB was an appointed first aider for the respondent and had as a result of that appointment, at the outset of the claimant's employment, been included (with the claimant's agreement) in a directed group email informing relevant individuals of the claimant's condition. KB recalls that she wanted to offer support. KB recalls that she was told that "*she couldn't*".

40. The Tribunal found that such a comment would have been inconsistent with the constructive relationship between JC and the claimant and the evidence of her recognition of the claimant's need to have colleagues on hand to help. Insofar as it might relate to Rosie, RB, although the Tribunal has not heard evidence from RB, the involvement of RB in facilitating the claimant's reasonable adjustments has not been the subject of complaint by the claimant or suggestive of a lack of support. In other words, evidence relating to RB suggests a supportive manager who facilitated reasonable adjustments to a number of colleagues, including the claimant.

41. KB's recollection relating to whom she had a discussion with and the content of it was unclear. The Tribunal is not able to determine on a balance of probabilities either the identity of the person that KB had spoken with or the material content of the conversation save that it could well have been about KB expressing an offer of help. Equally, the Tribunal is not able to determine the nature of any response albeit it might have reflected the underlying purpose of the group chat that there were those who worked directly with the claimant (NM/SB) and/or those who were based in the building (JC/RB) who were able to offer support. The tribunal notes that KB did not have any discussion on this topic with the claimant at any time during the claimant's employment although there was nothing stopping her from doing so. Had KB wanted to provide the kind of focussed support envisaged in a "buddy" it is surprising that it was not the subject of conversation between KB and the claimant.

42. It could well be the case that KB expressed a willingness to help in some way, but the Tribunal does not find that KB requested to be a disability "buddy" to the claimant and the Tribunal concludes that the respondent did not refuse KB, nor did the respondent say that she "couldn't". If KB had made such a request, it is likely that it would have come to the attention of the claimant and most likely also JC. The claimant was at liberty to add individuals to the group chat and the Tribunal finds there is no reason why KB would not have been added as a result.

<u>Board meetings and minutes</u>

43. One of the claimant's tasks was to take minutes of meetings. In evidence, the claimant accepted that her skillset was such that the respondent might reasonably expect the claimant to be able to undertake this task. This was qualified though by the fact that the claimant had not previously had experience of taking minutes at Board level (as opposed to the less formal management level). The claimant's predecessor at the respondent came in and provided the claimant with some training on Board meeting notes.

44. On 8 December 2022, the claimant attended the December Board meeting at Overton House. Her task was to take minutes and type them up afterwards. On 16 December 2022, the claimant shared a draft of the minutes of the meeting with the Chair of the Board [270]. The relevant email thread indicates that SB needed to undertake a number of edits. SB suggested that NM might go through the document with the claimant as that "*might be helpful for her learning how to do the Minutes*" [269]. The claimant did not provide the draft minutes in the first instance to the respondent notwithstanding, on the respondent's case, the claimant had been informed that was the correct procedure to adopt.

45. At OT/28, the claimant describes that NM, "r*esponded to this very negatively*". This is not evident from the parties' conduct at the time. The email thread provides feedback but is not negative. The topic is contained in "Concerns re liv" (see below) document but as is apparent below the claimant saw only the heading at the material time and did not see the contents until these proceedings.

<u>Performance concerns</u>

46. NM and SB describe concerns arising in the first few weeks of the claimant's employment regarding her work and her understanding of what her role required. The Board meeting minutes, above, is one example.

47. At the same time, NM and SB also gave consistent evidence that the claimant had identified that she had disabilities (as above, as far as the respondent was concerned, epilepsy and FND) and NM and SB were conscious that their concerns could well be a consequence of the claimant's disabilities so that it might well be that the claimant's disabilities were creating a barrier to her performance. The claimant was still new to the role.

48. A discussion took place between NM/SB and JC. JC suggested that NM should make a note of any concerns as they arose so that they could be accurately recorded. The intention of the note was that the concerns could be addressed with the claimant at an appropriate time. Given JC's input, this action was an appropriate management action.

49. NM told the Tribunal that she understood that the claimant's FND might impact her performance at work but that she did not have enough information to reach a conclusion. She had the benefit of some generic information about FND provided/signposted by the claimant but NM accepted in her oral evidence that she did little to investigate independently. NM did know (as the claimant had volunteered

this to NM) that the claimant was due to have a neurological assessment on 23 December 2022. The claimant was willing to share further information with the respondent following that assessment.

50. NM also told the Tribunal that she recognised that the claimant was still a new employee and might reasonably be expected to be learning her role. A mid-probation review meeting had been planned for 3 months into employment. By agreement with the claimant, this was deferred slightly (then, into mid-February 2023) given the deferred start of the claimant's employment. Given also the involvement of JC in advising on the process, the Tribunal is satisfied that the intention of NM in writing a note of her concerns relating to the claimant's performance was to raise them as appropriate with the claimant in the light of any information provided by the claimant after her neurological assessment on 23 December 2022 and probably as part of a mid-probation review in February 2023.

51. Acting on JC's advice, NM began noting her concerns in a WORD document, the result can be seen at [281]. The heading of the document is bold and in larger font: "**Concerns re Liv**". Three items were included: (i) Board minutes; (ii) calendar invites; (iii) General observations. The claimant was not aware of the contents at the time. It is necessary to return to this document in relation to later events on 9 January 2023.

Remote Link to Meeting Invitations

52. The claimant's role included sending meeting invitations. The claimant complains that on a continuing basis NM instructed her not to include a remote attendance link when sending meeting invitations (**A5**) and that this dissuaded colleagues from attending remotely.

53. There were times when meetings would be in-person and times when meetings would be held remotely. The claimant told the Tribunal that she considered that the opportunity of remote attendance encouraged greater inclusivity. It was common ground that the respondent preferred attended in-person meetings where feasible and this was explained further as being an encouragement towards collaboration and relationship-building.

54. As part of her role, the claimant typically sent meeting invitations by Microsoft Outlook. Sometimes such invitations were for an in-person meeting and sometimes for a remote meeting. It transpired that, regardless of the nature of the invitation, Outlook defaulted also to including a remote attendance link. NM explained that this caused confusion when the intention was that there should be an in-person meeting.

55. NM acknowledged that she asked the claimant to make sure that the default remote attendance link would be removed where in-person meetings were being arranged so as to avoid such confusion arising. NM also asked this of other employees when similarly sending invitations for in-person meetings. At Tribunal, the claimant agreed that NM's request had not been in connection with the claimant's performance, or, in any respect connected with the claimant's processing skills but in fact because NM wanted to avoid the confusion that was created by the default link.

56. The claimant's case was that there was a more appropriate way to deal with the issue: which was that the respondent should have expressed what was required of the meeting (e.g. in-person or remote) and <u>also</u> retained the link option for inclusivity. The claimant believed that requiring colleagues to request a link in such circumstances meant they were dissuaded from attending the meeting. In turn, NM was adamant that, "*if anyone had asked to attend remotely, this would have been supported*".

<u>Team Meeting on 19 December 2022</u>

57. On 19 December 2022, a team meeting took place. SB recalled this as a strategic planning meeting. JC described it in more detail as an Internal Strategic Oversight Group meeting. The claimant was present at the meeting, her role being to take the minutes of the meeting. It was intended that an ice breaker activity would start off the meeting, the subject of which was "*something you are looking forward to in 2023*".

58. The group sat arranged on chairs in a horseshoe arrangement. The "icebreaker" had been distributed beforehand: JC had not prepared her answer in advance. Other contributions had included, for example, a trip abroad.

59. What JC said at the meeting is not in dispute. JC was present at the meeting and in her turn she said that she was, "l*ooking forward to being thin again*". (**A1**). This comment drew laughs from several other attendees. SB was also participating in the meeting. SB did not challenge JC or "call out" the comment made by JC.

60. The claimant complains about the comment. She complains that the comment acted as a trigger to her difficulties with food and body image. The claimant has an eating disability which is accepted by the respondent to be a disability. The claimant says that a key component of her disorder is body image. The respondent contends that it did not know of the claimant's disability and specifically JC says that she was completely unaware that the claimant had any eating disorder. At JC/33, that, "*I had absolutely no idea that [the claimant] had any issues with eating*" and only became aware following the meeting on 9 January 2023. In evidence, the claimant accepted that the respondent did not know about her condition. The claimant explained that, notwithstanding her positive relationship with JC, her eating disorder was still "t*oo sensitive*" a topic and the claimant was in "*its secrecy stage*" of the condition. The claimant agreed that she first raised her food difficulties at the meeting on 9 January 2023.

61. The claimant did not respond or react to the comment. JC says that she might have expected the claimant to raise it given their positive relationship at the time. That is in no way a criticism of the claimant. After all, with such a sensitive topic the claimant, in her own words, was, as yet "*not brave enough to raise it as an issue*" at all. The first time the respondent was aware of upset regarding the comment was on receipt of the employment tribunal claim.

62. The Tribunal finds that JC made the comment because (at Christmas-time) there was a lot of chocolate at Overton House and many gifts from grateful grant-

recipients. JC said in evidence that she was sat in front of chocolate and snacks set out by the organisers and that she had "*just been tucking into the chocolate and was thinking about chocolate; not body image*". The Tribunal accepted that JC did not intend the comment to be directed at or related in any way to the claimant not least, as above, because JC was entirely unaware that the claimant had any issues with food or had an eating disorder. The claimant accepted in her oral evidence that there was no reason for JC to have known; that it was, however, an ill-considered comment. JC was questioned in detail about this. The Tribunal finds that had JC been aware of any issues that the claimant had with food she would not have made the comment. During her evidence, JC apologised to the claimant, which the claimant appreciated.

63. SB did not accept that she should have challenged the comment once made by JC. SB did not accept that it was a comment about body shape. SB accepted her responsibility in her senior position to foster an environment which avoided comments about protected characteristics and SB stated that she understood the need to exercise judgment about what was appropriate and what might need to be "called out in public".

<u>December 2022</u>

64. During December, the claimant had absences from work. She was absent on 6 December 2022. In accordance with the respondent's practice, there was a return-to-work meeting on the claimant's return the following day [409]. Following that, the claimant began to use the shared access to-do list spreadsheet document, referred to above.

65. On 12 December 2022, following a focal seizure in the morning, the claimant commenced work later in the day. On 13 and 14 December 2022, the claimant worked from home having informed NM that she was unwell. The claimant was absent from work on 20 December 2022. NM held a return-to-work meeting with the claimant on 21 December 2022 [414]. Return to work meetings, and related contents of meeting notes, indicate a supportive and positive management by NM.

66. On 21 December 2022, the claimant was at a workstation beside NM. Ms Fleming, a senior manager, came into the room. Ms Fleming spoke to the claimant and informed the claimant that she had received a work meeting invitation which had caused a clash and asked whether the claimant would change the invitation. The claimant complains that NM "*made a frustrated facial expression and sound of anger in response*" (**A2**), which unsettled the claimant.

67. The Tribunal notes that meeting clashes was one of the items that NM had (unbeknown to the claimant at that point) written into her note of concerns. The Tribunal also notes the claimant's contention that undertaking calendar invitations was a part of her job responsibilities that was impaired by her FND.

68. NM has no recollection of the incident. NM rejects the suggestion that she reacted in such a manner regarding the claimant. In NM/32, it is said that by NM that she is mindful of her senior position at the respondent and of how reactions can be

perceived. The claimant did not raise the matter with NM. NM's belief is that her relationship with the claimant was such as might have enabled the claimant to respond (as she did subsequently on 9 January 2023, see below).

69. It is convenient at this point to refer to a second similar alleged incident relied on by the claimant. On 11 January 2023 (and 2 days after the 9 January meeting, see below), the claimant complains that NM made *"a facial expression and sound of disdain and anger at a mistake the claimant had made*". (**A2**). NM has no recollection of this incident. The claimant does not provide any details or description of the circumstances of this incident, albeit in evidence she said that she thought it might be a meeting clash. Within the same paragraph of her witness statement, OT/44, the claimant describes how NM's behaviour seemed "*unpredictable*".

70. In answering questions from the respondent's counsel, the claimant acknowledges that these incidents were not consistent with the documentary evidence of support that the respondent was showing to the claimant. The claimant also acknowledged that the incidents were disproportionate to the significance of the matter in issue. When asked if she had misinterpreted the situation (on 21 December 2022), the claimant stated that it had occurred, "*immediately after Ms Fleming had spoken and that it was unsettling*" to the claimant. When asked regarding the second incident (on 11 January 2023), the claimant acknowledged that it was shortly after the 9 January meeting, which the claimant had found helpful and which had produced positive outcomes, and also occurring at the same time as the respondent was following up on other adjustments, as indicated at [285-9]. The claimant also acknowledged a helpful return to work meeting on 16 January 2023 [420], which indicated that NM was prepared to listen and to make suggestions to assist the claimant albeit, in the claimant's own words (in evidence), only "*when difficulties arise*".

71. The claimant attended a neuropsychology assessment at Gloucestershire Royal Hospital on 23 December 2022. The respondent was aware of this impending assessment and it had been agreed with the claimant that a meeting would be arranged in the New Year so that the respondent could better understand the impact of the challenges of FND specifically on the claimant. The resulting report is at [86].

72. The claimant summarises key elements of the report at OT/32. The claimant was diagnosed with a memory impairment affecting her ability to retain auditory information in particular. Of the three components of memory functioning (encoding, storing and retrieving), the assessor identified that the claimant struggled with encoding and retrieving. The claimant's ability to process information under pressure was found to be impaired.

The Events of 9 January 2023

73. The claimant returned to work in the New Year on 9 January 2023 following workplace sickness absence. Her return-to-work meeting is at [415]. NM noted down the claimant's response to the question, "*is there anything we can do to help?*", which was "*if the fatigue is particularly difficult to manage then some mornings/afternoons working from home may help – but overall I don't think any changes will need to be made*". The claimant did from time to time work from home

and for example informed "Liv's buddies" on occasions when she worked from home.

74. A meeting was arranged for 9 January 2023 between the claimant and NM following the claimant's disclosure that she had an update on her FND assessment. The claimant's evidence is that this meeting would be beneficial so that the senior team could better understand her disability. Initially it was a meeting between the claimant. NM later suggested that JC should also be invited, for reasons which will become apparent.

75. On 9 January 2023, the claimant was at her workspace, sitting side-by-side with NM, when the claimant had occasion to look away from her screen and at NM's screen. There was nothing untoward in this action. It is common ground that NM's screen was visible to the claimant (and in fact NM had two duplicate screens). NM was sat at her workspace and she was working on her own computer and screen. What the claimant caught sight of was a word document which carried the heading of: "*Concerns re Liv*". (**A3**).

76. The claimant was unsettled by this. She was not at that stage able to read the remaining words. The title was in larger font size and was bold and more readily visible. The claimant spoke directly to NM and said, "I *think I've seen something I wasn't supposed to*". NM agreed that this was said, and upon it becoming apparent to NM that it was the document on the screen that the claimant had seen, NM sought to reassure the claimant that there was not anything to be concerned about. It is common ground that NM said that they would talk about it at the arranged meeting for later in the day. However, NM was sufficiently anxious that the claimant had seen the document that she then suggested that JC should join the meeting for support (to all).

77. The meeting was a substantial one, the notes are at [274]. The claimant's FND condition was discussed in detail and a number of adjustments were agreed moving forwards. The claimant accepted that the meeting was a positive one in terms of "outcomes" for her. At the meeting the claimant also disclosed a tentative diagnosis of ADHD and she disclosed her eating disorder. It is common ground that this was the first occasion that the claimant had disclosed her eating disorder to the respondent.

78. The respondent's "Concerns" were also discussed: the minutes indicate that JC said that the meeting should focus on the claimant's neuropsychology but that if the claimant felt able, that the respondent could also share some of their observations and concerns as some of them may be related. The claimant said that she would like this and it would be helpful. NM reassured the claimant.

79. The notes of the meeting indicate a number of follow-up actions, including adjustments that were agreed. JC has listed adjustments, at JC/20. Follow-up actions refer to RB, the facilities manager, who was responsible for implementing adjustments. JC contacted RB, as is evidenced from the email trail on11 January 2023 [289] about adjustments. The email dated 11 January 2023 at 17.09 hours

states, “*we talked about Dragon*” which the Tribunal finds be a reference to Dragon dictation software and the potential for the claimant to get assistance from Dragon.

The Dragon Demonstration

80. The claimant had been offered a trial of the software ClaroRead by RB [282]. It was assistive software but it did not offer dictation (without an add-on). RB suggested that the claimant would find it useful to speak to KB. This was because KB already had Dragon software as an adjustment. On or about 11 January 2023, KB went to the claimant’s workspace with her laptop in order to give a demonstration to the claimant. What then happened is in dispute.

81. The claimant said that KB came to her workspace and began to show her Dragon. In her statement, OT/48, the claimant said that NM then intervened and said it wouldn’t work (i.e, that the claimant using Dragon would not work) and that NM told KB not to encourage the claimant to get the software as it would disturb NM and further that when KB suggested that the claimant could sit with her team or with another team elsewhere in the building that NM then said that would not be possible as it was necessary for the claimant to sit near to NM (**A7**). KB in her statement sets out a similar explanation that NM said that the claimant wouldn’t be able to have Dragon as the sound of the claimant dictating would be too noisy and that NM needed the claimant to be in the same room as NM.

82. In her oral evidence, the claimant said that she was talking to NM and said to NM that KB was going to talk to the claimant about Dragon, and NM said yes. KB and the claimant began a conversation, and the claimant’s evidence in answer to questions from respondent counsel was, “*KB and I had a conversation and she showed me her laptop and NM (who was working on her own things) said there was a distraction because KB was demonstrating how it worked and then the conversation ende*d”.

83. In KB’s evidence to the Tribunal, she said that she already had Dragon as an adjustment, which had been arranged through JC. KB was not aware whether NM knew about it. In respect of the conversation, referred to above, KB told the Tribunal that NM had asked what KB and the claimant were doing and that KB had explained about Dragon, but that NM said that it needed quiet in the office and Dragon would be too noisy. The Tribunal asked questions of KB who said that she and the claimant moved into a side room because they were making too much noise. The conversation in the side room lasted 15 minutes and KB left it with the claimant, *“to take up Dragon in any direction. The claimant could use access to work. KB suggested speaking to JC as JC had helped KB to obtain Dragon*”. JC later confirmed that NM would not have been involved in obtaining Dragon and would not have been asked to provide approval or authority if it was otherwise considered to be an appropriate adjustment for the claimant. The claimant’s evidence to the Tribunal was that she felt discouraged from obtaining Dragon, and “*which was why I didn’t ask for it*”.

84. NM did not recall the event or any occasion when Dragon was demonstrated to the claimant when sitting next to NM. She said in evidence that, “*I get focussed on what*

I am doing, and not always aware of whats happening around me". NM denied in evidence that she would have refused Dragon for the claimant. NM's evidence was that she was unaware of Dragon as an assistive software until these proceedings were underway. When questioned about this in Tribunal, NM maintained that she hadn't known of Dragon or its uses at the time, and that, "*her skills were finance and investment, and didn't have experienced knowledge of assistive technology*" but was, in NM's words, *"learning together*". Two days previously, NM and the claimant had had a positive meeting and a broad range of adjustments were discussed and actioned. On questions in re-examination, NM highlighted that assistive measures were discussed on 9 January meeting, which related to Outlook and specific adjustments such as screen filter clips, slide rule and coloured paper background. The blue coloured-paper notes of the meeting on 9 January [277] are a manifestation of that adjustment.

85. On further questioning from the Tribunal, NM accepted that she had not initially read the claimant's emergency contact form (which disclosed FND) and only did so later in the year; that she had an awareness of the claimant's FND condition because the claimant had shared documents about FND in general. When asked if NM had "delved" into FND, NM said that she had seen general documentation and being aware of the impending 23 December 2022 assessment, she then agreed with the claimant to meet in the New Year, in her words to understand more, such that up to that point her knowledge was more, "g*eneric, maybe an understanding of possibilities*". There was more that NM could have done to better understand the claimant's FND. NM considered that she had a good relationship with the claimant. NM understood there could well have been a relationship between the claimant's work performance and FND.

86. The claimant was asked in evidence whether she was able to work at different spaces in the office. The claimant agreed, stating that she would usually be next to NM but that she could go to a different place (while ensuring that her "buddies" were informed). The latter practice is corroborated in the "*Livs buddies*" chat.

All-Staff Away Day on 31 January 2023

87. The respondent held an all-staff away day on 31 January 2023. The claimant had responsibility for several aspects of the organisation of the day. During the day, the claimant felt increasing anxiety. At some point, the claimant recalls that KB had asked the claimant whether she was ok and it appears that the claimant "*felt embarrassed to say and worried what would be said if she didn't fulfil her duties*" OT/59.

88. Most unfortunately, the claimant had a seizure and an ambulance needed to be called. Some questioning arose in connection with what may have been said at the time of the claimant's seizure; specifically in relation to whether KB had offered to help JC (who was herself a first aider and who was overseeing looking after the claimant in crisis) and about whether JC had declined the offer of help. The Tribunal considered that there was no benefit in terms of determining this case to making findings of fact in relation to such matters as occurred in that moment of crisis on 31 January 2023.

89. JC did update KB later in the evening, after KB had enquired about the claimant. The claimant contends that KB should have been allowed to support her during the day: the Tribunal finds that the conversation, as above, between KB and the claimant suggests that KB was not prevented from offering support to the claimant at any appropriate point bearing in mind that KB was also a nominated first aider for the respondent.

90. Regrettably, the claimant had further seizures on 9 and 11 February 2023. On 16 February 2023, the claimant had a return-to-work meeting with JC. A Workplace Stress Assessment [331] was completed by JC. In it, the claimant described that she was upset when she had seen the document on 9 January 2023. On 16 February 2023, JC apologised, stating to the claimant that it was not a document that was intended to be seen by the claimant.

91. On 17 February 2023 the claimant worked from home.

92. The claimant suffered worsening ill-health. On 20 February 2023, the claimant had a further seizure. The claimant commenced a period of sickness absence and ultimately did not return to work.

<u>“Bad Diary Management” Group Chat</u>

93. The claimant was on sickness absence on 21 February 2023. She became aware of a message sent by SB on a whole team group chat. The context is of an in-house informal event where a colleague was planning to make pancakes (as it was Shrove Tuesday). SB was unable to attend. She informed the whole team that, “*can’t’ believe I am missing this…..bad diary management. Have a flippin good time all*”. (**A4**). The message received three smiley emojis and one message saying, “*Nice pun*”. [361].

94. The claimant felt that this undermined her position and was a comment relating to the claimant’s work performance, i.e., concerns around the claimant’s unsatisfactory performance of the task of diary management. In other words, that the claimant saw it as a “dig at” the claimant. The claimant says, at OT/77, that she was “*responsible for managing SB’s diary*” and hence felt that colleagues could easily assume that the implied mistake was in fact the claimant’s mistake.

95. SB was firm and clear in her evidence. The bad management was entirely SB’s own doing. A wide variety of colleagues could book a slot in SB’s diary: it was in that sense, an “*open diary*”. SB undertook primary responsibility for external stakeholder relationships and would as a result also manage her own schedule. SB also rejected the idea that the claimant was responsible for “diary management”; instead, the claimant did, along with others, have access to SB’s calendar for inserting certain meetings such as governance meetings; induction sessions for new trustees.

96. The claimant challenged SB over the group chat. SB maintained that it was not reasonable to infer that the claimant was responsible for the clash. SB maintained that the whole picture was one, “*simply about making pancakes and was not of*

significance, so that its clear that my comment was at my own expense and clearly a joke that I would miss out on pancakes". SB explained to the claimant that in fact the clash arose from a booking by an administrator of a group that SB was attending in London. In her evidence, SB offered to provide the Outlook evidence; the claimant expressed that she was satisfied with SB's explanation. The claimant did not raise the issue with SB at any point. Of course, by this time the claimant was not at work and did not return to work.

97. The claimant's health continued to decline. Her GP advised that the claimant would benefit from time off work. The claimant was prescribed medication used to treat depression.

98. The claimant contacted ACAS for pre-employment tribunal purposes. She had felt that a formal grievance against such senior individuals would serve no purpose and she felt too anxious in any event. The claimant did not feel supported by the respondent.

99. The claimant resigned on 22 March 2023 [365] and her effective date of termination was 29 March 2023 [370].

The Law

100. The claimant's claims, as identified in the agreed list of issues, arise in three ways: discrimination arising from disability, failure to make a reasonable adjustment and harassment.

Discrimination arising from disability

101. By section 15 (1) EqA 2010, which states:

> *"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*."

102. The Supreme Court in Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65, at para [12], sums up the first element of the section succinctly as follows, "*…section 15 appears to raise two simple questions of fact: what was the relevant treatment and was it unfavourable to the claimant?"*.

103. In Williams, at para [27], it was said that unfavourable treatment did not require a hypothetical or actual comparator but measured against an "*objective sense of that which is adverse and that which is beneficial*". The Tribunal also had regard to T-System Ltd v Lewis, EAT, 22nd May 2015 which referred to the disabled person being placed, "*at a disadvantage*".

104. In Pnaiser v NHS England [2016] IRLR 170 at para 31 Mrs Justice Simler DBE identifies the proper approach to be taken in cases involving consideration of s15 EqA.
"(d) … The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
(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.
(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator."

105. It is for the tribunal to reach its own judgment when fairly assessing proportionality based upon a detailed analysis of the working practices and business considerations involved having regard to the business needs of the employer: Monmouthshire County Council v Harris UKEAT/001/15 at para 44 which applied Hensman v Ministry of Defence UKEAT/0067/14.

Failure to make reasonable adjustments

106. Section 20 EqA 2010 provides that there is a requirement where a provision criterion or practice ('PCP') of A puts a disabled person at a substantial disadvantage in relation to the relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

107. Section 21(1) EqA 2010 provides that a failure to comply with the requirement is a failure to comply with the duty to make reasonable adjustments. It is necessary for a tribunal to identify the PCP applied by or on behalf of the employer, the identity of the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant: Environment Agency v Rowan [2008] ICR 218.

108. In considering the reasonableness of the proposed adjustment the question of whether the adjustment would work in practice is relevant. Having identified whether an adjustment is reasonable the burden of proof shifts to the respondent to show that an apparently reasonable adjustment that has a prospect of success was not a reasonable adjustment: Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10.

109. Respondent counsel referred the Tribunal to Ishola v TfL [2020] ICR 1204. A one-off decision can be a PCP but, at [38], not necessarily one when having regard to the act or decision and particularly where disability related discrimination is not made out in respect of that act or decision.

Harassment

110. By section 26 of EA 2010, which provides as follows:

> "*26 Harassment.*
> *(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.*

111. The section adopts a 4-step approach, asking:
   111.1. What was the conduct that the claimant was subjected to by the respondent
   111.2. Was it unwanted conduct
   111.3. Was it related to a relevant protected characteristic
   111.4. What was the purpose alternatively did it have the effect of violating dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.

112. In considering the issue of harassment, the tribunal reminds itself of the essential elements, namely unwanted conduct; the specified purpose or effect (as set out in s26 EQA); and that the conduct is related to a relevant protected characteristic: see Richmond Pharmacology v Dhaliwal [2009] IRLR 336, as updated by reference to the EqA provisions in Reverend Canon Pemberton v Right Reverend Inwood [2018] EWCA Civ 564.

113. The burden of proof provisions apply. When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of a protected characteristic (such as disability), it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of that characteristic. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of that characteristic. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see Nazir v Asim & Nottinghamshire Black Partnership [2010] IRLR 336 EAT.

114. The EAT in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor 2020 IRLR 495, EAT held that the question of whether conduct is '*related to*' a protected characteristic is a matter for the appreciation of the Tribunal, making a

finding of fact drawing on all the evidence before it. The fact that the complainant considers that the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser.

115. A similarly broad approach in Carozzi v University of Hertfordshire 2024 EAT 169 emphasised that there is no requirement for a mental element equivalent to that in a claim for direct discrimination. The EAT noted that there may be circumstances in which harassment occurs where the protected characteristic did not motivate the harasser. It gave the example of a person who unknowingly uses a word that is offensive to people who have a relevant protected characteristic because it is historically linked to oppression of people with that characteristic. There could be circumstances in which the use of the word would nonetheless amount to harassment applying the factors in section 26, notably the perception of the complainant and whether it is reasonable for the conduct to have the effect of violating dignity. The Tribunal had regard to British Bung Manufacturing Co Ltd and anor v Finn 2023 EAT 165: emphasised the importance of the context of a remark said to constitute harassment that might encompass the prevalence among persons having the relevant protected characteristic of the feature to which that remark alludes and the absence of any other factor or circumstances said to explain the remark.

116. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant. In Dhaliwal, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

> *"while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."*

117. The EAT in Dhaliwal also stated that: *"Not every…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".*

118. The EAT in Weeks v Newham College of Further Education (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that: "*….An 'environment' is a state of affairs. It may be created by an*

incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace.”. Context is crucial; and this is a factual assessment. Thus, an evaluation of the conduct complained of is highly fact sensitive and context specific: Evans v Xactly Corporation Limited, UKEATPA/0128/18/LA, 15 August 2018. The purpose or intention behind the conduct complained of could also be relevant to whether it was reasonable to regard it as having a particular effect: Heafield v Times Newspaper Limited, UKEATPA/1305/12, 17 January 2013, which in turn referred to the discussion in Richmond Pharmacology v Dhaliwal [2009] ICR 724 and in Grant [2011] ICR 390.

119. Similarly in the case of HM Land Registry v Grant [2011] EWCA Civ 769, “*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*.”

120. Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be recognised that is not always easy to do so. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met Driskel v Peninsula Business Services Ltd. [2000] IRLR 151.

121. As to the burden of proof, it is set out at section 136 EqA. The Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

Time Limits

122. As to time limits, the provisions on time limits under the EqA are set out at section 123 EqA:

123 Time limits

(1) *… proceedings on a complaint within section 120 may not be brought after the end of—*

(a) *the period of 3 months starting with the date of the act to which the complaint relates, or*

(b) *such other period as the employment tribunal thinks just and equitable.*

…

(3) *For the purposes of this section—*

(a) *conduct extending over a period is to be treated as done at the end of the period;*

(b) *failure to do something is to be treated as occurring when the person in question decided on it.*

(4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

(a) *when P does an act inconsistent with doing it, or*

(b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

123. Guidance for the test for a "continuing act" is set out in Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686. Recent case law regarding the exercise of discretion for the purposes of the just and equitable provisions includes Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23.

124. Where a claim is added by way of amendment, Galilee v Commissioner of Police of the Metropolis UKEAT/0207/16 held that when granting permission for a party to amend a claim, the amendment takes effect for the purposes of limitation at the time permission is granted to amend the claim, rather than dating back to the date the original claim was presented. The issue relating to whether the claim was out of time is a matter that can be left to be dealt with at the Final Hearing.

Discussion and Conclusions

125. We turn now to apply the law to the findings of fact and the allegations.

*Allegation 1: On or about 20 December 2022 Jenny Curtis said in a meeting in the claimant's presence "I'm looking forward to being thin again", which was not criticised or remedied by the CEO Sally Byng **(A1)***

Harassment

126. What was said has not been in dispute nor in any material sense was the context in dispute. The meeting commenced with an icebreaker that had been distributed beforehand although JC had not prepared her answer in advance. JC said, "*I'm looking forward to being thin again*". When JC said this, she had uppermost in her mind the fact that she had eaten a quantity or chocolate or snacks that had been provided by the organisers or donated to the respondent. JC was a witness who was reflective and whose evidence was aimed at assisting the Tribunal. The Tribunal accepted her evidence that when she made her comment it was not intended as a reference to body shape or image but instead as a consequence of a sense of having overeaten.

127. The Tribunal accepted the claimant's evidence that a key component of her eating disorder was that she had issues with body shape and/or image and that the claimant was distressed by the comment at the time although there is no indication that any reaction was visible not least because no other colleagues would have been

alive to a potentially adverse reaction from the claimant. The claimant had not shared with anyone at the respondent that she had an eating disorder or had issues with eating. At that point in time, the claimant was in a "*secrecy*" phase. The claimant later shared information about her eating disorder at the 9 January 2023 meeting although she did not disclose at any time during her employment her feelings about JC's words. SB was present and did not challenge JC comment.

128. JC's comment was unwanted conduct.

129. However, the comment was not related to a relevant protected characteristic, namely disability. The Tribunal accepted JC's evidence that the comment was related to a feeling of having overeaten and not body image or shape. The Tribunal has applied the broad approach to this issue as set out in the caselaw. The Tribunal reminded itself that JC's motivation behind the comment was a relevant factor but of itself not determinative. The claimant said that body image was a key component of her disorder but that is not evidence of such prevalence among persons having the relevant protected characteristic that the Tribunal felt able to decide that the comment was related to the relevant protected characteristic.

130. There was no intention to violate the claimant's dignity or otherwise offend on the part of JC. JC was a supportive colleague in in the workplace. She was also a measured witness whose evidence the Tribunal accepted. Further, JC had no knowledge at all of the claimant's eating disorder and could not therefore have intended to harass the claimant. Finally, the claimant (to her credit) fully acknowledged that JC did not have the relevant intention.

131. Taking into account all the circumstances, the Tribunal finds that JC's conduct and SB's conduct did not have the effect of either violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant's perception is highly material but is not of itself determinative. The fact of her reaction does not of itself determine the question. The Tribunal finds that it was obvious that JC did not intend to offend. The claimant knew JC well enough to know that and has acknowledged that. The Tribunal has taken into account that JC has provided an explanation for her remark. It was a single incident and the circumstances in which it was said were transitory, unplanned and consistent with a light-hearted environment. Further, it is unsurprising in such circumstances that SB did not challenge the comment. Having regard to the case law and the threshold required by the correct application of the caselaw, it is the Tribunal's view that this remark does not meet that threshold.

132. The harassment allegation fails.

Allegation 2: On two occasions which were on or about 21 December 2022 and 11 January 2023 Nicola Mosley the claimant's manager made a sound of aggravation and pulled a face expressing annoyance when she knew that the claimant's disability would pose an obstacle to the completion of the task assigned to the claimant and would be the cause of an error ***(A2)***

Arising From; Harassment

133. The Tribunal gave careful consideration to the nature of the evidence of conduct on the part of NM. The Tribunal accepts that it is the claimant's recollection that, on 21 December 2022, NM had made a sound and had appeared to pull a face and that this had occurred when Ms Fleming had been in the room. At the time, the claimant was working side-by-side to NM. The Tribunal also accepts that it is the claimant's perception that NM had reacted to a comment made by Ms Fleming that there was a clash in her calendar.

134. The Tribunal is being asked to decide what was the conduct of NM. The Tribunal found that Ms Fleming had come into the room and spoke to the claimant about a calendar clash, which may well have come about because of something that the claimant had done as part of her job. The Tribunal found that NM did make a noise and an expression in such a manner as attracted the claimant's attention. It is the context and reason for that conduct which is in focus. NM does not recall the event. The claimant did not raise the matter at the time and not until these proceedings.

135. The Tribunal unanimously agreed that their decision therefore arose in circumstances where there was limited evidence and that their conclusion was finely balanced. Ultimately the majority (Judge Beever and Mrs England) reached a different conclusion from the minority (Mr Cronin) about what on a balance of probabilities had happened.

136. The majority considered that the relationship between NM and the claimant was a supportive one; already evidenced by the collaborative approach to adjustments for the claimant, the operation of "Livs buddies" group chat and the agreement to explore the claimant's individual symptoms of FND following the imminent (in 2 days' time) neuropsychology assessment. This environment is corroborated by the positive meeting subsequently on 9 January 2023. Prior to 21 December 2022, there is no indication of impatience or intolerance on the part of NM towards the claimant and, as the Tribunal has found, keeping a record of "Concerns" was an appropriate management step to take. The second alleged incident on 11 January is the subject of vague evidence and the claimant (again, to her credit, seeking to assist the Tribunal) was unable to provide clear evidence of the circumstances of NM's conduct on 11 January 2023.

137. Overall, the majority was not satisfied that that NM's conduct on 21 December 2023 was as a reaction to what Ms Fleming had said or that it related to the claimant. Further, the majority was not satisfied that NM had expressed herself, whether in sound or facial gesture, so as to show disdain or anger on 11 January 2023 or if it did happen to any extent that it was as a reaction to a mistake that she believed the claimant had made.

138. The majority was not satisfied that NM's conduct on either occasion had been a reaction relating to the claimant or the claimant's performance of her job. The majority took account of the claimant's perception of events. However, this did not undermine the findings of the majority as it was not necessary to make a finding that

the claimant had made up the incidents. The majority also took account of its later findings in respect of the Dragon software (A7) and felt that there was no corroboration that NM had acted in a manner that was adverse to the claimant in connection with mistakes or errors in the performance of her job or in connection with potential adjustments.

139. The minority accepted the claimant's evidence in respect of both occasions and considered that there was nothing about the claimant's evidence to suggest that she would have simply made up the incidents. The minority noted that the claimant's witness statement, at [OT/31 and OT/44], describes the claimant's distress and also the claimant's resulting view that she, "*felt extremely nervous ahead of our meetings as NM's behaviour was unpredictable as a result of these incidents*". The minority considered that NM did not meet her responsibility as line manager when at the outset of employment failing to read the emergency contact form (which disclosed the claimant's FND) and considers that NM had not made efforts to investigate the potential impact of FND on the claimant. The minority considers that NM did not display a supportive approach towards the claimant as is evidenced by the minority's finding (see below, A7) in connection with the Dragon software.

140. The minority found that NM's conduct on 21 December 2022, in making an audible reaction and a frustrated facial expression, was as a direct response to Ms Fleming disclosing that there was a clash in her calendar (which the minority finds to be related to the claimant's performance of her role) and also on 11 January 2023 an adverse sound and a facial expression as a response to a mistake made by the claimant.

141. The minority also took account of its later findings in respect of the Dragon software (A7) and felt that this corroborated its conclusion that NM did act in a manner that was adverse to the claimant. The minority concluded that there was more than one incident and it was set against a backdrop of tension, or "unpredictable" behaviour".

142. On the basis of the majority, NM did not treat the claimant unfavourably. NM's conduct on 21 December 2022 in making a sound or expression that gained the attention of the claimant was not directed at or related to the claimant and it was not an expression of annoyance that was related to the claimant's disability or that the claimant's disability might pose an obstacle or cause an error in completing her job. NM did not place the claimant at a disadvantage. The claimant has not established that the conduct of NM on 11 January 2023 took place as alleged nor that if it did that it was directed at or related to the claimant or that it placed the claimant at a disadvantage.

143. The "something arising" relied on by the claimant is slowness in processing information and occasional disordered work. NM did not treat the claimant unfavourably because of something arising from the claimant's disability. NM's conduct was not directed at or related to the claimant or her disability or the effects arising from her disability.

144. The allegation of discrimination arising from disability fails.

145. On the basis of the majority, the conduct of NM on 21 December 2022 was unwanted. However, it was not conduct that was related to a protected characteristic. It was not directed at the claimant or related to the claimant or the performance of her job or in respect of the claimant's disability posing an obstacle or causing an error in completing her job. The majority is not satisfied on a balance of probabilities that there was conduct as alleged on 11 January 2023 at all or that such conduct was unwanted conduct or that it was related to a protected characteristic.

146. The majority does not find on a balance of probabilities that any conduct on the part of NM, on either 21 December 2022 or 11 January 2023, was intended to violate the claimant's dignity or otherwise offend the claimant. There was no evidence prior to 21 December 2022 of impatience or intolerance on the part of NM towards the claimant's performance of her role or of her genuine need and entitlement to reasonable adjustments.

147. In deciding whether, in all the circumstances, it would be reasonable to treat conduct as having the effect of violating Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, the Tribunal also takes into account the threshold as set out in the guidance, including Richmond Pharmacology. The majority finds that NM's conduct on 21 December 2022 does not meet the threshold for harassment.

148. A single event is capable of amounting to harassment but the Tribunal is entitled to take account of the fact that a single event needs to be sufficiently serious to meet the threshold. The majority found that there was no relevant conduct on 11 January 2022 and conduct on 21 December 2022 was a single event, transitory and falls short of the threshold required.

149. The allegation of harassment fails.

Allegation 3: On or about 9 January 2023 the claimant's manager Nicola Mosley had a document entitled "Concerns Re Liv" open on her screen which was in the claimant's line of vision. This referred to the claimant who became distressed and no apology was offered. This PCP relied upon is the respondent's practice of leaving sensitive documents open and viewable to staff ***(A3)***

Arising From; Failure to make Reasonable Adjustment

150. NM was working on her computer and duplicate screens at a workspace immediately adjacent to the claimant. NM had drafted a list of "*Concerns re Liv*" following advice from JC to be able to keep an accurate note for future reference. It is unsurprising that the claimant would catch sight of the screen contents and all the more realistically so given the claimant only saw the bold larger font title of "*Concerns re Liv"*.

151. The claimant commented to NM that she had seen something that she "shouldn't have". NM responded by seeking to reassure the claimant that she was not to worry and that it could be discussed at the planned meeting on 9 January 2023. It was evident that NM was sufficiently anxious about the claimant's response to seeing the document that she brought JC into the later meeting for support.

152. The content of the document, "Concerns re Liv" appears to be a legitimate management record of performance matters pertaining to the claimant. However, this allegation is not a complaint about the record being made. It is about the fact that the claimant should be able to discover what should have been a confidential document. There was nothing untoward about the claimant's actions on that day. The claimant was entitled to believe that the document should not have been visible to the claimant so openly in the workplace. It would evidently be disturbing even absent any disability context.

153. The Respondent treated the claimant unfavourably. It was to the claimant's detriment that she should be alerted in such an avoidable and unstructured and unmanaged way to the fact that her line manager apparently had "concerns" about her.

154. The "something arising" is the claimant's challenges in performing her role, including slowness in processing information and occasional disordered work.

155. It is necessary to ask if the unfavourable treatment was because of any of these things which are said to have arisen from the claimant's disability. Here, the Tribunal reminded itself of the allegation. The treatment complained of is not the fact that the respondent had concerns. Nor is it the fact that the respondent decided (with JC input) to record the concerns so that they could be addressed at some future point.

156. The complaint is that the sensitive document was open and viewable on the screen. NM did this because she was working in the office and was undertaking her manager responsibilities and preferred to work digitally at her workplace in the open plan office, rather than, for example, to keep a manual record in a notebook. It might legitimately be said that NM could have been more careful; she could for example have used a different more isolated workspace for such matters. Nevertheless, these criticisms highlight the essential conclusion that "Concerns re Liv" was open and viewable on NM's screen because that was NM's way of working and it was not in any sense because of the claimant's challenges in performing her role.

157. As a result, the claimant's allegation of discrimination arising from discrimination fails.

158. Turning to the reasonable adjustment claim, the respondent did apply a PCP of a practice of having a sensitive document open and viewable to staff. Respondent counsel urged the Tribunal to analyse the incident as a "one-off". That submission is rejected. The claimant's discovery of the document may be fairly described as a one-off. However, that occurred because of NM's practice of working digitally at her workplace and as a result her documents being open and viewable to staff.

159. The PCP applied to all in the workplace including the claimant. Given the claimant's FND, the claimant was more likely to be sensitive and distressed on seeing the document.

160. NM's role as a manager inevitably involved dealing with sensitive documents. NM could have ensured the confidentiality of the document by working on it in a manner – at a time and/or in a place or workspace - that it would not have been visible to other staff. The document was not time critical. At NM's own convenience the document could have been compiled when there was no risk of being viewable. The building had different workspaces and side rooms and the Tribunal did not hear any evidence that an alternative workspace would be unworkable. It was reasonable for NM to make the adjustment of ensuring the confidentiality of sensitive personnel performance documents.

161. The failure to make a reasonable adjustment claim succeeds.

Allegation 4: On or about 20 February 2023 Sally Byng posted a message on the whole team chat to the effect "can't believe I'm missing this as well as [other employee name withheld] which is bad diary management (in the context of diary management being the claimant's responsibility) ***(A4)***

Arising From; Harassment

162. The message was available to the Tribunal [361]. SB posted it when she realised that she could not attend the in-house informal pancake event because she was required to attend a meeting in London at the same time. SB maintained an "*open diary*" in the sense that various people could identify a gap in her diary and book a slot in it. On this occasion, an administrator involved in the London meeting had made the conflicting booking.

163. The Tribunal accepted that the message was not directed at the claimant and did not relate to the claimant at all. "Diary management" was not the responsibility of the claimant and in the Tribunal's judgment it was not likely to be the conclusion of any other colleague that the message was directed at the claimant.

164. The context of the message is crucial. It was a message to the whole team. The Tribunal accepted SB's evidence that this was not a forum where she would be likely to call out any individual accountability, nor did she. The content of the message concerned an informal social pancake making event. The obvious contrast with SB's responsibilities as CEO firmly indicates the humorous context of the message. The communication also evidently included a pun ("flippin") about pancakes.

165. SB did not treat the claimant unfavourably. It was not objectively reasonable to think that the message related to the claimant let alone that it reflected adversely on the claimant. It did not place the claimant at a disadvantage.

166. The "something arising" relied on by the claimant is the sometimes disordered and poorly planned work including errors in setting up meetings and calendar invites.

167. SB posted the message because she intended it to be a humorous comment in the context of missing a social pancake event which had clashed with a CEO responsibility at a London meeting. The pun reinforced the humorous nature of the message. SB posted the message, "*at my own expense and clearly a joke that I would miss out on pancakes*". The treatment of the claimant was not because of any of the things that are said to arise from the claimant's disability.

168. The allegation of discrimination arising from disability fails.

169. The message was not unwanted conduct. The Tribunal recognises that the claimant was on sick leave when she saw the message and that she reacted to it. However, it was not reasonable to think that the message related to the claimant let alone that it reflected adversely on the claimant.

170. The message was not related to a protected characteristic. The comment referred to bad diary management. There is no evidence of any prevalence among persons having the relevant protected characteristic of disability of the feature to which that comment refers. The comment has been explained by SB and the Tribunal has accepted that evidence.

171. There was no intention on the part of SB to offend the claimant. When the Tribunal decides whether, in all the circumstances, it would be reasonable to treat the conduct as having the effect of violating claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, the Tribunal takes into account the threshold as set out in the guidance, including Richmond Pharmacology. We must not cheapen the words of section 26 of the Equality Act. The Tribunal's decision is that this conduct does not cross that threshold.

172. The allegation of harassment fails.

Allegation 5: On a continuing basis from at least November 2022, the claimant's manager Nicola Mosley instructed the claimant not to include a link to join meetings remotely when sending invitations to those meetings. This was a practice which did not support inclusivity and prevented others from accessing the meetings remotely when they needed to do so ***(A5)***

Arising From; Failure to make Reasonable Adjustment

173. NM did instruct the claimant not to include a remote link to meeting invitations. The link in question that the claimant was instructed to remove was a default link that Outlook attaches to a message whether or not it is intended by the Outlook

invitation. The reason why NM gave this instruction was to avoid the confusion that arose when the invitation was for an in-person meeting.

174. The Respondent did not treat the claimant unfavourably. NM's instruction did not relate to the claimant at all. The fact that the claimant holds a belief that it would promote inclusivity if the default link was retained does not provide the evidence that the claimant was unfavourably treated by this instruction. The claimant was not placed at a disadvantage when instructed not to include a default link to meeting invitations.

175. In any event, NM held genuine views about the collaborative benefits of in-person meetings and that in the event that anyone wished to join remotely it would have been supported by the respondent. By contrast, a default link entailed a blanket approach to remote access which might not in every circumstance be appropriate or even feasible.

176. The "something arising" relied on by the claimant is not entirely clear. In the claimant's closing submissions, she refers to the fact that meetings were routinely organised far in advance and as a result it should have been possible to arrange for working from home facilities to be made available to the claimant. The claimant is conflating this issue with a separate point that was alluded to during the Hearing which was that the claimant should have been allowed to work from home on a more structured basis. However, that is not her claim and it is not pleaded as part of her claim or in respect of any detrimental treatment that she has received.

177. The reason why NM instructed the removal of the default remote link was that she wished to avoid confusion arising when a meeting was planned to be an in-person meeting. It does not impact on the steps that the respondent would or might take in the event of a colleague, including the claimant, seeking to attend the meeting remotely. NM did not instruct the removal of the default link for any reason to do with the claimant's own performance of her work or for example her challenges in performing the role of minute taking of meetings.

178. The allegation of discrimination arising from disability fails.

179. Turning to the failure to make reasonable adjustments claim, the PCP relied on by the claimant is a "practice of dissuading employees from attending meetings remotely". The Tribunal was not asked or required to determine whether the respondent in general operated an acceptable or lawful meeting attendance policy or practice. The facts that underpin this allegation relate to the removal of the default link. The instruction was an administrative one which reflected a default provision that was apt to confuse and had no bearing on the respondent's practice adopted for remote meetings. The Tribunal accepted the respondent's evidence that in the event of any colleague wishing to attend a meeting remotely, that "*if anyone had asked to attend remotely, this would have been supported*". The Tribunal found that the claimant has not established that there was a PCP of dissuading employees from attending meetings remotely.

180. A PCP (if it had been pleaded) that specified the removal of the default link would not have been a PCP that placed persons with whom the claimant shared a protected characteristic at a substantial disadvantage compared with those who did not have the characteristic because an automatic default link itself did not have any bearing on whether remote attendance was permitted or encouraged at the meeting.

181. The allegation of a failure to make a reasonable adjustment fails.

Allegation 6: refusing Katrin Brown to act as a disability buddy in connection with epilepsy ***(A6)***

Arising From; Failure to make Reasonable Adjustment; Harassment

182. The Tribunal reflected on its findings of fact, set out above. It found that it may well be the case that KB had expressed a willingness to assist in some way. The Tribunal has not found that KB requested to be a disability "buddy" to the claimant and the Tribunal's conclusion is that that the respondent did not refuse KB, nor did the respondent say that she "couldn't". The respondent's approach towards the claimant's epilepsy was supportive and positive. The collaborative nature of "Livs Buddies" is a revealing feature of the respondent's support.

183. If KB had made a request to act as a "buddy" and it was refused, the Tribunal finds that it is likely that it would have come to the attention of the claimant and most likely also JC. Yet KB did not have any discussion on this topic with the claimant at any time during the claimant's employment although there was nothing stopping her from doing so. Nor did KB discuss this request with JC. Had KB wanted to provide the kind of practical support envisaged in a "buddy" it is surprising that it was not the subject of any conversation between KB and the claimant. There was nothing stopping KB discussing the matter directly with the claimant and the Tribunal found that would have happened if KB had formed an intention to take on a role as "buddy". There was nothing stopping the claimant in those circumstances also identifying KB as a buddy just as she had DJ.

184. The claimant has failed to establish the conduct relied on. The Tribunal rejects the allegation that the respondent "refused" to allow KB to act as a "buddy". In those circumstances, each of the claimant's allegations of discrimination of arising from disability, failure to make a reasonable adjustment and harassment fail.

185. Specifically, there was no unfavourable treatment. This is because at no point did the respondent refuse KB to act as a buddy. The claimant was not aware of this suggestion until after her employment had ended. At no point was KB restricted or prevented from offering help to the claimant. The claimant was not placed at a disadvantage.

186. The "something arising" relied on is having epileptic seizures. However, this cannot be relied on by the claimant as being the reason why KB was allegedly refused. It might well be the context in which a request would be made however it is

not correct, either on the facts as found by the Tribunal or as a matter of logic, to conclude that the alleged refusal was because of any of the things which are said to have arisen from the claimant's disability. This allegation is misconceived.

187. The allegation of discrimination arising from disability fails.

188. The respondent did not apply a PCP of refusing or failing to provide a disability buddy. KB was not refused and in addition the evidence in fact points to the opposite conclusion particularly the collaborative operation of "Livs Buddies", including the claimant's inclusion of DJ, and also of the approach and attitude of JC over the material time.

189. The allegation of failure to make reasonable adjustments fails.

190. There was no unwanted conduct. This is because at no point did the respondent refuse KB to act as a buddy and the evidence points to the contrary conclusion. The claimant was supported in her need for "buddies" and there was collaboration and recognition that the claimant should get the support that she needed to be able to manage her condition in the workplace. There is no evidence that she was refused any buddy that she had wanted. That remained the position throughout her employment. The claimant only became aware of KB's potential involvement in the issue later in November 2023 when she spoke with KB who herself by that time had also left the respondent. However, the Tribunal has found that the respondent did not refuse a request for KB to be a buddy.

191. In any event, the Tribunal considers that there was no intention on the part of the respondent to violate the claimant's dignity or to create an intimidating etc environment. The respondent's approach towards the claimant's epilepsy was supportive and positive. Further, in deciding whether it would be reasonable to treat the conduct as having the effect of violating claimant's dignity or creating an intimidating etc environment for the claimant, the Tribunal took into account all the circumstances of the case including the respondent's supportive and positive approach and the fact that the claimant did not have any conversation nor was aware at any time during her employment that there was any resistance or refusal of support for her in respect of her epilepsy needs. To the extent that KB was informed that her assistance was not needed, it is conduct that falls short of anything like a refusal and was not inconsistent with the respondent's consistent approach towards supporting the claimant's requests for assistance relating to her epilepsy. The Tribunal has had regard to the guidance in the case law, including Richmond Pharmacology. The Tribunal concludes that the conduct did not have the effect of violating claimant's dignity or creating an intimidating etc environment for the claimant

192. The allegation of harassment fails.

Allegation 7: refusing or failing to act upon the Claimant's request for Dragon Dictate Software, first asked for in January 2023 ***(A7)***

Arising From; Failure to make Reasonable Adjustment; Harassment

193. The Tribunal gave careful consideration to the nature of the evidence of conduct relied on in support of this allegation and reflected on its detailed findings of fact, set out above. The factual basis for the allegation remained unclear because the claimant accepted in evidence that she did not in fact expressly make a request for Dragon Software.

194. After the meeting on 9 January 2023, JC followed up on potential reasonable adjustments. On 11 January 2023, JC wrote in an email [289] to RB that "*we talked about Dragon*", i.e., that JC and the claimant had talked about Dragon. This was not a request for Dragon Software but a suggestion by JC to look further into it. The claimant does not suggest the contrary.

195. The email corroborates the fact that on 11 January 2023 KB was asked by the respondent to demonstrate Dragon software to the claimant. KB already had Dragon as a disability adjustment. There was a willingness on the part of the respondent to investigate and provide adjustments.

196. On 11 January 2023, KB came to the claimant's workspace intending to demonstrate her Dragon software to the claimant. The room had 4 workspaces in it and the claimant was working adjacent to NM. There is a factual dispute about what then ensued. KB and the claimant at some point continued their discussion in a side room. The Tribunal unanimously found that NM spoke to the claimant and to KB while they were in conversation and that the effect of that intervention by NM was that KB and the claimant moved their discussion to the side room. It was because the discussion was at that point was causing a distraction.

197. What NM said and the circumstances and manner in which she said it is a matter of factual dispute. The Tribunal is being asked to decide what was the conduct of NM. Ultimately the majority (Judge Beever and Mrs England) reached a different conclusion from the minority (Mr Cronin) about what happened.

198. The majority noted that the event took place two days after the 9 January 2023 meeting, attended by NM and JC and the claimant, which was described by the claimant as "positive" in connection with the outcomes, i.e. the reasonable adjustments, that were agreed or promoted. They are further listed in JC's witness statement. The respondent was investigating and implementing a number of adjustments for the claimant. At no stage prior to 11 January 2023 had NM indicated to the claimant that she was unhappy or hesitant about the claimant's access to reasonable adjustments, including for example ClaroRead. The majority concluded that there was nothing prior to 11 January 2023 that indicated that NM might react adversely to the claimant's reasonable adjustments.

199. The majority concluded that NM had intervened to tell KB and the claimant that their conversation was causing a distraction and that it should be continued in the side room. The majority concluded that this was not a comment about the merits or otherwise of the Dragon software and specifically that it was not a comment that the

claimant would not be able to have Dragon. The majority consider that this is supported by the claimant's evidence to the Tribunal that, "*KB and I had a conversation and she showed me her laptop and NM (who was working on her own things) said there was a distraction because KB was demonstrating how it worked and then the conversation ende*d". It is also supported by KB's evidence that the conversation in the side room lasted 15 minutes and also at the end KB left it with the claimant, *"to take up Dragon in any direction. The claimant could use access to work. KB suggested speaking to JC as JC had helped KB to obtain Dragon*".

200. The majority consider the fact that their discussions continued for 15 minutes and ended with a positive suggestion from KB that the claimant should progress matters with JC indicates that NM's comment was not about rejecting Dragon but was simply about taking their conversation somewhere else. The majority concluded that NM did not dismiss the possibility that the claimant could use Dragon software. The majority concluded that the claimant could, and frequently did, move to a different workspace when the need arose. As a result, the majority also concluded that that NM did not dismiss the possibility that the claimant could work at a different workspace when a need arose.

201. The majority took into account that NM did not recall the conversation. The majority also took into account that NM stated that she did not know what Dragon software was (until these proceedings) and saw no reason to reject that evidence. NM described her role as essentially a financial role. It was the case that it did not fall to NM to approve or deny the claimant the reasonable adjustment. That role fell to RB and/or JC to facilitate reasonable adjustments and there is no evidence that the claimant spoke to either of them on that topic and make any request. It may be that the claimant has since formed a perception that she was discouraged from accessing Dragon Software. However, she had not raised it at the time. If the claimant knew of the facts at the time, it was only first considered as a claim by the claimant after her conversation with KB in November 2023, nearly a year after the events in issue.

202. The majority also took into account its findings of fact relating to A2 above. Ultimately, the majority concluded that NM's words and conduct on 11 January 2023 did not amount to a refusal or a rejection of Dragon Software for use by the claimant. The claimant did not in fact make a request, either of NM or of JC or RB, for Dragon software.

203. The minority agreed that the event took place on two days after the 9 January 2023 meeting, but considered that the meeting on 9 January 2023 was led by JC whose positive approach had influenced the outcome of the meeting and it was likely to be at the initiative of JC that adjustments were implemented. The minority also accepts the claimant's evidence that she was nervous on account the "*unpredictable*" behaviour of NM. The minority also took into account its findings of fact relating to A2 above.

204. The minority finds that NM's interruption of the demonstration because of distraction to her working would have had a significant effect on the claimant particularly in the light of A2 above. The minority considers that it is significant that

NM claims to have no recollection at all of this incident. The minority considers that the effect of deflecting the demonstration into side room on account of the distracting effect on NM amounted to a discouragement bordering on denial of a potential tool which would have assisted the claimant in dealing with her disability. The minority considers the fact that the ensuing conversation lasted for 15 mins is solely suggestive of the fact that there was merit in the idea that the claimant could usefully use the software. However, the claimant had felt unable to pursue it further given her line manager's reaction. The minority also considered that KB's advice to the claimant to progress Dragon software with JC reflected an impression that KB might have had that NM was resistant to the use of dictation software.

205. The minority considered that the evidence of both KB and the claimant was consistent. The minority also took into account its findings of fact relating to A2 above. Ultimately, the minority concluded that NM had intervened and did request a move to another room because the demonstration was a distraction and that this thereby discouraged the claimant. The minority did not accept NM's evidence that she was unaware of what Dragon software was.

206. On the basis of the majority, the respondent did not refuse or fail to act upon the claimant's request for Dragon software. On 11 January 2023, the claimant did not request Dragon software and NM did not tell the claimant/KB that the Dragon software would not work or that the claimant could not have it. There was no evidence of any request by the claimant after 11 January 2023. The claimant has not established the conduct relied on. The treatment as alleged by the claimant has not been established. The allegation of discrimination arising from disability therefore must fail.

207. Further, on the basis of the majority, NM did not treat the claimant unfavourably. The claimant was not refused Dragon software nor did the respondent fail to act on any request when NM asked the claimant to continue a discussion in a side room. A request to continue a discussion in a side room did not place the claimant at a disadvantage. The "something arising" relied on has not been clearly identified by the claimant but it might well be described as the claimant's requirement for assistive software. The reason why NM asked the claimant to continue a discussion in a side room was not because the claimant may have had a need for assistive software but because the discussion at that moment was a distraction.

208. The allegation of discrimination arising from disability fails.

209. The PCP relied on was refusing or failing to supply Dragon software. There was no refusal and the claimant did not make any request for the software. The respondent had provided Dragon software to KB as part of a reasonable adjustment. There was no evidence that the respondent failed to supply Dragon software to any other employee or had a practice of doing so. The claimant has failed to establish that the respondent applied the alleged PCP to the claimant.

210. The allegation of failure to make a reasonable adjustment fails.

211. On the basis of the majority, the claimant has not established the alleged conduct for the purposes of her harassment claim. The claimant was simply asked to continue a conversation in a side room. Further, the majority was not satisfied that this amounted to unwanted conduct. Further it was not conduct that related to a protected characteristic because on the basis of the majority NM did not refer to Dragon software; Dragon software was not requested by the claimant; there is insufficient evidence that enables the majority to conclude that Dragon software was prevalent in those who shared the claimant's characteristics or in fact that it would have been a reasonable adjustment for the claimant.

212. The majority found no basis for concluding that there was any intention on the part of NM to violate the claimant's dignity or to create an intimidating etc environment. Most likely, as NM said in oral evidence, "*I get focussed on what I am doing, and not always aware of whats happening around me*". The majority view was that there was no evidence of intolerance or impatience on the part of NM towards reasonable adjustments for the claimant. In deciding whether it would be reasonable to treat the conduct as having the effect of violating the claimant's dignity or creating an intimidating etc environment for the claimant, the majority took into account all the circumstances of the case including NM's relationship with the claimant and the respondent's approach towards reasonable adjustments for the claimant. The majority has taken into account the claimant's perception that this event had discouraged her from asking Dragon and from speaking to JC about it. However, taking into account all the circumstances, and including whether it would be reasonable to have that effect and having regard to the guidance in the case law, including Richmond Pharmacology, the majority concludes that the conduct did not have the effect of violating claimant's dignity or creating an intimidating etc environment for the claimant.

213. The allegation of harassment fails.

Allegations 6 and 7 – Time points

214. An issue arises as to the jurisdiction of the Tribunal to hear the complaints in relation to A6 and A7 which were added to the claim by way of amendment on 1 May 2024 [103].

215. In the light of Galilee, the amendment took effect for the purposes of limitation at the time permission was granted to amend the claim, rather than dating back to the date the original claim was presented.

216. In this case, the claimant had entered into the ACAS EC procedure between 24 February 2023 and 6 April 2023 and had presented her claim form on 28 April 2023. The amendment of her claim took effect on 1 May 2024.

217. The claimant complains in A6 that the respondent had refused to permit KB to act as a buddy. The date of the alleged refusal is unclear although KB refers to it in her witness statement as being in "*November/December 2022*". A claim in respect of a failure to make reasonable adjustments is subject to more complex rules as to the running of time in that it requires an assessment under section 123(3) of EqA of a

failure to do something being treated as occurring when the person decided on it and the Tribunal also has had regard to section 123(4) of EqA. The claimant complains in A7 that the respondent had refused or failed to act upon the Claimant's request for Dragon Software. In each of A6 and A7, the claimant's complaints extend to discrimination arising from disability, a failure to make a reasonable adjustment and harassment.

218. For the purposes of dealing with the time issue and taking into account the potential for a continuing act, the Tribunal is prepared to assume without deciding that there was conduct extending over a period and that the end of the period was the end of the claimant's employment on 29 March 2023. The Claimant's amended claims are out of time.

219. The claimant had not been aware of KB's evidence relating to A6, the alleged request to be a buddy, until the claimant and KB spoke together in November 2023. At that time, KB also talked about Dragon software. The claimant says that she took advice at that time and prior to that time did not appreciate that she might have a legal claim in respect of the Dragon software. The claimant in evidence stated that thought that, "*I needed to raise it at a Preliminary Hearing if I was asking for permission*" and that she was not aware of the details prior to the Hearing on 7 November 2023. The claimant is a litigant in person. The Tribunal takes account of the respondent's submission that the evidence for the allegations was not particularised until the exchange of witness statements in January 2025. The respondent contends that there was clear forensic prejudice in asking witnesses to respond to allegations. As the Tribunal has now heard the evidence, it has been alert to look for the actual prejudice. JC was able to answer questions regarding A6. RB was not called as a witness and it was not explained to the tribunal whether there were any relevant reasons for that. As regards A7, it is apparent that NM had no recollection at all of the event, and had no awareness of Dragon until proceedings commenced, and that Tribunal in all the circumstances is not persuaded that any evidential prejudice arises from the delay in bringing the allegation.

220. Taking into account the guidance in Adedeji, the Tribunal finds that it is just and equitable to extend time in respect of A6 and A7 to 1 May 2024 and accordingly the Tribunal has jurisdiction to deal with the claims.

Conclusions

221. The claimant's claim that the respondent failed to make a reasonable adjustment in respect of its practice of leaving sensitive documents open and viewable to staff is well founded and succeeds.

222. In all other respects, the claimant's claims of unlawful disability discrimination are not well founded and are dismissed.

223. In respect of the claimant's remedy, the Tribunal will send a separate case management order requiring that the parties are to notify the tribunal within 14 days

of the receipt of the written reasons whether they require a remedy hearing to be listed and if so to provide dates to avoid for a Hearing for 3hrs. The parties are reminded of rule 3 of the Employment Tribunal rules and the benefits of seeking to resolve disputes by agreement.

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EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 4 March 2025

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JUDGMENT SENT TO THE PARTIES ON

06 March 2025 By Mr J McCormick

FOR THE TRIBUNAL

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