

Appeal No. UKEAT/0043/19/LA

EMPLOYMENT APPEAL TRIBUNAL
ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 17 October 2019

Before

THE HONOURABLE MRS JUSTICE EADY DBE

(SITTING ALONE)

MS M RAKOVA

APPELLANT

LONDON NORTH WEST HEALTHCARE NHS TRUST

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR TRISTAN JONES
(of Counsel appearing via
Advocate)

For the Respondent

MR SAMUEL NICHOLLS
(of Counsel)
Instructed by:
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SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

The Claimant, who suffered various disabilities (Ehlers-Danlos Syndrome, Dyspraxia and Dyslexia), brought a number of complaints in Employment Tribunal (“ET”), all of which were dismissed. The Claimant appealed against the ET’s decision in respect of three claims of discrimination by reason of a failure to make reasonable adjustments: (i) in relation to what she complained was a PCP that conventional software provided by the Respondent be used; (ii) in respect of her claim regarding a failure to provide specialist software updates; and (iii) in relation to her complaint that she suffered substantial disadvantage by not being able to access the Respondent’s guest WiFi on her lap-top.

Held: *allowing the appeal*

- (i) The ET erred in holding that the Claimant had not demonstrated a PCP because the requirement identified only related to her. That was not how the Claimant’s case was put. Her complaint was in respect of the general requirement that employees (including her) use the conventional software supplied. Although the Claimant had been provided with specialist software, to the extent that this did not properly function, the PCP continued to apply to her. The ET had further erred in finding that a PCP that might cause the Claimant to be less efficient (hence her request for adjustments that would improve her efficiency) could not establish substantial disadvantage: being subject to a PCP that causes an employee to be less efficient might well mean they suffer a more than minor or trivial disadvantage. Moreover, the ET ruling’s in this regard could not be saved by its alternative finding that the Respondent had taken all reasonable steps to remove any substantial disadvantage: it had failed to identify the nature and extent of the substantial disadvantage in issue

and was accordingly unable to determine what adjustments were reasonable (**Environment Agency v Rowan** [2008] ICR 218, EAT applied).

- (ii) As for the specialist software updates, the ET had erred in its approach to substantial disadvantage, again failing to allow that questions of efficiency might be relevant to the determination of substantial disadvantage. It further failed to engage with the Claimant's case that the issue was not merely whether she had been provided with functional dictation equipment - without the software updates that was not fully functional. It was no answer to find that the issue was one of "maintenance": if there was an on-going obligation to provide the adjustments in issue, that would include (so far as reasonable) the maintenance of the software by way of necessary updates; the ET had failed to demonstrate engagement with this point.
- (iii) The same error of approach to substantial disadvantage was apparent in relation to the third complaint – the Claimant's lap-top access to the Respondent's WiFi. Although the ET also said that any disadvantage in this regard was not substantial, because it took less than a month to resolve, this failed to take account of the earlier finding that the Claimant had raised a general issue regarding the ability to access WiFi over a year previously.

A **THE HONOURABLE MRS JUSTICE EADY DBE**

B **Introduction**

1. This appeal raises questions as to the approach to be taken by the Employment Tribunal (“the ET”) in a claim of disability discrimination by reason of a failure to make reasonable adjustments; specifically, as to the determination of a provision, criteria or practice (“PCP”) and regarding the issue of substantial disadvantage. In giving this Judgment I refer to the parties as the Claimant and Respondent, as below.

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2. This is the Full Hearing of the Claimant’s appeal against a Judgment of the ET sitting at Watford (Employment Judge Bedeau sitting with lay members, Mr Scott and Mrs Brosnan, over some 23 days in October, November and December 2017 and January 2018, with a further three days in chambers for deliberations in February 2018). By its reserved, 144-page Judgment, sent out on 5 April 2018, the ET dismissed the Claimant’s various complaints of disability discrimination, harassment and victimisation.

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3. The current appeal relates to only one of those claims - that of disability discrimination due to a failure to make reasonable adjustments. More particularly, it relates to only three of the 19 complaints that the Claimant had pursued under this head. The Claimant was represented before the ET by leading counsel; Mr Jones first appeared for the Claimant at an earlier Rule 3(10) Hearing before the EAT, acting *pro bono* under the Employment Law Appeal Advice Scheme (“ELAAS”). The Respondent was represented by counsel before the ET but not by Mr Nicholls who now appears. I am grateful to both counsel for their assistance today.

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A **Factual Background**

4. The Respondent is an NHS Trust, which delivers hospital and community services across Brent, Ealing and Harrow. It employs over 9,000 staff and serves a diverse population of some 850,000 people. The Claimant commenced employment with the Respondent in June 2001. From October 2005 she worked as a Macmillan Colorectal Clinical Nurse Specialist at St Marks, Northwick Park Hospital, Harrow, Middlesex.

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C 5. The ET accepted that the Claimant was a disabled person for the purposes of the **Equality Act 2010** (“EqA”) in respect of three medical conditions: (1) Ehlers-Danlos Syndrome (“EDS”) - an inherited disorder of the connective tissue, giving rise to a predisposition to the dislocation of the Claimant’s joints and meaning that carrying anything in her hands could be challenging and that she was unable to sit or stand for long periods (I take this summary from the ET’s Judgment at paragraph 35; there is a fuller description of EDS at paragraphs 30 to 34); (2) Dyspraxia - a disorder that can affect any/or all areas of development and which caused the Claimant to suffer disadvantages principally with writing, but also with organisation (for example, of thought, writing and work schedules) (this summary is again taken from the ET’s Judgment, at paragraph 41; the ET discusses this condition more fully at paragraphs 36 to 40); (3) Dyslexia - a disorder that can give rise to difficulties in literacy skills and in being succinct in speech and writing, often characterised by poor short-term memory and weak organisational skills; in the Claimant’s case, the ET accepted that her oral reading of complex text was slow, that her reading comprehension was below the expected level and that she demonstrated weak organisational skills (see the ET’s summary at paragraph 50; its fuller description of the evidence in this regard is at paragraphs 43 to 49).

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A 6. Having thus identified the conditions in issue, it is fair to say that the ET's decision demonstrates an appropriate understanding of the interaction between many of the symptoms suffered by the Claimant.

B 7. In addition, following a road traffic accident in 2003, the Claimant had developed neck and back pain and various adjustments had been made in relation to the difficulties she suffered as a result. Those included adjustments to her visual display unit and the provision of a new
C chair, a desk lamp, monitor stand, wrist rest, headset and foot rest (see the ET's Judgment, at paragraph 29).

D 8. The ET also found that the Respondent made or offered various other adjustments that were intended to address the difficulties the Claimant experienced as a result of her disabilities, a number of which had been suggested under the Respondent's Access To Work ("ATW")
E scheme. I discuss certain of those adjustments in greater detail below.

9. The Claimant's role was clinical rather than administrative in nature, but she was required to perform administrative tasks arising from her clinical duties. In particular, the
F Claimant was required to keep accurate and clear records of patient care, which were to be written up as soon as possible after the event. The standard practice was for nurses to record all their notes directly onto the Respondent's system which was referred to as "GCIS". GCIS had
G been specifically modified for patients' notes and included generic templates for several processes including Holistic Needs Assessments ("HNAs"). The function of an HNA was to capture all the information needed to understand a patient's needs and deliver a pathway of care. Completion of the HNA was one of the Claimant's essential responsibilities.
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A 10. Over time, it was apparent that the Claimant was having difficulties completing these
records and there were concerns as to the late timing and quality of her GCIS entries. For her
part, the Claimant was complaining that she was having to stay behind to finish her work or
B take it home (see paragraph 283 and 327 of the ET’s Judgment). Certainly the ET accepted that
she worked long hours at times when no one else would be present in the office (see paragraph
362); various assessments had been carried out and the ET accepted that the Respondent had
made “*genuine and serious attempts to address the adjustment recommendations in a timely*
C *manner.*”

D 11. As the ET records, by June 2011 the remaining issues for the Claimant largely
concerned IT matters. Although the Respondent’s IT department was making strenuous efforts
to resolve the difficulties (see paragraph 90 of the ET’s Judgment), these related to the fact that
“*the Claimant was using software packages which only a few people in the Trust were using*
E *and the IT department were not familiar with those packages. Moreover, some of the software*
packages used by her were not compatible with the Respondent’s systems.” There were also
issues regarding whether the Claimant had accessed training on the software that had been
obtained.

F 12. In any event, in addition to the various adjustments to the Claimant’s workstation
(referenced above), by 28 May 2012 the Respondent had put into effect the following measures:

G “114. ...flexible working, to complete five days’ work in four days; and the completion
of ATW’s recommendations to include the purchase of specific equipment, such as
Dragon Naturally Speaking Professional, a noise cancelling headset, Switcher box and
USB sound card adapter, Texthelp Read and Write standard edition, Inspiration Mind
Mapping software, Screenruler Claroview suite software, Olympus digital recorder, a
pack of overlays, five half days dyspraxia strategy training, and seven half days training
for use of Dragon software, the three half days refresher training on all software
packages and 10 hours dyspraxia coping strategies tuition. Regarding the upgrade to
H Dragon Professional to include Medical edition and the purchase of a laptop, the
Respondent was going to review its position but in the end, it ordered both in June
2012.”

A 13. At paragraph 126, the ET noted that:

“...notwithstanding her condition, she was able to input her clinical notes using her PC and was able to use stickers to put on patients’ files to signal to other staff that she had seen the patient and there would be notes on GCIS to record this intervention. She had not demonstrated that the absence of the Dragon Medical caused her a substantial disadvantage or disadvantages. She was familiar with medical terms as she had to use them in her notes. What she was seeking was a more efficient way of working.”

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14. Subsequently, in 2013, the Respondent further approved: “...*Mindview software and training; Dragon Medical training; Texthelp Read and Write Gold version 10; scanner; lightweight trolley; headset; Livescribe Echo Smart pen; Goldtouch ergonomic travel keyboard; numeric keypad and electric stapler/punch.*” (see paragraph 139, ET Judgment). As the ET helpfully recorded (see paragraph 140):

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“The Livescribe Echo Smart pen is an electronic smart pen with a memory for handwriting capture, audio recording and additional applications. It is used like a normal ballpoint pen and the user writes with it in exactly the same way as they would a normal pen but it records whatever has been written so that it can be downloaded later and transferred directly into text in a word processing programme or another software package. The other advantage of the pen is that it can be used as a dictaphone, in addition to the digital dictaphone the Claimant already had. In order to use the pen to capture handwriting, the Claimant would need electronically sensitive paper. The paper could also be produced by a high resolution colour printer.”

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15. In March 2013, the Claimant fractured her fibula whilst at home and was off work until 2 December 2013, a period of nine months. The Respondent obtained advice from Occupational Health regarding the Claimant’s return to work. A further ATW assessment was carried out on her return, which made various recommendations including that the Claimant be provided with Dragon software upgrades - both Dragon Medical Practice Edition 2 and Dragon Naturally Speaking Pro Upgrade version 12. As the ET recorded (see paragraph 166 of its Judgment), those recommendations were made “...*not because of any substantial disadvantages but to improve the claimant’s efficiency.*”

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16. Going into 2014, the ET was satisfied that the evidence showed that appropriate support was in place for the Claimant. The Claimant was on annual leave from 19 February 2014 until 14 March 2014, but on 17 March 2014 started another lengthy period of sick-leave unrelated to

A her disabilities from which she did not return until 24 February 2015, some 11 months later. The Claimant's return was on a phased basis and she was given a reduced workload - essentially that of a newly qualified specialist and significantly less than her colleagues. **B** Indeed, the ET found that the Claimant's workload remained at a lower level than her colleagues throughout 2015, observing:

C "276. ...In the Department's Annual Report, she saw 21 new patients in the year, whereas her Band 7 colleague, Ms Sarah Pitcher, saw 98. Ms Khanna saw 80 and Dr Taylor saw 101 complex patients..."

277. In addition, the claimant recorded 530 interventions in that year which was lower than most of her colleagues. Ms Deborah Smith joined the team in September 2015 and recorded fewer interventions, 342 but she only started seeing patients in the last quarter of the year. Ms Pitcher recorded 1207, Ms Khanna 1439 and Dr Taylor 2152..."

D 17. More generally, issues regarding the Claimant's performance continued and, in turn, the Claimant raised concerns about the adjustments that had been put in place for her. In particular, she complained that the various software programs needed updates and that this was causing her computer to run slowly. The ET considered, however, that the Claimant had not explained **E** the precise disadvantages the software was causing her, although it was apparent that she was anxious that this should be more efficient and up-to-date (see paragraph 319).

F 18. The Claimant also made complaints about her ability to connect to Wi-Fi at work. The ET described the issues raised by the Claimant in this regard as follows (see paragraph 352):

G "The Claimant alleged that she was not given access to the hospital guest Wi-Fi. She stated that she wanted to be connected to the respondent's Wi-Fi using her laptop and mobile phone and to have guest Wi-Fi on her laptop... The guest Wi-Fi had different settings to protect the hospital but everything else was accessible. She needed to access supportive applications and said that she was told that access to guest Wi-Fi was not possible."

H 19. The Claimant had raised the issue relating to Wi-Fi access from her mobile phone in April 2015, but the ET noted how this was taken forward with the Respondent, as follows:

"354. In evidence Dr Taylor said she corresponded with the Claimant on 2 and 17 April 2015 about IT issues and said that the Claimant told her that there was an issue with her headset. She was using her own mobile phone for her work-related dictation and

A wanted access to the Respondent's Wi-Fi system. Dr Taylor thought that this was unnecessary as the Claimant had been provided with her own digital dictation recorder and several software packages to help her including voice recognition digital dictation. As the Claimant thought that access to the Wi-Fi system would help, Dr Taylor did not want to prevent this and suggested that she contact the Respondent's IT department. On 17 April 2015, she emailed Dr Taylor stating that she had checked with the IT department and they were happy to allow her Wi-Fi connection if requested by her manager. They were, however, not able to arrange Wi-Fi connection on her private mobile phone. She asked whether it was possible to have, for an interim period, a hospital handset."

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20. Clarifying the position in her evidence before the ET, the Claimant explained that, by the end of May 2015, she no longer needed guest Wi-Fi on her mobile 'phone but did need it on her laptop (see paragraph 357). As the ET clarified (see its findings at paragraph 440), the Claimant had been without her laptop for two weeks in April 2015, when she had to use her mobile 'phone, but her laptop was fully functional by 6 May 2015. Ultimately, the ET found that the Wi-Fi issue was resolved on 20 May 2016, after a meeting with the Respondent's head of ICT, who was able to give the Claimant guest Wi-Fi access on her 'phone and laptop.

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21. The Claimant had returned to full-time working for seven weeks before she again went on long-term sick leave on 25 May 2016. She did not return to work for the Respondent, albeit she remained in its employment, albeit still on sick leave, as at the date of the ET Hearing.

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The ET's Decision and Reasoning

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22. In pursuing her complaint of disability discrimination by reason of a failure to make reasonable adjustments, the Claimant first complained that she suffered a substantial disadvantage by reason of the PCP of being required to use the conventional software provided by the Respondent. She contended (relevantly) that a reasonable adjustment would have been for the Respondent to have provided electronic sensitive paper and an appropriate printer, to allow her to use the electronic pen provided for her, and/or for processes to have been put in

A place to enable software to be efficiently purchased, downloaded and updated. This claim is the subject of the first ground of appeal before me today.

B 23. The ET first stated (see paragraph 434) that the Claimant had not identified any actual
C PCP in this regard: the most she could say was that this was a practice that was referable only to her. In any event, the ET disagreed that there had been any requirement that the Claimant use conventional software: the Respondent had allowed the Claimant to install, upgrade and use
C different software packages at her request; specifically, Dragon and Dragon Medical, Mindmapping, Read and Write, Inspiration and Mindview.

D 24. In the alternative, even if there was any PCP, the ET stated that it was unable to discern the substantial disadvantage thus suffered by the Claimant in comparison with non-disabled employees or employees without her disabilities. The Claimant was able to type and write for
E short periods and could use the voice activated recorder and put sticky labels with her notes onto patients' files, albeit the ET accepted that the use of the Livescribe pen, electronic sensitive paper and a printer would have made the Claimant more efficient. The ET also noted
F that the Claimant had argued that, as a reasonable adjustment, processes should have been put in place for software to be efficiently purchased, downloaded and updated. It found, however, that there was a process to be followed: this required that there be approval at departmental level before the order and delivery process could begin. Moreover, when the Claimant
G requested software and equipment these were generally purchased for her, albeit the frequency of her requests did not allow for earlier adjustments to first be assessed (something that was the case for example with the dictation software Dragon Medical 2, albeit the ET again accepted
H that was something that would have made the Claimant more efficient).

A 25. The ET separately considered the various other adjustments that the Claimant claimed should have made in this regard before concluding in general terms: *“Even if there had been a substantial disadvantage by the application of the alleged PCP, in our view, the respondent had taken all reasonable steps to remove it. Accordingly, this claim is not well-founded.”*

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C 26. The Claimant further complained that the Respondent ought to have ensured that she had access to fully functional dictation devices at all times. It is this complaint that is the subject of the second ground of appeal before me. Again, the ET did not accept that the Claimant had been substantially disadvantaged. First, because she had use of a dictaphone and a Livescribe pen that were functional at all times. Second, because the Dragon software was a reasonable adjustment, but the Dragon update and Dragon Medical were refinements to make her more efficient and, as such, were not reasonable adjustments. In any event, the ET concluded that issues with Dragon software were to do with maintenance and, as such, not a failure to make reasonable adjustments (ET, paragraph 510).

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F 27. Finally (so far as is relevant for this appeal), the Claimant complained that she was subjected to a PCP in not having access to the hospital guest Wi-Fi. It is this matter that forms the subject of the third ground of appeal before me. The Claimant contended that a reasonable adjustment would have been to ensure that she had access to hospital Wi-Fi at all times.

G 28. The ET accepted that the Claimant had made out a PCP in this regard, but noted that her claim related only to her laptop; she had accepted that she did not need guest Wi-Fi on her mobile ‘phone by the end of May 2015. In this respect, the ET noted that the Claimant had been told that this was not possible. In any event, the ET did not accept this placed her at a substantial disadvantage, given this had been raised as an issue in May 2016 and then resolved

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A after a meeting with the head of ICT on 29 May 2016. The ET concluded that the Claimant's
complaint was "*an efficiency argument not related to either moving or lessening any*
disadvantages." In any event, it was satisfied that the Claimant had not been placed at a
B substantial disadvantage as she had guest Wi-Fi access following the meeting on 20 May to
resolve her IT issues (see paragraphs 520 and 521 of the ET's Judgment).

The Grounds of Appeal and the Claimant's Submissions

C 29. The first ground of appeal relates to the Claimant's computer software complaint. In
this regard, the Claimant identifies two errors on the part of the ET: (1) in finding that the PCP -
the requirement to use conventional software supplied by the Respondent - was only referable
D to the Claimant, when this had applied to all employees and not just her; (2) in the ET's
alternative finding that the Claimant suffered no substantial disadvantage.

E 30. The second ground of appeal arises in respect of the complaint regarding specialist
software upgrades. The Claimant argues: (1) that the ET again erred in finding that not being
more efficient was not a substantial disadvantage and/or was not something in respect of which
a reasonable adjustment was required; (2) alternatively, that the ET's finding that the Claimant
F suffered no substantial disadvantage was perverse.

G 31. The third ground of appeal relates to the Claimant's laptop access to the Respondent's
guest Wi-Fi. The Claimant submits that: (1) once again, the ET erred in failing to find that
efficiency issues were capable of giving rise to a substantial disadvantage; (2) the ET further
erred by finding the disadvantage had been resolved within the month of May 2016 - in fact, the
H issue of guest Wi-Fi had been raised as early as April 2015.

A 32. Addressing the first issue raised under ground 1, the Claimant complains that the ET
was wrong to find she had failed to identify a PCP. Her claim was not (as the ET wrongly
B suggested at paragraph 432) that she alone had been required to use conventional software
supplied by the Respondent: she was complaining about the general requirement that the
Respondent's staff use this software and the fact that the Respondent had made some
allowances for the Claimant would not undermine the existence of the PCP in the first place. It
was the Claimant's case that insufficient adjustments had been made and that was the issue the
C ET had to grapple with.

D 33. Secondly, on the ET's finding (relevant to all three grounds) that the Claimant was not
placed at a substantial disadvantage in relation to seeking increased efficiency, the Claimant
contends: (i) A substantial disadvantage need only be something that is "*more than minor or*
trivial" (see section 212 of the **EqA**) and being subject to a PCP that causes one to be less
E efficient may naturally be described as being put at a disadvantage, which is more than minor or
trivial. (ii) It would be wrong to draw a distinction between a PCP which prevents an employee
from performing a certain task and a PCP that makes the employee less efficient at that task:
there is no principled reason for such a distinction - the question in every case is whether the
F disadvantage (whatever it is) is more than minor or trivial. (iii) Nor can it be said that a PCP
that impacts upon the efficiency of all employees cannot be a PCP; in such a case the question
would be whether it bites harder on disabled employees (see **Griffiths v The Secretary of**
G State for Work & Pensions [2015] EWCA Civ 1265; [2017] ICR 160 paragraph 58). More
specifically, on the complaint addressed by the first ground, there was a failure by the ET to
grapple with the precise nature of the disadvantage.

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A 34. The Claimant observes that her case had acknowledged that adjustments had been made
by the Respondent. Her contention was that there was a failure to meet an on-going obligation
B and the ET had made no finding that the other adjustments had actually removed the substantial
disadvantage she suffered; rather, the language used suggested the ET thought that something
that addressed efficiency could not be addressing a substantial disadvantage. Although the
Respondent criticised the way the case had been put below, it was apparent from the Claimant's
C submissions before the ET that the substantial disadvantage relied on (in terms of the
Claimant's ability to perform her work efficiently) had been adequately identified. As for the
suggestion that the ET's subsequent finding that the Respondent had taken all reasonable steps
to remove any disadvantage (see paragraph 442) saved its ruling on this point, that could not be
D the case because the ET had failed to identify the nature and extent of the substantial
disadvantage in issue.

E 35. Turning to the second ground, it was important to note how the Claimant's case was put.
She had not been saying that there had been a failure to provide her with functioning dictation
devices, her complaint was that these were not *fully* functional. The ET's finding at paragraph
510 failed to engage with this distinction. More specifically, it was the Claimant's case that she
F needed the Dragon update and the further version of Dragon Medical to enable the dictation
devices to be fully functional and thus to address the substantial disadvantage, which was that
she was less efficient.

G 36. As for the third ground, the ET was wrong to approach the question of substantial
disadvantage in this regard on the basis that the Claimant had only raised an issue regarding
access to Wi-Fi on her laptop in May 2016. It was apparent from the ET's findings about the
H discussions between the Claimant and Respondent in April 2015, that the broader issue of

A accessing Wi-Fi (to enable her to use the applications that had been provided to her to better
enable her to carry out her work) had been raised at that stage and that meant that the issue had
remained unresolved for over 12 months.

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The Respondent's submissions

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37. Addressing the first ground, and the Claimant's complaint regarding the ET's approach
to the definition of the PCP, the Respondent submits that the ET could be taken to be saying
that if the Claimant was defining conventional software as that which she was using then this
would be specific to her and thus not a PCP; essentially, the ET was saying that the PCP - as
drafted within the Claimant's claim - did not actually apply to the Claimant because she was not
required to use the Respondent's conventional software.

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38. As for the points made regarding substantial disadvantage, it first needed to be
recognised that the Claimant's case in this regard had been poorly pleaded: there was a failure
to identify the real issues, in particular as to what the substantial disadvantage was.
"Efficiency" was the term used by the Respondent, not the Claimant: the Claimant had not
identified the substantial disadvantage and was opportunistically seizing on the ET's findings
that the adjustments sought did not address a substantial disadvantage but were simply to make
the Claimant more efficient. The Respondent contends that the Claimant's appeal in this regard
can properly be seen as a perversity challenge. Although the Claimant sought to focus on the
ET's distinction between a reasonable adjustment and a desire to be more efficient, the
efficiencies in question were too vague (see **Royal Bank of Scotland v Ashton** [2011] ICR
632) and the ET was entitled to see the duty to make reasonable adjustments as a requirement to

A take reasonable steps to avoid a substantial disadvantage and not merely to maximise efficiency.

B 39. In any event, the ET's conclusions could be upheld on alternative, unchallenged findings. In relation to the first ground and the complaint relating to computer software, the ET went on to find that, even if there had been a substantial disadvantage, the Respondent had taken all reasonable steps to remove it (see paragraph 442); there was no challenge to that finding.

C 40. As for the second complaint, regarding dictation equipment (the subject of the second ground of appeal), the Claimant's pleaded case had been put in terms of the need to provide her with a functioning dictaphone or Livescribe pen, both of which the ET found had been provided. The description of the adjustment as requiring the provision of *fully* functioning equipment could not assist the Claimant: it was obviously not a reasonable adjustment to guarantee full functionality at all times. The ET had found that the Claimant was provided with functioning equipment and that was sufficient. In any event, the ET went on to find (see paragraph 510) that issues with Dragon software were to do with maintenance and were not a failure to make reasonable adjustments. Again, there had been no challenge to that finding.

D **E** **F** 41. In relation to guest Wi-Fi, the third complaint addressed by the appeal, the ET found no evidence that the Claimant was substantially disadvantaged in not having access to guest Wi-Fi on her laptop and there was no challenge to that basic point. On appeal, the Claimant was now saying that the ET erred in finding that this issue had only been raised regarding the laptop access in May 2016 when the Claimant had raised the substantive point in April 2015 but the EAT could not be certain that that was the Claimant's case below.

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A **Discussion and Conclusions**

42. I start with the first question raised by the first ground of appeal: whether the ET erred in finding that the Claimant had failed to identify a PCP when complaining of the requirement to use conventional software supplied by the Respondent. Notwithstanding Mr Nicholls' valiant efforts on the Respondent's part, I have no hesitation in finding that the ET erred in this regard. The PCP identified by the Claimant was to use the Respondent's conventional software - a requirement that was imposed on the Respondent's staff generally, including (before any adjustments were put in place for her or to the extent that those adjustments did not work) the Claimant. Had the ET intended only to find that this PCP was not being applied to the Claimant because of the various adjustments that had been provided, it could have said so. Allowing for the appropriate latitude that needs to be given when reading a Judgment of the ET (particularly a lengthy decision such as this, which had to address a large number of complaints), I am unable to read the conclusion at paragraph at 434 in any other way save as erroneously re-interpreting the PCP as being specific to the Claimant rather than, as the Claimant plainly intended, as referring a general requirement imposed by the Respondent.

43. The second question raised by the appeal relates to the ET's finding, in relation to each of the three complaints in issue, that the Claimant had not demonstrated that she had been placed at a substantial disadvantage. In this respect, the underlying premise for the ET's conclusion in each instance seems to be founded on its view that substantial disadvantage could not be demonstrated by a desire to be more efficient or, alternatively, that merely being able to show that the Claimant could only work in a less efficient way was not sufficient to evince a substantial disadvantage.

A 44. Before considering the ways in which this question was addressed by the ET in each of the three contexts in issue on this appeal, it is helpful to bear in mind the relevant legal framework.

B 45. Where a disabled person is put at a substantial disadvantage by a PCP laid down by their employer, section 20 of the **EqA** requires the employer to “*take such steps as it is reasonable to have to take to avoid the disadvantage*” (see section 20(3)). By section 212, “*substantial*” is defined as “*more than minor or trivial*”. By section 21 of the **EqA**, it is then provided that a failure to comply with a requirement thus imposed under section 20 amounts to discrimination.

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D 46. It is common ground between the parties that the ET must (so far as is relevant in this case) both identify: (a) the PCP applied by or on behalf of the employer, and (b) the nature and extent of the substantial disadvantage suffered by the Claimant (see **Environment Agency v Rowan** [2008] ICR 218 EAT at paragraph 27, followed in **Royal Bank of Scotland v Ashton** [2011] ICR 632, and approved by the Court of Appeal in **Newham Sixth Form College v Sanders** [2014] EWCA Civ 734). The substantial disadvantage in issue must arise from the disability otherwise the duty will not arise (see **Newcastle Upon Tyne Hospitals Foundation Trust v Bagly** UKEAT/0417/11). In **Rowan** the EAT went on to warn that, unless it has identified both the PCP and the nature and extent of the substantial disadvantage, they will be unable to say what adjustments were reasonable to prevent that PCP placing the disabled person at a substantial disadvantage.

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H 47. Turning then to the ET’s finding on substantial disadvantage so far relevant to the complaint addressed by the first ground of appeal, it is apparent that the ET accepted that the adjustments the Claimant was seeking - the Livescribe pen, electronic sensitive paper and

A printer and software updates for particular applications - would have made her more efficient. It took the view, however, that this did not demonstrate that she was placed at a substantial disadvantage. No explanation is provided for why the ET reached that conclusion.

B 48. For my part, I cannot see that it can be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. Whilst it might be that a Stakhanovite desire for greater productivity would be entirely unrelated to any disadvantage
C suffered by the employee in question, it is also possible that, where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable her to be more efficient would indeed relate to the substantial disadvantage she would
D otherwise suffer. The ET may, of course, have found that such disadvantages as were suffered by a particular complainant in terms of efficiency were entirely unrelated to her disabilities. Alternatively, it may go on to find that the adjustments in question would not serve to mitigate the disadvantage, or would not be reasonable. What I cannot see, however, is why the ET in
E this case should simply assume (as it appears to have done) that there is necessarily a disconnect between seeking to be more efficient (thus acknowledging that one is less efficient) and claiming that that reflects a substantial disadvantage.

F 49. Although I can see that the Claimant's case in this regard might have been expressed more clearly, the substantive point was plainly before the ET. What the ET was required to do
G was to ask itself whether the Claimant's disabilities placed her at a substantial disadvantage. Where she was seeking adjustments to improve her efficiency, the question was whether she suffered a substantial disadvantage in that regard. Ruling out a possible correlation between these matters meant that the ET thus failed to identify the nature and extent of any disadvantage
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A claimed by the Claimant. That was an error of approach and one that the ET went on to repeat in respect of the other two matters to which this appeal relates.

B 50. Staying, however, with the first complaint, the next question is whether the ET's ruling is saved by its alternative finding that the Respondent had, in any event, taken all reasonable steps to remove any substantial disadvantage. I cannot see that it is. As was made clear in **C** Rowan, absent a proper finding on the nature and extent of substantial disadvantage, an ET is unable to properly assess the reasonableness of any proposed adjustment. Given its approach, the ET in this case was thus unable to undertake the necessary assessment and I therefore uphold the appeal on this first ground.

D 51. Turning to the second matter before me, had the ET simply found that the Claimant had been provided with a dictaphone and Livescribe pen that were functional at all material times, I cannot see that the Claimant could have succeeded in her challenge in this regard; on this point, I would therefore agree with the Respondent. The ET did not, however, stop there but went on to find that the Dragon update and Dragon Medical software would have made the Claimant more efficient, again then holding that these would therefore not be reasonable adjustments – **F** demonstrating reduced efficiency not being sufficient to show substantial disadvantage. That finding again reflects the ET's approach, whereby it assumed that a seeking to achieve greater efficiency could not relate to a substantial disadvantage. For the reasons I have already **G** explained, that reveals an error in approach.

H 52. As for the further finding that any issues relating to Dragon software were “*to do with maintenance*”, I cannot see that provides any safe alternative basis for the ET's rejection of this complaint. If the Respondent was under an obligation to make reasonable adjustments to

A address a substantial disadvantage suffered by the Claimant, and if that adjustment meant that it
had to provide particular software for her to use, that would have been a continuing obligation.
If the software in question could not fully function without the necessary updates then a failure
B to maintain those updates would be in breach of that obligation. I accordingly also uphold the
appeal on this second ground.

C 53. Finally, on the third complaint relevant to this appeal, although the ET again revealed an
error of approach in apparently seeing efficiency as irrelevant to the question of disadvantage, it
is possible to see an alternative basis for its decision, in that the ET apparently considered the
issue of Wi-Fi access for the Claimant's laptop had only been raised in May 2016 and was
D resolved on 20 May 2016. If that was the case then I can see that it might have been
permissible to conclude that any disadvantage was minor or trivial in nature. A difficulty
arises, however, in that this is not a finding that sits easily with the ET's earlier narrative of the
history, in which it relates how the Claimant had raised a more general issue relating to Wi-Fi
E access as early as April 2015. Although she had specifically raised the point in relation to her
'phone (because she was having to use her 'phone for work at that particular point in time),
when her laptop was restored to her, the issue relating to Wi-Fi – specifically, the need for
F internet access, if the applications on her laptop were to work properly - was relevant to her
ability to use her laptop computer, not her 'phone. I cannot see that the ET's conclusion has
engaged with this aspect of the history and, in the circumstances, I am unable to find that this
G provides a safe alternative basis for the finding made. I therefore also allow the appeal on the
third ground.

H Disposal

A 54. The parties are agreed that it will be necessary to remit these matters to the ET for determination. The question that arises is as to whether that should be to the same or a differently constituted ET.

B 55. The Claimant does not say that these issues should not go back to the same ET panel, but informs me that she now has a second claim before the Watford ET, arising from her subsequent dismissal by the Respondent. She says that I should effectively leave the question
C of the identity of the panel to the Regional Employment Judge: it would thus be for the Regional Employment Judge to determine whether the remitted hearing should be before the same panel as before or whether these matters should now be determined by the panel that will
D be sitting to hear the Claimant's dismissal claim (which might be the same panel as previously, or might be an entirely different panel).

E 56. For the Respondent it is urged that I remit the three points raised by this appeal to the same panel for determination. It observes that, in a very lengthy Judgment dealing with over 40 allegations, only three errors have been identified; this is by no means a case where the decision could be said to be wholly flawed, nor has it been suggested that the ET would be incapable of
F revisiting the issues raised with an open mind. Given the amount of work done by the previous panel, and the findings of fact made, the Respondent considers this would be the more proportionate course.

G 57. I have had regard to the guidance set out in **Sinclair Roche and Temperley and others v Heard & Anor** [2004] IRLR 763 EAT, and take the view that the appropriate course is to
H leave it to the Regional Employment Judge to determine the composition of the panel that will sit on the remitted hearing resulting from this appeal. That could be the same panel, sitting just

A to determine these three remitted matters. On the other hand, it might be considered more proportionate, and in the interests of justice more generally, to assign the remitted matters to such panel as is given the task of determining the Claimant's dismissal claim (whether the previous panel involved in this case or a different panel). That, it seems to me, is a decision **B** best determined at ET level. I do not know what is involved in the dismissal case and the ET will be better placed to decide whether it is appropriate for all these matters to be determined together.

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58. I therefore direct that this matter be remitted to the Watford ET and that it will be for the Regional Employment Judge to determine the question of the composition of the panel for that **D** remitted hearing – a decision that may be delegated to the ET at the Preliminary Hearing that I understand has been listed in the dismissal case.

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