EMPLOYMENT TRIBUNALS

Claimant: Miss F Farah

Respondent: Spire Healthcare Limited

Heard at: Manchester **On:** 26-29 August 2025

Before: Employment Judge Phil Allen
Mr A Egerton
Dr H Vahramian

REPRESENTATION:

Claimant: In person (for the first and last days) and by Ms S Phumaphi, counsel (for the second and third days)
Respondent: Ms R Senior, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of breach of the duty to make reasonable adjustments for disability is not well-founded and is dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

3. The complaint of harassment related to disability is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant is a registered general nurse. She applied for the role of pre-assessment nurse with the respondent. She was not successful following an initial telephone interview on 17 November 2020 and a second interview by Zoom on 24 November 2020. She was given feedback on 25 November 2020. She claims that the respondent breached the duty to make reasonable adjustments, and that it acted in a way which was discrimination arising from disability. She also alleges disability-related harassment in relation to the feedback call.

Claims and Issues

2. The claim has a long and complex procedural history. Preliminary hearings were held on 10 June 2021, 17 March 2022, 12 May 2022, 11 April 2024, 22 April 2025 and 28 April 2025. There was also a reconsideration hearing on 13 July 2023.

3. The issues to be determined in the claim were identified and a list was appended to the first case management order made following the preliminary hearing on 10 June 2021. That remained the list of the issues to be determined at the start of this hearing.

4. It had previously been found that the claimant was disabled at the relevant time on the basis that her learning difficulties arising from weakness in her auditory working memory had a substantial long term effect on her ability to carry out normal day to day activities. We did not need to determine issue one in the list of issues.

5. At the start of this hearing, the respondent suggested that we determined the liability issues first. We should only determine remedy issues after liability was determined and if required. When it was explained to her, the claimant agreed with that approach. That meant that we did not need to determine issues 4.7-4.12 in the attached list of issues, except for issue 4.11 which it was agreed should be determined alongside the liability issues.

6. The list of issues was included in the bundle (51).

Procedure

7. The claimant represented herself at the start of the hearing. On the first and last day she was accompanied by Ms A McFarlane, her McKenzie friend. A barrister, Ms S Phumaphi, attended and represented the claimant on the second and third days of the hearing (only).

8. Ms R Senior, a barrister, represented the respondent.

9. The hearing was conducted in-person with both parties and all witnesses attending in-person in the Employment Tribunal in Manchester.

10. We were provided with a bundle of documents which ran to 284 pages. We were also provided with some additional documents at the start of the hearing, some of which were clearer typed versions of what was said in emails in the bundle (which had very small print and were difficult to read). We read the documents in the bundle to which we were referred in witness statements, by the parties, or during questioning. Where we refer to a number in brackets in this Judgment, that is a reference to a page number in the bundle.

11. We were provided with witness statements from the witnesses called to give evidence. We read those witness statements on the first morning of the hearing. For Mrs Boylan we were provided with two witness statements: one signed in 2021 which had been written for the first hearing at which it was being considered whether the claimant had a disability; and a second dated April 2025 which provided additional evidence for this hearing.

12. We heard evidence from the claimant, who was cross examined by the respondent's representative, and we asked her questions. We heard her evidence on the afternoon of the first day and the morning of the second.

13. We heard evidence from the following witnesses for the respondent. Each was cross-examined by the claimant's barrister (who attended on the second and third days), and we asked them questions, and they were re-examined. The respondent's witnesses were: Ms Natalie Naughton, at the time of the interview senior pre op assessment nurse and now lead pre op assessment nurse; Mrs Andrea Boylan, nurse; and Mrs Laura Irving, senior recruitment advisor. The respondent's evidence was heard during the (extended) afternoon of the second day and the morning of the third.

14. After the evidence was heard, each of the parties was given the opportunity to make submissions. The respondent's counsel provided a written submission which detailed the relevant law only. Submissions were made orally on the afternoon of the third day.

15. We adjourned the hearing and reached a decision before informing the parties of our decision on the afternoon of the fourth day.

16. At the preliminary hearing on 28 April 2025, the Employment Tribunal had decided that the following reasonable adjustments should be made. They had also decided that other reasonable adjustments sought by the claimant would not be made. The adjustments which were identified to be made (273) and which were made during this hearing were:

a. Regular breaks, which were taken whenever the claimant requested them (and, in any event, no less than once every hour and fifteen minutes);

b. The claimant was allowed plenty of time to process the information before answering questions put to her in cross-examination;

c. The claimant was able to ask for any question to be repeated and, where it was possible to do so, either the respondent's counsel or the Employment Judge repeated the question or rephrased what was asked;

d. The questions asked were asked in a straightforward way, avoiding tag questions, legal jargon, compound questions and double negatives. The respondent's counsel explained each of the themes about which questions were being asked and sign-posted when she changed theme. The claimant was allowed plenty of time to read documents identified during cross-examination; and

e. The claimant was given access to a quiet room reserved for her use during the hearing.

17. It was confirmed that the respondent's counsel did not need to put the respondent's case to the claimant in cross examination in the same way as she might normally.

18. In addition, the claimant was given a blank pad of paper when being cross-examined and she was allowed to write on that pad during cross-examination. The claimant was not allowed to take notes she had prepared in advance with her to the witness table, when she gave evidence (as was also the case for all witnesses).

19. At the start of the hearing, the claimant applied to be allowed to use AI software to record the first day of the hearing and produce a document. When asked to clarify what she was asking to do, she was seeking to use an App on her phone to record the hearing (which would produce a note with AI assistance) or, in the alternative if the use of her phone was the issue, she offered to do so using her laptop computer. The reason why the claimant wished to do so was because she wished to provide a note to her counsel on the second day of what had occurred on the first. We heard brief submissions from the claimant. Following a break, the respondent's counsel outlined the respondent's initial response. The claimant then provided further submissions/points, to which the respondent responded. We then adjourned briefly to reach a decision, before returning and informing the parties of our decision.

20. The decision that we made was that we would not allow the claimant to record the hearing on the first day in the way in which she proposed. Our starting point was that the usual rule in a Tribunal hearing is that a party is not able to record a hearing. We appreciated that what we were being asked to do was a potential reasonable adjustment which we were being asked to make to address a disadvantage which the claimant said that she suffered as a result of her disability and, in particular, her short-term memory issues. However, we noted that on the first day the claimant was accompanied by her McKenzie Friend and her sister. Either or both of those individuals were able to make a note of the evidence heard on the first day. That note (or those notes) would be able to be provided to the barrister to explain what had taken place. As a result, the claimant was in the same position as any other party at the Tribunal, a note would be able to be taken recording what was being said. She was therefore not at a disadvantage as a result of her disability and was in a better position than many other claimants who attend a hearing on their own. We also decided that even if there were any disadvantage to the claimant arising from her short-term memory, that was able to be alleviated by other means, that is by the people supporting her taking notes of what occurred. In submissions, the claimant had referred to her concern that the notes would be incomplete or less thorough than an AI supported recording, but we found that the claimant would be, in that respect, in the same position as any other party to a Tribunal hearing.

21. In her submissions on this issue, the respondent's counsel referred to the decision of the Employment Appeal Tribunal in **Bella v Barclays Execution Services Limited** [2024] EAT 16. That decision emphasised what was said by the Employment Appeal Tribunal in **Heal v The Chancellor, Master and Scholars of the University of Oxford** [2020] ICR 1294. As we have said, we were mindful that we were under a duty to make reasonable adjustments to alleviate any substantial disadvantage related to disability in the claimant's ability to participate in proceedings. We determined that we believed that any potential disadvantage for the claimant could be alleviated by other means. We were concerned about the potential risk of any recording and AI related operation being used for prohibited purposes. We decided that we did not need to permit the claimant to record and translate the

hearing in the way she proposed, as she had people with her who could take notes as a record of the day for which her barrister would not be in attendance.

22. Written reasons were requested and, as a result, the Judgment and the reasons for it are contained in this document.

Facts

23. The claimant is a registered general nurse. She qualified in late 2017. We were provided with her CV (216). In the period immediately preceding her application to the respondent, she had taken time away from full-time work to provide care for a family member but had continued to undertake sufficient bank work for NHS Professionals to enable her to retain her registration.

24. The claimant has difficulties arising from auditory working memory. Prior to this hearing it had been determined that amounted to a disability at the relevant time. We were provided with a diagnostic assessment report by Dr Smith, a chartered psychologist, from 14 June 2016 (163), and a more recent workplace assessment by Dr Fox, a Practitioner Psychologist, of 10 June 2021 (181) (that was prepared after the events about which we heard evidence). We were also provided with a copy of the claimant's disability impact statement (182) and her submission for the disability hearing (278) both of which provided detail about the impact that the claimant's disability had upon her.

25. The claimant applied for a role with the respondent as a pre-assessment nurse. We were provided with the job description for the role (189). Amongst other things, the person profile part of the job description described as essential "*Significant nursing experience with some pre-assessment experience*" and desirable "*Significant pre-assessment experience [and] previous experience in a surgical environment*".

26. On 17 November 2020 Laura Irving undertook a telephone interview with the claimant. At the time Mrs Irving had been employed by the respondent for two weeks. It was the first interview she had conducted for the respondent. We were provided with a document completed by Mrs Irving on screen at the time of the interview (195). It was the respondent's case, that what was asked followed the structure set out in the document and what was answered was as recorded on the document. The claimant did not disagree that the interview had followed the structure of the document, but she disagreed that exactly what she said had been recorded.

27. The key issue of dispute was what was said about disability and adjustments.

28. The note made at the time recorded the only question as being "*Any special adjustments required to attend an interview?*" to which the recorded answer was "*no*".

29. Mrs Irving's written evidence was that all that was said was what was recorded in the note. In her oral evidence, she described being asked to explain what the question meant, explaining it with reference to parking, and being given the answer recorded.

30. The claimant's evidence was that she explained to Mrs Irving in the call that she had a learning disability. She said that Mrs Irving prefaced the adjustment question by explaining that the interview was to be conducted virtually so there weren't any adjustments to be made (and mentioning Covid), leaving the claimant with the impression that only physical adjustments would be considered. The claimant's evidence was that she said "*unsure*" when asked the question about whether any adjustments were required.

31. On occasion during cross-examination when asked about details of the 17 November call, the claimant explained that the interview was over five years ago, and she did not recall.

32. It was not either party's case that the claimant expressly referred in the telephone conversation to any specific adjustments which she asked to be made.

33. The claimant's evidence was that when applying to other potential employers, disclosing her disability to them had led to a discussion about the adjustments which might be made, with the potential employers proactively offering the claimant adjustments which they believed could be made in the light of her disclosure of her disability. It was her evidence that had occurred both before and after her application to the respondent.

34. The claimant was put forward to second interview. The second interview took place on 24 November 2020. It was conducted by Mrs Boylan and Ms Naughton (both nurses) by Zoom (due to the Covid situation at the time). Ms Naughton took notes within an interview record form which also recorded the questions asked and the score given to the answers provided (198). Mrs Boylan asked the questions.

35. The notes recorded that the claimant referred to her learning difficulty when answering a specific question about her last appraisal, what her objectives were, how she had achieved them, and how she had translated that into the next year's appraisal. The example given by the claimant was about how she had struggled when handing over due to her learning difficulty, and it was not in dispute that she went on to speak about how she had used notes to ensure that she recalled what she was told on hand over. Neither Mrs Boylan nor Ms Naughton asked the claimant anything further about her mention of learning difficulty. When asked why she had not done so, Mrs Boylan said that she did not think it was appropriate to force the candidate to provide personal information or to be required to discuss further any learning difficulty in the interview. She said that she believed that the answer given had reflected that the claimant had an effective coping strategy in a clinical setting with the difficulty to which she had referred and which she was articulating at the time.

36. It was the claimant's case that she referred to learning <u>disability</u> in the interview. In her witness statement, the claimant said she disclosed her specific learning <u>difficulty</u> (she did not say she said disability). It was the evidence of both Ms Naughton and Mrs Boylan that the claimant referred to learning <u>difficulty</u>, not disability. That was what was recorded in the notes. The claimant's verbal evidence was that she used the two phrases (learning disability and learning difficulty) interchangeably.

37. The notes provided the score given to the claimant for each question and a total score. It was the evidence of Ms Naughton and Mrs Boylan that the score was discussed, agreed and recorded, following the interview. Out of four for each question, the claimant was scored one, two, two, three, two and one, giving a total of eleven. Ms Naughton confirmed that no particular question had a greater weight towards appointment than any other. We were not informed of a minimum score for appointment or of any scoring requirements for appointment.

38. At the end of the notes (202), in a section on decision and feedback highlights, there were two reasons recorded. Mrs Boylan wrote that element of the form. The first was "*unable to elaborate on answers without a significant prompting*". The second was "*Limited pre op experience, very little knowledge around role of pre op nurse – questions seemed to be answered around ward nursing not POA*".

39. It was not in dispute that no particular adjustments were made for the claimant for the second interview. She was asked the same six set questions as all candidates (following the introductory discussion). She was not informed what she would be asked in advance.

40. In her witness statement, the claimant said the following about her second interview: "*The atmosphere of the interview was positive*". Notably, the claimant's witness statement did not contain any statement which suggested she had been rushed or not given the time she needed to answer the questions asked during the interview. When asked about this in cross-examination, the claimant's evidence was that she could not recall. It was Mrs Boylan's evidence that the claimant was allowed plenty of time in the interview to consider the question and give her response. It was also Mrs Boylan's evidence that during the interview itself the claimant did not hesitate or pause for any length of time over her answers, she was passionate, articulate, engaging and enthusiastic, and she spoke confidently at first before appearing slightly more nervous later in the interview, but not struggling to answer. Mrs Boylan could not recall precisely when the claimant had appeared more nervous, but she believed it was during the answers to questions, not simply after the introductory questions had been asked.

41. None of the witnesses could recall exactly how long the interview had lasted, although Mrs Boylan's evidence was that it was a normal length. The Zoom invite sent prior to the interview recorded that it had been arranged for half an hour. There were some inconclusive questions and answers about the length of the Zoom meeting, in the light of the licences and the limited time for such calls.

42. The claimant was not successful. Another candidate was interviewed, offered, and (initially) accepted the role. We were not provided with any evidence about the other candidate's scores or the basis upon which she was offered the role, save that we were told that she undertook the same interview with Ms Naughton and Mrs Boylan and was asked the same questions as the claimant. It was thought that she was interviewed after the claimant.

43. The claimant was provided with feedback by Mrs Boylan in a telephone conversation on the afternoon of 25 November 2020. No notes were taken of the call by either attendee.

44. It was the claimant's evidence that she was told that she lacked experience. Her witness statement said that she challenged this feedback as she believed that she met the job specification and had the relevant experience. It was the claimant's evidence in her witness statement that Mrs Boylan's tone became defensive and she said "*I've already made my mind up and I can't change it*". The claimant said that she attempted to explain that she had a learning disability and sought clarification but instead was questioned abruptly about her understanding of the role and the scoring. The claimant said she found the exchange upsetting and felt dismissed and interrogated. In her verbal evidence she referred to feeling humiliated. In a list of key issues from the call, the claimant also said: the feedback was vague; Mrs Boylan's tone was defensive, she refused to elaborate meaningfully on what lack of experience meant; and that Mrs Boylan made reference to the claimant's leave to care for a family member being a negative factor.

45. It was Mrs Boylan's evidence that she explained to the claimant that she lacked the experience required for the pre-operative assessment role. She said that she told the claimant that she had needed prompting to answer a few of the questions, which she believed came from a lack of experience. She told the claimant she was obviously enthusiastic and said she would be happy that she would be suitable for the role over time. She denied speaking to the claimant in an abrupt and patronising manner and said she was polite and professional throughout the call. In her evidence at the Tribunal hearing, Mrs Boylan denied saying what the claimant alleged about having made her mind up (whilst referring to the fact that it was five years ago), she said the claimant interrupted her when she was trying to explain and said that the claimant's time taken to care for her mother was not relevant to the decision. When asked whether the claimant referenced her learning difficulty or disability in the call, Mrs Boylan appeared to choose her words carefully when she said that it was not her belief that it was mentioned in the telephone call.

46. The claimant sought written feedback from the respondent about why she had been unsuccessful. In an exchange of emails as a result, on 27 November 2020, Mrs Boylan said the following to Mrs Irving (204):

> "*I am afraid Fatima was not successful as she could not articulate the role of the POA nurse adequately on questioning and when questioned around people she would liaise with she could talk about the wider hospital MDT but did not seem aware that the consultant and the anaesthetist, who would be lead for the patients care were pivotal in the decision making process.*
>
> *While she has an experience of surgical nursing and the admission process, this very different to the pre assessment process and it was evident throughout her interview that there was a lack of experience within the remit of the POA.*
>
> *Her character and enthusiasm as mentioned previously is something that is a credit to her, and I have no doubt that she will be successful in another role, I don't feel at this time Pre assessment is the correct place for her due to her lack of experience and following time away from the profession to care for her mother*"

47. On 7 December the claimant emailed Mrs Irving asking about things which had been said in the conversation with Mrs Boylan (282). The claimant went on to say, "*Having disclosed my learning disability beforehand I would have hoped for a level of reasonable adjustment, especially considering the scoring*".

48. On 9 December the claimant was provided with feedback in an email from Mrs Irving (210). Within that email Mrs Irving said, "*Regarding your learning disability, is this something you discussed with Andrea at the beginning of the interview as on the telephone interview with me I asked if you needed any reasonable adjustments to be made for your interview and you answered no".* The claimant responded that afternoon and said "*In the telephone interview you stated that the interview would be virtual, therefore there was not any need for reasonable adjustments in terms of attending. You then proceeded to ask me what I needed to which I responded I was unsure"*. Notably, the claimant did not assert in response that she had told Mrs Irving about her disability in the earlier call.

49. On 18 December 2020 the claimant sent an email to the respondent which contained a detailed account of what she said had occurred (213). In that email the claimant said that when speaking to Mrs Irving she had disclosed her learning disability. She said that when she was asked if she required support, she had responded with "*unsure*". The email said that Mrs Irving had proceeded to cross not for now and stated that the claimant could make the interviewers aware if she wished to. It was not clear on what basis the claimant could have described what Mrs Irving had recorded on the form, when the interview had been by telephone. There was no evidence that Mrs Irving recorded not for now on any document.

50. In her email of 18 December, the claimant said of the second interview "*The interview was a pleasant experience and I also shared my specific learning difficulty (SpLD) and how I work*".

51. With regard to the call of 25 November, the claimant also provided an account of what was said in her email of 18 December. The claimant said that she was told at the start of the call that she had interviewed well, had a great personality, and would be an asset to the respondent in the future. She said that

> "*Whilst trying to obtain more of an understanding by what she meant by lack of experience, AB responded "that I interviewed well, I had great personality, I would be an asset to spire or that maybe I should apply in two 2 years' time". I stated that my experience was primarily within surgery and not only do I regularly complete admissions but I also regularly do surgical safety checklists. I would not have applied if my experience was not aligned with the job specification.*
>
> *I was simply trying to understand what she meant by experience and wished for her to elaborate to which she then became defensive"*.

52. In her email, the claimant then quoted Mrs Boylan as having made the same statement as she alleged in her witness statement. The claimant went on to say that she had attempted to explain again that she had a learning disability and was advised to take time when answering questions. She said that Mrs Boylan had in a very abrupt manner, begun to interrogate her. She said that she had been told that

there was only one job to offer, and the claimant had not scored as highly as the other candidate, something which the claimant said she found to conflict with being told that she did not have the relevant experience.

53. We were provided with an email from Ben Curley to Evelyn Lingard of 14 January 2021 which contained a timeline of activity and referred to it as having been discussed with Mrs Irving (230). Of the interview on 17 November the timeline recorded

> "*LI asked the question "Are any special adjustments required to attend an interview?" FF said I don't understand the question. LI explained the interview process and that it would be held via a zoom call due to the COVID Pandemic. LI then repeated the question. FF replied "No""*.

54. In her evidence, Mrs Boylan drew a distinction between ward-based experience and pre-operative assessment experience (she referred to them as being entirely separate domains). It was her evidence, that the claimant did not demonstrate any pre-operative assessment experience. She also gave evidence that the claimant's answer to one of the questions asked had shown her lack of experience because of those to whom the claimant referred. The claimant disputed that her answer demonstrated such a lack of experience. When asked at the Tribunal hearing about her own pre-operative assessment experience, the claimant referred to work she had undertaken when employed by NHS Professionals.

55. In her answers to questions asked in cross-examination, Ms Naughton said that she did not believe that the questions could be given in advance of the interview, because for this type of role it was necessary to test the candidate's knowledge (she referred to patient safety). She said that even if the questions were given an hour before the interview, someone with Google would be able to work out what the answers should be, so you would not be checking that the person had the knowledge required in a healthcare setting. Mrs Boylan said that she would not have provided the questions in advance of the interview, because she wanted to test the knowledge of a candidate and providing questions prior to the interview would enable anybody to provide a textbook answer. She also said that, in her experience, she had never been asked to provide questions prior to a clinical role interview.

56. The claimant was not offered the opportunity to be re-interviewed for the role.

57. This Judgment does not seek to address every point about which we heard. It only includes the points which we considered relevant to the issues which we needed to consider in order to decide if the claims succeeded or failed. If we have not mentioned a particular point, it does not mean that we have overlooked it, but rather we have either not considered it relevant to the issues we needed to determine or we have not considered it necessary to refer to it in these reasons.

The Law

58. Section 26 of the Equality Act 2010 says:

> *"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."*
>
> *"In deciding whether conduct has the purpose or 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."*

59. The EAT in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for her; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, it is normally a healthy discipline for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

60. Conduct which is intended to have the relevant effect will be unlawful even if it does not, in fact, have that effect. A respondent can be liable for effects, even if they were not its purpose.

61. If the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires us to consider the effect of the conduct from the claimant's point of view; the subjective element. We must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element. We must do that taking into account all the other circumstances of the case.

62. Tribunals have been warned that whilst it is important to be sensitive to the hurt that can be caused by comments or conduct, it is important not to encourage a culture of hypersensitivity or the imposition of legal liability for every unfortunate phrase. We must consider whether it was reasonable for the conduct to have the effect on this claimant.

63. The respondent's counsel reminded us of what was said in **Grant v HM Land Registry [2011] IRLR 478** about the facts of that particular case:

> "*Even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute*"

64. We must also decide whether the conduct related to disability. There is not a requirement that the conduct must be motivated by disability. It is always relevant to take into account the context of the conduct which is likely to be an important factor.

65. Section 15 of the Equality Act 2010 provides:

> *(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.*

66. For unfavourable treatment there is no need for a comparison, as there would be for direct discrimination. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it.

67. In **Sheikholeslami v University of Edinburgh [2018] IRLR 1090** the Employment Appeal Tribunal held that:

> *"the approach to s 15 Equality Act 2010 is now well established … In short, this provision 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? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."*

68. **Pnaiser v NHS England [2016] IRLR 170** outlined the correct approach to be taken:

> *"From these authorities, 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. 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 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.

(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. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed."

69. As the respondent's counsel emphasised, what amounts to unfavourable treatment was considered by the Supreme Court in **Williams v Trustees of**

Swansea University Pension and Assurance Scheme [2018] UKSC 65 in which it was that said there was a relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify, but that treatment which is advantageous cannot said to be unfavourable merely because it is thought it could have been more advantageous or because it is insufficiently advantageous.

70. Section 15(1)(b) provides that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim. That requires: identification of the aim; determination of whether it is a legitimate aim; and a decision about whether the treatment was a proportionate means of achieving that aim. The test is an objective one, for which we must make our own assessment.

71. The respondent's counsel highlighted what was said in **Department of Work and Pensions v Boyers UKEAT/0282/19** and the need to balance the real needs of the organisation against the discriminatory effect of the thing being justified.

72. We must take into account the EHRC Code of Practice on Employment. We considered the guidance in relation to unfavourable treatment (5.7) and objective justification (4.25-4.32, 5.11 and 5.12). It is for the respondent to justify the practice, and it is up to the respondent to produce evidence to support its assertion that it is justified. We must ask ourselves whether the aim is legal non-discriminatory and one that represents a real, objective consideration? We must then ask whether the means of achieving the aim is proportionate? Treatment will be proportionate if it is 'an appropriate and necessary' means of achieving a legitimate aim. Necessary does not mean that it is the only possible way of achieving the legitimate aim, it will be sufficient that the same aim could not be achieved by less discriminatory means.

73. The code of practice also says (in paras 5.8 and 5.9) that something that arises in consequence of the disability means that there must be a connection between whatever led to the unfavourable treatment and the disability. The consequences of a disability include anything which is the result, effect or outcome of a disability. Some consequences may not be obvious.

74. Section 20 of the Equality Act 2010 imposes a duty to make reasonable adjustments. Section 20(3) provides that the duty comprises the requirement that where a provision, criterion or practice puts a person with a disability at a substantial disadvantage in relation to a relevant matter in comparison with people who do not have the disability, to take such steps as it is reasonable to have to take to avoid the disadvantage. That requires not only the existence of a disability, but also: identification of a PCP; and knowledge (actual or constructive) on the part of the respondent.

75. In paragraph 20 in part 3 of schedule 8 of the Equality Act 2010, the following is said about knowledge:

> "*(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -*
>
> *(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;*

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first … requirement"

76. Section 21 of the Equality Act 2010 provides that a failure to comply with the requirement set out in section 20 is a failure to comply with a duty to make reasonable adjustments.

77. **Environment Agency v Rowan [2008] IRLR 20** is authority that the matters we must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of a respondent;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant, including:

i. the nature of the claimant's disability;

ii. why this disability placed the claimant at a substantial disadvantage;

iii. what the substantial disadvantage was.

78. As the claimant's counsel emphasised, the requirement can involve treating the person with the disability more favourably than others (she relied upon **Archibald v Fife Council [2004] ICR 954**).

79. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase should be construed widely. A one-off act can be a PCP, but it is not necessarily the case that it is.

80. We are to objectively assess the issue of whether the person with the disability has been put at a substantial disadvantage and there must obviously be some causative nexus between the disability relied upon and the substantial disadvantage. We must consider the overall picture.

81. In assessing the efficacy of any proposed step, it is only necessary to establish that there was a real prospect of the step avoiding or reducing the relevant disadvantage.

82. A duty to consult is not of itself imposed by the duty to make reasonable adjustments, the only question is, objectively, whether the respondent has complied with its obligation to make a reasonable adjustment or not. The duty involves the taking of substantive steps, rather than consulting about what steps might be taken.

83. In terms of knowledge of disability and reasonable adjustments, the duty only applies if the respondent: knew or could reasonably be expected to know that the claimant had the disability; and knew or could reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage compared with persons who are not disabled (that is aware of the disadvantage caused by the application of the PCP). The question of whether the respondent could reasonably be expected to know of the disability and/or the substantial disadvantage is a question of fact for us to decide.

84. The claimant's counsel emphasised that, if the respondent did not know that the claimant was likely to be placed at the substantial disadvantage, then the relevant section did not impose a duty to make reasonable adjustments, relying upon **Secretary of State for Pensions v Alam UKEAT/0242/09**. She also quoted at length from the decision in **AECOM Limited v Mallon [2023] EAT 104**, passages which we took into account (one of those passages summarising the decision in **Ridout v T C Group [1998] IRLR 628**).

85. When considering reasonable adjustments, we took into account the EHRC Code of Practice on Employment and the passage emphasised by the respondent's counsel in her submission document.

86. When considering the discrimination and harassment claims we are required to apply the burden of proof. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> *"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*
>
> *(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".*

87. At the first stage, we must consider whether the claimant has proved facts on a balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed the act of unlawful discrimination. That is sometimes known as the prima facie case. At that stage we do not have to reach a definitive determination that such facts would lead us to the conclusion that there was an act of unlawful discrimination, the question is whether we could do so.

88. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. We must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

89. With regard to memory, the respondent's counsel quoted the following passage from the Judgment of Leggatt J in **Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560**:

> "*While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*
>
> *Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).*
>
> *Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time."*

90. We have restated some of what was said in the respondent's written submission on the law, but not all of it. We considered all that was said but have not found it necessary to reproduce all that was said or to list all of the cases referred to. In her submissions, the claimant's counsel did not disagree with anything said in the respondent's written submission on the law, save to (as we have highlighted) note the omission of **Archibald** from the cases highlighted.

Conclusions – applying the Law to the Facts

91. We did not consider the issues in the same order as they were included in the list of issues. In common with the approach taken by both counsel, we considered the claim for breach of the duty to make reasonable adjustments first, followed by the discrimination arising from disability claim, before determining the harassment claim.

92. In her submissions, the respondent's counsel addressed the length of time since the events occurred and reminded us of what was said in **Gestmin SGPS SA** about memory. We accepted what she said about memory generally. In our decision, as we have explained, we placed particular reliance upon the contemporaneous

records, or near-contemporaneous records, of what was said. However, we did not take the approach contended for by the respondent's counsel in two ways proposed. The respondent's counsel submitted that we should make decisions about the claimant's credibility based upon how she gave evidence during the Tribunal hearing. The claimant's counsel warned us not to do so, highlighting the claimant's disability, short-term memory issues and requirement for time to answer questions (particularly in stressful circumstances). We did not take into account at all, in determining the claimant's credibility, the way in which she gave evidence or answered questions in the Tribunal. The respondent's counsel also asked us to take into account what was said in a previous Judgment and case management order in this case about the claimant's credibility and the impact her disability has upon her. We did not do so. We relied upon the evidence which we heard to determine the issues and what we found occurred.

93. Issue 4 set out the claimant's claim for breach of the duty to make reasonable adjustments. Issue 4.1 asked about the respondent's knowledge (or imputed knowledge) of the claimant's disability. In submissions the parties addressed three separate occasions when knowledge or imputed knowledge was contended to have existed/arisen.

94. The first occasion was in the telephone interview on 17 November 2020 between the claimant and Mrs Irving. There was a direct conflict of evidence between the claimant and Mrs Irving about whether the claimant mentioned her disability during that call. We noted what was said in the only contemporaneous record (195) was that the claimant had been asked about adjustments and had said that none was required. In the timeline email of 14 January 2021 (230), which appeared to record Mrs Irving's recollection shortly after the relevant events, that detailed a slightly lengthier conversation, but not one which involved the claimant telling Mrs Irving about her disability. In her email of 7 December 2020, the claimant made reference to having told the respondent about her disability. However, very importantly in our view, in the email exchange between Mrs Irving and the claimant which followed on 9 December (210), Mrs Irving said that the claimant had not told her about her disability and the claimant responded but did not assert that she had done (as we would have expected her to have done if that was the case). In her lengthy email account of 18 December 2020, the claimant recorded telling Mrs Irving about her disability.

95. As a result of what was said in the contemporaneous or near contemporaneous records, as we have explained, we preferred Mrs Irving's recollection of the telephone call to that of the claimant. We found that that the claimant did not tell Mrs Irving about her disability (in any way) in that telephone call. As we have said, that is supported by the note made at the time of the call and the exchange of emails on 9 December 2020 (210).

96. We then needed to decide whether the respondent had imputed knowledge from what was said. We found that the claimant said that she did not require any reasonable adjustments, following a brief conversation about what adjustments might be. We did not find that the respondent could reasonably have been expected to have known that the claimant had a disability, as a result of what was said.

97. We would observe that it was perhaps unfortunate that we were not provided with any policy operated by the respondent to address or avoid disability discrimination. It was surprising that the respondent did not undertake some form of equal opportunities monitoring or questionnaire in advance of an interview (or, at least, it was not provided to us). It obviously would have been better if the claimant had been given a clearer opportunity to provide a statement of any disability and information about it in advance of any interview. The respondent was certainly not proactive in finding out such information. However, the fact that they were not, did not mean that the respondent had imputed knowledge of disability at the time of the first interview.

98. The second occasion which we needed to consider for issue 4.1 was the second interview on 24 November 2020 undertaken by Zoom with Ms Naughton and Mrs Boylan. There was a dispute about exactly what was said by the claimant when answering the fifth set question. The contemporaneous notes recorded the claimant referring to a learning difficulty. That was consistent with the evidence of Ms Naughton and Mrs Boylan and with what was said by the claimant in her witness statement. The claimant's evidence at this hearing was that she used the phrases learning difficulty and learning disability interchangeably. We found that the claimant used the words learning difficulty, consistent with the note taken at the time (and the evidence).

99. We therefore needed to decide whether the respondent knew that the claimant had the disability from the point in the second interview when the claimant referred to learning difficulty. We did not find that decision altogether straightforward. We accepted Mrs Boylan's evidence that learning difficulty can cover both a learning disability and something which is not a disability. From the claimant's point of view, we accepted that she was describing her disability. She was using language consistent with the report written about her impairment. We found, on balance, that the respondent did know about the claimant's disability at the point the claimant referred to her learning difficulty in the second interview. In any event, we would have found that the respondent could reasonably have been expected to know about it from what the claimant said in the interview.

100. The third occasion about which we heard submissions was the telephone conversation between the claimant and Mrs Boylan on 25 November 2020. The claimant said that she spoke about her learning difficulty or disability in that call. Mrs Boylan's evidence, as we have explained, was that it was not her belief that it was mentioned in the telephone call. We had no contemporaneous record of the call and notably Mrs Boylan made no notes at the time. The record made closest to the time of the events was the claimant's account in her email of 18 December (213) in which she said she did tell Mrs Boylan in that call. We noted that the call was not a straightforward call with clear questions and answers, it was Mrs Boylan's evidence that the claimant interrupted her when she was speaking during the call. On balance and based upon the record made closest to the time, the fact that Mrs Boylan's evidence about this was more equivocal on this than other matters, and the claimant's evidence, we found that the claimant did refer to her learning difficulty or disability in the call. On the same basis as for the second interview, we found that the respondent did know about the claimant's disability in the call on 25 November (and, in any event, could reasonably be expected to have known).

101. Issue 4.2 set out two potential PCPs (a PCP is a provision, criterion or practice) and we were asked to decide whether the respondent had those PCPs. The first PCP relied upon (issue 4.2.1) was asking questions at interview without prior notification of what the questions were. There was no dispute that was a PCP which the respondent had.

102. The second alleged PCP relied upon (issue 4.2.2) was expecting responses to questions posed at interview without affording a period of time for a considered response. That PCP was in dispute. We have already set out the evidence which we heard about the conduct of the second interview. We found Mrs Boylan to be a genuine and credible witness, and we accepted what she said about the conduct of the second interview. There was in practice no evidence that the claimant was rushed to provide answers. She was given time to do so. We did not find that the respondent had the second PCP relied upon (4.2.2).

103. Issue 4.3 was whether the PCP put the claimant at a substantial disadvantage compared to someone without her disability, in that she was unable to process the question asked to enable her to provide a sufficient response in the time expected. We considered that only for the PCP set out at issue 4.2.1, in the light of what we had decided. The respondent's counsel referred to the detail of the reports about the claimant's disability (and the first report in particular) and contended that the claimant was not put at the substantial disadvantage contended. The claimant's counsel also referred to parts of the reports and highlighted what the claimant had said in her submission document for the disability hearing (278). The report writers did not explicitly address a need for questions to be provided in advance of an interview (or exam) although they did explain that the claimant would need extra time for the preparation of tasks or to conduct tasks and give answers within interviews or assessments. In the light of what was said in the reports and the evidence provided by the claimant, we found that the claimant was put at a substantial disadvantage when compared to someone without a disability, by needing to answer questions in an interview without any advance notice of what those questions would be.

104. Issue 4.4 was, like issue 4.1, about knowledge. However, what we needed to determine for issue 4.4 was whether the respondent knew, or could reasonably be expected to know, that the claimant was likely to be placed at the disadvantage relied upon and found. From what the claimant said to Ms Naughton and Mrs Boylan in the second interview on 24 November, we did not find that the respondent knew that the claimant was likely to be placed at that disadvantage. We also did not find that the respondent could reasonably have been expected to know, based upon what the claimant said in the context in which she said it. The claimant referred to her disability in the process of providing an answer to a question and giving an example of addressing something which she had found challenging. The answer given did not mean that the respondent knew that she was at a disadvantage by not being given questions in advance of the interview. In the context of the answer given, the respondent could also not be reasonably expected to have known. We noted that Mrs Boylan relied in part on the first interview and what had been recorded on the note about adjustments required. She was able to do so. When asked about this and a hypothetical revelation of dyslexia in an interview, Mrs Boylan provided an answer which identified a nuanced understanding of the difference between a candidate addressing something in the interview which resulted in a disadvantage in the interview, and providing an answer to a question which addressed the question

being asked (but included a reference to a disability). The respondent was not expected to know that the claimant was likely to be placed at the disadvantage, as a result of what was said.

105. In the light of the decisions that we reached on PCP 4.2.2 and the knowledge of disadvantage for issue 4.4, the claimant's claim for breach of the duty to make reasonable adjustments could not succeed. We did however consider issue 4.5 in any event, even though we did not need to do so.

106. The fact that the respondent only became aware of the claimant's disability during the claimant answering the fifth set question of six in the second interview, meant that it would have already been too late for the reasonable adjustment sought to have been made. That reasonable adjustment would have required knowledge in advance of the second interview. When we highlighted that to the claimant's counsel, she referred to the potential adjustment of restarting the interview with different questions (which could also be asked of the other candidate). However, that was not the reasonable adjustment contended for or set out in the list of issues which had been identified as the issues we needed to determine. It was also not something put to the respondent's witnesses.

107. In terms of the interview and what it was seeking to achieve, we accepted the respondent's evidence that the questions asked were intended to establish the candidate's understanding and knowledge of the type of role for which she was applying. We noted that there was some reliance placed upon patient safety in the need to assess an applicant's experience. We accepted that undertaking an interview with standard questions is a normal approach undertaken by many employers to determine whether candidates have the experience required and the ability to do a job, and to determine who the best candidate is. In the circumstances of this case, we would not have found that giving the claimant the questions to be asked in advance of the interview, would have been a reasonable adjustment which the respondent was legally required to make. We made that decision in part based upon the evidence of the respondent's witnesses about the need to assess the candidate's experience and knowledge of the work required for the role, and the respondent's witnesses evidence that giving the questions in advance would have undermined their ability to assess that knowledge/experience as a candidate's answer could then have simply reflected their ability to undertake an internet search of what was required.

108. We would add one other thing in relation to the arguments which we heard about issue 4.5. In her submissions, the respondent's counsel referred to the lack of a level playing field if questions were provided in advance. The claimant's counsel emphasised that the duty to make reasonable adjustments can require an adjustment which places the person with the disability at an advantage. We agreed with the claimant's counsel's submission, and we would not have found what was sought to have not been reasonable, based upon the fact that it gave the claimant a potential advantage over other candidates. As the claimant herself emphasised, it is about offsetting a disadvantage which she otherwise suffers as a result of her disability.

109. We did not ultimately need to decide issue 4.11, which was the chance that the claimant would not have been appointed in any event (if she had succeeded in

her claim). There must have been some chance that she would not have been appointed because the respondent's interviewers decided that she did not have the experience to fulfil the role. The claimant did not demonstrate that she did. Her CV notably lacked any recorded pre-assessment role experience (as distinct from pre-operative experience). It was her evidence that she had some experience whilst working for NHS Professionals. The claimant had only limited post qualification experience as a nurse. We cannot in practice determine what the chances of not being appointed would have been in the light of our other findings, but we would have significantly reduced any award to reflect a high percentage chance that she would not have been appointed in any event, had we needed to do so.

110. Issue three in the list of issues set out the issues to be determined in the claimant's claim for discrimination arising from disability. The first issue for that claim (issue 3.1) was whether the respondent knew, or could reasonably have been expected to know, that the claimant had the disability (and from what date)? That reflected issue 4.1 and our findings on issue 4.1 also applied to issue 3.1.

111. Issue 3.2 set out what it was that the claimant said was the unfavourable treatment by the respondent. That was that, at the interview on 24 November, the claimant was required to answer questions about which she had no prior notice and for which she was not given additional time to answer. That issue raises some considerations which we have already addressed when determining issue 4.2. We found that the claimant was given the time needed to answer questions in the second interview and was not hurried or rushed. However, it was not in dispute, that the claimant was required to answer questions about which she had no prior notice.

112. Issue 3.2.1 contained within it two different things which could be said to be unfavourable treatment. The broader paragraph and what was said at the start, referred to the requirement to answer questions without prior notice. We did not find that in and of itself was unfavourable treatment. It was the respondent's standard approach to all interviews. In her submissions, the respondent's counsel emphasised the case of **Williams**. What the claimant was seeking was more favourable treatment and we would not have found that to be unfavourable. However, the last sentence of 3.2.1 addressed the fact that the claimant was not assessed as being suitable for the job. That clearly and obviously was unfavourable treatment. Not being assessed as able to do a job for which a candidate had applied, must be unfavourable. In that way, we found that the claimant was treated unfavourably.

113. Issue 3.3 asked whether the following arose in consequence of the claimant's disability: a need for time to process information before being required to provide answers. Based upon the reports provided, we found that the thing relied upon arose in consequence of the claimant's disability.

114. Issue 3.4 asked the first question which applies when applying the burden of proof to the discrimination arising from disability claim, namely whether the claimant had proven facts from which we could conclude that the unfavourable treatment was because of the thing arising in consequence of the disability? In answering that question, we focussed in particular upon the reasons recorded at the time for the claimant not being successful. Those were recorded at the end of the form (202) as written by Mrs Boylan. The first reason given by the respondent was that the claimant was unable to elaborate on answers without significant prompting. Applying

the burden of proof, we found that the first reason for the decision made showed the prima facie case required to show that the unfavourable treatment (assessing the claimant as not being able to do the job) was because of the claimant's need for time to process information before being required to provide answers.

115. Issue 3.5 asked the question which applies as the second part of the application of the burden of proof (where the prima facie case has been demonstrated), namely whether the respondent could show that there had been no unfavourable treatment because of something arising in consequence of disability? For that decision, we focussed upon the respondent's witnesses' evidence about why they made the decision and the two reasons given at the end of the form (202). The second reason was that the claimant had (in view of the respondent's interviewers) limited preoperative experience, very little knowledge around the role of a preoperative nurse, and (they said) the questions seemed to be answered around ward nursing and not preoperative assessment. It was Mrs Boylan's evidence that the two reasons on the form needed to be read together. The claimant's stated inability to elaborate on answers without prompting was because she could not give preoperative assessment-based answers rather than because of an innate inability to answer. We noted that the claimant herself described the second interview as a pleasant experience, both close to the time in her email of 18 December (213) and in her evidence to us. We accepted the evidence of Mrs Boylan and Ms Naughton about their view of the claimant's experience. That was set out in clear terms at the time in Mrs Boylan's email of 27 November (204). It was also consistent with Mrs Boylan's view that the claimant could be successful in another role as stated in the same email sent at around the time of the interview. On that basis, we found that the respondent had shown that the decision made was in no sense whatsoever because of the something arising in consequence of the claimant's disability. The respondent's view was that the claimant did not have the experience required and that was not because of any inability to answer questions in the interview.

116. As a result of our decision on issue 3.5, we did not need to go on and consider the other issues for the discrimination arising from disability claim. However, we did consider issues 3.6 and 3.7 in any event, which asked whether the treatment was a proportionate means of achieving a legitimate aim? The aims relied upon by the respondent had been set out at paragraph 25 of its amended grounds of response (65).

117. The aim relied upon was to provide a fair, consistent and non-discriminatory assessment process for all applicants. We found that to be a legitimate aim. Whilst the claimant contended that it was not a legitimate aim, we could see no basis for finding that it was not.

118. The key question for justification was whether the approach was a proportionate means of achieving a legitimate aim. The respondent in its pleading said that the interview process was a proportionate means of achieving the stated aim and placed some reliance upon the question asked of candidates about reasonable adjustments in the first interview. In part, we have already addressed similar issues when determining the reasonable adjustments claim. We found that the approach was proportionate in circumstances where the claimant did not inform the respondent of her disability until the fifth question of six in the second interview and did so in the way we have explained. More broadly, for the reasons we have

already given, we found that an interview process undertaken without providing questions in advance was a proportionate means of achieving the aim relied upon.

119. The final complaint which we considered was the harassment related to disability complaint (issue two). That was alleged to have arisen from what Mrs Boylan said to the claimant in the telephone call of 25 November 2020, when providing feedback on the second interview.

120. Issue 2.2 asked whether that was unwanted conduct? The respondent's counsel accepted that if Mrs Boylan was abrupt and patronising that would be unwanted (whilst denying that she was). More generally, the claimant herself sought feedback and therefore being given the reason why she was unsuccessful was not of itself unwanted. It was notable from the account of the call recorded by the claimant in her email of 18 December (220) that the claimant recorded that she was told at the start of the call that she had interviewed well, had a great personality, and would be an asset to the respondent in the future. The call became more contentious at the point when the claimant was told that she was believed to not have the experience required for the job, which the claimant disputed and contested.

121. In broad terms, someone being told why they were unsuccessful in an interview will always be unwanted, where that candidate disagrees. For this call, we did not find that Mrs Boylan was abrupt. We accepted her evidence that she was not abrupt and that she remained professional throughout the call. We did accept that the call became more contentious when there was a disagreement about experience. We have not made a finding on the allegation that Mrs Boylan was patronising as being patronising is something which is difficult to determine or define.

122. Issue 2.3 asked whether this related to disability? We did not find that Mrs Boylan's manner or approach to the call was related to disability. The feedback she provided arose from the interview and were the reasons why the claimant had not been successful. Whilst the claimant may disagree with those reasons, that was not related to disability. Even if Mrs Boylan's manner became stronger in the course of the feedback call, we found that would have been because the claimant was disagreeing with the reasons given and contesting what was said about experience. That was not related to disability. Even if part of the conversation was about taking time to answer questions, we did not find that Mrs Boylan's manner was related to disability. It was related to the contentious part of the call.

123. Issue 2.4 asked whether the conduct had the required purpose? That was not in fact a case pursued by the claimant (or her representative) at the hearing. The claimant's representative acknowledged that was not put to Mrs Irving.

124. Issue 2.5 asked whether the conduct had the required effect and, if it did, whether it was reasonable for the conduct to have the required effect?

125. It was the claimant's evidence that she felt humiliated by what was said to her in the call on 25 November. We accepted her evidence that was how she felt. That was clear from what she wrote shortly afterwards on 18 December. We accepted that the call in general, and what was said, did have the required effect.

126. The second part of issue 2.5 was whether it was reasonable for it to have had the requisite effect, that is of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. In the section on the law we have highlighted that it is important that we do not encourage a culture of hypersensitivity or impose legal liability for what has been described as every unfortunate phrase. The fact that the claimant felt that Mrs Boylan was dismissive of her challenges to the reasons, did not amount to what was legally required. We considered it important that organisations feel able to provide genuine feedback on unsuccessful interviews, without needing to be unduly concerned that adverse feedback (such as about a candidate's perceived experience) may amount to harassment. We have already recorded that we accepted Mrs Boylan's evidence that she was not abrupt in the call and that she remained professional throughout. We also noted what the claimant herself said about the call in her witness statement. We did not find that what occurred was conduct for which it was reasonable for it have the effect required (that is of violating dignity or creating a humiliating etc. environment for the claimant).

Summary

127. For the reasons explained above, we have not found for the claimant in respect of any of her complaints.

Employment Judge Phil Allen

1 September 2025

JUDGMENT AND REASONS
SENT TO THE PARTIES ON
15 October 2025

FOR THE TRIBUNAL OFFICE