Case Nos: 2400465/2022
2401438/2022
2408337/2022

EMPLOYMENT TRIBUNALS

Claimant: Mrs Noreen Ali

Respondent: Manchester University NHS Foundation Trust

Heard at: Manchester Employment Tribunal

On: 8, 9, 10, 11, 12, 15, 16, 18 and 19 April 2024

Before: Employment Judge G Tobin
Ms A Jackson
Ms E Cadbury

REPRESENTATION:
Claimant: In person
Respondent: Mr N Grundy, Counsel

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

1. The claimant was a disabled person at the material time, being 2 August 2021 to 12 July 2022, in respect of her Attention Deficit Hyperactivity Disorder. The respondent had knowledge of that disability from 16 August 2021.

2. The claimant was not disabled, within the meaning of the Equality Act 2010, in relation to her back pain, dyslexia, dyspraxia and lower limb pain.

3. The claimant was not harassed in relation to her disability in breach of s26 Equality Act 2010.

4. The claimant was not indirectly discriminated against in breach of s19 Equality Act 2010.

5. The respondent did not fail in its obligation to make reasonable adjustments, in breach of ss20 and 21 Equality Act 2010.

6. The respondent did not victimise the claimant in breach of s27 Equality Act 2010.

7. The allegations of discrimination did not have merit.

REASONS

Introduction

1. The claimant complained of disability-related harassment, indirect disability discrimination, failures to make reasonable adjustments and victimisation. The claims were summarised by Employment Judge Sharkett and Employment Judge Shotter following case management hearings of 17 May 2023 [see Hearing Bundle page 369-388] and 7 September 2023 [HB394-404] respectively.

2. This case was listed for a hearing on 7 September 2023 to determine whether the claimant was disabled within the meaning provided in the Equality Act. The claimant frustrated a determination of that preliminary issue at that hearing because she arranged a separate medical appointment, which precluded a clear investigation and determination of this preliminary matter. Judge Shotter remitted the determination of whether or not the claimant was a disabled person under EqA to this final hearing and increased the length of the final hearing.

3. So far as the claimant's disabilities, the claimant contended that she had, at all relevant material times, the following impairments which amounted to disabilities within the meaning of section 6 and schedule 1 of the Equality Act 2010 ("EqA"):

(1) Attention Deficit Hyperactivity Disorder ("ADHD");

(2) Dyslexia;

(3) Dyspraxia;

(4) Back pain;

(5) Lower limb pain;

(6) Anxiety and depression.

The issues

4. The parties presented an agreed List of Issues at the outset of the hearing. The issues to be determined were as follows:

1. Time Limits

1.1 Given the date the claim forms were presented and the effect of early conciliation, are any of the complaints out of time?

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

1.2.1 Was the claim made to the Tribunal within 3 months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within 3 months (allowing for any early conciliation extension) of the end of that period?

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

1.2.4.1 Why were the complaints not made to the Tribunal in time?

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

2. Disability

7.1 The respondent accepts that the claimant was disabled by virtue of ADHD for the purposes of s6 Equality Act 2010 ("EqA") at the time of the events the claim is about, 2 August 2021 – 12 July 2022 ("the material time"). The respondent concedes it had knowledge of ADHD from 16 August 2021.

7.2 In relation to: back pain, dyslexia, dyspraxia, lower limb pain and anxiety and depression, did the claimant have a disability as defined in s6 EqA at the material time? The Tribunal will decide:

7.2.1 Did she have the physical or mental impairments: back pain, dyslexia, dyspraxia, lower limb pain and anxiety and depression?

7.2.2 Did each have a substantial adverse effect on her ability to carry out day-to-day activities?

7.2.3 If not, did the claimant have medical treatment, including mediation, or take other measures to treat or correct the impairment?

7.2.4 If so, would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

7.2.5 Were the effects of the impairment long-term? The Tribunal will decide:

7.2.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

7.2.5.2 if not, were they likely to recur?

3. Harassment related to disability: s26 EqA

3.1 Did the respondent do the following alleged things:

3.1.1 On 5 August 2021 Anne-Marie Harris laughed in the claimant's face when she was informed that the claimant had a learning difficulty and required specific stationery as a result.

3.1.2 On 5 August 2021 Anne-Marie Harris inferred that the claimant would be being fraudulent and dishonest if she did not work time back when she was attending medical appointments.

3.1.3 On 26 August 2021, whilst "looming over" the claimant, Anne-Marie Harris laughed and mocked the claimant about the quality of the equipment that was to be sent to her by Access to Work.

3.1.4 On 1 December 2021, Ellin Swanborough told the claimant she had "perception issues" when she was speaking to her about the outcome of her Dignity at Work complaint.

3.1.5 In the meeting of 8 February 2022, Matthew Bradshaw made comments about the claimant's ability to use equipment (specifically noise cancelling headphones) and was visibly irritated when discussing her EHW assessment.

3.1.6 During a Microsoft Teams meeting on 9 February 2022, Matthew Bradshaw raised his voice when speaking to the claimant and spoke to her in an intimidatory and sarcastic manner (including, but not limited to, the cost of software). Mr Bradshaw also accused the claimant or wrongdoing (in relation to car parking) and spoke over the claimant during the meeting. He also shouted and refused to allow the claimant to speak.

3.1.7 In the meeting of 9 February 2022, Matthew Bradshaw refused to sign off the timesheets for the claimant's work coach.

3.2 If so, was that unwanted conduct?

3.3 Was it related to disability?

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

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

4. Indirect discrimination: s19 EqA

4.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

4.1.1 Hot desking in the office?

4.2 Did the respondent apply the PCP to the claimant from 3 August 2021 to 12 July 2022?

4.3 Did the respondent apply any such PCP to persons who are not disabled or would it have done so?

4.4 Did the PCP put persons with the claimant's disability at a particular disadvantage when compared with persons who do not, in that:

4.4.1 The claimant was unable to focus because she did not have guaranteed access to a quiet corner of the office and or the use of her ergonomic furniture.

4.5 Did the PCP put the claimant at that disadvantage?

4.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

4.6.1 Facilitating home/flexible working to reduce the number of staff in the office to comply with Covid-19 guidance and/or to reduce the risk of Covid-19 transmission.

4.7 The Tribunal will decide in particular:

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

4.7.2 could something less discriminatory have been done instead;

4.7.3 how should the needs of the claimant and the respondent be balanced?

5. Reasonable Adjustments: ss20 & 21 EqA

5.1 Did the respondent know, or could it reasonably have been expected to know, that the claimant had a disability? From what date?

5.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

5.2.1 Hot desking in the office.

5.2.2 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was unable to focus because she did not have guaranteed access to a quiet corner of the office and/or the use of her ergonomic furniture?

5.3 Did the lack of an auxiliary aid, namely:

5.3.1 an appropriate electric sit/stand desk and ergonomic chair;

5.3.2 effective noise cancelling headphones;

5.3.3 a notice board and 2 identical monitors;

5.3.4 computer software Grammar/micro-break/Dragon software and text help/read and write gold,

put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

5.3.5 working at a standard desk/chair causes physical pain (lower limb and back pain);

5.3.6 background noise causes the claimant to become distracted and an inability to concentrate (ADHD);

5.3.7 would allow the claimant to be more organised and enhance her concentration and memory (ADHD, dyslexia and dyspraxia);

5.3.8 the claimant's dyslexia causes her to take longer to review and digest documents and make spelling/grammatical mistakes.

5.4 Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantages listed above?

5.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

5.5.1 A designated desk;

5.5.2 Provision of the aids listed at 5.3.1 - 5.3.4 above.

5.6 By what date should the respondent reasonable have taken those steps?

6. Victimisation: s27 EqA

6.1 The respondent accepts the following are protected acts:

6.1.1 The claimant's Dignity at Work complaint dated 7 September 2021;

6.1.2 The claimant's grievance dated 11 February 2022;

6.1.3 The claimant's ET1 form filed on 26 January 2022;

6.1.4 The claimant's ET1 form filed on 22 February 2022 (not 22 January 2022 as stated in the claimant's Scott Schedule).

6.2 Did the respondent do the following things:

6.2.1 On 7 July 2022 Ellin Swanborough required the claimant to attend a meeting to discuss her employment;

6.2.2 On 12 July 2022 the claimant was dismissed at the behest of Ellin Swanborough and the dismissal panel.

6.2.3 On 30 September 2022 the claimant's appeal against dismissal was dismissed at the behest of Ellin Swanborough and the appeal panel.

6.3 By doing so, did it subject the claimant to detriment?

6.4 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

6.5 If so, has the respondent shown that there was no contravention of s27 EqA?

The Law

Disability

5. 4 EqA identifies "disability" as a protected characteristic. So, an employee should not be discriminated against on the basis of their disability.

6. S6(1) EqA defines disability:

> A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Harassment

7. The test for harassment is set out in s26 of EqA:

> (1) A person (A) harasses another (B) if –
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…
>
> (4) In deciding whether contact has the effect referred to in subsection (1)(b), each of the following must be taken into account –
> (a) the perception of B;

(b) the other circumstances of the case; and
(c) whether it is reasonable for the conduct to have that effect.

8. For allegations of harassment, there is no necessity to look for a comparator. As described in *Rayment v MoD [2010] EWHC 218 (QB), [2010] IRLR* the standard for harassment is conduct that is "oppressive and unacceptable". The definition approaches the matter from the claimant's perspective. Therefore, if a victim had made it clear that she found the conduct unwelcome, the continuation of such conduct will constitute harassment. Only if it would be unreasonable to regard the conduct as harassment will there be a defence here, but the test for connections between the conduct and the effect have been loosened so that unwanted conduct no longer has to be *on the ground of* the victims protected characteristic to fall within the definition, but merely *related* to it.

Victimisation

9. Victimisation under s27(1) EqA is defined as follows:

A person (A) victimises another person (B) if A subjects B to a detriment because –
9.1.1.1 B does a protected act, or
9.1.1.2 A believes that B has done, or may do, a protected act.

10. A "protected act" includes bringing proceedings under the EqA, as well as giving evidence or making allegations that a person has contravened the EqA. There is no need to find a comparator for victimisation as it is only the treatment of the victim that matters in establishing causation; it is possible to *infer* from the employer's conduct that there has been victimisation.

The burden of proof

11. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

12. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence:

i. Has the claimant proved facts from which, in the absence of an adequate explanation, the Tribunal could conclude that the respondent had committed unlawful discrimination?

ii. If the claimant satisfies (i) above, but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

13. The Court of Appeal in *Igen* emphasised the importance of *could* in (i). The claimant is nevertheless required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prima facie evidence of a link between less favourable treatment and, say, the

disability and not merely arising from unrelated events: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

Indirect discrimination

14. S19 EqA defines indirect discrimination:

> (2) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (3) For purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, that person with whom B shares characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

15. Some points stand out according to Baroness Hale in *Secretary of State for Trade and Industry v Rutherford and Another (2006) IRLR 551HL*:

> (e) The concept is normally applied to a rule or requirement which *selects* people for a particular advantage or disadvantage;
>
> (f) the rule is applied to a group of people who *want* something. The disparate impact complained of is that they cannot have what they want because of the rule, whereas others can.

16. To bring a claim of indirect discrimination, a claimant must first show that she belongs to a particular protected group. She must also show that she is put to a disadvantage to which the protected group to which she belongs is put. A *provision, criterion or practice* ("PCP") must then be identified which is applied to the claimant and has, or would have, an adverse impact on the claimant. The PCP must be apparently neutral; if it is premised on a rule that is itself discriminatory the claim is likely to be one of another form of discrimination: see *James v Eastleigh Borough Council [1990] ICR 554*.

17. The meaning of *provision, criterion or practice* is not defined in the legislation but, whilst neutral, will cover informal and formal working practices and is also intended to allow for an examination of working practices that do not operate as absolute requirements for the job in question. So, it is essential to determine a PCP in order to assess whether something the employer does to its employees gives rise to a difference in outcome, or has an adverse disparate impact, depending on the characteristics of its employees. In indirect discrimination claims, the adverse disparate impact must be shown to affect one group – to which the claimant belongs – more than it does to another group. Defining the PCP is essential to finding whether there has been indirect discrimination: see *Environment Agency v Rowan [2008] IRLR 20, Newham Sixth Form College v Sanders [2014] EWCA Civ 734, Brangwyn v South Warwickshire NHS Foundation Trust [2018] EWCA Civ 2235* and *Unison v Lord Chancellor [2017] UKSC 51*.

Failure to make reasonable adjustment

18. Under ss20-22 and schedule 8 EqA an employer has a duty to make reasonable adjustments in 3 situations:

i. where a PCP puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers cases on *how* the job, process, etc is done;

ii. where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers the situation of *where* the job is done;

iii. where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers those cases where the provision of an *auxiliary aid* (e.g. special computer software for those with impaired sight) would prevent the employee being disadvantaged.

A failure to comply with any of these requirements renders that omission actionable as discrimination under s21 EqA. This claim is focused upon the third provision identified above.

19. It is important to note that the duty to make reasonable adjustments arises only where the disabled person in question is put at a "substantial disadvantage" in relation to a relevant matter in comparison with persons who are not disabled. In order to undertake the comparative exercise, the EAT held in *Environment Agency v Rowan 2008 ICR 218 EAT* that a Tribunal must identify the: (a) the PCP applied; (b) the identity of the non-disabled comparators (where appropriate); and (c) the nature and extent of the substantial disadvantage suffered by the claimant. We address the necessity for identifying properly the PCP both above and below.

20. Counter-intuitively, s212(1) EqA states that "substantial" means more than minor or trivial. Although substantial disadvantage represents a relatively low threshold, the Tribunal will not assume that merely because an employee is disabled, the employer is obliged to make reasonable adjustments. The Tribunal is obliged to consider the nature and extent of the disadvantage in order to ascertain whether the duty applies and then what adjustments would be reasonable, see *Environment Agency v Rowan*. The Tribunal should avoid making generalised assumptions about the nature of the disadvantage and failing to correlate the alleged disadvantage with the claimant's particular circumstances.

21. The duty to make adjustments arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The reasonableness of the adjustment is an objective test: see *Smith v Churchills Stairlifts plc 2006 ICR 524 CA*.

22. The duty to make reasonable adjustments arises where a disabled person is placed at a substantial disadvantage "in comparison with persons who are not disabled": s20(3)-(5) EqA. There is a requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled persons: see *Fareham College Corporation v Walters 2009 IRLR 991, EAT*.

The Evidence

23. The Tribunal considered voluminous documentation amounting to 4,241 pages. The hearing bundle originally consisted of 4,184 pages but a number of documents were added at the outset of the hearing. The parties did not object to the late inclusion of this additional information.

24. In addition to the extensive documents the Tribunal also considered the evidence of the following:

1. The claimant, who provided two disability impact statements dated 18 July 2023 and 15 August 2023 as well as a witness statement dated 7 March 2024.

2. The claimant also called her support work coach, Sarah Musique, to provide evidence and she provided a witness statement which was dated 12 March 2024.

25. The respondent relied upon the following evidence:

1. Anne-Marie Harris who provided a witness statement dated 22 March 2024. Mrs Harris was the claimant's line manager.

2. Sarah Mort who provided a witness statement dated 20 March 2024. Ms Mort was a HR Business Partner and she provided evidence in respect of the claimant's grievance. She supported Ms Zoe Shand who was also the respondent's Dignity at Work investigator. Ms Shand was not available to attend the Tribunal because she was due to give birth at the time of the hearing.

3. Matthew Bradshaw, was the claimant's line manager from 8 September 2021 until 9 February 2022 and he provided a witness statement dated 22 March 2024.

4. Ellin Swanborough, who was the respondent's Dignity at Work Commissioning Manager. Ms Swanborough was at material times the Inpatient and Pharmacy Team's lead for the Trust's electronic patient records programme. Her official title was Head of Programmes Inpatients Pharmacy Work Streams. Ms Swanborough's statement was dated 20 March 2024.

5. James Stone, was a Human Resources Business Partner. He provided a witness statement dated 22 March 2022. Mr Stone supported Sue Gwynne in respect of the claimant's Dignity at Work appeal. Ms Gwynne was no longer employed by the Trust and she was not called to give evidence.

6. Nick Bailey, was at the material times Group Director of Corporate Workforce. He investigated the claimant's grievance of 11 February 2022. He gave a witness statement dated 24 March 2024.

7. Dan Prescott, was the Deputy Chief Informatics Officer and Director of Digital Technology Informatics and he chaired the panel that dismissed the claimant. Mr Prescott provided a witness statement which was dated 22 March 2024.

8. Mrs Shilpa Lockett, was the Deputy Director of Human Resources. She was on the panel that dismissed the claimant. Mrs Lockett's witness statement was dated 1 March 2023.

9. Stephen Gardener, who was the Director, Single Hospital Service Programme. He chaired the panel that considered the claimant's appeal against her dismissal. Mr Garner provided a witness statement dated 20 March 2024.

26. Having heard the totality of the evidence we now comment upon the witnesses as follows.

27. We had concerns about the claimant's evidence. We did not think the claimant gave us an accurate version of events and we did not believe that she was an reliable historian. We do not think that the claimant sought to mislead the Tribunal, but the claimant saw things from a particular perspective and was unwilling to accept any contrary view. We were concerned about certain aspects of her evidence, for example in one email the claimant sought to persuade us that when she repeatedly mentioned "weeks" she meant "days". She was preoccupied by a narrative that the respondent was uncaring in respect of her concerns about any delay in providing reasonable adjustments, but the delay was in respect of ordering and delivering specialised equipment and the timespan did not appear at all excessive to the Tribunal. Anything the respondent and its employees did which did not accord with what the claimant wanted was regarded with suspicion and for which she ascribed ulterior motives. This undermined the veracity of the claimant's account .

28. In the claimant's medical records on 18 September 2019, it records her employment as being an Underground Station Manager (desk based). This was at clear variance to what the claimant said in evidence as she clearer stated this work entailed very little desk-based or office work.

29. The claimant was also unreliable in her account of the facilitated mediation with Mrs Harris. The mediation addressed communication difficulties. It addressed some events that were raised and formed the subject of this complaint. The claimant said that the mediation should have dealt with reasonable adjustments. The contemporaneous evidence was that the agreement was completed, it was carefully reviewed by both parties and an agreement concluded. All that was outstanding was the requirement to sign the concluded mediation agreement. The claimant said at the hearing that the agreement fell short because it did not consider reasonable adjustments. The claimant wanted a further day to resolve some additional issues and that the agreement effectively needed a couple of sentences being tweaked. These arguments are inconsistent, and they are contrary to the contemporaneous accounts [see HB700-1696]. The claimant also said that she felt pressured and bullied by the mediator, which is not evidenced in any contemporaneous or near contemporaneous exchanges, which portray a cordial and professional relationship. We have addressed other conflicts in the evidence as we go through our findings of fact.

30. Mr Grundy highlighted the claimant's neuropsychological assessment report, on 28 June 2023, which was dated sometime after the events in question. This was conducted by Dr Kate Riach, Clinical Neuropsychologist, who noted that he claimant "told me she cannot remember events from the last two years, even with prompting, but she can recall the emotions she felt at the time of events…" [HB1297]. This reinforced our view that the claimant had a tendency to give a version of events that fitted her narrative rather than what, in fact, had occurred. The claimant's key memories of the harassment e.g. Mrs Harris "looming over" her and Mr Bradshaw "shouting" at her, reflect the claimant's feelings associated with events rather than the events themselves, which accord with the neuropsychologist's assessment.

31. We determined that the respondent's witnesses, both at the material times and after, treated the claimant with respect and surprising degree of latitude. The claimant seemingly challenged every decision she did not like. Her accounts were not consistent, but she was adamant for her version of events to have been heard. Throughout the grievance and Dignity at Work process, mediation, the disciplinary process and the associated appeals the claimant was given every opportunity to present her case. Nevertheless, the claimant continually claimed that she was not afforded sufficient time to properly explain her version of events, which we reject. The claimant's complaints were numerous, and where a clear and decisive resolution was required, the respondent afforded too much latitude for the claimant to obfuscate and protract matters.

32. In contrast to the claimant's evidence, all of the respondent witnesses appear credible and consistent in their accounts to the Tribunal. Importantly, their version of events matched the contemporaneous documents. The key witnesses in this case were: the claimant and Mrs Harris, Mr Bradshaw, Ms Swanborough and, Mr Prescott and Mr Gardener. All of these respondent witnesses were clear in their accounts. They were not prone to exaggeration, which we felt was a feature throughout of the claimant's evidence. We regarded the respondent witnesses, and particularly the respondent's key witnesses (as identified above) as giving honest and reliable versions of events.

33. Where there is a conflict in the evidence, we prefer the evidence of the respondent's witnesses. We were so concerned with the claimant's account that on any significant point we were unlikely to believe what she said unless this was independently corroborated.

Adjustments for the hearing

34. Arrangements had been made before the hearing and the claimant was allocated a reserved conference room throughout and she was provided with a orthopaedic chair. The claimant did not sit on the orthopaedic chair initially until remarked upon by the hearing Judge on day-3. Thereafter, the claimant sat on the chair for the remainder of the hearing.

35. We discussed adjustments at the outset of the hearing and during its course. The hearing often started up to 30 minutes early and sat on most days until between 4pm and 4.40pm or even 4.45pm. This facilitated more frequent breaks and we were able to complete the hearing within the allocated time albeit the claimant's cross-examination overran.

36. The respondent's side did not request any adjustments.

Our findings of Fact

37. We set out the following findings of fact, which were relevant to determining whether or not the claims and issues identified above have been established. We have not determined all of the points of dispute between the parties, merely those that we regard as relevant to determining the issues of this case as identified above. When determining certain findings of fact, where this is in dispute and where we consider it appropriate, we have set out why we have made these findings.

38. In assessing the evidence and making findings of fact, we placed particular reliance upon contemporaneous documents as an accurate version of events. We also place some emphasis (and drew appropriate inferences) on the absence of documents that we expected to see as a contemporaneous record of events and also on the absence of evidence which give an interpretation of what occurred. Witness statements are, of course, important. However, these stand as a version of events that was completed sometime after the events in question and are drafted through the prism of either advancing or defending the claims in question. So, we regard them with a degree of circumspection as both memories fade and the accounts may reflect a degree of re-interpretation.

39. On 1 July 2021 the respondent's Employee Health and Wellbeing ("EHW") Service complete a work health assessment with the claimant and produced an advice note [HB449].

40. On 7 July 2021 Ms Anne Marie Harris (who was the claimant's line manager) met the claimant via Microsoft Teams to discuss the EHW advice note. The claimant was assessed by Department of Work and Pensions Access to Work on 26 July 2021.

41. On 2 August 2021 the claimant commenced employment with the respondent as an EPR Clinical Application Analyst. She worked from home on her first day [HB459-473].

42. On 3 August 2021 to 5 August 2021 the claimant worked in the respondent's Trafford House office.

43. On 4 August 2021 Access to Work emailed the claimant and Mrs Harris confirming a grant had been awarded [HB531-545] and on 12 August 2021 the claimant provided Mrs Harris with her Access to Work report which recommended specific equipment and software [HB 563-568].

44. On 26 August 2021 the claimant worked in the office and thereafter she worked from home.

45. The claimant raised a grievance which was later converted to a Dignity at Work complaint on 7 September 2021 [HB673-895].

46. On 7 September 2021 the respondent provided the claimant with noise cancelling headphones [HB668].

47. The claimant was assigned a new temporary manager, Mr Matthew Bradshaw, on 8 September 2021.

48. From 9 September 2021 to 13 December 2021 the claimant was absent from work on sick leave due to stress and anxiety.

49. The claimant's grievance was converted to a Dignity at Work complaint at her request on 28 October 2021 [HB746-747].

50. On 28 October 2021 the claimant was provided with two mouse mats, headphones and computer software as recommended by the Access to Work [HB2754].

51. The next day, 29 October 2021, two ergonomic chairs, sit/stand desks, footrests, vertical mouse, ergonomic keyboards and keypads and laptop stands, which were recommended by Access to Work, were delivered to the claimant's home and to the office [HB2753-2755].

52. The claimant attended a Dignity at Work outcome meeting on 25 November 2021 which was chaired by Mrs Swanborough and the outcome was sent to the claimant on 2 December 2021. The complaint was not upheld [HB974-981].

53. On 10 December 2021 the claimant was informed that her noise cancelling headphones, docking station, a second monitor and dual monitor mounts were ready for collection [HB999-1000].

54. The claimant appealed the Dignity at Work outcome on 10 December 2021 [HB1240-1241].

55. On 13 December 2021 the claimant returned to work on a phased return (two hours daily for the first week) working from home. It is not clear what work the claimant did or could do throughout this time [HB998-999].

56. From 13 December 2021 to 21 February 2022 the claimant worked from home with some periods of annual leave, although again it is not clear what work the claimant could undertake during this period because she had not undertaken her epic training.

57. The claimant attended a Dignity at Work appeal meeting on 6 January 2022 [HB1252-1260].

58. The claimant issued her first claim with the Employment Tribunal on 26 January 2022 [HB58-125].

59. On 11 February 2022 the claimant raised three grievances, against Mr Bradshaw, Sue Britland-Jones Ms Swanborough, Sarah Mort and Zoe Shand [HB1411-1432].

60. From 21 February 2022 the claimant was absent from work on paid authorised leave.

61. The claimant issued her second Employment Tribunal claim on 22 February 2022 [HB198-250].

62. On 24 February 2022 the claimant attended a Dignity at Work appeal outcome meeting [HB 1446-1448] and the next day she was sent the outcome letter [HB 1453-1460].

63. On 2 March 2022 Mrs Swanborough informed the claimant that she was required to return to work from paid authorised absence on 3 March 2022. Ms Swanborough confirmed that she would also participate in facilitated discussions with Mrs Harris and Mr Burrows and mediation would be arranged between the claimant and Mrs Harris. Meetings would also be held to discuss reasonable adjustments and the claimant's probation.

64. On 6 March 2022 the claimant sent an email to Nick Bailey and James Stone [HB1497] stating:

> I have been advised that it is inappropriate for me to interact with any individuals named in [her Employment Tribunal] claim. Interaction with the individuals will impact upon my mental health causing distress and compromise the ET claim. Considering this information, I request [the respondents] act to ensure that she has no interaction with any individuals named in the ET Claim [i.e. Anne-Marie Harris, Nicole Howarth, James Burrows, Zoe Shand, Sarah Mort, Ellin Swanborough, Sue Britland-Jones, Matthew Bradshaw, Sue Gwynne].

65. From 7 March 2022 to 11 March 2022 the claimant worked from home, although we find the claimant had no work to do.

66. On 11 March 2022 Mrs Swanborough informed the claimant that following her email of 6 March 2022 her epic training course for the following week would be cancelled with a view to rebooking the training once it was clarified which team and what work the claimant was going to do. Mrs Swanborough informed the claimant that she requested that the claimant would be put on authorised paid absence from work whilst arrangements were made for the mediation [HB1593-1594].

67. The claimant was absent from work on paid authorised leave with some periods of annual leave and sick leave between 12 March 2022 to 12 July 2022.

68. On 17 and 18 March 2022 the claimant attended mediation with Mrs Harris and an independent external mediator specialising in neurodiversity [HB1683-1687].

69. On 27 April 2022 Ms Swanborough was informed by the mediator that the mediation had failed as the claimant refused to sign the mediation agreement [HB1706-1708].

70. On 27 April 2022 Ms Swanborough emailed the claimant referring to the outcome of the mediation process and setting the reasons why she felt the necessity to refer her to a formal hearing to consider whether her employment with the respondent should be terminated on the grounds of “some other substantial reason” (“SOSR”), that being the irretrievable breakdown of relationships between the claimant and her line manager and members of the wider team [HB1709-1710].

71. On 24 May 2022 the claimant attended a grievance meeting with Nick Bailey regarding her three grievances of 11 February 2022 [1933-1944]. On 1 June 2022 Mr Bailey wrote to Dan Prescott raising concerns that continuing with the internal grievance procedure would cause additional stress for the claimant and given her comments as to the breakdown of trust and confidence, together with her stated

outcomes, and that he did not consider the grievance process would result in any satisfactory outcome for the claimant. This is the letter in which the claimant asked for a pay rise in the end of her probation [HB1985-1987].

72. On 7 July 2022 the claimant attended a SOSR meeting/hearing [HB2012-2015] which was reconvened on 12 July 2022. At the reconvened hearing the claimant was informed her employment would be terminated on the grounds of SOSR due to the irretrievable breakdown in relations.

73. Mr Prescott sent the claimant the relevant outcome letter confirming the claimant's termination of employment on 15 July 2022 [HB2020-2026].

74. The claimant appealed the decision to dismiss her on 21 July 2022 [HB2030-2031].

75. On 27 September 2022 the claimant attended an appeal meeting with the appeal panel of Mr Stephen Gardener, Ms Vicky Hall and Ms Caroline Davidson [HB3845-3882]. On 30 September 2022 Mr Gardener sent the claimant the outcome letter of her appeal [HB2068-2071].

76. The claimant raised her third claim with the Employment Tribunal on 11 October 2022 [HB272-290].

Our determination on the claimant's disabilities

77. The material times in question were 2 August 2021 to 12 July 2022 (when the claimant was dismissed).

78. The claimant underwent an Access to Work assessment on 26 July 2021. This assessment was not vigorous in any way. The assessor appears to have taken what he was told at face value with no independent enquiry or perceivable analytical or critical engagement. Much of the information was either wrong, for example the claimant saying that she was diagnosed with dyslexia or is (on the face of it) considerably overstated. The assessment reported that the claimant had chronic pain in her back, neck and shoulders. This was a remote assessment. This says that this can cause stiffness, fatigue and loss of concentration. None of this was evidenced during the seven days of the Employment Tribunal. The claimant did not have any visual processing difficulties that we could tell. She did not need to re-read any documents and she was able to read fluently from documents at the hearing. The claimant was educated and articulate, and she did not have any difficulties in organising her thoughts. Although the claimant did say, at times, that she was distracted and she lost concentration, we did not perceive these to occur other than when she asked a question that was not helpful to her case or where she could not make inroads with questioning witnesses. Notwithstanding that her purported short-term memory and multitasking difficulties were said to be exacerbated by stress, the claimant presented as a well-prepared and articulate litigant in person so we were reluctant to accept the Department of Work & Pensions' Access to Work assessment as assisting the Tribunal in any meaningful way. We accept Mr Grundy's submission that this was an inept assessment, which was entirely self-serving for the claimant.

<u>ADHD</u>

79. The respondent conceded at the outset that the claimant was disabled by reason of ADHD, and it conceded that it had knowledge of ADHD from 16 August 2021.

80. In the claimant's disability impact statement, she stated: “most days my partner has to remind me to wear clean clothes that have no holes or stains and are appropriate for the situation and weather”. This sounds as though it was lifted straight from a Personal Independence Payment claim and is not natural language. We regard our assessment as more thorough, and we do not believe this. The claimant presented as clean, tidy and was fully engaged throughout the lengthy hearing. There was no contemporaneous evidence that supports such a profound lack of capacity.

Back Pain

81. The claimant, when discussing “dressing” raised point 4, “I have not worn a bra in months because of my chronic back, neck and shoulder pain…”. This is the only reference in the claimant's disability impact statements to back pain. The claimant said that she was diagnosed with her chronic pain (upper back, neck and shoulder) in October 2018. There is no medical evidence, orthopaedic or otherwise, contained within the hearing bundle to support this diagnosis.

82. There is a reference in her medical notes approximately two years and nine months before the claimant started work with the respondent to “back pain, unspecified (review). L3/L4 facet joint irritation”. However, this refers to lumbar spinal segments 3 and 4, which equates to lower back pain, so they do not appear to relate to the thoracic or cervical parts of the spine which would be mid- and upper-back complaints. There is no record of the claimant visiting her GP from October 2018 until 13 August 2021 in respect of back pain or any other musculoskeletal pain.

83. The claimant moved GP practices and registered in a Manchester GP surgery on 15 April 2021 [HB2264]. She completed a new patient questionnaire and there is nothing recorded in respect of back pain or a back condition. The claimant’s GP practice identified her ADHD [2263] but at that point no other disability was recorded.

84. On 13 August 2021, which was approximately two weeks after the claimant commenced work, she telephoned her GP practice complaining of musculoskeletal pain which was recorded as a first consultation for that matter, as opposed to a review. The claimant is quoted as stating:

> Started a new job in an office. I do not have a suitable chair, desk, monitor, etc. This is causing my chronic pain conditions to be more aggravated than usual, also my lower right limb is hurting as well which is annoying and unexpected. I rarely take painkillers as it doesn’t help much, but I need some at the moment because at the end of the workday I am in a lot of pain. My workplace is waiting for an assessment before buying me equipment, which could be weeks…”

85. There is no evidence of any chronic condition. It is difficult to see what caused this purported pain because, so far as we could see, the claimant was not engaged in any lengthy or demanding work so early in her employment.

86. In 2017 the claimant went for an assessment at the British College of Osteopathic Medicine Clinic in London. She was assessed by Mrs Jemma Sager, Head of Clinic, who gave a prognosis of full recovery within 3-4 weeks [HB3696-3974].

87. There are two further attendances with the claimant's GP on 25 October 2021 when the claimant complained of pain right neck, radiating to upper back and shoulders. The claimant had said that she had a longstanding intermittent flareups since the past three days and requested to discuss better pain management because over the counter painkillers were not satisfactory [HB2262]. On 1 March 2022 there was a telephone conversation in which the claimant complained again of upper back, neck and shoulder pain. The claimant said that she had requested amended duties and the claimant raised this in the context of amending her fit for work note. This was taken up again the following day [HB2246]. This coincides with the claimant's sick note for musculoskeletal pain [HB 2885].

88. On 29 April 2022 the claimant had a telephone call with her GP practice in which she said she was still in pain despite regular paracetamol. The claimant raised a referral to the pain clinic, and she also raised why her medical conditions of dyspraxia and dyslexia were not in her medical records. No substantive treatment was untaken other than the claimant apparently preserving a record of her contended impairment.

89. In the consultation of 1 May 2022, the claimant reported to her GP that recently all the chronic pain had flared up since November 2021. We note that the claimant was undertaking no substantive work for the respondent during this period so we could not see why her back conditions could possibly cause any difficulties.

90. Before the hearing, the claimant requested a height adjustable chair. She did not use this chair until this was raised by the Employment Judge just before lunch on day-3 of the hearing. Thereafter the claimant used the chair regularly. Throughout the time at the Tribunal the claimant appeared to suffer no back problem. She was able to move and flex without any apparent difficulties. The claimant was confident to raise various issues with the Tribunal, but none of these related to any back problems during the duration of the hearing. We do not make a finding from the claimant's demeanour, but merely raise this is one factor of many in our overall assessment.

91. We were not at all persuaded that the claimant suffered from the problems contended. There is not sufficient information for us to assess whether this had a substantial adverse effect on the claimant's ability to carry out day-to-day activities. The claimant's self-diagnosis was entirely self-serving such to support her claim. We determine that the claimant was not reliable in her evidence on this matter and we determine that her regular reports to her GP records was in order to preserve a record and keep these issues live. She wanted the equipment and she then sought to justify this. We determine that the claimant grossly exaggerated a condition that occurred in 2017, if it arose again, and we are not convinced it did, then we do not accept that this was significant. We do not accept that this is an intermittent or reoccurring condition because there is no evidence to support such a contention and that would be entire speculation. We are not persuaded that the effect of the claimant's impairment was long-term.

Dyslexia

92. At the preliminary hearing of 7 September 2023 Employment Judge Shotter noted that the claimant did not have any medical report confirming any diagnosis of dyslexia.

93. In her disability impact statement, at paragraph 7(c)(i), the claimant referred to struggling daily to read, and that she was a slow reader [HB2214]. This was at significance variance to the Employment Tribunal hearing where, the claimant was able to read the documents and read from the documentation, particularly but not only in cross-examination, when asking questions she read from the hearing bundle without any hesitation. An assessment of dyslexia is complex and normally provided after a great deal of investigation by a clinical psychologist or similarly qualified expert. The Employment Tribunal is certainly not qualified to make such an assessment as was identified by Employment Judge Shotter. In any event we are wholly unpersuaded that the claimant suffered from dyslexia because there is an absence of anything that could possibly lead to such a finding, notwithstanding that the claimant's medical notes refer to an absence of such material, at page 2239. There is no reference to dyslexia in the claimant's medical records because, we believe, she did not have dyslexia.

Dyspraxia

94. The only independent corroboration of the claimant's contended dyspraxia is contained within an educational psychologist's report from Dr Tim Harper dated 16 October 2009 [HB3947-3955]. This report was made almost 12 years before the claimant commenced work with the respondent. Dr Harper determined that the claimant was mildly dyspraxia. Her "mild difficulties" affected her writing in that the process of transferring complex thinking into a fluent and easily readable handwritten text is harder for her than it is for most people. There was no additional documentary corroboration.

95. The claimant had no perceivable cognitive difficulty and her memory of the hugely extensive material contained within the bundle appeared to be very good.

96. In cross examination Mr Grundy asked the claimant for examples of where her mild dyspraxia impacted upon her normal day-to-day activities, the claimant was not able to give satisfactory examples. When Mr Grundy challenged the claimant on the fluidity of her emails, her relevant grievances and her other documents the claimant said that she had some limited assistance from her partner, who was also similarly employed with the respondent. This was nowhere corroborated and appeared an unsatisfactory response to us. When asked about her use of software for general day-to-day activities the claimant said that she was able to cope. So, under the circumstances of the limited documentary corroboration, albeit historic and "mild", and self-declaring more recently, we find that the claimant accepts that she was able to cope with day-to-day activities.

97. Under the circumstances we find that on the balance of probabilities the claimant has not satisfied us that she has mild dyspraxia, which amounted to a disability under s6 and sch 1 EqA.

Lower limb pain

98. The claimant was unclear about what her lower limb pain related to. There is a reference in her GP notes on 23 April 2021 [HB 2260] which refers to ankle pain and an injury in which the claimant tripped and fell in 2018. There does not appear to be any significant difficulties highlighted. Various investigations were undertaken at the GP surgery on 27 April 2021 and nothing abnormal discovered in respect of these

tests. Again, on 23 April 2021 the claimant raised issues about her knee pain, for the first time. She complained that this had been lasting over one year but nothing seems to have come of this.

99. The claimant's disability impact statement refers to sciatica of the right limb which she said was diagnosed in December 2021, but we cannot find any such diagnosis in her medical records. There was an orthopaedic report by Dr Stephen Hughes, Consultant in Emergency Medicine prepared for the claimant's previous solicitors' personal injury claim [HB4001]. This noted that the claimant was a keen runner and that she had a history of tight hamstrings with pain around her knee and around her hip. The report refers to the claimant returning to her running. There is reference to iliotibial band, which is a common complaint amongst runners and is easily remedied, so we regarded that reference as not significant.

100. In the circumstances we do not regard the claimant as having a substantial impairment in her ability to perform normal day-to-day activities.

Anxiety and Depression

101. The claimant's GP records refer to various episodes where she appears to have been prescribed medication for anxiety and depression from 2018 to 2020. The claimant thereafter produces fit notes at work which refer to her stress and anxiety (work-related) and it appears that she went to her GP in respect of this. It is very likely that the claimant had a disability at all material times in respect of her stress and in respect of her anxiety and depression, however neither her reasonable adjustments complaint nor any other allegations of discrimination appear to rely upon this contended disability. Under the circumstances we do not make a formal finding in this regard because there is no related discrimination contended.

Our determination on the clams of harassment

102. The claimant seemed to have fallen out with Mrs Harris after Mrs Harris did not allow the claimant the requested time off for her previous Employment Tribunal claim. The claimant had requested paid leave or special leave to pursue a claim against her former employers. Mrs Harris made appropriate enquiries to the HR Department and the claimant was told that she needed to take this out of her annual leave entitlement. The claimant was surprisingly resistant to this because, she said, she did not believe she should have to take time off from her holiday entitlement to pursue unrelated Employment Tribunal proceedings. Throughout the period of her line management (and after) Mrs Harris had been accommodating towards the claimant and we detect that the relationship started to fracture, and fracture quite badly, when Mrs Harris did not give the claimant what she wanted.

Issue 3.1.1

103. This complaint of harassment is dealt with in the claimant's statement at paragraph 46J where the claimant does nothing further than repeat the allegation. There is no explanation of the dialogue surrounding the allegation. Mrs Harris deals with the allegations at paragraphs 31-40 of her statement and denies the incident occurs as contended by the claimant. Mrs Harris deals with the allegations in a far more expansive manner. At paragraph 39 Mrs Harris disputes that the claimant

referred to having a disability, although this was in the context of discussing special leave, and again at paragraph 46 Mrs Harris disputes that the claimant told her that she had a learning disability. Mrs Harris said that she did not laugh when the claimant informed her that she needed stationery because of her health condition. Mrs Harris made reference to her teaching qualifications for adults, and she said she assumed that the claimant asked for paper and highlighters as that was her learning style or preference.

104. Mrs Harris said that she was puzzled how the claimant would think that she would laugh in her face, and she raised this during the mediation. It seems odd to the Tribunal that any manager would laugh at an employee who had asked for highlighter pens and paper, particularly as the claimant contended that she informed that individual she had a learning difficulty. This would appear to be surprising behaviour in any context, but particularly in a health service environment. This is not the type of behaviour we would expect any manager to display. It was clear from the contemporaneous correspondence that Mrs Harris was keen to welcome the claimant and accommodate her into her team. She showed the claimant around the premises, she sought to introduce her to various colleagues, and she offered her lots of reassurance. The harassing behaviour then would appear to be out of character for this line manager, particularly on the claimant's first day in the officer and the fourth day of her employment. Significantly, the claimant did not raise the issue at the time – she first raised it in her grievance on 7 September 2021 [HB673-679].

105. Following the meeting/exchange the claimant sent a WhatsApp message to her partner. The claimant did not make any reference to this allegation because she said that she needed to discuss this with Mr Maloney afterwards. We reject this explanation because there is no indication that she had something to discuss with Mr Maloney nor was there any reference to apparent upset caused by such an exchange.

106. Mrs Harris wrote an email to her colleague requesting stationery to support the claimant's learning style and she identified notepads, pens, several coloured biros, highlighters and a ruler [see HB561] so this indicated that she did not seem to have any problem in ordering this stationary.

107. At the mediation the topic arose. Mrs Harris said that she was anxious to explore why the claimant felt she had laughed in her face. Ms Mustique was not at all critical of Mrs Harris – she seemed to adopt a more conciliatory course suggesting [if it did happen] that it might be a misunderstanding and she referred to Mrs Harris saying that if she did laugh "it might be down to nerves". We are satisfied that Mrs Harris sought to avoid confrontation on the issue. She tried to resolve the issue without confrontation but in evidence Mrs Harris was adamant that she did not laugh and that this was not down to nerves, and we believed her.

108. We believe Mrs Harris' account. We do not believe the claimant's version of events. Mrs Harris did not do the alleged conduct complained of. This complaint fails.

Issue 3.1.2

109. This was an extraordinary allegation the claimant made against Mrs Harris in that we are asked to determine that Mrs Harris created a harassing environment based on some form of inference that the claimant was being fraudulent and dishonest,

without any indication of the words that were used. In the circumstances of this case, such a claim is ludicrous. We asked the claimant and she was not able to account for what Mrs Harris was supposed to have said that could have violated her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment, so we are effectively asked to judge this complaint on the basis that the claimant did not like what was said to her but she could relay to us what was said to her that was so unacceptable.

110. Mrs Harris could not understand why the claimant was so offended so as to make this allegation. She referred the claimant to the Trust's policy on medical appointments and special leave, and this appeared to be perfectly consistent with the way she proposed to handle the claimant's medical appointments. The claimant sought to disapply those procedures to her. We perceive that she wanted a degree of special treatment because she was pursuing an Employment Tribunal claim against her previous employer. Generally, we found the claimant to be demanding and, when rules did not suit her, they should not be applied to her. This matter had been aired in emails prior to the claimant's employment, although the claimant had not been clear. There was a lack of clarity around the appointment in question on 5 August 2021. Mrs Harris said that she was told by the claimant that she had a medical appointment, so she inferred that this was a GP appointment; she worked in a medical setting, so naturally Mrs Harris interpreted "medical" as relating to "doctor". At the hearing the claimant contended that it was a physiotherapist appointment, but we have not seen any evidence as to whether there was, in fact, a medical appointment or whether it was a physiotherapist or other appointment, and we determined that the claimant had been deliberately vague about this.

111. In any event, Mrs Harris informed the claimant of the Trust's policy that staff would attempt to get a medical appointment outside working hours but if it impinged upon the working day then the relevant member of staff would make up the time. This was relayed to the claimant and the claimant's emails to her partner, Mr Maloney, identified her reluctance to accept this [see HB2705-2706]. A similar dissatisfaction was expressed by the claimant when she asked to have paid time off to pursue her Employment Tribunal claim against her former employer, and this was not granted as either paid time off or unpaid time off and Mrs Harris told the claimant that she needed to book annual leave.

112. In her oral evidence the claimant could go no further than say that Mrs Harris "heavily implied" that the claimant would be fraudulent and dishonest if she did not work the time back when she was attending medical appointments. We do not accept that Mrs Harris made any such inference. The allegation fails at the first stage.

Issue 3.1.3

113. There were no contemporaneous records in respect of this allegation. The nearest contemporaneous note was the claimant grievance [HB681]. The claimant's complaint at that time seemed to centre on some form of unauthorised medical disclosure. So far as we understand, the claimant's grievance with Mrs Harris contended that Mrs Harris contended that she hoped the claimant's new equipment from Access to Work would be better and, apparently, this referred to a supposed breach of the claimant's confidentiality by indicating out loud that the claimant had pursued an Access to Work application. There was no complaint about "looming over"

the claimant nor about creating a harassing environment. So at that stage the criticism centred on the quality of equipment that was due to be provided by Access to Work.

114. The Tribunal was generally puzzled about this allegation, so we went through all the relevant documentation. The claimant's account of the incident appears in various formats. Sometimes Mrs Harris was said to be talking about Trust furniture and sometimes she was talking about Access to Work equipment. Sometimes Mrs Harris was laughing as she approached the claimant and sometimes she was laughing when she was talking to the claimant, and sometimes she was laughing when she walks away from the claimant. The first time "looming" enters the equation was on the first Employment Tribunal claim [HB103].

115. So, the claimant has not been consistent with her recollections of the incident throughout, and again we take this into account. The claimant had either added the laughing out loud or conflated this from the previous allegation, but Mrs Harris' account seems to be more consistent in that she confirms that she saw the claimant struggling with one of the office's chairs and that part of one had come off. Mrs Harris said that she instructed the claimant to find a replacement and said some form of innocuous comment like her new chair is likely to be of better quality. There is a theme running through these exchanges whereby the respondent does not perceive that the claimant had taken offence at any of the relevant times because Mrs Harris and later Mr Bradshaw report that matters ended cordially. They did not perceive a problem.

116. So far as this incident is concerned, in her Claim Form the claimant said that she was stunned into silence by the humiliating and belittling comments of Mrs Harris [HB103]. We do not find that the event contended by the claimant took place in the manner contended. Mrs Harris did not "loom over". Mrs Harris did not laugh and/or mock the claimant. We also reject any contention that, so far as this incident, it had the purpose of violating the claimant's dignity or that the exchange created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

117. We believe Mrs Harris and not the claimant. By no stretch of the imagination is there anything belittling in someone stating that they hope the claimant's next chair will be better, even if the claimant can be said to be upset about the purported breach of confidentiality.

Issue 3.1.4

118. The Tribunal did not understand how the claimant could be offended by Ms Swanborough's reference to "perception issues". The claimant appears to have elevated this into denying her neurodiversity. This allegation relates to a comment made in the outcome of the investigation under the respondent's Dignity at Work policy which was sent to the claimant on 1 December 2021 and determined by Ms Swanborough. The claimant referred to these events at paragraph 83(e) in her statement, albeit rather briefly. Ms Swanborough dealt with it at paragraph 38 of her witness statement. At this stage Ms Swanborough did know about the claimant's ADHD because it had been raised during the meeting, but Ms Swanborough said, and we accept, that she did not say that the claimant had perception issues. She explained that actions could be perceived differently because there were often two sides to a story. She said she used the words that communication could be "received/perceived

and differently interpreted by individuals". The letter then proceeded to state as follows [HB979]:

> There is no evidence to support claims that James Burrows acted in a discriminatory way to you within the meeting that took place. Nicole did not step in as she did not feel that his behaviour was inappropriate.
>
> I discussed the findings of the investigation with you concerning your interactions with JB and confirmed that there was insufficient evidence found to support your allegations. I have recognised that you found this news difficult to receive and I wanted to emphasise that the majority of the concerns relate to communication which can be received, perceived and interpreted differently by individuals. NH was present at the meeting and has an entirely different recollection of events.
>
> She supported JB's statement that you raised some concerns but these lacked detail so James was intent on understanding the specifics. You changed topics a number of times and he needed to bring you back to your initial points, to aid his understanding of your concerns.
>
> An example of the perception issue is your assertion that JB mocked you when he expressed his wish that you enjoy your holiday. You believe he knew you were going to court. JB was not aware of your reason for annual leave and he confirmed that his wish for you to have a good holiday was in the interests of good working relationships.

119. We could not see anything untoward with Ms Swanborough's observation. The index incident cannot be attributed to disability discrimination in any way. A colleague wished the claimant a good holiday. The claimant took offence and believed that this was somehow mocking her; this without questioning the remark. The claimant's criticism is absurd. It fits into our impression that the claimant took offence at the slightest comment that she perceived might have a possible ulterior motive. Anything that was said that she did not easily understand was perceived as unfavourable.

120. In evidence the claimant said that by raising the "perception issue" Ms Swanborough was somehow deriding or, at least, dismissing her neurodiversity. Again, we cannot see how this can possibly be the case. Ms Swanborough seemed to go out of her way to answer a fundamentally unintelligible point and attempted to explain how a comment could be said in one context and received in an entirely manner, and this applies to anyone at any point.

121. This complaint is so lacking in merit that we were not so sure if the claimant did actually perceive this comment as humiliating. However, we suspect she did because she pursued this claim, but we have our reservations because the claimant seemed to elevate and pursue anything that was said to her that did not seem to give her the answer she wanted. In any event it is not reasonable to construe that such an explanation had the purpose of violating the claimant's dignity or was intent on creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Accordingly, this allegation is dismissed.

Issue 3.1.5

122. This allegation surrounded a meeting on 8 February 2022 with Matthew Bradshaw. The purpose of the meeting was to discuss the Occupational Health report [HB1347-1358] which was sent to Mr Bradshaw the day before. Mr Bradshaw and the claimant met to go through this report, but they had only reached point 8 and then they continued and completed the exercise the next day, 9 February 2022. It was not clear

what comments Mr Bradshaw is supposed to have made about the claimant's proposed inability to use the noise cancelling headphones. In the claimant's statement, she refers to the accusation of the claimant breaking the headphones and also breaking a laptop stand she received in November 2021.

123. Mr Bradshaw proposed to set up a dedicated session with IT support to confirm headphone functionality and usage [HB1362]. We determine that the claimant took this as Mr Bradshaw accusing her of not knowing how to use the headphones, see claimant's statement paragraph 91(c). At 13:07 on 8 February 2022 the claimant sent Mr Bradshaw an email which, so far as points 5 and 6 are concerned, suggests that a constructive dialogue took place [see HB1370-1371] yet seven minutes later the claimant writes to Mr Maloney that Mr Bradshaw had upset her and said offensive and demeaning things [HB1373], although she does not specify what those upsetting and demeaning things were. Mr Grundy contended that the claimant was deliberately manipulative and her note to Mr Maloney should be read in that context. The claimant had approached ACAS in respect of a claim on 31 January 2022 and this included a claim against Mr Bradshaw [see HB197]. It is not clear what the potential claim against Mr Bradshaw was at that time (although he had been the claimant's line manager for about four months, during which the claimant had been off sick for most of the time). The claimant commenced her claim on 22 February 2022, which is after this incident, so the respondent's case is that the claimant was attempting to lay some form of paper-trail to draw Mr Bradshaw into the mix of respondents. Whether or not the claimant had a claim against Mr Bradshaw to any extent, we determine that the claimant was likely to take offence at anything that Mr Bradshaw may well have said that did not give the claimant what she wanted.

124. We do not accept that Mr Bradshaw became visibly irritated with the claimant because he denied this, he was an experienced manager, and, having read the contemporaneous correspondence, this did not fit the dynamics of the apparent relationship at that time. It also significantly contrasted with Mr Bradshaw's demeanour at the hearing, but that is less relevant. There are no contemporaneous documents to show that he had taken umbrage with the claimant and in his evidence he said that he was well aware that the claimant was taking notes at that meeting, so we do not accept that he behaved in any untoward manner. The claimant by this stage was proving difficult to manage. She had refused to be line managed by Mrs Harris and she had pursued a grievance in respect of her perceived line manager's failure to accommodate her reasonable adjustments. We do not think Mr Bradshaw would have approached this meeting in anything other than a very careful manner so as to avoid giving the claimant grounds for claiming further offence. Again, we determination that this allegation was not sustainable on the facts.

Issue 3.1.6

125. If Mr Bradshaw had behaved so badly on 8 February 2022 as the claimant alleged, then it would be surprising that the claimant would attend the second part of this meeting the following day, either at all or without demonstrable protest. Our very firm understanding is that this was not a claimant who took things lying down. The claimant was an assertive individual who wanted her own way, irrespective of the consequences that this had on others and irrespective of the cost that this may have to the business. Yet, the claimant did not raise any concerns at the meeting of 8 February 2022, nor did she raise any concerns about Mr Bradshaw's alleged

harassing behaviour on 9 February 2022. Again, the claimant does not say what Mr Bradshaw said or the way that things could have amounted to harassment – instead we are referred to a screenshot of her messages to Mr Maloney [HB1385-1389, 1397] which we believe were self-serving and, we are persuaded, seem to have been written with an Employment Tribunal claim in mind.

126. In respect of the cost of software and in relation to car parking, although not limited to these, the claimant said that Mr Bradshaw ranted at her until the meeting ended and he used her name in an intimidatory manner. The software cost was largely met by Access to Work and the car parking did not seem to affect Mr Bradshaw directly so we could not see why he would be so put out. In any event, Mr Bradshaw said that he did not behave in this manner, and he denied the allegation and we preferred the evidence of Mr Bradshaw. This allegation is dismissed.

Issue 3.1.7

127. We do not accept that Mr Bradshaw acted in any way inappropriately in respect of the timesheets for the claimant's work coach. He had a responsibility to ensure that the timesheets were checked. This responsibility was perhaps even more salient because the claimant had not undertaken any work at this stage. Mr Bradshaw's position was that he did not believe that there was suitable proof that the service had been delivered, particularly as in evidence Ms Mustique said that she had not done the work in accordance with the Access to Work plan but the sessions had been broken down and delivered over a wider period of time. It was obvious to us that Mr Bradshaw had legitimate concerns regarding signing off the timesheet and this appears to be another example of the claimant criticising, and ascribing ulterior motives to something she does not like.

128. The claimant does not say in her statement how this violated her dignity. We do not think much of this complaint, and we dismiss it accordingly.

Our determination in respect of indirect discrimination and the alleged failure to make reasonable adjustments

129. The respondent did not have a hot desk policy. At the relevant time there were nine people in the orders team, and they attended the workplace for three days every three weeks [HB488]. The team sat together in two rows of desks to preserve social distancing. The claimant attended the office on 3, 4 and 5 August 2021, 26 August 2021 and no time thereafter. She was not told that she could not sit at the same desk if she wanted to, and there are no complaints or WhatsApp messages that made reference to any restrictions on where she could sit. The claimant was told on 13 September 2021 by Mr Bradshaw that once her desk arrived, she could be consulted on where it would be located [HB701].

130. The claimant contended that there was a PCP in respect of hot desking. We do not accept that there was a PCP in respect of hot desking other than the rather informal arrangements provided above. The claimant contended that she was put to a substantial disadvantage compared with someone without her disability because she was unable to focus because she did not have guaranteed access to a quiet corner of the office and/or the use of her ergonomic furniture.

Issue 4.4.1

131. Prior to the claimant starting the job Mrs Harris raised concerns about the open plan nature of the office and the claimant working therein. The claimant said that she would, in fact, be able to work in such an environment because this patently suited her needs then.

132. There is no medical evidence to support the proposition that the claimant was unable to focus because she did not have guaranteed access to a quiet corner in the office. The claimant contended that her inability to focus was the reason that noise cancelling headphones were required, so it follows that it did not really matter where she sat in the office if she was wearing such headphones.

133. The highest that the claimant can say in respect of her claim for her indirect discrimination claim is that for the five days that she worked in the office she was unable to focus because she did not have access to a quiet corner. However, the office was large and there were around 200 workspaces. Because of the covid restrictions the vast bulk of staff were not present, and we only heard that the claimant's teams coordinated on an ad hoc basis, so therefore nine staff were present in a largely empty office. There is no basis for us to conclude that the claimant could not find a quiet space to work within this – had she asked we have no doubt that this would have been accommodated.

134. Access to Work had ordered ergonomic furniture for the claimant. However, following our determination on the claimant's disabilities set out above, we are not persuaded that this ergonomic furniture was needed, so there was no disadvantage to the claimant.

135. This allegation has no merit whatsoever.

Issue 5.3.1: desk and chair

136. The Access to Work report is based on the claimant's contention that she needed an electronic sit/stand desk and an ergonomic chair. As stated above, the report is less than robust and is entirely reliant upon the claimant's unsupported contention that this will assist her. There was no evidence to support the proposition that the claimant would be placed at a substantial disadvantage when working with a standard desk/chair.

137. The claimant completed her Access to Work assessment before she arrived in the office so she could not have known what the respondent's chairs would have been like. So far as working from home, on 28 July 2021 the claimant indicated that she had a temporary solution for working at home "for the desk and chair situation", which was not specialist equipment. In any event the electric chair and the electric desk were delivered on 29 October 2021 [HB 2753-2754].

138. Because we do not believe that the claimant had significant lower limb and back pain, we do not accept that working at a standard desk/chair caused the claimant physical pain, discomfort or any particular detriment.

Issue 5.3.2: Effective noise cancelling headphones

139. The claimant contended that she needed noise cancelling headphones because the background noises caused her to become distracted and she was unable to concentrate because of her ADHD. This did not accord with any diagnosis that she had been given in respect of the ADHD because her condition was mild and there is no evidence that the lack of noise cancelling headphones in the office placed the claimant at any substantial disadvantage. During evidence the claimant said that she needed noise cancelling headphones at home. The claimant said that this was because her partner also worked at home. This was never raised before, and we regarded this as a change of the claimant's case because nowhere in the contemporaneous evidence does she say that she required noise cancelling headphones for home use. This also undermines the claimant's credibility further.

Issue 5.3.3: Notice board and two identical monitors

140. The Access to Work did not identify the necessity of a notice board and there was no evidence provided other than the claimant's assertion that the lack of provision of a notice board place her at a substantial disadvantage. We reject that assertion as there is no corroborative evidence that this may allow the claimant to be more organised and enhance her concentration or memory so far as the ADHD is concerned.

141. We do not accept that the claimant had dyslexia and we do not accept that the claimant's dyspraxia constituted a disability under the EqA.

142. The Access to Work report suggested that the claimant would be provided with a second monitor to work from home but there was no indication that this must be identical to the first one, i.e. the same manufacturer and model. The claimant said that this was important because resolution needed to remain the same. We are not at all persuaded that two different monitors cannot provide the same resolution. There was no evidence to support the claimant's contention that she needed to identical monitors.

Issue 5.3.4: Computer software – Grammar/micro-break/Dragon software, text help/read and write gold

143. The claimant said that her dyslexia caused her to take longer to review and digest documents and make spelling/grammar mistakes. The claimant's correspondence and voluminous complaints and exchanges with the respondent established that she could write well and fluently. The claimant appeared to be at no disadvantage for the non-provision or late provision of such equipment.

144. In any event, the equipment that was identified in the Access to Work report was delivered on 25 October 2021 [2755]. This was delivered within a reasonable period of time. We note that the claimant could not undertake any substantive work before she completed her epic training, and the epic training was not held up because of the late provision of this equipment.

145. We note that the claimant said she did the first bit of the training, but she did not do the exam, however the claimant contended that the software that was required was in relation to her dyslexia but as she has not evidenced that she had dyslexia at the material time and we do not accept that such equipment was required.

Our determination in relation to victimisation

Issue 6.2.1: the claimant's referral to a SOSR meeting

146. On 27 April 2022 Ms Swanborough required the claimant to attend a meeting to consider whether her employment with the respondent be terminated on the grounds of *some other substantial reason*, that being because of an irretrievable breakdown in the relationships between the claimant and her line manager and members of the wider team [HB1709-1710]. This followed a breakdown in the mediation process, particularly as the respondent thought that the parties had resolved matters and the claimant refused to sign off the mediation agreement. Ms Swanborough recounted in evidence to the Tribunal that she felt she had to do something as the dispute between the claimant and her employers and colleagues had come to an impasse. Ms Swanborough said that she believed that the claimant would not work with her line managers and it was then unlikely that they would want to work with her because she was proving to be so difficult to manage.

147. Referring the claimant to a meeting which could have resulted in her dismissal, was clearly a detriment. However, Ms Swanborough contended that the detriment had nothing to do with the claimant's dignity at work or her grievance or her various Employment Tribunal claims – it was because the working relationship had broken down. She said, and we accept, the respondent's managers were able to work with each other and undertake the jobs they had been paid to do but, by April 2022, the claimant had been employed for nine months and she had not undertaken any productive work for the respondent. This matter needed resolution and Ms Swanborough could see the only way to achieve this would be to address this through a possible dismissal (SOSR) mechanism, whereby a decision could be made in respect of the claimant's ongoing employment.

148. In line with *Martin v Devonshire Solicitors*[1] and having distinguished the circumstances from *Woodhouse v West North West Homes Leeds Ltd*[2] we regard this referral as properly and genuinely separable from the claimant's protected acts of her Dignity at Work and grievance complaints and her complaints to the Employment Tribunal claim. The claimant has not persuaded us that her protected acts were sufficiently relevant to transfer the burden of proof as set out in issue 6.4. The timeline does not fit. Issues 6.1.1 and 6.1.2 were resolved some time before the reference to the possible dismissal meeting and the Employment Tribunal proceedings were being dealt with separately. Even if we were wrong in our application of 6.4, Ms Swanborough's motivation was both entirely credible and convincing; her letter of 27 April 2022 was detailed and measured. At the hearing she explained that the claimant had been employed for almost 9 months and had not undertaken any significant or measurable work. The claimant said she could not work with the team, which amounted to a refusal to work with a number of colleagues that she had been recruited to work with. The claimant would not work with any manager that seemingly did not let her have her own way, which made her unmanageable. The crunch was the claimant's response to mediation. Ms Swanborough regarded the respondent, and particularly Mrs Harris (as her supposed line manager) as investing a huge amount of time, effort and goodwill for the mediation. Ms Swanborough said that she believed that a resolution had been achieved, yet the claimant then withdrew and negate the whole process. Ms Swanborough said that the mediator was so frustrated with the claimant's

[1] UKEAT/0086/10, [2011] ICR 352
[2] UKEAT/0007/12

behaviour that she could not see any way forward for that process. Ms Swanborough said that she genuinely could not see what else the respondent could do so she came to the belief that nothing could ever be achieved with the claimant through dialogue. Seemingly, the claimant had to win so unless the respondent was to give her own way on everything she wanted, any mediation, dialogue or negotiation was bound to fail.

149. We determine that Ms Swanborough's decision to refer the claimant to a meeting where her ongoing employment would be reviewed was not because of the protected acts but due entirely on the basis of the ascribed breakdown in relationships and the impasse as described above.

Issue 6.2.2: the claimant's dismissal

150. The allegation is primarily made against Ms Swanborough contending untoward behaviours, but it also suggests that the panel came to an inappropriate decision.

151. We heard evidence from Ms Swanborough, Dan Prescott and Shilpa Lockett who were on the dismissal panel. The dismissal panel dismissed the claimant on 12 July. The panel told the claimant that it had found sufficient evidence to support the conclusion of an irretrievable breakdown in relationships and that they did not believe that there was any reasonable alternative to the claimant's dismissal [HB2023-2026]. This outcome letter was detailed and, we find, this stands as an accurate assessment of the claimant's employment position. Both Mr Prescott and Ms Lockett were very clear in their evidence that they accepted that a breakdown in the relationships had occurred. The claimant accepted this, particularly as this was acknowledged by her trade union representative, Louise Heywood.

152. Mr Prescott's statement at pages 8-10 set out in detail why he contended the relationships had broken down. Chief amongst this was his acceptance that the claimant's trade union representative had concurred that there was "a massive breakdown in relationships".

153. Mrs Lockett decided that the relationships had broken down and that this was irretrievable despite efforts to restore working relationships through external mediation. Mrs Lockett viewed the mistrust and damage was too engrained to re-establish a positive working relationship between the respondent and the claimant.

154. Mr Prescott was shocked by the extensive nature of the breakdown which had occurred over such a short period of time. He said that he could not see the claimant working productive in any changed environment within the respondent's organisation, and having examined this dispute in detail we consider that conclusion to be correct.

155. Not only were the claimant's protected acts severable insofar as they were considered within the overall picture of a breakdown in relationship, they were not determinative nor were they in any significant way relevant to the claimant's dismissal. The claimant was dismissed as a consequence of her inability to form any form of constructive working relationship with her managers and her colleagues. The fact that this had taken the respondent almost ten months to arrive at this conclusion is perhaps surprising, particularly as the claimant had undertaken no work during that period of time, but this makes the conclusion all the more obvious to us.

156. There was not one single shred of evidence that Ms Swanborough acted inappropriately in respect of the dismissal panel. This was merely a baseless allegation from the claimant. Ms Swanborough presented the management's case and did so (so far as we could tell) in a transparent and professional way. There were no meetings with the panel outside the external process. There were no approached by Ms Swanborough. This allegation is wholly without merit and we dismiss it accordingly.

157. The decision to dismiss the claimant was clear, credible, consistent with the outcome letter presented and, so far as we can see, in no way tainted by victimisation.

Issue 6.2.3: The appeal dismissal

158. So far as the claimant's final allegation of victimisation is concerned, Ms Swanborough was not involved in the appeal process in any meaningful way. Mr Prescott took the management case to appeal and effectively adopted many of Ms Swanborough's arguments, which is common in such circumstances and predictable and unsurprising in this case. It is usual practice for the respondent to arrange the a decision-maker in a dismissal case present the management case at the appeal. This is so that he/she can argue the appropriateness of the dismissal in a more meaningful because he was aware of the relevant factors and their weight. Mr Prescott could also account for the panel's actions if there is a dispute about the procedure. The fact that the decision was based largely on the management case does not render the process inappropriate or suspicious.

159. The appeal panel consisted of 3 directors, Stephen Gardner, Vicki Hall and Caroline Davidson. The panel found from both the management's and the claimant's case that there was a comprehensive and irretrievable breakdown in relationships. The appeal was conducted by way of a review, rather than a re-hearing. The appeal looked at whether the decision to dismissal was fair and reasonable and consistent with the respondent's procedures.

160. So far as redeployment, Mr Gardener said in evidence he considered that this was limited because the relationships had broken down so quickly, with so many colleagues, and that the efforts to repair these had proved fruitless. The panel assessed the chances of redeployment working as marginal.

161. At the appeal the claimant's then trade union representative Kevin Dolan accepted that there had been a complete breakdown in relationships and the argument shifted more towards redeployment in his concluding remarks.

162. In the appeal outcome letter [HB 2068-2071] Mr Gardener wrote:

> … As it was clear from both the management's case and your own statements that a comprehensive and irretrievable breakdown of relationships had occurred, the panel focussed on the question of whether dismissal was a fair and proportionate sanction. Serious consideration was given to whether redeployment would be appropriate as an alternative to dismissal.
>
> In determining whether redeployment would be appropriate, the panel noted that you had a series of relationship breakdowns with numerous individuals in the Hive team over a comparatively short period of time. Attempts to improve relationships were not successful and when you were assigned a new temporary line manager as a supportive measure, this resulted in you submitting a further Grievance. During the hearing, the panel heard that the mediation

between yourself and Anne Marie Harris had been extended from one day to two days. However, this had failed because you refused to sign the mediation agreement which had been agreed upon during the mediation meeting. The panel also heard that the SOSR panel had given thorough consideration to redeployment as an alternative to dismissal during their decision process.

163. Mr Gardener said the panel rejected any case for redeployment. He said that this was not because the claimant had not passed her probation, nor was it that it did not fall within the redeployment policy – it was based purely on the speed and the severity of the claimant's breakdown in proper, normal working relationships that he, and the panel, could not countenance the claimant continuing to work for the respondent.

164. There was not one shred of evidence that Ms Swanborough contacted the panel, indeed Ms Swanborough said that she was aware of who the members of the appeal panel were but she never approached any of them. We accept this evidence. Ms Swanborough said she may have attended courses or other professional engagements which they had attended and she may have acknowledged them at work in passing but no more. Ms Swanborough said she did not enjoy any personal friendships or exchanges with any member of the appeal panel. Mr Prescott said he did not speak to Ms Swanborough before he made his decision and there is not a shred of evidence that anyone else from the panel did so either.

165. Under the circumstances we dismiss this allegation. This allegation is without merit.

Time limits

166. We have not addressed the time limits points because the claimant did not succeed in any of her complaints of discrimination.

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Employment Judge Tobin
Date: 31 August 2024

JUDGMENT SENT TO THE PARTIES ON
2 September 2024

FOR THE TRIBUNAL OFFICE