Case Numbers: 3200763/2016 &
3200117/2017

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EMPLOYMENT TRIBUNALS

Claimant: **Ms G Boateng**

Respondent: **Financial Ombudsman Service**

Heard at: **East London Hearing Centre** **On: 3-5, 9 May & (In chambers) 10 May 2017**

Before: **Employment Judge Barrowclough**

Members: **Mr T Burrows**
Dr J Ukemenam

Representation

Claimant: Mr Samuel Martins (Legal Executive)

Respondent: Mr Richard Hignett (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that the Claimant's complaints of (a) direct disability discrimination (s.13 Equality Act 2010), (b) discrimination arising from a disability (s.15), (c) a failure by the Respondent to make adjustments (ss.20 & 21), and harassment (s.26) all fail and are dismissed.

REASONS

Background

1 By her claim, presented to the Tribunal on 15 August 2016, the Claimant, Ms Geraldine Boateng, who was born on 10 June 1972, raised a number of complaints against her former employers, the Financial Ombudsman Service. By the time of the full merits hearing before us, those had been refined to complaints of: -

1.1 direct disability discrimination (s.13 Equality Act 2010);

1.2 harassment (s.26);

1.3 discrimination arising from a disability (s.15); and

1.4 a failure to make adjustments (ss.20 and 21).

The remaining original complaints of age discrimination, automatic unfair dismissal, and unlawful deductions from wages had by then either been abandoned or withdrawn.

2 The Respondent accepts that they employed the Claimant as a Payment Protection Insurance ("PPI") Consultant from 16 November 2015 until 10 October 2016, when she was dismissed; and also that at all material times the Claimant was a disabled person by reason of both dyslexia and depression (although the time of the Respondent's actual or constructive knowledge of those conditions remains in dispute).

3 A preliminary hearing in this case was held on 17 October 2016, when the Claimant was neither present nor represented, she having been in Ghana when the hearing invitation was sent out. Nevertheless, the parties were able to agree a List of Issues (exhibit R-6) to be determined by the Tribunal, the trial bundle (exhibit R-1) and finally a Chronology of relevant events (exhibit R-8), for which we are suitably grateful.

4 We heard this case over the course of a four day full merits hearing, agreed to deal with liability issues only, on 3-5 May inclusive and 9 May 2017, when the Claimant was represented by Mr Samuel Martins, a Consultant and the Respondent by Mr Richard Hignett of Counsel. The Claimant gave evidence on her own behalf but called no other evidence; Mr Hignett called as witnesses for the Respondent:-

4.1 Mr David Pittman, the Claimant's original line manager and a Team Manager (PPI Consultants);

4.2 Mr Thomas Brissenden, one of their Ombudsmen and previously a Team Manager for PPI casework;

4.3 Ms Julia Chambers, one of the Respondent's HR Business Partners;

4.4 Ms Zoe Kearns, a Team Manager with the Respondent who took the decision to dismiss the Claimant.

5 At the conclusion of the evidence and having heard the representatives' closing submissions, we reserved our judgment; and the Tribunal reconvened on 10 May 2016 in the absence of the parties to review the evidence and submissions we heard and to reach this judgment and these reasons.

Findings of fact

6 The Claimant has an LLB Degree in law with psychology from the University of East London, where she studied between 2009 and 2013. Since then and prior to her employment with the Respondent, she had worked for two separate firms of solicitors

in London, before acting as a Gateway Assessor/Adviser for the Hackney Citizens Advice Bureau from April 2014 until November 2015. In her evidence to the Tribunal, the Claimant told us that at least some of her former employers had been made aware of her condition of dyslexia, and that they had made a number of (unspecified) adjustments to assist her during her time with them.

7 The Respondent is an independent organisation providing free and independent services to consumers in order to settle complaints between them and businesses which provide financial services to the public. The Respondent's office or workplace in which the Claimant and her colleagues worked is a very large open plan space, in which up to about 100 people work at any one time, with different functions or operational areas being divided into teams, whose members sit and work together on a bank or banks of desks or work stations in defined areas of the room.

8 The Claimant's original diagnosis of dyslexia (so far at least as we were made aware) took place on 26 February 2010, as set out in an Assessment Report prepared then by Vivien Newman to assist the Claimant in her university course and studies. A copy of the first four pages of that report is at pages 489 to 492 in the bundle, and that is the document the Claimant supplied to the Respondent during her employment. However, at the full merits hearing and after the evidence had been concluded but before closing submissions, a copy of the full report, which runs to 16 pages, was belatedly provided by the Claimant's representative, and became exhibit C-3. In relation to the partial report originally disclosed, the summary therein contained makes plain that the Claimant's overall verbal IQ abilities are within a broad "average" range although it was harder to assess her overall visual reasoning abilities, for the reasons there given. Dr Newman found that the Claimant concluded from the discrepancies with which the Claimant presented that her difficulties fulfilled the criteria for a specific learning difficulty, namely dyslexia; and went on to make recommendations in relation to both the Claimant's coursework (including extra time for exams and the possible use of either a scribe or a computer) and to her disabled student allowance.

9 On 16 September 2015, an employment agency ("*Randstad FP*") submitted an application on behalf of the Claimant, their client, for the role of a PPI consultant with the Respondent. The completed application form is at pages 67-71 in the bundle. It includes a declaration made on behalf of the Claimant by the agency. That provides answers to a number of specific questions, including: "*does your candidate need any reasonable adjustments to make their application and working experience more accessible here?*", to which the answer supplied was: "*no*". Accordingly, no reasonable adjustments were requested or specified by the agency in the application form. It was never explained in the evidence we heard how it came to be that Randstad FP completed the declaration form in that manner. The Claimant told us that she could not remember whether she had told them that she suffered from dyslexia.

10 In any event, the Claimant attended an interview for that role with the Respondent on the following day (17 September 2015) and her interviewers' notes are at pages 69 to 85 in the bundle. The Claimant's application was successful and she commenced employment with the Respondent on 16 November 2015. A copy of her contract of employment, signed by both parties on that same day, is at pages 86 to 88 in the bundle. It should be noted that that was for a fixed term from 16 November 2015 to 30 September 2016; and that the contract makes plain that the first three

months of employment are probationary, following which, if performance has been satisfactory as determined by the employer, the employee's employment will be confirmed. The contract also provides that if it is deemed by the Respondent that a longer probationary period is necessary, then that period may be extended; that that issue will be discussed with the employee and confirmed in writing; and that the reason for any such extension of the probationary period will be specified in that confirmatory letter, together with details of any improvements in performance or conduct which may be required of the employee.

11 The Claimant was one of 14 new PPI consultants then recruited by the Respondent on nine month fixed term contracts. For the first two weeks of their employment, the new PPI consultants received training, and were required to pass two "gateway" assessments. In the case of the Claimant and her colleagues, that two week period was in fact extended due to an interruption caused by them being required to work on a sifting task for a specific group of cases; and the training period did not therefore end until 16 December 2015, when the "*accreditation*" period commenced. That normally takes three weeks, during which the Respondent would look for new recruits being able to deliver a "*clear run*" (approximately six cases that received green (or positive) quality checks), and whereby it was deemed that they would be able to work on cases on their own without 100% mentor supervision.

12 Whilst we were not taken to any job description or specification in the bundle, our understanding is that PPI consultants, of whom the Claimant was one, set up and process new cases or complaints that are received by the Respondent which relate to payment protection insurance claims. That includes logging those cases in the Respondent's case management system (called "*Clipper*"), data entry, and preparing case files to be reviewed by an adjudicator.

13 Whilst the accreditation process normally takes about three weeks, in the Claimant's case because of the interruption of Christmas and some annual leave that the Claimant had scheduled, and since she was struggling to achieve a clear run, her line manager Mr Pittman decided on 14 January 2016 to extend the deadline for the Claimant's accreditation to 27 January. Mr Pittman was absent on holiday from 14 until 26 January, and on the day after his return he held a meeting with the Claimant. No notes were then taken, so far as we are aware; however Mr Pittman wrote to the Claimant later that same day (27 January) summarising the matters they had discussed earlier. That email, sent at 16:16 hours that day, is at pages 118/119 in the bundle. It deals with four areas or issues. These include the deadline for the Claimant's accreditation, which was extended once more until close of play on Friday 29 January; her pattern of repeated lateness in arriving at work; the possibilities of the Claimant being able to undertake flexible working; and, most significantly, her condition of dyslexia.

14 It is agreed and accepted that the first time that any member of the Respondent's staff was informed of the Claimant's dyslexia was shortly before her meeting with Mr Pittman on 27 January. Mr Pittman's note at page 118 records:

> "*You told Najma on Monday this week that you are dyslexic – something which you haven't mentioned until now. You told me that it doesn't really affect you and you feel it hasn't impacted your accreditation too much. I asked how your*

previous employers had supported you with your dyslexia and you couldn't recall the exact name of the software. Here's a list of some of the equipment that Access to Work have recommended in the past:

- *Dragon speech-to-text software*
- *ClaroRead software, which helps with proofreading*
- *Inspiration software, for mind mapping/visual note taking*
- *Software that magnifies your screen.*

Please let me know you've used any of these before and if they would be useful to you again."

15 Mr Pittman went on in that email to advise the Claimant that he thought she would need to book a workplace needs assessment with Access to Work, and provided her with a link to that organisation; and signed off by saying that if there was anything else that they (the Respondent) could do to support the Claimant, she should let him know.

16 The Claimant responded to Mr Pittman's email later on the afternoon of 27 January at 17:55 hours. She thanked him for addressing these issues with her and stated that she had taken them on board and was "*willing to make changes*". Her email continues:

"*In relation to my difficulties, I have had a look at the list of equipment you have sent over and I quite familiar with them all. I reckon the software that magnifies the screen will be an option to consider for my role here.*"

17 The Claimant's email continues that, as discussed at their meeting, flexible working would be something to be looked at in the future once she had finished accreditation; and concludes by the Claimant saying that she would keep Mr Pittman updated of any changes she required.

18 The Claimant received her accreditation from Mr Pittman on 1 February 2016. He said that whilst she was then still receiving some red (or negative) marks on cases she was handling, she was showing progress and he wished to give her a chance to work in the 'live' environment - that is without 100% mentor support. Mr Pittman explained to us that once accredited, PPI consultants are expected to complete 10 individual cases per day, gradually increasing over time up to 30 per day, the number expected of a fully competent consultant. Following accreditation, consultants would typically have two or three of their cases checked each week, although that would depend upon the perception of risk or competence in individual consultant cases. In the Claimant's case, by the end of the first week in February she was averaging 9.5 cases per day.

19 The Claimant's three month probationary period of employment was due to expire on 16 February 2016. However, and as Mr Pittman set out at paragraph 18 of his witness statement, because since accreditation she had received two further red or negative quality checks, and also because of her poor timekeeping, it was decided to

extend the Claimant's probationary period until 29 March. Of the 14 new PPI consultants who had been recruited by the Respondent and who started work in November 2015, three other individuals apart from the Claimant then had their probationary periods similarly extended for one reason or another.

20 During the discussion which took place on 16 February between Mr Pittman and the Claimant, when he informed her that her probationary period was being extended, it became clear that the Claimant had not yet contacted Access to Work concerning appropriate steps to be taken to help her at work, as had originally been suggested by Mr Pittman on 27 January; and immediately following their conversation he sent the Claimant a link to that organisation once again, and at the same time referred her to the applicable provisions concerning working flexible hours for the Respondent. Mr Pittman's unchallenged evidence was that initial contact with Access to Work can only be made by an employee, rather than an employer; albeit once that has been done, the employer can participate thereafter. That is confirmed at pages 103n-p in the bundle.

21 On 18 February 2016, the target in terms of cases to be dealt with by the Claimant and the other consultants who had been recruited with her was increased to 20 per day. On the following day, the Claimant and Mr Pittman had a discussion about her start time at work, which was then currently set at 9am. The Claimant said that she was worried about the number of delays she was experiencing in getting to work, and accordingly it was agreed that thereafter she should start work by 9:30am, instead of 9am.

22 At a further meeting between Mr Pittman and the Claimant on 23 February Mr Pittman told her that he was putting in place a performance improvement plan ("PIP") in relation to her attendance and performance at work, which plan is in the bundle at pages 130-131. It contains what Mr Pittman considered to be the steps that needed to be taken by the Claimant to improve both her performance and her poor timekeeping, and was sent to the Claimant following their meeting. The Claimant did not think it was appropriate that her history of late arrivals at work should be included in the plan and would not sign off the document; and it was ultimately sent to her in an uncompleted and un-agreed form on 4 March. Mr Pitman's covering email at page 133 sets out his expectations both in relation to the quality of work undertaken by the Claimant and her late arrival at work issues, and informed her that if by 29 March there were no discernible and maintained improvements or if she was still failing to meet the PIP's objectives, the Respondent might proceed to a probation review hearing.

23 On 25 February, and at Mr Pittman's suggestion, the Claimant had been provided with a number of yellow computer screen overlays, which had previously been used by a former employee, in the hope that they might assist her. As Mr Pittman records in his email at page 145 (sent on 16 March, the day after their latest 'catch-up' and following the Claimant's return to work from leave), the Claimant did in fact use those overlays, but found that they had not helped as much as she had hoped, and suggested that green screen overlays would be better. Mr Pittman goes on to say in that email that he would speak to the Respondent's HR department concerning that, and keep her informed. He also recorded that the Claimant had told him that using green rather than white paper would help her at work, and that he had spoken to HR about that, who suggested that the Claimant buy the particular green

paper she wanted herself and keep the receipt, in order that she could claim the expense back from the Respondent thereafter. That was because there was then no suitable green paper in stock or held by the Respondent which, we were told, aims to operate as a paperless office or undertaking. Whilst the Claimant's PIP had formally commenced on 1 March, she had been on holiday from 2 to 15 March; and on the evidence we heard and saw, we have no doubt that the first time that the possibility/desirability of either green screen overlays or green paper was raised by the Claimant was in her conversation with Mr Pittman on 16 March, and as recorded in his email of that date. We reject the Claimant's assertion, which is unsupported by any evidence, that in fact either or both were raised or mentioned by her in January 2016, or at any stage before 16 March 2016.

24 It was also agreed at the meeting on 15 March (and confirmed by Mr Pittman in his email the following day at page 145) that the Claimant's daily target of individual cases to be dealt with be reduced from 20 to 12, increasing by one a week in each of the following weeks; and that the Claimant move from the bank of desks at which she was then currently sitting and working to a specific desk or workstation in a quieter part of the Respondent's large open plan office, which other staff were informed was effectively the Claimant's whenever she was at work. The reason for those changes was because of the continuing errors and problems with the work produced by the Claimant, and to help her to concentrate and to spend more time in achieving accuracy on the fewer cases with which she was expected to deal.

25 The green screen overlays which had been discussed in the meeting on 15 March were provided very shortly thereafter, and on 18 March the Claimant, in response to an enquiry from Mr Pittman, told him that she had received and was using them, and that they were *"perfect"*. Mr Pittman also then decided and informed the Claimant that in future, and in order that she could concentrate on the accuracy of her casework, no 'ad hoc' tasks would be assigned to her at work, as generally happened from time to time with other PPI consultants. Simultaneously Mr Pittman contacted the Respondent's HR support team to tell them that he would like to involve an organisation called 'Unum', a private health provider, to carry out an on-site assessment to discover if there were adjustments that could be made to help the Claimant at work. By way of explanation, Mr Pittman said in that email (page 149) that he had repeatedly tried to contact Access to Work, but so far had not been able to get hold of anyone within that organisation. It is clear from that and indeed from other evidence we heard that at some point (it is believed around 22 February), the Claimant had herself contacted Access to Work; and that thereafter Mr Pittman had tried to follow up that contact in order to expedite their involvement and assessment. Page 186 of the bundle records Mr Pittman's attempts to do so, commencing on 9 March and with repeated calls on 16 and 18 March and thereafter. On 21 March the Claimant sent Mr Pittman an email (page 153) saying that she thought it would be a good idea if she tried to call Access to Work herself, since it was taking longer than expected for them to get involved. Mr Pittman agreed, commenting on his own number of unsuccessful attempts to reach them; and in fact the Claimant succeeded that day, and an appointment was made for Access to Work to come to the Claimant's workplace on 6 April in order to undertake an assessment.

26 Mr Pittman wrote separately to the Claimant on 21 March, recording the matters discussed at their latest catch-up meeting that day (pages 157-158). He recorded that the Claimant's record of punctual attendance at work had significantly improved, and accordingly that it was no longer necessary for her to email Mr Pittman at the beginning and end of each working day; that as a result she would be allowed to work flexible hours or 'flexitime' thereafter, her core hours being between 10am and 4pm; that there continued to be quality issues about some of the work she undertook; but that the Claimant had said that having been moved to a different bank of desks had helped her, since she found the working environment to be quieter than before. Finally, Mr Pittman had asked if there was any further support or assistance that the Claimant required at that stage, and that she had said not: the Claimant was nevertheless encouraged to say so, if and when the position changed.

27 Two days later on 23 March, there was an investigation meeting between the Claimant and her line manager Mr Pittman. That was in advance of the end of her extended probationary period, which was to conclude on 29 March; to review the Claimant's performance since accreditation on 1 February; to try to establish why she had still not met the required standard for PPI consultants; and to reassess the support which had been offered to the Claimant. Mr Pittman says, and it is not disputed, that the Claimant did not agree with some of the feedback provided during that meeting concerning the quality of her work. He also says that in his opinion, the Claimant did not understand the significance and impact on the Respondent's consumers of some of the errors in her casework. That led him to compile an investigation report, a copy of which is at 177-179. The report sets out in considerable detail the relevant background, the issues and the Claimant's response thereto, and annexes all relevant past documentation. Mr Pittman's conclusion and recommendation was that there was sufficient material to warrant the Claimant being called to a formal probation review hearing, since despite having been on a PIP for the last month, there had in his view been no sign of consistent improvement in the quality and quantity of cases that the Claimant had worked on. The Claimant was therefore invited by letter dated 1 April to attend a probation review meeting on 4 April (pages 174-176). It is at about this time that the Claimant first mentions depression. She had informed Mr Pittman on the afternoon of 24 March that she was unwell and feeling depressed and had left work early that day, not returning to work thereafter until 31 March, following the Easter break and two days holiday.

28 The probation review hearing scheduled for 4 April was postponed due to the unavailability on that day of the Claimant's union representative. On 4 April, the Claimant sent an email to one of the Respondent's HR advisers stating that she was facing depression; and that same evening the Claimant had a doctor's appointment, which she told Mr Pittman was a "*depression review*". The Claimant was signed off sick thereafter from 5 to 28 April, and her outstanding probation review hearing was put on hold. The Claimant's initial medical sick note is at page 184a, which states that the Claimant was not fit for work due to "*work related stress*"; with the subsequent certificate dated 13 April specifying "*low mood*". The final certificate for the Claimant's period of absence is dated 27 April, for one day only, identifying "*stress*" as being the relevant condition.

29 The Claimant's Access to Work assessment which had been arranged for 6 April had had to be postponed due to the Claimant's unavailability because of ill-health; and Mr Pittman had booked an Occupational Health ('OH') assessment to take place on 19 April, since the given reason for the Claimant's absence was work related stress. However the Claimant contacted him on 18 April stating that she did not feel well enough to attend work for that OH assessment; and asking whether it could take place by other means, for example by telephone. That was not possible, and the OH appointment was rescheduled for 3 May.

30 As noted above, the Claimant's extended probationary period had come to an end on 29 March. No action was then taken in relation thereto, other than the invitation two days later to attend a probation review meeting (which did not in fact take place until 10 May); and the Claimant was then absent from work due to ill-health for most of April. Of the three other PPI consultants who, like the Claimant, had had their initial probationary periods extended until the end of March, one (JO) had been dismissed on 3 March due to a conduct issue; another (AN) was dismissed on 2 March following a probation review hearing arising from the poor quality of work undertaken; and the third (FR) completed her probationary period and had her employment confirmed on 29 March following the successful completion of her PIP. It therefore follows that only the Claimant was effectively granted a further extended probationary period.

31 An OH management report was prepared following the rearranged meeting between the Claimant and an RGN (Ms Rosie Rubie) on 3 May. That report is at pages 201-203. It recommended a phased return to work by the Claimant, and that a stress risk assessment be undertaken, as well as the outstanding Access to Work assessment. It was suggested that the Claimant should initially return to work for four hours a day, increasing by one hour a day per week until her normal contractual hours were reached. On the same day, the Claimant and Mr Pittman had met for a further catch-up meeting following her return to work from sickness. Mr Pittman then decided to reduce the Claimant's daily target of cases to be dealt with to ten per day. On 4 May, and in the light of the OH report then received, that target was further reduced to six cases a day. All these matters were set out by Mr Pittman in his email to the Claimant of 3 May (page 204), in which he also confirmed that the Claimant had by then been provided with a supply of the green paper requested (in fact ultimately obtained by the Respondent), as well as green screen overlays; and that once again she should let him know if further assistance was required. The Claimant acknowledged and agreed that email later that same day.

32 Mr Pittman spoke to Access to Work three days later on 6 May in order to re-book the Claimant's assessment, postponed from 6 April; and confirmed the position to the Claimant who was to contact them thereafter; and it was ultimately agreed that the Access to Work meeting should take place on 19 May.

33 The Claimant's postponed probation review meeting took place on 10 May 2016 chaired by Mr Yoni Smith. Minutes of the meeting are in the bundle at pages 215 to 227. It was subsequently reconvened on 18 May, and the notes of the further matters then discussed are at pages 235 to 243. Mr Smith's outcome letter dated 19 May is at pages 244-245. In summary, Mr Smith made plain that he had decided to extend the Claimant's probationary period by a further period of three months, so that it expired on

17 August 2016. His reasons for doing so were stated to be that he did not believe that all the reasonable adjustments in relation to the Claimant's disability of dyslexia had then been put in place by the Respondent. Specifically, and whilst he said that he did not believe that the Claimant had made the Respondent aware of her condition until January 2016, an Access to Work assessment had yet to be undertaken, and any potential adjustments arising in consequence, such as additional software, were not then in place. Mr Smith recommended that a further PIP be put in place for the Claimant, and warned the Claimant that if she did not make satisfactory progress, either during or by the end of the extended probationary period, another probation review hearing might take place which could lead to her dismissal.

34 The Claimant's Access to Work assessment finally took place on 19 May, giving rise to an initial report summary with recommendations dated 24 May (pages 252-254). That recommends and confirms grants for the purchase of software and additional training and assistance. The subsequent full report dated 31 May is at pages 252-267.

35 The Claimant and Mr Pittman had met on 16 May to complete a stress risk assessment, as recommended by OH in their report of 3 May. The completed questionnaire and Mr Pittman's notes are at pages 230-232. The Claimant made clear during that meeting that she believed she had been harassed and bullied whilst working for the Respondent, and that her work relationships were strained. The Claimant repeated and amplified those remarks having received the outcome letter from her probation review meeting on 19 May, when she mentioned that she was considering filing a grievance against Mr Pittman. The Respondent's HR support team accordingly offered the Claimant and Mr Pittman a joint mediation session, and that took place on 23 May. Notes of that meeting, signed by both the Claimant and Mr Pittman and the mediator (Ms Carolyn Harwood) are at page 246a. They appear to confirm the viability of a continuing work relationship between the Claimant and Mr Pittman; and indeed Mr Pittman (who by this time had himself been prescribed medication for anxiety at work by his GP) believed that the meeting had gone well and been positive overall. However, on the following day (24 May) the Claimant met Mr Brissenden, Mr Pittman's line manager and asked for a transfer from Mr Pittman's team. That was agreed, and Mr Brissenden confirmed in his email later that day (page 248) that the Claimant would gradually move from Mr Pittman to Ms Connie Smith's team over the course of the next week or so. More or less simultaneously Mr Pittman, who was by then aware of the Access to Work recommendations concerning the Claimant, alerted the Respondent's HR support team to the software and other aides which had been recommenced and for which grants had been provided to assist her.

36 On 25 May, the Claimant wrote to the Respondent's HR department appealing against Mr Smith's decision on 10 May to further extend her probationary period. In her grounds of appeal, the Claimant claimed that that decision amounted to *"discrimination arising in consequence of* (her) *disability"*. She went on to assert that no reasonable adjustments had been made until three and/or six months after the start of her employment, which had been to her detriment.

37 As noted, the full Access to Work report was received by the Respondent on 31 May. Having recommended the use of additional software as listed, the report suggests that the Claimant would need time to learn and to adapt to new strategies and techniques; that there might therefore not be any immediately obvious improvement in terms of her performance; and that she might need a period of time,

perhaps around three to six months, to adjust and to put into practice a new method of working. On the same day the Claimant and Mr Pittman met to discuss the implementation of the additional software that had been recommended and which was being obtained by the Respondent to help her (page 282); and the Claimant also moved to join Ms Smith's team.

38 Following the Claimant's move to her team, Ms Smith put in place a second PIP in relation to the Claimant. In the period between 1 June and the Claimant's being signed off sick on 19 July, that plan was initially sent to the Claimant by Ms Smith on 7 June and was thereafter discussed, amended, and used as the basis for the desired improvements in the Claimant's performance, although it was not signed or agreed by the Claimant, and it was ultimately not completed due to the Claimant's sickness absence from 19 July onwards, and her subsequent dismissal.

39 The Claimant's appeal against Mr Smith's decision to further extend her probationary period had been due to be heard on 6 June; however on 2 June the Claimant presented a grievance against Mr Pittman accusing him of harassment and of causing her to suffer from depression (pages 302-306). That resulted in the appeal hearing being postponed and a suggestion that the grievance and the probationary review appeal be heard together on 9 June, to be chaired and determined by Ms Constance Chinhengo. That was agreed, and the initial hearing went ahead on 16 June (hearing notes pages 359-366), ultimately resulting in Ms Chinhengo's outcome letter dated 8 July (394-397).

40 On 3 June the Dragon software and Dolphin Magnifier apparatus, both recommended in the Access to Work report, had been installed on the Claimant's PC. Training for the Claimant was arranged and subsequently took place. Following the Claimant's move to Connie Smith's team, it had been agreed that the Claimant's casework would be subject to 100% checks, and that she would be mentored by Nalini Mackie and Kyriaki Christodoulou. Whilst it is right to say that the Claimant told Ms Smith on 9 June that she felt much calmer since moving to her team, and that she believed that she had settled in well, it is plain that feedback sessions involving the Claimant presented problems. This led to Ms Mackie writing to Ms Smith repeatedly about the difficulties in mentoring the Claimant, culminating in her email on 17 June (page 367), less than three weeks after the Claimant's move, in which she stated that communication between the Claimant and both mentors had broken down to a point where it was no longer workable; and that even a quick 10-minute feedback meeting had become a battle. Ms Mackie stated that neither mentor felt that they could continue to work with the Claimant any longer, and that the situation had become unworkable and unproductive. The difficulties apparently encountered included the Claimant's unwillingness or inability to accept or take on board the feedback with which she was provided, a lack of interest in or engagement with what she was being told, and on one occasion the Claimant had apparently taken a non-work phone call in the middle of a feedback session. The Claimant's view was reported as being that her mentors should be supportive rather than judgmental. Overall, the mentors felt that they had given as much help and support to the Claimant as was possible and there was nothing further they could contribute or wished to pursue. Mr Brissenden responded to Ms Mackie by stating that he and Ms Smith would in future provide feedback to the Claimant, although her former mentors would continue to undertake the checks on the casework produced by the Claimant.

41 Whilst as noted software and other aides recommended by Access to Work had been adopted and installed on the Claimant's PC and training provided, this had given rise to difficulties with the Claimant's computer which was prone to freeze or crash, potentially as a result of the additional software installed. It is clear from page 411 that the Claimant started experiencing such IT issues on 16 June. Those it was believed had been resolved by 22 June; and on the following day the Claimant's computer was "re-built" by the Respondent's IT department. However, that was not the end of the matter since the additional software had not been reinstalled on the re-built computer, as the Claimant reported to Ms Smith on 27 June. That was remedied by 1 July, as the Claimant confirmed to Ms Smith, albeit the Claimant needed some time thereafter to get used to her re-jigged PC.

42 On 28 June the Claimant requested that her grievance and her appeal against Mr Smith's decision to further extend her probationary period should not be heard and considered together, rather than separately. That request post-dated the initial hearing before Ms Chinhengo which had taken place on 16 June. The further hearing before Ms Chinhengo on 29 June (hearing notes 384-388) and Ms Chinhengo's subsequent outcome letter dated 8 July (393-397) therefore only addressed the Claimant's grievances against Mr Pittman, which were not upheld, although a number of recommendations in relation to the Claimant's future employment with the Respondent were put forward in her letter. In effect, the Respondent had agreed to the Claimant's request for separate hearings, since on 12 July Ms Dionne Spence wrote to the Claimant inviting her to attend an appeal hearing on 14 July arising from Mr Smith's decision, which she would chair and conduct. The Claimant replied that she was unwell and would not be able to attend that hearing, which was accordingly rescheduled for 20 July.

43 At the Claimant's request, additional training for her on the Dragon software had been arranged and was due to be provided on 19 July. However, the Claimant consulted her doctor on that day, when she was signed off as not being fit due to stress at work for one week. Accordingly, she did not attend that training, and was unable to attend her appeal hearing which had been due to proceed on 20 July; and that was provisionally rescheduled for 3 August. The Claimant saw her GP again on 26 July, and this time was signed off for a period of two weeks (until 9 August), once again as a result of stress at work. As a result, the Claimant informed the Respondent on 3 August that she would be unable to attend the postponed hearing of her appeal against Mr Smith's decision, which had been due to take place later that day. In fact, the appeal hearing did go ahead on that day in her absence, and notes of the hearing chaired by Ms Spence are at pages 435-436. Ms Spence's outcome letter is dated 17 August (pages 437-441), where for the reasons therein set out she determined that Mr Smith's decision to extend the Claimant's probationary period for a further three months was justified, and she accordingly dismissed the appeal.

44 The Claimant next saw her GP on 8 August when she was signed off work for a further week, this time by reason of depression. She was signed off again on 16 August, this time until 30 August, the given reason for her inability to attend work being stress at work. A further sick note dated 24 August signed the Claimant off for a month until 28 September, once again because of stress at work. Accordingly, and as matters turned out, 19 July 2016 was the Claimant's last day at work.

45 The Claimant's probationary period, as extended by Mr Smith and upheld on appeal, was due to come to an end on 18 August. At that stage, as noted above, the Claimant was signed off sick and had been absent from work for some time. Mr Brissenden asked Ms Smith to organise and arrange a further referral of the Claimant to OH. That was fixed for 23 August, and it was only immediately before that appointment that the Claimant notified the Respondent that she would be unable to attend. The appointment was rearranged for 1 September, which the Claimant did attend. That resulted in a second OH report dated 5 September, at pages 449-455, which was prepared by Dr Morello, who advised that the Claimant was not then fit to attend a disciplinary hearing, and would need to attend more counselling and eventually seek specialist help if her symptoms did not settle; and that it would be appropriate for him to review her once again in approximately four to six weeks, once more counselling had been received. In fact, no additional counselling took place since the Claimant remained signed off sick until 28 September; she did in fact leave the country for Ghana on 23 September, where she remained until 15 October when she returned to the UK, albeit her absence abroad was not then known by the Respondent; and finally because the Respondent did not receive Dr Morello's report dated until 20 September, albeit it was dated 5 September.

46 As noted, the Claimant's latest sick note expired on 28 September; and it is clear that on that and the following day a number of attempts were made by Ms Smith and Mr Brissenden to contact her by email (pages 452 & 453), albeit unsuccessfully. Nothing having been heard from the Claimant, Mr Brissenden wrote to her once again by email (page 454) on 4 October. Mr Brissenden had already sent the Claimant an 'investigation pack' in connection with a further probation review hearing consequent upon the expiry of her last extended probation period on 18 August. In his email of 4 October, Mr Brissenden stated that since the Respondent had heard nothing in response from the Claimant, they assumed that she had nothing to add to the pack; and that since no up-to-date sick note had been received from her, her current absence from work was unauthorised. On the same day, Ms Julia Chambers of the Respondent's HR department emailed the Claimant (page 456) inviting her to a probation review hearing to be held on 6 October. That invitation is at pages 457-458 with enclosures as summarised in the email cover note; and set out alternative means or methods by which the Claimant might wish to participate in the hearing (including by telephone, written representations, or by sending a representative in her place) if she did not feel well enough to attend in person; and that one possible outcome of the hearing could be her dismissal. In fact, the Claimant neither responded nor attended the hearing on 6 October, which was rescheduled for 10 October, as summarised in the letter sent to the Claimant by email and post on 6 October (472-473), which once again reminded her of possible alternative means of participation in the restored hearing.

47 Due to her lack of response, a number of attempts were made by the Respondent during the first week of October to speak to the Claimant on her private phone, the number for which they had. Those attempts were unsuccessful, although it was noted that the Claimant's phone then emitted an apparently foreign ring tone. As a result, Ms Smith sent the Claimant a 'WhatsApp' message on the morning of the 6 October (page 470). It reads as follows:

> "*Hi Geraldine, I just wanted to know if you received the emails that Tom and I sent you last week regarding your sick note and your probation? Thanks*".

Notification was received by the Respondent that that message was received on the Claimant's telephone later that same day at 7:51pm, and read at 8:02pm.

48 The Claimant's evidence to the Tribunal was that on 6 October she was still in Ghana, but that she did not then have her phone with her. She said that she had given it to her cousin on their joint departure from the UK to Ghana on 23 September. Accordingly she did not know and could not say whether it was her cousin or someone else who had accessed the phone and read that message.

49 In any event, there was no response from or contact by the Claimant or anyone else on her behalf, and the probation review hearing went ahead in her absence on 10 October, conducted by Ms Zoe Kearns. Copies of her preparatory notes and the matters which Ms Kearns had planned to raise with the Claimant at that hearing are contained in the notes at pages 474 to 484. At the conclusion of the hearing Ms Kearns adjourned and took time to consider her decision. By her letter dated 11 October (pages 487-488) she wrote to the Claimant to confirm the outcome of the hearing, which was that the Claimant be dismissed for the reasons therein set out. They can be summarised as that the Claimant's probationary period, which had been extended twice had come to an end; and that, despite the support and adjustments that had been provided or made to assist her, the Claimant had failed to demonstrate that she could undertake her role as a PPI consultant to the level or standard required by the Respondent, both in terms of the quality and the quantity of the work she produced. The Claimant was informed in that letter of her right to appeal against the decision to dismiss her, but did not exercise that right.

50 We were told that the Respondent did not discover or appreciate until they were preparing for the full merits hearing in this case that the Claimant had in fact submitted a further sick note. That is at page 473a, and the covering email note is at page 473b. It is clear that the sick note was in fact submitted to the Respondent's HR department by email at 3:37pm on Friday 7 October, and was forwarded approximately 10 minutes later to Ms Smith in her capacity as the Claimant's line manager under cover of a note which reads: "*Please find attached a fit note or Geraldine Boateng*". We must presume that Ms Smith, who was not a witness before the Tribunal, did not see that either on 7 October or in advance of the probation review hearing on 10 October; there is certainly nothing in the evidence to suggest that any of the relevant managers and staff were aware of its existence before that hearing. The sick note itself is dated 28 September 2016 and comes like its predecessors from the Claimant's GP surgery. It states that the Claimant's case was assessed on 28 September 2016 (when the Claimant accepts that she was in fact in Ghana), and signs her off work for a further month, from 28 September until 31 October, because of stress at work.

51 The Claimant disclosed during the course of the full merits hearing and after her own evidence had concluded confirmation from British Airways of her travel arrangements whereby she had left London Heathrow for Ghana on 23 September and returned on 15 October 2016; together with a handwritten letter from one of the doctors at her GP surgery dated 30 March 2016 (page 516) in which it is stated that the Claimant had been "*put back on antidepressants*" and advised to attend counselling as a result of experiencing problems at work. That letter also records that the Claimant

had then told her doctor that she had disclosed her dyslexia to her employer on starting her current job; but that nothing had been put in place to help her with that at work, which had left her feeling victimised and unsupported.

Discussion and Conclusions

52 In terms of the credibility of the witnesses from whom we heard, we accept Mr Hignett's submission that the Respondent's witnesses generally gave their evidence in a careful and straightforward manner, and that their accounts were supported and confirmed by the contemporaneous documentation in the bundle to which we were taken. That applies in particular to Mr Pittman, who had the most frequent, numerous and prolonged dealings and contact with the Claimant of all the witnesses from whom we heard.

53 In contrast, we have significant reservations about the reliability of the Claimant's account and evidence. As Mr Hignett submitted, her evidence was frequently exaggerated, inconsistent and contradictory, or implausible. For example, the Claimant told the Tribunal that her computer crashed almost every day from 3 June (when the software recommended by Access to Work was installed onto it) until 19 July, her last day present at work, rendering it effectively unusable. But the documentary evidence in the bundle reveals instead that the Claimant encountered IT problems during the week of 16 June, which were solved by 21 June, as the Claimant accepted on the following day; and also after her computer was re-built on 27 June, but which the Claimant agreed had been resolved by 1 July. Secondly, the Claimant denied that she had been spoken to by anyone at the Respondent due to her frequently being late for work. Yet the documentation reveals that she arrived late on 21 occasions in her first three months, and also that there were several conversations between the Claimant and her line manager concerning her repeated lateness. Thirdly, the Claimant asserts in her ET1 that she informed the Respondent of her dyslexia at the start of her employment with them, as she also apparently told her GP (see the letter dated 30 March 2016), and Mr Yoni Smith at the probation review meeting on 10 May 2016. Yet in her evidence the Claimant accepted that the first time she in fact informed the Respondent of her condition was very shortly before her meeting with Mr Pittman on 27 January, when she told her mentor Namja, as Mr Pittman's email at page 118 records. Finally, there is the Claimant's last sick note (page 473A) dated 28 September 2016. That (apparently) arose out of a medical assessment on that day, and the Claimant's evidence was that she had given the resulting certificate to her friend Gladys to post to the Respondent. That cannot be right, since from the documents the Claimant herself provided it is clear that she was in fact in Ghana from 23 September onwards until mid – October. Additionally, any such medical assessment that day could not have been by telephone, since the Claimant's evidence was that on arrival in Ghana she had given her phone to her cousin, with whom she had travelled, and who had retained it thereafter. The Claimant sought to extricate herself from that difficultly by instructing Mr Martins to say during his closing submissions on her behalf that she had been mistaken, and that she must have seen her doctor on 23 September. Quite apart from the obvious objection of Mr Martins being unable to give evidence, there is the further problem that the certificate records that the Claimant's consultation and assessment took place on 28 September. In these circumstances, it is unclear how the sick note dated 28 September came into existence, and whether or not it is legitimate.

54 These and other incidents lead us to conclude that the Claimant's evidence to the Tribunal was not reliable and should be approached with great caution, save where specifically supported and confirmed by contemporaneous documentation; and wherever the Claimant's account conflicts with that of the Respondent's witnesses, we have no hesitation in preferring the latter.

55 Turning to the agreed list of issues, the jurisdictional issue of whether the claim was presented in time potentially arises in relation to events pre – dating 16 April 2016, effectively four months before the presentation of the Claimant's ET1. However, since the Claimant's case is essentially that the Respondent intentionally discriminated against her because of her disability from 27 January 2016 onwards, when they became aware of her dyslexia, and that all subsequent incidents were part of 'a continuing act', the out of time point does not arise for determination independently of the specific allegations themselves; and neither of the parties' representatives addressed this issue in their closing oral remarks.

56 In accordance with the Court of Appeal's judgement in Gallop v Newport City Council [2013] EWCA Civ. 1583, for an employer to have the requisite knowledge that an employee is suffering from a disability it must have actual/constructive knowledge of (a) the impairment, (b) that it has a substantial adverse effect on day to day activities, and (c) that it is a long-term condition. In relation to the Claimant's dyslexia, it was not disputed that the first time the Claimant made the Respondent aware of that condition was on 25 January 2016, when she told her mentor Namja. That was discussed at her meeting on 27 January with Mr Pittman when, we accept, she told him that it did not affect her much, as he noted contemporaneously (page 118), and as the Claimant did not dispute in her response later that same day. The first four pages of the Claimant's dyslexia assessment carried out in 2010 (pages 489 – 492) were not disclosed by the Claimant until 21 March, over four months after she started work for the Respondent and two months after she disclosed the existence of that condition. No reason has been put forward that delay in disclosure. We agree with Mr Hignett that whilst the portion of the 2010 report then disclosed confirms both the Claimant's condition and that it was long term, it does not address the nature of the adverse effect or impact on the Claimant's day to day activities; and at that stage the only relevant information the Respondent had was the Claimant's statement that 'it did not affect her much'.

57 As we have made clear in our findings of fact, the delay in contacting Access to Work, arranging for them to visit, and before that visit could finally take place on 19 May was certainly not the respondent's fault. In fact, Mr Pittman repeatedly prompted the Claimant to contact that organization, and, once she had done so, himself repeatedly tried to speed up the process of obtaining their specialist advice about what would help her at work. Secondly, whilst the Claimant's dyslexia was confirmed in the OH report of 3 May, no details of its impact on her were then provided. It therefore wasn't until 24 May, when Access to Work's abridged report was received by the Respondent recommending specific software and training, that the Respondent had actual or constructive knowledge of the substantial adverse effect of the Claimant's condition upon her day to day activities, and thus that she fell within the definition of disability in the Equalities Act. Once that was known, the Respondent more or less immediately arranged for the steps recommended to be obtained or put in place.

58 It is convenient to consider Issues 6, 7 & 8 together. There is no dispute that the letter from the Claimant's GP in February 2017 (page 506/507) confirms that the Claimant had then been suffering from symptoms of depression from March 2016, and that she had been on medication and receiving treatment for depression since then. The Claimant, it is accepted, was disabled by reason of depression from March 2016 onwards. The real issue is when did the Respondent have the requisite actual or constructive knowledge?

59 The relevant evidence is that at their meeting on 24 March 2016, the Claimant told Mr Pittman that she was feeling depressed; that the Claimant provided the Respondent with a note from her doctor dated 20 March (page 516) that she was then on anti-depressant medication and receiving counselling; that she told Mr Pittman on 31 March that she was receiving counselling; and five days later informed the Respondent's HR that she was facing depression. The next reference to depression is in the Claimant's second sick note during her prolonged absence from work from 19 July 2016 onwards, albeit the other sick notes then submitted do not mention depression, but rather stress or stress at work. The OH report, received by the Respondent on 20 September following the Claimant's appointment on 5 September, states that the Claimant was then presenting with symptoms of depression; that that had had a significant effect on her life; and suggest that she be referred to a mental health expert (page 450).

60 In our judgment, it follows that whilst the first diagnosis of the Claimant's condition of depression of which the Respondent was aware – rather than that she was receiving anti-depressant medication- was in August 2016, and the OH report in September that year made plain it's substantial adverse impact on the Claimant, the Respondent did not and could not know that that condition was or was likely to be long-term, in the sense of lasting more than 12 months, at any time prior to the Claimant's dismissal on 10 October 2016. Accordingly, the Respondent did not know that the Claimant was disabled by reason of depression before she was dismissed.

61 Issue 9 focuses on direct disability discrimination. Have facts been established by the Claimant from which we could properly conclude, in the absence of a satisfactory explanation, that she was treated less favourably by the Respondent than it treats or would treat other employees without those disabilities because of one or both? If so, the burden of proof shifts to the Respondent to prove on a balance of probabilities that the reason for its treatment of the Claimant had nothing whatsoever to do with the protected characteristic; and if it fails to do so, unlawful discrimination is established. That exercise frequently if not always gives rise to the question for the Tribunal of 'the reason why' the Claimant was treated in the manner established.

62 The first incident relied upon is the Claimant's being denied the possibility of working flexitime (around the Respondent's core hours of 10 am to 4 pm) between November 2015 and May 2016. The Respondent's unchallenged evidence was that flexitime is only ever available to employees once they have completed the accreditation process. The Claimant was not accredited until 1 February 2016, so could not have been offered flexitime before then. The evidence also established that flexitime would only ever be available once an employee had demonstrated that he or she could manage their working time, by arriving at work punctually and following the Respondent's lateness reporting procedures when required. As noted above, the

Claimant was electronically recorded as arriving late for work on 21 occasions during her first three months' employment, and was spoken to by Mr Pittman or others about that a number of times – see pages, 112,115,117, 118 and 126. On 19 February Mr Pittman put back the Claimant's start time at her request from 9.00 am to 9.30 am to help her, since she had told him that she regularly encountered travel difficulties or delays in her journey from home to work. The Claimant was given an informal warning about her continued pattern of late arrivals at work on 4 March, and told that she must improve. She did, over the following three weeks or so, and flexitime was granted to her on 21 March, seven weeks after the Claimant had become potentially eligible for it. The reason for that delay was because of the Claimant's poor time keeping, and had nothing at all to do with her dyslexia. Once her pattern of late arrivals stopped, or at least improved, the Claimant was offered flexitime.

63 We do not accept that a risk assessment, as opposed to a workplace assessment, was either appropriate or necessary in January 2016 when the Respondent first learnt of the Claimant's dyslexia, as she now asserts. As Mr Hignett submits, the existence of that condition would not present a potential risk of harm to the Claimant (or to anyone else) in the undertaking of her role and duties at work. We cannot identify any comparable condition to dyslexia which would warrant such a risk assessment, and none was put forward by the Claimant. It was not suggested at the time by the Claimant or by anyone on her behalf that a risk assessment was required. A workplace assessment was plainly sensible, and the Respondent and in particular Mr Pittman took repeated steps to try to ensure that one was undertaken. It was nothing to do with the Respondent that Access to Work were unable to carry out their evaluation before 19 May. Whilst a risk assessment did take place in May, that was because of the OH report and due to the Claimant's then complaining of stress and/or stress at work which we accept would or at least might give rise to such a step. In our judgment, no less favourable treatment of the Claimant because of her dyslexia has been established.

64 The Claimant asserts that Mr Pittman harassed her in the period January to May 2016, both whilst she was at work and whilst signed off sick, by means of repeated emails and phone calls to her about her attendance and performance at work. However, Mr Martins was unable to point to any (in our judgment) excessive number or frequency of communications, or any unduly onerous pattern, whilst the Claimant was at work. The Respondent's requirement up until 21 March 2016 that the Claimant should email Mr Pittman every day on arrival at and before leaving work was reasonable, in the light of her proven record of repeated lateness. Additionally, it was clear from the evidence, and in particular from her interactions with her various mentors, that the Claimant was a challenging employee who was by no means easy to manage. There is nothing to suggest that any non-disabled employee behaving in the same or a similar way would have been treated any differently by the Respondent. In relation to contacts with the Claimant during the time she was signed off, Mr Pittman sent her five emails and made two short phone calls to her in the period between 5 and 28 April, when she was off sick continuously. Almost all of those communications concerned the management of her lengthy absence, making arrangements for an OH referral, or answering the Claimant's queries in relation thereto. Once again, we find nothing excessive or unreasonable in that pattern of behaviour, and there is nothing to suggest that a non-disabled comparator would have been treated differently.

65 The next alleged act of direct discrimination relied on is the decision taken on 10 May 2016 by Mr Yoni Smith to extend the Claimant's probationary period, because all the necessary adjustments were not then in place. We cannot see how that extension can possibly amount to less favourable treatment since (a) the only available alternative to such an extension in the light of the continuing concerns about the Claimant's performance would have been dismissal, and (b) of the four PPI consultants taken on in November 2015 by the Respondent who had their initial probationary period extended by one month at the end of February 2016, the Claimant was the only one whose probationary period was further extended, the others being dismissed, as page 169A make clear.

66 The Claimant asserts that being transferred from Mr Pittman's team to Ms Connie Smith's team in June 2016 amounts to less favourable treatment. Once again, it is difficult to see how that can be so. It is very clear, we think, that the move was a consequence of the Claimant's stating that she did not think that her mediation meeting with Mr Pittman, following her accusations of his bullying and harassing her, had been a success. The Claimant said in her evidence (although not in her witness statement) that she felt that she had no choice, and that the move was not her idea. Mr Pittman disagrees and says that her move was at the Claimant's request. We think it more likely that the Respondent's version is correct, particularly since there is no evidence of the Claimant complaining about the move – if anything, the opposite is true (see page 328). In any event, it was plainly either the Claimant's request or her complaints about and her relationship with her line manager that caused the Claimant to be moved; not her dyslexia. Finally, although Ms Smith's team do not work as PPI consultants, they had all been trained on such work, and the Claimant herself continued to work as a PPI consultant; so there was no change to the nature of the work she did as a result of her move. Overall, no less favourable treatment has been established.

67 We turn to the fact that the probation review hearing went ahead on 10 October 2016 in the Claimant's absence. Whilst the issue is framed in terms of *'whilst she was on certified sick leave'*, we accept and it was not really contested that the first time the Respondent became aware of the Claimant's last sick note dated 28 September 2016 (page 473A) was after her dismissal and in their preparations for the Tribunal full merits hearing. At the time of the review hearing on 10 October, the Respondent believed, we accept, that the Claimant had been absent from work without leave and not covered by any sick note since 28 September. Additionally, she had not responded to the Respondent's repeated attempts to contact her, including the WhatsApp message to her phone which had apparently been read, and had not attended the first meeting scheduled for 6 October, once again without getting in touch. The Respondent had not been informed by the Claimant that she was then out of the country. In all the circumstances, it is hardly surprising that they decided to go ahead with the review in the Claimant's absence. There is nothing to link the Respondent's conduct to the Claimant's dyslexia; in fact, if as the Claimant alleges the Respondent was intentionally discriminating against her because of her disability, then one would have expected them to go ahead with the review hearing on 6 October, rather than postponing it to the following week and in effect giving the Claimant another chance.

68 That brings us finally to the Respondent's decision to dismiss the Claimant following the 10 October hearing. There is nothing to link that decision to the Claimant's dyslexia. We accept that the reasons for her dismissal were because she had reached the end of her probationary period, which had already been extended twice; that even with the extra time that had thereby been provided, the software and other assistance recommended by Access to Work, and the support of her mentors and managers, the Claimant had failed to demonstrate that she could undertake her role as a PPI consultant in terms of the quantity and quality of work performed; and that she had (apparently) been absent without leave since September 28 and had failed to contact her employers or to attend two review hearings. There is nothing to suggest that a non-disabled comparator would have been treated differently; in fact, and as noted above, the Claimant's three colleagues who had had their probationary periods extended had all been dismissed at the conclusion of their initial extensions.

69 It therefore follows that there is nothing in the Claimant's complaint of direct disability discrimination, which is accordingly dismissed.

70 We can deal briefly with the allegations of harassment set out at issues 10 and 11. Calling and going ahead with the probation review hearing on 10 October cannot possibly amount to harassment when (a) as we have found, the Respondent did not then know that the Claimant had been signed off sick at the time, and (b) the letters inviting her to both the hearing on 6 and 10 October offered the Claimant alternative means of participating in the hearing, if she chose not to attend. Secondly, the Claimant could not say during the course of her evidence what it was in the termination of employment letter dated 11 October that had the purpose or effect of violating her dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. As Mr Hignett points out, the fact that the Claimant may very well not have agreed with the contents of the letter, which may have upset her, is not enough to amount to harassment.

71 We turn to consider Issues 12 to 15, which focus on the Claimant's complaint of discrimination arising from a disability (s.15 Equality Act). The Claimant identifies seven acts or omissions by the Respondent where she says that she was treated unfavourably; and we look at each in turn. The first is the slowness or lack of implementation of a number of tools or aides the Claimant required to perform her role between January and July 2016, including a green PC overlay, green paper, a screen magnifier, a microphone headset, training on Dragon and Clipper software, and a dedicated quiet desk.

72 In relation to green screen overlays, the first time that the Claimant requested this aide was on 16 March 2016 (see page 147), and they were provided on the following day, the Claimant saying that they were *'perfect'* in answer to an enquiry on March 18. The Claimant had been provided with yellow overlays that had become available in the Respondent's office in late February, and it was when she stated that these were not as helpful as had been hoped that the green overlays were provided.

73 Green paper was first requested by the Claimant on the same day (16 March) (page 145). The Claimant was told to buy it herself (since the green paper then held by the Respondent was not the right shade) and to keep the receipt in order that she

could recoup the expense from the Respondent. The Claimant did not do so, and on 4 April denied that the above suggestion put forward at page 145 had been made. That same day, Mr Pittman purchased a supply of the correct green paper and provided it to the Claimant. Finally, it is clear from page 179A that the Claimant did not tell the Respondent that she was not able to buy green paper herself, as had been suggested, because of her depression, as she later claimed in her witness statement.

74 Screen magnifying software was first put forward as an option by Mr Pittman following his meeting with the Claimant on 27 January 2016, based upon his previous experience of individuals who have dyslexia. In her response later that day, the Claimant merely said that it was *'an option to consider'.* The first time the Claimant actually asked for this tool was on 16 May that year, following the OH report; and the Respondent immediately sought to obtain it. The attempt to install Dolphin magnifying software onto the Claimant's PC on 31 May failed, but it was successfully installed on 3 June. Neither the 2010 dyslexia assessment nor the Access to Work report in May 2016 recommend screen magnification software as being an appropriate aide for the Claimant.

75 The Dragon software having been satisfactorily installed on the Claimant's PC on 3 June, she emailed the Respondent's IT support centre on 14 June saying that she did not have a headset to use with it. That request was repeated by the Claimant in her PIP meeting with Connie Smith on 1 July, and Ms Smith chased up the support centre on the same day (page 391). The Claimant was not at work between 3 and 11 July; but by 15 July the Claimant was back in the office and using the headset, as page 407 confirms.

76 Training on the Dragon software had initially been arranged to take place in July 2016, but was brought forward and took place on 14 June. The Claimant had already stated at her probation review meeting with Mr Smith on 18 May that she had used that software in earlier employments, as she confirmed in her oral evidence. One month after the June training, the Claimant told Ms Smith (on 15 July) that the training session had been interrupted, and that she required more assistance on the software. Accordingly, a further training session was booked for the Claimant on 19 July; but that was the day that the Claimant left work early due to sickness, and in fact did not return to work thereafter. Accordingly, the further training session was cancelled.

77 The Claimant confirmed in her evidence that the issue concerning the provision for her of a quiet desk relates to the period up until early June 2016, when she was moved to Connie Smith's team, and not thereafter. From the evidence we heard, the issue was first raised by the Claimant in a meeting with Mr Pittman on 16 March, when she said that the bank of desks she was working on could be noisy. Mr Pittman took steps to remedy that, and on 17 March the Claimant was assigned a permanent desk in a different location and next to a window. There is no evidence that the Claimant subsequently complained to Mr Pittman about her relocation or noise levels, and in May Mr Pittman specifically asked the Claimant whether the office noise levels were affecting her concentration at work. The Claimant replied (page 246) that there were no such problems, but that if they arose she would notify him. She did not do so before her move. Accordingly, we reject the Claimant's assertion to Mr Smith on 10 May that she was still awaiting a desk move, and also her statement to Ms Smith that the different desk provided by Mr Pittman was not quiet enough.

78 For the sake of completeness, we repeat that the contemporaneous documentary evidence establishes that the problems that the Claimant faced on her PC once the recommended software had been installed were short term, rather than continuous from 3 June until 19 July as the Claimant said in her evidence.

79 It is abundantly clear in relation to all the tools or aides identified by the Claimant that as soon as they were raised and requested by the Claimant, they were promptly addressed and/or provided by the Respondent. No unfavourable treatment of the Claimant, in the sense that she was put at a disadvantage, has been proved, in our judgment. The only instance of any delay (itself fairly modest, in our judgment) was the time lag before a microphone headset was provided by the IT support centre. Once that was raised by the Claimant with her manager, Ms Smith took steps to ensure that the Claimant had the equipment on her return to the office; and in any event, any such delay by the Respondent's IT cannot we find have been because of something arising out of the Claimant's disability, rather than an oversight or simply pressure of work in that department.

80 The next area of allegedly unfavourable treatment relates to the case targets set for the Claimant by the Respondent. The Claimant confirmed in her evidence that relates to the daily targets set, and it was not in dispute that in the ordinary course of events a PPI consultant is expected to progress reasonably rapidly from 10 cases per day post-accreditation to 30. In the Claimant's case, she was averaging 9.5 cases per day immediately after becoming accredited; and her target was increased to a daily figure of 20 on 18 February, along with other new consultants. However, Mr Pittman reduced that figure to 12 at his catch-up with the Claimant on 16 March, when it was clear that she was not making the progress that had been hoped and in order that she could concentrate on the accuracy of the work she produced; and that was further reduced to 6 a day from 3 May and following her phased return to work and the OH recommendation. Bearing in mind that the Claimant was able to produce 9.5 cases per day on average to a reasonably accurate standard at the time she was accredited at the end of February 2016, without any of the aides or software later provided to help her, those targets and the Respondent's approach does not seem to us to be unreasonable or unfavourable, or to have disadvantaged the Claimant. We think the targets set were legitimate and justified, and took account of the Claimant's dyslexia and her sickness absences.

81 The fact that no risk assessment was undertaken in January 2016 is also raised as an instance of unfavourable treatment. We do not agree for essentially the reasons set out at paragraph 63 above. Additionally, Mr Hignett is correct in pointing out that even if the failure to undertake such an assessment was unfavourable, it did not arise from either the Claimant's absence or anxiety, which are the disability-related effects the Claimant relies upon.

82 Next, and as already noted, the Claimant was in fact permitted to take part in the probation review hearings, on both 6 and 10 October 2016, by means of alternatives to personal attendance, for example phone, email, or sending a representative in her place. Both invitation letters made that quite clear; so the allegation fails on the facts as established.

83 The same is true of the Claimant's allegation of a failure to consult her with regard to suitable adjustments for her dyslexia. We are satisfied from the evidence we heard, as summarised in our findings of fact, that the Claimant was repeatedly and comprehensively consulted about what adjustments or aids would be appropriate in relation to her dyslexia from more or less the moment the Respondent became aware of that condition.

84 The issue identified at 12(f) is *'not delaying the probation review meeting until the Claimant was fit to attend'.* We have already determined that none of those involved in the meeting on 10 October (and indeed that scheduled for 6 October) were then aware that the Claimant had submitted a sick note following an alleged medical consultation on 28 September. The probation review meeting had initially been scheduled to go ahead on 19 August, but didn't because the Claimant was then signed off sick. There was no indication of when the Claimant would be fit to return to work, and from 28 September onwards the relevant personnel at the Respondent believed that her continuing absence was unauthorised and without leave. Repeated attempts were made to contact the Claimant from 28 September onwards, but without success; although it appeared that the WhatsApp message to the Claimant's phone had been read but not responded to. Finally, the Claimant had been offered alternative means of participating in the meeting, but had not adopted any. In the circumstances, whilst the Claimant may have been disadvantaged in the meeting going ahead in her absence, that was because she had decided to go abroad for an extended period, had not informed her employer, and had not kept in touch with or enabled the Respondent to contact her; rather than because of something arising from her depression or dyslexia. The Claimant suggested in passing that her trip to Ghana was taken on medical advice; but no evidence from her medical advisers was produced to confirm that suggestion, which we reject. Secondly and in any event, we find that for the reasons above the Respondent was justified in going ahead in the Claimant's absence on 10 October, in that it was proportionate to proceed in these circumstances and adopting probationary periods, and extending them where appropriate, before confirming an employee's employment amounts to a legitimate aim.

85 We have already made plain what we find to have been the reasons for the Claimant's dismissal in paragraph 68 above. She was not dismissed because of her absence or anxiety arising from her depression or dyslexia. If we were wrong in coming to that conclusion, we would in any event determine that the Respondent was justified in dismissing the Claimant, for the reasons set out in the preceding paragraph.

86 For these reasons, the Claimant's complaint of discrimination arising from a disability is dismissed.

87 The Claimant's last complaint is that the Respondent failed to comply with a duty to make adjustments in accordance with s.20 Equality Act 2010 in a number of different ways.

88 It is accepted by the Respondent that its practice of measuring the performance of PPI consultants on volume of work and minimum quality standards amounts to a PCP. Accordingly, was the Claimant placed at a disadvantage in comparison with a non-disabled person in that because of her dyslexia she was not able to meet the minimum requirements of the role, in terms of the quality and quantity of the work she produced?

89 In terms of the quality of the work produced by the Claimant, there is essentially an assumption inherent in her case that because she suffers from dyslexia, she is more prone to make mistakes in paperwork than a non-disabled comparator. However there was no real evidence to that effect before the Tribunal, and we bear in mind that she told Mr Pittman in January 2016 that the condition *'did not affect her much'*; that she had worked in professional office environments before and was apparently familiar with at least some of the range of aids and software available to help those with dyslexia; and that certainly by the time the Claimant moved to Ms Smith's team the recommended software was put in place, but still her performance problems, in terms of the quality of her work, persisted. There is certainly nothing to suggest that because the Claimant was assigned mentors and her work was frequently checked she was placed at a material disadvantage when compared with a non-disabled comparator: there was nothing to suggest that such a comparator who produced a similar quality of work to that of the Claimant would have been treated any differently, and if anything worse than the Claimant was treated, bearing in mind the fate of those of her colleagues who had their probationary periods extended.

90 In terms of the quantity of work produced by the Claimant, we find that she has failed to prove that the reduced daily targets that were assigned to her placed her at a material disadvantage when compared with a non-disabled person undertaking the same role. As already noted, the Claimant's daily targets were progressively reduced to take the pressure off her and to help her to produce more accurate and reliable work in the additional time available for each case. Accordingly, we are not persuaded that the duty to make adjustments was in fact engaged.

91 In case we are mistaken in coming to those conclusions, we make clear that we accept that, as detailed above the quantity of cases that the Claimant was expected to complete in a day was reduced, in fact more than once, we find in a timely and appropriate manner and as more information concerning the Claimant's condition became available, for example after the OH and Access to Work reports had been received. Since the work being done by the Claimant and her colleagues involved the checking and processing of complaints about PPI submitted by members of the public, it would not have been reasonable to reduce the number of green (or satisfactory) checks to be achieved by the Claimant in the cases she handled. But the Respondent did change the system by which the Claimant's work was checked to allow feedback to imbed and take effect, as Mr Pittman told us and as page 145 makes clear; and the checks themselves were altered once the Claimant joined Connie Smith's team from a binary red/green system, to what in the Claimant's work had gone well, and what could have been done better. Those changes were both reasonable and ameliorated any disadvantage to which the Claimant was subjected. Accordingly, if the duty to make adjustments was engaged, it was satisfied by the Respondent.

92 The Respondent accepts that its practice of holding probation review meetings or hearings amounts to a PCP. Was she placed at a disadvantage in comparison with a non-disabled person because by reason of her dyslexia she was not able to attend the probation review hearing on 10 October? First, we have already determined that it was not by reason of her dyslexia that the Claimant could not attend that hearing, but rather by her choice. Secondly, even if it was for a reason related to her dyslexia that she did not attend, we accept that she was not disadvantaged in comparison with, to

adopt Mr Hignett's example, someone who was absent due to a bereavement. As noted, the invitation to the hearing offers alternative means of participation to personal attendance. The duty to make adjustments does not arise. That possibility would also apply in the event that the duty did arise, and would have been a reasonable adjustment that would have ameliorated any disadvantage; as would the fact that the Claimant had the right of appeal against the outcome of the review hearing, but chose not to exercise it. Finally, even if the Respondent's managers had known (on 10 October) that the Claimant had then been legitimately signed off sick for a further month, it would not have been reasonable to further delay and postpone the hearing, since the Claimant would at the conclusion of that sickness certificate have been continuously absent from work due to illness for over three months, with no indication of when she would be well enough to attend any such hearing. On the basis of the Claimant's evidence about her continuing ill-health, that delay could well have lasted for many months more.

93 For these reasons, the Claimant's complaint in relation to the duty to make adjustments which arises on the PCP's adopted by the respondent fails and must be dismissed.

94 The Claimant's s.20 reasonable adjustments complaint also relies on the Respondent's alleged failure to comply with its duty to take reasonable steps to provide auxiliary aids, as listed at Issue 18, within a reasonable time frame. Those aids are the same as the 'tools' enumerated at Issue 12 (a) in relation to the Claimant's s.15 complaint. For the reasons set out at paragraphs 72 to 79 above, we find that in so far as the duty to make adjustments arose and was engaged, the Respondent satisfied and did not breach that duty in relation to all the auxiliary aids relied on by the Claimant. It therefore follows that this part of the Claimant's s.20 complaint is also dismissed.

95 The final issue for determination is the Polkey point, namely if the decision to dismiss the Claimant was in fact discriminatory, what are the chances that the Claimant would have been dismissed in any event, and within what period? As Mr Hignett helpfully reminded us, this is the point elucidated by the Court of Appeal in Abbey National plc v Chagger [2010] ICR 397. Mr Hignett submitted that since the Claimant's evidence was that she remained unfit for work at the time of the Tribunal hearing, there was no basis for inferring that, absent dismissal, she would have returned to work. Secondly, it was the Claimant's pleaded case that she could have passed probation and achieved the Respondent's daily targets within twelve to fifteen months, had all the necessary adjustments been in place. That would mean extending the Respondent's usual probationary period of three months by up to five times; which, Mr Hignett suggested, was not reasonable. Finally, in her evidence to the Tribunal the Claimant had said that had all the requested adjustments been made, she could have achieved the daily target of 30 cases within 6 months. That undermines not only her pleaded case but also her evidence about her continuing ill-health. We accept those submissions and find that the likelihood is that even if the Claimant had not been dismissed on 11 October 2016, she would probably have been dismissed within a few months thereafter, even perhaps by the end of that year.

96 However, for the reasons set out above it is our unanimous judgment that all the Claimant's complaints fail and are dismissed.

Employment Judge Barrowclough

23 June 2017