EMPLOYMENT TRIBUNALS

Claimant: **Ms A Lovell**

Respondent: **National Highways Limited**

Heard at: Reading **On:** 6 to 9 May 2025, 4 & 5 June 2025 (discussion and judgment writing)

Before: Employment Judge George, Mr P Hough, Mr D Wharton

Representation
Claimant: Mr N Toms, counsel
Respondent: Mr C Ilangaratne, counsel

RESERVED JUDGMENT

1. The unanimous decision of the Tribunal is that the following complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds:

    a. LOI 2.(f): Giving the claimant a level 5 score in June 2022.

2. By a majority (employee-side NLM Mr D Wharton and employer-side NLM Mr P Hough: Employment Judge George dissenting), the following complaints of unfavourable treatment because of something arising in consequence of disability are not well-founded and fail:

    a. LOI 2.(d): Removing 'M2 Operations' work from the claimant on 4 May 2022;
    b. LOI 2.(e): Telling the claimant on 4 May 2022 that she would be put on a PIP.

3. The unanimous decision of the Tribunal is that the remaining complaints of unfavourable treatment because of something arising in consequence of disability (LOI 2.(a) and (c)) are not well-founded and are dismissed.

4. The unanimous decision of the Tribunal is that the following complaint of harassment related to disability is well-founded and succeeds:

a. Ms Webber telling the claimant on 4 May 2022 "I don't now whether I would have appointed you", "Well I didn't hire you" and "I didn't sign off your probation either".

5. By a majority (employee-side NLM Mr D Wharton and employer-side NLM Mr P Hough: Employment Judge George dissenting), the remaining complaint of harassment related to disability is not well-founded and is dismissed.

6. The unanimous decision of the tribunal is that the respondent shall pay to the claimant compensation for injury to feelings in the sum of **£2,360.00** calculated in the following way:

	£	**£**
Compensation for injury to feelings caused by s.15 disability discrimination as in LOI 2.(f) No interest as loss fully mitigated by 8 November 2022	500.00	500.00
Compensation for injury to feelings caused by harassment related to disability	1,500.00	
Interest @ 8% from 04.05.2022 to 04.06.2025 36 months @ £10 p.c.m.	360.00	
	1,860.00	1,860.00
Total compensation		**2,360.00**

REASONS

1. In this hearing we had the benefit of a joint hearing file of 1072 pages. The parties had agreed a Cast List and Chronology which was particularly helpful because it cross-referred to relevant documents. In these reasons we use the initials of the first and last names of individuals named in the Cast List for ease of reference and mean no discourtesy by this. Counsel exchanged written submissions after evidence was concluded and replied to each other (and answered Tribunal questions) orally. Those written submissions are referred to as CSUB and RSUB respectively.

2. The claimant had disclosed audio recordings of (at least) two meetings. She was given permission to record meetings as one of the adjustments recommended by occupational health following her diagnosis with ADHD and anxiety. There was a discussion at the start of the final hearing about whether or not we would permit them to be played in open tribunal. Initially the respondent invited us to listen in full

to the entirety of the recording of the meeting of 4 May 2022. The claimant's position was that it was not necessary to do so but, if we did so, then we should also listen to the recording of 7 June 2021. The suggestion was that we should do so when reading into the case: together the recordings of the two meetings would amount to about 1.5 hours of audio.

3. The Tribunal was unwilling to do this for three reasons. First, it was unclear that it was necessary to listen to the entirety of either recording to get a sense of the tone of the participants and there was an agreed transcript of both meetings. Secondly, it was disproportionate to spend so much of the time available for pre-reading on listening to the audio when it would be quicker to read the transcript. Finally, if points were to be made in closing that the audio showed that a participant had behaved in a particular way, then the relevant part of the audio should be played in open tribunal during that witness's evidence so that they had a fair opportunity to answer the allegation.

4. In the end, the respondent chose to play selected passages during the claimant's evidence and asked questions about them in cross-examination. The claimant did not ask for particular passages to be played and cross-examined with reference to the transcripts.

5. We heard oral evidence from the claimant and Ms Clare Webber, latterly the Senior Communications Manager and the claimant's line manager from August 2020 onwards. They both adopted written statements as their evidence and were cross-examined upon them. Beyond regular breaks, no particular adjustments were requested by Ms Lowell. Ms Webber has a hearing impediment; we asked whether any particular adjustments were needed to the face-to-face hearing and none were asked for.

6. The respondent had intended to call Mike Russell - the Communications Business Partner and, prior to Ms Webber's promotion, the claimant's line manager. He had approved a witness statement which had been exchanged as directed and had been available to give evidence when the case was original listed for hearing in June 2024. The hearing was postponed due to non-availability of judicial resource. He was unfortunately unavailable to give evidence at the re-listed hearing; he no longer works for the respondent and had booked to be on holiday. The respondent asked us to take his evidence into account and give such weight as we thought appropriate. The claimant agreed that it was appropriate for us to do that but argued that very little if any weight should be given to his evidence in those circumstances.

7. Timetabling the hearing was discussed on Day 1 of the four day allocation. Due to a personal appointment, the tribunal was unable to sit on the afternoon of Day 4. When the hearing was originally timetabled the expectation was that there would be sufficient time to conclude evidence and submissions by the end of Day 3. The decision was taken at the outset to reserve judgment with the expectation that there would be sufficient time to make the decision on Day 4. Unfortunately, oral evidence took slightly longer than expected so additional deliberation and judgment writing days were timetabled. As this is a majority decision in part, the draft judgment was circulated for approval to the individual tribunal members. Those factors have led to a delay in the final judgment being sent to the parties.

The Issues

8. A revised List of Issues had been agreed ahead of the hearing (page 56). Paragraph numbers in that Agreed List of Issues are referred to in these reasons as LOI para.1 or as the case may be. A minor amendment was made to delete the reference in LOI 2.(b) to an allegation that "Smart Motorways" work was removed in Spring 2021

and, following oral evidence that specific allegation of unfavourable treatment was withdrawn entirely.

9. As the Tribunal decided at the outset to reserve judgment and because the potential remedy issues if the claim succeeded to any extent were limited to an assessment of compensation for injury to feelings, it was agreed that remedy issues would be covered in oral evidence and submissions together with the liability issues. Therefore, when the Tribunal retired to consider our decision, we had all the evidence and submissions needed to made decisions on all of the issues in the claim.

10. For ease of reference, the Agreed List of Issues (with the deletion of LOI 2.(b)) is appended to these reasons. The original paragraph numbering has been retained.

Findings of Fact

11. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

12. This is, in part, a majority decision both as to some of the findings of fact and as to the conclusions drawn from the facts as found. Where particular findings of fact are those of the majority or (conversely) the minority, that is clearly stated at the start of the relevant paragraph. Findings and conclusions set out in a particular paragraph are unanimous unless expressly stated otherwise. For the avoidance of doubt, the majority in all cases were Mr Wharton and Mr Hough and the minority was Judge George.

13. The claimant commenced employment with the respondent as a Communications Manager on 23 January 2019, the same day as Ms Webber started employment in the same role. The claimant's probation was completed on 24 May 2019 (page 70).

14. Ms Webber was promoted to Senior Communications Manager, a new position, in August 2020. She became the claimant's line manager at that time. As is well known, this was during the national coronavirus pandemic. Construction was exempt from the stay-at-home order. Those engaged in construction (including road construction) were permitted to continue working and so the business of the respondent continued. The claimant and other employees continued in their roles, working from home. At some point it was agreed that the claimant and other parents should work mornings only because schools were closed and they needed to home-school their children. This affected part of the academic year 2019-2020 and part of the academic year 2020-2021.

15. The claimant's caring responsibilities were particularly challenging because she is the single parent of a special educational needs child.

16. The claimant was diagnosed with ADHD (inattentive presentation) following a consultation on 6 October 2020. A short form letter from consultant psychiatrist said that (page 745)

> "Ms Lovell's diagnosis of ADHD is likely to affect her ability to study and work in a shared space due to distractibility, it is likely to affect her ability

to prioritise tasks, organise herself and concentration for sustained periods. It is therefore appropriate to consider reasonable adjustments in the work and study environment so that she is not disadvantaged by her symptoms."

17. Page 666 is the longform written report dated 21 October 2020 which was written by the same consultant. It was provided to the occupation health service used by the respondent and is referred to in the second occupational health report (page 137). Ms Lovell reported particular manifestations (the word she used in evidence) of her ADHD to the consultant (page 667 – 8):

> "Day to day Ms Lovell reported that she was always late, she tended to get easily overwhelmed, particularly about having to prioritise tasks. She tends to interrupt, she gets easily frustrated, in order to work she needs a distraction free space, she has difficulty making decisions and she tends to be very reactive in her way of working. She reported that she tends to get bogged down in details which can be exhausting and she is a perfectionist.
> …
> Ms Lovell described herself as being irritable, frustrated and snappy. She tends to have impulsive arguments with people and this has in the past been a problem in the workplace, however she did not feel that she was emotional on a day to day basis."

18. In paragraph 1 of the Opinion and Recommendations section (page 669), the consultant says that the claimant meets the diagnostic criteria for Attention Deficit Hyperactivity Disorder (ADHD) predominantly Inattentive Presentation.

> "The criteria were met because of longstanding inattention characterised by disorganisation, difficulty completing tasks, distractibility and mental restlessness as well as emotional dysregulation. In addition to ADHD, Ms Lovell has distressing dairy [SIC] intrusive thoughts associated with compulsions, a constellation of symptoms consistent with **obsessive compulsive disorder (OCD)** as well as daily anxious ruminations and somatic symptoms of **anxiety**, in particular around her health and medical procedures, consistent with health anxiety."

19. This was based upon the claimant's self-reported manifestations, but the opinion by an expert psychiatrist from the Adult ADHD and Adult ASD Service of the South London and Maudsley NHS Foundation Trust is reliable and one to which we think it right to give weight. Not only are they expert in the condition, but they assessed the claimant according to recognized criteria and diagnostic tools with input from the claimant's mother. There is no reason to think that they were wrong to accept the claimant's account of her own experiences or failed to use their clinical judgment appropriately when assessing whether those experiences were accurately described by her and whether her account was reliable.

20. The claimant gave a similar account of her experiences to the occupational therapist who saw her on 5 May 2021. That occupational therapist was expert in ADHD and her clinical assessment notes (page 120) and the report (page 137) are both in the hearing file. Ms Webber gave evidence that she got both documents but paid more attention to the latter which contains the recommendations.

21. The occupational therapist's overall findings on capability "indicate that Ms Lowell is fit and capable of completing her role and hours with support and adjustments." (page 140) She said that, while not a medical decision, her opinion was that the diagnosis was likely to be considered a disability within the meaning of the EQA. Ms Webber accepted that she understood that when she read the report. The concerns reported by the claimant are set out at pages 138 – 139.

22. At page 140, the occupational therapist sets out some information about ADHD for the benefit of the referring manager and explains that ADHD has three core symptoms which affect people with it to different degrees:

"**Inattention**:
Difficulties with concentration, short term and working memory
Difficulties with planning and getting started (activation)
Difficulty with organisation and losing things
Easily distracted by small things which others would not notice

Impulsiveness:
Acting or speaking on the spur of the moment without thinking through the consequences.
Difficulty controlling emotions

Hyperactivity:
Whilst adults with ADHD are usually much less active than children with ADHD, they may still have symptoms such as restlessness and the need to tap or fidget. Some people are diagnosed with attention deficit disorder, without hyperactivity: this is particularly the case for girls and women and specific to Ms Lovell.

ADHD is a lifelong condition and cannot be 'cured' – but it can be successfully managed. Many people with ADHD find their symptoms improve with medication – but this only works for as long as the medication is in the body – unfortunately, Ms Lovell is unable to take medication for her ADD."

23. The respondent has provided some evidence that the claimant had difficulty completing the role of communications manager to their satisfaction. An example of that is the difficulty in time management which led to work for HL not being completed in a timely fashion in about August 2021 (page 243) and about which a complaint was made to Ms Webber (page 241). The claimant did, on occasion, have difficulty completing or meeting performance objectives. This is not to say that she did not complete tasks or meet objectives; she had difficulty doing so.

24. On balance of probabilities we accept that, as a consequence of her ADHD, the claimant was easily distracted (as she told the occupational therapist - page 138), had difficulty prioritising tasks and meeting timeframes, found some large tasks overwhelming and procrastinated on completing such tasks. As a matter of objective fact, those traits meant that she had difficulty in completing or meeting performance objectives and difficulty completing tasks in time.

25. In the claimant's contemporaneous account of the incident of 27 & 28 May 2021 and her interaction with the IT team on 28 May 2021 (page 161), which was relayed by her to HR on the day, she said that her reaction had been influenced by or impacted by being neurodiverse because an effect of that in her case was that she experienced emotional dysregulation.

26. We have found that part of the evidence leading to the diagnosis of ADHD by the consultant psychiatrist was that emotional dysregulation was a trait shown by the claimant. There is expert evidence both that emotional dysregulation was reported by the claimant and that it is a recognised trait of ADHD generally.

27. It is argued on behalf of the respondent that the evidence does not specifically address whether the claimant experiences traits of emotional dysregulation because of her ADHD and only that this is a trait of people with ADHD generally. However, the consultant's report in the passage at page 667 – 668 specifically records the claimant informing her of emotional aspects and that appears to feed through into the conclusion that she meets the criteria, including because of emotional dysregulation (page 669).

28. We accept on the balance probabilities that a trait of ADHD which the claimant experiences is becoming emotional or struggling to cope with her emotions.

29. The analysis of the medical evidence about the claimant's ADHD dates from the October 2020 diagnosis and the detailed occupational health report in May 2021. The claimant had been referred to occupational health in September 2020 (page 112) which led to an interim report on 7 December 2020. However that clinician volunteered that they were not expert in the condition and recommended that an assessment be carried out by someone who was. Between knowledge of the diagnosis and the detailed recommendations of the occupational health therapist in May 2021 the respondent did attempt to support the claimant once they had knowledge of her diagnosis despite not having detailed recommendations from occupational health.

30. The claimant told Ms Webber that she had received a very comprehensive diagnosis (that at page 666) and asked her what she would require to see it because it contained "extremely, extremely personal information" which she was not happy with too many people having access to (page 111). Ms Webber replied to say that she did not need anything because occupational health would work with them. This exchange was in October 2020 when detailed recommendations from occupational health might reasonably have been expected to be available within a few weeks. The claimant then said that she was happy to let OH have access but "only if it is kept confidential between them, you and Mike" which made it clear that the claimant was willing for Ms Webber to see the comprehensive consultant's report. The claimant also sent a link to an employer's guide to adjustments for people with ADHD (page 110).

31. Ms Webber seemed to think that the claimant was unwilling for her to see the full report which was a misunderstanding of what the claimant had said. Additionally Ms Webber wanted the medical information in the consultant's

report to be interpreted for application in the workplace which is the purpose of an occupational health assessment. The only conclusion we draw from this that is relevant to our decision is that Ms Webber had the opportunity to consider the full consultant's report. She decided to wait for that to be interpreted through the lens of the occupational health therapist who could advise on what steps Ms Webber needed to take. It was understandable that she should want the expertise of the occupational therapist on what adjustments might assist Ms Lovell.

32. The majority (the non-legal members Mr Wharton and Mr Hough) accept that the decision to wait for the occupational health report was a reasonable one. Therefore, they find that Ms Webber was reasonably unaware of the contents of the full report although they note that the claimant herself explained that she experienced emotional dysregulation as a consequence of ADHD and that that was an explanation for the incident on 28 May 2021 (see page 155 and 159 - 161).

33. Employment Judge George respectfully disagrees with the view that it was reasonable in the light of all the correspondence for Ms Webber not to ask for or read the full report. She draws the conclusion from the correspondence that Ms Webber was being asked to read the full report by the claimant. This means that Ms Webber was not reasonably unaware of the contents – including where it refers to emotional dysregulation.

34. Ms Webber clearly read the employer's guide to employing people with ADHD (forwarded to her in October 2020 – page 111) because she replied to the claimant that the information mentioned work coaches which Ms Webber thought would be really helpful to the claimant. Although we did not have specific evidence on this, there is some synergy between what a work coach would provide and the deep dives scheduled between Mr Russell and the claimant between January and February 2021. From the contemporaneous documentation, those deep dives involved giving the claimant a structured approach to working to assist her to prioritise tasks and complete them. The tribunal understands that there were approximately 6 of those and accept that it was unusual for them to be provided; the tribunal infers from the fact of them that Ms Webber and Mr Russell had genuine concerns about the claimant's ability to complete and meet performance objectives and to do so in time.

35. The decision about whether particular OH recommendations are steps which it is reasonable for an employer to have to take has to take into account both the needs of the employer and those of the employee. It does not inevitably follow from an occupational health or other medical recommendation that particular adjustments would or may be of assistance to the employee in alleviating a particular disadvantaged arising from a disability that the employer can reasonably be expected to implement them. There are other factors which have to be balanced in individual cases. This is noted in the Occupational Therapist's letter page 140 which says that the recommendations "are made on a permanent basis *if operationally viable* to assist her in managing her assessed and reported difficulties whilst at work" (our emphasis). That issue would take into account other factors such as the cost, any disruption to the organisation, and the impact on other workers.

However, it has not been suggested that the steps recommended by occupational health were not ones which it was reasonable for the respondent to have to take. In fact, they set about implementing all of them.

36. In oral evidence Ms Webber would not refer to the steps taken by the respondent as reasonable adjustments. Nevertheless, contemporaneously the recommendations are referred to as the claimant's reasonable adjustments.

37. The recommended adjustments were set out in an internal document by Ms Webber which appears to have been used to record who was to be responsible for putting them in place. It is at page 144 and those which were the respondent's responsibility to put in place have been highlighted in yellow on that page.

    a. The recommendation that the claimant had a dictaphone to allow her to record meetings was put in place by giving her permission to use her iPhone to make a recording. As we understand it that was done immediately.

    b. It was recommended that instructions be given both verbally and in written format. As we understand it this was put in place immediately by Ms Webber and Mr Russell.

    c. The recommended ADHD coaching "to develop strategies to assist her with her difficulties" required Ms Webber to communicate with HR. Ultimately this was put in place with the first meeting taking place on 22 February 2022.

    d. It was agreed that the claimant should have extra time to complete reading and process the information she has read.

    e. She was encouraged to take notes when reading important information.

    f. It was advised that she print off written documents and initially the suggestion was that Ms Lovell purchase a printer and claim the cost back from the respondent. The reason for the recommendation was that the therapist suggested highlighting the written documents will enable Ms Mrs Lovell to prioritise tasks using a traffic light system. She did not appear to use it in that way; her oral evidence was that she was able to or intended to sort the pages into piles because she found a visual, physical representation of what she had to do effective to help her prioritise tasks. She could not recall using the traffic light system.

    g. It was recommended that she work in an area that was quiet with fewer distractions and that co-workers should not disturb her. As we understand it Mrs Lovell was given permission to work from home so that she could control her working environment and this recommendation was achieved that way.

h. The final recommendation that required action by the respondent was voice recognition software. The emails at page 320 suggest that by September 2021 this had not yet been provided but the claimant has not argued before us that lack of this tool impacted on her ability to carry out her role.

38. The chronology of the provision of a printer to the claimant needs more detailed findings. The claimant's evidence (rather broadly stated) was that the diagnosis was in October 2020 and she did not have a working printer until April 2022. In the first place, the recommendation for a printer was made in May 2021 rather than in October 2020. Her oral evidence was that she sent 123 emails chasing up a printer between June 2021 and April 2022 although she accepted the hearing file did not contain anything like that quantity of emails.

39. The majority (Mr Wharton and Mr Hough) infer from this discrepancy that the claimant exaggerated the extent that she had chased completion of this particular adjustment and that this damaged her credibility.

40. Judge George accepted the claimant's explanation for the discrepancy namely that she had listened to advice to include only a selection of chasing emails.

41. The use to which she intended to put the printer was slightly different to the use proposed by the OH therapist (the traffic light system referred to above). In oral evidence Mrs Lovell said she wanted to print documents off "because there were so many details that have to be absorbed when working on closures and dates" and the OH therapist's suggestion was just an example of how it might be used; she had not had a chance to put the traffic slight system into place.

42. It was put to her that there was an option of buying the printer herself and reclaiming the cost. Her response was that on her salary she could not afford that and that she had been told by the respondent's HR that she had been misinformed and it was "on us" to supply the printer (see an email from June 2021 at page 194 where the claimant asks whether the respondent could take out a subscription to ensure that she does not run out of ink).

43. By September 2021 the discussion had reached the point that it appears to be proposed that the claimant have a large office type printer. She stated (page 325) that "my line manager is complaining that it is affecting my performance to not have one". The claimant accepted that offer (see email of 22 September 2021 page 319). There are communications about making arrangements to deliver the printer on 14 October 2021 (page 343) which stated that the standard NH home worker printer should be available when the previous owner leaves on October 11 (page 315). There then appeared to be a discussion about whether the clamant should purchase paper and reclaim it (page 364). However from 18 November 2021 the claimant had everything needed to print at home – at least temporarily.

44. Contemporaneous emails (page 1007) include her stating that it only worked for about three weeks; her oral evidence was that it was available from December and only worked for 2 weeks. Although we do not think that the claimant intended to mislead in her evidence about this, it is an example

where her recollection and immediate response in oral evidence was not quite accurate and tended to exaggerate the respondent's failings.

45. The respondent did not accept that the printer had only been operational for as little as three weeks. The claimant was adamant that it had stopped working before Christmas but accepted that she may not have reported it until she was back at work after the Christmas break.

46. There is a report to IT on 3 February 2022 (page 1013) that the claimant's printer no longer recognises her laptop. The claimant may not have reported the failure immediately but this is apparently not the first email in the communication so the respondent appears to have known there was a problem sometime in January and the printer was only working for a few weeks (a maximum of two months which included the Christmas break). A new device was provided on 31 March 2021 (page 1022) and was then made operational on 21 April 2022 (page 1020)

47. The claimant's evidence about the usefulness of the printer was that, as a person with ADHD she is a visual learner and "that's how we see things rather than a mesh of emails". When she had the printer, she had printed off the work that needed to be done and put them in piles by priority. She may not have highlighted passages but regarded what she had done as essentially providing the same support to her ability to prioritise things. See also her email on 22 March 2022 (page 999) where she states

> "This is actually really starting to affect my work now having been reprimanded for not keeping on top of all my schemes and this is because I haven't got a printer to be able to help me prioritise my workload. This will now affect my appraisal raiting (*sic*)."

48. Ms Webber was in tribunal throughout the claimant's evidence. When, during her own oral evidence, she was asked whether she agreed or disagreed that the printer was there to help with time management she said that she had to work at making the connection between what printing things off lends to organising time but, having heard the claimant's evidence, if you print them off and put it into piles you could probably think about how long that pile is going to take you to do.

49. We accept that, in principle, piles of work of high, medium and low urgency work would help with prioritising and time management. That appeared to be what the claimant was saying. The claimant could not recall whether she used the printer for the recommended traffic light system or not. Ms Webber accepted that having heard the claimant's evidence, that was logical but we find that this was not a connection Ms Webber made at the time.

50. The minority, Employment Judge George, accepts that the lack of a printer at home could apparently not be alleviated by use of the office printer without interfering with the other adjustment that Mrs Lovell work from home so that she could control her working environment, except, perhaps, on an occasional basis.

51. The majority, Mr Wharton and Mr Hough, find that the claimant could reasonably have made use of occasional visits to the office to print off relevant materials for use at home and that the fact that she did not suggests

that she was not as badly affected by the lack of the printer as she now seeks to portray. She did, after all, visit Guildford when necessary to repair or replace her laptop. The Majority view is also that the evidence suggests that the claimant's performance failure were not causally linked to the failure to provide her with a working printer. Furthermore, her vagueness about the use she put it to when it was working causes them to infer that the printer was not an important tool to reduce the effects of ADHD on her. Their view is that the importance of the printer has been somewhat exaggerated within these proceedings because it suited the claimant's case to do so.

52. The minority view of Judge George is that the printer is only indirectly relevant to the claim; if the respondent has to show that particular acts were objectively justified, then if they can show that the failure to provide the printer was irrelevant to a particular error or failure on the part of the claimant, the absence of the printer would be irrelevant to the justification argument. In any event, given we accept that a printer is something which, in principle, would help to improve the time management and performance issues then, on balance, the absence of a printer means it is more likely that the claimant will continue to have time management and performance issues and there is a causal link to that extent.

Removal of Major Projects work (the A31 Ringwood By-Pass) in January 2021

53. In January 2021 the claimant was working reduced hours to support home schooling of her special needs son due to Covid related school closures. Some work would have had to be removed from the portfolio of projects the claimant was responsible for to make her workload manageable. The A31 Ringwood By-Pass was one of those and appears to have been the focus of attention in this complaint because it was a Major Projects task and that was the specific allegation. Other work was redistributed at the same time – as we understand it. The predominant reason for the removal was the need to reduce workload to support the claimant's homeschooling and caring responsibilities at that exceptional period.

54. It was argued by the respondent that it was a fallacy to consider Major Projects as being inherently more important than other projects and that reallocation of such work could not be regarded as inherently disadvantageous. We accept that up to a point. However, those in this category (and projects such as the Smart Motorways) were higher budget and higher profile which could reasonably cause an employee to regard it as disadvantageous to be removed from them. The claimant mentioned her work on this project in her appraisal (page 86). In cross-examination she explained that she had been working on making a film for that project which was something she had been particularly interested in and had asked for the reallocation to be temporary. That had been refused, on her account.

55. Removal of this project was a complaint in the claimant's grievance. In the investigation notes at page 603, Ms Webber was asked questions about support given during Covid. She stated that she reprofiled the claimant's workload and took work that was quite complex or contentious off her leaving

her with more routine work. She also says that, after the ADHD diagnosis, she had tried to take work off the claimant that was difficult for her.

56. We infer from this that Mrs Webber was concerned that the claimant, as a person with ADHD, would struggle with detail, with lots of things at the same time and with having to prioritise things. These were performance concerns that Ms Webber had which chimed with problems she observed the claimant experiencing in delivering projects on time or with sufficient time for consultation.

57. This was probably part of the reason why she removed the A31 project from the claimant. Nevertheless, it played a minor part in her reasoning. This is because the reason the claimant had lots of things to deal with at the same time at that particular time was that her son's school was closed and she was trying to home school him. At some point, the respondent agreed that all parents could work half days to support homeschooling while it was necessary.

58. Additionally, in January 2021, the respondent did not have the benefit of the expert OH report which stated that the claimant was fit to do her full role with adjustments; the original report had been by an OH therapist who candidly explained they were not expert in this condition and could not provide the advice sought. In the absence of formal recommendations Ms Webber was doing the best she could to support the claimant. It was also at about this time that the deep dives with Mr Russell took place (see page 779 dated 14 January 2021 inviting her to the first).

59. We find that at the time, the claimant's concern was that removing the project could be seen as discriminatory (presumably on grounds of sex) because she was home schooling and was a parent. She made that statement to Ms Webber at the time and the line manager took advice from HR on manging this situation (see page 118). This makes clear that the predominant reason for the reduction <u>at this time</u> was to support the claimant with home schooling. We accept that Ms Webber did not say that the reallocation of the A31 project was permanent but she did say (as set out in her communication to HR at page 118) that it was not possible to commit to what schemes or projects the claimant would go back to when she resumed full time working.

<u>IT Incident of 28 & 29 May 2021</u>

60. On 7 June 2021 the claimant and Ms Webber met to discuss an incident which had happened in late May. The claimant's account of the incident is set out in an 11-page document in which she explained a series of events between 26 and 28 May 2021 involving technical problems with her laptop. Her email exchanges with the IT team are embedded within the document. She apparently made several trips to Guildford from her home to arrange first for a replacement laptop, then to address her inability to enter "Share" on the replacement laptop, culminating in an exchange with some IT colleagues on 28 May. She explained in the document that she was becoming increasingly anxious because she had deadlines for particular work, was due to miss some working time the following week for training and that was her last week before some leave. There is considerable detail in her account about why

she was asking for a particular laptop due to having experienced bursitis the previous year, her calls to HR so that she could confirm that to the IT team and about the exchange in general.

61. It is not necessary for us to make findings about what happened on 28 May 2021. The claimant's account is that, due to the pressure, disappointment at missing the training, frustration and anxiety she became upset. Her account emphatically is that she was upset and was not rude. She explained to the HR colleague that part of ADHD was that she can get "emotional dysregulation" which was "not something we can help when we get frustrated at a situation." (page 161 – in the account which the claimant forwarded to Ms Webber).

62. On 1 June 2021, the Senior Problems and Incidents Manager emailed Ms Webber to ask her to take the incident up with Ms Lovell. The account he provided to her (from his staff) was that those staff had ben put in an uncomfortable position, that the claimant had been impatient and rude (see the account at pages 908 – 909).

63. The relevance of this to our decision is not about whether the claimant's account is to be preferred or whether she became rude but about what action the respondent took as a result of the Senior Problems and Incidents Manager raising this with Ms Webber and asking her to take action because he was unhappy that his staff were reporting rudeness by colleagues whom they were trying to assist.

64. Ms Webber's note of the meeting on 7 June 2021 is at page 188. The transcript of the claimant's audio recording (made with consent) is at page 170. One of the things that Ms Webber says (page 178) is that she has to take a complaint of conduct of this kind seriously "so this is like an informal warning but if it were to happen again it would have to be a formal grievance which would …" (at that point Ms Lovell interrupted).

65. Ms Lovell stated more than once that she thought the incident was one person's word against another and that she had been upset by what appeared to her to be the IT colleagues' failure to treat her problem with urgency or, as she saw it, seriously. For example, she challenged Ms Webber about whether it is right to discipline someone "for something they can't help, for part of their disability" and the latter responds "particularly with conduct though I'm sure that you can see that if someone isn't' behaving in a way or is behaving in a way", before being interrupted again by the claimant who repeats that it was their word against hers and that she hadn't been rude, she had been upset. Ms Webber repeated (page 180) that she would write the meeting up, she was dealing with it informally but that if there was another complaint she would not be able to stop it being formalised.

66. Ms Webber gave evidence in her para.47 about concerns which she had about the claimant's work through the summer of 2021 including an episode on 20 July 2021 when the claimant emailed her to tell her she had overlooked that her annual leave started that day, rather than the following day, and Ms Webber had to pick up work as a result. Much of the detail of this was not put to the claimant in cross-examination but she did give evidence that she had made an error about the start of her holiday.

67. Ms Webber made a note of areas of concern at about this time (page 958). In that she outlined a plan where, until 31 August 2021, she would continue with implementation of reasonable adjustments including the printer and ADHD coach and then resulting monitor improvements until 15 October and "If reasonable adjustments have made no difference to the above areas" start a performance improvement plan. She sets out 3 concerns about performance including delivery, timing and quality, 3 consequences of ADHD which affected the claimant's work and 2 behavioural matters both of which arose out of the IT incident: what was described as the "IT argument" and damaged hardware.

68. The claimant agreed that this would have been a reasonable approach in principle but, when cross-examined on page 958 said that the adjustments had only been in place for 7 days when she was told she was being put on a performance improvement plan.

69. In the event, there was a delay in the printer and ADHD coach being put in place. Ms Webber, when asked about this note, said that she had not revisited the timescale at any point because there hadn't been any formality behind those timings and had just been a rough estimate. She did not think there was any reason why she should have to wait 6 weeks before taking action after the adjustments were in place.

Removal of Smart motorways work January 2022

70. This refers to the launch of the M27 Smart Motorway Upgrade. Ms Webber covered this in para.49 to 57 of her statement. There she gives evidence that she considered that the claimant did not know how to draft for social media or how to write for the web and also delivered the work with no time allowed for approval. She illustrated this with pages 972-973, 978-985. Page 979 (January 2022) contains politely worded concerns about how the claimant had dealt with a piece of communications work about the M20 moveable barrier.

71. Ms Webber's rationale was that the M27 Smart Motorway scheme had only a month or two left to run before it was officially opened: this required careful and sensitive handling because of the increased public concern about Smart Motorways generally. She states in para.52 that she reallocated the work from the claimant to herself for time management and performance reasons.

72. At this time the claimant was scheduled to start jury service on 7 February 2022. As is well known the expectation is that a juror will serve two weeks but it may be longer. In actual fact the claimant's service only lasted a few days but presumably that was only known once her jury service started.

73. When asked in cross-examination whether she personally had carried out the work or whether it had in fact been allocated to Madeleine, Ms Webber's oral evidence was that they had worked on it together with Madeleine reporting to her.

"I think if I had had more time, [the claimant] could have worked with me on it. Just that Madeleine and I had just done the M4. We were like 'Let's take this one and do it as well'."

M2 Road Closure communications

74. On 4 May 2022 the claimant emailed Stephen Wall (SW) with a draft communication about road closures on the M2. She stated that "I can't really go ahead with anything else until I know the content is accurate." She had mailed him on 11 April 2022 (page 1016) asking for a marked up map with the diversion and closure marked. There seems to have been some problem about the map. The first draft copy sent to SW for approval is at page 432. There was an exchange during the morning of 4 May 2022 between the claimant and SW. He told her (page 437) that the information was incorrect because the closure was for two whole weekends (and not only Friday and Saturday evenings) but eastbound only rather than an eastbound closure one weekend and westbound the next as in her draft.

75. The claimant explained that she had taken her information from the communications plan (page 351) which does state that the M2 will be diverted both eastbound and westbound, although only one carriageway at a time. Therefore, although the communications plan was inaccurate, her first draft was not identical to it. Furthermore her mail on page 437 suggests she later recollected that the May closure was not westbound: that suggests she had not kept accurate notes of updated information. She appears to send a redraft because at 11.15 she mailed again asking if there are any errors (page 440 – the second draft is at page 465 which still informs only of evening closures). SW's reply referenced banner messages that have been sent out which suggests that a communication of information had previously been published with the correct information on it. He stated that there were still errors and set out the correct information in his mail of 12.11 (page 440).

76. However, he also told the claimant to "hold fire". As we understand it, a Brock Gold meeting was potentially going to decided that Brock was activated and that would delay the M2 roadworks closures.

77. SW appears to have forwarded this to Graeme Steward Area 4 Programme Delivery Manager (GS) who mailed Ms Webber at 12.34 (page 879) with two pieces of inaccurate correspondence about the planned M2 closures. The first was a letter from the correspondence team (i.e. not the claimant's work) and the second was the draft letter passed to GS by SW. He says of the claimant's draft:

> "The content is poorly drafted, again giving misleading information. These are full weekend closures, from 8pm Friday evening to 6am Monday morning, however the letter states Friday and Saturday nights only. The general drafting is not good.
>
> A lot of work has been done to plan these works effectively, and the information has been shared with Ashley through several planning meetings and other discussions, and yet is still be incorrectly reflected in this important letter. The customer correspondence says they could not find any reference to this work on the website – does the scheme not have a webpage?
>
> Can you please review with Ashley and ensure the appropriate focus is on this? Steve Wall, the scheme PM, is liaising with Ashley direct as well.

As it stands, our first weekend closure this weekend has been cancelled due to BROCK, and we're still waiting for clarification on whether we proceed at all in May, what with BROCK now likely being deployed until after May/June Bank holiday weekend. Therefore a degree of flexibility is required (which is not great, but that's not our collective fault)."

78. GS says that information has been shared with the claimant though several planning meetings. However, the claimant stated that the planning meetings had been timed before her working day and started at time she could not attend because of child care commitments. This fact was not disputed. However, the tribunal's view is that the respondent could reasonably expect the claimant to ensure that she found alternative ways to obtain necessary information circulated in these meetings. Her evidence was that she attempted to do so and that her emails were not replied to. Nevertheless, the chronology of the claimant's exchanges with SW suggest that, even if one focuses only on the 4 May exchange, she did not draft a letter which was consistent with previous correct information that she had sent out which suggests a lack of attention to detail and a reliance on others to check her accuracy.

79. Objectively, the draft letter does raise performance concerns. It appears to contain information which Area 4 Delivery Manager says is incorrect because it advises of Friday and Saturday night closures when it is a full weekend closure. It is reasonable of Ms Webber to have concerns about how this situation has arisen and the fact that the Delivery Manager has drawn it to her attention suggestions that he expected her to look into it. What he asked was for her to ask the claimant to focus on this. He did not ask for the claimant to be removed from the task.

80. Ms Webber sent an email to Mr Russell at 12.57 (page 879). This was before she had spoken to the claimant. In it she said,

"I am going to take her off this particular piece of work and feel this alone warrants starting her on an improvement plan – even without the scoring from her appraisal.. I'm going to explain that to her tomorrow."

81. Notwithstanding what she said in that email, as things turned out she told the claimant that she would start her on a performance improvement plan (PIP) that day. By the time Mr Russell replied (at 13.43) providing the managing poor performance procedure Ms Webber had already started a MS Teams meeting with the claimant. Ms Webber's statement evidence was that it was a regular 1-to-1 meeting but accepted at the hearing that that was incorrect: the regular meeting was intended to be the next day and this meeting was called at short notice.

82. The process for introducing a PIP is set out in the policy at page 1046 which was sent by Mr Russell to Ms Webber. His email points to a need for the informal stage being the first step to take with the claimant(bullet point 1 on page 1046). The informal stage should include the contents of section 2 on page 1047.

83. CW did not take advice from HR before having the impromptu meeting with the claimant on 4 May and appears not have receive the email from MR with

the policy before starting the meeting. We do note that the final paragraph before section 3 on page 1048 leads to the inference that that HR advice before the informal stage is not necessary. However, possibly because Ms Webber had not taken advice before the meeting, she appears not to have been aware that the informal discussion should include those bullet points.

84. It was put to the claimant in cross-examination that what Ms Webber did on 4 May was discuss her concerns informally, with specific reference to bullet point 1 on page 1046 – the informal stage. Ms Lovell's response was that Ms Webber had not said that it was the informal stage and it was clear that the claimant regarded herself as being told she was being put on a formal performance improvement plan.

85. However, when Ms Webber was asked about the desired contents of the informal discussion (from page 1047) the impression given from Ms Webber's evidence was that she intended to have future meetings at which those matters would be covered.

86. The tribunal infers from that the, despite the way it was put to the claimant, Ms Webber had decided to start the informal stage of the formal PIP process with the claimant but did not call for the Teams meeting on 4 May intending that she would conduct an informal discussion at it. Instead of being a meeting simply to address the consequences of GW's email about the M2 roadworks closures, Ms Webber appears to have lost control of the meeting which developed into a discussion about a range of issues.

87. As was usual practice, by consent, the claimant recorded the meeting and the transcript is at page 445. There are some disputes about what happened. Ms Webber's statement evidence (para.62) is that some of the audio is missing because at one point the claimant was yelling at her and she asked her to stop yelling. In none of the passages played to us was the claimant yelling. Had she been yelling in any of the disclosed audio we would expect that to have been played to us. She talks loudly and it is clear both from the passages we heard and from the transcript that she interrupted Ms Webber – as she did in the 7 June 2021 meeting. Such interruptions could be perceived as rude and challenging. The claimant was clearly upset but was articulate and firm.

88. We accept that there must have been some exchange between the two women before the first entry in the transcript at the top of page 445 because there is no greeting and there is no context to the "this" in "I'm not putting you back on <u>this</u>" (our emphasis) and "this letter". She must have said she wanted to talk about the M2 project and referred to the specific letter.

89. Judge George finds that the passage at the lower hole punch

> "Well, Clare, can I just say, what I don't like is when you've got a problem with me you come straight in and you say, 'so I'm going to have to take it off…' before letting me have a chance to speak and that's what I don't like because you should hear both sides of the situation and then make a decision."

leads to the inference that the claimant's recollection is correct and there was minimal conversation before the start of the transcript and no discussion

about her explanation for any errors; the meeting started and she was told that she was being removed from the M2 project. She considers that conclusion to be supported by Ms Webber's email to Mr Russell from before the start of the meeting which made clear that she had decided to remove the project from the claimant before finding out if there was any explanation for the inaccuracies. The discussion at the bottom of page 450 causes Judge George to infer that Ms Webber made the decision before it was brought home to her that the claimant had not bee responsible for one of the two pieces of inaccurate correspondence.

90. The majority (Mr Wharton and Mr Hough) accept Ms Webber's evidence that there was a relevant and important exchange before the claimant pressed play which was not captured by the claimant's audio recording. They accept that the claimant was asked for her explanation for the errors in the letter. They accept Ms Webber's oral evidence

"And I do remember that I asked what had happened and in hindsight was there anything that she'd do differently .. and she said no."

91. Ms Webber informed the claimant in the meeting on 4 May 2022 that she was being removed from the M2 road closure project and that she, her line manager, would move to put the claimant on a PIP.

92. At the bottom of page 447 one of the concerns expressed by Ms Webber is "that you don't think there's anything wrong with anything that you ever do or anything wrong with this." Objectively we consider this to be a fair observation. The claimant's explanations in the meeting were not sufficient to excuse the drafting errors. Furthermore, we all observed that the claimant came across in oral evidence as being of the view that no criticism of her work was reasonable where the performance was adversely affected by manifestations of her ADHD. She appeared at times to think that if ADHD caused challenges which were the effective cause of delay and lack of focus or poor attention to detail such that there were errors or last minute demands on other people then that should be excused, regardless of the impact on her quality of work or on her colleagues. She came across as having the view that it was a complete answer to criticism that she has ADHD. That is not what the law requires which is, broadly stated, that the needs of the business should be balanced with the need to give a disabled employee a fair opportunity to overcome the disadvantages their disability gives them. The claimant comes across in the contemporaneous transcripts and came across in oral evidence as having poor insight into her own performance. She emphasised what she had done well – which was relevant – without acknowledging that she had made errors in the draft for which she was responsible.

93. However, we also note the following statement by Ms Webber in the 4 May 2022 meeting about the consequences to the claimant's role of taking her off the M2 road closure project (page 449)

> "Now I've descoped, right I'm going to tell you something, I've descoped this role so much so that you're just doing these letters - you don't do the strat comms, you don't do major projects so this is all you do. I'm having to take you off this and so

its not going to be leaving you with very much at all. So because there's big mistakes in this."

94. Ms Webber told the claimant that GS and SW had lost confidence in her and did not want the claimant working on the M2 road closure project. Ms Webber did not assert that she had had any later communication with either of them about their confidence in the claimant.

95. Mr Hough and Mr Wharton accept that, taking the emails from GS as a whole, this was a reasonable inference for Ms Webber to draw and that she reasonably considered that to restore confidence something decisive needed to be done and that that was to remove the claimant from the project.

96. Judge George does not think that that was a reasonable conclusion for Ms Webber to draw from the email which merely asks her to inform the claimant to focus on this task.

97. Four particular criticisms of performance and conduct were relied on before us as the reasons for the PIP. As it happens more than four things were referred to in the meeting (page 450).

98. The claimant explained in the meeting that she took information from the communication plan (page 451) and Ms Webber explained that she does not want members of her team just saying the detail wasn't in the communication plan. In essence, she said that as communications professionals they are not simply repeating information, they are not "letterbox people" – i.e. receiving information and passing it on. Her expectation was the claimant should develop a relationship with the project managers to get the correct information in sufficient time for accurate first drafts to be drawn up in good time so that they were not being sent out to be checked at short notice. This we consider to be a reasonable expectation for Ms Webber to have and the claimant did not appear to be achieving that.

99. The PIP is first mentioned in a passage from the bottom of page 452 to the top of page 453. She informed the claimant that because of 4 complaints she has had she has decided to "get some kind of improvement in place and that's got to take the form of a plan, a performance improvement plan." Ms Webber does not hold the informal stage on that date which we infer from the comment in the second half of page 457 – "we're going to do the PIP". The claimant asked Ms Webber frequently for her to record the reasons why in writing because she said the mistakes were not hers.

100. The four complaints to Ms Webber about the claimant's performance were explained in her statement para.69 to be the following:

    a. The complaint by IT about the incident of 28 May 2021 (referred to in para.58 - 63XX above);

    b. Email from a colleague called Hermes about communications concerning the A2. His email to GS (page 245) of 18 August 2021 causes us to think that this was one of the matters which was said not to have been completed when the claimant went on leave (see para.64XX above). He mentioned tasks not being complete before

the claimant went on leave which had impact on others. In her oral evidence, the claimant specifically attributed poor time management and forgetting when that leave started to her ADHD. Two of the reasonable adjustments were not in place at that point and in her grievance information (page 533) the claimant attributed difficulties at this time to the lack of her printer. We are mindful that the claimant was not asked in cross-examination about this or the third allegation and it would be wrong, therefore, to find that the criticisms of her in relation to these projects were justified when she was not given the opportunity to comment on them.

c. The only documentary evidence about the 3rd matter is the transcript page 450. Again the claimant was not asked about it in evidence. The allegation was that a project run by Nicola Carley had gone out without any communications on the scheme at all. We do have the claimant's account through the grievance in which she alleged (page 534) she had been told on her return from leave in Spring 2022 that a colleague had had to do it in her absence. The claimant states that she was absent from key meetings because of childcare responsibilities and had taken reasonable steps to find out necessarily information another way. The respondent took the view that the fact that there had been no communications prepared before the claimants leave was sufficient to demonstrate poor performance on her behalf. This is more recent in relation to when the 4 May meeting took place.

d. The email from Area 4 Delivery Manager about M2 closure communications;

101. The majority (Mr Wharton and Mr Hough) find that there is objective evidence that the claimant's work on the M2 communications was inaccurate and therefore not up to the respondent's standard and that the delay in providing the final adjustments was completely irrelevant to those errors. They rely on the claimant's answer in cross-examination that she had written the M2 banners accurately in March 2022 when (according to her) she still had no functioning printer. They consider there appears to be nothing connected with ADHD which explained why that accuracy could not be transferred to the draft letter. They accept the respondent's argument that the delay in providing a printer would have made no difference to that. In any event, it was one of a raft of measures put in place by the respondent to support the claimant and she made a further error which they were objectively justified in tackling.

102. There are other unspecified problems alluded to which did not involve a complaint to Ms Webber. We find that those problems were part of the reason why she thought the performance needed to be managed under the policy. However, the 4 things she raised in the meeting and that have been evidenced before us as justifing the decision are those set out above.

103. The majority (Mr Wharton and Mr Hough) are of the view that the claimant's reaction to management was objectively problematic and made the situation difficult to manage in that she was very defensive and lacked insight.

104. Judge George does not criticise the claimant for defending herself and for pointing out where she considered that her personal circumstances excused errors or lack of prompt action, where she considered the performance to be the work of others or where she considered lack of particular adjustments to contribute to the causes of her errors. Her desire to recount events from the beginning in responses and the fact that she became upset may arise in consequence of ADHD. Nevertheless, it is understandable that Ms Webber, subjectively, found the meeting to be heated and difficult. Judge George agrees that the claimant lacked insight into the challenges that the effect of ADHD had on her work posed for the respondent and her colleagues. For example, see her statement that she is being put on a plan for someone else's mistake: she could not see that she had sent drafts last minute and that the second draft was (according to SW) still inaccurate.

105. The claimant relies upon particular comments made in the meeting of 4 May as the basis of her harassment complaint. Both are found in the transcript but to understand the context and apply the statutory test it is necessary to quote extended passages.

106. The first allegation (LOI 9.(a)) is found at page 460 to 461:

CW	there is now this is the 4th time someone has come to me about your work
AL	And the others were all directly to do with my disability
CW	**That may well be the case but they don't know that, you know they didn't know that you have a disability and or the behaviour that you displayed to them the way that you conducted yourself was not professional**
AL	No no I don't think that's the case
CW	OK obviously you're not going to accept any of this
AL	I've never been rude to Gabi, I've never been rude to Hermes, I've never been rude to Nicola I don't think that's the case at all
CW	But you were rude to the IT people
AL	No we had a falling out and I got upset because he wasn't communicating that he was doing anything on my laptop and I had an episode which is related to my neuro-diverse condition. So that's not a complaint, if I've been put on a plan because of that..

CW	But they don't know that you've got a neuro-diverse condition so how it came across..
AL	Yes but you do. You do. And therefore you know that and you know that's part of my disability and therefore to be put on a performance plan because of something to do with my disability when a reasonable adjustment has not been put in place, because by then I didn't even have an ADHD coach, then that's actually unlawful

107. The second passage (again in bold) LOI para.9.b..

CW	Well I'm afraid there have they've been too many occurrences of similar errors, similar …
AL	They're all to do with my ADHD and the sooner that everyone kind of understands that the better because if you guys, I hadn't have had to wait over a year - a year and a half to have a printer, and over a year to have an ADHD coach then these problems wouldn't have happened
CW	<u>But you can't blame those things on things to do with your ability to do the job. I see those as very different. You know, yes you have the neuro-diversity and you have certain traits to do with your ADHD but there are also shortcomings in the way that you work there are skills that you don't have</u>
AL	Such as what?
CW	Um I'm not going to go into them now but I'm just trying to describe how I see them
AL	Well what example can you give me, I mean you can't say something like that and not have an example
CW	Well personally I don't think your experience is, I think its very different from What we require in this job to do the reputational work for example

AL	So I was Scotland Yard press officer dealing with..
CW	Yes I know, we can, yes I know
AL	You're talking over me again
CW	I would argue that whatever experience you had at the BBC, at Scotland Yard at the NHS, it was probably very different from what's needed now in this role
AL	But obviously I was hired, I passed my probation and I was considered you know fine for the job.
CW	In this role?
AL	Yes exactly
CW	**Well, I didn't hire you**
AL	Well I know you didn't obviously
CW	**I didn't sign off your probation either**
AL	I know so someone else considered me good enough for the job so that's not not really under review, because I got the job same level as you and that's that so its not for you to assess my suitability cos someone else has done that and I got the job.
CW	Well... I'm your line manager now though

AL	I know, but obviously I haven't suddenly like diminished. I've been doing the job for whatever for 3 and half years and I'll continue to do the job
CW	Umm, but **I don't know whether I would have appointed you because...**
AL	Well that's immaterial you know because you weren't my, you were the same level as me at the time. I got appointed.

108. The claimant's grievance is at page 512 and was lodged on 22 June 2022. It can be seen from page 514 that she complained of the comments which are within LOI 9.(b) together with "well … I'm your line manager now though" as harassment and threatening which she took to mean that "she didn't want me there and was going to ensure a bad outcome for me with the performance plan."

109. The Majority (Mr Wharton and Mr Hough) interpret the comments in bold above as an emotional response by Ms Webber rather than calculated statement at the end of an ill-tempered meeting. They do not think it right to infer from those off-the cuff remarks that Ms Webber had decided or expected that the claimant's performance would not improve.

110. The Minority (Judge George) finds that it was reasonable of the claimant, however, to view them in the way that she did. She also reminds herself that Ms Webber told the grievance investigator that the occupational health report said that the claimant could do her job without adjustments when in fact (see page 131), it says the opposite: it says that she was capable of doing her job with support and adjustments. When asked in cross-examination why she had misdescribed it to the grievance investigator, she was unable to provide a satisfactory answer to that question.

111. Judge George draws the inference from that and from the passage underlined in para.105XX above, that Ms Webber did not accept that - or perhaps did not understand how - the claimant's ADHD impacted on her ability to carry out her work in any significant respect and therefore did not analyse the possible interaction between the lack of particular adjustments and the incidents which she relied on as justifying the PIP.

112. The claimant resigned on 17 August 2022 and her effective date of termination was 2 September 2022. There are no complaints within the claim which arise out of the end of her employment.

The Level 5 appraisal score

113. She was signed off work on 5 May and returned on 20 June 2022. She was line managed by Mr Russell while the grievance investigation was carried out. On 12 May 2022 (page 472) she was given a reminder to complete her

self-assessment for her year-end appraisal. Mr Russell's evidence was that Ms Webber had, to his knowledge, intended to award the claimant a score of 4 (Working Towards) in her annual performance review but that this had not happened before he temporarily replaced her as line manager.

114. In his para.36 he states that he made the decision that the claimant should receive a score of 5 (Unacceptable). He did so because he considered the claimant to be the lowest performer within the bracket of Pay Bands 4 – 6 and did not think there was a good reason to explain that,

"all the adjustments that she had been recommended were in place, and despite this she was still performing comparatively to a lower level then her peers".

115. Ms Webber explained that this score, given in June 2022, covered the year 1 April 2021 to 31 March 2022. That was the same as Mr Russell's evidence (MR para.37). There are no documents to support the initial assessment or Mr Russell's decision to reduce the score and Mr Russell was not present to explain his decision. The final adjustments of an ADHD coach (see para.37.cXX above in February 2022) and the printer (see paras.38XX to 44xx) were not in place during the period under assessment in that appraisal period. It was suggested in cross-examination that it would have been a reasonable adjustment to adjust the scoring and Ms Webber said that that had been what she had tried to do.

116. We accept that Mr Russell was mistaken in his belief that all adjustments were in place at the time of the performance he was assessing in this appraisal. The financial loss – the performance related pay she would have received had she achieved a score of 4 – was paid to her after her successful grievance about this decision. After deductions, this was a sum of £464.90 (page 643).

Law applicable to the issues in dispute

Discrimination arising from disability

117. Section 15 EQA provides as follows:

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

118. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness. It should not be forgotten that the treatment must be unfavourable nor that the

defence of justification is available in claims of s.15 discrimination.

> "In considering whether the example of the disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."
>
> *EHRC Employment Code paragraph 5.6.*

119. The importance of breaking down the different elements of this cause of action was emphasised by Mrs Justice Simler (as she then was) in Pnaiser v NHS England [2016] I.R.L.R. 160 EAT at paragraph 31,

"the proper approach can be summarised as follows:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises […].

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, 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) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning

was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, 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.

(g)[…].

(h) Moreover, the statutory language of s.15(2) makes clear […] that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. […]

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

120. The Court of Appeal considered s.15 EQA in City of York Council v Grosset [2018] ICR 1492 CA and held as follows:

    a. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability?

    b. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something".

    c. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something".

    d. Section 15(1)(a) does not require that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability.

121. More recently, HHJ James Tayler in Bodis v Lindfield Christian Care Home Ltd [2024] EAT 65 addressed the question of the extent to which the 'something' should contribute to the reasons for the unfavourable treatment, in order to establish prima facie liability under s.15 – that is to say liability subject to a successful justification defence. He said (para.46)

    "I consider that great care should be taken before concluding that something that was consciously taken into account by a decision maker was only taken into account

to a trivial extent so that liability is not established"

and referred back to the classic statement of the test in Nagarajan.

122. The test of justification is an objective one, according to which the employment tribunal must make its own assessment: see Hardy & Hansons plc v Lax [2005] ICR 1565 , paras 31–32, and Chief Constable of West Yorkshire Police v Homer [2012] ICR 704 , paras 20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed. This requires the employer to show that the treatment is objectively justified, notwithstanding its discriminatory effect on the employee: Hardy & Hansons para.32. The Tribunal has to take into account the reasonable needs of the business but should

"make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary". (*ibid*)

123. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove and "they must produce evidence to support their assertion that the treatment is justified and not rely on mere generalisations" (EHRC Code para.5.12).

124. The respondent relies on the case of Hampson v Department of Education and Science [1989] ICR 179 (RSKEL para.15). That case involved a policy for authorising teacher to teach in the U.K. which was alleged to be indirectly discriminatory on grounds of race. Although the same statutory formulation is used in s.19 as in s.15, a reference to establishing that the policy corresponds to a real need on the part of the employer risks focusing (in relation to the second pleaded legitimate aim – that of performance management) on justifying the *policy* when what the employer must show under s.15 EQA is that the *treatment of the claimant* was justified.

125. The test for objective justification contrasts with that of the 'band of reasonable responses'; the Tribunal emphatically is not considering whether no reasonable employer would have acted as this employer did but whether this employer has shown that their treatment of this claimant was genuinely done to achieve an aim assessed by the Tribunal as a legitimate business aim; whether the treatment was apt to achieve that aim and whether it was reasonably necessary with a view to achieving that aim.

126. The other potential defence is lack of knowledge of disability but that is not relied on in the present case.

Harassment

127. It is unlawful for an employer to harass an employee (see section 40(1) of the EQA). The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

"(1) A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic,

and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) …

(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."

128. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT (a race related harassment claim) at paragraph 22, Underhill P (as he then was) said:

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

129. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "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."

130. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out further guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88 which is at the top of page 1324 in the ICR version of the case report]:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account

all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

131. In Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31, the EAT considered the meaning of "related to" within s.26 EQA and contrasted it to the test of "because of" within s.13 EQA,

"Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. … "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."

132. As a result of our conclusions on the issues based on events prior to 4 May 2022, no question of lack of jurisdiction arises. Taking into account the effects of early conciliation, a claim based on an act taking place on 3 May 2022 or later was presented within the applicable time limits. There is no need, therefore, to set out the law relating to time limits.

Remedy

133. When considering the law in relation to compensation for injury to feelings, we remind ourselves of the case HM Prison Service v Johnson [1997] ICR 275 EAT where it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand, they should not be so low as would diminish respect for the anti-discrimination legislation but on the other they should not be excessive. We should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

134. We also remind ourselves of the cases of MOD v Cannock [1994] IRLR 509 and Alexander v The Home Office [1988] ICR 604. The injury must be proved, our findings on that injury must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved.

135. The well-known case of Vento v. Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 CA (followed by Da'Bell v. NSPCC [2010] IRLR 19 EAT) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in Da'Bell, which increased the levels of the bands to take into account inflation since the Vento decision, and the case of De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA, it the Presidents of the Employment Tribunals in England & Wales and in Scotland have published Presidential Guidance by which the Vento bands are updated annually. The present claim was presented on 11 October 2022 and therefore the applicable bands are those in the Fifth Addendum:

    a. Between £29,600 and £49,300 for the most serious cases;
    b. Between £9,900 and £29,600 for serious cases not meriting an award in the highest band;
    c. Between £990 and £9,900 for less serious cases, such as an isolated or one-off acts of discrimination.

136. The respondent did not argue that, if we found that the claim succeeded to any extend, compensation should be reduced to take account of the chance that the claimant would have been treated in the way complained of, absent any discrimination.

137. The tribunal has a duty to consider making an award of interest on awards of compensation for discrimination under Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

Conclusions on the Issues

138. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions. Where they differ, the Majority's findings of fact informed their conclusions and the Minority's findings of fact informed her conclusions.

Discrimination arising in consequence of disability

139. We start by reaching conclusions on LOI 4; this is the issue about the link between disability and the alleged reasons for Ms Webber's allegedly unlawful actions. It requires us to consider whether the factors alleged to be at least part of the reason for the acts complained of arose in consequence of disability. The "somethings" relied on are:

    a. Difficulty completing and/or meeting performance objectives;

    b. Difficulty meeting performance tasks/ completing tasks in time;

    c. Communication issues with colleagues including becoming emotional and/or struggling to cope with her emotions

140. This requires us to be satisfied as a matter of objective fact, in the light of the evidence, that those things are objectively connected with ADHD in the claimant's case. Do we accept that she had those issues and that they arose in consequence of ADHD?

141. For reasons we set out above (para.23 and 24xx.xx above), we accept that the claimant did, on occasions, have difficulty completing or meeting performance objectives and difficulty meeting performance tasks or completing tasks in time. We also accept that, as a matter of objective fact, those traits arose in consequence of ADHD, based upon the evidence of the consultant psychiatrist and the occupational therapist (see in particular paras.17 & 18 and para.22XX above).

142. We have also explained in para.XX25 to 28 above, why we find as a matter of objective fact, that becoming emotional and/or struggling to cope with emotions was an aspect of ADHD which the claimant experiences. It is referred to as emotional dysregulation and that was accepted by the consultant psychiatrist to be a manifestation of ADHD that the claimant experiences. We are satisfied that becoming emotional and struggling to cope with emotions can cause communication issues with colleagues – particularly where it is not understood that an emotional reaction is something a co-worker with ADHD is more likely to show and is likely to find difficult to control, because of a lifelong condition. Such a person is likely to appear to react disproportionately in stressful situations.

143. LOI 2(a) fails. This is the removal of the A31 Ringwood By-Pass. We refer to but do not repeat our findings in paras.51XX and following.

144. For reasons set out in para.XX52 we accept that this was a detriment in that the claimant reasonably considered herself to be disadvantaged by the decision.

145. The claimant has shown that the A31 Ringwood By-Pass was removed from her and that at least part of the reason was that she had difficulties delivering projects on time and challenges in meeting performance expectations (see paras 54 & 55). An element of Ms Webber's reasons for doing that, we accept, were performance concerns which arose in consequence of the claimant's ADHD. We consider that element was more than trivial although it played a minor part in Ms Webber's reasoning.

146. This occurred during the second schools closure because of the coronavirus pandemic. The claimant was juggling work with home schooling. At some point, the respondent permitted the claimant (and other parents in the same situation) to work mornings only. Therefore her working time had been reduced by half because of the needs of home-schooling – something entirely unrelated to ADHD. She probably found it more difficult than someone without ADHD would have done to meet deadlines and objectives under the then prevalent circumstances. At the time, her concern was lest she be sidelined as a working parent. Her workload needed to be reduced to support her.

147. The respondent needed to ensure effective communications because construction projects were not shut down during lockdown. They needed to

do this with reduced resources and latitude should be given to them to decided how to do so. This falls within their stated aim at LOI 8.a).

148. We need therefore to consider whether the respondent has shown objective evidence that removing this particular project was reasonably necessary in all the circumstances in pursuit of that aim. The discriminatory aspect was a minor part of their reasoning and, through no fault of the respondent, they were trying to support the claimant (whom they knew to have a diagnosis of ADHD) without the benefit of recommendations from OH about what adjustments should be put in place to enable the claimant to carry out the full range of her role. This should be put in the balance when considering the impact on the claimant. It should be put in the balance when considering whether the respondent has shown that the decision to remove this project was a proportionate means of achieving their legitimate aim.

149. The impact on the claimant was tempered because, overall, it was part of supportive measures to enable the claimant to combine work and family responsibility. Furthermore, there were other sizeable and high profile projects (such as the M27 Smart Motorway) which she was still working on at that time.

150. At that time and in those circumstances, when some reduction of work had to be done and given the contemporaneous explanation (page 118 see para.57), we accept that removing this project was reasonably necessary. The respondent has shown this a proportionate means of achieving the aim in LOI 8.a.

151. We turn to LOI 2(c). Ms Webber did remove the M27 Smart Motorway project from the claimant in January 2022.

152. Would the reasonable employee consider themselves to be disadvantaged by this? This action was unfavourable because she wanted to continue with her long term work on the project and would no longer be responsible for it at the point when it was shortly going to culminate in the opening. The project was due to open within a month or two; it was not going to be opened in the two weeks of the claimant's jury service. She had been working for a long time with the individuals on the team. This was unfavourable treatment of her and the reasonable employee would consider themselves to be disadvantaged by this act.

153. Did Ms Webbers' reason include that the claimant had difficulty meeting performance objectives and difficulty completing tasks in time? We refer back to para.69XX above. There were a number of reasons, however the requirement for careful and sensitive handling does not explain her lack of confidence that the claimant could provide that careful and sensitive handling. Time management problems are part of her reasons: her witness statement (para.52) makes that plain. This conclusion is supported by her reference in para.50 of her statement to the claimant submitting work with no time allowed for approval.

154. It is argued on behalf of the respondent (RSUB para.74) that the "test on causation" is not made out because Ms Webber's decision was a practical decision which she attested had nothing to do with ADHD. With respect, her explanation in para.52 of her statement that she reallocated the work

because of the claimant's time management makes that argument difficult to sustain.

155. Time management problems arises in consequence of ADHD in Ms Lowell's case. However there were other reasons which Ms Webber describes as performance reasons connected with the claimant's drafting and appropriate choice of wording for the specific media outlet. She expresses concern that the claimant reposted work rather than adjusted it for the specific medium. We do not see a causal connection between those sort of performance concerns and ADHD and they are not the "something" relied on.

156. We have accepted that the claimant had difficulty meeting performance objectives because of the impact on her of ADHD. However the connection between that and the quality of work (by which we mean the draftsmanship) is tenuous because at best it might be influenced by difficulty working under pressure. The claimant had, by this date, received advice on managing her time from her consultant and occupational health.

157. Nevertheless, reminding ourselves of the guidance of HHJ James Taylor in Bodis, we conclude that the influence on Ms Webber's reasoning of time management problems was more than trivial. This does require us to move onto the proportionality exercise in relation to this task. It is for the respondent to show that Ms Webber's decision to remove the M27 work from the claimant was done in order to achieve one of the aims relied on, was likely to achieve that aim and was reasonably necessary to do so.

158. We consider that relevant factors when considering whether removing this project was reasonably necessary include:

    a. Ms Webber's reasonable expectation that the claimant was not going to be available for at least 2 weeks due to jury service at a critical juncture;

    b. The prospect that Ms Webber could have reassigned the project temporarily and made a change back or permanent decision about work allocation when more known about the claimant's length of likely absence;

    c. Ms Webber had recent experience of working on a very similar project with the support of MS when they managed communications on the M4 Smart Motorway to opening;

    d. Although Ms Webber seemed to accept that that hadn't gone completely smoothly, that does not undermine her judgment that she could take the lessons she had learned forward; on the contrary that supports her assessment that communications in the final weeks before opening a Smart Motorway were particularly important and sensitive;

    e. Ms Webber's experience of the claimant's time management was that she provided text for approval at short notice; since she reasonably wanted to keep her eyes on the way in which this opening was communicated in the sensitive atmosphere prevalent at the time,

she reasonably wanted to receive draft communications with sufficient time for approval;

f. There are examples of correspondence in the hearing file which provide objective evidence to back up the concern that text was provided for approval at short notice;

e. This concern was particularly valid since Ms Webber's experience of the claimant's work was that she did not tailor the wording of her communications sufficiently appropriately for the channel used and therefore her work might need redrafting;

f. It would have had less impact on the claimant for Ms Webber to work with MS during jury service and then reallocate it to work alongside the claimant. However that does not take sufficient account of the disruption of allocating it to one person during jury service then and reallocating it or of the time management problems explained above.

g. Incrementally, there was an impact on the claimant caused by this removal in February 2022 because, by May 2022 Ms Webber described the claimant's role as having been descoped (para.XX91 above). However, the needs of the respondent in February 2022 reasonably outweighed the impact on the claimant of removing that particular project, notwithstanding the incremental effect.

h. On balance, it was an objectively proportionate decision. Removing this project at this time was reasonably necessary in all the circumstances.

159. We turn to LOI 2(d). The claimant was removed from the M2 road closure project on 4 May 2022 following a report from the Area 4 Delivery Manager to Ms Webber that two pieces of communication/draft communication about that project (one of which the claimant was responsible for) contained fundamental inaccuracies about the date and extent of the planned road closures. Ms Webber's view was that the claimant's performance was inadequate, particularly in relation to inaccuracies in the draft and because she had consulted on the details at the last minute.

160. For reasons we have already explained, the latter amounts to difficulties completing tasks in time and difficulty meeting the performance standards expected by the respondent. We have found that those factors arose in consequence of ADHD.

161. The legitimate aim is shown. It is almost self-evident that if information is put into the public domain that the M2 is to be closed in one direction overnight when in fact it is to be closed in the direction for the entire weekend that would be a failure on the part of the respondent to meet the standards expected of it. Ms Webber removed the work because she considered it necessary to meet the standards expected of the respondent and provide the service of accurate information to the public.

162. The majority are of the view that this was reasonably necessary in all the circumstances.

a. The Majority (Mr Wharton and Mr Hough) accept that there was an urgent need to remove the claimant from the M2 project. This was because Ms Webber needed to rebuild confidence in her colleagues in Area 4 in the service provided her communications team (see their findings in para.93XX above). There was an pressing need to sort out communications about the M2 road closure and to reassure Area 4 that, when alterative dates had been agreed on, communications would proceed smoothly.

b. The Majority think it immaterial that, because of unrelated reasons, the M2 roadclosure was postponed.

c. They accept (para.88XX above) that Ms Webber asked the claimant about the work she had done before communicating her decision to remove her from the project. The claimant had an opportunity to comment. They accept that Ms Webber did discuss the claimant's performance with her on 4 May 2022.

d. The claimant has and displayed then a lack of self-awareness that her performance was objectively lacking – she failed to achieve deadlines and deflected attention from what she could do to address that.

163. Judge George disagrees.

a. She considers it relevant that the road closure had been postponed in any event so there was time to work with the claimant to address any lack of information.

b. The claimant's explanation for delivering the draft may not have been a complete excuse for the repeated inaccuracy but it appeared that part of what she relied on was an alleged failure by the project management team to respond to multiple enquiries for the correct information. That was the approach Ms Webber suggested she take. Without investigating the extent to which the claimant was at fault for the inaccuracy, a sudden decision to remove the project – leaving her role completely descoped, was not objectively justified.

c. The decision could reasonably have been postponed for a few days. It is possible that investigation would have led to same result but also possible that accurately managing communications in the M2 project could have become a particular target for the claimant.

d. There were other ways of achieving the aim of providing a good service to the Area 4 project management team.

e. There had not been time to see whether the adjustments of the ADHD coach and the printer improved performance.

164. LOI 2(e). The claimant has shown that, on 4 May 2022, Ms Webber told her that she would be placed on a PIP (see para.97XX above). This was unfavourable treatment. A PIP can be intended to be – and in this case the minority view is that it was intended to be – supportive. Nevertheless the tribunal unanimously consider that it is unfavourable and a detriment, given

it is the informal stage of a formal process the final stage of which can be dismissal.

165. The respondent argues that the effective reason for the PIP were the mistakes made by the claimant in the M2 communications drafting which came to light on 4 May 2022 (RSUB para.97). Even if one could square the submission in that paragraph that raising prior concerns does not mean that the main reason Ms Webber introduced the PIP was previous conduct with para.69 of Ms Webber's statement, there can be multiple reasons why an employer acts. The employee only has to show that the "something" is an effective cause of the unfavourable treatment and that it arose in consequence of disability.

166. It is also argued on behalf of the respondent that the claimant hasn't shown that any performance issues are linked with ADHD where they arise because she missed meetings because of childcare responsibilities.

167. Ms Webber, in her para.69, relied on four episodes to justify starting a PIP. She was cross-examined about them, they are all referred to in the transcript and are set out in para.98XX above.

168. We have found that the claimant experiences emotional dysregulation and that that arises in consequence of ADHD. There is a dispute between the paper accounts of the IT colleagues who describe the claimant as rude (pages 908 – 909) and the claimant who says she was very upset during the 28 May 2021 episode. Either way, we accept that the claimant behaved in a way which either was or was perceived to be disproportionate to the situation and that this behaviour was probably affected by emotional dysregulation. Therefore, the event of 28 May 2021 arose in connection with disability.

169. The thread of poor time management runs through the other three matters raised by Ms Webber. That amounts to difficulty completing tasks in time which is one of the "somethings" relied on in the s.15 EQA complaint (LOI.4.ii.). For reasons explained above, we conclude that this arose in consequence of disability. The burden therefore moves to the respondent to justify the decision to place the claimant on a PIP.

170. We accept that Ms Webber genuinely had the aim of properly managing the performance of their employees to ensure that work was being done to an appropriate standard (LOI 8.b).

171. There are factors relevant to whether or not the introduction of the PIP was objectively justified which all members of the tribunal agree to be relevant:

    a. There is objective evidence that the claimant's performance was not as the respondent reasonably wanted and needed it to be. Some matters like timeliness and accuracy did not show signs of improvement.

    b. She was not new in the post. She'd had more than 3 years in the post.

172. The majority (Mr Wharton and Mr Hough) conclude that the PIP was justified, taking into account those factors and the following:

a. Although mindful that the detail of correspondence concerning the August 2021 communications from HL and the project run by Nicola Carley was not put to the claimant in cross examination and it is therefore not fair to find against her in relation to that, there is nevertheless evidence that problems in particular with reliable time keeping had been continuing over time.

b. Most of the adjustments about working hours, location and type of work had been in place for a long time before the events of May 2022.

c. The respondent made all of the adjustments recommended and in May 2022, when everything bar the printer had been in place since 22 February 2022, another similar problem arose.

d. The issue with the M2 road closures and the correspondence from the Area 4 Delivery Manager about her performance meant that something more formal had to be put in place.

e. It was not unreasonable to include the IT incident because there was evidence that the claimant's behaviour on that occasion had, objectively, been unsatisfactory.

f. She was heading for a requires improvement on her appraisal which itself would point to performance management – for the respondent to avoid the need for performance management would have simply avoided their responsibility to her.

g. Implementation of a PIP was aimed to give her more help. This is a factor which the non-legal members give significant weight to in their assessment that the action was proportionate. They accept that Ms Webber's aim genuinely was to assist the claimant to improve. They infer this from contemporaneous comments she made to that effect.

h. Ms Webber's comments which are the subject of the successful harassment complaint (see parasXX183 to 187 below) do not affect that finding because they are persuaded that, in effect, she lost control and was provoked by the challenging nature of the conversation which emerges from the transcript. They give more weight to her actions in the previous 18 months since the ADHD diagnosis, which were supportive. They accept that, overall, she adequately understood the claimant's disability related challenges and the respondent's obligations.

i. They note that the decision was to start the informal stage of the formal process – no more. This was a step which had limited impact on the claimant.

j. Objectively, the lack of a home printer appears to be unrelated to whether or not the claimant ought to have found out accurate information to include in the letter about the M2 closure. It appears unrelated to the fact that the claimant's second draft still contained errors. This means that the respondent did act reasonably in moving to put the claimant on a PIP notwithstanding the fact that the final adjustment was not long in place.

k. The respondent was not bound to follow the draft timetable set the previous July when that was never formalised and was drawn up on the assumption that the adjustments would have been in place much sooner and over a shorter period of time.

l. It was an emotionally charged meeting at which the parties spoke over each other and Ms Webber was interrupted. When she was trying to assert control over the meeting she did not expess herself well. Bearing in mind the claimant's expectations appeared to be that performance issues which were related to her ADHD should be entirely excused, the Majority think she must have been very hard to manage.

m. It was an error of judgment for Ms Webber to have allowed herself to be drawn into discussing her reasons for putting the claimant on a PIP in the meeting on 4 May 2022 when she had not prepared for the informal discussion of the process. Nevertheless, her reasons were essentially sound and she relied on evidence which objectively justified the decision to introduce the PIP.

n. Furthermore, the respondent's overall attitude was one of support and a balanced approach to helping the claimant with her challenges.

o. She had had considerable support from the respondent by this stage – albeit not all of the agreed adjustments for very long. In particular she had had close support from Mr Russell in the deep dives in the first couple of months of 2021 and she was still not meeting the respondent's reasonable expectations. The fact of them also supports Mr Russell's evidence that her performance meant they were necessary.

p. The inclusion of the IT incident (which they accept was not of the same character as the other matters relied on) does not undermine the decision to introduce a PIP for performance reasons.

q. The respondent could not reasonably have been expected to wait for another mistake before starting the formal process. Mistakes caused internal tensions and meant that others had to pick up the workload.

r. The claimant's lack of insight meant that it was necessary to formalise the process.

173. Judge George is very aware that the assessment about what is and is not reasonably necessary to achieve a particular business aim is precisely the sort of thing that the wider industrial experience of the non-legal members of the tribunal brings a real world dimension to. Moreover, she is conscious that she is differing in her conclusion from experienced colleagues representing the perspective of both employer and employee. She respects that broader industrial experience but nevertheless respectfully disagrees with her colleagues' conclusions because she has differed from them in some of her primary findings of fact and for the following reasons.

a. By the time Ms Webber met the claimant, she knew that the communication no longer needed to be sent that day and there was

no urgency about the situation. There was no need to make this decision or announce it in the moment without taken advice from HR or reflecting on what evidence she relied on.

b. Objectively, Judge George thinks no reasonable employer would have relied on the 28 May 2021 IT incident when starting the PIP. Taking that into account is logically flawed. It is unlike the other matters because it is a matter of conduct and not performance. The incident happened more than a year previously; so far as we were told there had been no further incidents where a complaint was received that the claimant was rude or where she had acted in a disproportionate way. Therefore what improvement was desired? Furthermore, a decision had been taken then to deal with it informally *unless there was another similar incident* (Judge George's emphasis). Ms Webber was unable to explain what had changed save that it had been an incident which really troubled her. However, there had been no investigation so no resolution of whether and the extent to which the claimant was culpable in relation to the incident.

c. Unlike the flaws in the decision to remove the A31 Ringwood project from the claimant, the disability related reasons (the IT incident and time management concerns) are a significant part of the reasoning for the decision; it is not possible to separate them from other reasons – such as accuracy and drafting skill. Besides, working accurately under pressure when one's time management skills are poor is more of a challenge.

d. Ms Webber had originally envisaged a structure which would give the claimant clear breathing space for all reasonable adjustments to bed in. Ms Webber did not revisit that once the printer and the ADHD coach were in place.

e. Ms Webber's email to Mr Russell and Judge George's findings that, during the 4 May 2022 meeting, she merely announced her decision to remove the claimant from the M2 road closure project (para.XX87 above) cause Judge George to conclude that the decision to start the PIP at that time was a knee jerk reaction and ill-thought through. Her failure to take HR advice or to read the policy means that she made and announced the decision without compiling the evidence she would rely on. She did not, therefore, consider the fairness or otherwise of relying on, in particular, the IT incident and the reports from HL in August 2021. The latter related to episodes which also pre-dated key adjustments.

f. Judge George does not think an employer can never be justified in formally managing disability related performance issues which arose when reasonable adjustments were not in place. However, a reasonable employer would analyse what went wrong, why and the impact of the missing adjustments before doing so. Judge George is not persuaded that Ms Webber did so.

g. There is evidence that Ms Webber did not fully understand the challenges that neurodiversity posed for the claimant – she struggled

to understand what benefit some of the adjustments would bring. Her misspeak when she told the grievance investigator that the OH advice was that the claimant was fit to carry out all duties without adjustments (para.109XX above) causes Judge George to infer that Ms Webber simply thought that the claimant was not good enough at her job and thought there were problems with the claimant's skills separate to the neurodiversity. Whether she was correct or whether the claimant's performance could improve is what a breathing space after the adjustments were in place could have achieved.

i. Judge George accepts that the claimants lack of insight and assertive defensiveness (para.102XX) meant that, subjectively and understandably, the 4 May 2022 meeting was difficult for Ms Webber to handle.

j. It is not that Judge George thinks that the respondent should be required to accept unsatisfactory performance from someone with a disability even where that unsatisfactory performance is due in part to the disability. However the occupational health evidence was that with adjustments she could do her job. If the adjustment were in place and she was not doing her job to a reasonable standard then it would be objectively reasonable to implement a PIP.

k. Although there is reason to think that with the majority of the adjustments in place claimant was nevertheless failing to meet the required standard, Judge George considers this to be primarily relevant to a different question – if the decision had not been taken to instigate a PIP on 4 May what are the prospects it would have been instigated at a later stage – which is a remedy issue.

l. The Hermes Luli email of concern dates from August 2021 and refers to an episode from about June 2021, when the ADHD coach and printer were not yet in place. The Nicola Carley matter was more recent. Although it was not fully explored in oral evidence, it dates from around time the ADHD coach started in February 2022. The printer had been working intermittently from November 2021 but was fully operational only from April 2022. Since that was not fully aired in cross-examination, Judge George does not think the respondent has shown that reliance on it as justification for the PIP was objectively justified or what the underlying performance concern was.

m. Against the background of unspecified problems (some of which have been evidenced in correspondence which was not the subject of cross-examination) the email from GS about the M2 road closure communications draft is something any manager would be concerned about. On its own it would not justify a PIP but in principle performance management was a logical reaction to it.

h. However, Judge George thinks that the decision to start the PIP was premature and based in part on matters which no reasonable employer would have included. It was not reasonably necessary.

174. LOI 2.f) We refer to our findings at para. XX111 to 115. The claimant was given an appraisal rating of Level 5 by Mr Russel. This was an assessment that her performance was unacceptable and we accept that this was unfavourable treatment.

175. The tribunal conclude that at least part of the reasons for Mr Russell's decision was difficulty completing and meeting performance objectives and in doing so in time. These we have found arise in consequence of disability. We have found that part of Mr Russell's reasons were his mistaken belief that all reasonable adjustments were in place in the time period he was considering. That was incorrect and we are not satisfied that, despite the fair administration of an appraisal scheme being within the scope of legitimate aim LOI 8.b), it was reasonably necessary to score the claimant 5 given that error in his reasoning.

176. Furthermore, Ms Webber's evidence was that she had adjusted her assessment of the score to Level 4 because the adjustments were not in place. This gives weight to the tribunal's unanimous conclusion that Mr Russell's reduction of the score was disproportionate and this particular complaint succeeds. Whether or not he would have rated her Level 5 had he not made that mistake would be a remedy issue although it is not one the respondent has relied on in argument.

Harassment

177. Our findings about what was said rely on the transcript of the meeting on 4 May 2021 are in paras. 104XX and 105xx above.

178. The tribunal accepts that all of the statements – that the subject of LOI 9.a) and the three statements which are the subject of LOI 9.b) were unwanted conduct.

179. LOI 9(a): The statement itself refers to the claimant's disability of ADHD. It references the IT incident of 28 May 2021 in which, according to the claimant, she became upset and any overreaction or perceived overreaction was a result of emotional dysregulation arising from ADHD. Ms Webber states that the IT colleagues did not know that the claimant has a disability. This the tribunal accepts means the statement is inherently related to disability both because of its content and because it refers to an incident which focused on the claimant's disability related conduct.

180. It is argued on behalf of the claimant that this comment was made with the purpose of creating the harassing effect. The argument was based on the oral evidence of Ms Webber: it was put to her she had said this comment deliberately to upset the claimant and her response in cross-examination was that it hadn't been her only purpose.

181. We heard this part of the audio of the meeting. Her tone is neutral at that point in the recording. We think in the heat of the moment during cross-examination (bearing in mind that the witness has a hearing impediment) it is unlikely she intended to accept that any part of her deliberate purpose had been to upset the claimant.

182. Alternatively, the claimant argues that the statement had the harassing effect, and it is reasonable to regard it as having the harassing effect because it amounts to her line manager saying that behaviour displayed on 28 May 2021, which she says is due to a disability and outside her control, was unprofessional when there had not been any investigation to decide who's version of events was correct.

183. The majority (Mr Wharton and Mr Hough) conclude that it is not reasonable to regard the comment as having that meaning or supporting that inference. The context of the comment as a whole was an explanation of what Ms Webber understood the IT colleagues' perception to be to explain why the complaint had been made and cannot reasonable be regarded as a judgment by Ms Webber that the claimant had been unprofessional. This fundamentally affects whether it is reasonable to regard that statement as meeting the statutory test of violating dignity, or creating a hostile degrading, humiliating or offensive environment for the claimant.

184. Mr Wharton and Mr Hough also reflect that the purpose of the meeting on 4 May 2022 was not to investigate the May 2021 incident. Reference to it arose to explain why that incident was part of the reason for starting an informal PIP. It is not reasonable for those words in that context to have the effect that meets statutory test. One might describe the statement as unwelcome and embarrassing; annoying and irritating perhaps but, in their view, it does not meet the statutory test. Furthermore, it was such a minor aspect of the respondent's reasons for the PIP that, in the context, it was not reasonable to have the harassing effect.

185. The minority (Judge George) accepts that an employee in the claimant's position, hearing that from their line manager would reasonably feel they were being criticised for an aspect of their disability. She recognises that, if an employee has done something worthy of criticism then even if it arises from an aspect of disability the employee could reasonable be criticised for it. However, the claimant never accepted that she had been rude as alleged by the two IT colleagues; her account was that she was upset. So far as we heard, no attempt was made to explain to the IT colleagues that there might be reasons outside the claimant's control which caused behaviour which they regarded as rude – which may objectively have appeared rude. Judge George, having read the transcript and listened to the audio accepts that Ms Webber has presumed that the IT colleagues' version of events was correct and, either did not accept that the conduct is ADHD related or thought that the claimant was at fault for not controlling something which was an aspect of ADHD. This leads to her view that the claimant was unprofessional for behaving in that way. It is an isolated comment but Judge George accepts that the claimant was seriously offended by being called unprofessional for something she can't help and this means that the statutory test is met – in particular where it refers to creating a humiliating environment for the claimant.

186. LOI 9(b) concerns three subsequent comments set out in para.105XX above. The immediate context is that Ms Webber was trying to explain that she thought that the claimant's previous experience was very different to that which the respondent required in the job in particular in relation to reputational work. When Claimant tried to refer to her previous experience at Scotland

Yard, Ms Webber says that that was very different. Then the claimant says – in defence of her ability to do her job – "I was hired, I passed my probation". It was in response to that that Ms Webber says "Well, I didn't hire you".

187. The tribunal unanimously accepts that she said this because she was not impressed with the claimant's performance. Her belief that the claimant was underperforming is linked to time management because there have been instances where the claimant did not deliver work on time or at all. That is linked to the claimant's disability. Ms Webber avers in her statement para.76 that her comments were related to the claimant's performance.

188. The tribunal are unanimously of the view that this indirect link to disability is sufficient to mean that the comments were related to disability so LOI 10 is answered in the affirmative in relation to LOI 9.b).

189. We need to consider first whether Ms Webber's purpose was to create the harassing effect. We reject that argument; she was not deliberately trying to do that.

190. However, this passage comes towards the end of the meeting when the claimant has just being told that there is going to be a PIP supervised by her line manager. In that situation the tribunal unanimously considers that it was reasonable to find it intimidating to be told by your line manager "I don't know whether I would have appointed your", "I didn't sign off your probation either" and "I didn't hire you". It creates a hostile, and humiliating atmosphere because there is the implication that the line manager is at least uncertain whether the claimant would succeed in improving through implementation of the PIP. In that context, the tribunal unanimously conclude that the statutory test is met.

<u>Remedy</u>

191. The tribunal must assess compensation for injury to feelings on two unrelated unlawful acts: reducing the appraisal score to level 5 unacceptable and the single comment on 4 May 2022. These are our unanimous conclusions on the award of compensation for those unlawful acts.

192. It is often challenging to isolate the impact of specific incidents against the background of a much larger claim. It is clear that the bulk of the claimant's upset concerns allegations which have failed. Nevertheless, the fact of the grievance shows that the claimant was upset by the downgrading of her score as she was entitled to be. Taking into account the applicable bands, and the very minimal contribution that the Level 5 score played towards the claimant's unhappiness with her treatment, we consider that an award of £500 – approximately the amount of the bonus which she was later awarded – is the right sum. We consciously award a sum lower than the bottom of the lowest band because the incident amounts to no more than a footnote in the history and it can be inferred that the injury to feelings caused by it were similarly extremely modest.

193. We do have the power to award interest on compensation hurt feelings. However, in this instance we do not consider it just and equitable to do so because we find that her hurt feelings caused by this act were entirely mitigated once she succeeding in being paid the missing performance related

pay attributed to the unlawful underscoring. That was paid in about December 2022 and we do not think it just & equitable to award interest for injury to feelings which only lasted 6 months.

194. We consider it important to balance the need for there to be respect for the anti-discrimination with the need for there to be evidence of injury caused by the successful claim when assessing loss caused by the single successful act of harassment which took place on 4 May 2022. This clearly falls within the lowest band of between £990 and £9,900 as an isolated act.

195. No doubt it was hurtful and distressing to be told by her line manager that she was being placed on a PIP and that she, the line manager, was not sure that she would have appointed the claimant in the first place. It features as an allegation in the grievance and we read that document (in particular page 514) for a sense of the comparative importance of these comments when set against the imposition of the PIP itself (which we have found – by a majority – not to be unlawful) and other comments which have not even been included as core allegations within the claim (such as the alleged public humiliation in a virtual teams meeting when Ms Webber allegedly corrected the claimant about where her parents live). This makes it difficult to ensure that we assess only the injury to feelings caused by the unlawful act.

196. Doing the best we can, we consider that £1,500 is an appropriate award and interest will be awarded on that at the usual rate. That is the compensation it is Just & equitable to award for the successful harassment complaint.

Approved by:

Employment Judge George

24 July 2025

JUDGMENT SENT TO THE PARTIES ON
24 July 2025

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

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

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

APPENDIX
REVISED AGREED LIST OF ISSUES

Disability

1. It is agreed that C is a disabled person within the meaning of Section 6 of the Equality Act 2010 by reason of ADHD, anxiety and OCD and was at the material times in the claim. R admits knowledge of C's ADHD following her diagnosis in October 2020. It admits knowledge of C's anxiety and OCD following receipt of the occupational health report dated 13 May 2021.

S. 15 – Discrimination arising from disability

2. Did R subject C to the following treatment:

(a) Removing some 'Major Projects' work from her in January 2021
(b) **[withdrawn]**
(c) Removing all 'Smart Motorways' work from her in January 2022
(d) Removing 'M2 Operations' work from her on 4/5/22
(e) Telling C on 4/5/22 that she would be put on a PIP
(f) Giving C a level 5 score in June 2022

3. If so, in respect of each act, was that treatment unfavourable?

4. Did the above unfavourable treatment occur because of something arising in consequence of C's disabilities, ADHD and anxiety? C avers the following arose from her disabilities – the relevant disability relied upon is listed:

i. Difficulty completing and/or meeting performance objectives - ADHD
ii. Difficulty meeting performance tasks/ completing tasks in time - ADHD
iii. Communication issues with colleagues including becoming emotional and/or struggling to cope with her emotions - ADHD
iv. Her sickness absence from 5 May 2022 - anxiety

5. With respect to the treatment at 2(a) – (e) C relies on 4(i-iii).
6. With respect to the treatment at 2(f) C relies on 4(i-iv)

7. If in any case the reason for the treatment was something arising in consequence of C's disability, was that treatment a proportionate means of achieving a legitimate aim?

8. R will rely on the following legitimate aims:

a) Its ability to appropriately distribute the work it requires amongst its employees to ensure that it is being done to the expected and required standard within the necessary timeframe to meet its obligations and the services it provides.
b) Its ability to properly manage and appraise/rate the performance of its employees, including the management of C's performance to ensure that the work being done was to an appropriate standard, and when that was not the case seeking to manage C's performance appropriately in line with R's performance management processes and policies, including giving her the appropriate rating for her performance in the performance year 2021/2022.

S. 26 – Disability related harassment

9. Did R subject C to the following conduct:

(a) Ms Webber said on 4/5/22 "that may well be the case but they don't know that, you know they didn't know that you have a disability and or the behaviour that you displayed to them the way that you conducted yourself was not professional
(b) Ms Webber said on 4/5/22 "I don't know whether I would have appointed you" "well I didn't hire you" "I didn't sign off your probation either"

10. If so, was that conduct unwanted related to C's disabilities?

11. If so, was the purpose of that conduct to violate C's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for C?

12. If not, was the effect of that conduct reasonably to violate C's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for C?

Jurisdiction

13. In relation to paragraph 2 (a-c):

a) Did C submit her claim within the period of three months starting with the date of the act to which the complaint relates? (Equality Act 2010 section 123(1)(a))

b) In respect of any complaints which are out of time, do they form part of a continuing act, taken together with acts which are in time? (Equality Act 2010 section 123(3)(a))

c) If the complaints were not submitted in time, would it be just and equitable to extend time? (Equality Act 2010, section 123(1)(b))

Remedy

14. What, if any, compensation is the Claimant entitled to?