EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Seeta Dadhria	**v**	Menzies World Cargo Limited

Heard at: Cambridge

On: 1 – 3 & 7 July 2025
In Chamber discussion: 8 July 2025
Judgment given: 22 August 2025

Before: Employment Judge Tynan

Members: Ms M Harris and Mr B Smith

Appearances
For the Claimant: In person
For the Respondent: Ms K Hosking, Counsel

JUDGMENT having been sent to the parties on 16 September 2025 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunal Procedure Rules 2024, the following reasons are provided:

REASONS

Introduction

1. The Claimant, who is disabled within the meaning of the Equality Act 2010 by reason of Neurofibromatosis Type 1 ("NF1") was employed by the Respondent from 25 November 2002 until September 2022 when she was summarily dismissed for gross misconduct. Her dismissal was upheld on appeal, though her notice rights were effectively acknowledged or reinstated as part of the appeal outcome, with the result that payment was made in lieu of her notice. She claims that she was unfairly dismissed and discriminated against as a disabled person. Her discrimination claim is pursued under sections 13, 20 / 21 and 26 of the Equality Act 2010. Her discrimination complaints date back as far as 2010.

2. The Claimant represented herself at the Final Hearing, assisted by her friend, Ms Craig. She has made two witness statements, in addition to a Disability Impact Statement. Although she seems to have filed her second supplemental witness statement without the Tribunal's prior permission to do so, the Respondent has not objected to the statement and we have been content to admit it into evidence. On behalf of the Respondent we had witness statements and heard evidence from the Claimant's long term colleague, Mandeep Benepal who took the decision to dismiss the Claimant, and Karl Aldwinckle who heard the Claimant's appeal against her dismissal.

3. The issues in the case are set out in an Agreed List of Issues. A note on the Law was submitted ahead of the Final Hearing and Ms Hosking provided detailed written submissions in closing. The note provides a thorough overview of the Law and relevant legal principles, which we are content to adopt and do not repeat here.

4. There was an agreed single bundle of documents comprising of 709 pages inclusive of Index ("the Bundle"). The numbering is slightly unconventional but we have been able to work with it. Any page references that follow correspond to the Bundle.

Introduction

5. Claimants often claim to be disabled by reason of more than one impairment or condition. For example, people with autism spectrum conditions frequently also experience anxiety disorders; the reasons for this are still not fully understood, but it is thought for example that the difficulties that people with autism experience in their social interactions and communications can be a source of anxiety, leading in some cases to depression. The autism, anxiety and depression are discreet conditions; in medical terms, they may be referred to as being 'co-morbid'. A person with an autism spectrum condition will not inevitably develop an anxiety disorder or other mental health issues, something to hold in mind when considering these and other claims under the Equality Act 2010, particularly where a claimant presents with a range of issues.

6. Section 15(1) of the Equality Act 2010 provides as follows:-

> **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.

7. Sections 20(1) to (3) of the Equality Act 2010 provide as follows:-

> **Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

8. In summary, in order for a claim to succeed under section 15, the 'thing' that has led to them being treated unfavourably must arise in consequence of their disability rather than have some other cause. Under section 20, a claimant must establish that they are disadvantaged because of their disability, and not for some other reason. It is for a claimant, in this case Ms Dadhria, to establish not only that they are disabled, but to put forward evidence as to the symptoms, effects and impacts of their disability so that the Tribunal can decide whether the requirements of sections 15 and 20 of the Equality Act 2010 are met.

9. In this case the disability relied upon by the Claimant is NF1, a complex multi-system neurocutaneous disorder which causes tumours to grow on the nerves and skin. In her Disability Impact Statement, the Claimant states that NF1 is known to cause common complications like Attention Deficit Disorder and learning disabilities, specifically poor co-ordination, selective reading, attention deficits and short term memory problems. She does not identify when or how this connection is said to have been established. Whilst the Respondent accepts that ADD (or ADHD) and learning disabilities are commonly diagnosed in those with NF1, it does not accept that there is medical evidence to support the conclusion that any such conditions or impairments are generally caused by NF1 or, specifically in the Claimant's case, that these conditions or impairments developed in her adult life following her diagnosis with NF1. Ms Hosking has explored the matter at some length and with considerable attention to detail in her written submissions and, at our invitation, spoke in further detail on this aspect in the course of her oral submissions.

10. It is important to record that the Claimant has not pursued any claim to be disabled on the grounds that she was diagnosed with ADD (or ADHD) or because she has one or more learning difficulties or disabilities, or because she has developed an anxiety disorder or other mental health issues. Regardless of whether this was done on legal advice, or simply reflects her lack of knowledge and experience of legal proceedings,

particularly since she has represented herself, we can only adjudicate the claim that is before us, which in this case is limited to her NF1. Her section 15 and section 20 / 21 Equality Act 2010 complaints depend for their success on the Claimant establishing, on the balance of probabilities, that if she has an impaired ability to concentrate and multi-task, as well as selective reading difficulties, these things arise in consequence of being disabled by reason of NF1.

11. Cases such as Royal Bank of Scotland Plc v Morris, Dunham v Ashford Windows, and Herry v Dudley Metropolitan Council serve to highlight the importance of expert medical evidence in disability discrimination cases. Claimants can and often do, provide important evidence and invaluable insights as to the ways in which their day to day activities are impacted by any conditions or impairments of theirs; but however well-read they may be on the subject, they are rarely medically qualified to diagnose their own health conditions or to assist the Tribunal with a detailed medical understanding of the reasons as to why they may present as they do.

12. In this case, the Claimant received a diagnosis of NF1 in 2009. In our judgement, in her mind the diagnosis has come to explain a range of issues and difficulties in her life, specifically mistakes at work, including difficulties with concentration and remembering how to complete tasks, as well as with following instructions. For reasons we shall explain, we conclude that it is more likely on the balance of probabilities that the various issues she describes, and which ultimately resulted in the loss of her employment with the Respondent, reflect learning difficulties that have been present throughout her life, and which, on the balance of probabilities, are not a feature or symptom of her NF1 even if they may be associated with it in some way.

13. It is important in this regard that we say something about Mr Marshall, who was instructed to prepare an expert medical report on the Claimant. Ms Hosking submits that we cannot rely upon any aspect of his report. We disagree; there is much in the report that has helped inform our understanding of the Claimant, even if we agree with Ms Hosking that we should approach his conclusions with a degree of caution. For the Claimant's benefit we should explain that Tribunals sometimes refer to a party or a witness as unreliable. There may be a variety of reasons for this. Sometimes a party or witness is found to have been untruthful. However, more often, the tribunal is unable to rely upon evidence, including expert evidence, because it is inconsistent with contemporaneous documents and records. Although we approach Mr Marshall's conclusions with caution, this is not because he has been in any way dishonest or unprofessional in his approach. Appendix 2 to his report confirms that he is a well qualified, experienced and respected consultant forensic psychologist. However, by his own admission, NF1 is not within his area of expertise and he does not have experience in working with individuals with NF1. His lack of expertise and experience has been compounded by his lack of access to the Claimant's complete medical records but critically in our judgement, by an untested assumption

or acceptance on his part that the Claimant's reported cognitive issues have arisen since she was diagnosed with NF1; in response to follow up questions posed by the Respondent's solicitors he has acknowledged that he was influenced in the matter by his letter of instruction from the Claimant's then solicitors, in which they wrote:

> "Since the Claimant's diagnosis she has been making uncharacteristic errors at work which she believes is as a result of the learning difficulties arising from NF1".

That proposition, or premise, namely that NF1 gives rise to learning difficulties has seemingly never been questioned. It is not something we accept without question; on the contrary we agree with Ms Hosking that the relatively limited available evidence in this case points to learning difficulties and disabilities being commonly associated with NF1 rather than caused by it; in other words that where learning difficulties or disabilities are present in a person with NF1, they are 'co-morbid', and as such that they need to be relied upon as disabilities in their own right, or at least in combination with NF1 if they are to be considered as part of any legal claim. However, this is not how the Claimant has presented her claim; instead, she attributes any issues and difficulties in her life entirely to her NF1.

14. According to the NHS (page 394 onwards of the Bundle), ADHD affects around half of all children with NF1. NF1 is also said by the NHS to be linked with autism spectrum condition. However, it remains unclear why this is, in the same way it is not clearly established why anxiety disorders are prevalent amongst those with autism spectrum conditions. Ms Hosking explores the matter in some detail in her written submissions. We agree with her careful and insightful analysis at paragraphs 12 to 33 of her written submissions, even if, as we say, we do not entirely discount Mr Marshall's report.

15. In order to further illustrate the point we are making, we note that whereas learning difficulties and disabilities may be more prevalent amongst people diagnosed with NF1, and accordingly associated with the condition, by contrast, symptoms affecting the brain and nervous systems are relatively common in NF1, so that, for example, migraines are features of the condition rather than merely associated with it. Further direct symptoms of NF1 are noted on the NHS web pages (page 395 of the Bundle), for example: malignant peripheral nerve sheaf tumours (a type of cancer) and gastrointestinal tumours. Similarly, NF1 may lead to high blood pressure in children and adults. These direct, even if sometimes secondary, symptoms, including for example personality changes resulting from tumours on certain areas of the brain, and issues with balance and co-ordination, are features of the condition rather than merely associated with it. In our judgement it is an important distinction that we are required to hold in mind in coming to any decision on the Claimant's complaints.

16. Returning then to the statement in the Claimant's solicitors' letter of instruction to Mr Marshall that learning difficulties arise from NF1, we concur with Ms Hosking that there is no evidence available to us to support the conclusion that a person with NF1 may develop learning difficulties or disabilities in adult life. Likewise, we concur with her when she says that receiving a diagnosis of NF1 may be distressing and could well cause anxiety, particularly during any period of adjustment, as could be the case when new tumours grow or if an MRI result shows changes, but that NF1 is not an anxiety condition and the condition is not exacerbated by anxiety.

17. The Claimant rightly points out that as part of her assessment by Mr Marshall she underwent testing in relation to her cognitive functioning and mental health. Her test results, and Mr Marshall's evaluation of these, are at pages 100.142 to 100.148 of the Bundle. In terms of cognitive function, the Claimant's full scale IQ is 72, above just 3% of her peers, placing her in the borderline range of adult intellectual ability. Mr Marshall states that such individuals may experience difficulties relative to their peers in performing certain daily tasks. In response to follow up questions posed on behalf of the Respondent he says there is no information in the Claimant's medical records that she has been diagnosed with a learning disability. Any references in the limited available clinical records to differences or difficulties in learning on the part of the Claimant reflect her self-evaluation rather than any cognitive functioning tests having been undertaken by other medical practitioners.

18. Mr Marshall goes on to say, in response to the eighth question posed by the Respondent's solicitors, that he has not diagnosed the Claimant with a learning difficulty. The Weschler Adult Intelligence Scale ("WAIS-1V") was used by him to measure the Claimant's cognitive functioning and intelligence. Mr Marshall confirms that WAIS-1V cannot establish a link between any learning difficulty and NF1.

19. In Appendix 1 to his report, Mr Marshall details the Claimant's personal and family history. She recounted difficulties with spelling in childhood but told him that she was not investigated for dyslexia or ADHD. If Mr Marshall had access to the Claimant's occupational health records, which is not clear, he would have been made aware that Dr Alex Swan, a Consultant Occupational Physician, recommended in 2010 that the Claimant should be assessed through a local Dyslexia Action Centre for dyslexia, something the Claimant did not follow up in spite of telling her manager at the time that this was something she intended to pursue through her GP. It is unsatisfactory that this particular aspect was not explored further by Mr Marshall. Even if he was unaware of the 2010 recommendation, the Claimant told him about difficulties in childhood with spelling, and that she had not been investigated for dyslexia or ADHD. And, of course, Mr Marshall was specifically instructed to provide his professional opinion as to the likely cause of errors at work. Even if these were said to be uncharacteristic, in our judgement it was incumbent upon

him to consider whether they might have one or more causes rather than simply the cause being advanced by the Claimant.

20. In the course of her evidence at Tribunal the Claimant volunteered that she had had been forgetful, clumsy and messy as a child and that she had also mixed up her letters. Appendix B to the Equal Treatment Bench Book has a section on dyslexia. Noted difficulties with dyslexia include:

    - Weak short term memory;
    - Mistakes with routine information;
    - A poor working memory revealing itself as the inability to:
        - retain information without notes;
        - hold onto several pieces of information at the same time;
        - listen and take notes; and
        - carry out three instructions in sequence.
    - Inefficient processing of information;
    - Poor time management; and
    - Chronic disorganisation.

21. Even this limited, non-exhaustive summary suggests to us that, as in 2010, dyslexia was an issue ripe for further exploration and consideration, not least when the Respondent's solicitors specifically raised the topic of potential learning difficulties with Mr Marshall. The typical difficulties with dyslexia we have just noted are brought into even sharper focus when one considers that Mr Marshall offered the following observations in relation to the Claimant:

> "There is evidence from Ms Dadhria's profile that her working memory, that is her ability for sustained concentration and attention and holding things in mind such as instructions and other activities associated with short-term memory, is in the borderline range and indicative of a significant difficulty relative to her peers." (page 100.150)
>
> "Ms Dadhria had a particular area of deficit on the sub-test 'information', which measures an individual's ability to acquire, retain and retrieve information." (page 100.178)

22. Mr Marshall also said that based on the Claimant's scores, amongst other things, she was likely to experience difficulties in articulating or understanding verbal instructions, so that she would require simple language and short sentences, and that sentence complexity should be avoided. We note in this regard that word finding problems, lack of

precision in speech, misunderstandings and misinterpretation are, according to the Equal Treatment Bench Book, all associated with dyslexia.

23. It is unfortunate that this and any other potential causal explanations are not explored or addressed in Mr Marshall's report. There is some indication of an affirmation bias, by which we mean that Mr Marshall was instructed on the basis, and seems to have accepted without question, that the Claimant began to make uncharacteristic errors at work following her diagnosis with NF1. At the very least, he seems not to have given thought, as Dr Swan did in 2010, to whether the Claimant's diagnosis with NF1, rather than the condition itself might have impacted her concentration at that time and, if so, whether for example other stressors in the Claimant's life might have affected her concentration in 2022. He also seemingly took at face value the statement in his letter of instruction that learning difficulties arise from NF1, including poor co-ordination, selective reading, attention deficit and short term memory problems. The Claimant's solicitors did not identify their source materials in this regard or, if relevant, their own qualifications or experiences which might have qualified then to offer an opinion in the matter. There is no evidence that Mr Marshall questioned the basis upon which he had been instructed or that he researched the matter for himself. The information on the NHS website already referred to, which was readily available to him, might have provided him with a more rounded view, particularly in the absence of any specialist knowledge or experience of his own in relation to NF1. Mr Marshall's failure to consider the matter independently of his instructions undermines our ability to be confident in his conclusions and has been exacerbated by the other concerns identified in paragraph 9 of Ms Hosking's written submissions as well as his over reliance upon imprecise, somewhat anecdotal evidence from the Claimant and Ms Craig (who accompanied the Claimant to the assessment).

24. As far as we can tell, the only evidence that potentially supports a direct causal link between NF1 and cognitive issues is to be found in Dr Swan's 2010 report, in which he noted as follows:

> "Poor co-ordination and special awareness along with short term memory problems are also reported as common complications of neurofibromatosis (NF1) and it is therefore possible that the condition is contributing to her concentration."

There seems to be a typographical error; we think the reference to 'special' awareness was likely intended to refer to 'spatial' awareness. Dr Swan did not indicate where the complications he referred to were said to have been reported, for example whether they featured in research reported in a respected medical journal or was material he had discovered on-line, or indeed if it had simply been reported to him by the Claimant.

25. Potentially the most significant evidence put forward by Mr Marshall are the Claimant's results from the National Adult Reading Test ("NART-R"),

which Mr Marshall describes as a measure of estimated pre-morbid intellectual functioning, and from which he concludes that there has been a decline in the Claimant's cognitive function. Mr Marshall notes that the test has some sensitivity to acquired brain dysfunction and further that there is, in his words "some discrepancy and updated data regarding the predicted value of the outcome of the NART-R on an individual's IQ". Nevertheless, he reports that the Claimant's score would indicate that she may previously have been functioning in the low average to average range of adult intellectual ability, as opposed to the lower borderline range using WAIS-IV. On this issue, he does at least explore and discount the potential for head injury as accounting for any impact on cognitive functioning, before going on to offer his opinion that the Claimant's diagnosis of NF1 explains the change in functioning, "relative to her pre-morbid level". Putting aside the limitations of the NART-R test, which Mr Marshall himself acknowledges, his acknowledged lack of expertise and experience in relation to NF1 and, as we have noted already, that he was instructed on the basis there is an accepted causal link between NF1 and learning difficulties, his reference to the Claimant's stated pre-morbid level of functioning infers that her diagnosis provides the relevant point for contrasting her pre- and post-morbid level of cognitive functioning. If so, we do not agree; NF1 is a genetic condition that people are born with, even if the symptoms may develop gradually over many years. Whilst the condition may only become disabling for the purposes of the Equality Act 2010 later in life, in our judgement it is wrong to approach diagnosis as a morbid event and to seek to contrast cognitive functioning prior to and following diagnosis.

26. Although the Respondent does not have the burden of proof in the matter, we conclude that the Claimant's reported cognitive issues are likely (that is to say, on the balance of probabilities) indicative of learning difficulties or even a learning disability, possibly dyslexia. For the avoidance of doubt, the Claimant has not pursued any claim to be disabled by reason of learning difficulties or a learning disability, or by reason of ADHD, anxiety, depression or some form of Post Traumatic Stress Disorder. The Claimant has failed to establish on the balance of probabilities that any inability or impaired ability on her part to concentrate and multi task, and any selective reading difficulties, arise in consequence of being disabled by reason of NF1. As these are identified in the List of Issues as the three things that are said to have arisen in consequence of her disability, her section 15 Equality Act 2010 complaints cannot therefore succeed. It is also essentially fatal in terms of her section 20 / 21 Equality Act 2010 complaints since the Claimant claims to have been disadvantaged by the six PCPs because of her impaired cognitive functioning, rather than because of any other claimed symptoms of her condition. The only potential exception is the breach of security procedures in 2010; in that regard, we agree with Ms Hosking that the Claimant's concentration seems to have been adversely affected by the temporary anxiety she experienced on being diagnosed with the condition. Dr Swan said,

> "I am of the opinion that it is most likely that the recent diagnosis of neurofibromatosis has understandably caused her some distress and affected her concentration abilities. I am optimistic this will gradually improve."

Although, as we say, he went on to refer to short term memory problems as being reported common complications of NF1, there is no obvious support for that view in the other materials available to us. We remain of the view that cognitive issues may present in those with NF1 but as Ms Hosking says that the condition is progressive in relation to nerve tumours, but static in relation to learning difficulties i.e, they are either present from childhood or not present at all, and even if present from childhood that they are associated with NF1 rather than a symptom of the condition.

27. The Claimant says for the first time in her supplementary statement that anxiety is a component of NF1. This is not reflected in the List of Issues or the claim form from which the List of Issues derives. Putting aside that the Claimant would require our permission to amend her claim if she wishes to pursue any claims relating to anxiety, whether as a disabling condition in its own right or as something arising from her NF1, and that she has not made any application to amend her claim, the Claimant has not in any event persuaded us on the balance of probabilities that any ongoing anxiety is part of her condition or has arisen in consequence of it. On this issue, we agree with Ms Hosking's analysis in paragraphs 29 to 33 of her written submissions. Dr Swan noted in 2010 that the Claimant reported sometimes feeling low in mood about the diagnosis but did not suggest that anxiety was part of the condition itself. Even though it is accepted by the Respondent that the period of anxiety in 2010 was something arising from the Claimant's NF1, any claim in respect of the final written warning issued to the Claimant in 2010 would be very significantly out of time. That in itself would be a reason to refuse any application to amend to introduce the anxiety issue.

28. Although the section 15 and section 20/21 Equality Act 2010 complaints cannot succeed, we must still consider whether the Claimant was directly discriminated against in being subjected to a disciplinary process in 2022 for making errors in respect of Consignment Security Declarations (CSDs) and dismissed at the conclusion of that process. We shall examine this aspect of the claim when we address the Claimant's complaint that she was unfairly dismissed.

29. The Claimant pursues various complaints of harassment. Issues 16.1 – 16.5 and 16.7 are essentially complaints that the Respondent failed to implement reasonable adjustments. As the unwanted conduct about which complaint is made is unrelated to the Claimant's NF1, it is difficult to see how they can succeed in the alternative under section 26 of the Equality Act 2010. However, we shall come back to this.

Findings

30. Our key findings are as follows.

31. The Claimant commenced employment with the Respondent on 25 November 2002. She remained in the same role throughout her employment, namely a Customer Reception Officer. There is no suggestion that she was other than a loyal and essentially reliable employee. There is no evidence of any issues of concern during the Claimant's first eight years of employment. The NF1 diagnosis came in 2009 or 2010; the Claimant suggests a diagnosis in 2009 though Dr Swan recorded it as having been in 2010. Dr Swan said that the Claimant would benefit in being allowed extra time for tasks that she found particularly difficult and being provided with information in formats that were accessible, but this recommendation was evidently in the context of his assessment was that the Claimant was suffering symptoms consistent with a diagnosis of dyslexia, in other words that the adjustments would address any difficulties arising from any such condition rather than from her NF1. He recommended elsewhere in his report that the Claimant should be permitted time to attend relevant follow up medical appointments (he did not suggest that these should be paid i.e, that she should not be required to take paid or unpaid leave to attend the appointments), he also recommended that her performance should be closely monitored and consideration given to the provision of mentoring support. These adjustments were proposed in respect of her NF1. Towards the end of his report Dr Swan said that he had written to the Claimant's GP and that a report might also be required from her consultant neurologist. However, there are no such reports in the Bundle.

32. The Claimant seems to have been referred to Dr Swan in the context of a disciplinary process; the letter at page 321 of the Bundle refers to the Claimant having been issued with a final written warning in respect of an incorrect CSC (which we suspect was a precursor to the CSD). She was told that further security failures of any kind could not be tolerated. Jonathan Neal, the Terminal Operations Manager asked the Claimant to let him know the outcome of her planned dyslexia assessment. We do not know whether he followed the matter up with the Claimant, or indeed she with him.

33. Consignment Security Declarations ("CSDs") are provided by drivers when they come to the Respondent's cargo warehouse at Heathrow with consignments that are to be loaded on to aircraft. They are an essential part of the security process and have to be completed in accordance with Civil Aviation Authority regulations. It was a key part of the Claimant's role to check CSDs, as Ms Benepal describes in paragraph 8 of her witness statement. The Respondent's acceptance of a CSD is confirmation that the relevant consignment is safe to fly.

34. There was some discussion in 2010 as to whether the Claimant might change role and move to the transhipment desk but the Claimant asked to return to her substantive original role it seems after just a few days.

Thereafter any work issues seem to have settled down, even if Ms Benepal occasionally had cause to issue the Claimant with interaction forms, namely informal warnings, when the Claimant made certain errors; these were understood by Ms Benepal to be linked to the Claimant being distracted by her phone.

35. The Respondent issued updated guidance for completing CSDs in 2015. This was unrelated to the Claimant, rather because the CAA had issued its own revised guidance. The Claimant was one of a number of members of the Respondent's staff who signed to confirm that she had been briefed on the updated guidance. In early 2016 staff at the Respondent, including the Claimant, were reminded of the importance of correct acceptance of CSD documentation. Again, there is nothing to suggest this reminder arose following any mistake by the Claimant. The reminder was accompanied by detailed, full written instructions on the completion of CSD documents.

36. The Claimant was the subject of formal disciplinary proceedings in March / April 2018 in connection with her failure to collect £50 from a driver in respect of a shipment. It was said to have resulted in extra work for colleagues. There was a documented cash handling procedure in place at the Respondent, which the Claimant had signed in 2015 as confirmation that she had read and understood it. When the matter was discussed with the Claimant on 3 April 2018 she said,

> "I am really sorry I did not follow procedure, I know how important it is and will follow it now."

She did not suggest any link to her NF1, rather that she was uncomfortable about having to ask colleagues to check cash receipts and that she often felt she was passed from pillar to post by colleagues who were too busy to help. She was issued with a written warning that would remain live for six months. If it seems to us a somewhat harsh sanction in the particular circumstances, when an informal discussion might have sufficed, the Claimant did not appeal the decision to issue her with a warning. We note that the decision itself was reached following a twelve minute adjournment by John Faulkner, the Cargo Services Manager who acted as the disciplinary officer on that occasion. The decision itself was confirmed in writing – see page 125 of the Bundle.

37. Within two months a new issue arose regarding two CSDs that had been incorrectly accepted by the Claimant. They were recorded on an employee interaction form completed by Ms Benepal (pages 129 and 130). When questioned about the matter, the Claimant had been unable to confirm how the 'method of screening' box on the form should be completed in given scenarios. Ms Benepal had re-briefed the Claimant in this regard showing her the CSD examples and guide folder which were kept on the Supervisor's desk. A more formal investigation was initiated some weeks later. When the Claimant met with Mr Faulkner on 2 August 2018, she told Mr Faulkner that she did not know why she had accepted potentially unsecure cargo. She said,

> "I can see it is wrong but I do not know how I missed it."

She went on to demonstrate to Mr Faulkner a clear understanding of the relevant checking procedure, before going on to suggest that Ms Benepal had spoken to her aggressively and that she had, in her words,

> "…lost interest in what she was saying to me. I was angry she shouted at me in the middle of the office, it was not professional."

When this was explored further with the Claimant she said,

> "Maybe I was in a mood, I was very angry, there was no need to be spoken to like that. I do understand the procedure."

38. The Claimant went on to say that if ever she was unsure as to the correct procedure she would check the Supervisor's CSD guide located on the co-ordinator's desk. As the interview was coming to a conclusion she said,

> "People make mistakes…"
>
> (page 136)

39. There was no suggested link to her NF1 or indeed any other condition of hers.

40. The Claimant was due to have a further meeting with Mr Faulkner on 15 August 2018 to find out what, if any, further action would be taken in the matter. However, there was then a further alleged breach of secure cargo acceptance procedures on 10 August 2018. The Claimant was informed by Mr Walsh, Cargo Services Manager on 23 August 2018 that she would be required to attend a Disciplinary Hearing to discuss both matters, to be held on 3 September 2018. The Claimant was reminded of her right to be accompanied. Although not formally listed in the meeting minutes as an attendee, the Claimant's trade union representative, Tony Doran was evidently present throughout the meeting on 3 September. Almost twenty minutes into the meeting the Claimant introduced the subject of her NF1, which she said caused her to be forgetful. We have set out why any cognitive issues did not in fact arise from her NF1. The Claimant referred to having two lumps on her brain and said,

> "…this might be something to do with it."

41. Had this proved to be the case, it might have provided a direct causal link to her NF1. The meeting was adjourned and when it resumed a few minutes later Mr Walsh confirmed that the Claimant would be referred for an occupational health assessment. Whilst that was undoubtedly the right course of action, we are critical of the Respondent for referring the Claimant without completing a referral form or posing any specific questions to be addressed. In his report, Dr Clift offered the view that the Equality Act 2010 was unlikely to apply, notwithstanding Dr Swan's conclusion to the contrary some eight years earlier. It seems to us that Dr

Clift must have been unaware of Dr Swan's previous involvement and report, which was a glaring omission on the part of the Respondent. Nevertheless, Dr Clift was able to confirm that MRI scans had revealed two small lesions on the Claimant's brain and that according to her consultant neurologist they were very small and nothing to worry about. The Claimant told Dr Clift that two further MRI scans had revealed no change in the lesions. She questioned nevertheless whether they might be causing problems with her memory. At that stage she was not suggesting cognitive issues arising from the condition itself. The Claimant told Dr Clift that since May that year she had become anxious about what the consequences might be for her if she continued to make mistakes. She believed this had exacerbated matters and led to increased mistakes on her part. We agree with Ms Hosking that this was unrelated to the Claimant's condition, rather it was consistent with the anxiety which any employee in that situation might experience regardless of any disability.

42. As Dr Swan had done in 2010, Dr Clift recommended the Claimant should be given time out of her work to attend appointments. Although there was and is no NF1 related explanation for any tendency on her part to make mistakes, Dr Clift suggested that Respondent work with the Claimant to develop systems to minimise the likelihood of further mistakes. The Claimant had in mind a checklist as well as slowing down the speed of her work. Although Dr Clift had not suggested any connection between the Claimant's NF1 and the mistakes that were under consideration, Mr Walsh dealt with the report in a fairly cursory manner when he discussed it with the Claimant on 26 September 2018. We refer in particular to the meeting minutes at page 176 of the Bundle. They evidence that the Claimant was preoccupied with the fact that she had been given the wrong address for the appointment and that Dr Clift did not know about NF1. Mr Walsh failed to steer her back to the point in hand, namely whether there was any connection between her condition and the mistakes she had made. The notes at page 176 suggest that Mr Walsh's mind was essentially made up on the matter before he adjourned to consider his decision. He is noted as having said at least three times to the Claimant that after 15 years with the Respondent she was expected to be competent in her role and not to make mistakes. Following a break of indeterminate length, Mr Walsh confirmed that the Claimant would be issued with a final written warning which would remain live for 12 months. She was warned that further errors could lead to her dismissal. He also confirmed that she would be re-briefed on the correct procedure for checking CSDs and that the Respondent would work with her to discuss a checklist to minimise further mistakes. That evidences to us that the Respondent was focused on flight security and safety, but ultimately also on supporting the Claimant to achieve the standards of work performance and / or conduct expected of her, even if Mr Walsh had rushed his meeting with her. We understand that the guidance notes at pages 180 – 184 of the Bundle were updated by the Respondent with the Claimant specifically in mind. It clearly documents how a CSD should be completed and what each box on the form denotes.

43. Even if the Claimant had concerns regarding pressures of work within the workplace in 2020 and 2021, no further issues arose until 2022. The sporadic nature of the Claimant's errors since her diagnosis with NF1 in 2009 – 2010, reinforces us in our conclusion that it was not the cause of a cognitive decline from that date.

44. On 27 January 2022 the Claimant was required to attend an investigation interview with Jatinder Johal, Cargo Duty Manager and Daniel Henri, Office Lead regarding her failure on 18 January 2022 to identify discrepancies in four CSDs. She could describe the correct procedure to them when the documentation relating to the CSDs was presented to her, though could not immediately explain why the necessary security checks were not made. She said,

> "I can see right away that they are wrong."

45. She went on to suggest that perhaps she had been rushing and that she would take her time in the future. She apologised and said it would not happen again. Later the same day she was advised that she would be required to attend a Disciplinary Hearing on 2 February 2022 at which she could be accompanied by a trade union representative, or other companion. She was informed that the alleged failings on her part were deemed as misconduct under the company's Disciplinary Policy and Procedures. The Claimant attributes her errors to memory issues on her part, see in this regard paragraph 29 of her Witness Statement, though at paragraph 30 she goes on to reference mitigating circumstances at the time, namely the recent death of her uncle. In her statement she suggests this was an exacerbating factor, whereas at her disciplinary hearing on 2 February 2022 she put it forward as the immediate and only obvious explanation for her distraction on 18 January 2022; she did not refer to her NF1 or any other health related issues. It was said during the disciplinary hearing that the Respondent had been charged by the relevant airline in respect of the Claimant's errors. The Claimant was apologetic and said she would ensure she was more alert to future potential errors. Her trade union representative seemingly said nothing on her behalf. Valeria Castorina, who was the disciplinary officer, decided to issue the Claimant with a first written warning which would remain live for nine months. She did so following a 12 minute adjournment. The outcome was confirmed in writing; in her letter Ms Castorina referred to the Claimant having been negligent. The Claimant was reminded of her appeal rights but she did not exercise them.

46. Just two days later the Claimant was suspended from duty and invited to attend an investigation meeting to discuss concerns that she had duplicated an Airway Bill for a previous shipment on 1 February 2022. It was described by the Respondent as a potentially serious breach of safety and security jeopardising the safety of the building, aircraft and passengers on board the aircraft. She was accompanied at the investigation interview on 10 February 2022 by her trade union representative. The meeting notes confirm that the Airway Bill in question

related to a shipment that had been flown out of Heathrow the previous year. The Claimant had used her company PIN number to override the security status of the shipment that had already flown and manually created the Airway Bill for the new consignment. The Claimant said she did not know how or why it had happened. Noel Pereira, who was the investigating officer, explained that no pre-alert had been received from the agent for the shipment. The Claimant was able to confirm that in the absence of such pre-alert the agent should be contacted. As the meeting progressed the Claimant speculated whether she might have been training someone at the time and distracted from the task at hand, she said,

> "I have said before I cannot multi-task".

47. On 14 February 2022 the Respondent wrote to the Claimant to invite her to attend a disciplinary meeting to be held on 17 February 2022. The issues of concern were said to be acts of gross misconduct under the company's Disciplinary Policy and Procedures in that they potentially involved a serious breach of safety and security, brought the company into disrepute, amounted to serious negligence and a serious infringement of health and safety rules, and gave rise to a serious breach of confidence. Once again the Claimant was reminded of her right to be accompanied. She was also provided with a pack of relevant documentation.

48. Ms Castorina was again the disciplinary officer. During the hearing they covered much of the same ground discussed on 10 February 2022. Since that meeting a copy of the pre-alert had been located. The Claimant's trade union representative acknowledged that the pre-alert was not in the format required under CAA regulations. As regards the duplication of an existing Airway Bill, the Claimant suggested she might have been instructed to do this, but it was speculation on her part as she did not say who might have given any such instruction or when it was given. Ms Castorina identified what she referred to as three milestones that might have prevented the error. She went on to say that she could not obviously identify a training need, to which the Claimant responded,

> "No, I should pay more attention, be more alert and check pre-alerts. I should not rush. I had loads going on training a new person too."

49. In summary, therefore, the Claimant was attributing the matter to human error on her part. There was no suggestion of any health issues. She apologised about her mistakes.

50. The meeting was adjourned for just five minutes before Ms Castorina returned to say that the severity of the breaches could have led to the Claimant's dismissal but that she would be given another chance. The Claimant was issued with a final written warning which would remain on her file for 12 months. She was informed of her appeal rights which she did not exercise.

51. There was then a further incident on 23 August 2022 when the Claimant accepted secure cargo with an incorrect CSD. The matter was discussed

with the Claimant on 25 August 2022. Unlike in February, she had no prior warning of the investigation interview, notwithstanding her continued employment was then significantly at risk given the live final written warning, nor was she afforded an opportunity to be accompanied by her trade union representative. During the investigation interview, the Claimant was able to provide a clear description of the process or protocol around accepting export shipments, specifically the relevant security / CAA checks. The Claimant did not offer any obvious medical explanation for her acceptance of a consignment with an incorrect CSD. She simply said that in future she would double check everything and not make such mistakes, essentially the same assurance she had offered on 17 February 2022. She apologised and said she would make sure it did not happen again.

52. On 6 September 2022 Ms Benepal wrote to the Claimant inviting her to a disciplinary hearing on 13 September 2022 to discuss an allegation that she had failed to follow standard safety regulations of the company and of the aviation industry. She was warned that the allegations could constitute gross misconduct and accordingly that she was at risk of being dismissed. She was reminded of her right to be accompanied. Ms Benepal was the disciplinary officer. The Claimant was accompanied by Tony Doran, by then a UNITE Convener who had accompanied the Claimant at both disciplinary hearings in 2018 and who was familiar therefore with her NF1. When Ms Benepal asked the Claimant if there was anything she wanted to talk about or to let them know, she replied,

> "I mean I just made a mistake, everyone makes mistakes. I know I should not rush, take my time and do things. I have no explanation for it, people make mistakes."

53. Mr Doran pointed out that the mistake had been picked up and accordingly that an aircraft had not been endangered. He went on to say that the Claimant should have been taken off Reception or given training. Ms Benepal replied,

> "I do not know what training we could offer. We could have taken Seeta off Reception, but where were we going to put her? We have taken her off before and put her on other desks, but she requested, for medical reasons, to go back on Reception. We've tried to support her, but she had health issues and requested to return to Reception. We have done our best to support Seeta."

54. She was thereby limiting the available options for dealing with the situation before she adjourned to consider the matter, reach her findings and decide upon any appropriate action. When Mr Doran tried to take up the matter again with Ms Benepal she was essentially dismissive of what he had to say, telling him,

> "We are just going over the same mistakes continuously. We have tried to help her, but she is making the same mistakes over and over again."

55. The meeting adjourned for thirty minutes. When it resumed the Claimant was dismissed with immediate effect. Ms Benepal said,

> "Looking at this and all your previous mistakes, they are all the same mistakes. We have therefore come to a decision to dismiss you with immediate effect."

56. The outcome was confirmed in a letter dated 15 September 2022 which does not obviously identify why the Claimant was considered to have committed an act of gross misconduct as opposed to her performance / capability having fallen below the standard reasonably expected of her. The letter refers to there having been no mitigating circumstances around the errors made, but does not refer to other broader mitigating circumstances, including why Ms Benepal had concluded that the Claimant should be summarily dismissed rather than any other sanction imposed, including demotion or redeployment.

57. The Claimant instructed solicitors who lodged a detailed written appeal on her behalf. They referred in their letter to the Claimant as disabled within the meaning of the Equality Act 2010 and asserted, incorrectly as we have now concluded, that NF1 is known to commonly cause learning disabilities. It seems they took that information from Dr Swan's 2010 report. They went on to say that the Claimant's diagnosis had caused her stress and affected her concentration, though it seems to us that they conflated this temporary reaction or response to the diagnosis with the underlying symptoms of the condition as they understood them, namely as identified in the third page of Dr Swan's report. The appeal was pursued on six grounds set out in the solicitors' letter and can be summarised as:

    57.1. an alleged failure to consider the Claimant's disability and how it affected her work performance;

    57.2. that the Claimant had been treated unfairly, including because others in the Export Department were not disciplined, notwithstanding they were alleged to have failed to spot the 23 August error;

    57.3. that the disciplinary procedure was unfair;

    57.4. that in light of the occupational health reports the Respondent had failed to provide sufficient support for the Claimant (the letter does not state in terms that the Respondent had failed in its duty to make reasonable adjustments);

    57.5. that the Claimant should have been put on a Personal Development Plan and that the Respondent failed to redeploy her or consider reasonable adjustments; and

57.6. that the Claimant's dismissal was effectively a convenient opportunity to, "get rid of" an older, better paid employee.

58. The solicitors did not say that any ongoing anxiety disorder arose from the Claimant's NF1.

59. The Claimant was invited to attend an appeal hearing on 19 October 2022, but her solicitors requested on her behalf that the appeal should be dealt with in writing. She was therefore issued with a written decision on her appeal by Mr Aldwinckle on 31 October 2022. His four page letter addresses each of the six grounds of appeal in detail.

Conclusions

60. We shall deal with the Claimant's harassment complaints first, albeit as we say, a number are complaints that the Claimant was harassed by reason of the Respondent's failure to make reasonable adjustments.

61. Sections 26(1) and (4) of the Equality Act 2010 provide as follows:-

> **Harassment**
>
> (1) A person (A) harasses another (B) if:
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of:
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

62. Harassment within the meaning of section 26 will only be established if the unwanted conduct in question relates to a protected characteristic.

Issue 16.1

63. The unwanted conduct complained of is the Respondent's alleged failure to implement reasonable adjustments in light of recommendations in the occupational health report of 5 November 2010. As Ms Hosking says, the

complaint is very substantially out of time. There is no explanation by the Claimant for that delay, or why it might be just and equitable for her to be permitted, nevertheless, to pursue the claim, involving as it does the Respondent's alleged mismanagement of her needs some fifteen years ago. Putting such considerations aside for a moment, as we have said already, the recommendation that the Claimant should be permitted additional time for tasks, together with information in accessible format, was intended to address any difficulties related to dyslexia.

64. The Claimant's specific complaints in relation to this issue are set out in paragraphs 10 and 11 of her witness statement. She complains that she was required to arrange medical appointments in respect of her NF1 using her annual leave entitlement, or else take unpaid leave. Whilst she does not identify when precisely this was, Dr Swan had not recommended that she be granted additional paid time off for her medical appointments, merely that the appointments should be accommodated if these fell on a work day. In which case the complaint is not established on the facts. In her statement she specifically confirms that any appointments were authorised by the Respondent, in which case the recommended adjustment was implemented.

65. The Claimant's other complaint relates to the Respondent's alleged failure to provide adequate training, instruction and supervision to support her transition to the transhipment desk. She states that the transfer was intended to address workplace stress. Again, for the reasons we have set out already, there is no claim in respect of stress or anxiety. In any event, Dr Swan did not recommend that the Claimant should be redeployed, in which case the Claimant's complaint that the Respondent harassed her by failing to implement adjustments recommended by Dr Swan is not made out.

Issue 16.2

66. It is alleged, following the occupational health report of 17 September 2018, that the Respondent failed to put in place a system to support the Claimant in minimising the likelihood of mistakes at work. However, whilst this was recommended by Dr Clift, it was not in the context of anything arising in consequence of the Claimant's disability (s.15 of the Equality Act 2010) or to address any disadvantage arising from her disability (s.20 of the Equality Act 2010. In which case we cannot see how any alleged failure on the Respondent's part, namely any unwanted conduct (s.26 of the Equality Act 2010) might have related to her disability. In any event, we agree with Ms Hosking that the Respondent did work with the Claimant to put an appropriate system in place. A checklist was developed which the Claimant kept on her desk. She was also re-briefed by Mr Walsh and given new guidance on completing CSDs. On the facts the complaint is not made out. We would in any event have said that it would not be just and equitable to permit the claim to be brought over four years out of time. The complaint is not well founded.

Issue 16.3

67. The Claimant complains about the volume of her work following her return from furlough leave in 2020, and that she was not supported on Reception. Her specific complaint is that she was required to train three staff members. However, the rota records from this time evidence just four days in September 2020 when the Claimant was required to train other members of staff. Putting aside that the Claimant did not make any errors during those shifts (or indeed it seems over the following year or more), she says that this further burden caused her to feel stressed and anxious, and that she found it difficult to communicate effectively with the people she was training whilst also being responsible for serving drivers at the front desk. If this latter challenge is a reference to any difficulties of hers in multi-tasking, this did not arise from her NF1, likewise any stress and anxiety. In order to succeed in her s.26 Equality Act 2010 complaint, the conduct complained of must relate to the relevant protected characteristic, in this case disability by reason of NF1. Any failure on the Respondent's part to arrange cover for Reception whilst the Claimant trained colleagues did not relate to her disability or to any disadvantage or other thing arising from it (s.15 and s.20 of the Equality Act 2010). Whether or not the Respondent ought reasonably to have made cover available to the Claimant to take some of the pressure off her to enable her to focus on training her colleagues, is legally besides the point; the question is whether the Respondent discriminated against her, not whether it acted unreasonably or inconsiderately. The Claim does not succeed.

Issue 16.4

68. The Claimant says that she was expected to serve drivers with consignments to be transported on other airlines when she was on the designated Qatar reception. As Ms Hosking notes in her submissions, the only specific incident relied upon is said to have arisen in October 2021. Putting aside that it is therefore eight months out of time, the long standing recommendations that the Respondent should closely monitor the Claimant's performance and consider providing mentoring support, do not obviously touch upon this situation. In particular, the Claimant does not suggest that she was incapable of training colleagues, rather she asserts that she had difficulty juggling this with her other responsibilities, something that may have arisen from undiagnosed learning difficulties but which did not arise in consequence of NF1. As with the other s.26 harassment complaints above, the conduct complained of did not relate to her disability.

Issue 16.5

69. There are two aspects to the complaint. Firstly, the Claimant asserts that the Respondent failed to consider the effects of her disability on her performance on 2 February 2022 and showed no empathy in respect of the mitigating circumstances, namely the recent death of her uncle. It is not necessary for us to make any specific findings in that regard, even if it is the case that Ms Castorina was noted to have said,

"I apologise if I am not being empathetic…"

70. The Claimant's uncle's death and the Respondent's understanding, empathy or otherwise in relation to it was unrelated to her disability, an essential element of a successful s.26 Equality Act 2010 complaint.

71. As regards the Respondent's alleged failure to consider the effects of the Claimant's disability on her performance, firstly, for the reasons we have set out already, the Claimant's mistakes were not as a result of something arising out of her disability by reason of NF1 (s.15 Equality Act 2010).

72. Her complaints are not well founded.

Issue 16.6

73. The Claimant complains about the final written warning issued on 17 February 2022. Putting aside that she did not mention her disability or link this to the errors that resulted in the warning, any inability on her part to multi-task does not relate to her NF1 as required in order to found a complaint under s.26 Equality Act 2010. The complaint is not well founded.

Issue 16.7

74. We agree with Ms Hosking that moving the Imports Department to the back of the office out of the sight of customers and drivers did not relate in any way to the Claimant, let alone her disability. In order to succeed in her claim, there must be some clear relation between her disability and the conduct complained of (s.26 Equality Act 2010). That essential connection or relationship is absent here. The complaint cannot succeed.

Issue 16.8

75. The Claimant was not given prior warning or notice that she would be interviewed on 25 August 2022 in connection with her actions in accepting secure cargo with an incorrect CSD on 23 August 2022. We shall consider this in a moment in the context of the Claimant's complaint that she was unfairly dismissed. Given that the Claimant had previously received written invitations to attend investigation interviews, it was not unreasonable for the Claimant to regard the Respondent's failure to issue such an invitation on this occasion as unwanted conduct that created an adverse environment for her (s.26 Equality Act 2010). However, we cannot see on what basis it can be said that this related to her disability. If, which is not clear on the face of the claim, the Claimant is saying that she required formal notice of the meeting due to some cognitive impairment, for all the reasons we have set out already, any such impairments are unrelated to her NF1. Her section 26 complaint about the matter does not succeed.

Issues 2.1, 2.2, 16.9, 16.10 and 19.2.1

76. Section 13(1) of the Equality Act 2010 provides:

> **Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

77. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer (section 94 of the Employment Rights Act 1996).

78. Section 98 of the 1996 Act provides,

> 98 General
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it-
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do
>
> …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

79. In our judgement the Claimant was unfairly dismissed. It is asserted on behalf of the Respondent that the Claimant was dismissed for a reason relating to her conduct. It was alleged that she had failed to follow standard safety regulations of the company and of the aviation industry, and this was said to amount to gross misconduct. It is indeed included in the Respondent's Disciplinary Policy as an example of gross misconduct. However, the Policy provides no further clarity as to whether any failure must be deliberate, or wilful, or whether it is sufficient that the failure is as a result of neglect or negligence or even lack of ability on the part of the employee. Ms Hosking suggests that as it relates to health and safety and security in the aviation industry, it is an offence of strict liability. It is not clear on the fact of the Policy that this is in fact what the Respondent intended or had in mind, otherwise an employee who had received inadequate training would nevertheless be guilty of gross misconduct for security breaches for which the Respondent could be said to be responsible. The Menzies Group has 32,000 employees globally; it is a well resourced Group with an experienced HR capability and extensive knowledge and expertise in aviation logistics and regulation. If the Policy was intended to capture failings regardless of any fault on the part of employees, the Policy might have said so. We would have said that any such Policy is inherently unfair.

80. In the course of the disciplinary hearing Ms Benepal referred to the fact that the Claimant had made repeated mistakes. There is no evidence within the meeting minutes that she actively turned her mind to the question of whether this was wilful conduct, or for example, human error on the part of the Claimant. In her letter confirming the Claimant's dismissal, Ms Benepal referred to discussions in previous meetings, "on how to improve your performance", which points more obviously to it being a capability related dismissal. In any event, in our judgement, it was unreasonable for the Respondent to dismiss the Claimant for misconduct without making specific findings and articulating in its decision why her mistakes were being categorised as misconduct as opposed to evidencing some lack of capability on the Claimant's part. The same criticism can be made of the live final written warning, and indeed the earlier warning in 2022. In our judgement it was not simply a technical error or oversight, rather it gave rise to substantive unfairness, in so far as it touched upon how the Claimant might be dealt with if there were legitimate concerns as to her ability to do her job, including whether consideration ought to have been given to the potential for redeployment. We think it self-evident that there is a material difference between an employee who wilfully disregards their employer's rules and requirements, and an employee who fails to do so in error, whether any errors of theirs reflect a lack of capability, some degree of carelessness, ill health or some other personal circumstances of theirs. An employer is much more likely to lose trust and confidence in an employee who deliberately flouts its rules. In our judgement, the Respondent acted unreasonably, that is to say outside the band of reasonable responses in failing to make specific findings as to the Claimant's culpability or otherwise in the matter and in relying upon her

failure to improve her performance in and of itself as providing sufficient grounds to dismiss for gross misconduct.

81. There was other unfairness. Regardless of there being no explicit right under the Disciplinary Policy, or the ACAS Code, to be accompanied at the investigation stage, there is no explanation for why this was not offered to the Claimant, particularly as it was known that she was disabled and had previously related errors in 2018 to short term memory issues connected to her NF1. In our judgement it is irrelevant that the Respondent had previously concluded that the errors in 2018 were not in fact related to her NF1. She was a potentially vulnerable employee with 20 years' service who was clearly understood to be at risk of dismissal. In our judgement, the Respondent also acted unreasonably in failing to give the Claimant advance warning of the investigation interview, again even if this is not specifically mandated under the ACAS Code. The Respondent knew that the Claimant had previously reported problems with her memory. Regardless of the extent of any such problems and their likely cause, it was a further reason to notify the Claimant of the meeting in advance so that she had an opportunity to prepare for the meeting, take advice as appropriate, and if relevant make a request to be accompanied.

82. This is linked to a further concern of ours; in our judgement the Respondent acted unreasonably in failing to refer the Claimant for a further occupational health assessment. It accepts that the anxiety in 2010 that contributed to errors that year arose in consequence of her disability. That may not have been the case in 2018, but at the point that her continued employment was in the balance, the Respondent was in possession of two conflicting reports as to whether she was disabled, even if Dr Swan and Dr Clift had recommended essentially the same adjustments. The Respondent knew, or ought to have known that NF1 is a progressive condition. In which case, in our judgement, acting as a reasonable and responsible employer it ought to have updated itself on her health situation given that the most recent occupational health report available to it was then over three years old and given also its responsibility as we see it, to take reasonable steps to inform itself as to the reason or reasons why the Claimant might be failing to adhere to its documented rules and processes.

83. There was further unfairness insofar as the notes of the disciplinary hearing evidence that Ms Benepal approached matters with a closed mind, certainly in terms of any mitigating circumstances and the potential for some outcome other than dismissal. In particular, she dismissed out of hand Mr Doran's suggestion that the Claimant might be taken off Reception. In our judgement it is irrelevant that 12 years earlier the Claimant had asked to return to her Reception role after a few days in transhipment; she was not then facing the loss of long term, secure, well paid employment. It is related to what we have said already about the Respondent's failure to make specific findings as to the reason or reasons for the Claimant's failings. However, insofar as it was seemingly a

capability issue, that should at least have put redeployment in the frame as something to be considered.

84. None of these matters were corrected on appeal. We are not critical of Mr Aldwinckle's decision per se. His letter of 31 October 2022 engaged with the Claimant's points of appeal, but the fact that the issues of concern we have identified may not have been raised by the Claimant does not alter the fact that these shortcomings were not rectified. Indeed, the points of appeal reinforced the need for up to date occupational health advice. Ms Hosking rightly highlights aspects of the procedure that were handled fairly and in accordance with the ACAS Code, but these do not address or vitiate the material unfairness we have just identified.

85. We agree with Ms Hosking that the Claimant's complaints that the disciplinary hearing and her dismissal the same day were acts of direct discrimination are not well founded. The Claimant seeks to contrast her treatment with another employee, Ms Atkinson who accepted an incorrectly completed CSD 12 September 2022. They are not appropriate comparators. The Claimant was a long-standing, experienced employee who was already the subject of a final written warning. Ms Atkinson was a new employee in her probation period; it was her first known security breach. Their situations are not comparable. Putting aside any unfairness in the matter, which is not to be equated with discrimination, we are firmly of the view that a longstanding employee with comparable experience of working on Reception but without the Claimant's disability, would have been treated identically.

86. The Claimant seeks in the alternative to contrast her treatment with how D Ratajek and M Ghita were treated. The latter is not a relevant comparator, as they identified the error that had been missed by the Claimant on 23 August 2022 and stopped the shipment. As regards Mr Ratajek, we accept Ms Benepal's evidence that it was not his responsibility that day to check the CSD as he was carrying out specific dangerous goods checks. In any event, as Ms Hosking submits, there was no evidence that he had two live warnings or a history of errors.

87. In summary, the Claimant has failed to establish sufficient primary facts to support an inference that she was discriminated against.

88. As regards her harassment complaints, the disciplinary hearing and her dismissal were undoubtedly unwelcome, or unwanted. But neither related to her disability and, in any event, it would be unreasonable for her to consider that they created an adverse environment for her. She apologised for the matter when interviewed on 25 August 2022. There was no suggestion either by herself or Mr Doran on 13 September 2022 that it should not have been escalated to a formal meeting. Mr Doran's statement that the Claimant should have been taken off Reception suggests instead that he recognised that the Respondent had legitimate concerns in the matter. The Claimant's complaints of harassment are not well founded.

89. As we did not receive the parties' submissions on the point, nor indeed hear evidence in the matter, we have not made any findings or reached any conclusions as to what would, or might have happened, had the Respondent not treated the Claimant unfairly. The Respondent has the burden of proof in this regard. We intend to give consideration to this issue when we go on to consider the issue of remedy.

Approved by:

Employment Judge Tynan

Date: 30 September 2025

Sent to the parties on:

1 October 2025

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For the Tribunal Office.

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