

Neutral Citation Number: [2026] EAT 155

Case No: EA-2025-000066-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 October 2026

Before:

HIS HONOUR JUDGE AUERBACH

Between:

MRS T MCMANUS

Appellant

- and -

BRITISH AIRWAYS PLC

Respondent

Mx Oscar Davies (instructed by OH Parsons LLP) for the **Appellant**
Mr Jonathan Davies (instructed by Weightmans LLP) for the **Respondent**

Hearing date: 22 September 2026

JUDGMENT

SUMMARY

Harassment

When applying section 26(4) **Equality Act 2010**, in order to decide whether conduct had an effect referred to in section 26(1)(b), the employment tribunal should, in overview, consider two questions:

- (1) Did the claimant in fact perceive the conduct as having such an effect?
- (2) If so, is it reasonable to regard the conduct as having such an effect in all the relevant circumstances of the case?

What are or are not the relevant circumstances of the case is not prescribed by the statute and is a fact-sensitive question. The EAT will not interfere with the tribunal's assessment of them unless it treats as relevant, circumstances which no tribunal acting reasonably could so treat, or fails to take into account circumstances which any tribunal acting reasonably would regard as relevant, or its overall evaluation surmounts the high threshold for a true perversity challenge.

In this case the employment tribunal did not err in concluding that a particular comment made by an OH practitioner in the context of an OH assessment meeting was not reasonably to be regarded as having a section 26(1)(b) effect. The claimant's mental ill health could in law properly be treated as a relevant circumstance, but was not bound to lead to the conclusion that it was reasonable to regard the conduct as having that effect; and, on a fair reading, the tribunal did not err by failing to take it into account. Nor, on a fair reading, did the tribunal err by considering the effect of the particular remark in isolation from the wider context of the overall meeting and other things that were said by the OH practitioner during the course of it.

Observations in **Harkins v Marks and Spencer plc** [2026] EAT 131 considered and followed.

HIS HONOUR JUDGE AUERBACH:**Introduction and the Facts**

1. I will refer to the parties as they were in the employment tribunal. The claimant is employed by the respondent as cabin crew. In 2022 she brought complaints of direct disability discrimination, failure to make reasonable adjustments and disability-related harassment. These were heard before Employment Judge Anstis, Ms A Crosby and Ms H T Edwards at Reading in September 2024. The tribunal dismissed all of the complaints. Written reasons were subsequently provided.
2. This is the claimant's appeal. As before the tribunal, she was represented by Mx Oscar Davies and the respondent by Mr Jonathan Davies, both of counsel. The live grounds of appeal all relate to one of the unsuccessful complaints of harassment related to disability. Drawing on the employment tribunal's findings of fact, the relevant background is this.
3. The respondent accepted that the claimant was at all relevant times a disabled person by reason of depression, anxiety and social phobia. These conditions had developed during the course of the Covid-19 pandemic. In February 2022, following a lengthy sickness absence, the claimant was contemplating a return to work. She had previously been part of Worldwide Cabin Crew, but, following changes made during the pandemic, she would be returning to a role as part of Heathrow Cabin Crew (HCC). The claimant considered that this change put her in a worse position.
4. Emma Taylor was the manager with responsibility for managing the claimant's absence. The claimant had received support from various organisations and individuals who she referred to as her Mental Health Support Team (MHST). She wrote to Ms Taylor referring to having completed a wellness and recovery action plan with her MHST, and setting out the adjustments that she was requesting to support her return. Ms Taylor replied with some initial observations.
5. The respondent has an in-house occupational health service: British Airways Health Services

(BAHS). Ms Taylor referred the claimant to BAHS, and Judith Akuta was allocated to speak to her. On 16 March 2022 the claimant wrote to Ms Akuta setting out the adjustments that she was seeking. In a reply Ms Akuta asked her to “kindly note” that it was not the remit of her MHST to make such recommendations. It was Ms Akuta’s job to assess her. The tribunal observed that, while there may have been other ways of expressing this, Ms Akuta was essentially right.

6. The telephone consultation between the claimant and Ms Akuta took place on 17 March 2022. I will set out in full what the tribunal said about it in the course of its fact-finding.

“28. It is agreed by both sides that this telephone consultation did not go well. It lasted from around 11:00 – 13:00. A number of the claimant’s claims (including claims of disability-related harassment) arise from what occurred in the meeting. On the claimant’s account (and the account of one of her witnesses) she was in tears and very distressed during the meeting. Ms Akuta accepts that she was annoyed with the claimant during that meeting, although she says she did not let that annoyance show.

29. Having heard from both the claimant and Ms Akuta, it is clear that both had different approaches to the meeting.

30. The claimant was very nervous about the meeting. She was recovering from a prolonged period of illness and a number of other difficulties arising from Covid19 and the associated lockdowns. She was facing a return to work as HCC in quite different circumstances to those she had known when on the worldwide fleet, and it is clear that she was not happy with the change from worldwide fleet to HCC. She was nervous about her return to work, and placed heavy reliance on the advice of her Mental Health Support Team. Her previous experience of addressing her disability with supporting professionals appeared largely to have been positive. She was not prepared for Ms Akuta’s more business-like approach.

31. For her part, Ms Akuta considered herself to be an experienced occupational health practitioner who was well versed in questions that may arise on the return to work of disabled members of cabin crew. She had a job to do and was confident in her ability to do so. She had a range of commonly available adjustments that she could recommend. This was one of a number of appointments she would have had that day, and she approached it in a routine and business-like manner.

32. That contrast in approaches shows itself on the question of the taking and giving of the claimant’s medical history. In their closing submissions Mx Davies says Ms Akuta “refused initially to let C discuss her history, the only way Ms Akuta wants to attain it is through prescriptive questions ...”. In her evidence Ms Akuta was clear that she did not want what the claimant apparently wanted to give her – a lengthy narrative of her medical history. For Ms Akuta there were particular key questions that she needed the answers to in order to understand the situation, and matters (such as confidentiality and consent) that had to be addressed even before she got into the claimant’s medical history. It is arguable whether Ms Akuta’s approach amounted to “refusing ... to let C discuss her history”, but it is clear that she (Ms Akuta) viewed asking direct questions as a better way of obtaining the necessary history than allowing the claimant to give her own narrative account of events.

33. The claimant approached the meeting on the basis that it was to discuss her medical condition and the adjustments that had been proposed by her Mental Health Support Team. Ms Akuta approached the meeting on the basis that it was a meeting for her to gain the necessary information from the claimant from which she could then consider and recommend adjustments according to her own professional expertise.

34. It is not in dispute that during this meeting and in making her recommendations Ms Akuta was

working to a “matrix”, which we understand to be a predetermined list of possible adjustments that the respondent’s scheduling department had agreed could be accommodated for cabin crew. As well as being described as a “matrix” it was referred to as a menu of standard adjustments that could be recommended by BAHS and which, presumably, could then be accommodated without further question by those in charge of scheduling.

35. The factual allegations that arise during the meeting are that:

- a. The claimant was “subject to aggressive and demeaning behaviour by Ms Akuta”.
- b. “Ms Akuta failed to take seriously, and give due and proper consideration to, the C’s disability and/or requests for reasonable adjustments”
- c. “Ms Akuta told her that Access to Work was not for people like the C but was meant for people in wheelchairs”

These are said to be both acts of direct disability discrimination and disability-related harassment, but at this stage the question for us is simply whether they occurred.

36. An allegation in the form described at (a) above typically requires an explanation of what particular behaviour by Ms Akuta is said to be aggressive and demeaning. That is provided by Mx Davies in para 20 of their closing submissions, and is set out below, along with our findings. The quotes are alleged to have been said by Ms Akuta. We have omitted matters (f), (g) and (i), which are things said to be done by the claimant not by Ms Akuta. At this stage the question for us is whether these were said or done, and not what the legal consequences of them were.

- a. *“I ask questions and you answer”*

This was said by Ms Akuta. It appears in the near-contemporaneous notes made of the meeting by the claimant and although Ms Akuta did not expressly accept that she said it she did agree this accorded with her approach to such a consultation.

- b. *“You should be better now, you have had over 12 months of support, why are you not better? BA only allow 6 sessions, they have a business to run.”*

Ms Akuta does not accept that she said it. We take it that this was said, but in the slightly different form recorded by the claimant at the end of the consultation: “you have had counselling and treatment for over 12 months now, why do you still need it. You should be better now. BA only support short term as they have a business to run.”

- c. When the C mentioned Access to Work, you said *“Its not for people like you, its for people in wheelchairs.”*

This was not accepted by Ms Akuta, but we accept that it was said as it is recorded in these terms in the claimant’s note.

- d. *“have you tried to commit suicide”*

Ms Akuta accepted she had asked this.

- e. *“I need to know if have you have tried to kill yourself”*

Ms Akuta accepted she had said this.

- f. ...

- g. ...

- h. Ms Akuta said she had until 3pm to consent, pressurising the C to consent. C’s oral evidence *“First said no, I pleaded, please Judith, please can I have some time. Then she said, ok, you have until 3pm, or I’ll close your case”*.

Ms Akuta does not accept this. If it happened it was in a separate call almost immediately after the meeting. It is recorded in the claimant's note (except for "or I'll close your case") so we accept that this was said, but not including the "or I'll close your case" element. ...

i. ..."

7. Later the same day Ms Akuta sent her report to Ms Taylor. The tribunal set out the material content. I do not need to reproduce it, save to note that Ms Akuta recommended no standby for a month, and was of the view that the claimant's condition was likely to be considered a disability. The tribunal made further findings about how events unfolded thereafter, which I do not need to set out. However, I note that the claimant returned to work, initially in a ground-based role, in July 2022, and then to flying duties in November 2022. I was told that she still works for the respondent.

The Tribunal's Conclusions

8. There were a number of complaints of harassment before the tribunal. Those relating to matters other than Ms Akuta's involvement were, for various reasons, dismissed. Before turning to consider the specific complaints relating to Ms Akuta, the tribunal made the following observations.

"129. We have spent some time in our fact finding to set out the background to the meeting of 17 March 2022, the different approaches of Ms Akuta and the claimant to that meeting and what occurred in that meeting.

130. First, we accept Mr Davies's submission that just because the behaviour the claimant objected to occurred during a meeting to discuss her disability, that does not automatically mean that what was done or said "related to" the claimant's disability.

131. Second, it is apparent from Mx Davies's submissions (para 54 "The effect of this conduct ...") that the claimant is bringing her case based on the effect rather than the purpose of Ms Akuta's comments, so s26(4) comes into consideration.

132. It has been clear from the claimant's evidence that Ms Akuta's comments were unwanted. The questions that follow are (i) whether they related to the claimant's disability and (ii) by reference to s26(4), whether they had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant."

9. The tribunal found that what Ms Akuta wrote in the email exchange prior to the meeting was not an act of harassment contrary to section 26. Under the heading: "Aggressive and demeaning behaviour" the tribunal continued:

"138. We have made findings of fact as to the various things that were and were not said during the meeting.

139. With the exception of the comments in relation to Access to Work and the question of consent to the release of the report (which are themselves the subject of separate allegations) these relate to matters that we have found were said: “I ask questions and you answer”, “you have had counselling and treatment for over 12 months now ...”, “have you tried to commit suicide ...” etc.

140. The claimant did not want these things said. We also find that they relate to the claimant’s disability in that they are questions or comments that pertain directly to the claimant’s disability. The claimant perceived them as being acts of harassment. The question is whether, taking account of the claimant’s perception, the other circumstances of the case, and whether it is reasonable for them to have that effect, they should be considered to have the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

141. “The other circumstances of the case” are particularly pertinent here. This was a medical consultation, and each of the comments or questions had some medical basis. This is most obvious in the case of the questions about suicide, which clearly have relevance to the assessment that Ms Akuta had to make, but each of the questions or comments had relevance to the medical task being undertaken – for instance, the need for specific answers to specific questions in order to take a relevant medical history.

142. The fact that something may have a medical basis is not to be taken as a free pass for the clinician to ask questions in as offensive a manner as possible, but it is not unusual for medical consultations to have to touch on or refer to matters that the subject of that consultation may find offensive or difficult.

143. In considering “all the circumstances of the case” we are reluctant to elevate what might be a (for want of a better word) bedside manner that the subject of the consultation finds objectionable into a matter of disability-related harassment. Different clinicians will approach things in different ways and some will be more brisk or direct than others. Difficult questions can properly be asked without amounting to disability-related harassment.

144. Taking account of all the circumstances of the case and whether it was reasonable for the conduct to have that effect, we do not consider that Ms Akuta’s behaviour in general in that meeting crossed a line that meant that we should consider the claimant was subject to aggressive and demeaning behaviour or that Ms Akuta’s behaviour generally in that meeting amounted to an act of disability-related harassment.”

10. The next complaint was that Ms Akuta failed to take the claimant’s disability and the matter of adjustments seriously. Considering in particular the content of her report, and that it followed a two-hour meeting, the tribunal found that complaint not made out on the facts.

11. Under the heading “Access to Work”, the tribunal continued as follows:

“146. We have found that Ms Akuta said Access to Work was “not for people like you, its for people in wheelchairs”.

147. This was not wanted by the claimant. It was related to the claimant’s disability, since it draws a contrast between the claimant’s disability and the disabilities of others.

148. Having heard evidence from Ms Akuta we take it that she knew very little about Access to Work or its remit. Did this question have the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

149. The claimant says that it did. That is the first point we have to take into account. The second

thing is “all the circumstances of the case” which include that this was one small element of a two hour meeting, and that Ms Akuta was genuinely ill-informed or out of date about Access to Work.

150. We have to consider whether it is reasonable for the comment to have the effect contended for by the claimant. The claimant’s account is “When I mentioned Access to Work, Ms Akuta said [the words attributed to her]”. In closing submissions Mx Davies says “her reaction – panicking and becoming very anxious – is entirely reasonable in her circumstances”.

151. We know that the claimant did not appreciate Ms Akuta’s approach during that meeting, but at the end of this decision this is the only remaining comment we are addressing, having found that the others did not amount to disability-related harassment. In those circumstances it is far from clear that “panicking and becoming very anxious” was “entirely reasonable”. On the face of it, to panic and become very anxious seems to be an unreasonable response to an observation that Access to Work did not have a role in assessing adjustments for her. It is not clear whether Access to Work was an organisation previously approached by the claimant or whether it formed part of the Mental Health Support Team relied upon by the claimant. It is also not clear whether what Ms Akuta said was actually correct or not, although the hearing seemed to proceed on the basis that she was wrong.

152. So what we have is Ms Akuta getting the remit of Access to Work wrong. It seems to us to be going too far to say that this should be taken to have violated the claimant’s dignity or created a hostile degrading etc. environment for the claimant. “*Violating ... dignity*” and “*creating an intimidating [etc] environment*” are deliberately strong words. It is not just a question of incorrect or inappropriate behaviour. Saying that Access to Work did not deal with mental health conditions cannot reasonably be said to do that, and in those circumstances we do not consider this to be an act of unlawful disability-related harassment, despite the claimant’s perception of the matter.”

12. There was one other complaint of harassment concerning Ms Akuta, in a further short conversation, giving the claimant a deadline to consent to the release of her report. That was found to be unwanted behaviour, but, while without the claimant’s disability there would have been no report, setting that deadline did not, the tribunal found, relate to her disability in the statutory sense.

The Grounds of Appeal

13. Grounds 1 – 4 of the eight original grounds of appeal were permitted by Lord Fairley P to proceed to a full appeal hearing. All of them relate to the complaint of harassment concerning Ms Akuta’s comment about Access to Work. The President considered grounds 2 and 3 to be developments of ground 1 or different ways of expressing it. Ground 4 is a perversity challenge.

14. Ground 1 is expressed as follows:

“Ground 1: Error of law in relation to disability-related harassment

2. The Employment Tribunal (“ET”) erred in law by failing to properly apply the test for harassment under Section 26 of the Equality Act 2010. Specifically, the ET misapplied the objective test when dismissing the claim regarding the statement made by the Respondent’s Occupational Health professional, Judith Akuta, “Access to Work is not for people like you, it’s for people in wheelchairs.”

3. The ET accepted that this statement was made during a telephone consultation with the Appellant

on 17 March 2022 (paragraph 35(c)) and that it was unwanted conduct related to the Appellant's disability. The ET further acknowledged that the statement had the subjective effect of violating the Appellant's dignity or creating an offensive and humiliating environment (paragraph 151).

4. Failure to Properly Apply the Objective Test: the ET found against the Appellant on the final element of the harassment test, concluding that it was unreasonable for her to have been so affected. This finding was legally flawed for the following reasons:

a. Section 26(4) of the Equality Act 2010 requires the tribunal to consider "all the circumstances of the case," which includes the Appellant's health condition and her previous experiences of harassment, see paragraph 7.18 EHRC Employment Code.

b. The judge misquotes the statute. Stating "The second thing is "all the circumstances of the case"" whereas the statutory wording is in fact "the other circumstances of the case" (s.26(4)(b)).

c. The ET failed to consider the specific vulnerabilities of the Appellant, who was known to suffer from anxiety and depression, conditions that were aggravated by uncertainty and perceived hostility.

d. The ET's reasoning that the Appellant's reaction was "panic and very anxious" and therefore "unreasonable" disregards the context of her disability, which inherently predisposes her to heightened anxiety (paragraph 151).

e. The reasoning is circular. The tribunal states at paragraph 151 that because it is the only remaining allegation, it is not disability related harassment because the other allegations did not make it through, or that her reaction was disproportionate to that statement.

5. Further, the ET failed to assess the cumulative impact of this comment in conjunction with other proven statements made by the occupational health professional, including:

a. "You should be better now; you've had over 12 months of support" (paragraph 36(b)).

b. "Have you tried to commit suicide?" and "I need to know if you have tried to kill yourself" (paragraphs 36(d) and 36(e)).

c. The imposition of a deadline for consent under pressure ("You have until 3pm to consent", paragraph 36(h)).

d. Had the ET properly considered the cumulative effect, it would have concluded that the Appellant was subjected to a hostile and degrading environment."

15. Ground 2 contends that the tribunal failed to take into account the cumulative effect of the other statements found to have been made during the meeting, including by failing to take into account that the Access to Work comment was part of the overall "aggressive and demeaning" behaviour alleged by the claimant. Ground 3 in substance develops that challenge. Ground 4 contends that no reasonable tribunal could have concluded that it was unreasonable for the claimant to feel humiliated or degraded by the statement. It asserts that the tribunal should have found that her response was reasonable for someone with her specific vulnerabilities.

The Law

16. Sections 26(1) and (4) **Equality Act 2010** provide as follows:

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

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

... ..

(4) In deciding whether conduct has the effect referred to 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.”

17. Section 26(5) lists the relevant protected characteristics, including disability. Prior to the **2010 Act**, there were separate pieces of legislation for each characteristic. In **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 the EAT (Underhill P and members) considered the definition of harassment in the **Race Relations Act 1976**, as follows:

“(1) A person subjects another to harassment in any circumstances relevant for the purposes of any provision referred to in section 1 (1B) where, on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of –

- (a) violating that other person's dignity, or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect.”

18. At [15] the EAT said the following (footnote omitted):

“Thirdly, although the proviso in s-s. (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be *reasonable* that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase “having regard to ... the perception of that other person” was liable to cause confusion and to lead tribunals to apply a “subjective” test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a “subjective” element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will

be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt. ...”

19. In **Grant v HM Land Registry** [2011] EWCA Civ 769; [2011] ICR 1390 at [47] Elias LJ (for the Court) said, of the phrases within section 26(1)(b) of the **2010 Act**:

“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.”

20. In **Pemberton v Inwood** [2018] EWCA Civ 564; [2018] ICR 1291 Underhill LJ noted that section 26 of the **2010 Act** is not worded identically to the predecessor provision in the **1976 Act**.

One difference was the replacement of “on grounds of” by “related to.” He continued at [88]:

“The other difference is that, although section 26 (2) has the same three elements as section 3A (2) (in short: B's perception; the “circumstances”; and reasonableness), they are specified as matters to be taken into account in deciding whether the effect has occurred, whereas in section 3A (2) it was expressed to be a requirement of liability that it was reasonable that the conduct should have the effect in question. However, it was not suggested to us that that difference in the structure of the successor provision was intended to make any substantive difference, and I do not believe it does. Nevertheless it means that the precise language of the guidance at para. 13 of my judgment in *Dhaliwal* needs to be re-visited. I would now formulate it as follows. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1) (b), a tribunal must consider both (by reason of sub-section (4) (a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.”

21. That citation omits the footnotes, one of which observed that “it is important not to lose sight of the force of the particular adjectives used” in section 26(1)(b), and referenced **Grant** at [47].

22. In **Harkins v Marks and Spencer plc** [2026] EAT 131 the EAT (Recorder Seán Jones KC) said at [36]:

“... in assessing what degree of robustness may be reasonably expected of an employee with a mental impairment, it will be important to bear that impairment in mind in making the assessment. An employee who is known by an employer to have, say, an anxiety disorder or PTSD, may require to be dealt with in a manner which is characterised by a greater degree of sensitivity and care than an employee might typically require if a finding of harassment is to be avoided. What might be reasonably expected of them in terms of robustness is different. There must, however, be a limit. Some mental impairments may have the effect of making it significantly harder for an employee to

view good faith attempts to engage with their performance as being anything other than unjustified persecution. It cannot have been the intention of the legislature to make it impossible for an employer to discuss performance concerns without committing an act of harassment. It follows that there is a balance to be struck in determining what is reasonable. An employee's vulnerability is a factor to be taken into account but equally the tribunal cannot find itself in a position where it is imposing unrealistic expectations upon employers.”

23. For the respondent Mr Davies contended that, as a matter of law, the question of whether a claimant’s subjective perception of the conduct complained of had been materially affected by her mental health disability fell to be considered as part of its determination, pursuant to section 26(4)(a), of whether she subjectively perceived the conduct as having a proscribed effect. It would, he argued, then be an error to take that impact into account a second time when applying sections 26(4)(b) and (c), because those provisions require the tribunal to apply an objective test, within which features that are purely subjective to a particular claimant could not properly be taken into account.

24. For the claimant Mx Davies contended that whether the claimant’s perception was affected by her disability was properly considered as a relevant circumstance when applying sections 26(4)(b) and (c), as it could well be regarded as relevant to the tribunal’s consideration of whether, objectively, it was reasonable to view the conduct as having a proscribed effect. To do so did not impermissibly introduce an element of subjectivity at that stage. While it would be a relevant consideration, it would not necessarily be decisive. It was a matter for the tribunal’s objective appreciation.

25. As ground 1 identifies at para. 4(a), the claimant relies on this point on para. 7.18 of the EHRC *Code of Practice: Employment* (2011). That provides, in relation to harassment by effect:

“In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker’s health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct

would not have been offended.”

26. Mx Davies also relied upon the analysis in Harkins at [36] (see above).

27. Mr Davies, for the respondent, noted that, while the provisions of the EHRC *Code* fall to be taken into account where they appear to be relevant (see section 14(4) **Equality Act 2006**) they are not themselves part of the statute; and, he submitted, they cannot alter the law. He also submitted that the point made by the *Code* at 7.18 (b) could equally be treated as applying to the subjective part of section 26(4) as to the objective part. The discussion in Harkins confirmed that a tribunal was in any event engaged, when deciding the overall question of effect, in a weighing and balancing exercise.

28. My further conclusions about the law follow.

29. In the passage in Dhaliwal which I have set out, the EAT described the drafting of the pre-**2010 Act** formulation of the concept of effect as “clumsy”. With respect to the drafter, I am not sure that the **2010 Act** version is an improvement. But, that said, there is a danger of over-thinking the textual analysis of the statute; and, as the authorities have discussed, the overall architecture of the concept of effect, which has not in substance changed between the old and new formulations, is clear.

30. Although the drafter of the **2010 Act** version has referred to three aspects at section 26(4)(a), (b) and (c), in reality the factors referred to at (b) and (c) are, as noted in Pemberton at [90] and Harkins at [35], intertwined. Though it can be broken down more, in my judgment there are, in overview, two substantive stages to the tribunal’s enquiry. First, did the claimant in fact subjectively perceive the conduct as having a proscribed effect? If so, then, secondly, is it, objectively, reasonable to regard it as having that effect, in all the relevant circumstances of the case?

31. I note also that, while the first question is subjective, in the sense that it is about what a claimant herself in fact perceived, it is still the tribunal that must decide the answer, drawing upon all the evidence presented to it in the given case. A claimant’s statement to the effect that she did hold

that perception may not necessarily be decisive. The tribunal may, in the given case, decide, having considered *all* the evidence, that, in truth, despite what she now says to the tribunal, she did not.

32. As to the second question, the starting point is that, in principle, “all the circumstances” means “all the relevant circumstances”. But what they are is a fact-sensitive matter for the appreciation and evaluation of the tribunal in the given case, as is the question of how to weigh and evaluate those circumstances. The EAT cannot intervene unless the tribunal has clearly failed to take into account a circumstance, which no reasonable tribunal could have treated as irrelevant, taken into account a circumstance which no such tribunal could have treated as relevant, or reached an overall conclusion which is, in the **Yeboah v Crofton** [2002] EWCA Civ 794; [2004] IRLR 634 sense, truly perverse.

33. As to the point on which counsel disagree, the giving of an example in the EHCR *Code* cannot assist if it is at odds with the correct analysis of the meaning or effect of the words of the statute. However, I do not consider that the reference in para. 7.18(b) of the *Code* to the worker’s mental health is at odds with a correct analysis of the substantive law. That is for the following reasons.

34. First, we now have an authoritative statement of the law on this very point in the form of [36] of the decision in **Harkins** (see above). As is well-established, the EAT generally treats its own previous decisions as of persuasive authority and follows them unless one of the established exceptions discussed in **British Gas Trading Ltd v Lock** [2016] ICR 503 (EAT) at [75] applies. In my view none of them does. In particular **Harkins** was not manifestly wrong. In my judgment it is right, and I am of the same view. I briefly add the following to what was said in that case.

35. First, the question of whether a given claimant held a particular perception is, in principle, different from the question, if they indeed did, of *why* they did so. Evidence about their mental ill health may, of course, be relied upon, evidentially, as supporting the conclusion that they in fact perceived the conduct as having the proscribed effect. But that is a different reasoning exercise from

considering what the relevance of the mental ill health and/or its impact may be, to the question of whether it is *reasonable* to consider the conduct as having the proscribed effect.

36. Secondly, to repeat, where a claimant did indeed subjectively perceive the conduct as having the proscribed effect, then when it comes to the question of whether, if so, it is reasonable, in all the circumstances, to treat it as having done so, Parliament has not prescribed what may be regarded as relevant circumstances. That is, as I have explained, a fact-sensitive matter for the appreciation of the tribunal, so long as it does not err in one of the limited and specific ways that I have discussed.

37. Nor do I consider that it would, in principle, be wrong to take a claimant's mental ill health into account at the section 26(4)(b) and (c) stage, because that is a feature of the circumstances that is personal or subjective to her. The question is whether it is reasonable to treat the conduct as, for example, violating *her* dignity, or creating a proscribed environment for *her* (see **Dhaliwal** at [15]). But it will still be for the appreciation of the tribunal to decide whether, taking her mental ill health into account along with *all* the other relevant circumstances found by the tribunal, it is objectively reasonable to treat the conduct in question as having the proscribed effect.

38. As the discussion in **Harkins** at [36] explains, a finding that a claimant's mental ill health was a relevant consideration is not bound to lead to the conclusion that the conduct should reasonably be regarded as having the proscribed effect. In particular, in a case where the context is a legitimate management enquiry or investigation into an unavoidably sensitive subject, that may be regarded as particularly relevant, not only to an assessment of whether the actor had the proscribed purpose (in a case where it is alleged that they did), but also as to whether, given that context, their conduct is reasonably to be regarded as having the proscribed effect.

Discussion

39. In the grounds of appeal, after some scene-setting in paras. 2 and 3, the substance of ground

1 appears at paras. 4 and 5. I have already addressed the point of law raised at para. 4(a). In oral submissions Mx Davies indicated that the point at para. 4(b) was not pursued. As to (e) I cannot see that the tribunal's reasoning was – specifically – circular. In all events, I do not think that (e) adds anything of substance to the other strands of this ground of appeal.

40. It seems to me that there are, in overview, two substantive lines of challenge raised by the remainder of ground 1. The first is to the effect that the tribunal erred when deciding the objective question, because it failed to consider the impact of the claimant's anxiety on her perception of the Access to Work comment (the challenge advanced by paras. 4(c) and (d)). The second is the challenge advanced by para. 5, that the tribunal failed to take into account the context of the other factual statements that were found to have been made during the meeting, and wrongly considered this remark in isolation without regard to that context. I consider that this second line of challenge is, effectively, repeated or developed by grounds 2 and 3.

41. I turn to consider the first of those two challenges.

42. Mx Davies argued that at [149] to [152] the tribunal failed to take into account the impact of the claimant's anxiety on her reaction to the Access to Work comment. They submitted that at [149] it "identified essentially two" relevant circumstances, being that the comment was one small element of a two-hour meeting and that Ms Akuta was genuinely ill-informed or out of date about Access to Work. Further, at [151] the tribunal wrongly treated the claimant's anxiety as evidence that her response was excessive, rather than as a personal circumstance to be taken into account. Mx Davies also submitted that the tribunal made a further error at [152], because it materially recast the comment as a neutral, albeit incorrect, statement about the coverage of Access to Work, rather than a personal comment, which contrasted "people like you" with wheelchair users.

43. I remind myself that, as Mx Davies properly acknowledged in their submissions, it has

repeatedly been said over the years, that the decision of an employment tribunal must be read fairly and as a whole. In this case the tribunal noted at the outset, at [3], that it was accepted that the claimant was at all material times disabled by reason of depression, anxiety and social phobia. It also, at [6] and [7], described the context of this having developed during Covid-19 lockdowns and of the claimant having to return to a new role that she felt put her in a worse position. It went on to identify the further context that, during her absence, the claimant had been receiving “substantial support” from what she referred to as her MHST and held their advice in “high regard” [21].

44. When it turned specifically to the call on 17 March 2022 the tribunal noted that, on the claimant’s account and that of one of her witnesses, the claimant “was in tears and very distressed during the meeting” [28]. Although the tribunal did not say so expressly, the general sense of this passage is that it did accept that as a fair description of her general emotional state during the meeting. At [30] the tribunal went on to say that the claimant was “very nervous” about the meeting. It noted again that the context was that she was “recovering from a prolonged period of illness” and other difficulties arising from Covid-19 and the lockdowns. It referred again to her “facing a return to work as HCC”, which she was not happy about. She was “nervous about her return to work”, and placed heavily reliance on her MHST. She was also “not prepared” for Ms Akuta’s approach.

45. Pausing there, it appears to me to be quite clear from these passages that the tribunal had very much in mind the contextual features to which the claimant attached weight, *including* the illness which had given rise to her absence, which was the very disability which it was accepted that she had, and that she went in to the meeting in an anxious state of mind. When in due course it came to set out its conclusions in relation to the harassment complaints, it also specifically referred back to these passages in its earlier fact-finding [129], effectively reassuring and explaining to the reader that, in reaching its conclusions, it had not forgotten, and was (properly) drawing upon, those earlier findings.

46. When it came to consider its conclusions in relation to the harassment complaints relating to

what happened during the meeting, at [138] and following, the tribunal followed the list of issues, as further particularised by Mx Davies, as set out at [35] and [36]. It started by considering various specific alleged remarks that had been identified as part of the “aggressive and demeaning” behaviour. It found that each of these was said, was unwanted, related to the claimant’s disability, and was perceived by her as having the proscribed effect. But when considering the reasonableness question it properly took into account the context that “this was a medical consultation and each of the comments or questions had some medical basis” [141]. It also balanced this with the observations at [142] that I have also reproduced above. In that particular passage, I observe, the tribunal effectively articulated the guidance in **Harkins** at [36] *avant la lettre*.

47. Reading all of those various passages as a whole I do not agree with Mx Davies that the tribunal simply took no account of the claimant’s case that her reactions were influenced by her disability. But it plainly considered, as it was entitled to do, that another particularly significant circumstance, was that all of these remarks were made by an OH practitioner in the context of an OH assessment. The tribunal did not say that the things that it mentioned at [149] were the *only* relevant circumstances, but rather that the circumstances *included* those things. Further, in weighing everything up, the tribunal did not treat the OH assessment context as giving Ms Akuta a “free pass”.

48. Nor do I agree that [151] should be read as indicating that the tribunal erred by treating the claimant’s anxiety as evidence of the unreasonableness of her response. The claimant’s general disability was described as “anxiety” (as well as depression and social phobia). It was accepted that she had this disability, and, as we have seen, the tribunal found that she was particularly nervous and anxious about, and throughout, this meeting. But the tribunal was concerned, at this point, and against that general background, with what was said to have been the particular effect on her, of the conduct complained of. As the tribunal recorded at [150] Mx Davies submitted to it that her reaction to this particular comment had been “panicking and becoming very anxious.”

49. The tribunal went on, at [151] and [152], properly to consider whether it was reasonable to view that comment as having an effect described in section 26(1). As the tribunal noted there – clearly following the guidance in **Grant** and **Pemberton** – the words in section 26(1) are “deliberately strong words” and “it is not just a question of incorrect or inappropriate behaviour.” I note also that the EAT observed in **Harkins** at [31], when considering **Grant**, that it is not enough to show that the act was more than trivial and the upset more than minor; and that, for example, in **Pemberton**, in the particular circumstances of that case, it was not enough that the conduct was “profoundly upsetting”.

50. Nor do I consider that in the final words of [152] the tribunal erred by materially recasting what had been said. It set out accurately the words allegedly said, drawing upon the list of issues, at [35(c)]. It set them out again at [36(c)], where it found there that they *were* in fact said. It started its conclusions in relation to this complaint at [146] by setting out the precise words, in quotation marks, for a third time, and indeed then found at [147] that it was “because it draws a contrast between the claimant’s disability” and those of others that the remark was related to the claimant’s disability.

51. I do not read the tribunal, just a few paragraphs later at [152], as having forgotten, or deliberately miscast, the phrase that was used. I appreciate the claimant’s point that the phrase “people like you” was, she felt, particularly insensitive. But the tribunal’s point at [152] was that it was – for the purposes of this statutory wrong – not just a question of “incorrect or inappropriate behaviour”, and that the substantive nature of what Ms Akuta was saying, and the context in which she said it, of an OH assessment considering adjustments, were relevant considerations.

52. Standing back, the overall sense of this passage, in context of the decision as a whole, is that the tribunal took on board, and had in mind, that the circumstances included that the claimant had the disability of anxiety (and depression and social phobia), that she was anxious and nervous about the meeting for that and other reasons, that she was distressed by what it called Ms Akuta’s business-like approach, which was not what she had been expecting, and that she found the meeting upsetting all

the way through. But the tribunal also considered it to be a relevant part of the circumstances – to which, as it was entitled to do, it plainly attached particular weight – that the context was an OH interview and that Ms Akuta was engaged in the role of the OH practitioner conducting that interview; and that the remark – correct or not – was in substance about her understanding of whether Access to Work could provide support for the claimant, having regard to the particular nature of her disability.

53. For these reasons, I do not consider that the tribunal erred as contended for by this first overall strand of ground 1.

54. I turn to the second overall strand of ground 1, which, as I have said, is reiterated and developed in grounds 2 and 3. This is that the tribunal failed to consider the “cumulative effect” of the Access to Work comment in the context of the meeting as a whole, and in particular the various other remarks that it had found were in fact made, notwithstanding that none of them constituted acts of harassment. Reliance is placed, in particular, on the tribunal having said, at the start of [151] that this is “the only remaining comment we are addressing”. Mx Davies submitted that this betrayed the error of compartmentalising this remark and removing it from its general context.

55. I do not agree that this is a fair, or correct, reading of the tribunal’s decision. Once again, I note the findings that were made during the course of the decision about the overall background leading up to this meeting, the frame of mind in which the claimant went in to it (and why), about how she was disarmed by Ms Akuta’s general approach, and about her general emotional state all the way through. Once again the tribunal’s conclusions about this particular claimed act of harassment – the Access to Work remark – followed hard on the heels of its discussion of the other remarks. That included the tribunal expressly stating, at [144], in general terms:

“Taking account of all the circumstances of the case and whether it was reasonable for the conduct to have that effect, we do not consider that Ms Akuta’s behaviour in general in that meeting crossed a line that meant that we should consider the claimant was subject to aggressive and demeaning behaviour or that Ms Akuta’s behaviour generally in that meeting amounted to an act of disability-related harassment.”

56. As I have noted, in support of this line of challenge, ground 2 contends that the tribunal failed to take into account that the Access to Work comment was one of those said to have been aggressive and demeaning. Rather, it is said, at [139] it specifically excluded it from its assessment of the claimed aggressive and demeaning behaviour. I do not agree. My reasons follow.

57. As I have set out, the tribunal accurately captured at [35] that, as framed in the list of issues (annexed to its decision), three factual allegations related to what happened during this meeting. “Aggressive and demeaning behaviour” was the description of the first, and the Access to Work comment was the third. The tribunal then recorded at [36] Mx Davies’s submission as to what specific alleged behaviour fell under the umbrella of “aggressive and demeaning”. That list itself included at (c) the Access to Work comment. That comment was therefore placed under that umbrella but had also in any event been complained of separately as well. That list of “aggressive and demeaning conduct” also included at (h) Ms Akuta allegedly pressurising the claimant in the further follow-up phone call. But that allegation too was also already identified separately in the list of issues.

58. When it came to its conclusions, the tribunal approached matters in the same order as the list of issues, starting with “aggressive and demeaning behaviour”. But, when it worked through the particular allegations that fell under that umbrella, it noted, correctly, at [139], that two of these were already separately identified; and so it dealt with them in the succeeding paragraphs. That it did so in that way, does not signify that the tribunal considered the Access to Work comment in isolation from the context, which included the making of the other remarks. It is merely a reflection of this structural feature of how the matters complained of were identified and set out before the tribunal.

59. For all of these reasons, reading the decision fairly and as a whole, I do not consider this second line of challenge, advanced by grounds 1, 2 and 3, to be made out.

60. Ground 4, is, as framed in the ground itself, a perversity challenge to the effect that no

reasonable tribunal could have concluded other than that the claimant's perception of the Access to Work comment was reasonable, having regard in particular to the findings that the claimant had the disability of anxiety, and as to her general state of anxiety during this meeting. Mx Davies, as they must, acknowledged the high threshold faced by such a challenge, as discussed in **Yeboah v Crofton** (above) and other familiar authorities. In the section of their skeleton directed to this ground the emphasis is placed, once again, on the arguments that the tribunal misdescribed the remark at [152] and/or failed to integrate its findings about the disability and the surrounding consultation into the objective assessment. I have found these criticisms not to be made out.

61. In all events, the pure perversity challenge advanced in ground 4 is, in my judgment, simply not made out. Taking account of all the features that the claimant contends should have been taken into account, including the impact of her disability, and the other remarks made during the course of the meeting, the tribunal was fully entitled, having regard in particular, as it did, also to the nature of the meeting, and Ms Akuta's role, to conclude that, in all the circumstances, it was not reasonable to regard the Access to Work comment as having an effect described in section 26(1)(b).

Outcome

62. The tribunal clearly entirely accepted how anxious the claimant was about this meeting, how it did not unfold in the way she was expecting, that it was a distressing experience for her, and that she perceived a number of things said by Ms Akuta as harassing. But its task was, specifically, to consider whether her legal complaints of harassment, including relating to the Access to Work comment, were made out, applying the definition in the statute, and guided by the authorities. For reasons I have set out, it did not err in that regard, in any of the ways alleged by the grounds of appeal.

63. The appeal is therefore dismissed.