RESERVED JUDGMENT AND REASONS **Case No.2400241/2024**

EMPLOYMENT TRIBUNALS

Claimant: Ms K Sylvester

Respondent: Stuart Phillpson (1)
Martin Banks (2)
The University of Manchester (3)

Heard at: Manchester **On:** 20th, 21st, 22nd, 23rd and 24th October 2025 and in chambers on 28th October 2025

Before: Employment Judge Thompson
Ms Claire Metcalfe
Mr Stephen Carter

REPRESENTATION:

Claimant: In person
Respondent: Miss Kirsten Barry, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of discrimination arising from disability pursuant to section 15 of the Equality Act 2010 is well founded and succeeds.

2. The complaint of indirect disability discrimination pursuant to section 19 of the Equality Act 2010 is well founded and succeeds.

3. Each complaint of victimisation pursuant to section 27 of the Equality Act 2010 fails and is dismissed.

4. Each complaint of harassment pursuant to section 26 of the Equality Act 2010 fails and is dismissed.

REASONS

Introduction

1. By a claim form presented on 17th January 2024 the Claimant complained of disability discrimination during her employment by the Third Respondent (hereinafter referred to as "the University") in its E-Learning Service. The Claimant has been employed by the University since December 2018 and remains employed by the University as a Learning Technologist.

2. There is no dispute that the Claimant has the condition of dyspraxia and that she was a disabled person by reason of the impairment of dyspraxia at all relevant times.

3. It is not in issue that on 16th February 2023 the Claimant unintentionally used the incorrect pronoun for a transgender colleague who shall hereinafter be referred to as CD. Her case is that following this incident, she was subject to harassment pursuant to section 26 of the Equality Act 2010, unfavourable treatment because of something arising in consequence of her disability pursuant to section 15 of the Equality Act 2010, indirect disability discrimination pursuant to section 19 of the Equality Act 2010 and victimisation pursuant to section 27 of the Equality Act 2010.

4. All of the claims are denied by the Respondents. The Respondents further contend that the Tribunal has no jurisdiction to determine some of the complaints which are prima facie out of time. Further, they say it would not be just and equitable for the Tribunal to extend time.

The Issues

5. The list of issues has been set out in an annex to Employment Judge Ross's Case Management Order on 5th June 2024 [**66 – 71**]. The Claimant has annotated this to include dates and to clarify which claims are pursued against which Respondent [**94 – 100**]. The list of issues is repeated here:

1. **Harassment related to disability (Equality Act 2010 section 26)**

   1.1. Did the Respondents do the following alleged things:

      1.1.1. The Claimant's accidental slips of the tongue on 16 Feb 2023, regarding the pronouns of CD were cited in the formal investigation report on 30 Mar 2023, by R1 and R2, as only being a "contributory factor" rather than a mitigating circumstance.

      1.1.2. R1 wrote the Claimant an email on 28 April 2023, stepping the Claimant down from her role as co-lead of the XR pilot study.

      1.1.3. R1 in the same email of 28 April 2023 requested the Claimant to pass on already known information about her disability to her line manager.

1.1.4. R1 made a humiliating offer to refer the Claimant to the university's Disability Advisory Service, which he knew the Claimant was already engaged with.

1.1.5. R1 removed the Claimant from the XR service area on 28 June 2023.

1.1.6. On 19 July 2023, the Claimant applied for the position of Assistant e-Learning Manager. Despite being more qualified and experienced than the person who got the interim position, the Claimant was unsuccessful. The panel was made up of Emma Rose (Head of TLSE, to whom R1 had earlier complained about the Claimant's teaching activities around 17 July), the Claimant's line manager and R1.

1.1.7. At a meeting on 17 August 2023 called by R1 where R1, R2 and the Claimant's line manager were also present, the Claimant was questioned about her "teaching activities" (the Claimant does not teach, she supports students during the semester, especially with the more practical and/or creative based XR dissertations). R1 wanted to establish if the Claimant's work had led to her accidental slip of the tongue.

1.1.8. The appeal hearing on 06 September 2023 R1 and R2 said they did not know about the Claimant's dyspraxia until "later", namely post their investigation report. This was not true as the investigation report references dyspraxia. The respondents continued to present this false information in a meeting with the Claimant's line manager and others on 03 Oct 2023.

1.1.9. The respondents labelled the Claimant's slip of the tongue as harassment in their appeal outcome, 19 September 2023.

1.1.10. After the Claimant's sick leave ended on 04 April 2024 the respondents did not permit the Claimant to return to work until 09 September 2024, and then temporarily into an alternative team.

1.2. If so, was that unwanted conduct?

1.3. Was it related to disability?

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

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

2. **Discrimination arising from disability (Equality Act 2010 section 15)**

The Claimant has the impairment of dyspraxia. The respondents accept the Claimant was a disabled person within the meaning of section 6 Equality Act 2010.

2.1. Did the respondents know, or could they reasonably have been expected to know, that the Claimant had the disability of dyspraxia? From what date?

2.2. If so, did the respondents treat the Claimant unfavourably in any of the following alleged respects:

2.2.1. The respondents placed the Claimant into the formal process under the respondent's Dignity at Work and Study procedure, from 16 February 2023 following a complaint by employee CD.

2.2.2. There was a finding under the respondents' formal Dignity at Work and Study procedure, in the final investigation report received 30 March 2023, that the Claimant had unlawfully harassed the complainant

2.2.3. There was a finding under the respondents' formal Dignity at Work and Study procedure at the Appeal Stage, in the Appeal Outcome on 19 September 2023, that the Claimant harassed the complainant.

2.3. Did the following things arise in consequence of the Claimant's disability:

2.3.1. The Claimant's short-term memory issues causing a slip of the tongue when using recently changed gendered pronouns.

2.4. Has the Claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

2.5. Did the respondents place the Claimant in the formal Dignity at Work and Study procedure because of her slip of the tongue in pronouncing CD's recently changed gendered pronouns, and did that arise in consequence of her disability?

2.6. Did the respondents find the Claimant had unlawfully harassed the complainant under the respondent's policy because of her slip of the tongue, mispronouncing CD's recently changed gendered pronouns, and did that arise because of the Claimant's disability?

2.7. If so, can the respondents show that there was no unfavourable treatment because of something arising in consequence of disability?

2.8. If not, was the treatment a proportionate means of achieving a legitimate aim? The respondents say that its aims were:

2.8.1. Being able to apply its Dignity at Work and Study Policy (and accompany procedures) in response to a complaint raised by a member of staff.

2.8.2. Applying the definitions included in its Dignity at Work and Study Policy and ultimately seeking to ensure that members of staff and students are, and feel, able to work and study in an environment free from harassment.

2.9. The Tribunal will decide in particular:

2.9.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.9.2. could something less discriminatory have been done instead;

2.9.3. how should the needs of the Claimant and the respondent be balanced?

3. **Indirect disability discrimination (Equality Act 2010 section 19)**

3.1. A "PCP" is a provision, criterion or practice. Did the respondents have the following PCP?

3.1.1. An internal guidance document on supporting trans staff and students which states, "Intentionally or persistently using the incorrect pronoun or trans person's previous name constitutes harassment.

3.2. Did the respondents apply that PCP to the Claimant?

3.3. Did the respondents apply the PCP to persons with whom the Claimant does not share the characteristic of disability, or would it have done so?

3.4. Did the PCP put disabled people at a particular disadvantage when compared with people who are not disabled in that disabled people with short-term memory loss are more likely to unintentionally mispronounce recently changed gendered pronouns.

3.5. Did the PCP put the Claimant at that disadvantage?

3.6. Was the PCP a proportionate means of achieving a legitimate aim? The respondents say that their aims were:

3.6.1. seeking to ensure that the Third Respondent's staff and students are, and feel, able to work and study in an environment free from harassment

3.7. The Tribunal will decide in particular:

3.7.1. was the PCP an appropriate and reasonably necessary way to achieve those aims;

3.7.2. could something less discriminatory have been done instead;

3.7.3. how should the needs of the Claimant and the respondent be balanced?

4. **Victimisation (Equality Act 2010 section 27)**

4.1. Did the Claimant do a protected act as follows:

4.1.1. The Claimant alleged race discrimination to the first respondent on 03 February 2023 verbally in a one-to-one “walk and talk” meeting. The Claimant complained that positions had been irregularly filled by previously casually employed individuals without an interview process, disadvantaging other potential candidates from within the university, including BAME students who had no chance to apply because the job had not been advertised. This was detailed and reported to EDI and the BAME network group on 06 October 2023.

4.2. Did the respondents do the following things:

4.2.1. Use the Claimant's slip of the tongue (for which she apologised) of using the incorrect pronoun for another employee (CD) to progress a formal complaint against the Claimant under the respondents’ Dignity at Work and Study procedure instead of using the informal process and/or training and/or mediation.

4.2.2. Made a disproportionate recommendation to move the Claimant.

4.2.3. Caused or permitted a finding that the Claimant had unlawfully harassed AM.

4.2.4. R1 took the lead in investigating the issue of the mispronunciation of pronouns together with R2 (with whom the Claimant had also raised the irregularity of the job cascade event, her protected act) despite his lack of independence.

4.2.5. Received the final report on 30th March, before a scheduled discussion on 03 April 2023 rather than after it.

4.2.6. Delayed in dealing with the Claimant’s appeal. The Claimant appealed on 11 May 2023 and had to wait 118 days (83 working days) before the appeal was heard on 06 September 2023.

4.2.7. Made a finding at the initial stage that the Claimant had unlawfully harassed the complainant and at the appeal stage that the Claimant had harassed the complainant, 19 September 2023.

4.2.8. Did not permit the Claimant to return to work when her sick leave ended on 04 April 2024, until 09 September 2024, and was then temporarily assigned to an alternative team.

4.3. By doing so, did it subject the Claimant to detriment?

4.4. If so, has the Claimant proven facts from which the Tribunal could conclude that it was because the Claimant did a protected act or because the respondents believed the Claimant had done, or might do, a protected act?

4.5. If so, have the respondents shown that there was no contravention of section 27?

5. **Time limits**

5.1. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

5.1.1. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

5.1.2. If not, was there conduct extending over a period?

5.1.3. If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

5.1.4. If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

5.1.4.1. Why were the complaints not made to the Tribunal in time?

5.1.4.2. In any event, is it just and equitable in all the circumstances to extend time?

6. **Remedy for discrimination or victimisation**

6.1. Should the Tribunal make a recommendation that the respondents take steps to reduce any adverse effect on the Claimant? What should it recommend?

6.2. What financial losses has the discrimination caused the Claimant?

6.3. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

6.4. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.5. Should interest be awarded? How much?

Evidence and Witnesses

7. The Tribunal had a bundle of documents in two lever arch files running to 1119 pages. Some documents were added to the bundle during the hearing. Any references to page numbers in these Reasons is a reference to pages from that bundle unless otherwise indicated.

8. The Tribunal heard from 4 witnesses, each of whom confirmed the truth of their written statement before answering questions orally.

9. The Claimant was the only witness on her side.

10. The Respondents called three witnesses. **Mr Stuart Phillipson** is the First Respondent. He is currently the E-Learning Manager at the University's Faculty of Humanities. At the time of the events that we are concerned with, he was an Assistant E-Learning Manager at the University's Faculty of Humanities. **Mr Martin Banks** is the Second Respondent. He is currently the Lead People Partner at the University's Faculty of Humanities. At the time of the events that we are concerned with, he was a People Partner at the University's Faculty of Humanities. **Mr Paul Rowbotham** is the Head of Teaching, Learning and Student Experience in the School of Social Sciences.

11. We heard evidence over the course of the first 4 days. On the 5th day, we received written submissions from the Respondents' Counsel, Miss Barry. We also heard oral submissions from Miss Barry. The Claimant had partially prepared written submissions for the 5th day but was unable to deliver any oral submissions as she had only slept for 2 hours. We allowed her time to finish preparing her written submissions until the following week, so that we would have them in time to deliberate in chambers on 28th October 2025. We also gave the opportunity to the Respondents to provide any further written reply after they had an opportunity to consider the Claimant's written closing submissions. We therefore had and considered the Claimant's written submissions and the Respondent's reply to those submissions. We also had further written submission limited to section 109 and 110 from the Respondents before we deliberated in chambers on 28th October 2025.

Relevant Legal Principles

Liability of Employers and Employees

12. Sections 109 and 110 of the Equality Act 2010 provide a framework for when liability can be attributed to individuals/others:

"**109 Liability of employers and principals**

(1) Anything done by a person (A) in the course of (A's) employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal with the authority of the principal must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by (A) in the course of A' employment it is a defence for B to show that B took all reasonable steps to prevent A -

(a) from doing that thing, or

(b) from doing anything of that description.

> **110. Liability of employees and agents**
> **(1) a person (A) contravenes this section if –**
> **(a) A is an employee or agent;**
> **(b) A does something which, by virtue of Section 109(1) or (2)**
> **is treated as having been done by A's employer or principal (as the case may be) and**
> **(c) The doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be);**
> **(2) It does not matter whether, in any proceedings the employer is found not to have contravened this Act by virtue of section 109(4).**
> **(3) A does not contravene this section if –**
> **(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act and**
> **(b) It is reasonable for A to do so;"**

13. In the case of **Baldwin v Cleves School and Others [2024] EAT 66** it was held that if an employee or agent has been found to have acted in such a way that amounts to a breach of the Equality Act 2010, the Tribunal must also find those individuals liable, regardless of whether the employer is found liable. It has no discretion not to find a contravention in these circumstances. However, that is unless the individuals have been led to believe by their employer that they have done nothing wrong (s110(3)).

Burden of Proof

14. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material 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 subsection (2) does not apply if A shows that A did not contravene the provision."**

The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

15. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

16. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden or proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

17. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable…**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –**
>
> **(a) when P does an act inconsistent with doing it, or**
>
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."**

18. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96** which deals with circumstances in which there will be an act extending over a period.

19. A complaint which is otherwise out of time may benefit from a just and equitable extension under section 123(1)(b). The case law includes **British Coal Corporation v Keeble [1997] IRLR 336**, in which the EAT confirmed that in

considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. In **Department of Constitutional Affairs v Jones [2008] IRLR 128** the Court of Appeal emphasised that the guidelines expressed in **Keeble** are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case.

Harassment

20. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (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.**

21. A Claimant must show that he or she was subjected to conduct that was "unwanted" i.e. unwelcome or uninvited. The unwanted conduct must be related to disability. The causative test is much wider than the concept of "because of" and the ET must make clear findings of the impugned conduct and how it relates to the protected characteristic: see **Windsor Clive Primary School v Forsbrook [2024] EAT 123.**The conduct must also have had the purpose or effect of either "violating the Claimant's dignity" or creating an "intimidating, hostile, degrading, humiliating or offensive environment" for the Claimant.

22. In determining whether conduct had the requisite harassing effect, within the meaning of s26(1), the Tribunal must take into account the employee's perception; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect. Accordingly, whilst the Claimant's subjective perception is a key factor, it is counterbalanced by the requirement for an objective aspect to the legal test.

Discrimination arising from disability

23. Section 15 of the Act reads as follows:-

> **"(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."

24. The Supreme Court confirmed in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2018] UKSC 65**, that section 15 was intended in broad terms to reverse the ruling in **London Borough of Lewisham v Malcolm [2008] UKHL 43.** There is no need for a comparator for a claim brought under s.15 EqA.

25. A s.15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

26. "Unfavourably" is not defined in the EQA. The Code at paragraph 5.7 states that it means that the disabled person "must have been put at a disadvantage". The Code notes that: "Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably". The Code gives examples of unfavourable treatment. It is clear from the examples in the Code that the unfavourable treatment may be in consequence of a policy applying to everyone; it does not need to have been targeted at the disabled person. Lord Carnwath said in **Williams**:

"**27….. in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which [Counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section….."**

28. On the other hand, I do not think that the passages in the Code do anything to overcome the central objection to Mr Williams' case as now formulated, which can be shortly stated. It is necessary first to identify the relevant "treatment" to which the section is to be applied. In this case it was the award of a pension. There was nothing intrinsically "unfavourable" or disadvantageous about that. By contrast in *Malcolm*, as Bean LJ pointed out (para 42), there was no doubt as to the nature of the disadvantage suffered by the claimant. No one would dispute that eviction is "unfavourable". [Counsel's] formulation, to my mind, depends on an artificial separation between the method of calculation and the award to which it gave rise. The only basis on which Mr Williams was entitled to any award at that time was by reason of his disabilities. ….. had he been able to work full time, the consequence would have been, not an enhanced entitlement, but no immediate right to a pension at all. It is unnecessary to say whether or not the award of the pension of that amount and in those circumstances was "immensely favourable"

(in Langstaff J's words). It is enough that it was not in any sense "unfavourable", nor (applying the approach of the Code) could it reasonably have been so regarded."

27. Langstaff P explained the two-step test required for a s.15 claim in **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305**. He said it did not matter in which order the tribunal approaches these two steps:

"It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability."

28. In **Pnaiser v NHS England and anor [2016] IRLR 170 EAT**, Mrs Justice Simler considered **Weerasinghe** and other authorities and summarised the proper approach to determining s.15 claims as follows in paragraph 31:

"(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 section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport [1999] IRLR 572*. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(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 section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton UKEAT/0149/14* a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) 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 section 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 section 13 and a discrimination arising from disability claim under section 15.

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

29. The respondent will successfully defend the claim if it can prove that the unfavourable treatment is a proportionate means of achieving a legitimate aim. This is the same test as for indirect discrimination. There relevant principles are summarised in paragraphs 55-59 of **Powell v University of Portsmouth [2024] EAT 56.**

30. Proportionality will involve an objective balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant: a test established in the context of indirect discrimination in **Hampson v Department of Education and Science [1989] ICR 179 CA**.

31. Factors to be considered in the balancing exercise may include:

- Whether a lesser measure could have achieved the employer's legitimate aim e.g. **Ali v Torrosian and others (t/a Bedford Hill Family Practice) EAT 0029/18.**The Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective – para 4.31.
- A failure to comply with the duty to make reasonable adjustments. The Code, para 5.21 states – "**If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified**."

32. The Code also contains some provisions about justification. Paragraph 4.27 considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages:-

- is the aim legal and non discriminatory, and one that represents a real, objective consideration?

- if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

33. As to that second question, the Code goes on to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. Factors to

be considered in the balancing exercise may include whether a lesser measure could have achieved the employer's legitimate aim.

34. Paragraph 4.31 notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

Indirect Discrimination

35. The test for indirect discrimination appears in Section 19(1) of the Equality Act which states as follows:

> **"(1) A person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —**
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> **(c) it puts, or would put, B at that disadvantage, and**
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim."**

Victimisation

36. To constitute a protected act, the "act" relied on must be for the purposes of or in connection with the Equality Act 2010: as such, the employee must do something under, for the purposes of or in connection with the Act or make any allegation, express or implied that someone has contravened the Act Section 27(1).

37. The employer must subject the employee to the alleged detriment *"*because*"* of the protected act. In other words, the protected act must be a real or effective cause of the detriment: **Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 HL**.

38. S39(2) defines prohibited conduct that may be relied upon by employees in bringing a claim to the ET and it includes "(d) by subjecting B to any other detriment". The effect of s212(1) which provides that "detriment" does not include conduct that amounts to harassment is that if the Respondent's conduct in relation to the finding of unlawful harassment at appeal amounts to harassment it cannot also amount to s15 discrimination and s27 victimisation. An act of harassment cannot also be a detriment (unless in relation to s13) and unfavourable treatment is a detriment.

Findings of Fact

39. This section of our Reasons sets out the broad chronology of events in the period with which this case is concerned. Any disputes of primary fact which are of significance will be addressed in the discussion and conclusions section.

The Claimant's workplace

40. The Claimant came to the University as a mature student in 2011 and graduated in 2013 with an MA in Educational Technology and TESOL. She commenced her employment with the University in December 2018. She was initially employed as an E-learning Support Officer at Grade 5 on a fixed term contract.

41. By 2020 the Claimant had been promoted to a permanent role as a learning technologist at Grade 6 in the Faculty of Humanities. She worked in a team managed by Linda Irish. Her responsibilities included supporting academics in the School of Education, Environment and Development (SEED).

42. The Claimant's particular interest in the E-Tech arena was in XR (Extended Realities). She had undertaken a professional diploma part time in Games Design and Media from 2014 and 2017 with this specialism in mind. She was integral in the creation of the XR Pilot study in the XR Service Area in Humanities and became the Service Area deputy lead in XR in 2021. In February 2023 she was appointed as the Service Area Co-Lead for XR.

43. The Claimant says this in her December 2022 PDR about the XR Project [**150**]: "**The XR pilot study is exactly the type of work that I left a well-paid job in Germany to come to the UK to do my Master's in EdTech, before going on to Game School, and I feel that my extensive skill set, knowledge and experience (and the money I spent doing these) are finally being put to their best use!"**

44. It is also clear from that same document [**152**] that her long-term ambition in 2024/2025 was to undertake a PhD in XR. The First Respondent commented in the Claimant's December 2022 review on her involvement in the XR Project and wrote : "**It has been great working with you more of later btw. I know you are massively overworked but this really is a moon-shot kind of project**" [**149**]. He told her on 12th December 2022 that "**VR is a priority for the University**." [**142**].

45. The First Respondent was not the Claimant's direct line manager, though he had temporarily been her direct line manager for a period of time some years earlier. Nevertheless, the Claimant and the First Respondent regularly

interacted on most days, and the First Respondent had some degree of management responsibility over the Claimant because of the "matrix" structure.

46. The First Respondent was directly responsible for a number of teams, including a team consisting of three ELSAs (e-learning support assistants) who were CD, HV, and AMC ("the ELSAs"). The Claimant interacted with the ELSAs primarily in the context of the XR Project. She estimates that she would spend about 10% of her working time with the ELSAs.

47. The Claimant's relationship with the First Respondent was very good until around January 2023, when the relationship broke down after a series of events that we will set out below.

Knowledge of the Claimant's dyspraxia

48. It is not in dispute that the Claimant is dyspraxic, which is a neurodivergent condition. Dyspraxia is usually associated with problems with physical coordination but has much broader and complex characteristics. It is a condition that affects the way that the brain processes and transmits information and it is a lifelong condition [**930**].

49. The Claimant received a diagnosis of dyspraxia when she was aged 42 in November 2011, at a point when she was a student at the University [**898 – 905**]. The November 2011 report does not explicitly highlight that the Claimant had any short-term memory issues. There is reference to her not being able to "**access the right word**" [**899**].

50. In January 2019 (by which point the Claimant was employed by the University), she gave consent to DASS (Disability Advisory and Support Service) to disclose information about her disability to anyone as appropriate. The University's Access to Work department provided the Claimant with equipment, namely noise cancelling headphones. The Claimant brought up her dyspraxia in a PDR with her line manager Linda Irish in July 2021 [**122**]. This was in relation to her work environment, namely in respect of noise and temperature. The First Respondent knew the Claimant had dyspraxia from at least June 2022.

51. The Claimant did not raise any issues in connection with her dyspraxia with her employer (save as set out above) prior to the events which we concerned with. The Claimant says that she saw her dyspraxia as a superpower that made her more creative and better at managing her time than her colleagues and that it did not negatively impact her work.

The Health and Safety Issue

52. On 18th January 2023 there was an incident which the Claimant describes as a health and safety issue. One of the ELSAs, CD, was sneezing and blowing his nose in work and the Claimant suggested that it may be best for him to go home or use one of the back offices. The Claimant says CD's response was disrespectful.

53. The Claimant reported this issue to Anna Verges Basili who was at the time the First Respondent's line manager. This led to the First Respondent writing a Teams message to the Claimant [**165**]. We agree with the Claimant's characterisation of the tone of the First Respondent's message as hostile. He was clearly upset that the Claimant had gone over his head in reporting the issue to his manager.

The Job Cascade

54. In around January 2023 the First Respondent promoted Rebecca Oldfield, a white female, to a Grade 5 position in the e-learning department without any application process being undertaken. By this we find that she had not filled in an application, been short-listed or attended an interview. Rebecca Oldfield was in a Grade 3 post and was promoted to the Grade 5 position initially on a 6-month fixed term contract. The First Respondent says that he promoted Rebecca Oldfield to this position without carrying out a recruitment process because of the urgency of the need to find a person for the position which had been vacated as a result of another individual going on maternity leave. He also says this was a very short-term appointment.

55. Rebecca Oldfield's post then became vacant as a result of her leaving her Grade 3 post to take up the Grade 5 post. Her old post was then "**ring fenced**" by the First Respondent and offered by him on a job share basis to two casual members of staff, both of whom were white and students at the University, namely CD and HV, again without any application process.

56. The Claimant was concerned about the appointment of these three individuals, all of whom had been "**gifted**" jobs by the First Respondent. She did not believe that any of them had the experience or qualifications to be automatically placed into these roles without any form of competitive process. CD and AV were students of drama and global development respectively and had been placed into positions in e-learning and Rebecca Oldfield was being promoted up two grades and, in the Claimant's opinion, did not meet the job criteria for the Grade 5 post. The Claimant was aware in particular of two recent graduates from the University's in house master's level learning technologists' program (both of

whom were non-white) who had not been given the opportunity to apply for the Grade 5 post given to Rebecca Oldfield.

3rd February 2023 "walk and talk"

57. It is not in dispute that the Claimant and the First Respondent engaged in a "walk and talk" conversation on 3rd February 2023. It is further not in dispute that in this conversation, the Claimant raised her concerns in relation to the recent recruitment process outlined above.

58. The Claimant says that she made it clear in this conversation that the recruitment process was disadvantaging other potential candidates from within the University including BAME students who had no chance to apply because the job had not been advertised. She says that she referred to all three posts. The Claimant says that she named two non white individuals who would have been better candidates. She says that she did not "**directly call out a middle-aged white male manager, to tell him face to face that his actions and response were racist… however it is clear in the context of this discussion that this was what I was upset about**" [Claimant's witness statement, paragraph 2.21].

59. The First Respondent's recollection is that only one job was mentioned- Rebecca Oldfield's job. The First Respondent also says that what the Claimant was unhappy about was that Rebecca Oldfield was being given a Grade 5 post when in the Claimant's view she was not appropriate for the role. He says that at no stage did the Claimant raise any issue in relation to how this might have disadvantaged BAME students. He denies that she named any individual who had been allegedly disadvantaged.

The 16th February 2023 incident

60. CD was both a student and member of staff at the University at the time of the events we are concerned with. He was initially a member of causal staff at the University before taking up a Grade 3 post on a fixed contract from January 2023 onwards. He is one of the individuals who had been given a role without a formal recruitment process as part of the job cascade.

61. CD transitioned from a woman to a man at some point around 2021/2022. The Claimant recalls that the first time she met CD was in the summer of 2022. We accept that there may have been some confusion at first about when CD came out. We note that the First Respondent said at the appeal hearing that "**They [CD] came out to different people at different times**" [**427**]. The First Respondent says that by the start of term in September 2022 it was common knowledge in the workplace that CD had transitioned. We find that by the autumn of 2022 the Claimant was aware that CD had transitioned.

62. There also appears to be some confusion about CD's preferred pronouns. The Claimant believes that CD initially used "**they**" as a pronoun before adopting "**he/his**" pronouns. The First Respondent says that CD uses "**he/his/they**" pronouns in his witness statement [at paragraph 10] but in the appeal, he said that CD "**consistently used he/they**" pronouns [**427**]. The Claimant points out that "**he/his**" pronouns are gender specific for a male whereas "**they**" is a gender-neutral pronoun. There are emails in the bundle from CD in January 2023 which demonstrate that CD had adopted "**he/his**" pronouns on his email signature. We find that by January 2023 the Claimant was aware that CD was using he/his pronouns.

63. It is not in dispute that on 16th February 2023 the Claimant misgendered CD. This happened in front of a number of people who were in the Claimant's team, as well as members of the First Respondent's team. We understand that there was a total of 7 or 8 individuals present (including the Claimant and CD).

64. We have not heard evidence from anyone who was present when this incident occurred, apart from the Claimant. The Respondents say that what happened on the day is a matter of fact or agreed evidence. The matters that we find are not in dispute are as follows. The Claimant used the incorrect pronoun for CD. CD corrected the Claimant. The Claimant apologised to CD, making a comment suggesting she would probably misgender CD in the future and was apologising for future occasions as well. Rebecca Oldfield made it clear that the Claimant should not misgender CD at all in the future. Everyone went back to working. CD was later found crying. The Claimant tried to speak to CD later, but he did not want to speak to her.

The Investigation Process

65. At about 4.45pm on 16th February 2023 the First Respondent was sent a What's Ap message from HV telling him that an incident had occurred [**168**]. At about 5.30pm the First Respondent spoke via What's Ap with HV and AMC. He did not take any notes of this conversation.

66. At 5.58pm, the First Respondent sent the Claimant a Teams message [**169**] telling her "**Please note, from now onwards you can't make use of the ELSAs [HV, CD, AMC] until further notice while I look into some things. Please do not get in touch with them**." On the same evening the First Respondent contacted the Second Respondent and they made arrangements to speak the next morning.

67. On the morning of 17th February 2023, the First and Second Respondents met. There are no notes of this meeting. The First Respondent then met with the Claimant's line manager, Linda Irish. Following this meeting, the Respondents put in place other temporary measures. In particular, the Claimant was told that she was not permitted to work in the main shared office space. This meant that she was to have no physical interaction with the rest of her team, who all worked in the shared open plan workspace along with 40 or so other staff. When she came on campus, she had to book a back room on the same floor so that she did not risk coming into contact with CD. She was also not allowed to discuss any of the specific issues relating to the misgendering complaint with her colleagues, including her line manager.

68. The First Respondent also met on 17th February 2023 with CD. He did not take notes of this meeting. The First Respondent asked several of CD's colleagues who were present when the misgendering incident occurred to provide written statements. He obtained a joint statement from HV and AMC [**173**] and statements from Rebecca Oldfield [**170**] and Elsa Lee [**167**]. These statements were all obtained within a day of the incident.

69. The Second Respondent also spoke to CD on 17th February 2023 and followed that up with another meeting with him on 22nd February 2023. The Second Respondent did not take notes of either of these meetings with CD. The Second Respondent says that CD made it clear at this second meeting that there had been previous times when the Claimant had misgendered him. The Second Respondent says that as CD wished for the matter to be pursued formally through the DAWS (Dignity at Work and Study) policy, he had no discretion and that a formal investigation had to take place.

70. It then took some 4 weeks (until 16th March 2023) before the Second Respondent appointed a Lead Investigator, namely the First Respondent. The Second Respondent would act as the HR Partner. It also took 4 weeks for the Claimant to be told that the matter was being dealt with through the DAWs procedure. There was no real explanation as to why it took the Second Respondent so long to appoint someone as Lead Investigator, other than that he was busy with other matters. Given that this would not have been a time-consuming task and in the interim the Claimant was being restricted in her workplace, this delay was far too long. It is hard to reconcile this delay with averments that the First and Second Respondents make later in the chronology about their concerns about the Claimant's wellbeing. We note that by this point the Claimant was finding it very difficult as she was isolated from her colleagues at work and had visited her GP on 2nd March 2023 with a complaint of stress. She was receiving no well-being support directly from her line manager (who she was not allowed to speak to

about the investigation) and she received no updates at all that we can see about what was going on with the potential investigation.

71. On 16th March 2023 a statement was obtained from CD [**195**]. It is a short statement (less than a page) dealing with the 16th February 2023 incident. It is the only account of any of the misgendering that we have seen from CD.

72. On 20th March 2023 the Claimant was sent an email by the First Respondent [**185**] informing her that: "**I am investigating a formal complaint of unacceptable behaviour… the specific nature of the complaint is that you have repeatedly and publicly misgendered a colleague, [CD]**". The Claimant was invited in that letter to attend a meeting with the First and Second Respondents on 27th March 2023.

73. The First Respondent did not interview any of the witnesses to the incident on 16th February 2023. He also did not interview anyone (including CD) about past misgendering incidents (even though the allegation was one of repeated misgendering). He took the view that this was unnecessary as the facts were agreed.

74. On 27th March 2023 the Claimant attended the investigation meeting [**189**]. She had prepared copious notes to read out at the meeting [**231-251**]. She says and we accept that she cried when reading out her notes and skipped over parts that she was too afraid to read out, namely the parts that were critical of the First Respondent. She raised her dyspraxia at this hearing. The Respondents' notes include these references: "**Have spent life trying to champion people, doesn't know if its because they have dyspraxia or older… You associate pronouns with pictures, dyspraxia, visual perception of the world, know it on a cognitive level, not doing it on purpose**".

75. We find that it was clear to the First and Second Respondents from this meeting that the Claimant was saying that her dyspraxia made it more difficult for her to gender CD correctly. That is exactly what they have recorded in their investigation report [**206**].

76. There is nothing in the minutes of the investigation meeting that suggest that the Claimant was asked any follow up questions to explain why it was that her dyspraxia made it more difficult for her to gender CD correctly. The First Respondent said in cross examination that after this meeting he had done some internet research which he says was inconclusive about whether dyspraxia could be the reason why the Claimant had used the incorrect pronoun. He said in his evidence to the Tribunal that the Second Respondent had obtained advice from EDI (Equality, Diversion and Inclusion) on the issue. The Second Respondent in his evidence suggested that he had approached EDI after the 4th April 2023

meeting but that he did not actually speak to anyone about the Claimant's dyspraxia.

77. The Claimant requested a private meeting with the Second Respondent on 28th March 2023 [**197**]. She did not explicitly say why she wanted a separate meeting with the Second Respondent in the email making this request. She tells us that she wanted to read out the parts of her notes that she says she had felt too afraid to read out on the day of the investigation meeting. The Second Respondent did not ask what it was that the Claimant wanted to raise separately with him but inferred from her email that whatever it was would have no impact on the investigation. He offered her the date of 3rd April 2023 to meet.

78. The Claimant was not expecting that the investigation report would be completed within less than two days of the meeting on 27th March 2023. The report had by that point gone through numerous drafts (about seven in total that we can see) passing back and forward between the First and Second Respondents [**191–203**]. The Claimant was sent the report on 30th March 2023 [**204-209**]. We understand that her line manager Linda Irish was also sent a copy of the report, as was CD.

The Investigation Findings

79. The First and Second Respondents jointly determined the investigation outcome. Their finding was that the Claimant had unlawfully harassed CD. The Respondents relied upon the definition of harassment in the DAWS policy as follows [**983**]:"**Harassment is unwanted physical, verbal or nonverbal conduct which may (intentionally or unintentionally) violate a person's dignity or create an intimidating, hostile or degrading, humiliating or offensive environment**." Their finding was the harassment was unintentional but that it was still harassment as it had left CD feeling uncomfortable in his workplace.

80. The Respondents also looked at the guidance they have in place that is specific to transgender individuals. That document (the Guidance on Supporting Trans Staff and Students) states as follows [**1084**] : "**Intentionally or persistently using the incorrect pronoun, or a trans person's previous name, constitutes harassment and instances of this nature will be handled through the Dignity at Work and Study Processes**". The Respondents took the view that the Claimant had persistently used the incorrect pronoun over a period of time.

81. The recommendation made in the investigation report was that as this was a serious matter, it should be managed formally under the relevant policies. The

Second Respondent made it clear in his evidence that the only policy that could apply was the disciplinary procedure and so the next step would be possible referral under the disciplinary process. However, the First and Second Respondents say that whether or not there was such a referral was not up to them, but up to the Claimant's line manager and others.

82. Nevertheless, the recommendation of the investigation was that the temporary measures should continue to remain in place. They also recommended that the Claimant should be moved to another part of the University while "**further relevant policies and procedures**" are conducted.

Events Between Investigation Report and the Appeal

83. The Claimant attended two meetings with the Second Respondent after the investigation report was completed. The first was the meeting on 3rd April 2023 which had been planned before the Claimant had seen the investigation report. There is a transcript of this meeting at **217-229**. There was then another meeting on 4th April 2023 which involved both the First and Second Respondents. There is also a transcript of this meeting at **264-277**. We note that these are transcripts of covert recordings made by the Claimant. In summary, the Claimant strongly disagreed with the investigation decision and was critical of the process too. It was clear that the next step would be an appeal and the Claimant was given an extended time to lodge her appeal as she was on annual leave.

84. Her appeal was eventually lodged on 11th May 2023. She did not have an appeal hearing until 6th September 2023. Before the Claimant's appeal was heard, she says that she was subjected by the First and Second Respondents to various punitive measures which we will outline below.

85. First, on 28th April 2023 the First Respondent wrote to the Claimant [**286**], informing her that she was being "**stood down**" from her role as co-lead of the XR pilot study. The Respondents say that this is line with the DAWS procedure [**991, para 21**] which specifies that consideration will be given to changing work location or duties even where a complaint is not upheld. They say this was partly because the processes had not concluded but also because the Claimant had indicated she had been working long hours which had been a source of stress, and because no other member of staff carried two large service areas and it was felt that having one service area to focus on would allow Claimant to spend more time on her own well-being.

86. In the same email the First Respondent suggested passing on the information that Claimant had dyspraxia to her line manager and in order to see what support DASS could offer. The Respondents say that given that Claimant had raised her dyspraxia, it was appropriate for them to act upon this disclosure of information about her disability to explore if she needed any support at work.

87. On 28th June 2023 the First Respondent wrote the Claimant another email, she says removing her from the XR service area [**319**]. The Respondents say this was a continuation of the original restrictions that were put in place for practical reasons. They say the Claimant had continued to involve herself in this work and therefore it was necessary to clarify that it was for others to decide how the area was developed and supported. The Claimant had interpreted the instruction on 28 April as a request to reduce her managing a single large service area.

88. The next event in the chronology occurred on 19 July 2023, when the Claimant applied for the position of Assistant e-Learning Manager (a Grade 7 post). The position of Assistant E-Learning Manager became vacant, and the Claimant applied along with three other internal candidates. All were short-listed and the panel consisted of the First Respondent, Linda Irish and Emma Rose. The panel gave the Claimant the lowest score of all of the candidates. The Respondents say that the answers she gave at interview were not sufficiently detailed or focused.

89. The next event that the Claimant raises is a meeting on 17 August 2023 called by the First Respondent. The Second Respondent and the Claimant's line manager were also present. The Claimant was questioned about her "**teaching activities**". This was something that the Respondents say the First Respondent knew nothing about and he was entitled to explore any additional work with the Claimant and to understand if this was having any impact on her well-being, particularly given that she stated that she had been working long hours and that this had contributed to the incident in question in February 2023.

<u>The Appeal</u>

90. The Claimant appealed on 11th May 2023 [**296-301**]. There were significant delays all at the Respondents' end in progressing the Claimant's appeal and in convening a meeting. We can not see any explanation offered other than an email in which the Claimant was advised that "**recent events**" were responsible for this and apologies were provided [**326-327/358/375-376**].

91. The appeal was heard on 6th September 2023 [**422-443**]. There was a panel of three with Paul Rowbotham chairing the appeal.

92. At the appeal on 6th September 2023, it is recorded in the notes that the Second Respondent says that it was during the second conversation that they were aware from the Claimant that she had dyspraxia and at this point they asked the question about engaging with DASS [**437**]. He had met with her three times in total, and the second conversation was on 3rd April 2023, after the investigation report. The information given by the Second Respondent to the appeal panel was wrong, as the Claimant had raised her dyspraxia during the first conversation on 27th March 2023.

93. The appeal outcome resulted in three of the four appeal points being partially upheld [**465-470**]. First, the panel felt that not enough consideration had been given as to how the Claimant's dyspraxia might impact on her ability to remember the pronoun change. However, the report still found that there was a breach of the DAWS policy, and that CD had been subject to harassment. The panel accepted that there was no intention to harass CD, but it was felt that further investigation into Claimant's dyspraxia might have been helpful. Second, the panel found that the First Respondent should not have been the lead investigator, although technically he had been able to conduct the investigation. The panel noted that the investigation had nonetheless followed due process and had been handled diligently. Third, the panel did not accept that there were factual inaccuracies in the investigation report. Fourth, the panel felt that the recommendation of the Claimant's removal from the team was disproportionate, and that the situation should be reviewed by local management before further formal proceedings were considered.

Events following the outcome of the appeal hearing

94. Shortly after the appeal, the First Respondent was promoted to the role of E-Learning Manager at the University's Faculty of Humanities (after a recruitment process and with this position having been vacated by Anna Verges Basili) and therefore became responsible for management of the area in which the Claimant worked.

95. After the conclusion of the appeal hearing, the focus seems to have been on mediation. CD initially declined mediation. We were referred to the chronology prepared by the Respondents which explains the reasons for the delays in relation to the mediation and the Claimant's return to work. Suffice it to say that it was not until the summer of 2024 before mediation started, with it ending around October 2024.

96. Prior to the appeal the Claimant was coming onto campus on the days when she was not working from home but using one of the back offices on the same floor as her colleagues so that she did not come into contact with CD. However, after the appeal, this was further restricted such that she was not even allowed on the same floor as CD.

97. In mid November 2023, the Claimant suffered a fall and was hospitalised. She was then on sick leave until 4th April 2024. She did not to return to work until 9th September 2024.

98. Before we look at what happened with the Claimant's role, it is important to note that there was a process going on in the period April 2024 – September 2024 involving complaints. The Claimant had submitted a formal complaint against the First and Second Respondents on 3rd November 2023. The First Respondent also had his own complaint against the Claimant which he initially made on 28th April 2023 which had been put on hold at that time.

99. The two sets of complaints were investigated by Peter Wandsworth. The complaints that the Claimant raised against the First and Second Respondents were dismissed and the First Respondent's complaint against the Claimant was also dismissed.

100. Returning to the Claimant's work situation, from April to September 2024 she was on full pay, fit for work (initially on a phased basis), but was not working at all. In September 2024 when she did return to work, she returned to an alternative team in a different part of the University. Her Grade (Grade 6) remains the same as does her pay.

101. We have not heard any witness evidence from the Respondents on why this was the case, but have been referred to a letter dated 21st March 2024, from the University's solicitor, David Horan, [**632**]. At that point she was due to return to work on 2nd April 2024 on a phased return basis, but it was suggested that "**having regard to the welfare of all involved and affected by the current issues and the importance of finding a resolution, we consider it important for the mediation process to take place prior to you commencing your return to work. To assist with this, we will ensure that with effect from Tuesday 2nd April (the date you have mentioned to Linda as a potential return date), your absence stops being classified as sickness absence (i.e.. there will be no further impact on your sickness absence entitlement or benefits), but there will be recorded a period of agreed absence on full pay pending the conclusion of the mediation**

process. The University will do everything it can to ensure the mediation process is progressed as quickly as possible".

102. The Respondents say that the Claimant indicated her willingness to explore mediation and at no stage expressed any concern about a period of agreed absence on full pay. They say that an opportunity was identified in the e-Learning Team in the Department for the Student Experience (DSE) and arrangements were then made for Claimant to start in that role in September 2024 which she agreed [**654**]. They say that the absence on full pay was with the Claimant's agreement, and at no stage did she raise any issues with the same.

103. Despite the fact that the appeal recommendation was to put on hold a move to another team, the Respondents say that as the mediation process had not been completed, it was felt appropriate to do this.

104. We find that the Claimant was always open to mediation and suggested it straight away. CD does not appear to have been asked about his willingness to engage in mediation until some 6 months after the misgendering incident.

105. The Claimant is happy with her new boss and colleagues in DSE. However, she also says that her career and academic intentions have been sabotaged, and she feels like she had very little option. She points out that she had previously been the lead/co-lead on two Service Areas and there are no leadership roles she can do in DSE. She says that she created the XR Pilot study in the XR Service Area in Humanities and there is no XR Service Area in DSE. She says that she had intended on doing a PhD by Publication as related to her XR project, but that this is no longer an option as she no longer has access to the relevant academics who could support this activity. She previously worked with a large group of colleagues and now works in a small team. She previously supported academics in the School of Education and now works on ad hoc projects rather than being connected with a faculty.

106. The Claimant was never subject to any disciplinary process relating to the CD harassment allegation. She was told in October 2024 (as part of the mediation process) that disciplinary proceedings would not be commenced.

<u>The Process Generally</u>

107. We consider it is appropriate at this point to note some of our findings relating to the investigation and appeal which will have a bearing on the key issues in this

case. We will address firstly the Claimant's concern from the outset as to the impartiality of the First Respondent. We note that the DAWS policy requires the Lead Investigator to be someone who is independent of the complainant (CD) and the respondent to the complaint (the Claimant). The First Respondent was CD's line manager, and he was also the line manager of several of the witnesses. He also worked closely with the Claimant. There had been a couple recent of incidents in which he had issues with the Claimant, namely the health and safety incident where he had challenged her for going to his line manager and the job recruitment exercise where she had challenged him on the appointment of Rebecca Oldfield. He had also been the person who had warned her of a previous incident (or incidents) of misgendering. He may not have been a witness to the misgendering incident on 16th February 2023, but our finding is that he was clearly not independent of either CD or the Claimant and ought never to have been the Lead Investigator.

108. We turn to our criticism of how this issue was handled at the appeal. The key point that the Claimant made as to why she felt the First Respondent was not impartial was that he was CD's line manager. She says this very clearly in her grounds of appeal [**296**]: "**Importantly, [the First Respondent] is the line manager of [CD], along with those he had interviewed to support the dignity at work complaint. He has developed a close relationship with the support assistants and other members of his team, including promoting them, without interview or job application process, and I had expressed dissatisfaction with the way that this had been handled**". What the Claimant was saying here is correct: the First Respondent was CD's line manager, and he was the line manager of the witnesses. She is also correct that he had promoted CD and HV from casual staff to fixed term posts as part of the job cascade. The appeal panel made the finding that the First Respondent was not "**formally responsible for either part**" [**466**]. This is just not correct, and it is an error that Mr Rowbotham also makes in his witness statement [at paragraph 26]. He was asked about this when he gave evidence and claimed not to know that CD was line managed by the First Respondent or that the witnesses were in his team. This is sloppy work by the appeal panel, even if it was the Second Respondent who provided incorrect information at the appeal hearing when he said the First Respondent was "**not a line manager, had no involvement with [the Claimant] at that point in time**" [**427**]. We find that the appeal panel were far too quick to accept what the First and Second Respondents told them, including on this point where with basic due diligence they would have realised that the Claimant was correct and the Second Respondent was incorrect on the issue of whether the First Respondent was the line manager of CD.

109. We turn to the evidential findings of the investigation report. The investigation report referred to laughter, commenting that "**Karenne laughed about this [confirmed by three witnesses, this is contested by Karenne, who says**

either she didn't laugh or doesn't recall doing so]." HV and AMC refer to the Claimant "**laughing constantly**" [**174**]. Rebecca Oldfield called it an "**over compensatory laugh**" [**172**]. CD described that "**Karenne, who I also think was embarrassed, laughed…**". We find that whilst there may have been laughter this was on balance nervous/embarrassed laughter rather than the constant laughter suggested by HV and AMC in their joint statement.

110. Moreover, we find that what the Claimant was alluding to when she made her "**future apology**" was that she was likely to misgender again because of her dyspraxia. In addition, we find that the Claimant made a further comment at the time of the incident which we find was a veiled reference to her dyspraxia. This is the comment that Rebecca Oldfield refers to when she recalls the Claimant say that "**I get frustrated because I can't change my brain**" or "**train my brain**" [**171**]. We take the view that these two comments support a contemporaneous belief by the Claimant that her neurodiversity may have been the reason for her incorrect pronoun use.

111. We also find that the Claimant apologised again after she was pulled up on her apology (Rebecca Oldfield statement **171** but not referred to in the investigation report). We also find that the Claimant was crying (Elsa Lee statement **167** but not referred to in the investigation report).

112. Whilst the Respondents say that the facts were all agreed and there was no need to interview anyone or take statements, there were some important nuances in the evidence. We find that the way the findings have been presented in the investigation report paints the worst possible picture of the Claimant. They have left out details in the evidence which would have painted the Claimant in a better light (she apologised again for her poor apology, she too was crying) and which would have supported her statement that dyspraxia might have impacted on her pronoun misuse.

113. The report also concluded that there had been persistent misgendering of CD by the Claimant. There is a dispute of fact about how many times the Claimant misgendered CD prior to the 16th February 2023 incident. The Claimant says it was 4 times at most and only one of those times she recalls being in CD's presence. The Respondents suggest that it was as many as 18 times in CD's presence.

114. We have not seen any statements or interview notes from CD or any of his colleagues which sets out their evidence as to the number of times CD was misgendered. The First Respondent says this in his witness statement: "..**the Dignity at Work investigation was commenced as a result of the misgendering incident which occurred on 16 February 2023, and in the**

context of Karenne having previously misgendered [CD], an estimated 18 times that he specifically recalls" [at para 158]. However, when the First Respondent was asked to refer to any document in the bundle that supported his reference to 18 times, he said that he had only asked CD recently (ie after the commencement of this Tribunal claim) how many times the misgendering had occurred and at that point CD estimated it was 18 times. It is our finding that the First Respondent's statement is misleading in this regard, as it implies that the investigation had been commenced in the knowledge by him of it being 18 times.

115. We are hampered by the fact that no one in the course of the investigation or appeal has actually asked CD how many times he was misgendered by the Claimant. We find that the Claimant had probably misgendered CD more than 4 times but that it was unlikely to have been as frequently as the Respondents now assert (18 times). Although we note that there is no definition of "persistently" in the Respondents' documents, we find that on balance the Claimant did persistently misgender CD.

116. There is also a dispute about how many times the Claimant was approached by the First Respondent and informally told not to misgender CD. She says it was once whereas the First Respondent says it was three times. We prefer the Claimant's evidence on this point. We make this finding because we consider that if the First Respondent was repeatedly warning the Claimant as he suggests, he would in all likelihood have taken the matter further, either by doing more than giving just a "soft" warning, or by taking it up with the Claimant's line manager, or by suggesting some sort of training for her. We also find that if there had been repeated warnings, there would be some record of them. We also note that the First Respondent did not find it necessary to even record his interviews with staff relating to the 16th February 2023 incident as he said it was very early on in the process.

117. There is also a dispute about whether the Claimant used the phrase "**the girls**" to include CD. The Claimant says that she used this phrase to describe HV and AMC and not CD. Once again, we note that there is no statement or document from HV, AMC or CD referring to this incident and we are left with the First Respondent's version of what they are said to have told him. We accept the Claimant's account as it is supported by her contemporaneous note at [**250**] where the First Respondent confirmed that the Claimant had not used "**the girls**" comment in the presence of CD. Although these are the Claimant's notes, we find that they are reliable as she does not appear to have retrospectively altered them at any point to better suit the case that she now puts forward.

Discussion and Conclusions

Harassment related to disability

118. The first allegation is that the Claimant's accidental slip of the tongue regarding CD was cited in the investigation report as only being a "**contributory factor**" rather than a mitigating circumstance. We do not accept that the description in the investigation report amounts to unwanted conduct. We see these two phrases as labels which are interchangeable. We also do not accept that it is related to disability. We also do not accept that it had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

119. The second allegation relates to the email on 28th April 2023 stepping the Claimant down from her role as Co-Lead of the XR Pilot Study. We do find that this is unwanted conduct and that it had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It is our finding that the removal of the Claimant from the XR Co-lead was meant to be punitive and to discredit her. We agree with her that the First Respondent is being disingenuous when he suggests this was being done for the Claimant's health and wellbeing. We make this finding in part because on this same day (28th April) the First Respondent made his own DAWS complaint against the Claimant, [**286.2**] accusing her of making "**unsubstantiated allegations to discredit anyone who has acted as a witness or investigated [the Claimant's] harassment**". Further, we find that the XR co-lead was very important to the Claimant and she had only just been appointed to this role. The First Respondent had wanted her to take on this role at the end of December 2022 even though he knew she was overworked because he knew it was an important project to the University.

120. However, we do not find that the Claimant was stepped down for a reason which related to her disability. We find that this was meant to hurt the Claimant professionally and punish her for raising issues over the First Respondent's investigation into the CD harassment allegation. There is an indirect link to the disability insofar as the Claimant says that the reason for her misgendering CD in the first place relates to her disability. However, it is our view that this is too far removed for us to find that it is a reason related to her disability.

121. The third and fourth allegations are that the First Respondent requested the Claimant to pass on already known information about her disability to her line manager and made a humiliating offer to refer her to the University's Disability Advisory Service which she was already engaged with. We do not find that this

is unwanted conduct and/or that it had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The First and Second Respondents had been told by the Claimant that she had dyspraxia and were probably not aware at this point that her line manager already knew or that she had previous interactions with DASS. We do not find that the suggestion of a referral when viewed objectively satisfies the section 26 test.

122. The fifth allegation is that the Respondent removed the Claimant from the XR Service Area on 28th June 2023. Our findings in relation to this mirror what we have said in relation to the second allegation. We do find that this is unwanted conduct and that it had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It is our finding that the removal of the Claimant from the XR Co-lead was meant to be punitive. However, we do not find that the Claimant was removed for a reason which related to her disability. We find that this was meant to hurt the Claimant professionally and punish her for raising issues over the First Respondent's investigation into the CD harassment allegation.

123. The sixth allegation is that on 19th July 2023 the Claimant was unsuccessful in her application for the Assistant e-Learning Manager role. We accept that the Claimant did not get this role because she performed poorly at interview. It does not surprise us that she performed poorly given that she had not slept due to the stress she was under generally because of the investigation and particularly because the First Respondent was on the interviewing panel. We do not accept the Respondents' characterisation of her being delusional about her abilities. She was clearly a good candidate on paper and would not have made the short list had that not been the case. She performed badly at interview because stress affected her performance at interview, not because she was a poor candidate. However, we do not find that the Claimant being unsuccessful in the role was unwanted conduct. Further, we do not find that it had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We also do not find that the Claimant was unsuccessful in getting this role for a reason which related to her disability. The Claimant was ultimately unsuccessful because she performed poorly at interview.

124. The seventh allegation is that on 17th August 2023 the First and Second Respondents questioned the Claimant about her teaching activities. We find that this was an over-the-top step to take, given they could have just asked the Claimant's line manager if she was doing such activities rather than calling a panel-based meeting. It is our finding that by this point the First Respondent had lost all impartiality as far as the Claimant was concerned. Their once cordial working relationship had soured as a result of first her going over his head to

report an issue to his manager; then her raising concern over recruiting Rebecca Oldfield without an interview; and finally raising his failings in the investigation process. He was at this point fishing for some potential misconduct. We do find that this is unwanted conduct and that it had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. However, we do not find that the Claimant was removed for a reason which related to her disability. Once again, we find that this was meant to punish her for raising issues over the First Respondent's investigation into the CD harassment allegation.

125. The eighth allegation is that the Claimant says that at the appeal on 6th September 2023, the First and Second Respondents said they did not know about the Claimant's dyspraxia until later, namely post their investigation report [**429**]. She says that the Respondents continued to present this false information in the meeting with the Claimant's line manager and others on 3rd October 2023, when this time Linda Irish suggested to the Claimant that her dyspraxia had not been mentioned until "later".

126. We do not agree with the Respondents that the Claimant is confused as it is clear from the notes that the First and Second Respondents knew about Claimant's dyspraxia during their first meeting with Claimant on 27th March 2023. Her point was that the Second Respondent had tried to mislead the appeal panel (as well as the Claimant's colleagues) into believing that she only mentioned dyspraxia at the second interview, ie the 3rd April 2023 interview which was after the investigation report. We understand the Claimant's concern because the Respondents continue to present a case on the basis that she is using her dyspraxia as a defence. We find that there is a clear narrative being perpetuated by the First and Second Respondents which minimises the Claimant's disability – suggesting she did not mention it until later, or the second meeting, or that it was a throw away comment.

127. We do find that this is unwanted conduct and that it had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. However, we do not find that this was for a reason which related to her disability. We find that at this point the First and Second Respondents were trying to justify their failure to investigate matters properly in relation to the CD harassment allegation.

128. The ninth allegation is that the Respondents' labelled the Claimant's slip of the tongue as harassment in her appeal outcome on 6th September 2023. The Claimant here is complaining about the outcome of the investigation and the appeal insofar as there was a finding of harassment and effectively saying that

her disability was not taken into account during that process. We do find that this fits within the section 26 test – it is not unwanted conduct that has the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

129. The final allegation is that when the Claimant's sick leave ended on 4th April 2024, the Respondents did not permit the Claimant to return to work until 9th September 2024, and then temporarily into an alternative team. We do not find that this is unwanted conduct and/or that it had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The Claimant agreed to this course of action, albeit that she may have felt that she had no choice. She did not express that. We also do not find that this related to her disability. We accept that it was the consequences of the practical issues that arose given that she had by this point already lodged an employment tribunal claim.

130. In summary, we do not uphold any part of this complaint.

Discrimination arising from disability

131. The Respondents accept that they knew or could reasonably have been expected to know that Claimant had dyspraxia at all relevant times. They do not rely upon a knowledge defence.

132. The Respondents deny that the Claimant's short-term memory issues caused a slip of the tongue when using CD's pronouns. They say it is for Claimant to establish the link and she has failed to do so to the appropriate standard. She commenced employment with the University in 2018 and had never suggested that she had short-term memory issues with any of her line managers. They draw our attention to all of the times after the incident when the Claimant did not suggest a link. They say it comes up for the first time in the investigatory meeting of 27th March 2023 but, even then, it is listed as a possibility only along with other contributory factors. They say if there was a short-term memory issue which had caused her to use the wrong pronoun one would have expected the Claimant to focus on this. They say the dyspraxia became more of an issue at the appeal but even in Claimant's appeal letter she does not attribute any short-term memory issues to the slip of the tongue.

133. We note that the Respondents' witnesses have not consulted their own EDI or DASS departments which their key witnesses had access to at any stage to seek expert advice on the proposition put forward by the Claimant about the link between her dyspraxia and her incorrect pronoun use. They have consulted EDI at various stages of this process in relation to the transgender aspects of

the investigation. We also note that the Respondents have not disclosed any literature or other material on the possible impacts of dyspraxia on short term memory and/or pronoun misuse.

134. We find that the literature that the Claimant has provided supports her contention that dyspraxia does affect short term memory **[930]**. We note that this is consistent with the comments in the Equal Treatment Bench Book which suggests that people with dyspraxia can have short term memory problems, including retrieving information from the mind "**on the spot**". The Claimant has also included references to a 1983 study **[947]** that links dyspraxia to pronoun error. Delayed expressive grammar, including the use of pronouns, is also highlighted as associated with dyspraxia in the literature **[948- 950]**. We therefore accept that dyspraxia is a condition that can manifest itself in the way described by the Claimant, namely that it can affect short-term memory and the ability to recall correct pronouns. We accept that just because dyspraxia can affect some individuals in this way, it does not automatically follow that the Claimant was affected in this way or that it was the cause of her incorrect pronoun use on this particular occasion.

135. The Respondents say that there is a flaw in Claimant's causation argument in that she claims that she very rarely used the wrong pronoun and got it right more often than not. They question how if that is the case that the Claimant can contend that on the few occasions she used the wrong pronoun, her dyspraxia in the form of short-term memory loss was the causative factor.

136. The Claimant described it to us in this way. She says that it will take her longer to process some types of new information from her short-term memory into her long-term memory. This means that compared to someone who is neurotypical, certain things take her brain longer to process before they become learned or automatic behaviours. She said that in order to adopt a pronoun, she has to visualise the pronoun. She was not saying that she always gets pronouns wrong, rather than the adoption process is a longer one and she benefits from visual reminders. She explained that at the time she was using a post it note with "**CD = he**" to remind her that CD needed to be called "**he**" . We found the Claimant's evidence convincing on this point. We do not accept that there is a flaw in her argument. It takes her longer to reach consistency of pronoun use because of her short-term memory problems caused by her dyspraxia. We also note that she was saying that these problems are worse when she is stressed or tired and she said at the meeting on 27th March 2023 that she was both stressed and tired when she misgendered Con 16th February 2023.

137. We acknowledge that the Claimant has not consistently said that her dyspraxia was the reason for her pronoun misuse. However, we must give some allowance

for the fact that, as with many neurodiverse conditions, it is often difficult for the person with the condition to explain why or how their brain is functioning the way it is, as to them the behaviour is their normal. However, there are clearly some contemporaneous references to dyspraxia being the cause of the pronoun misuse, including the comment that Rebecca Oldfield refers to when she recalls the Claimant say that "**I get frustrated because I can't change my brain**" or "**train my brain**" [**171**]. We take the view that this supports a contemporaneous belief by the Claimant that her neurodiversity may have been the reason for her incorrect pronoun use. We also find that the Claimant raised her dyspraxia at the hearing on 27th March 2023 in the comments that: "**Have spent life trying to champion people, doesn't know if its because they have dyspraxia or older… You associate pronouns with pictures, dyspraxia, visual perception of the world, know it on a cognitive level, not doing it on purpose**".

138. We also acknowledge that the Claimant could not be certain as to why she used the wrong pronoun, but we do not find this surprising, as it would be difficult for her to know for sure whether it was because her disability. However, we do not need to be certain that the disability was the reason for the misgendering: instead, it is a factual issue that we must determine like any other on balance of probabilities. Having weighed all the evidence, we find that on balance the reason why the Claimant had used the incorrect pronoun on this and previous occasions was because of her dyspraxia. Her dyspraxia affected her short-term memory, meaning it took longer for her to consistently adopt the correct pronouns compared to a neurotypical person. We therefore find that this was the "something arising" in consequence of the Claimant's disability.

139. The Claimant has identified unfavourable treatment which she says was because of that "something arising." The first of these is that she was placed into a formal process under the DAWS procedure following the complaint by CD because of her slip of the tongue. We accept what the Respondents say on this, namely that the Claimant was placed into the formal process because CD wanted the matter to be dealt with formally. We remind ourselves that we must focus at this stage on the reason in the mind of the Second Respondent, who appears to us to be the person who decided that the Claimant would be placed in the formal process. We accept his evidence that he felt he had no choice once CD requested a formal procedure and that this was therefore the effective reason for or cause of her being placed in the formal procedure rather than the disability.

140. The Claimant also says there was other unfavourable treatment which she identifies as the finding of unlawful harassment under DAWs procedure and at the appeal. The Respondents say that the evidence was considered and the Claimant only mentioned in general terms that her dyspraxia might have played

a part at the investigation. They say that under the policy, which follows the statutory definition of harassment, the definition of harassment was met and therefore she cannot establish the necessary causal link to the action taken and the *"*something arising*."* They make the same point about the finding of harassment at the appeal stage.

141. We do not agree with the Respondents' submissions on this point for these reasons. First, we do not accept that this was a throw away comment. We find that the First and Second Respondents were well aware that the Claimant was relying on this as the explanation as to why she was still getting her pronouns wrong. Further, we find that the definition of harassment under the DAWS procedure needs to be read in conjunction with the Guidance on Supporting Trans Staff and Students which states [**1084**] : "**Intentionally or persistently using the incorrect pronoun, or a trans person's previous name, constitutes harassment and instances of this nature will be handled through the Dignity at Work and Study Processes**". We find that the important ingredient for the finding of harassment was the *persistence* of incorrect pronoun misuse. The Respondents refer to both policies in their investigation report and appeal conclusions. We find the Guidance is worded in this way because there is a recognition that people can use incorrect pronouns and it only enters the territory of being harassment if it is done intentionally or persistently. We also find that the First and Second Respondents relied on the fact that CD had implied it was persistent as being the reason that he felt uncomfortable at work. We also note that on 20th March 2023 the Claimant was sent an email by the First Respondent [**185**] informing her that: "**I am investigating a formal complaint of unacceptable behaviour… the specific nature of the complaint is that you have <u>repeatedly</u> and publicly misgendered a colleague, [CD]**".

142. We ask ourselves why it was that the Respondents made a finding of unlawful harassment (at investigation and appeal stages) and conclude that it was because the Claimant <u>persistently</u> used the wrong pronouns. We then ask ourselves whether her persistent pronoun misuse arose in consequence of her disability. We answer that question in the affirmative because it is our finding that the Claimant's dyspraxia affected her short-term memory, meaning it took longer for her to consistently adopt the correct pronouns compared to a neurotypical person. In conclusion, it is our view that the finding of harassment at both stages arose because of the "something arising" from the Claimant's disability.

143. We turn to the question of a defence under 15(1). The Respondents say that the University had a DAWS policy and accompanying procedures in place which are designed to be utilised in response to a complaint raised by a member of staff. They say it was a legitimate aim to apply the policy and the definitions

contained therein to ensure that members of staff felt able to work in an environment free from harassment.

144. The Respondents say the needs of Claimant and the Respondents were balanced in the sense that the Claimant's dyspraxia was taken into account and would have been looked at further if any further procedures had been taken forward. They say that the First and Second Respondents merely recommended that consideration be given to further policies and procedures being employed but ultimately that did not happen. It was not reasonable for the First and Second Respondents to make further enquiries regarding the dyspraxia when this had only been mentioned as a throw away comment, particularly when the Claimant had never mentioned this in the past.

145. We accept that the Respondents have identified a legitimate and non-discriminatory aim. However, we do not accept their submissions that the means of achieving the aim are proportionate.

146. We do not agree that dyspraxia was considered to be a throw away comment for the reasons we have already set out above. We also do not accept that it was appropriate for her dyspraxia to be explored at a later stage if further processes had been implemented. It ought to have been explored at the investigation and then the appeal stage when the Respondents were aware that her disability was or may have been the reason why she had misgendered CD. What is important here is that the DAWS policy allows the Claimant to be subject to temporary measures while the processes are still ongoing. In this case, the Claimant was in various "processes" for over 18 months before it was finally confirmed that no disciplinary action was to be taken. During that period, she was isolated from her peers and then moved away from the position of Co-lead in XR, a position which she coveted. A chain of events was put in place as a result of this process which led to the Claimant's career prospects being severely damaged. We can not ignore the fact that the policy gives far reaching powers to impose temporary measures. We also note that because of delays by the Respondents, nothing was done in the recommended timescales (the investigation and appeal were both outside of recommended guideline times because the University's HR team were busy with other things going on at the time).

147. We note that appeal panel recognised the point at the heart of this case: there were two individuals who had two different protected characteristics and both protected characteristics had to be considered. The appeal panel recognised that there was a duty to make reasonable adjustments to people with disabilities [witness statement of Paul Rowbotham at paragraph 34]. However, they have not gone on to consider what those adjustments ought to have been.

Essentially, they ought to have recognised that "persistently" ought to have been viewed differently if it took someone longer to consistently adopt the correct pronouns because of a disability. There were a number of ways that they could have done this. They could have made an adjustment to the policy to provide the Claimant with "extra time" to adopt the correct pronouns, or they could have decided not to apply the "persistency" criteria at all in her case.

148. There are also lesser measures that could have achieved the same aim without there being a finding of harassment. The most obvious example would have been mediation. We struggle to see why this was not suggested until after the appeal. This whole issue could have been nipped in the bud if the Claimant and CD had sat down and it had been explained to CD that the Claimant had not intended to misgender him and she had a disability which meant that it was going to take her longer before she was consistently using the correct pronouns. By the time mediation was offered, there was already a narrative running through the office that the Claimant was using her disability as a defence and/or had not mentioned it until "later" and we take the view that this will have influenced the willingness of CD to want to engage in mediation at the time it was eventually suggested.

149. Another lesser measure would have been less restrictive working arrangements which did not involve the Claimant being isolated or losing her position as co-lead of the XR project. The Claimant and CD both worked in a hybrid pattern, meaning some days they were at home and other days they were on campus. CD worked part time hours compared to the Claimant who worked full time hours. We can not find any evidence that there was any consideration given to putting a split schedule in place which would have enabled the Claimant and CD to be working on campus on different days. We note that the appeal panel seem to have thought that they were making the Claimant's working environment less restrictive but do not seem to have understood the restrictions that she was actually under. Their recommendation was interpreted by local management to mean that the Claimant should not even be on the same floor as CD. It is our view that the Respondents ought to have implemented less restrictive working arrangements as discussed above, either as an alternative to a finding of harassment or at the very least as less restrictive temporary measures while the processes were ongoing.

150. Another lesser measure would have been not to refer the matter to the next stage in the process in light of the Claimant's disability. Mr Rowbotham said when he gave evidence that the appeal panel's intention was that no further action was taken and that the matter should not proceed to the disciplinary stage. It is unfortunate that the appeal outcome letter does not say that, as it could have saved the Claimant a year of stress over whether she was going to lose her job.

The appeal outcome letter [**469**] instead makes a series of recommendations and says that local management will review the situation "**before further formal proceedings are considered**". It was not until over a year later that the Claimant was told as part of the mediation process that the matter would not proceed to a disciplinary stage. It is our view that the Respondents ought to have determined that the matter ought not proceed to the disciplinary stage in light of the Claimant's disability at the investigation stage and/or at the appeal, either as an alternative to a finding of harassment or at the very least that any finding of harassment was coupled with the recommendation that no further procedures were to be considered.

151. In summary it is our finding that the means of achieving the aim was not proportionate.

152. The claim under section 15 therefore succeeds.

Indirect race discrimination

153. The Respondents accept that they had the PCP identified, namely the internal guidance document on supporting trans staff and students which states "***intentionally or persistently using the incorrect pronoun or trans persons previous name and constitutes harassment".*** They also accept that this PCP was applied to Claimant and that it was applied or would have applied to persons with whom Claimant does not share the characteristic of disability.

154. The Respondents argue that the that Claimant has not adduced any or any cogent evidence to demonstrate that she suffered from short-term memory loss arising from dyspraxia. They also say that she has not proved that disabled people with short-term memory loss are more likely to unintentionally mispronounce recently gendered pronouns. We do not accept these arguments for the reasons we have already given when dealing with this point under the section 15 claim.

155. We find that the PCP put disabled people at a particular disadvantage when compared with people who are not disabled. The Claimant as a person with short term memory problems as a result of her dyspraxia was more likely to persistently get her pronouns incorrect compared to a person who does not have dyspraxia.

156. In the alternative, the Respondents submit that the PCP was a proportionate means of achieving the University's aim to ensure that its staff and students felt able to work and study in an environment free from harassment. They say it was appropriate and reasonably necessary to have the PCP in place and it was

necessary for this to be applied to the Claimant in order to support CD, a trans member of staff. They say the needs of the Claimant were balanced because she was given every opportunity to explain the full context of everything that had happened and yet she did not focus on her dyspraxia. They say that appropriate checks and balances were in place to ensure that all relevant matters were looked at (including the opportunity to appeal). They say the investigation was merely a fact find and Claimant would have been able to explore the relevance of her dyspraxia (if she chose to raise this) if further processes had been implemented.

157. We have already considered these same issues in respect of the section 15 claim. In summary it is our finding that the means of achieving the aim was not proportionate. We refer to paragraphs 146 to 150 above.

158. The claim for indirect discrimination therefore succeeds.

Victimisation

159. We do not accept that the Claimant made a protected act. It is our finding that the Claimant did not raise there being any racist component to the job cascade, either expressly (which she accepts) or by implication (by her referencing two obviously non-white candidates who had missed out or otherwise). We make this finding primarily because the Claimant's account is not supported by the contemporaneous documents. We refer to the Teams message with the First Respondent on 6th February 2023 [**166.1**]; the notes she prepared of her discussion with the First Respondent [**231 – 251**] which were shared with the Second Respondent on 3rd April 2023 [**249**]; and the notes of the meeting on 4th April 2023 [**273**]. None of these documents reference a racist element to the job cascade.

160. We do not doubt that the Claimant believes that the closed recruitment process disadvantaged BAME candidates. We also do not doubt that the Claimant, as an individual of mixed-race heritage, will have been particularly alert to this as potential discrimination. We note that the First Respondent himself accepted that one of the implications of not having open recruitment policies is the potential to disadvantage BAME candidates. However, we do not find that the Claimant raised the discrimination angle as a concern in this walk and talk nor do we accept that it could be implied from anything she said that she was raising discrimination as a concern. We broadly accept the First Respondent's account that the Claimant's focus was on the ability of Rebecca Oldfield, who was being promoted up 2 grades, to carry out her newly appointed role.

161. The claim for victimisation therefore fails.

Time Limits

162. The Claimant's claim was presented on 17th January 2024 and she entered into ACAS early conciliation for 2 days (from 13th to 15th December 2023).

163. The Respondents say that the complaints at 1.1.1 – 1.1.8, 2.2.1, 2.2.2 and 4.2.1 - 4.2.7 (except for the appeal element) are prima facie out of time. They say that the First Respondent's last involvement with the Claimant in relation to any alleged act occurred on 17th August 2023 and therefore even if the allegations are capable of constituting an "act extending over a period" such that time begins to run from the end of that period, the Claimant is still out of time by 2 months insofar as the First and Second Respondents are concerned.

164. We note at this point that we have dismissed all the complaints of harassment (including the allegations at 1.1.1 – 1.1.8), the complaint at 2.2.1 (that the respondents placed the Claimant into the formal process under the respondent's Dignity at Work and Study procedure, from 16 February 2023 following a complaint by employee CD) and all of the complaints of victimisation (including the complaints at 4.2.1 - 4.2.7) in any event.

165. It is therefore only allegation 2.2.2 that has succeeded and which the Respondents say is out of time. This is the allegation that there was a finding under the respondents' formal DAWS procedure, in the final investigation report received 30 March 2023, that the Claimant had unlawfully harassed the complainant. We are satisfied that the allegation at 2.2.2 is part of a continued state of affairs extending over a period of time. We make this finding because the complaint stems from the same policy and its implementation, the investigation, the temporary measures justified under the policy, and then as followed up on the appeal. There are no gaps in the timeline, and this is an ongoing state of affairs. We also note the same key people were involved, which we note is relevant but not conclusive. We also note that the Claimant has remained an employee of the University which again is relevant but not conclusive.

Personal Liability of First and Second Respondents

166. Miss Barry argues that there cannot be any personal liability on the part of the First and Second Respondents in respect of the indirect disability claim because no discrimination has occurred because of the conduct of individual

respondents. She says it arises because the application of University's PCP, namely the internal guidance document on supporting trans staff and students. Although that has been applied by the First and Second Respondents, she submits this was on the basis that they believed the policy did not contravene the Equality Act and it was reasonable for the First and Second Respondents to believe that to be the case (in accordance with s110(3) EqA).

167. In relation to the s15 complaint is concerned, she argues that the First and Second Respondents were simply applying the University's DAWS procedure, at CD's request, and therefore reasonably believed that this would not amount to an infringement of the Equality Act. Further, she argues that the First and Second Respondents applied the definition of harassment contained within the University's DAWS procedure and reasonably believed that this would not amount to an infringement of the Equality Act.

168. We do not accept these submissions. This is not a case where the First and Second Respondents were simply applying the University's DAWS procedure and definitions. We find that they were aware that the Claimant was raising her dyspraxia as the likely reason why she misgendered CD and they chose to ignore that. We find that they did not conduct a fair or impartial investigation and then provided incorrect information to the appeal panel. When the Claimant challenged the investigation, they punished her by imposing further disproportionate measures including removing her from the XR co-lead. They could have made adjustments or imposed other lesser measures that we have identified and chose not to, preferring to perpetuate a narrative to the Claimant's colleagues that she did not mention her disability until "later" and/or that the reference to her dyspraxia was a throw away comment and/or that she was otherwise using her disability as a defence. We find that they are personally liable for both the indirect discrimination claim and the section 15 claim as they have acted in such a way that amounts to a breach of the Equality Act 2010 and we do not accept that they have been led to believe by their employer that they have done nothing wrong.

Summary

169. In conclusion, the complaints of discrimination arising from disability pursuant to section 15 of the Equality Act 2010 and indirect disability discrimination pursuant to section 19 of the Equality Act 2010 are well founded and succeed.

170. The complaints of victimisation pursuant to section 27 of the Equality Act 2010 and harassment pursuant to section 26 of the Equality Act 2010 fail and are dismissed.

171. The claim will now be listed for a further hearing to determine remedy. The parties are invited to provide their dates of availability for a 1-day remedy hearing for the period from January-March 2026.

Employment Judge Thompson

Date 10th November 2025

JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 December 2025

FOR THE TRIBUNAL OFFICE

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