



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Smith

**Respondent:** West Yorkshire Combined Authority

**Heard at:** Leeds      **On:** 5 to 8 and 11 to 13 October 2021  
21 and 22 October 2021 and 6 December 2021  
(reserved decision in chambers)

**Before:** Employment Judge Cox

**Members:** Mrs L Anderson-Coe  
Mr M Brewer

**Representation:**

**Claimant:** In person

**Respondent:** Mr Newman, solicitor

## RESERVED JUDGMENT

These claims fail and are dismissed.

## REASONS

### Procedural background

1. On 31 May 2020 the Claimant presented a claim to the Tribunal alleging that the Respondent had discriminated against her in various ways relating to disability, contrary to the Equality Act 2010 (the EqA). At a Preliminary Hearing for case management, the Tribunal had insufficient time to identify which acts within her

claim form were alleged to be unlawful discrimination, and which type of unlawful discrimination each was alleged to be, but it did identify in broad terms that the Claimant was alleging direct discrimination, indirect discrimination, harassment, discrimination arising from disability and a failure to make reasonable adjustments. The disabilities on which she relied were attention deficit hyperactivity disorder (ADHD) and dyspraxia.

2. The Claimant had presented another document on around 3 August 2020 which purported to be further and better particulars of her original claim but in fact included (although was not limited to) additional allegations of victimisation. At that time, the Tribunal gave the Claimant leave to amend her claim to include the information in that document but without identifying whether that information raised new factual or legal allegations and, if it did, what those allegations were.
3. The Claimant resigned on 15 September 2020. On 14 December 2020 she produced a further document in which she applied to amend her claim to include allegations of discriminatory constructive dismissal and victimisation. At a Preliminary Hearing for case management on 14 December 2020 the Tribunal gave her leave to further amend her claim to add the complaints “as set out in the application dated 14 December 2020” but without identifying what new factual and legal allegations were being made. It also ordered the Claimant to provide further details of her claims of failure to meet the duty to make adjustments, harassment and victimisation.
4. The Tribunal’s first task at the main Hearing was to clarify and particularise the allegations. With the assistance of the parties, the Tribunal analysed the claim form and the other documents the Claimant had produced and the Orders that had been made in relation to them. It drafted a list of the allegations which both parties agreed could properly be viewed as being included in the original claim or the documents that were the subject of the Orders giving leave to amend. Both parties agreed that list as accurate. During the Hearing, the Claimant narrowed her allegations in some respects and the final version of them is set out in these reasons and forms the basis of the Tribunal’s findings. Once the allegations in the claim form and the other documents had been identified, the Claimant applied to amend her claim again to include further allegations. The Tribunal refused that application, for reasons that were given at the Hearing.
5. The process of clarifying the claim and dealing with the further application to amend took a substantial amount of time. In addition, the Tribunal was presented with a large amount of documentation that was difficult to navigate: the file for the Hearing ran to nearly 3,000 pages, contained many duplicated documents and was poorly indexed.
6. As a result of these factors, the Hearing overran the original time estimate and the Tribunal spent three days deliberating on its decision. It regrets the delay that this has caused to the parties in receiving its Judgment.

## The evidence

7. At the Hearing, the Tribunal heard oral evidence from the Claimant in the form of a witness statement and a separate impact statement relating to her disabilities and their effect on her day-to-day activities. Together, these ran to 73 pages. The Tribunal also heard oral evidence from Miss Heather Briggs, the Claimant's UNISON representative, who attended various grievance and welfare meetings with her.
8. For the Respondent, the Tribunal heard oral evidence from the following:
  - a. Mr Alex Waugh, Lead Enterprise Co-Ordinator within the Respondent's Economics Service Directorate. He was the Claimant's line manager from June 2019 to October 2019 and the subject of a grievance she raised in August 2019.
  - b. Mr Henry Rigg, who at the relevant time was Interim Executive Head of Economic Services. He dismissed the Claimant's appeal against the outcome of her grievance about Mr Waugh.
  - c. Mrs Danielle Choma, Schools Partnership Service Manager, who took over from Mr Waugh as the Claimant's line manager in October 2019 after the grievance against him. She was the subject of the Claimant's second grievance of 10 March 2020.
  - d. Ms Stacey Baker, HR Business Partner. Ms Baker became involved in the Claimant's case at a time when she had already gone on an extended period of sick leave, which ran from February 2020 until her resignation in September 2020.
  - e. Mrs Joanne Grigg, head of HR for the Respondent, who dealt with the Claimant's application for payment for her absence from work.
  - f. Ms Liz Hunter, who at the relevant time was Head of Transport Policy. She dealt with the Claimant's March 2020 grievance and also attended welfare meetings with the Claimant during her sickness absence.
  - g. Mr Dave Pearson, Director of Transport and Property Services, who dealt with the Claimant's appeal against the outcome of the second grievance.
9. Because of the length of the Hearing file, the Tribunal emphasised to the parties that it would be taking into account only the documents to which it was expressly referred by the witnesses or the parties. Further, at the conclusion of the evidence, it directed the Claimant to identify the written and oral evidence upon which she relied in relation to the reasonable adjustments allegations, by

reference to the relevant page numbers in the Hearing file and paragraph numbers in her witness statement.

10. In 18 June 2019, two months after she began her employment with the Respondent and less than a fortnight after Mr Waugh became her line manager, the Claimant began covertly recording her meetings with managers. Neither side has raised any issues in relation to the covert nature of these recordings. Agreed transcripts of those recordings have provided the Tribunal with authoritative evidence on the content of the meetings.

### **Background facts**

11. Certain background facts were not in dispute,
12. The Respondent is a public body that carries out various functions on behalf of local authorities in the West Yorkshire area that are best exercised at a regional level, including, for example, transport services.
13. The Claimant began working for the Respondent on 8 April 2019 as an Enterprise Co-ordinator. She worked as part of the Employment and Skills team, whose aim was to encourage the development of a skilled and flexible workforce in the West Yorkshire area by working with employers and education providers to create more and better jobs and a highly skilled workforce to fill them.
14. In 2014 the Government created a Careers and Enterprise Company (CEC) for schools, with the aim of improving the provision of careers education and advice for young people and raising their awareness of the work opportunities that might be available to them. The CEC created an Enterprise Advisor Network through partnerships with regional organisations such as the Respondent, with the aim of developing partnerships between schools and employers. The aim was to help educational institutions to improve their careers provision, employers to inspire young people to join their industry, and young people to learn from employers and entrepreneurs (Enterprise Advisers) about personal motivation, the different economic sectors and the reality of the world of work.
15. The Claimant's job involved co-ordinating and implementing the Enterprise Advisor Network in the Wakefield area. Her role was to identify and link an Enterprise Adviser from the world of work with an appropriate school and manage that relationship as necessary.

### **Disabilities and knowledge of them**

16. In advance of the Hearing, the Respondent conceded that the Claimant was at all material times a disabled person within the definition in Section 6 EqA, in relation to each of her conditions of ADHD and dyspraxia.

17. At the Hearing itself, the parties agreed that, for the purposes of the claim it could be assumed that the Respondent had knowledge of each disability by the end of July 2019.
18. The Respondent's concession that the Claimant was a disabled person as a result of her dyspraxia and ADHD at the relevant time meant that it accepted that each of these conditions had a substantial adverse effect on her ability to carry out normal day-to-day activities (Section 6(1)(b)). An effect is substantial if it is anything more than minor or trivial (Section 212(1)). In order to decide the claims, however, it was still necessary for the Tribunal to make findings as to how, and the degree to which, the Claimant's conditions affected her.
19. In her impact statement, the Claimant maintained that her disabilities have a very substantial effect on her. The overall impression given by that statement was that the Claimant struggles very significantly in all aspects of day-to-day living. She said, for example, that as a result of her dyspraxia it takes her "a few hours to get dressed and leave the house in the morning". She has, she said, significant difficulty in reading or understanding written material in English.
20. The Tribunal is fully aware of the dangers of making findings about a Claimant's disability from observations it makes of her conduct at the Hearing itself, which is far from a normal setting. The Tribunal also accepts that the Claimant had spent many hours familiarising herself with the documents that were used at the Hearing. It remains the case, however, that the Claimant was able to navigate around the Hearing files, which were in six volumes, fluently and handle them with no visible difficulty, even when she was being asked to provide information with no notice. She maintained focus and concentration throughout her cross-examination of the Respondent's witnesses, which extended over several days. She chose to take, and successfully completed, a degree in English Language and Literature. She also has an MSc in Management, finishing in the top 10% of those on the course. It was not until 2017, when she was her mid-twenties, that she sought an assessment for, and was diagnosed with, dyspraxia and ADHD. In her previous employment before she joined the Respondent, she had managed her work without needing to disclose her disabilities to her employer or ask for any adjustments. None of this sits easily with her evidence on the extreme degree of difficulty she has in relation to tasks involving motor skills, concentration and organisation and reading or understanding written materials.
21. The Tribunal nevertheless accepts that the Claimant's disabilities do have more than a minor or trivial effect on her day-to-day activities, even if not to the degree that she asserts. Both her dyspraxia and her ADHD affect the speed at which she processes written materials, her memory, her ability to concentrate and her ability to organise her thoughts. Her dyspraxia also affects her motor functions. A report compiled in March 2017 by a specialist teacher while the Claimant was completing her Masters degree (referred to in these reasons as "the dyspraxia report") confirms that she sometimes has difficulties with tasks such as putting on

make-up, tying shoelaces and using cutlery. She also finds it difficult to grip a pen and write legibly, which leads to her gripping the pen tightly, which in turn causes carpal tunnel syndrome in her wrists. Her impaired motor functions also lead to difficulty in using a keyboard and mouse. She finds it difficult to copy from one document to another, so it takes her longer than the average person to do this task.

## DISCRIMINATION ARISING FROM DISABILITY

22. It is unlawful for an employer to subject an employee to a detriment by treating her unfavourably because of something arising in consequence of her disability, unless the employer can show that that was a proportionate means of achieving a legitimate aim (Section 39(2)(d) read with Section 15 EqA). **The Claimant alleged that at a 1-2-1 meeting on 18 February 2020 Mrs Choma threatened her with a performance management process.** The day after this meeting, the Claimant began a period of sickness absence from which she did not return.

23. The issues in relation to this aspect of the claim were:

- a. Did Mrs Choma treat the Claimant unfavourably in the way alleged?
- b. If she did, what was the reason for that treatment?
- c. Was that reason something that arose in consequence of the Claimant's disability?
- d. If it was, was it a proportionate means of achieving a legitimate aim?

24. The agreed transcript of the meeting records that what Mrs Choma said to the Claimant was: "I will revisit this in two weeks Stacey and if there's, if things are not right, then we'll have to get a meeting in with Michelle and discuss it, it's not difficult." The reference to Michelle was to Mrs Burton, Head of Employment and Skills, a more senior manager within the organisation.

25. The Respondent's procedure for dealing with disciplinary and capability matters states that: "Each stage of the formal process will be conducted by an appropriate manager no less senior than at the previous stage and wherever possible, they will be more senior." This procedure was not applicable to employees who were, like the Claimant, in the first year of employment and there was no indication in the evidence that the Tribunal heard that Mrs Choma was having the conversation as the informal stage of a capability process. Nevertheless, the Tribunal accepts that it did amount to unfavourable treatment and a detriment, because it was a threat to involve a more senior manager if the Claimant's performance did not improve. That might presage a more formal or serious stage of a process to manage her performance.

26. Mrs Choma made the comment because she had a number of issues with the way in which the Claimant was documenting her whereabouts and her working

hours. The Respondent required its employees to enter their whereabouts during the working day into an electronic calendar or diary. They also had to record the hours they worked by clocking in and out at the beginning and end of the working day and at the beginning and end of their breaks, by tapping or swiping a card on a device in the office that was around half the size of an A4 sheet of paper. If they were not in the office, they were required to enter their hours online on a system called Carval, on a spreadsheet-type form. Mrs Choma had identified that there were gaps in the Claimant's electronic calendar/diary so that it was not clear where she was, she was not using the machine in the office to clock in and out and she was not updating the Carval system promptly to record her hours.

27. The Claimant's case was that she had difficulties in using the usual clocking in and out machine and Carval because of her impaired motor skills related to her dyspraxia. The Tribunal accepts that the Claimant's motor skills are affected by her dyspraxia. But the Tribunal does not accept that the Claimant's failure to comply with the Respondent's time and movement recording requirements arose in consequence of that. If it had, the Tribunal would have expected the Claimant to say so at the time. In fact, at no time did she tell her managers that she was finding it difficult to comply because of her dyspraxia, even though she had already disclosed that disability to the Respondent and there had been extensive discussion about adjustments she might need. Her explanation to her managers on why she did not clock in and out when she was in the office was that she could not find her swipe card because it was at the bottom of her bag. She told the Tribunal that she preferred to write down the times she began and ended work on a piece of paper or on a spreadsheet on her own computer, as she had done in her previous employment. She clearly did not, therefore, have difficulty in entering her hours on a spreadsheet, which could have been the Carval form just as easily as her own spreadsheet. She said that if she opened her phone to go online to enter her hours on Carval she would be distracted by other activity on the phone and that, in any event, she did not know how to use the Android phone she had been supplied with by the Respondent because she was more familiar with using an i-Phone, which was the type she used for her personal life. She said none of this to Mrs Choma. Indeed, when Mrs Choma said at the meeting on 19 December 2019 that the Claimant was struggling with managing and clocking in and out, the Claimant's response was "I'm not struggling".
28. Although the Claimant maintained to Mrs Choma that she did not know what she was doing wrong, the Tribunal finds that Mrs Choma made clear to her that she was not doing things the way the Respondent required her to. Her non-compliance was not because of impaired motor skills arising in consequence of her dyspraxia, as she alleged, but rather because she preferred to record her hours in the way she had done in her previous job.
29. The Tribunal does not accept on the evidence that it has heard that the Claimant's practice in relation to her electronic diary was, as she maintained, because of the difficulty she has in copying entries between paper and screen

associated with her dyspraxia. She did not say that was the reason in her witness statement, nor did she give this as the reason to the Respondent. The thrust of the Claimant's evidence was not that she had difficulty with the physical act of making entries in the diary but rather that she did not understand what she needed to put in the diary and how quickly she needed to update it if her plans changed. From the transcripts that the Tribunal has read, it is satisfied that Mrs Choma had made clear to the Claimant that she was not entering sufficient information in her diary or updating it sufficiently promptly. That was the reason why Mrs Choma made the comments she did, and that reason did not arise in consequence of the Claimant's disability in the way she alleged.

30. For these reasons, this allegation fails.

### **FAILURE TO MAKE ADJUSTMENTS**

31. The Claimant alleged that the Respondent had failed in various ways to meet its duty to make adjustments for her disability of dyspraxia.

32. The duty to make adjustments arises if an employee is put at a substantial disadvantage in comparison with a person who is not disabled because of the application of a practice or lack of an auxiliary aid, and the employer knew or could reasonably have been expected to know that the employee was a disabled person and was at that disadvantage. The employer is then under a duty to take such steps as it is reasonable for it to have to take to avoid the disadvantage (Section 20 EqA). A failure to meet the duty amounts to discrimination (Section 21(2)) and if the employer subjects the employee to a detriment by discriminating in this way, it is unlawful (Section 39(2)(d)).

33. So, in relation to each allegation of failure to meet the duty to make adjustments, the Tribunal needed to decide:

- a. In relation to the allegations about adjustments to practices, did the Respondent have that practice?
- b. Was the Claimant at a substantial disadvantage compared with a non-disabled person because of the practice or the lack of the auxiliary aid? A disadvantage is substantial if it is anything more than minor or trivial (Section 21(2)(1) EqA).
- c. If she was, did the Respondent know that, or could it reasonably have been expected to know that, and when did that actual or constructive knowledge first arise?



- d. What steps, if any, did the Respondent take to adjust the practice or provide the aid, and when?
- e. Were those steps sufficient to amount to the steps that it was reasonable for it to have to take to avoid the disadvantage to the Claimant?

### **Evidence on disadvantage and knowledge of it**

- 34. In assessing whether the Claimant was under a disadvantage in comparison with a non-disabled person in the ways she alleged, the Tribunal took into account the Claimant's witness statement and her impact statement, the 2017 dyspraxia report, a "holistic workplace assessment" of the Claimant (referred to in these reasons as the "holistic assessment") carried out by Access to Work (ATW) on 19 August 2019 and two Occupational Health Reports by the Respondent's external occupational health advisers dated May and June 2020.
- 35. In relation to the Respondent's knowledge of the disadvantages the Claimant was under because of her disabilities, the Tribunal makes the following findings about the documents it saw.
- 36. The parties agreed that the Respondent saw the 2017 dyspraxia report when the Claimant gave it to them on 2 July 2019. This was the point at which the Claimant first disclosed her disabilities to the Respondent. The parties also agreed that on 3 September 2019 the Respondent was given a copy of the list of equipment that ATW recommended after its assessment of the Claimant. When the Claimant first disclosed her disabilities to the Respondent it sought her consent to refer her for an occupational health assessment, but the Claimant did not consent to this until April 2020. The Respondent saw the May and June 2020 occupational health reports soon after they were made.
- 37. In her submissions at the end of the Hearing, the Claimant asserted that the Respondent also knew the entire contents of the ATW holistic assessment, which explained the background and rationale for the equipment and training it recommended. She said she discussed the holistic assessment in detail with Mr Waugh and Ms Tyreman, HR Adviser, at a meeting on 6 September 2019. She submitted that both Mr Waugh and Ms Tyreman read the report at that meeting. The Tribunal does not accept that. The Claimant did not say that in her evidence to the Tribunal and she did not put that to Mr Waugh when she questioned him. Even if she had given evidence to that effect, the Tribunal would not have considered it credible that both managers would have had an opportunity to read the holistic assessment, which runs to several pages, during that meeting. The Tribunal does accept, however, that one of the issues raised in the holistic assessment that was not included in ATW's list of recommended training and

equipment was discussed in general terms at the September 2019 meeting, namely ATW's recommendation that the Claimant be allocated a fixed desk.

38. The Claimant also asserted that the Respondent had been sent a document that set out information for employers on how to support employees with ADHD and dyspraxia. The Respondent did not accept that it received that document, but the Tribunal finds that it did, as it appears to be included as an attachment to an email sent from Ms Clarke, HR Support Officer, to Mr Waugh on 3 October 2019. (The Tribunal was not referred to the page in the hearing file where this email appears, but it was referred to the attachment to the email where it appeared in another place in the hearing file without the relevant page. The Tribunal considered it fair to view the complete version of the attachment.) This one-page document states that "consultation between the Customer [the employee], their manager and colleagues can be very helpful to establish how the Customer would like to communicate and work to help reduce the impact of their disability on their role. The following advice may be also useful to assist the employee in their workplace:" and goes on to give some general advice. This was expressed in brief, broad themes and did not, therefore, address the Claimant's specific disabilities and work circumstances.
39. The Claimant's evidence was that in the first meeting she had with Mrs Choma when she became her line manager, she explained all the difficulties she had with her disabilities, what adjustments had been recommended by ATW and why they had been recommended. The Tribunal does not find that evidence credible. The meeting was an initial meeting for, as the Claimant records, an informal chat about the new line management arrangement. It was scheduled by Mrs Choma to last half an hour.
40. The Tribunal takes judicial notice of the fact that dyspraxia and ADHD are conditions that vary significantly in the ways in which, and the degree to which, they affect individuals. It was therefore important for the Respondent to have clear and comprehensive information on how the Claimant was affected by her disabilities if it was to know, or if it was reasonably to have been expected to know, the disadvantage she was under because of her disabilities. If that information did not come from documents, it had to come from the Claimant herself. The Respondent's state of knowledge about what disadvantage the Claimant was under would also affect what steps it was reasonable for it to take to avoid the disadvantage to the Claimant.

### **Caseload**

41. The first allegation of failure to make reasonable adjustments related to the Respondent's **practice of requiring enterprise co-ordinators such as the Claimant to carry a caseload of between 20 and 25 schools or colleges**. The parties agreed that the Respondent had that practice.

42. On the basis of the evidence presented to it, the Tribunal accepts that the Claimant's dyspraxia meant that she carried out her work more slowly than others did. She needed more time to plan her work and to read and absorb documents. For that reason, the Tribunal is prepared to accept that being required to bear the standard caseload of between 20 and 25 schools or colleges would put the Claimant at a substantial disadvantage in comparison with people who are not disabled.
43. The Tribunal does not accept, however, that the Respondent knew, or could reasonably have been expected to know, that the Claimant was at that disadvantage. Although the Claimant was clear and assertive about her need for adjustments for her disabilities, as she was entitled to be, she never said to either of her line managers that she was finding her caseload too onerous because of her dyspraxia and that it needed adjusting too. She did not raise it as an issue in either of her grievances.
44. Nor does the Tribunal accept the Claimant's assertion that the Respondent could reasonably have been expected to have been aware of her disadvantage because of the amount of flexitime hours she was accumulating. At the time, she was providing her managers with a credible explanation unrelated to her disabilities for why she was needing to work more than her normal working hours. So, for example, at a meeting on 19 December 2019 with Mrs Choma and Ms Tyreman, when the Claimant's management of her time was discussed, the transcript of that meeting records that the Claimant explained that her long hours were due to various transient factors: the big schools coming back in September, preparing for her grievance hearing, time out for training and a week of annual leave, and two events she had had to prepare for. She was effectively reassuring her line manager that there was not a problem.
45. In summary, the Tribunal does not accept that the Respondent either knew or could reasonably have been expected to know that the normal caseload was causing the Claimant a problem because of her dyspraxia. This allegation therefore fails.

### **Clear instructions and priorities**

46. The Claimant alleged that the Respondent had a **practice of requiring enterprise co-ordinators to carry out their work without being given clear instructions and priorities**. In her submissions at the end of the Hearing, the Claimant relied on evidence relating to Mr Waugh's practice only; she made no reference to lack of clarity in relation to Mrs Choma's management of her.
47. In relation to Mr Waugh, the Tribunal accepts that on 2 September 2019 Mr Waugh told the Claimant in an email that he did not think she had to request flexi leave on Carval for half a day, but he would double check. On 18 September 2019 he indicated that the Claimant needed to fill in her timesheets by the end of

the flexi leave period. Both indications were incorrect: flexi leave did need to be requested even if only for half a day and timesheets needed to be filled in promptly, not by the end of the flexi leave period. As a new recruit to the organisation himself, it is understandable that Mr Waugh was not fully aware of the detail of the Respondent's attendance and time recording systems, but the Tribunal does not accept that this put the Claimant at a substantial disadvantage compared with a person who was not disabled. Everyone needed to know the Respondent's requirements so that they could comply with them.

48. The Claimant also said that Mr Waugh did not give those he was managing clear instructions and priorities in relation to reporting deadlines for inputting data on activities relating to the schools for which they were responsible.
49. At a meeting on 6 August 2019, Mr Waugh raised with the Claimant his concern at the lack of data input on activities relating to the schools for which she was responsible. In response the Claimant sent him activity spreadsheets showing what activities she had recorded. In an email on 7 August 2019, Mr Waugh stated that reports on KPIs were completed monthly and councillors might ask questions about performance at any time. It was therefore important for activity to be recorded in a timely manner and within agreed deadlines. He also questioned the Claimant on where the 47 activities she had now entered in the databased for August had come from, given that she had told him she had been having difficulty in obtaining information on activities from the schools. In an email of 14 August, the Claimant asked him to explain what exactly his concerns were. She suggested that if his concerns related to the way in which the whole team was reporting data, he should raise it in a team meeting. She suggested that he might want to speak to one of her colleagues for help with his concerns.
50. The Claimant also wrote Mr Waugh a detailed email on 12 August 2019 pointing out to him all the reasons why data may not have been available, She gave him various suggestions on what he might read to better understand what was involved in her role and the area for which she was responsible. She gave detailed information on her performance in data gathering in comparison with her predecessor which, she said, illustrated that she was capable of managing her time effectively and inputting information into the database. She said that neither she nor anyone else in the team was aware that there was a monthly KPI report.
51. These emails were clear and detailed. Their overall tone was assertive and, if anything, patronising towards Mr Waugh. The Tribunal finds that these were emails written by a person who was indignant that her performance had been criticised, she thought unfairly, by a manager who did not understand what was involved in her role or how he should be managing his team. These were not emails sent by someone who was under some form of disadvantage, because of her disabilities, due to her manager's lack of clarify. She was also clearly of the view that all the team was working on the same basis that she was.

52. At a meeting on 15 August 2019 the Claimant had an extensive discussion with Mr Waugh about the ways in which he was not managing her well. She wanted him to consult with her more and work as a team. She said that he was not making clear, as her previous manager had, what her priorities should be and that no one in the team knew the monthly deadline for recording activity data for KPI reports. Mr Waugh told her that he thought he had been clear but that if she was not clear about anything, she just needed to ask.

53. The Tribunal is prepared to assume that Mr Waugh had not been clear about what was required in terms of data inputting. It does not accept, however, that that put the Claimant at a substantial disadvantage compared with a person who was not disabled. The whole team was under the same disadvantage, in that they had not been given clear instructions on what was expected of them and on how their performance would be assessed.

54. Further, at no point did the Claimant tell Mr Waugh that she had difficulties with what he was or was not telling her because of her disabilities. She expressed it at all times in terms of difficulties that the whole team was experiencing or in terms of the shortcomings in his management style. Even assuming that Mr Waugh had been less than clear, he could not reasonably have been expected to know that the Claimant was at a comparative disadvantage as a result of her disabilities because of this because she never told him so. She was able to express clearly and at length all the concerns she had with his shortcomings, but never raised her disabilities, even though she had already disclosed these to the Respondent on 2 July 2019.

55. For these reasons, even though the Tribunal accepts that some aspects of Mr Waugh's instructions to his staff were not clear, it does not accept that there was any duty to make adjustments for the Claimant. This allegation therefore fails.

#### **Fixed desk for Claimant's sole use**

56. The Claimant alleged that she was under a substantial disadvantage compared with people who were not disabled but for the **provision of a fixed desk for her sole use**.

57. The Respondent expected its staff to "hot desk", that is, to work at whichever desk was available at the time. ATW recommended in its holistic assessment (although not in its list of recommended equipment and training that the Respondent was sent) that the Claimant should have an allocated desk in a location with lower background noise, to assist the Claimant to concentrate on her work. Because of her disabilities the Claimant is easily distracted by background noise.

58. Although the ATW recommendation related to the need for the Claimant to have a desk in a location with lower levels of background noise, rather than a desk for

her sole use, the Tribunal accepts that the Claimant was under a substantial disadvantage compared with a non-disabled person by not having a fixed desk. The additional stress of not knowing where she was to be working at the beginning of the day would have been more difficult for her to cope with, because she was already having to make a higher degree of effort than others to manage her disabilities when carrying out her work.

59. Although, as already stated above, the Tribunal does not accept that Mr Waugh saw the full ATW holistic assessment, it does accept that at the meeting with the Claimant and Ms Tyreman on 6 September 2019 he discussed with the Claimant, the possibility of her being allocated a fixed desk. From the fact of this discussion, the Tribunal infers that Mr Waugh knew that the Claimant was at a substantial disadvantage compared with an employee who was not disabled from not having an allocated desk. As a result, Mr Waugh took steps to ensure that the Claimant had a desk for her sole use. On 11 September 2019 he sent the Claimant a draft email he proposed to send to staff explaining that a particular desk was to be a fixed desk for her with effect from 12 September. The Claimant confirmed that the draft email was fine and thanked him. The Claimant therefore had a fixed desk from 12 September.
60. The Tribunal is not satisfied that the Claimant was under a substantial disadvantage by her allocated desk not being for her sole use. She did need to clear her equipment and documents from the desk at the end of the working day if she was not going to be in the office the following day, so that someone else could use it. The Tribunal accepts that the act of clearing her desk would have been slightly more onerous for the Claimant than for another employee without impaired motor skills, but the Tribunal does not accept that this was more than a minor or trivial disadvantage compared with that faced by an employee without a disability who needed to clear their desk of papers and equipment if they were not going to be using it the following day.
61. Even if the Claimant had been put at a substantial disadvantage by the fixed desk not being for her sole use, the Tribunal does not accept that the Respondent knew or could reasonably have been expected to know that. Unlike the allocation of a fixed desk, the Claimant did not raise the issue with them. Although she was generally clear and assertive about her need for adjustments, she did not at any point identify to her managers that she was under any disadvantage in having to share her desk.
62. In summary, the Tribunal finds that the Respondent met its duty to make reasonable adjustments by providing the Claimant with a fixed desk and had no duty to provide a desk for the Claimant's sole use. For these reasons, this allegation fails.

### **Writing slope and document holder**

63. The Claimant said that she was under a substantial disadvantage compared with people who were not disabled but for the **provision of a writing slope and document holder**.
64. In the list sent to the Respondent on 3 September 2019, ATW recommended that the Claimant be provided with an integrated document holder and writing slope. The holistic assessment gave the rationale for this: it would help to reduce aches and pains when working at a desk by allowing the Claimant to read, write or type without risking awkward twists or turns. This would assist the Claimant as her role involved making handwritten notes and working with various paper documents alongside the computer. The only reference to a disability is a statement that the Claimant's dyspraxia makes it difficult for her to read. The Claimant has not relied on dyslexia as a disability in this claim and the Tribunal saw no evidence that she has ever been diagnosed with it, although the Tribunal accepts that some of the indicators of dyslexia may be the same as those for dyspraxia.
65. The Tribunal considers that any employee working with notes and paper documents alongside a computer would benefit from a writing slope and document holder to avoid awkward twists and turns. It also accepts, however, that the Claimant would be under a more than minor or trivial comparative disadvantage because of her disabilities if such an aid were not provided, because of the difficulties she was already dealing with in making legible notes and organising her work because of her dyspraxia. Further, the Tribunal also accepts that the Respondent could reasonably have been expected to know she was at that disadvantage, because of the contents of the dyspraxia report, which it had seen.
66. On 3 September 2019 Ms Tyreman, who was dealing with adjustments for the Claimant at that time, drew up a list of recommended items for the Respondent to obtain for the Claimant, which included alternatives that appeared suitable but were cheaper than the recommendations given by ATW. Whilst the Respondent could potentially have drawn on funding from ATW for the purchase of equipment for the Claimant, this would not have met the whole of the cost. The Respondent was therefore spending public funds, and it needed to consider whether the items it was ordering for the Claimant were not only fit for purpose but also value for money. The Tribunal accepts that if the Respondent could identify a cheaper alternative to the option recommended by ATW, it was reasonable for it to order that equipment, provided the alternative avoided the disadvantage to the Claimant.
67. Ms Tyreman's list included a link to a product "clear-copy-document-holder-writing-slope.html" that the Respondent had already ordered for the Claimant. The Tribunal did not hear evidence from Ms Tyreman, who has since left the

Respondent's employment, but it accepts that the text of this link indicates that Ms Tyreman had reasonable grounds to believe she was ordering equipment that would meet ATW's recommendations on what was needed to meet the Claimant's needs.

68. On 29 October 2019 the Respondent emailed the Claimant to inform her that the equipment had arrived. She did not collect it until 16 December 2019. At that point, she found that it was in fact a document holder only. The Claimant wrote to Ms Tyreman on the same day to explain that she needed a writing slope because she had difficulty with gross and fine motor skills and would benefit from assistive technology to help her with note taking and written work.
69. On 6 January 2020 Ms Tyreman ordered the exact piece of equipment recommended by ATW and on 13 January 2020 this was collected by the Claimant.
70. The Tribunal finds that the Respondent took the steps it was reasonable for it to take to avoid the disadvantage to the Claimant and that it met its duty to make adjustments by providing the Claimant with a combined document holder and writing slope. For these reasons, this allegation fails.

## Headphones

71. The Claimant said that she was under a substantial disadvantage compared with people who are not disabled but for the **provision of noise-cancelling headphones**.
72. The Tribunal accepts that because of the effect of her disabilities on her ability to concentrate, the Claimant was vulnerable to being distracted by background noise in the office. This is reflected in both the dyspraxia report, which the Respondent saw, and the ATW holistic assessment, which it did not see. The Tribunal also accepts that the Respondent knew that the Claimant was under this comparative disadvantage because of the contents of the dyspraxia report and the ATW recommendation for noise-cancelling headphones. The Tribunal finds that the Respondent was under a duty to take reasonable steps to provide the Claimant with noise-cancelling headphones.
73. In its list of recommended equipment, ATW recommended that the Claimant be provided with a model sold by Bose, priced at £259. In her list of 3 September 2019 Ms Tyreman included various significantly cheaper models.
74. In her submissions, the Claimant accepted that she was issued with noise-reducing headphones on 3 December 2019, as part of the Respondent's roll-out of new information technology equipment for the whole workforce. The Respondent also accepted in its submissions that the Claimant was issued with headphones in December 2019. For the purposes of this allegation, therefore,



the Tribunal finds that the Claimant was issued with headphones in December 2019. The Tribunal heard no evidence on the specification of the headset that the Claimant was given.

75. At the meeting she had with Mrs Choma and Ms Tyreman on 19 December 2019, the Claimant reported that the headphones she had been supplied with were not performing satisfactorily. Ms Tyreman explained the Respondent's position, which was that the headphones the Respondent had supplied were compliant with industry standard and noise cancelling, impliedly confirming that, in the Respondent's view, they were adequate to avoid the disadvantage to the Claimant. As the Tribunal did not hear evidence from Ms Tyreman, it was unable to ask her to clarify which industry standard the headphones met.
76. From mid-February 2020, the Claimant was on sick leave. The May 2020 occupational health report recommended that noise reducing headphones would be helpful for the Claimant. On 9 June 2020 at a welfare meeting Ms Baker told the Claimant that she had asked the Respondent's ICT (presumably the Information and Communication Technology) team to confirm the specification of the headphones with which the Claimant had been provided and whether they would meet the Claimant's needs. On 11 June Ms Baker confirmed to Ms Hunter that the standard issue was not in fact noise-cancelling so a noise-cancelling pair needed to be ordered. She stated that she would order headphones once the issue with the pen (another adjustment recommended for the Claimant, discussed below) had been resolved with ICT. At a welfare meeting on 23 June Ms Hunter confirmed that headphones had been requested by ICT. Although the Tribunal was not provided with any documentary evidence to confirm that noise-cancelling headphones had in fact been ordered, it accepts that the process of obtaining them for the Claimant had begun by 23 June 2020.
77. The Tribunal accepts that the Claimant was not under a disadvantage from the lack of the headphones at any time when she was or would have been working from home and that all the Respondent's staff were working from home for some months in 2020. No evidence was provided on the exact period but the Tribunal finds it more likely than not that this was during at least the duration of the national lockdown, which began in late March 2020 and for most purposes ended on 4 July 2020. The Tribunal also accepts that the Claimant began a period of sick leave on 19 February 2020 and did not need headphones at this time because she was not working in the office. One of the reasons the Claimant was off work, however, was because she was concerned at the lack of progress in relation to what she considered to be reasonable adjustments for her, of which the provision of headphones was one.
78. In summary, the Tribunal finds that the Respondent failed to meet its duty to provide the Claimant with noise-cancelling headphones.

## **Mindmapper software**

79. The Claimant said that she was under a substantial disadvantage compared with people who were not disabled but for the **provision of mindmapping software**.
80. On the basis of the Claimant's impact statement and the dyspraxia report, the Tribunal accepts that the Claimant's dyspraxia has a substantial effect on her ability to plan and structure her work.
81. ATW recommended that the Claimant be provided with Innoyo Ideamapper Pro software, at a cost of £382.80.
82. The Tribunal was presented with no evidence on what a mind map is. It has therefore adopted the definition of a mind map given in Wikipedia, which accords with its own understanding: "A mind map is a diagram used to visually organise information. A mind map is hierarchical and shows relationships among pieces of the whole. It is often created around a single concept, drawn as an image in the centre of a blank page, to which associated representations of ideas such as images, words and parts of words are added. Major ideas are connected directly to the central concept, and other ideas branch out from those major ideas." The Tribunal takes judicial notice of the fact that many people, disabled and non-disabled, find mind maps useful to organise their thoughts.
83. In its holistic assessment, which the Respondent did not see, ATW explained the recommendation it had made for the purchase of mindmapping software. It took the Claimant a lot of time and effort to organise her work. These difficulties could revolve around time management and prioritisation when completing a range of tasks, and the Claimant had no current strategy for organisation except memory, which could be impaired when she was under pressure. The recommended software would "help to address structural difficulties, and both plan, and execute, written work with greater ease. Enhancing and improving the effectiveness of her current strategies will boost confidence and productivity with the workload."
84. The Claimant had already been using mind-mapping to help her with the difficulties she had in organising her work because of her disabilities. She did this manually, using an A3 sheet of paper. The Tribunal was provided with no evidence to explain why a software programme would have been easier for the Claimant to use nor how it would be more effective for the task. There was no evidence before the Tribunal to establish that the Claimant was at a substantial disadvantage compared with a person who was not disabled by not being provided with software to draw a mind map.
85. When the software was discussed at the 19 December 2019 meeting between the Claimant, Mrs Choma and Ms Tyreman, Ms Tyreman explained that,

because the Respondent did not have the full ATW report (that is, the holistic assessment), it did not understand the rationale for the recommendation to order the software. In response, the Claimant just said that the expert had decided it would be useful. She said she did not know why it had been recommended because she was not an expert. She thought that it might be because she is a very visual person. Given the Respondent's lack of information about the rationale for the ATW recommendation, even if the Claimant had been at a substantial comparative disadvantage by not being provided with this software, the Tribunal does not accept that the Respondent knew, or ought reasonably to have been expected to know, that she was.

86. In summary, the Tribunal concludes that the duty to provide mindmapping software did not arise. This allegation therefore fails.
87. In any event, although the evidence about this was patchy, it appears that the Respondent did take some steps to explore obtaining mindmapping software for the Claimant and put some alternatives to her. By 23 December 2019, Ms Tyreman had requested the ATW-recommended software, although it appears that this was not ordered by the ICT team. The Tribunal heard no evidence on why it was not ordered. At a welfare meeting on 23 June 2020 the Claimant confirmed that she had not looked at some alternative software that had been identified by the Respondent. Ms Hunter asked her to let the Respondent know when she had. At a meeting on 11 September 2020 Ms Briggs confirmed that the Respondent had identified solutions in relation to the mindmap software and would be placing an order once it had a commitment from the Claimant to return to work. According to the notes of the meeting, Ms Briggs said: "Once we have an idea of whether [the Claimant] will return to work within the foreseeable future, we will work with ICT to understand what timescales are for delivery".

### Digital pen

88. The Claimant said that she was under a substantial disadvantage compared with employees without her disabilities but for the **provision of a digital pen** recommended by ATW, the Iris Digital Notes 3. This pen allowed notes made by hand on paper to be simultaneously transcribed to text on a computer screen or tablet.
89. ATW's rationale for this recommendation (which the Respondent did not see) was that the Claimant had to make handwritten notes in meetings and assessments but could later find these confusing and lacking in structure. The pen allowed the user to make written notes which automatically transferred to the computer for editing.
90. The Tribunal accepts that, because of her dyspraxia, the notes the Claimant made in meetings were confusing and lacking structure and that it would be easier for her to edit them if they were on a computer. The Tribunal accepts that

she would be at a substantial disadvantage compared with a person without a disability but for the provision of a pen that would translate her handwritten notes into text in a digital format.

91. In contrast to its response to the recommendation for mindmapping software, the Respondent never queried with the Claimant why ATW had recommended a digital pen. From this, the Tribunal is prepared to infer that the Respondent knew or could reasonably have been expected to know that the Claimant would be at a comparative disadvantage if a digital pen were not provided. It was therefore under a duty to take reasonable steps to provide one.
92. At a meeting on 19 December 2019 Mrs Choma and Ms Tyreman asked the Claimant to try a pen they had ordered for another employee that allowed the user to produce text by writing directly onto the screen of a tablet. The Claimant was reluctant to accept that this would be suitable because, she said, she preferred to work with pen and paper. She did not say that her preference for writing on paper was related to her dyspraxia and she gave no evidence to the Tribunal to that effect either. Mrs Choma made clear that if the pen they were suggesting did not work for the Claimant then the Respondent would look at ordering her different equipment.
93. On 20 December 2019 the Claimant was provided with the pen the Respondent had suggested. It was not until 6 February 2020 that the Claimant informed the Respondent that it was not suitable. She did not say why. It was only during the Tribunal hearing that the Claimant explained that, because she grips a pen tightly, if she writes direct onto a screen the image is distorted by the pressure of her hand.
94. The Claimant went off on sick leave shortly after explaining that the pen she had been supplied with was unsuitable. The outstanding adjustments for the Claimant were discussed extensively over the course of the many welfare meetings that were held during her sickness absence. The Respondent's response to the Claimant's second grievance was sent to her on 15 May 2020 and the Respondent's attention then moved towards addressing the Claimant's return to work. On 9 June 2020 Mrs Baker requested ICT to provide the Claimant with the Iris Digital Notes Air 3 pen that ATW had recommended but by the time of a welfare meeting on 23 June 2020, Ms Hunter explained that ICT had offered an alternative pen that was more readily available from the Respondent's suppliers. Ms Baker said that she would send the Claimant a link for the product, to which the Claimant's response was "yes sure" and "thanks".
95. At a meeting on 11 September 2020 Ms Briggs confirmed that the Respondent had identified solutions in relation to the pen and would be placing an order once it had a commitment from the Claimant to return to work. According to the notes of the meeting, Ms Briggs said: "Once we have an idea of whether [the Claimant]

will return to work within the foreseeable future, we will work with ICT to understand what timescales are for delivery”.

96. The Tribunal finds that the Respondent did not take the steps it was reasonable for it to take to provide a digital pen. It did not make its proposal for a pen that wrote direct onto a tablet until three months after it had received the ATW recommendation. Even when the Claimant made clear that the version with which she was then provided was not satisfactory, it took no steps towards ordering the ATW recommended version until June 2020 and it was not until September 2020 that it appeared ready to order what it had identified as being a suitable alternative.

97. In summary, the Tribunal finds that the Respondent failed to meet its duty to provide a digital pen.

## **HARASSMENT**

98. Section 40 EqA makes it unlawful for an employer to harass an employee. Harassment is defined in Section 26 to include unwanted conduct related to disability that has the purpose or effect of violating an employee’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. In deciding what effect conduct had, the Tribunal must take into account the employee’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect (Section 26(4)).

99. It is for the employee to show facts from which the Tribunal could conclude, in the absence of any other explanation, that the conduct related to disability. If she does, then the Tribunal must conclude that the conduct related to disability, unless the employer can show otherwise (Section 136 EqA).

## **Threat of capability procedure**

100. The Claimant’s first allegation was that she was harassed by **Mr Waugh in a 1-2-1 [supervision] meeting on 6 August 2019 when he threatened her with a capability procedure.**

101. As already mentioned above in the context of the allegations of failure to meet the duty to make adjustments (under “Clear instructions and priorities”), this meeting was called because Mr Waugh was concerned that the Claimant was not capturing and recording activities in relation to the schools for which she was responsible onto a database. Mr Waugh was answerable for this information being up-to-date and complete: it illustrated how his team was meeting monthly KPIs. From the exchange of emails after that meeting and Mr Waugh’s email to

the Claimant of 7 August 2019 in particular, it is clear that he expected the Claimant to provide a plan on how these concerns would be addressed. In his email, Mr Waugh said: “if you are unable to provide this then I would need to consider other options which could include formal capability, it is really important that we work together to improve the current position in relation to your work and that the expectations of your role can be fully met”.

102. The Tribunal accepts that this amounted to unwanted conduct, in that it was a clear message to the Claimant that one aspect of her performance in the job was not currently satisfactory. The Tribunal does not accept, however, that it related to the Claimant’s disabilities. She did not allege that her failure to capture and input sufficient data was related to her disabilities. Rather, she alleged that Mr Waugh would not have threatened her with a capability procedure had she not been a disabled person. There was no evidence before the Tribunal to support this. The Tribunal accepts Mr Waugh’s evidence that the Claimant had not been making an adequate record of her activities and he wanted to make clear to the Claimant that the extent and timeliness of her data inputting must improve. There was no evidence to indicate that he would not have adopted the same approach with any other enterprise co-ordinator he was managing whose data records were the same as the Claimant’s. (The Claimant presented evidence to Mr Waugh that she said showed that her predecessor had entered less data than her, but Mr Waugh was not that person’s line manager.) Nor was there any evidence to indicate that Mr Waugh had any inclination to treat the Claimant less favourably because of her disabilities.

103. The Claimant alleged that the effect, rather than the purpose, of Mr Waugh’s actions was to create a hostile environment for her. Whilst that may have been the Claimant’s perception, the Tribunal does not accept that in all the circumstances it was reasonable for it to have that effect. She knew why Mr Waugh was taking up the issue of data input with her. She also knew that Mr Waugh acknowledged the difficulties she was having in obtaining data from schools, which she discussed with him during their meetings, and that he wanted to support her in drawing up a plan to overcome those difficulties. These were no more than the actions of a manager being clear with an employee about his expectations of her and supporting her to achieve them.

104. For these reasons, this allegation fails.

#### **Cross-referencing hours and calendar**

105. The Claimant’s second allegation of harassment was that **in 1-2-1s from November 2019 onwards Mrs Choma made the Claimant open her calendar and Carval to cross-reference the two.**

106. The only evidence presented to the Tribunal in relation to this allegation related to the 1-2-1 on 18 February 2020. Mrs Choma was discussing with the Claimant her concerns she had about the Claimant not keeping her calendar up to date. As a result, there were occasions on which Mrs Choma was unable to establish where the Claimant was. On the Claimant referring to the current state of her calendar, Mrs Choma said to the Claimant “let’s have a look”, indicating that she was asking the Claimant to show her her calendar. Then, in dialogue with the Claimant, Mrs Choma looked at the entries for the following days to establish what the Claimant had recorded about her anticipated activities. Mrs Choma also asked the Claimant to pull up Mrs Choma’s own calendar so that they could find a mutually available date for a further meeting.
107. The Tribunal accepts that this conduct was unwanted, in that Mrs Choma was checking the Claimant’s recording of her movements and the Claimant was not happy about that. The Tribunal then had to consider whether it related to the Claimant’s disabilities. The Claimant’s case was that Mrs Choma was doing this because of assumptions she was making about the Claimant’s ADHD and what that meant about her ability to manage her time and obey the Respondent’s rules. The Tribunal had no evidence that Mrs Choma’s action was because of any assumption she was making about the Claimant’s ADHD. Rather, she was acting on the evidence in front of her, which was that the Claimant was not keeping her calendar entries accurate and up to date.
108. The Claimant alleged that Mrs Choma was asking her to check her calendar with the purpose of creating a hostile environment for her. The Tribunal finds that that was not Mrs Choma’s purpose. There was nothing in the transcript of the meeting to indicate that Mrs Choma was doing anything other than attempting to explain to the Claimant what the problem was so that the Claimant could put it right. The Tribunal accepts the Claimant’s evidence that she was upset by being asked to open her calendar so that Mrs Choma could check it, but the Tribunal does not accept that it was reasonable for it to have that effect in all the circumstances. A line manager needs to know where an employee for whom she is responsible can be found during the working day and if the employee is not recording her whereabouts with a sufficient degree of accuracy and timeliness, then that needs to be addressed.
109. For these reasons, this allegation fails.

### **Email of 3 December 2019**

110. The Claimant’s third allegation of harassment relates to **an email Mrs Choma sent her on 3 December 2019**. The email reads as follows:

*“I have received two absence requests – one for a full day and one for half. In this flexi period you only have one day remaining. So I won’t be able to put it through on the system. Do you want to change your half day to annual leave?”*

111. The Tribunal accepts the content of this email was unwanted because the Claimant wanted to take both a full day and a half-day as flexi leave. Mrs Choma’s email was merely informing the Claimant that the computer system would not allow Mrs Choma to enter more than one day as flexi leave, because of the amount of flexi leave that the Claimant had already taken in the relevant period.
112. The Claimant’s case was that this email related to her disabilities because the reason she had taken flexitime in excess of the amount that could be taken in the relevant period was because of her disabilities. On the basis of the evidence with which it was presented, the Tribunal accepts that the Claimant’s disabilities caused her to work more slowly than others. The Tribunal does not accept, however, that the evidence before it was sufficient to establish that she had built up more flexitime than was permitted in any flexitime period because of that. She had herself identified to Mrs Choma various other reasons for her having to work in excess of her normal hours, none of which was due to her disabilities (as noted above in the Tribunal’s findings on the alleged failures to meet the duty to make adjustments, under “Caseload”).
113. Even if the email had related to the Claimant’s disabilities, the Tribunal would not have accepted that the effect of it was to create a hostile or humiliating environment for her. (The Claimant did not allege that that was Mrs Choma’s purpose in sending the email.) Although the Claimant was not happy about being refused time off under the flexitime policy, Mrs Choma was indicating that she would approve time off for her as annual leave. In effect, Mrs Choma was doing no more than informing the Claimant what the effect of the Respondent’s time recording computer programme was, and suggesting a way in which she could still take the time off she had requested.
114. For these reasons, this allegation fails.

#### **Comments at the meeting on 19 December 2019**

115. The Claimant’s fourth allegation of harassment related to various **comments made at her meeting with Mrs Choma and Ms Tyreman on 19 December 2019**, which she said were made with the effect, but not the purpose, of creating a hostile environment for her.
116. The Claimant alleged that **Mrs Choma and Ms Tyreman made remarks relating to her Claimant’s disability, such as: “Stacey doesn’t understand**



**what a normal working day looks like**". It is apparent from the transcript of the meeting that neither Mrs Choma nor Ms Tyreman made that comment. The Claimant had spent time on non-work activities that were not recorded at the time in her calendar. Mrs Choma was discussing with her the importance of her keeping her calendar accurate and up-to-date and generally letting Mrs Choma know where she was. She was explaining that the Claimant needed to record any activities that were outside what could be viewed as normal. In that context, Mrs Choma said: "So a normal working day is you check in, you'd have lunch, you check out on people with maybe have two smoking breaks, if you're a smoker. That's what I'd expect from my team and my staff. And if it's different to that I want you to have the conversation."

117. There was no evidence before the Tribunal to establish that this comment related to the Claimant's disabilities. It was Mrs Choma's attempt to explain to the Claimant that she needed to keep the Respondent informed about anything that she was doing that was out of the ordinary.

118. The Claimant did not allege that this comment was said with the purpose of creating a hostile environment for her. The Tribunal further finds that it was not reasonable for this comment to have had that effect in all the circumstances. The comment was made as part of a reasonable and unconflictual attempt by a line manager and HR advisor to discuss with the Claimant what the Respondent's concerns were about the way in which she recorded her whereabouts and how she needed to change her practice.

119. For these reasons, this allegation fails.

120. The second instance of alleged harassment at the meeting was that **Ms Tyreman tried to force the Claimant to disclose her disabilities to the whole team before she would approve disability awareness training for the Claimant's colleagues.**

121. From the transcript of the meeting it appears that there was a discussion between the Claimant and Ms Tyreman about the arrangements for the disability awareness training for the Claimant's colleagues that had been recommended by ATW. Ms Tyreman said that it was going to be difficult to require people to go on a course to raise their awareness of neurolinguistic disabilities without knowing the reason why. The recommendation was for 10 to 14 people to go on the course, but Ms Tyreman was concerned that the Respondent would not be able to explain to the people who were selected to go on it why they had been chosen to take part, given that that would involve them being told about the Claimant's disabilities. When the Claimant asked Ms Tyreman "So what solution are you suggesting then, do you want me to tell people?", she replied: "No I just think we need to have a discussion about how it's approached".

122. The Tribunal does not accept that Ms Tyreman's comments amounted to her trying to force the Claimant to disclose her disabilities to the team before she would approve the training. She was just discussing the practical difficulties she could see with identifying the individuals who should go on this very specific course without explaining to them why they had been asked to attend.
123. The Claimant did not allege that these comments were said with the purpose of creating a hostile environment for her. Even if the Claimant felt that Ms Tyreman's comments were creating a hostile environment for her, the Tribunal does not consider it was reasonable for them to have that effect in all the circumstances. The concerns that Ms Tyreman was raising were reasonable and she was attempting to involve the Claimant in a dialogue about how they could be resolved.
124. For these reasons, this allegation fails.
125. The third aspect of this meeting that the Claimant alleged amounted to harassment was **Ms Tyreman's refusal to make an adjustment for her as "there was not a business case for it" and "IT don't like installing new software"**. The comment at issue here relates to what Ms Tyreman said when discussing with the Claimant at the meeting the ATW recommendation that the Claimant be provided with Innoyo Ideamapper Pro mindmapping software. From the transcript, it is apparent that what Ms Tyreman actually said was that she had spoken to the Respondent's ICT team about the software and they did not like installing software onto the system unless there was a business reason for doing so and the Head of Service would need to approve it.
126. The Tribunal accepts that these comments related to the Claimant's disability, in the sense that they related to an adjustment the Claimant alleged was needed to address a disadvantage she was at because of her disabilities. The Tribunal does not accept, however, that Ms Tyreman's comments amounted to refusing to make an adjustment. She was simply explaining to the Claimant that there needed to be a business case for a new piece of software and that it would need the authorisation of the Head of Service. This was a reasonable position for any organisation to take. As Ms Hunter explained in her evidence, and as the Claimant would have been aware, the Respondent was in the process of updating all its IT systems. It was therefore was not willing to install new software beyond the software it had already decided upon without it being clear why it was needed.
127. The Claimant did not allege that Ms Tyreman made these comment with the purpose of creating a hostile environment for her. The Tribunal accepts that the Claimant felt that the Respondent should be ordering the software because ATW had recommended it. The Tribunal does not accept, however, that Ms Tyreman's comments in explaining the need for a business reason and approval for the purchase could reasonably have the effect of creating a hostile

environment for the Claimant, particularly when (as noted above in the context of the allegations of failure to meet the duty to make adjustments, under “Mindmapper software”) Ms Tyreman was saying that it was not clear why ATW had recommended the purchase in the first place and the Claimant was unable to clarify the position.

128. For this reason, this allegation fails.

129. The fourth incident at this meeting that was alleged to amount to harassment was **a suggestion by Ms Tyreman of a cheaper pen that did none of the things that the original digital pen suggested by Access to Work would do**. As noted above in the findings on the duty to make adjustments (under “Digital pen”), the ATW recommendation was that the Claimant should be supplied with an Iris Digital Notes Air 3, a digital device that allows for notes written on paper to be simultaneously translated into text on a computer for editing, to assist the Claimant with the notes she keeps of meetings.

130. From the transcript of the meeting, it is apparent that Ms Tyreman did suggest an alternative, which the Respondent was intending to order that day, which would enable the Claimant to write directly onto the screen of her computer. This pen would convert writing with a pen into text on the screen and would allow the Claimant to colour code her notes, just like the pen recommended by ATW. It is not the case, therefore, that Ms Tyreman was suggesting an alternative that would do nothing that the pen recommended by ATW would do. During the discussion about the pen the Respondent was ordering, Mrs Choma reassured the Claimant that if the pen on order did not work, the Respondent would look at whether some other equipment was needed.

131. The Tribunal accepts that Ms Tyreman’s comments about an alternative pen related to the Claimant’s disabilities, because they were concerned with an auxiliary aid recommended by ATW to assist her with managing the effect of her disabilities. The Tribunal also accepts that Ms Tyreman’s comments were unwanted, because the Respondent was not immediately agreeing to provide the pen recommended by ATW. The Claimant did not allege that Ms Tyreman’s comments had the purpose of creating a hostile environment for her. The Tribunal does not accept that it was reasonable for them to have that effect either. Ms Tyreman and Mrs Choma were discussing a proposed solution with the Claimant and reassuring her that if it did not work for her the issue would be revisited. It is difficult to see how this amounts to conduct that was creating a hostile environment for her.

132. For these reasons, this allegation fails.

### Comments about sitting still

133. The Claimant alleged that **in a meeting on 30 January 2020 Mrs Choma harassed her by conduct relating to her disability of ADHD when she made comments about the Claimant being unable to sit still.**

134. The comment at issue was made during a discussion between Mrs Choma and the Claimant about an incident when the Claimant had asked during the course of a meeting whether she could leave. Mrs Choma was saying that the Claimant should have spoken in advance to the person who was conducting the meeting to say that she needed to leave early. The Claimant explained to Mrs Choma that she had needed to leave because she needed to eat and take her ADHD medication before the next meeting she was due to attend.

135. During the course of the discussion, Mrs Choma acknowledged that the Claimant's disabilities might make it difficult for her to stay in lengthy meetings without a break. She made clear that it was not a problem for the Claimant to have a break, but she needed to discuss that in advance with the person leading the meeting. During that discussion, the Claimant and Mrs Choma had this dialogue:

*Claimant: But you're saying that if I needed to leave and it's asked but that's what I'm saying is that I didn't think we were were allowed to miss any of them. Any part of it so that's why at quarter past*

*Mrs Choma: no but that's what I'm saying is you always raise your condition. If you're looking at that and think you need a bit of time. Just rearrange it so if you notice I'll always have a meeting they'll always be a little mini break for people to move around because people struggle anyway.*

*Claimant: what do you mean raise my condition*

*Mrs Choma: like about you can't sit still and stuff.*

136. The Claimant denied that she had ever told Mrs Choma that she could not sit still. Mrs Choma's response was that the Claimant had said that she needed to have breaks every hour or two. The Claimant denied that too. Mrs Choma then said: "Right? Oh, that's my misunderstanding from the HR meetings and stuff then that we've had".

137. The Tribunal accepts that this comment was unwanted by the Claimant and that it related to her ADHD, in that Mrs Choma believed that the Claimant's

ADHD made it difficult for her to sit still in meetings. The Claimant said that the purpose of the comment was to create a hostile environment for her, but the Tribunal does not accept that. Mrs Choma was under what turned out to be a misunderstanding as to why the Claimant might have needed to leave the meeting early. When the Claimant corrected her about that, she immediately acknowledged that this must have been her misunderstanding. There was nothing to indicate that she was intending to create a hostile environment for the Claimant.

138. In any event, having read the transcript of the entire meeting, which lasted for over an hour, the Tribunal finds that the comment did not in fact have the effect of creating a hostile environment for the Claimant. The overall tone of the meeting was amicable and the Claimant said nothing to indicate that she was other than momentarily put out by Mrs Choma's comments, which was based on a misunderstanding that she was quick to correct and which Mrs Choma was quick to acknowledge.

139. Even if the comment had had the effect of creating a hostile environment for the Claimant, the Tribunal does not accept that it was reasonable in all the circumstances for the comment to have had that effect. The context of the comment was that Mrs Choma was reassuring the Claimant that breaks were not a problem if she needed them. She immediately acknowledged her misunderstanding about whether the Claimant could sit still.

140. In order to meet the definition of harassment, the purpose or effect of the conduct at issue must be to create an intimidating, hostile, degrading, humiliating or offensive environment. These are strong words. Mrs Choma's comment did not approach that level of conduct.

141. For these reasons, this allegation fails.

### **Threat of performance management**

142. The Claimant's final allegation of harassment was that **at a meeting on 18 February 2020 Mrs Choma threatened the Claimant with performance management**. This allegation was also made as one of discrimination because of something arising in consequence of disability, dealt with above.

143. From the transcript of the meeting, it is apparent that the comment in question was made in the context of Mrs Choma discussing with the Claimant that she needed to record her whereabouts. Mrs Choma needed to know that the Claimant was OK and where she could be contacted. The most immediately relevant parts of the dialogue are these:

*Mrs Choma: but when you're at work, whether you're at home or out of the office, you should be contactable during work hours.*

*Claimant: I am contactable during work hours.*

*Mrs Choma: yeah, so...I will revisit this in two weeks Stacey and if there's, if things are not right, then we'll have to get a meeting in with Michelle and discuss it, it's not difficult.*

144. The Tribunal accepts that these comments were unwanted: the Claimant did not want to be challenged about her failure to record her working hours and whereabouts accurately and in a timely way but was being told that the matter would be taken up with a more senior manager if she did not improve her performance in this regard. The Tribunal does not accept, however, that the comments related to the Claimant's disabilities. As noted above in the Tribunal's findings on the allegation that the comments were discrimination arising from disability, the Claimant's failure to meet the Respondent's requirements on recording her time and whereabouts were not due to her disabilities.
145. The Claimant alleged that Mrs Choma's comments were made with the purpose of creating a hostile environment for her. There was no evidence to support that assertion. The Tribunal finds that Mrs Choma was doing nothing more than attempting to manage the Claimant's practices in relation to the recording of her working time and whereabouts and making clear that things might need to be progressed to involve a more senior manager if she did not change.
146. The Tribunal does not accept that it was reasonable for Mrs Choma's comments to have the effect of creating a hostile environment for the Claimant in all the circumstances either. It was reasonable for the Respondent to require employees to record their working hours and whereabouts and it was reasonable for Mrs Choma to raise with the Claimant how her practices needed to change. It was also reasonable and fair for her to make clear to the Claimant what the consequences would be if her practices did not change. There was nothing in the way in which Mrs Choma discussed these issues with the Claimant that would support a finding that it was reasonable for the comments to create a hostile environment for her.
147. For these reasons, this allegation fails.

## **VICTIMISATION**

148. It is unlawful for an employer to victimise an employee (Section 39(4)(d) EqA). An employer victimises an employee if it subjects her to a detriment

because she has done a protected act, which includes alleging that the employer has breached the EqA (Section 27).

149. The parties agreed that the Claimant did two protected acts:
- a. At a meeting on 15 August 2019 she complained to Ms Burton that Mr Waugh was discriminating against her.
  - b. On 9 or 10 March 2020 she submitted a formal written grievance to Mr Archer, the Respondent's Director of Economic Services, alleging that Mrs Choma had subjected her to disability discrimination [1736]

### **Submitting the Claimant to numerous supervisions**

150. The Claimant alleged that, **because of her August 2019 complaint that Mr Waugh was discriminating against her, Mrs Choma submitted her to an unreasonable number of 1-2-s from October 2019 onwards.**
151. According to the agreed chronology, Mrs Choma took over the Claimant's line management on 11 October 2019. In the 17-week period from then until the Claimant went off on sick leave on 19 February 2020 she was asked to attend 12 1-2-1s. This amounted to less than one a week.
152. The Tribunal has not been presented with any evidence that directly establishes, or could even be the basis of an inference, that Mrs Choma held any of these 1-2-1s with the Claimant because of the complaint she had raised about Mr Waugh. Mrs Choma accepted in her evidence to the Tribunal that she did need to have more 1-2-1s with the Claimant than with some other members of her team. But that was because Mrs Choma had identified issues that needed to be addressed and followed up with the Claimant, including her time recording, that she had not identified with the rest of her team. From the transcripts of the meetings that the Tribunal has seen, the Tribunal accepts her evidence as entirely credible.
153. For this reason, this allegation fails.

### **Delaying adjustments**

154. The Claimant alleged that **from April 2020 onwards, because of the formal grievance she raised in March 2020, Ms Baker deliberately delayed progressing adjustments for the Claimant.** Specifically, she alleged that Ms Baker made an unnecessary referral to the Respondent's occupational health

advisers and then made unnecessary enquiries about the report that the advisers produced.

155. The Tribunal found Ms Baker's evidence on her handling of the Claimant's requests for reasonable adjustments to be clear and credible. At the time of her involvement with the Claimant's case, Ms Baker was newly appointed to the Authority. She began work on 3 February 2020, shortly before the Claimant went on sick leave, and therefore did not know the Claimant and had not had an opportunity to talk to her personally about what might help her at work. Initially, Ms Baker attempted to arrange a time to meet the Claimant through her union representative, Miss Briggs, on the basis that Mrs Sian, the UNISON Branch Manager, suggested that this would be the appropriate approach. When it did not prove possible to arrange the meeting through Miss Briggs, Ms Baker approached the Claimant direct. The meeting was eventually held on 3 April and the Claimant then agreed, for the first time, to be referred to the Respondent's occupational health (OH) advisers for assessment. Ms Baker made the referral with the intention of identifying what could be done to support the Claimant with regard to her disabilities.

156. The Tribunal does not accept that Ms Baker made this referral because she was trying to delay reasonable adjustments for the Claimant. Rather, she had decided that the Respondent needed its own advice on the range of possible adjustments the Claimant might need to support her in her work, and that this advice needed to be broader than just the issue of equipment, which had been covered by the ATW recommended list. There was nothing in the evidence to indicate that Ms Baker was influenced in any way by the Claimant's grievance.

157. The OH assessment took place on 16 April. On 20 April at a welfare meeting the Claimant confirmed to Ms Baker that she had not received the report as the OH advisers had not received the ATW report and dyspraxia report, but she had sent them copies. Ms Baker anticipated that the Claimant would contact her when the OH report was issued to her. On 5 May the Claimant informed Ms Baker that she had not heard anything from the OH advisers. Within 20 minutes Ms Baker asked the Claimant if she wanted her to follow up to find out what was happening. On 11 May the Claimant told Ms Baker that the OH advisers had told her that they were waiting for a copy of the ATW report. The Claimant maintained that she had sent them a copy on 20 April but confirmed that she had sent a further copy that day. (This must have been just the ATW recommendations, in the light of the further request from the OH advisers to the Claimant detailed below.)

158. The OH report was finalised on 15 May 2020 and was uploaded onto the external portal on 19 May 2020. Ms Baker did not receive an email notification,



as she should have done, to alert her to this. She had a week's leave and on her return on 26 May she checked the portal and found that the report had been uploaded.

159. Ms Baker did not consider that the OH report had addressed all the questions in the referral and so she planned to call the author, Ms Higson, to ask her to expand on some of the points. The Tribunal does not accept that this amounted to Ms Baker deliberately delaying adjustments for the Claimant. She needed more information than the OH report provided because some questions remained unanswered.
160. The OH adviser told Ms Baker that she thought the Respondent had seen the holistic assessment from ATW rather than just the list of recommendations and when Ms Baker told her that it had not, she said she would contact the Claimant to get her consent to it being shared. Ms Higson herself could not advise on what the ATW-recommended adjustments were trying to achieve until she had seen that report. On 28 May Ms Higson asked the Claimant to provide a copy of the full ATW report but said she would not share it with the Respondent. On 28 May, Ms Baker confirmed to Ms Hunter that the OH adviser was going to ask the Claimant to authorise the Respondent to see the full ATW report so that OH could advise more fully.
161. By 29 May Ms Higson had received a copy of the ATW report from the Claimant, presumably including the holistic assessment, and sent a further OH report to the Claimant for her approval. The Claimant made some changes on 31 May and the report was then sent to the Respondent and forwarded to Ms Hunter by Ms Baker on 1 June.
162. Ms Baker's handling of the Claimant's case needs to be viewed against the background that Ms Baker had the lead role for the Respondent in terms of its HR response to the COVID-19 epidemic. She had at least three senior leadership team meetings a week to update them on developments, and in particular on how many staff were shielding and how many had COVID. She had a high workload of managing employees with anxiety and mental wellbeing issues related to the pandemic.
163. In all the circumstances, the Tribunal finds that Ms Baker acted with professionalism throughout. There was no evidence that she delayed progressing adjustments for the Claimant, whether because of the Claimant's grievance or otherwise. On the contrary, considering the other demands she had to deal with, she acted commendably promptly.
164. For these reasons, this allegation fails.

## Disability leave

165. The Claimant alleged that **from 3 April to 8 June 2020 Ms Baker delayed in requesting disability leave on the Claimant's behalf, because of her March 2020 grievance.**
166. The parties agree that the first time that the Claimant raised the issue of her pay whilst on sick leave was at the welfare meeting on 3 April 2020. Ms Baker confirmed that she would continue to receive sick pay because she was not well enough to attend work. She raised again at the welfare meeting on 20 April that she was now on half pay, but she did not ask for any adjustment.
167. On 11 May the Claimant emailed Ms Baker to say that she wanted her to look into adjusting her pay as a reasonable adjustment for her disability. On 12 May Ms Baker said that she would come back to the Claimant about this. From around 19 May Ms Baker was on leave for a week and Mrs Grigg was on leave for a fortnight from 18 May.
168. On 28 May the Claimant exhausted her occupational sick pay and moved onto statutory sick pay only. At a welfare meeting on 1 June she asked for extended disability leave while adjustments were being put in place. Ms Baker said that she would raise it with Mrs Grigg. On 3 June the Claimant emailed Ms Baker confirming that she wanted her to speak to Mrs Grigg about a reasonable adjustment for her to be given disability leave, on full pay, rather than it being classed as sick leave.
169. On 8 June, Mrs Grigg's first day back from leave, Ms Baker forwarded the Claimant's request to her. She asked Mrs Grigg what the process was for considering and approving or declining the request.
170. The Tribunal accepts that there was a delay between 11 May, when the Claimant first expressly asked Ms Baker to consider paying her leave at her full rate of pay, and 8 June when Ms Baker forwarded that request to Mrs Grigg. There was a week between 11 May and the start of Mrs Grigg's holiday during which Ms Baker might have forwarded the Claimant's request to her. The Tribunal accepts that it in normal circumstances it would have been reasonable for Ms Baker to address this issue with some urgency, given that it involved financial hardship for an employee. It remains the case, however, that during this period, as already noted, Ms Baker was dealing with much correspondence relating to the Claimant's OH report and finalising and sending the Claimant the letter confirming the outcome of her March 2020 grievance. She was also dealing with her extensive and demanding duties relating to the Respondent's

management of the effects of COVID-19. The Tribunal does not accept that the short period in which Ms Baker took no action on the Claimant's request was sufficient to support an inference that she was delaying in referring the Claimant's request to Mrs Griggs, whether because of the Claimant's grievance or otherwise.

171. For these reasons, this allegation fails.

### **Delay in dealing with disability leave request**

172. The Claimant alleged that, **because of her March 2020 grievance, Mrs Grigg delayed from 8 June to 5 August 2020 in making a decision on whether to grant the Claimant disability leave.**

173. Having received Ms Baker's 8 June email forwarding the Claimant's request, on 10 June Mrs Grigg asked Ms Baker for some more detail about the points made by the Claimant in her request and reasonable adjustments, the circumstances around the Claimant's absence, also how the Claimant's case was similar or different to other cases the Claimant had cited in her request. She said she would get back to Ms Baker as soon as possible once she had received the further information but warned that due to her other work commitments and the time she needed to consider the Claimant's case there might be a delay in responding.

174. At a welfare meeting on 23 June at which Ms Baker was also present, Ms Hunter mentioned to the Claimant that Mrs Grigg had asked for more information about the request and asked the Claimant if she had anything to add to what she had already put in writing. According to the notes of that meeting, the Claimant made various comments but added: "will put this in an email a lot better".

175. On 7 July the Claimant asked for an update. In response, on 8 July Ms Baker asked the Claimant whether she had any further comments she wanted to be considered as part of the decision-making process, as Ms Hunter had invited her to do in the welfare meeting. She thought the Claimant wanted to take this opportunity but had not heard from her. If she did not wish to add further detail, she would ask Mrs Grigg to make a decision without it. The Claimant said that she had not been told that it was necessary for her to send an email, she had merely offered to send what she had just said in the meeting in an email afterwards if that was what was wanted by the Respondent.

176. On 8 July Ms Baker emailed Mrs Grigg with an apology for the delay in coming back to her, attaching a copy of the Claimant's email of 8 July and providing additional information about the Claimant's case.
177. On 10 July Ms Hunter emailed the Claimant to confirm that she had understood the Claimant had wanted to provide additional information for Mrs Grigg and would be putting that in an email. She confirmed that there was still time for the Claimant to provide further information if she wanted to. If she did not hear from the Claimant, they could progress the decision without it.
178. On 5 August Mrs Grigg sent the Claimant an outcome letter, confirming that the Respondent would not be granting her additional paid leave. She logged in to her work email account on 5 August in order to send this letter, even though that was the first day of her holiday, which lasted until 14 August. The Claimant said that this was evidence that she was motivated to refuse her request by the Claimant's grievance. The Tribunal does not accept that. It accepts Mrs Grigg's clear and credible evidence that she wanted to ensure that this piece of work was complete and that the Claimant knew the outcome to her request before she continued with her holiday. The Tribunal notes that, although the essence of the Claimant's allegation was that Mrs Grigg delayed in giving her a response to her request, she was at the same time seeking to argue that Mrs Grigg's action in responding on the first day of her holiday, which avoided further delay in the response being given, should be held against her.
179. The Tribunal does not consider that the delay from 8 June to 8 July was Mrs Grigg's responsibility or attributable to anything she did or did not do: She had asked for further information and that was not provided by Ms Baker until 8 July. There was then a further delay from 8 July to 5 August. The Tribunal accepts that this delay was regrettable but does not consider it anywhere near sufficient to support an inference that Mrs Grigg was deliberately delaying her response, whether because of the Claimant's grievance or otherwise. Mrs Grigg's eventual detailed written response to the Claimant's request evidences that she had considered carefully the application of the Respondent's existing policies and changes to those policies that were in the pipeline. If she had wanted to penalise the Claimant for her grievance, it would have been much easier for her to simply refuse the request on the basis that it was not covered by the Respondent's policy on special leave. If she had wanted to penalise the Claimant by delaying her response to her request, she could have left her reply until her return from holiday. The Tribunal also takes into account that Mrs Grigg was the Head of the Respondent's HR function, dealing with the effects of COVID-19, so she certainly would have had a heavy and demanding overall workload at this time. In summary, the Tribunal does not accept that the reason

for the timing of Mrs Grigg's response was in any way affected by the Claimant's grievance.

180. For these reasons, this allegation fails.

## **CONSTRUCTIVE DISMISSAL**

181. The Claimant resigned on 15 September 2020 with immediate effect. She alleged that she resigned in response to the Respondent's conduct, including but not limited to the acts of alleged discrimination upon which the Tribunal has made findings above. She alleged that that conduct, individually or cumulatively, amounted to a breach of the implied term of mutual trust and confidence and that, because part of that conduct amounted to unlawful discrimination, her constructive dismissal amounted to an act of unlawful discrimination too.

182. It is unlawful for an employer to discriminate against an employee by dismissing her (Sections 39(2)(d)) and that includes a constructive dismissal. A constructive dismissal arises where an employee resigns in response to a repudiatory breach of contract by her employer. It is an implied term of any contract of employment that the employer will not without reasonable and proper cause act in a way that is calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and its employee. When considering whether conduct is likely to destroy the relationship of trust and confidence, the question is whether it is likely to have that effect if objectively assessed, although taking into account the employee's individual circumstances. Because of the fundamental nature of the implied term of mutual trust and confidence, a breach of it amounts to a repudiatory breach of contract.

183. The issues for the Tribunal to decide in relation to this aspect of the claim were these:

- a. Did the Respondent act in a way for which there was no reasonable and proper cause?
- b. If so, was that action calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and the Claimant?
- c. If so, was any part of that conduct unlawful discrimination?
- d. If the Respondent was guilty of conduct that breached trust and confidence, did the Claimant affirm the continued existence of her contract of employment after that conduct had occurred and so lose the right to claim that she had been constructively dismissed?
- e. If not, was the Respondent's repudiatory conduct the reason why the Claimant resigned?

184. The Tribunal has upheld two acts of unlawful discrimination, namely, the Respondent's failure to meet the duty to a noise-cancelling headset and to

supply a digital pen. From the detailed findings that the Tribunal has made, it will be apparent that the Tribunal was satisfied that all of the other allegedly discriminatory conduct by the Respondent not only did not amount to unlawful discrimination but in fact formed part of the Respondent's genuine and reasonable attempts to manage the Claimant's employment, including her performance and her need for adjustments, or to deal with her grievances. There was a reasonable and proper cause for these actions and, objectively assessed, they were neither calculated nor likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and the Claimant.

185. The Claimant alleged that the Respondent had also acted in various other ways that, individually or cumulatively, amounted to a breach of trust and confidence.

### **Refusal of request for disability leave**

186. The first such allegations was that **on 5 August 2020 Mrs Grigg refused the Claimant's request for disability leave** when she could have granted the Claimant's request to be paid by viewing her absence as special leave under clause 9.2 of the Respondent's then applicable attendance policy.

187. That policy gives these examples of what special leave was intended to cover: assessment for dyslexia, hearing aid tests/fittings, training with a guide dog and hospital treatment as an outpatient. These examples indicate that special leave was intended to cover a time-limited period of absence from work that related to disability but was not sick leave. The Tribunal accepts that Mrs Grigg had reasonable and proper cause for concluding that the Claimant's request was not covered by the policy. It was not designed to cover a situation like that of the Claimant's, who was on long-term and open-ended sickness absence due to what her GP fit notes described as "stress at work" caused, she said, by the Respondent's treatment of her.

188. For these reasons, the Tribunal does not accept that Mrs Grigg's decision amounted to, or contributed towards, a breach of the implied term.

### **Failure to redeploy**

189. The Claimant alleged that **Ms Baker's failure to redeploy her to another team** amounted to or contributed towards a breach of trust and confidence.

190. The parties agreed that the first time redeployment for the Claimant was mentioned was at a welfare meeting on 3 April 2020, at which Ms Baker was present. It was the Claimant who raised the possibility of redeployment. Ms Baker's response was that she needed to look at what alternative roles were

available and whether they would be of interest to the Claimant. Even if the Claimant were redeployed, Ms Baker said, there was “still some work to do”. This was presumably a reference to the need to identify exactly what adjustments needed to be made, since it was at this point that Ms Baker suggested that the Claimant be referred to the Respondent’s OH advisers for assessment.

191. In a welfare call with Ms Baker on 20 April, the Claimant asked for an update and Ms Baker told her that the Respondent did not typically re-deploy when there was an ongoing grievance (as there was in the Claimant’s case) so the only option would be for her to come back into her normal team. The Claimant’s response to this was “ok”. The May OH report confirmed Ms Higson’s understanding that the Claimant had requested redeployment. Ms Higson did not herself recommend redeployment.
192. On 1 June 2020 at a welfare meeting, Ms Baker discussed with the Claimant which line manager she would be prepared to work with if not with Mrs Choma.
193. At a welfare meeting on 9 June 2020 Ms Baker asked the Claimant whether she wanted to revisit the issue of redeployment. The Claimant said she wanted to talk to one of the potential alternative line managers, to find out what was going on at work. She said that she was not willing to enter mediation with Mrs Choma and therefore, if she had to go back to be line managed by her, she would want to be redeployed. She said she would choose what to do once she had spoken to the potential alternative manager. Ms Baker asked the Claimant to keep her eye out for vacancies on the Respondent’s online noticeboard, including those connected with the Transforming Cities Fund.
194. At this meeting on 9 June, and again at meetings on 23 and 29 June, the Claimant, incorrectly, stated that OH had recommended that she be redeployed. At the meeting on 23 June she said she had decided that she wanted to be redeployed and that was her decision. Ms Hunter said that she would need to discuss the process with Ms Baker. At the meeting on 29 June Ms Baker said that she had gone back to check the OH reports and OH had not recommended redeployment. Nor had redeployment been recommended in the grievance outcome. That meant that the onus was on the Claimant to identify alternative vacancies in the organisation that she might want to apply for. That situation might change if the Claimant’s appeal against the grievance outcome was upheld.
195. On 29 June the Claimant’s union representative, Ms Briggs, emailed Ms Baker and Ms Hunter asking them to get clarification from OH as to whether they recommended redeployment.

196. On 24 July the Claimant asked Ms Baker for an update on this and Ms Baker replied to explain that they would be following this up once the grievance appeal outcome was known.
197. The appeal outcome was delivered on 12 August. It did not recommend redeployment. At a welfare meeting on 8 September the Claimant stated that she thought OH was being asked about a recommendation on redeployment, Ms Baker said she was happy to go back to OH for clarification on whether it was a recommendation that OH was making. The following day, she emailed Ms Higson who confirmed that she had not suggested redeployment, although any advice she had given would be applicable regardless of the Claimant's role. The Claimant was informed of this clarification by being copied in to the OH email on 10 September.
198. The Tribunal accepts that Ms Baker had reasonable and proper cause for the way in which she handled the Claimant's request for redeployment. When the Claimant raised redeployment, Ms Baker explored with her what she wanted. Once Ms Baker had clarified with Ms Higson that she was not recommending redeployment and the grievance process had not resulted in such a recommendation either, Ms Baker had reasonable and proper cause for concluding that redeployment was not appropriate and that the Respondent should now focus on discussing with the Claimant what was needed to get her back to work. There was discussion of the possibility of her changing her line manager, but that would not involve her changing her substantive role.
199. The Claimant appears to have approached this issue on the erroneous belief that OH had recommended redeployment and that she was therefore entitled to it. That was not the case. Ms Baker's decision not to pursue redeployment for the Claimant was not conduct that amounted to or contributed towards a breach of the implied term.

#### **Failure to investigate discrimination by Mrs Choma**

200. The Claimant alleged that the Respondent had breached trust and confidence by failing properly to investigate her allegations that she had been harassed and discriminated against by Mrs Choma. There were four shortcomings that she identified in the way in which the Respondent handled her grievance.
201. The first failure was that **no investigation was carried out to find out whether HR had shared the confidential 2017 dyspraxia report on the Claimant with anyone**. In her grievance, the Claimant complained that the dyspraxia report might have been passed on to Mrs Choma, contrary to her request to Ms Tyreman that the report remain strictly confidential. It was not until



the Claimant's appeal against Ms Hunter's decision on her grievance that she asked for an ICT investigation into whether the dyspraxia report had been shared with Mrs Choma.

202. Mr Pearson's evidence, which the Tribunal accepts, is that he concluded, after consulting with Ms Sharp, HR Business Partner, that the best approach was just to ask Mrs Choma directly whether she had seen it. He did not consider that the time and resources necessary to carry out an IT investigation would be justified. In any event, he approached the appeal as a review of whether the original decision on the Claimant's grievance was sound, rather than a re-hearing of it. The Respondent's own grievance procedure was silent as to whether an appeal should be conducted as a re-hearing or a review, and the Tribunal accepts that Mr Pearson had reasonable and proper cause for taking the approach that a review of whether the original decision was sound was all that was required of him.

203. The Tribunal does not accept that Mr Pearson's approach to the Claimant's request in her appeal for an ICT investigation into whether the dyspraxia report had been shared could, objectively assessed, amount to or contribute towards a breach of trust and confidence. It was not his role to delve into the minutiae. He had reasonable and proper cause for his view that an ICT investigation was neither required nor justified to enable him to deal with the appeal fairly.

### **Failure to interview colleagues**

204. The Claimant alleged that the Respondent had breached the implied term by **not interviewing her colleagues**, who could have provided evidence that was relevant to an assessment of Mrs Choma's treatment of the Claimant. Their calendars were not examined to find out how they completed them, nor were they asked whether Mrs Choma treated them differently to the way in which she treated the Claimant in relation to the requirement to keep calendars up to date.

205. This allegation relates to the aspect of the Claimant's grievance that alleged that on 15 January 2020 Mrs Choma had asked her to update her calendar to show where she was at all times with an exact location. She said that no-one else in the team was asked to provide this level of detail in their calendars. Ms Hunter's evidence was that she did not consider it necessary to interview the Claimant's colleagues or look at their calendars because, having considered what information the Claimant had given her and what the Claimant and Mrs Choma had told her in interviews she had held with them, she felt that she had sufficient information to address the Claimant's grievance. There was no dispute that Mrs Choma was holding more 1-2-1s with the Claimant than with the rest of her team, but that was because, as Ms Hunter accepted, she had more

need to do so because the Claimant was not complying with the Respondent's time recording requirements. Most of the allegations related to what was said in 1-2-1 meetings and Ms Hunter considered that the Claimant and Mrs Choma had different understandings of what had been said at those supervisions.

206. On 5 May 2020, after the grievance hearing, the Claimant sent Ms Hunter screenshots of the calendars of herself, other colleagues and Mrs Choma for the week of 20 to 24 January 2020. Ms Hunter looked at these and took them into account in her deliberations. She nevertheless concluded that they did not demonstrate that the Claimant had been treated any differently to her colleagues.

207. The Tribunal finds that Ms Hunter had a reasonable and proper cause for her decision not to interview the Claimant's colleagues. She had reasonable grounds for her view that, whilst the Claimant may have been scrutinised more than her colleagues in relation to the recording of her whereabouts, this was because Mrs Choma had concerns about her that she did not have about the other members of the team.

208. At the appeal stage, Mr Pearson did not think it was necessary or appropriate for him to investigate with the Claimant's colleagues each point of detail. He was trying to obtain a broad picture of how Mrs Choma and the Claimant were working together and whether Mrs Choma had acted fairly. The Tribunal considers that he had reasonable and proper cause to adopt that position, given that he was conducting the appeal as a review, not a complete re-hearing of the grievance.

209. The Respondent's failure to interview the Claimant's colleagues did not amount to, or contribute towards, a breach of trust and confidence.

### **Failure to challenge or note discriminatory comments**

210. The Claimant alleged that it was a breach of the implied term when **Ms Baker and Ms Hunter did not challenge Mrs Choma when she said at their interview with her on 7 May 2020: "Stacey wanted regular breaks and I thought because of ADHD and didn't like to sit still"**. The Claimant also alleged that it was a breach of the implied term when **Mr Pearson did not to refer to these comments in the appeal outcome**.

211. Ms Baker and Ms Hunter interviewed Mrs Choma about the Claimant's grievance on 7 May. The notes of that meeting confirm that these comments were made:

*Ms Hunter: Briefly back to reasonable adjustments, in the 121 where you asked about coping with workload, anything more specific about disability and work discussed?*

*Mrs Choma: Stacey says it doesn't impact on her work at all.*

*Ms Hunter: So no support measures as they're not needed?*

*Mrs Choma: One conversation, recalling from memory, Stacey wanted regular breaks and I thought because of ADHD and didn't like to sit still.*

*Might be blurring with something else though.*

212. In this part of the interview, Ms Hunter appears to have been asking about the aspect of the Claimant's grievance in which she complained that Mrs Choma had suggested to her that she had left a meeting early because she had trouble sitting still when she had never in fact said that. (This was the subject of one of the Claimant's allegations of harassment, dealt with above under "Comments about sitting still".) The Tribunal accepts the evidence of Ms Baker and Ms Hunter that it did not occur to them to challenge Mrs Choma's comments because they did not perceive them as offensive and Mrs Choma was not talking about the Claimant in a derogatory manner. Ms Baker explained that she thought Mrs Choma was just recounting a conversation that she thought she had had with the Claimant but might have misremembered. The Tribunal accepts that the interviewers had reasonable and proper cause for not challenging Mrs Choma's account: they, on reasonable grounds, did not perceive the content or tone of her comment as derogatory towards the Claimant.
213. During the grievance appeal meeting on 1 July 2020, the Claimant mentioned to Mr Pearson that Mrs Choma had "persisted" in saying that the Claimant had left a meeting early because she could not sit still. Mr Pearson did not address this in his appeal outcome letter, but the Tribunal considers that he had reasonable and proper cause for not doing so. From the appeal letter, the Tribunal accepts that Mr Pearson had reasonable and proper cause for believing that neither the allegation that Mrs Choma had made this comment to the Claimant nor the allegation she had repeated it in her investigatory interview was the focus of the Claimant's grievance appeal. Rather, her complaint in her appeal was that Mrs Choma had regularly used the word "condition" to refer to her disabilities, and that was what he was concentrating on. The appeal letter raised the "sitting still" comment only in the context of the point the Claimant was raising about the dyspraxia report being shared with Mrs Choma without her authority. She alleged that because the report recorded that she had difficulty sitting still, that must be where Mrs Choma had got that information from.
214. In summary, the Tribunal finds that the fact that Ms Baker, Ms Hunter and Mr Pearson did not take issue with or note Mrs Choma's comment during the investigatory interview was capable of amounting to, or contributing towards, a breach of trust and confidence.

### **Failure to consider additional evidence**

215. The Claimant alleged that it was a breach of trust and confidence that **Mr Pearson did not consider the evidence she gave him that Mrs Choma had lied in her investigation interview** when she said that the Claimant had left the workplace without permission and had not contacted her until 10pm.
216. The Claimant submitted many pages of additional evidence to Mr Pearson on 8 July. Mr Pearson did not consider this evidence. After consultation with Ms Sharp, he decided it was not appropriate to do so because it had not been submitted to Ms Hunter at the initial stage of the grievance. The Tribunal accepts that Mr Pearson had reasonable and proper cause for adopting that position. He was applying a reasonable limit on the material it was appropriate for him to consider, given that his role was limited to reviewing the soundness of the initial decision. This was not conduct that amounted to, or contributed towards, a breach of trust and confidence.

### **Did the Respondent breach the implied term of trust and confidence?**

217. In summary, the Tribunal finds that there was reasonable and proper cause for all the Respondent's actions, including the acts alleged to be discrimination but which the Tribunal has found not to be so.
218. Further, there was no evidence before the Tribunal that anyone involved in any of these actions was aiming to destroy or seriously damage the relationship of trust and confidence between the Respondent and the Claimant, and the Tribunal finds that, objectively assessed, none of these actions was likely to do so. From the transcripts of the Claimant's many meetings with her line managers and HR advisors, it is clear that the Respondent invested a very substantial amount of management time and effort in managing the Claimant, trying to support her in meeting its requirements on data recording and recording of her working hours and whereabouts, and discussing with her possible adjustments for her disabilities and her complaints about the way she was being managed. From the Claimant's formal grievances, it is clear that she did not accept that her line managers were simply attempting to manage her. She viewed their criticisms of her as unjustified and unfair and she thought that they were acting with hostility towards her. Objectively assessed, the Tribunal finds that she had no reasonable grounds for taking that view.
219. The Tribunal's finding that the Claimant's views of the Respondent's actions had no reasonable basis in fact are supported by its findings in relation to the Claimant's evidence about a meeting she had with Mr Rigg on 26 November 2019. Mr Rigg had dealt with the Claimant's grievance against Mr Waugh. He

wrote to her to tell her that he had not upheld her appeal but followed that up by offering to meet her to have an informal chat about her employment with the Respondent. He aimed to reassure her that, even though the grievance had not gone her way, he wanted her to flourish within the organisation. He also wanted to give her an opportunity to discuss other issues she might like to raise on an informal basis, with a view to her relationship with her line managers being repaired.

220. In her evidence to the Tribunal, the Claimant said that, during their informal meeting, Mr Rigg told her that he had found evidence of discrimination by Mr Waugh. The Tribunal prefers the evidence of Mr Rigg, which was clear, detailed, credible and emphatic, that he had not told the Claimant that he had found evidence of discrimination by Mr Waugh. Rather, he had said that all parties could have handled the situation better, including the Claimant, and that Mr Waugh might have acted differently had he had more experience as a manager. In the Tribunal hearing, Mr Rigg was visibly upset when the Claimant put to him her allegation about what he had said (an allegation which the Tribunal has found to be untrue), and the Tribunal considers that understandable, given that he had gone out of his way to offer the Claimant his support.

### **Failure to make reasonable adjustments**

221. The remaining issue is therefore whether the Respondent's failure to meet its duty to provide an auxiliary aid of noise-cancelling headset and a digital pen amounted to a breach of the implied term. Whilst accepting that any breach of the EqA is a significant failure and there can be no reasonable and proper cause for such conduct, the Tribunal does not accept that, in all the circumstances of this case, the Respondent's failure to provide the Claimant with these aids was sufficient to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent. The context here, of which the Claimant was aware, was that the Respondent was otherwise investing very substantial management resources in managing and supporting the Claimant and exploring adjustments for her. They were not refusing to make adjustments nor displaying any resistance to the idea of doing so. Further, the managers involved in the process of making adjustments for the Claimant were also involved in the demanding task of managing the Respondent's response to COVID-19.

### **Affirmation**

222. Even if the Tribunal had accepted that the Respondent's failure to provide headphones and a digital pen amounted to a redudiatory breach of the Claimant's contract, it would have found that by her subsequent actions the

Claimant affirmed the continued existence of her contract of employment and lost her right to resign and claim constructive dismissal.

223. As explained below, the Tribunal finds that the Respondent could reasonably have been expected to provide the Claimant with a digital pen by the end of November 2019 and noise-cancelling headphones by 24 January 2020 and so had already breached its duty to make adjustments by the end of January 2020. The Claimant was on sick leave from 19 February 2020 onwards. The Tribunal does not consider that the Claimant affirmed the continued existence of her contract merely by accepting occupational sick pay. She took various other steps, however, that cumulatively evidenced that she accepted the continued existence of her contract: she raised a grievance; she pursued a grievance appeal; she sought to have her absence paid as special leave; and she attended numerous welfare meetings at which she had extensive discussions about the arrangements for her return to work.

224. For these reasons, the claim of discriminatory constructive dismissal fails.

#### **Time limits**

225. The Tribunal needed to consider whether the claim in relation to the failure to make reasonable adjustments had been presented in time. A Tribunal has no jurisdiction to deal with a claim of discrimination that has not been presented within a three month period beginning with the date of the discrimination or such other period as the Tribunal considers just and equitable period, taking into account possible extensions of time for the period of early conciliation. Where there is conduct extending over a period, time starts to run at the end of that period (Section 123 EqA).

226. A failure to meet the duty to make adjustments is an omission. For the purpose of the time limit for presenting a claim to the Tribunal, time starts to run when the employer decides not to meet its duty (Section 123(3)). In the absence of evidence to the contrary, an employer is taken to decide not to meet the duty when it does an act inconsistent with doing so. If the employer does not do an inconsistent act, time starts to run at the end of the period in which the employer might reasonably have been expected to meet the duty (Section 123(4)).

227. The Tribunal was presented with no evidence to indicate that the Respondent ever set its face against meeting its duty to provide noise-cancelling headphones or a digital pen for the Claimant. Indeed, the evidence indicates that it took some steps to meet the duty, albeit belatedly, and discussed the issue with the Claimant. There was no evidence that the Respondent did an act that was inconsistent with meeting its duty to provide these aids. The Tribunal therefore considered when the Respondent might reasonably have been expected to meet its duty.

228. In relation to the provision of a digital pen, although the Tribunal accepts that it was reasonable for the Respondent to ask the Claimant to try the pen that wrote direct onto a tablet, it did not take that step until December 2019. If it had provided this possible alternative to the Claimant within a reasonable time of receiving the ATW recommendation in September 2019, it would have found out by October 2019 that it was not satisfactory and would have been in a position to identify and order a suitable alternative. The Tribunal finds that the Respondent might reasonably have been expected to provide the Claimant with a digital pen by the middle of November 2019.
229. In relation to the provision of noise-cancelling headphones, the Tribunal finds that, once the Claimant had made clear on 19 December 2019 that the headphones she had been issued with were not sufficient to meet her needs, the Respondent should reasonably have made enquiries about the specification of the set with which she had been issued. It would have discovered then what it apparently did not discover until later, namely that the specification of the standard issue headphones was not adequate. It should then reasonably have taken steps to order the Claimant a set that met the necessary specification. Even taking into account the inevitable delays caused by the Christmas holidays, the Respondent might reasonably have been expected to order the headphones by early in the New Year at the latest and for the headphones to have been issued to the Claimant by 24 January 2020.
230. The Tribunal finds that these two failures to provide auxiliary aids, given their similar nature, amount to conduct extending over a period ending on 24 January 2020.
231. The Claimant entered two periods of early conciliation before presenting her claim on 31 May 2020. The first began on 18 November and ended on 3 December 2019. The second began on 15 May and ended on 30 May 2020. The Tribunal accepts the Respondent's submission that it is only the first of these periods that can be taken into account when applying the extension for early conciliation in Section 140B EqA (Commissioners for HM Revenue and Customs v Serra Garau [2017] ICR 1221). This is the case even if some of the events that are the subject of the eventual Tribunal claim have not yet happened at the time of the first conciliation (Compass Group UK & Ireland Ltd v Morgan [2017] ICR 73). In any event, neither period of early conciliation affects the time for the presentation of the claims, since the first early conciliation period ended before time started to run on 24 January 2020 and the second began over three months after that date.
232. The claim relating to the failure to make reasonable adjustments was presented on 31 May 2020. It was therefore presented more than five weeks after the date on which the basic three-month time limit expired. The Claimant argued that the Tribunal should find that her claim had been presented within

another just and equitable period because she had sought to explore whether matters could be resolved through the Respondent's grievance process, including lodging a grievance appeal, before bringing her claim.

233. This assertion was not borne out by the facts. The Claimant approached ACAS under the early conciliation procedure on 18 November 2019, several months before she presented her second grievance. She was clearly already contemplating a Tribunal claim at that point. Further, she brought her claim before she presented her appeal against the outcome of that grievance on 2 June 2020. The Tribunal does not accept that the Claimant delayed in bringing her claim for the reasons she asserts and can identify no other basis in the evidence it has heard for finding that the claim has been presented with another just and equitable period.

234. For those reasons, the Tribunal dismisses the claims of failure to meet the duty to make adjustments.

Employment Judge Cox  
Date: 9 December 2021