Neutral Citation Number: [2026] EAT 132

Case No: EA-2023-001459-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 September 2026

Before:

HER HONOUR JUDGE TUCKER

- -

Between:

NSL LIMITED

Appellant

- and –

MR DEAN BEAN

Respondent

- -
- -

Lydia Seymour KC and Emman Bhangu (instructed by AfterAthena Limited) for the **Appellant**
Anna Loutfi (instructed by Pattinson & Brewer Solicitors) for the **Respondent**

Hearing date:14 May 2026

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JUDGMENT

SUMMARY

Unfair dismissal; disability discrimination

The Claimant, a long-serving Civil Enforcement Officer with severe dyslexia, was dismissed for gross misconduct after the Respondent concluded that he had falsely recorded his whereabouts during part of a patrol on 19 April 2019. The allegation depended principally upon data from his handheld device, which the Claimant maintained was unreliable. During the investigation and disciplinary process, he complained that the allegations and technical material were unclear, that appropriate support had not been provided for his disability, and that he had been required to sign handwritten investigation notes which he could not read or understand. He alleged that the imposition of that requirement amounted to a failure to make reasonable adjustments and indirect disability discrimination. He also alleged that the requirement for him to sign the notes amounted to an act of harassment, and that a comment made in the outcome of his grievance that the notes were very short also amounted to harassment.

By a majority, the Tribunal found that the Claimant was unfairly dismissed, but that he had been guilty of the misconduct alleged and a reduction was made to the compensatory award of 100%. The Tribunal declined to make any reduction to the basic award. The Tribunal upheld the claim of indirect discrimination, failure to make reasonable adjustments and both allegations of harassment.

The Appellant appealed against the Employment Tribunal's findings of unfair dismissal, indirect disability discrimination, failure to make reasonable adjustments and disability-related harassment.

The Appellant contended that in determining that the dismissal was unfair, the Tribunal failed to consider the appeal process. It contended that the failure to reduce the basic award was an error because the Tribunal focused on the conduct of the Respondent, not the Claimant as required by the statute. In respect of the discrimination claims, the Appellant contended that the decision to address the claims of failure to make a reasonable adjustment and the indirect discrimination claims together led to error on the part of the Tribunal and that the Tribunal erred in its analysis regarding harassment.

The appeal against the unfair-dismissal decision was dismissed: read fairly and as a whole, the

Tribunal had concluded that the lack of clarity in the allegations and technical evidence, which persisted even at the hearing, rendered the dismissal unfair notwithstanding the appeal process. The inevitability of dismissal was properly reflected by a 100% reduction in the compensatory award. The Tribunal had also been entitled not to reduce the basic award. Again, read fairly, its focus was on the conduct of the complainant. Its finding of failure to make reasonable adjustments was upheld: the expectation that the Claimant sign investigation notes before he could read and, implicitly therefore, understand them, placed him at a substantial disadvantage compared to non disabled comparators, and, allowing him to take the note away for review was a sufficiently identified reasonable step. The appeal was, however, allowed in relation to indirect discrimination. The Tribunal had failed to determine group disadvantage and had conflated the distinct questions of justification under section 19 and the requirements of what was reasonable by way of reasonable adjustment under section 20. The appeal was also allowed in respect of the harassment findings. The Tribunal had not adequately explained how the relevant unwanted conduct related to disability, or made the findings required as to the proscribed effect under section 26. Grounds 1, 2, 3, 5 and 6 were dismissed; Grounds 7, 8, 9 and 10 were allowed. Disposal was reserved pending further submissions.

HER HONOUR JUDGE TUCKER:

1. This is an appeal by NSL Limited ("NSL"), the Respondent before the Tribunal, against the Reserved Judgment and Reasons of the Reading Employment Tribunal, Employment Judge Anstis and Lay Members Ms C Baggs and Mr J Appleton ("the Employment Tribunal"). The Judgment was sent to the parties on 6 November 2023. I refer to the parties to the appeal as the Respondent and Claimant, as they were before the Employment Tribunal.

2. The Employment Tribunal upheld the Claimant's claims of unfair dismissal, indirect disability discrimination, failure to make reasonable adjustments, and disability-related harassment. In respect of remedy for the claim of unfair dismissal, the Tribunal made a full basic award for unfair dismissal but reduced the compensatory award by 100% by reason of the Claimant's conduct.

3. Nine grounds of appeal were permitted to proceed to a full appeal hearing. Further written submissions were received from the Respondent after the hearing regarding the decision in *Ryan v SW Ambulance Service* referred to below. It was clarified in early August 2026 that the Claimant did not wish to submit any further written submissions. The Grounds of Appeal concern first, the fairness of the dismissal process, and whether the Tribunal erred by failing to consider the appeal process; secondly, whether the Tribunal erred in not making any reduction to the basic award; thirdly, the Tribunal's approach to the pleaded PCPs, disadvantage, reasonable adjustments and justification, the Respondent contending that by considering the claim of indirect discrimination and reasonable adjustments together, the Tribunal fell into error; and fourthly, the Tribunal's findings of disability-related harassment. I set out each ground and the parties' submissions in more detail below.

The facts

4. The Claimant was employed as a Civil Enforcement Officer ("CEO"), formerly described as a parking warden. He began employment with the Royal Borough of Windsor and Maidenhead on 2

November 2007. His employment transferred to the Respondent under TUPE on 1 December 2017, when the Respondent took over the Council's parking-enforcement contract. The Respondent summarily dismissed him on 26 June 2019.

5. The Claimant has dyslexia, described as severe. Shortly before the transfer of his employment to the Respondent, he met John Evans of the Respondent to discuss its consequences. His wife and trade union representative also attended that meeting. The note recorded: "Dyslexia – may take longer but once I learn then I do". The Respondent accepted that the Claimant was disabled and that it knew of his disability from the outset. The Tribunal recorded that Mr Evans did not consider further enquiry regarding the Claimant's disability to be necessary because the Claimant was good at his job and his dyslexia did not appear to affect his day-to-day work.

6. Prior to the events which led to his dismissal, the Claimant had not been subject to disciplinary proceedings and was regarded by the Respondent as good at his job. The Claimant was ultimately dismissed for conduct, the Respondent concluding that he had falsified his whereabouts whilst working on 19 April 2019.

The events of the 19th April 2019

7. On Good Friday, 19 April 2019, the Claimant was assigned to work in Inner Windsor. He reported to the depot for the daily briefing and was then driven to the operational base at the Coach Park. CEOs had designated patrol routes but were not required to follow them in a fixed order or to be at a particular place at a particular time. The Claimant could decide when to take his breaks, save that his lunch break had to end at least 90 minutes before the end of his shift.

8. Each CEO used a Chipside handheld device ("the HH"). The CEO was required to manually record entry to and exit from each street or enforcement area they went to; observations made of irregularly parked vehicles; penalty charge notices they issued; and, breaks they took. The HH

transmitted live data and also generated GPS location data. The Claimant understood the rules governing the HH's use and had used such a device for several years.

9. The Claimant's HH crashed and rebooted four times during the morning. His log recorded a lunch break from 13:35 to 14:05; Alma Road from 14:09 to 14:11; Ward Royal from 14:11 to 14:21; Alma Road again from 14:21 to 14:28; and his return to the Coach Park at 14:28, where he remained until the end of his shift at 15:00.

10. The central factual dispute in the claim before the Tribunal concerned the Claimant's whereabouts between approximately 14:09 and 14:28. His manual entries showed him walking from the Coach Park along Alma Road to Ward Royal and back. The Respondent's case was that the GPS data showed that he had remained in the Coach Park rest area and the Claimant had falsely recorded his whereabouts, a practice described as "ghost logging". The Claimant maintained that he had carried out the patrol and that the GPS data for that period was unreliable. He accepted that, if he had ghost logged, that could amount to falsification of records, bring the Respondent into disrepute with its client and justify dismissal.

11. The Tribunal heard a significant amount of evidence about how the HH recorded a CEO's location and how the GPS did so, the GPS display using purple dots to record sampled automatic locations, green pins to record the location attributed to the device when manual entries were made, and blue lines crudely joining recorded points. The Tribunal found that the system and its presentation caused considerable confusion.

The Respondent's investigation

12. Some days after the 19th April 2019 (on 23rd April 2019), the Claimant was spoken to about taking lunch too late in the day. A file note recorded that he needed to plan his day and breaks better. Later, on 26 April 2019 (and without the Claimant being aware of this) a supervisor attempted to recreate his afternoon patrol. The Tribunal recorded that it was not given an explanation for why that

took place or what triggered the enquiry.

13. The first investigation meeting took place on 30 April 2019. The Tribunal accepted the Claimant's evidence that he had been called into a room for what he thought was a chat about his lunch break; that he asked to be accompanied because of his dyslexia but was told this was unnecessary; and that he had not been told that he was suspected of idling or falsifying records. The meeting lasted about 48 minutes, but the substantive handwritten notes comprised two pages. At the end, the Claimant was told to read and sign them. He said that handwritten text looked to him like "squiggles and lines and white space"; that his stress was high; and that he said, "if that's what I said, fine", before signing, but signed the notes so that he could leave. The Tribunal accepted that account.

14. The Claimant was then suspended. The letter confirming suspension alleged deliberate falsification of records or activities on his tour log, bringing the company into serious disrepute and failure to carry out simple working instructions. The Tribunal found that the letter did not identify which entries were challenged or why they were thought to have been falsified. It also recorded that no witness directly involved in the local contract gave evidence explaining what had prompted the investigation, although another employee had been dismissed for the same offence at the same place and on the same day, and another had been warned for a similar offence.

15. A second investigation meeting took place on 8 May 2019. The Tribunal accepted the Claimant's account that his request for a postponement so that his trade union representative could attend was refused; that his wife, whom he regarded as his disability advocate, was not permitted to accompany him; and that a work colleague was substituted to accompany him at short notice. During the meeting, the Respondent's manager put to him that the GPS data showed him in the Coach Park at a time when his manual entries placed him in Alma Road and Ward Royal. The Claimant maintained that he had walked to Ward Royal, made an observation and returned. The Tribunal found that the essence of the Respondent's case was put to the Claimant at this meeting. It also accepted his

evidence that he was again asked to sign the notes before he could leave.

The disciplinary and grievance process

16. The Claimant was invited to a disciplinary hearing. The invitation repeated the three general allegations and enclosed his patrol log, the investigation notes, GPS and HH entries, the supervisor's GPS entries and the disciplinary policy. The Tribunal found that GPS material consisted of screenshots from an apparently interactive online system and that there was no coherent way of reproducing in a single screenshot of all that was needed to understand events at a particular time; the side-bar and map did not necessarily correspond; overlapping pins and labels obscured the critical image; and the quality of reproduction was poor. The electronic documents before the Tribunal were in colour, but those delivered to the Claimant were in black and white, making colour-coded information impossible to decode. Further, they were supplied without a key or explanation. The Tribunal concluded that, without explanation, the material was incomprehensible. It recorded in its Reasons that even during the Tribunal hearing, considerable explanation was required and NSL's disciplinary manager had spent "hours" using the live system to understand it, an opportunity which had not been available to the Claimant or his representative.

17. The disciplinary hearing took place on 21 May 2019 and was chaired by Roisin Mallen, a manager from outside the Windsor and Maidenhead contract. The Claimant was accompanied by his trade union representative. Ms Mallen read out the disputed entries and worked through the Claimant's account and the GPS data. The Claimant maintained that his entries were correct and that the HH had crashed four times. His representative submitted that there was no proof of deliberate falsification. At the conclusion of the hearing, the Claimant's trade union representative asked to take the notes away. Ms Mallen indicated that a copy would be provided and that any proposed amendment should be raised promptly, although the Tribunal understood that the notes were not in fact provided.

18. On the same day, the Claimant raised a grievance alleging disability discrimination and failure

to make reasonable adjustments. He complained that he had not been permitted to be accompanied by his chosen companion and that he had been required to sign documents which he could not read or understand without support. A second grievance followed on 6 June 2019. Both were heard by John Evans on 14 June 2019 and dismissed by letter dated 21 June 2019. The outcome letter stated, in addressing the need to sign the notes, that the material was "very short, just over a couple of pages".

19. The disciplinary outcome was deferred pending the grievance decision. By letter dated 26 June 2019, Ms Mallen found that the Claimant's entries and patrols between 14:09 and 14:28 did not match; that he had logged locations he had not visited and recorded an observation at a location where he had not been; and that this caused a complete breakdown in trust and confidence. She found the Claimant guilty of gross misconduct and dismissed him without notice.

20. The Claimant appealed immediately and submitted detailed grounds on 4 July 2019. His disciplinary appeal was heard by Brian Knowles on 31 July 2019. Mr Knowles carried out further enquiries, including into the reliability of the HH, low battery power, the recreated patrol and potential witnesses, and held a further meeting with the Claimant on 5 November 2019. The appeal was dismissed by letter dated 28 November 2019. The Tribunal stated in its decision that "nothing in this case seems to depend on the disciplinary appeal" (paragraph 81 of the Reasons).

The Employment Tribunal's decision

21. The Employment Tribunal heard evidence and submissions over five days, from 12 to 15 and on 18 September 2023, and deliberated in chambers on 19 September and 11 and 20 October 2023. Its Reserved Judgment was sent to the parties on 6 November 2023. The Tribunal held that the Claimant had been unfairly dismissed; that his basic award was not to be reduced for contributory fault; that the Respondent had subjected him to indirect disability discrimination; that it had failed to make reasonable adjustments; and that it had subjected him to disability-related harassment. By a majority, it held that the compensatory award for unfair dismissal should be reduced by 100%; that

the Claimant had not been wrongfully dismissed; and that he had not been subjected to discrimination arising from disability.

22. In respect of the claim for wrongful dismissal, as noted above, the central factual issue was whether the Respondent had proved, on the balance of probabilities, that the Claimant was in the Coach Park during the disputed period. The majority preferred the GPS location data to the Claimant's oral evidence. It acknowledged that the HH had rebooted during the morning and was later sent for repair because PCNs were not downloading, but, considered that those matters did not cast doubt upon the GPS measurements. The HH had accurately recorded the Claimant's location for the rest of the day, and the positions recorded during the disputed period showed a range of locations within a small area of the Coach Park rather than repetition of a single last-known position. The majority concluded that the Claimant had recorded false location information, thereby committing a repudiatory breach of contract.

23. The minority member considered that the Claimant's dismissal was wrongful and placed weight upon the Claimant's length of service and clean record, the problems exhibited by the particular HH earlier that day, its subsequent defect, and the limited value of attempts to recreate the route using other devices when the Claimant's case was that his own device was unreliable. The minority considered that the Respondent had not proved that the GPS data should be preferred to the Claimant's account.

24. The Tribunal recorded that the evidence was capable of the interpretation adopted by either side of the panel and that the division in the decision reflected the difficulty in determining the issue.

25. In respect of the claim of disability related discrimination contrary to section 15 Equality Act 2010 (EqA 2010) claim, the "something arising" from disability asserted by the Claimant was the Claimant's inability readily to adapt to changes in working practices and his difficulties with time management; the alleged unfavourable treatment was dismissal. The Tribunal held that the timing of

his lunch break had been a factor in his suspension and investigation. The majority, however, found that by the time of dismissal this matter had been entirely overshadowed by the question about whether he had honestly recorded his location. It, therefore, did not materially influence the dismissal and the majority rejected the claim. The minority considered that failure to follow the instruction about lunch remained a material element of the dismissal and was not justified by the legitimate aims advanced.

26. The Tribunal considered the claim of failure to make a reasonable adjustment and the claim of indirect discrimination together. It identified two material PCPs: first, not allowing employees to be accompanied at investigation meetings by a companion of their choosing; and secondly, the Respondent's requirement for investigation meeting notes to be signed at the end of the meeting. It declined to take forward a third alleged PCP, the disciplinary policy, because it did not understand how the policy as a whole was said to disadvantage the Claimant. The Tribunal stated:

"117. The first PCP is accepted by the respondent. The second is not, although the respondent accepts an alternative PCP for notes to be signed by or on his behalf at some point.

118. The respondent's acceptance of a PCP of having meeting notes signed by or on behalf of the employee is inevitable given that that is how the form used for the notes is set up. The 'record of investigatory interview' form contains this on its front page: 'I have read over what has been written and I have been allowed to correct or add anything I wish. This is a true and correct record and I have signed at the foot of each page to signify this.' Towards the middle of the front page the following appears: 'If you agree it is a correct and true record you will be asked to sign your name at the foot of each page.' The only issue is whether it is required for the signature to be at the end of the meeting or whether it can be later.

119. It is clear to us that it was the respondent's expectation that meeting notes would be signed by the employee at the end of the investigation meeting. That is what the claimant was asked to do at the end of every meeting except when his union representative specifically requested that the meeting notes were provided for signature after the meeting. It is telling that although this was apparently agreed, the notes in question were not provided.

120. Framing this PCP as a 'requirement' is rather difficult as it suggests that the respondent is in a position to enforce signature at the end of the meeting which, of course, it is not. It is, however, clear that there was an expectation that the notes would be signed at the end of the meeting. That is what was asked of the claimant and the supposed deviation from that requirement was never completed by the respondent. An 'expectation' is sufficient to establish a PCP, and we find that there was a PCP that employees should sign meeting notes at the end of the meeting."

27. The Tribunal found that both PCPs placed the Claimant at a substantial disadvantage. His

dyslexia meant that he could not read the handwritten investigation notes to the extent that a person without dyslexia could, and he could not read the notes which he was expected to sign at the conclusion of the meetings. It also found that he required a companion who understood the limitations caused by his disability and could both read documents and interpret or explain questions and matters which he might not immediately understand. A colleague acting merely as a reader did not remove that disadvantage; his wife and trade union representative were given as examples of persons able to provide the necessary assistance.

28. The Tribunal stated:

122. The PCPs both amounted to potential indirect disability discrimination (subject to questions of justification) and gave rise to an obligation to make reasonable adjustments. The respondent has always known of his disability and its effects so we do not see that any question of a lack of knowledge of the disability arises.

123. The question on indirect discrimination then becomes whether the respondent has justified its PCPs by reference to its legitimate aim, said to be 'a fair, consistent and effective approach in dealing with misconduct issues'.

124. The analysis of this is essentially the same for both PCPs.

125. As regards the first PCP – being accompanied by a companion of the individual's choosing, we do not see how allowing a companion of someone's choosing compromises a fair or effective approach in dealing with misconduct issues. It may, of course, compromise a consistent approach if allowance is made for disabled employees that is not made for others, but a 'consistent approach' that does not allow for disability is anathema to the regime of disability discrimination, and cannot be said to be a legitimate aim. The nature of disability discrimination law is that in some cases disabled people will be treated differently to those who are not disabled, so having a 'consistent approach' cannot be said to justify indirect discrimination in this case.

126. Similarly, allowing an individual to take the investigation meeting notes away for review before signature can hardly be said to compromise fairness or effectiveness an effective approach to dealing with misconduct. We heard no evidence at all from the respondent's witnesses about how delayed signature of the investigation notes may be unfair or give rise to a less effective approach to dealing with misconduct. As with the first PCP, 'consistency' cannot properly be argued as a legitimate aim where the disability discrimination regime specifically envisages different treatment being required for people who have disabilities.
127. The two PCPs we have found both amount to indirect disability discrimination.

128. The respondent did not make any adjustments to these PCPs. In the list of issues the respondent relies on Schedule 8 para 20(1) of the Equality Act 2010: 'A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know … that an interested disabled person has a disability and is likely to be placed at a disadvantage …'

129. We have already established that the respondent knew of the claimant's disability so the only possible argument is that it did not know and could not reasonably be expected to know that his

disability would place him at a disadvantage. This cannot possibly arise on the question of signature of the notes, since difficulties in reading (and possibly writing) are the best known symptoms of dyslexia. It may be less obvious that there are also difficulties of understanding that may require assistance from a person familiar with the claimant's difficulties, but we note that the claimant was accompanied in his original transfer meeting by his wife, which would have been unusual, and we consider that the respondent could reasonably have been expected to know that he needed assistance from someone who knew of his difficulties during these meetings.

130. The respondent failed to comply with its duty to make reasonable adjustments in respect of the two PCPs we have identified."

29. In respect of the claims of harassment, the Tribunal upheld two allegations. First, the allegation that the Respondent had insisted that the Claimant sign the investigation notes at the end of the meetings on 30 April and 8 May 2019. On the facts, the Tribunal preferred the Claimant's evidence to the Respondent's. If found that there was insistence that the meeting notes were signed (paragraph 132, read with its heading). It found that the conduct was unwanted and related to his disability because it concerned his reading and understanding of the notes. It stated:

> **133. The respondent says that the individuals who required this "*were following what they thought to be the respondent's practice in relation to notes*", but following practice does not mean that it does not amount to harassment. In the list of issues the respondent says that this was not unwanted conduct and that it did not relate to the protected characteristic of disability. The respondent's submissions conclude that "*this does not meet the standard of harassment*".**
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> **134. It is clear from the claimant's evidence that this was unwanted conduct, and matters in relation to reading and understanding notes clearly "related to" the claimant's disability. The respondent's defence to this is not made out and we find that this did amount to disability-related harassment.**

This must be read together with the following passage from paragraphs 37 and 57 of the Reasons where the Tribunal set out the Claimant's evidence regarding the first and second investigatory meetings which it accepted:

> **37. … "*At the end of the meeting I was made to sign documents that I could not read or challenge which were relied upon during the disciplinary process.* [The supervisor] *told me to read the notes and sign them. I really struggle to read anything handwritten at the best of time and the marks on the page just looked like squiggles and lines and white space. My stress levels were high, and his insistence that I read them was making me anxious, so I said "if that's what I said, fine" and signed the notes so I could leave the room."***
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> **"57. As regards the end of the interview, the claimant says (and we accept) "*Again, I was made to sign the meeting notes before I could leave the meeting.*"**

30. The Tribunal also upheld the complaint concerning Mr Evans's statement in the grievance outcome letter that the notes were "very short just over a couple of pages". It held that a factual comment could amount to harassment and that the comment related to disability because it concerned the Claimant's ability to read. Having considered the statutory threshold and the importance of context, it concluded that, in a grievance alleging failure to accommodate his inability to read and understand documents without support, the comment had the proscribed effect and went beyond a trivial act or unfortunate phrase. It stated:

> **135. The respondent accepts, as it has to, that this was said in the letter. The respondent Also accepts that it was unwanted conduct. In the list of issues the respondents only further observation on this is to say that, *"this was a factual comment*".**
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> **136. Being a factual comment does not mean that it was not also harassment. There is no requirement that in order to be harassment a comment has to be untrue, or a matter of opinion. Many true or factual comments might also amount to harassment. It depends on whether it relates to the claimant's disability (which does not seemed to be in dispute, and which it clearly is given that it relates to his ability to read) and, beyond that, whether it has the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for claimant.**
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> **137. The respondent accepts in its closing submissions that this comment did *"have the unintended consequence of making the claimant feel bad about his disability".* The respondent appears to accept in principle that the comment would meet the definition of harassment but for the degree of its impact. The respondent says that *"it is not accepted that this comment meets the high bar of having the purpose or effect of violating the claimant's dignity*".**
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> **138. This derives from the respondents position that Hughes emphasises the strength of words such as "violating" or "intimidating".**
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> **139. We have considered the Hughes case and note the reliance there on Elias LJ's decision in Grant v HM Land Registry [2011] EWCA Civ 769 that "*tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment..*" We also note the reliance on Underhill P's decision in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 that:**
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>> ***"Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that at any offence was unintended. While it is very important that employers and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."***
>
> **140. A key element of the decision in Hughes is that "*context [is] very important in determining***

the question of environment and effect".

> **141. We will apply the words of the statute to the comment in question, bearing in mind that what is required is more than a, "trivial act causing minor upset."**
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> **142. The context is that this was said in the outcome of a grievance where the claimant had complained about a failure to accommodate or make adjustments for his disability, including a *"requirement for me to sign documents that I could not read or have the capacity to understand and challenge without support".***
>
> **143. In that context, we find that a comment in the outcome letter that the document the claimant had to sign was "very short" does amount to unlawful harassment. It did relate to the claimant's disability, since it concerned his ability to read the document. It may not have been intended to violate the claimant's dignity or create a hostile environment for him but, taking into account section 26(4) that was its effect, and we find that it went beyond being "trivial" or simply an "unfortunate phrase".**

31. The Tribunal rejected the third allegation, concerning the statement in the grievance appeal letter that the Claimant had asked "do I need to bring someone in", rather than saying "I require someone with me". It held that the grievance appeal manager was entitled to take the words used at face value and that, notwithstanding the Claimant's perception, it was not reasonable for the statement to have the proscribed effect.

32. The Tribunal was divided on the question of fairness of the dismissal. It made a preliminary observation as follows:

> **"147. We recognise that a distinction between substantive and procedural unfairness is not always helpful. The question for the tribunal is whether the dismissal was unfair, not whether it was substantively unfair or procedurally unfair. Nevertheless, it is a distinction adopted by the parties in the list of issues, and we will consider unfairness by reference to that list of issues."**

The majority considered the investigation sufficient and dismissal within the range of reasonable responses; the minority considered that insufficient investigation had been undertaken into alternative evidence of the Claimant's whereabouts and would have found substantive unfairness. The Tribunal stated:

> **"156. These are the matters said to amount to procedural unfairness:**
>
> **'a. The Respondent failed to set out the detail of the allegations against him prior to the disciplinary hearing;**
> **b. Although the Respondent provided GPS print outs prior to the dismissal hearing, they did not make sense without the key which was only provided by the Respondent in the dismissal**

letter;
c. The Respondent failed to share new evidence they had apparently obtained with the Claimant whilst relying upon the same in dismissing him;
d. The Respondent failed to reasonably make further enquiries regarding the Claimant's health, including seeking an up-to-date medical report regarding such;
e. The Respondent failed to explore alternative options to dismissal.'

157. The tribunal is unanimous that the claimant's dismissal was unfair for the reasons set out below.

158. Points (a) and (b) are the key points here. There are clear deficiencies in the way the respondent set out the allegations and the evidence ahead of the disciplinary hearing. The disciplinary invitation letter set out the allegations as being:

'• Deliberate Falsification of records/activities on your Tour report Log dated 19th April 2019
• Bringing the company into serious disrepute
• Failure to carry out simple working instructions'

159. The first allegation does contain some specifics, but it is not clear from this that the only period in issue is the twenty minute period in the afternoon.

160. The disciplinary invitation letter was accompanied by the black and white print outs from the Chipside system that we have previously referred to.
161. No key or description of what these were supposed to show was provided to the claimant in writing until after his dismissal. We have explained the difficulty that the tribunal had in understanding these. As described, this is partly inherent with trying to capture an online system in paper form, but partly because the respondent made no real effort prior to his dismissal to present this to the claimant in any sort of comprehensible written form.

162. This is, in our unanimous view, sufficient to render the claimant's dismissal unfair. The lack of clarity in disciplinary allegations and the evidence may not be so significant in other cases, but it was of clear significance in this case where the investigation steps appear to have been dealt with on a relatively informal basis without (as described above) any necessary support or accommodations made for the claimant.

163. Points (c)-(d) are less obviously matters of unfairness. The 'new evidence' appears to be a reference to the re-run of the claimant's route carried out by Mrs Mallen, but in circumstances were someone conducts follow-up work after a disciplinary hearing it is not always necessary to give the employee an opportunity to comment on that work. For the majority (although not for the minority) a medical report was not required, as the claimant's disability did not play a part in his dismissal.

164. On point (e), although the majority have found that the claimant's actions did amount to gross misconduct and justified dismissal that is not to say that the respondent had no alternative to dismissal in this case. Mrs Mallen was questioned about what (if any) mitigation she had considered, but she could not identify any mitigation. Plainly the claimant's long history of good service ought to have been taken into account, and it seems to us that the respondent did not explore alternative options to dismissal. This contributes to the unfairness of the dismissal, but only to a limited extent as the majority consider that dismissal was, in any event, within the range of reasonable responses."

33. On Polkey, the majority accepted that the procedural unfairness was serious and sufficient to make the dismissal unfair. It found, however, that Ms Mallen had worked through the Chipside/HH

material with the Claimant at the disciplinary hearing, so that by dismissal he understood the evidence and the central dispute. The majority further found that, although an alternative sanction should have been considered, dismissal for the misconduct was inevitable, particularly given the Respondent's need to protect its reputation and integrity with the Council. It therefore reduced the compensatory award by 100%:

"172. The Polkey rule would not apply to the claimant's basic award. For that, we have to consider whether 'any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce … the amount of the basic award to any extent …'.

173. The majority have made clear that they consider that the claimant had committed gross misconduct, but are wary that in the light of the 100% reduction in the compensatory award any reduction in the basic award would run the risk that the unfairness of the dismissal was not reflected in an appropriate award of compensation. Accordingly, while acknowledging the claimant's misconduct, the majority consider that it would not be just and equitable to make any reduction to the basic award. The minority concurs in this view, although as set out above that is for different reasons, on the basis that the claimant has not committed any misconduct."

121. In both cases we find that the PCPs put the claimant at a substantial disadvantage. Most obviously, his dyslexia meant that he was not able to read the notes to the extent that someone without dyslexia could. That was particularly so with handwritten notes such as were used in the investigation meetings. We accept that he could not read the notes that he was expected to sign at the end of the investigation meetings. Expecting him to sign them at the end of the meetings put him at a substantial disadvantage. Beyond that, his dyslexia meant that he needed someone to accompany him to formal meetings such as these who understood the limitations his disability placed on him, and who could not only read documents for him but also interpret and explain questions and other matters he may not immediately understand. Examples of such people are his wife and his trade union representative, but this disadvantage was not alleviated simply by the provision of a work colleague who could accompany him and act as a reader (such as happened in his final investigation meeting).

129. We have already established that the respondent knew of the claimant's disability so the only possible argument is that it did not know and could not reasonably be expected to know that his disability would place him at a disadvantage. This cannot possibly arise on the question of signature of the notes, since difficulties in reading (and possibly writing) are the best known symptoms of dyslexia. It may be less obvious that there are also difficulties of understanding that may require assistance from a person familiar with the claimant's difficulties, but we note that the claimant was accompanied in his original transfer meeting by his wife, which would have been unusual, and we consider that the respondent could reasonably have been expected to know that he needed assistance from someone who knew of his difficulties during these meetings.

The Grounds of appeal and the parties' submissions

Ground 1: Failure to take account of the appeal when determining the fairness of dismissal

34. By Ground 1 the Respondent contended that in determining that the Claimant was unfairly

dismissed, the Tribunal erred by failing to consider, or sufficiently consider, the appeal process and its ability to remedy any procedural shortcomings in the decision to dismiss. This, it was submitted, was particularly important because the Tribunal concluded that the dismissal was unfair for three specific reasons: first, the Respondent had failed to properly set out the detail of the allegations which the Claimant faced (paragraphs 158-9 and 162 of the Judgment); secondly, the Respondent had only provided the key to the GPS print outs so that they could be understood properly *after* the decision to dismiss was made (para. 160-2 of the Judgment); and, thirdly, because the Respondent failed to explore alternatives to dismissal. It was submitted that the Tribunal was required, in considering whether the dismissal was fair or unfair to consider the substance of the disciplinary process as a whole: **Taylor v OCS Group Ltd** [2006] ICR 1602. It was submitted that in error, and breach of that requirement, there was, in fact, no analysis of the appeal process at all within the Tribunal's decision, the only reference to it being at paragraph 81 of the Reasons, set out above at the end of paragraph 22.

35. It was submitted by the Respondent that the (purely) procedural shortcomings within the Respondent's process identified by the Tribunal were capable of being remedied at appeal, which took place by way of reconsideration. By that stage, the Claimant knew the detail of the evidence, had been given a key to the GPS material, and mitigation and alternatives to dismissal had been considered.

36. On behalf of the Claimant it was submitted that, on a fair reading, whilst that which the Tribunal stated was concise, it was clear that the Tribunal had considered the appeal, as evidenced by its reference to it at paragraph 81 of the Respondent. It was submitted that, in context, it was clear that the Tribunal found that nothing depended on, or was altered by the appeal, i.e., that it had not remedied the unfairness. It was submitted that the appeal did not materially clarify the allegations or the technical evidence; the black-and-white maps remained difficult to understand, with or without a key. The Claimant submitted that the Tribunal assessed the process as a whole and was entitled to

conclude that the defects remained sufficient to render the dismissal unfair.

Ground 2: Assessment of the basic award

37. Ground 2 contends that the Tribunal erred in law when deciding not to reduce the basic award under section 122(2) ERA 1996.

38. The Respondent submitted that s.122(2) of the ERA 1996 requires the Tribunal to consider the conduct of the complainant but that, in error, in this case the Tribunal took an irrelevant consideration into account, namely, that if it were to make a reduction to the basic award, there would not be appropriate recognition of the Respondent's responsibility for the procedural failings it had identified. Relying upon **Parker Foundry Ltd v Slack** [1992] ICR 302, the Respondent drew attention to the significantly relevant decision of the majority that the Claimant had been guilty of gross misconduct, that dismissal was inevitable and that there were grounds for a 100 per cent reduction of the compensatory award.

39. The Claimant submitted that the Tribunal had plainly had the correct statutory test in mind, and had had the Claimant's conduct in mind in reaching its decision not to reduce the basic award. It was submitted that the Tribunal exercised the just and equitable discretion afforded to it, highlighting the Tribunal's express acknowledgement of his gross misconduct. It was submitted that section 122(2) of the ERA 1996 does not require a reduction in the basic award to be made whenever misconduct is found. The Claimant submitted that the majority was entitled to consider that the compensatory award had already been reduced by 100 per cent and that it was not appropriate to reduce the basic award.

Grounds 3, 5 - 8: indirect disability discrimination and failure to make reasonable adjustments

40. Underpinning all of these grounds of appeal was the Respondent's contention that the decision by the Tribunal to consider and analyse two distinct statutory provisions together led it into error.

That error, it submitted, impacted both the decision in respect of indirect disability discrimination and the claim that the Respondent failed to make reasonable adjustments for the Claimant during the disciplinary process.

41. By Ground 6, the Respondent argued that the Tribunal's conclusion that it had failed to make reasonable adjustments was perverse. The Respondent only pursued this ground of appeal insofar as the submissions in respect of Grounds 3 and 4 established perversity in the Tribunal's decision.

42. By Ground 3 the Respondent submitted that, once the Tribunal framed the second PCP as an 'expectation' that the notes of the disciplinary/investigation meeting should be signed, rather than a requirement to do so (as set out in the agreed list of issues), it failed to first, identify and, then, to analyse with sufficient precision, the reasonable step which Respondent should have taken. The Respondent submitted that the step identified by the Claimant which should have been taken by way of a reasonable adjustment —allowing the Claimant to take the notes away for later review and signature—flowed from a *requirement* imposed upon him to sign them immediately. That, same step, however, did not necessarily flow from a mere expectation to do so. It was submitted that the Tribunal did not reconsider whether the step contended for by the Claimant still applied after it had reframed the PCP as an expectation rather that a requirement to sign the notes. Nor did it make an express finding identifying what it was reasonable for the Respondent to do given that the formulation of the PCP had changed. **HM Prison Service v Johnson** [2007] IRLR 951 makes clear that it is important to consider how the reasonable adjustment contended for reduces or removes the disadvantage caused by the relevant PCP. In addition, the Respondent drew attention to the fact that the Claimant had not asked to take the notes away.

43. The Claimant submitted that, notwithstanding the PCP being framed as an expectation to sign the notes rather than a requirement, the pleaded step remained clear and flowed directly from the PCP as found: the Tribunal accepted that he was made to sign the notes before he could leave, that the

Respondent knew of his dyslexia and its effects, and that there had been no deviation from the practice. On his case, the need to allow time to process and understand the notes, including taking them away before signature, was sufficiently identified and also removed the disadvantage caused by either requiring him to sign the notes or expecting him to do so. He relied upon the anticipatory nature of the duty to make adjustment. He submitted that, in reality, the appeal seeks to revisit factual findings determined by the Tribunal.

44. Ground 7 concerned the Tribunal's treatment of disadvantage. Disadvantage must be established in a claim of indirect discrimination contrary to s.19 of the EqA 2010 and a claim for reasonable adjustments under s.20 of the EqA 2010. The Respondent contended that the Tribunal relied upon disadvantages not identified in the agreed list of issues, failed to address group disadvantage for the section 19 claim, and failed to consider the effect of changing the second PCP as set out above (from a requirement to sign notes to an expectation that he should do so).

45. The identified disadvantages in the list of issues were first, increased stress and confusion in relation to who could accompany the Claimant (PCP1), and, secondly, the need to / expectation to sign the notes (PCP2). However, the Tribunal found that the disadvantage in relation to the choice of companion was a need for a companion who could interpret and explain matters, and, in relation to the notes, an inability to read handwritten notes. The Respondent submitted that these were materially different and issues which were not raised with the parties before the Tribunal reached its conclusions. In respect of indirect disability discrimination, it further submitted that the Tribunal analysed the disadvantage experienced by the Claimant as an individual but made no finding that either PCP put, or would put, persons sharing the relevant disability at a particular disadvantage compared with persons who did not.

46. The Claimant submitted that the Tribunal's findings were set out within the pleaded case and arose from evidence heard and which it accepted. It submitted that, as established in **Essop v Home Office (UK Border Agency); Naeem v Secretary of State for Justice** [2017] ICR 640, it was unnecessary to establish why the PCP caused the disadvantage. It was submitted that reading difficulties associated with dyslexia were sufficiently well known for group disadvantage to be self-evident or intrinsically understood. It was submitted that, at paragraph 121 of the Judgment, the Tribunal compared his ability to read with that of a person without dyslexia; and that at paragraph 129 of the Judgment, addressed the wider nature of dyslexia. It was also submitted that the decisions in **Eweida v British Airways** [2010] IRLR 322, **Dobson v North Cumbria Integrated Care NHS Foundation Trust** [2021] IRLR 729 and **Marston (Holdings) Ltd v Perkins** [2025] IRLR 318 supported his case.

47. By Ground 8 the Respondent submitted that the Tribunal failed to recognise or maintain the distinction between justification of indirect discrimination under section 19 EqA and the concept of justification in respect of the duty to make reasonable adjustments under section 20 EqA 2010 and the separate obligation within the latter provision to do that which was reasonable to reduce or remove disadvantage.

48. The Respondent submitted that the Tribunal erred in treating consistency as incapable of being a legitimate aim. This conclusion was reached in the context of the claim that the Respondent failed to make a reasonable adjustment. It submitted that consistency and predictability may be legitimate aims when a general rule is applied: section 19 of the EqA 2010 requires justification of the rule rather than an ad hominem (individual) exception. The Respondent relied upon **Seldon v Clarkson Wright & Jakes** [2012] ICR 716 and **Homer v Chief Constable of West Yorkshire Police** [2012] ICR 704. It submitted that, impermissibly, the Tribunal imported reasoning appropriate to the analysis of justification of a decision regarding a reasonable adjustment into the distinct analysis required in respect of indirect discrimination by s.19 of the EqA 2010.

49. The Claimant accepted that consistency may, in principle, be a legitimate aim, but submitted that the Tribunal rejected it on the facts of this case rather than as a matter of universal principle. The Claimant submitted that, pursuant to **Minis Childcare v Hilton-Webb** [2024] EAT 108, the Tribunal considered section 19 separately, but found no legitimate purpose in applying either of the identified PCPs rigidly in the circumstances. It recorded the absence of evidence that delayed signature would make the process unfair or less effective. The Claimant submitted that any overlap in the discussion of sections 19 and 20 did not amount to an error of law.

Grounds 9 and 10: Disability-Related Harassment

50. Grounds 9 and 10 challenged the two findings of disability related harassment. Ground 9 alleged that the Tribunal failed properly to set out and apply section 26 EqA 2010 and reached perverse conclusions. Ground 10 concerned the requirement that the unwanted conduct be "related to" disability. The Tribunal found that the Claimant was subjected to unlawful disability related harassment as a result of the insistence he sign the investigation meeting notes and because of Mr Evans's statement in the grievance outcome letter that the notes he had to sign were "very short just over a couple of pages".

51. The Respondent submitted that, in relation to the investigation notes, the Tribunal did not identify with sufficient clarity the conduct which amounted to "insistence"; that this finding was difficult to reconcile with its description elsewhere within its Reasons of an 'expectation' or 'request' to sign; and that it did not explain how the application of a neutral practice to all staff was related to Mr Bean's disability. It submits that the Tribunal addressed whether reading and understanding notes related to disability, rather than whether the Respondent's relevantly impugned conduct did so. It further contended that the Tribunal did not analyse the purpose or effect required by section 26(1)(b), or the matters in section 26(4) of the EqA 2010.

52. In relation to the grievance outcome letter, the Respondent submitted that the Tribunal

misstated its case. The Respondent had not confined itself to saying that the comment was factual; it had said that the author was addressing the effect of the notes upon the fairness of the process. The Respondent did not accept that the comment was related to disability or that the Tribunal properly determined that issue. It submitted that the Tribunal did not resolve that dispute, did not examine the author's reasoning, and did not make the findings required by section 26(4) of the EqA 2010. It relied upon **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** [2020] IRLR 495, **Worcestershire Health & Care NHS Trust v Alle**n [2024] EAT 40 and **Pemberton v Inwood** [2018] ICR 1291.

53. The Claimant submitted that the words "related to" were wider than the causative language of "because of" (used elsewhere in the EqA 2010). It was submitted that the requisite link between conduct and a protected characteristic may be satisfied even where the relevant protected characteristic (in this case, disability) did not motivate the person to engage in the conduct, relying upon **Carozzi v University of Hertfordshire** [2025] IRLR 179. The Claimant submitted that the Tribunal accepted his evidence that the Respondent insisted he signed the notes, preferring his evidence on that issue. The Tribunal found that the conduct was unwanted and related to his known difficulties in reading and understanding. As to the grievance letter, he submitted that the Tribunal was entitled to assess the comment in its context. Read fairly and as a whole, the Tribunal's Reasons show that it considered his perception, the circumstances and whether the alleged effects were reasonable.

The relevant legal principles

54. The question of whether a dismissal is fair or unfair is determined by reference to the principles set out in sections 98(1) to 98(4) of the Employment Rights Act 1996, (ERA 1996) which provide as follows:

> **"98. General**

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."**
>
> **(2) A reason falls within this subsection if it—**
>
> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
>
> **(b) relates to the conduct of the employee,**
>
> **(c) is that the employee was redundant, or**
>
> **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
>
> **(3) In subsection (2)(a)—**
>
> **(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and**
>
> **(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

55. When considering fairness, a Tribunal is bound to consider the entirety of a disciplinary process to make the determination of whether the dismissal was unfair or not. See ***Taylor v OCS Group Ltd*** [2006] ICR 1602:

> "**43. … the employment tribunal must focus on the statutory test and that, in considering whether the dismissal was fair, it must look at the substance of what happened throughout the disciplinary process"**

This includes that which takes place at an initial disciplinary process, and at appeal, whether the appeal takes place by way of rehearing or a review of what has gone before. There is no rule of law that a review cannot remedy defects which an appeal by way of rehearing can. The question is whether, having regard to the equity and substantial merits of the case, the employer acted reasonably or unreasonably in treating the particular issue as a sufficient reason to dismiss the employee.

56. There is often reference in reported cases and in practice before tribunals to issues of substantive fairness and procedural fairness. That distinction does not appear within s.98 of the ERA 1996. Following the House of Lords decision in ***Polkey v AE Dayton Services Ltd*** [1987] UKHL 8 it has long been the law that a dismissal may be unfair because of a failure in process, an unfair process, even if dismissal was inevitable. The *Polkey* case overturned earlier authority according to which a dismissal was held fair if the employer could establish that a procedural flaw or failing would have made no difference and that dismissal would have occurred in any event. Now, a dismissal may be unfair because of a procedural flaw or failing, but justice between the parties is achieved by a reduction in compensation to reflect the likelihood of dismissal having taken place in any event. The task of the tribunal, however, remains as set out in **Taylor v OCS**, to focus on the statutory test and language to determine whether the dismissal was fair or unfair.

57. When a dismissal has been determined to be unfair, a Tribunal will then consider remedy. When the remedy is an award of money, pursuant to section 118 of the ERA 1996, that award must compose of a basic award, governed by s.112 of the ERA 1996 and a compensatory award pursuant to s.123 of the ERA 1996. A compensatory award seeks, as its name suggests, to compensate for the loss sustained by the claimant in consequence of the dismissal, in so far as that loss is attributable to the action of the employer respondent. A basic award is not directly linked to the loss sustained. It is calculated by way of a statutory formula and is an award intended to reflect the loss of a job and service. Section 122 of the ERA 1996 provides as follows

> **"122. Basic award: reductions.**
> **(1) Where the tribunal considers that any conduct of the complainant before the dismissal (or,**

> **where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.**
> **(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.**
> **(3) Subsection (2) does not apply where the reason or principal reason for the dismissal is that the complainant—**
> **(a) was redundant, or**
> **(b) was dismissed by reason of the operation of a requirement imposed by or under an enactment."**

The legislation provides tribunals with a broad discretion to reduce (or not to reduce) the basic award for reasons connected to the conduct of the complainant (i.e., claimant). It is clear from the language of the statute that the tribunal is, "restricted to a consideration of the conduct of the complainant" (confirmed in ***Parker Foundry Ltd v. Slack*** **[1992] ICR 302**). Importantly, however, there is no principle that a basic award cannot be reduced below a certain threshold or level. The discretion is a very wide one, the only restriction being that which the tribunal considers just and equitable having regard to the conduct of the complainant. It must, as with any discretion, be exercised judicially and reasons must be given for the decision made.

58. Section 19 of the Equality Act 2010 (EqA 2010) provides as follows

> **"19. Indirect discrimination**
> **(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.**
> **(3) The relevant protected characteristics are—**
> **age;**
> **disability;**
> **gender reassignment;**
> **marriage and civil partnership;**

race;
religion or belief;
sex;
sexual orientation.”

59. Section 20 of the EqA 2010 provides as follows

“20. Duty to make adjustments
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A’s costs of complying with the duty.
(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.
(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
(a) a feature arising from the design or construction of a building on premises occupied by A,
(b) a feature on premises occupied by A,
(c) in relation to services within section 29(1), a feature affecting the provision of the services, or
(d) any other physical element or quality.
(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chancing a practice, policy or procedure includes a reference to abandoning it."

60. As the Respondent correctly submitted, whilst both statutory provisions (s.19 and s.20 of the EqA 2010) seek to achieve equality and have some elements in common, they are different, distinct forms of discrimination. They are, in my judgment, best considered and analysed separately.

61. The concept of indirect discrimination is a form of discrimination which can arise in respect of all protected characteristics within the EqA 2010. Its purpose is to prevent inequality of treatment arising from the application of what appear to be neutral rules, provisions or practices but which impact those with protected characteristics differently, and can, thereby, cause disadvantage to those individuals. To succeed in a claim of indirect discrimination it is necessary to establish that the application of the impugned rules/provisions/practices cause disadvantage both for a group who share a protected characteristic *and* the individual bringing the claim, (commonly referred to as the group and individual disadvantage respectively). If those elements of group and individual disadvantage are established the discrimination which is thereby established will be unlawful unless it can be justified. See generally **Essop v Home Office (UK Border Agency); Naeem v Secretary of State for Justice** [2017] IRLR 558 and **Ryan v South West Ambulance Service NHS Trust** [2021] ICR 555. The following important principles (amongst others) derive from **Essop,** as set out in paragraphs 55-56 of **Ryan**:

(i) In claims of indirect discrimination, both group and individual disadvantage must be established. (In cases where Art 9 ECHR are engaged, additional considerations may apply);

(ii) Once group disadvantage has been established by a claimant, the individual claimant "has to show that he has been put at "that disadvantage". "That disadvantage" is the same disadvantage that the group to which s/he belongs to is, or would be, put; there must be 'correspondence' between the two. (iii) It is not, however, necessary for the claimant to show the reason for the group disadvantage; all that is required is that there is a corresponding group and individual disadvantage

(iv) Real care and attention must be paid to how the disadvantage (both group and individual) in a particular case is framed. It must be clearly articulated, both at the group and the individual level.

(v) In general terms, if the disadvantage is expressed as a likelihood of a particular outcome in respect of a particular group, then any person in that group suffers that disadvantage. In other words, a disadvantage expressed as a likelihood of an outcome, will generally affect more people. However, if the disadvantage is framed in terms of achievement of a particular event, or, of an event occurring, it may be said that only those who actually achieve that event or in respect of whom the event occurs will suffer the same disadvantage. (See **Essop** paragraphs 31-2).

The relevant parts of paragraphs 31-32 of **Essop** provide as follows

> **"31. … what is required by the language is correspondence between the disadvantage suffered by the group and the disadvantage suffered by the individual. This will largely depend upon how one defines the particular disadvantage in question. If the disadvantage is that more BME or older candidates fail the test than do white or younger candidates, then failure is the disadvantage and a claimant who fails has suffered that disadvantage. If the disadvantage is that BME and older candidates are more likely to fail than white or younger candidates, then the likelihood of failure is the disadvantage and any BME or older candidate suffers that disadvantage.**
>
> **32. That leads to the second argument - that "undeserving" claimants, who have failed for reasons that have nothing to do with the disparate impact, may "coat tail" upon the claims of the deserving ones. This is easier to answer if the disadvantage is defined in terms of actual failure than if it is defined in terms of likelihood of failure (because only some suffer the first whereas all suffer the second). But in any event, it must be open to the respondent to show that the particular claimant was not put at a disadvantage by the requirement. There was no causal link between the PCP and the disadvantage suffered by the individual: he failed because he did not prepare, or did not show up at the right time or in the right place to take the test, or did not Page 13 finish the task. A second answer is that a candidate who fails for reasons such as that is not in the same position as a candidate who diligently prepares for the test, turns up in the right place at the right time, and finishes the tasks he was set. In such a situation there would be a "material difference between the circumstances relating to each case", … A third answer is that the test may in any event be justified despite its disparate impact. Although justification is aimed at the impact of the PCP on the group as a whole rather than at the impact upon the individual,**

> **as Langstaff J pointed out, the less the disadvantage suffered by the group as a whole, the easier it is likely to be to justify the PCP. If, however, the disadvantage is defined in terms of likelihood of rather than actual failure, then it could be said that all do suffer it, whether or not they fail and whatever the reason for their failure. But there still has to be a causal link between the PCP and the individual disadvantage and it is fanciful to suppose that people who do not fail or who fail because of their own conduct have suffered any harm as a result of the PCP. It must be permissible for an employer to show that an employee has not suffered harm as a result of the PCP in question."**

62. The duty to make reasonable adjustments is different. First, it applies only in respect of the protected characteristic of disability. Secondly, in respect of that protected characteristic it seeks to achieve equality in an entirely different way to the prohibition of indirect discrimination. Inherent within the statutory concept is a recognition that those living with disability experience difficulties in participating in a society which has been established to meet the needs of those without disability. In order to achieve parity of opportunity for those with disability, the duty may involve an element of positive discrimination (see generally ***Archibald v Fife Council*** [2004] UKHL 32.) The duty seeks to level the playing field for the individuals impacted by structures/organisation/ rules which create disadvantage for them as a result of disability.

63. In both causes of action however, it is necessary to identify something which creates a disadvantage which impacts the disabled complainant when comparison is made with others. In a claim made under s.19 of the EqA 2010, a claimant must identify a provision criterion or practice. In s.20 of the EqA 2010 a claimant must also identify a provision, criterion or practice. That first step, however, is, in my judgment, where commonality ends. (I note that in truth, there are already differences: in the case of reasonable adjustments, a claim can also be based on a physical feature, or an auxiliary aid, neither of which are relevant to this claim and about which I say no more). There are differences between the two provisions as to what the relevant disadvantage must be and in respect of that which is required when considering justification.

64. Broadly, there are three steps which must be addressed in both a claim of a failure to make reasonable adjustments and a claim of indirect discrimination. First, in each claim, the Tribunal must identify a PCP as set out above. Secondly, the Tribunal must consider whether the Claimant has established the relevant disadvantage. At this point however the Tribunal must, in my judgment, recognise the specific and different requirements of, on the one hand s.19 and on the other, s.20 of the EqA 2010. Section 19 requires the tribunal to identify both group and individual disadvantage. Section 20 requires the tribunal to focus on the disadvantage caused to the claimant only and compare that to the position of others who are not disabled. Thirdly, the Tribunal must, in the case of a claim of indirect discrimination, consider justification; whether the PCP is a proportionate means of achieving a legitimate aim. In a claim of failure to make reasonable adjustments, the analysis at this stage is different: the tribunal must consider what steps, if any, it was reasonable for the Respondent to take to reduce or avoid the disadvantage for the Claimant. The purpose of the duty is to remove or reduce the disadvantage caused, so far as is reasonable to do so.

65. When a tribunal is deciding whether an employer is in breach of its duty to make adjustments, it is important that the step which it is said the employer failed to take pursuant to that duty is clearly identified. Unless that takes place, it is not possible to properly assess the reasonableness of taking it. See generally ***HM Prison Service v Johnson*** [2007] IRLR 591.

66. Section 26 of the EqA 2010 provides as follows

> **"26. Harassment**
> **(1) A person (A) harasses another (B) if—**
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
> **(2) A also harasses B if—**
> **(a) A engages in unwanted conduct of a sexual nature, and**
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b).**

> **(3) A also harasses B if—**
> **(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,**
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b), and**
> **(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
> **(5) The relevant protected characteristics are—**
> **age;**
> **disability;**
> **gender reassignment;**
> **race;**
> **religion or belief;**
> **sex;**
> **sexual orientation."**

67. There are a number of elements which a claimant must establish if they are to succeed in a claim of harassment. First, that the respondent engaged in 'unwanted conduct'. Secondly, that that conduct related to the protected characteristic, in this case, disability. A tribunal must set out some detail of what, within the factual matrix, led it to the conclusion that the conduct in question related to the relevant protected characteristic. See ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 and ***Worcestershire Health & Care Trust v Allen*** [2024] EAT 40. Thirdly that the conduct complained about had the relevant proscribed effect: either that it violated the Claimant's dignity, or it created an intimidating, hostile, degrading, humiliating or offensive environment for her or him. In determining that third issue the tribunal must take into account the matters set out in s.26(4) of the EqA 2010, namely, the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect. Therefore, it must identify what the subjective perception of the claimant was, and also whether, objectively, it was reasonable for him to have that perception. See ***Pemberton v Inwood*** [2018] ICR 1291 73. The Tribunal correctly identified that in determining whether the proscribed effect was created, context is all important. In addition, the Tribunal correctly identified that Tribunals must not 'cheapen' the meaning and intent in the words used in the statute so that minor disquiet or unhappiness about something is labelled as harassment. This is an area where that which the tribunal hears and sees during the hearing will be significantly important. Its task however is to translate that into its Reasons

so that it can be understood why the tribunal that something complained about did, or did not, meet the statutory requirements of the definition of harassment.

68. Tribunals frequently use lists of issues to identify claims and issues. These documents are useful case management tools. They are not, however, a document which sets out a claim or response to it: those documents are the claim form and response. They are not documents which should be used to tactical advantage, nor to limit proper consideration of relevant statutes or authority. Generally they serve to ensure that all parties, and the tribunal, are clear as to what the factual and legal issues are, and to ensure that the tribunal only considers the claim made and asserted by the claimant as to which see ***SoS for Justice v Prospere*** UKEAT/0412/14/DA and ***Chandok v Tirkey*** [2015] ICR 527. In the latter case Langstaff P stated:

> **"16. … The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document but the claims made …**
>
> **17. I readily accept that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so predominantly before employment tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents A tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it … such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence… that which clear headed justice most needs… is focus. It is an enemy of identifying and in the light of the identification resolving, the central issues in dispute.**
>
> **18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it … it should provide for focus on the central issues."**

Self evidently, a list of issues will assist in providing focus on the central issues. The important point I wish to make is that it is not, however, a replacement for the claim form and response, its purpose is to identify the central issues, not to limit proper consideration of them. In general, as set out by Bean LJ in ***Mervyn v BW Controls Ltd*** [2000] ICR 1364 (at 43-46), "it is good practise for an employment tribunal at the start of a substantive hearing …. to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties if it is clear that it does not, or that it may not do so, then the employment tribunal should consider whether an amendment to the list of issues is necessary in the interests of justice".

That was said in the context of unrepresented parties. However, I consider it is good practice for a tribunal to consider whether the issues identified accurately reflect the legal questions it must determine in order to decide the claims before it.

Analysis and conclusions

Unfair dismissal

69. The EAT is concerned only with errors of law. It is, in my judgment worth repeating that which has been said many times in appellate jurisdictions: the Tribunal at first instance is the arbiter of fact and the forum before which the fairness of a dismissal is to be assessed, absent an error of law, including perversity. A tribunal's Judgment and Reasons should be read fairly, and as a whole, without an unduly technical or hypercritical approach or undue criticism of one particular sentence, phrase or words without placing them or it within the context of the Reasons as a whole. See, amongst other decisions, ***DPP Law Ltd v Greenberg*** [2021] EWCA Civ 672.

70. In this case, the Tribunal found (by a majority) that the Claimant had committed an act of gross misconduct, and, that despite the unfairness of the dismissal identified in its decision and analysis, he would have been dismissed in any event. On the question of fairness, the Tribunal noted, at paragraph 147, that the distinction between procedural and substantive unfairness is *"not always helpful"* and that the relevant question is whether the dismissal was unfair (or fair). I agree.

71. The statutory question to be determined pursuant to s.98 ERA 1996 when considering a claim of unfair dismissal is whether "the dismissal is fair or unfair (having regard to the reason shown by the employer)". The answer to the question, "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee". The statute directs that

this, “shall be determined in accordance with equity and the substantial merits of the case.” There is no reference in those words to ‘substantive’ fairness or ‘procedural’ unfairness. Reference to procedural unfairness has, perhaps, become more prevalent after the decision in *Polkey*. It is, however, important to note that the statute sets out no clear demarcation between a substantively unfair dismissal and a procedurally unfair one. The question is whether the dismissal is fair or not. The nature of the flaw which led to unfairness may be a procedural flaw or one related to the substance of the issues before the employer or a procedural but which also has implications for substantive fairness. Where the flaw is procedural a Tribunal may be required to consider whether to and how to reflect the consequences of that in remedy.

72. For example, in a case involving a disciplinary process a tribunal may have concluded that information was provided late during the course of the disciplinary process. That tribunal might go on to determine that that procedural flaw had consequences for the fairness of the dismissal and that the procedural flaw led to an unfair dismissal, but it is not required to do so. The tribunal’s assessment will be fact sensitive and will depend on the equity and substantial merits of the case having regard to the other matters set out in the preceding paragraph. On the one hand the information may have been provided so late that the employee had no time to assimilate it and then present information within her knowledge relevant to what took place, or any sanction. The procedural failing then has substantive consequences if, for example, relevant information was not considered. Alternatively, the late provision of information may have had no impact at all upon the fairness of dismissal, because the employee did not engage at all in the process. The Tribunal *might* then conclude that notwithstanding the late provision of information, the dismissal was fair. Finally, the late provision of the information may have had some impact on fairness, but an impact which is mitigated by other facts. In the last situation, for example, the employee may have needed more time to assimilate the information, but that may not have led to anything different being said. In each case however, the

decision the Tribunal must make pursuant to the statute is the same: was the dismissal fair or not. In none of the three examples could a decision be made of 'procedurally unfair dismissal'. In the examples given, the Tribunal may determine that the dismissal was unfair but then reflect the consequences of the procedural failings in the remedy; it might go on to determine that, having regard to the nature of the procedural failing and its consequences, dismissal would have occurred in any event. That opens the door for it to consider making a *Polkey* reduction, i.e., a reduction to any compensation awarded to fairly reflect the percentage chance that the dismissal would have occurred in any event (notwithstanding the procedural failing which took place.)

73. This, in my judgment, explains why a focus on procedural unfairness, or strict demarcation between procedural and substantive unfairness may not always be helpful. In many cases, a procedural flaw may lead to a more nuanced response to analysis of the question of whether the dismissal was substantively fair or not, "having regard to the equity and substantial merits of the case"; the demarcation between procedural and substantive unfairness cannot always be strictly separated. Fairly read, as a whole, I consider that this is one of those cases and, further, one where the Tribunal concluded that the appeal was not material to the overall failings within the dismissal process.

74. In this case, the Tribunal clearly focused on the words of the statute: recognising that as the reason for dismissal was a potentially fair one (relating to conduct), the task of the Tribunal was to determine fairness generally pursuant to s.98(4) ERA 1997. (Paragraph 148). Having recognised that the distinction between substantive and procedural unfairness may not always be helpful, the Tribunal provided detailed answers to the questions identified in the list of issues. The list of issues adopted a clear demarcation/ distinction between procedural and substantive fairness. The Tribunal considered fairness by reference to that list of issues, caveating its response about the distinction between the two. Whilst doing so, the Tribunal identified matters, "*said to* amount to procedural unfairness" (ny

emphasis) (paragraph 156). The Tribunal's conclusions however are set out at paragraphs 157-164 of the Judgment. I consider that a fair reading of those paragraphs are that the Tribunal concluded that, as contended by the Claimant, the Respondent had failed to set out relevant details about the alleged misconduct or provided material in a way which was comprehensible. This, in my judgment, is difficult to confine to an instance of mere procedural failing. To the extent that it was a matter of procedure, it was one which had consequences for substantive fairness. Further, at paragraph 161 of the Reasons, the Tribunal referred to difficulties with understanding the material relied upon by the Respondent which extended beyond the time of the initial decision to dismiss: they continued into the hearing before the Tribunal. The Tribunal noted that the lack of clarity in the disciplinary allegations and evidence was of "clear significance" in this particular case, where the investigation had been relatively informal and undertaken without necessary support of accommodations being made for the Claimant. (Paragraph 162). These paragraphs must be read in light of that which the Tribunal sets out in paragraphs 60-68. In particular, at paragraph 67 the Tribunal set out that, "both this hearing and the disciplinary <u>process</u> have lacked a simple and coherent explanation of the system, screenshots …. tolerances or accuracy expected in the system …".

75. I consider that, read fairly, the Tribunal concluded that the lack of clarity and detail regarding the allegations and in respect of the technical evidence were sufficient to render the dismissal unfair, and that this was the case notwithstanding what took place on appeal. In my judgment, the Tribunal then concluded that the inevitability of dismissal should be reflected in compensation (reduction of the compensatory award by 100%). I consider that the third asserted procedural failing (failing to explore alternatives to dismissal) set against the finding that the Claimant's dismissal was inevitable, is something which was also more properly considered at remedy.

76. Finally, I observe that Tribunals should not shy away from determining claims before them without being obliged to slavishly follow a list of issues if they consider that they do not helpfully set out the issues which need to be decided in order to determine the claim.

Reduction to the basic award

77. Section 122(2) of the ERA 1996 requires a Tribunal to consider whether any of a claimant's conduct before dismissal was such that it was just and equitable to reduce or further reduce the basic award. The Respondent is correct that, at this point, the focus must be on the conduct of the Claimant as set out clearly in ***Parker Foundry Ltd v Slack*** [1992] ICR 302.

78. In this case the Tribunal found that the Claimant had falsely recorded his whereabouts at work and that this was a repudiatory breach of contract justifying dismissal without notice. I have set out above, however, how I considered that the Tribunal determined that the dismissal was unfair: because of the lack of clarity and detail about the allegations and a lack of clarity in the technical evidence and that this was particularly significant because of the relatively informal nature of the disciplinary process. The Tribunal also reached conclusions regarding a lack of accommodation or appropriate support for the Claimant.

79. The reasoning could, perhaps, have been more clearly expressed. However, read fairly, I consider that the Tribunal concluded that it would not be just and equitable to make a reduction in the basic award notwithstanding the Claimant's conduct. (Paragraph 173 of the Judgment). I consider that, on a fair reading, the Tribunal did focus on the Claimant's conduct and that what the Tribunal is there conveying is that the *Claimant's conduct* did not render it just and equitable to make any reduction to the basic award because, although he was guilty of misconduct, he was not responsible for the manner in which he was dismissed, namely, unfairly, because of the matters identified by the Tribunal.

Indirect discrimination and reasonable adjustments

80. I take Grounds 3 and 5 to 8 together.

81. I consider that the Tribunal's decision to consider the claims of indirect discrimination and reasonable adjustments together made their analysis significantly more difficult and did lead to error. I consider that it is better to consider distinct statutory torts separately and that, had the Tribunal done so in this case, it may have avoided the errors identified below because it would have focused on the specific issues in the different types of discrimination.

82. I consider that, in this case, the Tribunal erred in respect of the third of three steps identified above.

83. The Tribunal found that two PCPs had been established. First, PCP1, that of not allowing employees to be accompanied to investigation meeting by a companion of their own choosing, and, secondly, PCP 2, 'expecting' investigation meeting notes to be signed at the end of the meeting.

84. In my judgment, however, the Tribunal erred in its analysis of the claim of indirect discrimination in a number of respects. First, it restricted its consideration of disadvantage to that of the individual disadvantage, to the Claimant's position. There is no analysis within the Judgment or Reasons of the question of group disadvantage. The question the Tribunal was tasked to address pursuant to s.19(2)(b) of the EqA 2010 was whether PCP1 and/or PCP2 put, or would put, disabled people at a particular disadvantage when compared with people who were not disabled. As submitted by the Respondent, that required the Tribunal to look beyond C's situation and consider the position of disabled people more broadly as per the Judgment of Ralph Gibson LJ in **University of Manchester v Jones** [1993] ICR 474 at 497G and 498A. The Tribunal simply failed to undertake this part of the analysis.

85. Further, I consider that the Tribunal identified disadvantage not advanced by the Claimant and not identified in the list of issues. In relation to PCP1 the disadvantage relied upon by the Claimant was "increased stress and confusion meaning that he could not raise any issues other than through the grievance process". The Tribunal did not appear to make a determination in relation to that factual issue. Instead it reached (albeit arguably reasonable) conclusions that the Claimant needed someone to accompany him who understood his disability both to read documents for him and to explain and interpret questions and other matters.

86. The Tribunal also departed from the claim advanced in respect of PCP 2 that the policy of signing meeting notes committed him to a level of agreement when, in real time, he did not know what he had committed to although I do not consider that this was significant for the following reasons. The Tribunal's Reasons recorded at paragraph 121 that, "the dyslexia meant that he was not able to read the notes to the extent that someone without dyslexia could", particularly in respect of handwritten notes. I consider that, fairly read, in context, paragraph 121 is intended to convey that the substantial disadvantage suffered was that the Claimant could not read the notes before signing them. That, in my judgment, is fairly understood as referencing an inability to understand the notes before signing them. Inevitably, not being able to understand the notes before signing them on the facts of the case led to a situation where the Claimant had signed as indicating agreement with the notes when in practice he could not really have given that agreement.

87. I do not, however, consider that the Tribunal erred in respect of the claim of reasonable adjustment because of their description of the PCP2 as an expectation to sign the notes rather than a requirement as asserted in Ground 5. I consider that the list of issues, and paragraph 120 and 126 of the Reasons should be considered and read together and within the context of the Reasons and Judgment as a whole. It is clear that the Tribunal considered that there was pressure put on the

Claimant to sign the notes before he could leave, and that the only reason he did sign them (without understanding what was written) was so he could leave. The Tribunal made a practical point that the requirement to sign could not be enforced. (I understand that to mean that, realistically the Claimant could not actually be physically forced to sign them or physically prevented from leaving if he did not.) Its description of the requirement to sign as an expectation to do so was intended to reflect that reality. Fairly read however, it did not refer to a different situation or set of circumstances or facts other than that which was before the Tribunal. It was not, in my judgment, a finding of a PCP which had not been advanced. The relabelling was a matter of semantics: the Tribunal used a phrase to describe the same situation but which they considered better reflected it. The Tribunal found that the disadvantage which arose for the Claimant, disabled by reason of dyslexia compared to others who were not disabled, was that he was required to sign the notes without being able to read them, whereas the non-disabled comparator would have been able to read them when signing them. The adjustment sought was that the Claimant should be able to take the notes away to consider them (with help) before signing them. I do not consider that there was an error in this analysis. Nor do I consider that the fact that the Claimant did not ask to take away the notes means that the Tribunal erred: the duty to make the adjustment is on the employer, not the employee. The Claimant had established that the Respondent knew of his disability. The evidence before the Tribunal was that further enquiries were not made about it because it did not appear to impact his day-to-day performance. That did not absolve it of responsibility to consider whether, and if so, how, it might impact his participation in an investigatory or disciplinary process.

88. Having failed to properly analyse relevant disadvantage for the purposes of the claim of indirect discrimination, I consider that the Tribunal also fell into error in its approach to justification. At paragraph 125 of its decision the Tribunal held that consistency could not be relied upon as a legitimate aim, “where the disability discrimination regime specifically envisages different treatment

being required for people with disabilities." This passage in my judgment reflects the consequences of considering both the claim of reasonable adjustments and indirect discrimination together and that, at this point, the Tribunal imported analysis and reasoning relevant to the claim under s.20 to the claim of indirect discrimination. As set out above, the prohibition of disability discrimination may extend to positive discrimination in respect of discrimination arising from disability (s.15 of the EqA 2010) and the duty to make adjustments. The fact that that is the case does not, however, prevent consistency being a legitimate aim for the purposes of a claim of indirect discrimination. Consistency may be possible to be a legitimate aim, as the Claimant accepted in submissions. The assessment will be fact sensitive and specific to the circumstances of the particular case. The task of the tribunal is to consider the discriminatory impact of the relevant rule against the objective which is sought to be achieved by it. In my judgment the Tribunal erred in failing to consider justification in the claim of indirect discrimination.

Harassment

89. In respect of the first allegation of harassment, I consider that the factual findings made by the Tribunal and its reasons are insufficient for this court or the parties to understand the Tribunal's analysis. The Tribunal has not, in my judgment, adequately set out how it considered that the requirement to sign the notes was 'related to' disability. I consider that, fairly read, it can be understood that the allegation of harassment the Tribunal found had occurred was imposition of the requirement/expectation that the Claimant sign the notes of the investigation meetings. I consider that the Tribunal found that the evidence before it justified the making a finding that there was insistence that he should do so. I also consider that the Tribunal found that it was clear from the Claimant's evidence that his inability to read the notes related to, and arose from his disability, and that the failure to adjust the process gave rise to a duty to make adjustments. (See in so far as the claim of harassment is concerned paragraph 134 of the Tribunal's decision, set out at paragraph 29 above). However, the Tribunal has not, in my judgment explained how the requirement or expectation/insistence that he

should *sign* the notes established a claim for harassment, particularly where the Respondent's case was that the requirement to sign them arose from the application of a policy which the staff at the investigation meeting were seeking follow. The Tribunal has not described *how* the insistence he sign the notes related to disability. Fairly read, it is understood from the Reasons that the Claimant's inability to read them did so, but it is not clear how the insistence that he should sign them related to disability and what, if any, conclusions were reached about the intent of the staff at the investigation meeting. The Respondent's case was that the Claimant would have been asked to sign whether he was disabled or not. I agree with the Respondent's submissions that if it was the simple application of that rule to the Claimant (in fact PCP1) which constituted harassment when the Claimant had a disability, it was incumbent on the Tribunal to explain that clearly. As set out by HHJ Auerbach in **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** [2020] IRLR 495 at paragraph 25, the Tribunal was required to articulate and with sufficient clarity, "*what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged."* This, the Tribunal did not do. Rather, the reader is left trying to fill the gap and infer what that might have been. A Tribunal's Judgment and Reasons should be fairly read as a whole as set out above. However, when there is a gap in the reasoning or analysis, it is not for the appellate court to seek to fill that gap. This, in my judgment is one of the cases where the reasoning and analysis can only be made good by inferring something which is just not there on the face of the Reasons. Further, the Tribunal has not identified which proscribed effect was created, nor how it reached conclusions about that. Again, the case advanced by the Respondent is not addressed. There is no analysis of what the Claimant felt nor an objective assessment of the reasonableness of his perception (beyond the reference to the Claimant's stress levels being high and that the requirement to sign the notes made him feel anxious.) There is no conclusion about whether the conduct had the purpose of causing the proscribed effect or whether, inadvertently it was created. All these matters are important, not only to understand the Tribunal's conclusion but also because they are highly relevant at the stage of assessing remedy. I allow Ground 9.

90. I also consider that similar criticisms are legitimately made in respect of the harassment allegation regarding the comment in the grievance outcome letter notwithstanding that the Tribunal's analysis is fuller in respect of this allegation. A number of points raised by the Respondent are well founded. First, it appears clear from the list of issues that it was in dispute that the making of the statement related to disability. Secondly, although the Tribunal refers to the fact that the comment was made in a grievance in which the Claimant specifically raised his inability to read the document as an exacerbating feature and one which, in my judgment, fairly read, was a relevant part of its analysis that the comment did create the proscribed effect, the Tribunal did not address the issues expressly raised by the Respondent, including the author's intent and that (on its case) the comment was made in the context of the author considering the extent to which the notes impacted on the overall fairness of the disciplinary process. In order to explain its decision, it needed to do so. Again, the Tribunal has not set out their factual determinations and analysis of the relevant statutory provisions within s.26 of the EqA 2010; conclusions about what the Claimant felt and whether that which he felt was reasonable.

91. For the reasons set out above, I dismiss the appeal in respect of Grounds 1,2, 3, 5 and 6, part of Ground 7 and allow the appeal in respect of Grounds, 8, 9 and 10 and part of Ground 7.

Disposal

92. I thank the parties representatives for their helpful written and oral submissions. I have not, however, heard submissions on disposal. The parties are to provide short written submissions on disposal within 21 days and, if they consider that a further hearing is necessary, to notify the EAT within 7 days so that arrangements can be made for that hearing to be listed promptly.