



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Charles

v

British Telecommunications plc

Heard at: Watford

On: 18-22 September 2017

Before: Employment Judge Smail
Mr R Leslie
Mrs I Sood

Representation

For the Claimant: Mr O Solanke, Lay Representative

For the Respondent: Mr S Proffitt, Solicitor

RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed by the Respondent.
2. The Claimant was a disabled person at all material times by reason of dyslexia.
3. The Respondent did not fail to make reasonable adjustments.
4. The Respondent justifies any unfavourable treatment of the Claimant arising from his disability as being a proportionate means of achieving a legitimate aim.
- 5.

REASONS

1. By a claim form presented on 31 January 2016 the Claimant claimed unfair dismissal. He had been employed by the Respondent between 14 March 2005 and 7 December 2015 as an Openreach engineer. Whilst the claim form appeared to be for unfair dismissal, there was a sentence to the effect

that the Claimant was discriminated against in the way the performance review was conducted. The Respondent sought clarification as to what was meant by 'discriminated against' and by amendment, notice of which was given prior to the preliminary hearing before Employment Judge Henry on 6 June 2016, disability discrimination on the basis of a disability in the form of dyslexia was added to the proceedings. That was confirmed at the preliminary hearing on 6 June 2016. We are told and accept that this amendment was made prior to the disclosure from the Respondent of the Remploy reports, further details of which appear below.

The issues

2. We are told that there have been three preliminary hearings. The Respondent at the outset of this hearing supplied a draft list of issues which has not been materially challenged by the Claimant, although the issues have become clearer in the course of the evidence.

Unfair dismissal

- 2.1 The Respondent claims that the Claimant was dismissed for capability reasons. Accordingly, was capability the reason for the Claimant's dismissal?
- 2.2 Was there a reasonable investigation into the question of the Claimant's capability?
- 2.3 Was the Claimant given sufficient opportunity to improve his performance?
- 2.4 When they made their decision, did the Respondent have reasonable belief in the Claimant's incapacity?
- 2.5 Was there a reasonable search for alternative employment?
- 2.6 On the question of a reasonable search for alternative employment, whilst listed as an issue, neither side addressed us on the matter in the hearing. The argument was not developed by the Claimant. Accordingly, we do not deal with it as it was not pursued.
- 2.7 Was dismissal a response within the band of reasonable responses? In the event that the dismissal was unfair, we would also consider questions of percentage reductions under the Polkey principle, namely whether a fair dismissal may have resulted in due course anyway.

Disability discrimination

- 2.8 Did the Claimant have the mental impairment of dyslexia at all or any material times?

- 2.9 Did the dyslexia have a substantial and long term adverse effect on the Claimant's ability to carry out day to day activities, including normal work activities? If so, from when did the Claimant have the protected characteristic of disability by reason of dyslexia?

Discrimination arising from disability

- 2.10 Did placing the Claimant under performance management and ultimately dismissing him amount to unfavourable treatment?
- 2.11 Did requiring the Claimant to perform at 'a higher target of 90%' amount to unfavourable treatment? In the course of evidence, this issue was clarified. Most of the Claimant's performance management targets were at 85% in terms of productivity of what is known of the IPOP score. The IPOP score is the average time taken by engineers in respect of any particular task at a particular individual exchange where the engineers work. 100% therefore was the average time for engineers; the Claimant's target normally was 85%, which was 85% of the average time it would take an engineer at the particular exchange the Claimant was situated at to perform a particular task. The Respondent submitted in submissions that the Claimant should be stuck with the pleaded case on this as finalised in the list of issues. We respectfully disagree. The Respondent knew full well the precise nature of the case against it in this regard and was more than able to deal with it not being prejudiced in any way. Accordingly, did requiring the Claimant to comply with specified targets amount to unfavourable treatment?
- 2.12 Was the Claimant's inability to achieve his performance targets because of his dyslexia?
- 2.13 Did the Respondent know or should it reasonably ought to have known that the Claimant was disabled by reason of dyslexia?
- 2.14 Can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

- 2.15 Did the Respondent implement provisions criteria or practices (PCPs)? The pleaded case is requiring the Claimant to perform at the same level as his non-disabled colleagues. It is clear, however, from the evidence that this was not the PCP; it was requiring the Claimant to perform at a standard set in accordance with performance management processes, typically 85% in terms of productivity.
- 2.16 A further pleaded PCP is said to be 'upgrading laptops over a three to three month' period in 2014. The idea was that this was too long.

This PCP has not figured relevantly in the case as presented at all. It has not been pursued as an issue. In any event the period in question, 2014, is significantly before the Claimant was dismissed in 2015.

- 2.17 Did any relevant PCP place the Claimant at substantial disadvantage in comparison to those who did not have dyslexia?
- 2.18 Was the Claimant unable to perform to standards set in the performance reviews?
- 2.19 Would the following adjustments have avoided the substantial disadvantage?
 - 2.19.1 Extra time allowed to conduct work effectively. That is a relevant adjustment for us to consider in this case.
 - 2.19.2 Communicating instructions one at a time in a quiet location. This has not figured relevantly in the case. The Claimant received his instructions electronically on his iphone and laptop.
 - 2.19.3 Encouraging the Claimant to repeat back instructions. This has not figured in the case because the Claimant was not given oral instructions. He was in fact provided with a read/write software which could read written instructions to him.
 - 2.19.4 Providing the Claimant with written information in advance. This has not figured in the case because the Claimant was provided with written information in advance in the form of the communications to his iphone and laptop.
 - 2.19.5 Allowing the Claimant to work in a quiet environment without distractions. Again, this has not been developed in the case before us because the working environment for the Claimant necessarily was frames within an exchange, and no issue has been developed in respect of this.
 - 2.19.6 Providing the Claimant with a dictaphone as a memory aid. Again, this has not been developed before us. It was accepted that the Claimant had a dictation facility on his iphone and laptop. It simply has not been contended before us that the question of a dictaphone amounted to any solution to any problem.
 - 2.19.7 Encouraging the Claimant to use spellchecker on his computer. He had a spellchecker. The Claimant has not been challenged about his spelling in the performance

reviews. This again has not been developed relevantly before us.

2.19.8 Providing the Claimant with a disability passport. A disability passport is something that the Respondent has in respect of those recognised to be disabled. That is an issue we deal with.

2.19.9 Upgrading the Claimant's laptop as a priority. As we have said, that has not been developed before us as a relevant matter. Well before the Claimant's dismissal, his laptop had been upgraded.

2.20 Accordingly, we are left with two principal adjustments. Firstly, extra time allowed to conduct work effectively and, secondly, provision of a disability passport.

2.21 Did the Respondent fail to make those reasonable adjustments?

2.22 Did the Respondent know or reasonably ought to have known at material times that the Claimant was disabled by reason of dyslexia?

Time limits

3. The Respondent also takes time limits points insofar as relevant.

The law

4. Unfair dismissal: s.98 Employment Rights Act 1996

4.1 It is for the Respondent to show a potentially fair reason for dismissal. By s.98(2), a reason relating to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, is a potentially fair reason. Capability means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality. By sub-section (4) where the employer has fulfilled the requirements of ss.1, the determination of the question whether the dismissal is fair or unfair, having regard to the reasons shown by the employer: (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and (b) shall be determined in accordance with equity and the substantial merits of the case.

4.2 This will involve the Tribunal examining whether the Respondent had a genuine belief that capability was the reason for the Claimant's dismissal; that it had reasonable grounds for its belief; that it had carried out a reasonable investigation in all the circumstances; and

dismissal was an option within a band of responses open to a reasonable employer.

5. Disability discrimination

Disability

- 5.1 By s.6 of the Equality Act 2010 a person has a disability if he has a physical or mental impairment and the impairment has a substantial and long term adverse effect on the employee's ability to carry out normal day to day activities. The burden for proving disability lies on the Claimant on the balance of probabilities.
- 5.2 The leading case on dyslexia disability is the case of Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763, a decision of Mr Justice Elias, the then President of the EAT. In that case a senior police officer discovered late into his career and indeed his life, that he suffered from dyslexia. It was not until preparing to take examinations to become a superintendent that the problem was discovered. An expert report placed him in the category of having mild dyslexia. A further stated that the dyslexia was more severe than that. The Tribunal accepted the first report and the recommendation that the officer be allowed an additional 25% time at each stage of the selection process. The employment Tribunal was wrong to find that the Claimant in that case was not disabled. Carrying out assessments or exams was properly to be described as a normal day to day activity. Reading and comprehension are themselves normal day to day activities. 'Day to day activities' has a meaning which encompasses the activities which are relevant to participation in professional life.
- 5.3 This may first have been set down by the European Court of Justice in Shacon Navas v Euresst Colectividade SA [2006] IRLR 706 ECJ but is now to be accepted in English law also. Appropriate measures must be taken to enable a dyslexic employee to advance his employment since the effect of the disability might adversely affect promotion prospects, in which case it must be said to hinder participation in professional life. The only proper approach to establishing whether the disadvantage was substantial was to compare the effect of the disability on the individual; this involves considering how he in fact carries out the activity compared with how he would do it if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial. In that case, once the Tribunal accepted that the officer was disadvantaged to the extent of requiring 25% extra time to do the assessment, then it inevitably followed that there was a substantial adverse effect on normal day to day activities. The officer was therefore a disabled person within the meaning of the then Disability Discrimination Act.

6. Discrimination arising from disability

6.2 By s.15 of the Equality Act 2010:

“1. A person discriminates against a disabled person if:

(a) the person treats the disabled person unfavourably because of something arising in consequence of the disabled person’s disability; and

(b) the person cannot show that the treatment is a proportionate means of achieving a legitimate aim.”

6.3 By sub-section (2) the cause of action does not arise if the employer shows that the employer did not know, and could not reasonably have been expected to know, that the disabled person had the disability.

7. Failure to make reasonable adjustments

7.1 Under s.20(3) the first requirement of the duty is a requirement, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. By s.21(1) the failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments and by sub-section (2) the employer discriminates against the disabled person if the employer fails to comply with that duty in relation to that person.

7.2 Knowledge of disability for the purposes of reasonable adjustments is dealt with in schedule 8(3) to the 2010 Act. By sub-paragraph (1), the employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the substantial disadvantage referred to in the first, second or third requirements of the duty.

8. Time limits

8.1 By s.123 of the 2010 Act, proceedings on a complaint may not be brought after the end of (a) the period of three months starting with the date of the act to which the complaint relates; or (b) such other period as the employment Tribunal thinks just and equitable.

8.2 By sub-section (4), in the absence of evidence to the contrary a person is to be taken to decide on a failure to do something: (a) when the person does an act inconsistent with doing it; or (b) if the person

does no inconsistent act, on the expiry of the period in which the person might reasonably have been expected to do it.

- 8.3 Time limits in this case only arise in respect of the alleged failure to make reasonable adjustments.
- 8.4 Burden of proof is potentially important in discrimination cases by s.136(2) if there are facts from which the court could decide in the absence of any other explanation that an employer contravened the provision concerned, the court must hold that the contravention occurred. By sub-section (3), sub-section (2) does not however apply if the employer shows that the employer did not contravene the provision.

Findings of fact relevant to the issues

9. Mr Ken Thomas was the Claimant's line manager from sometime in 2006 until November 2012. During the course of his dealings with the Claimant and reviewing his performance, the Claimant seemed to Mr Thomas regularly to make simple mistakes which he could not understand. For example, he might do a job and connect the wrong cables, or fail to input data correctly which caused an error. He eventually formed the view in early 2011 that the Claimant might have dyslexia or possibly some sort of mild learning difficulty. This was based purely on his own personal and professional experiences with people with such conditions. He informally raised the matter with the Claimant and suggested the Claimant might go and see his GP about it. The Claimant was a bit dismissive of the suggestion but ultimately agreed to go on a referral arranged by the Respondent for a dyslexia assessment. Mr Thomas was in discussions with HR on this matter. HR advised Mr Thomas that a performance plan could not be progressed until the assessment had taken place. That was on 7 April 2011. The referral was received by Remploy on 13 April 2011. The assessment took place on 16 May 2011 and an interim report was sent out on 6 June 2011.
10. The interim report set out the referral that Mr Thomas believed that dyslexia was a possibility and maybe having an effect on the Claimant's performance. It was thought that this may be partly due to sequenced numbers in the wrong order. The Claimant told Remploy that dyslexia was never identified as a possibility at school. He had found that although he was achieving good marks, he could take longer in exams. Mr Charles stated that his reading was fine and he read regularly but he felt his spelling and work with numbers was of particular concern, especially when working owing to the significant extent of tasks involving the use of numbers when working as a frames technician. The Claimant reported to Remploy that he did not feel confident when writing emails and when he had to take notes. It was recorded that Mr Thomas had changed the site the Claimant had worked on three times in an attempt to help him achieve his targets. It was reported that achievement of targets was not consistent. Mr Charles

wondered if a dictaphone would help. Remploy in fact made a referral to a separate organisation to assess the dyslexia. In the meantime, Remploy suggested that training needs should be considered; Mr Thomas may wish to explore altering the targets the Claimant was asked to meet in order to help him focus on the quality and accuracy of his work. Once Mr Charles had the results of the dyslexia assessment, a referral to Access for Work for an assessment may be beneficial. Access to Work could make recommendations of suitable software/equipment which may assist the Claimant at work. Further, once Mr Charles had the results of his dyslexia assessment, he may wish to declare them and their possible impact on his work by completing a BT disability passport. A link was given to the relevant intranet address.

11. We have seen that the interim report was emailed directly to the Claimant at his work email and also Mr Thomas.
12. The dyslexia vocational evaluation report, which followed the interim report, was dated 24 October 2011. At that point the Claimant was 52 years of age, his date of birth being 26 February 1959. The reason for the referral recorded that the Claimant had been referred by his employer to assess which dyslexia traits he had and to enable him and BT to understand what tools could assist him. The dyslexia vocational evaluation took place at the Remploy Ltd premises in Southwark on 21 October 2011. A Vinegrad test was administered which involved 20 questions which may be answered yes or no. Certain questions were a particularly good indicator of dyslexia. The Vinegrad assessment indicated that Mr Charles was having dyslexic traits. In addition to that, a cognitive traits test was performed. The Claimant had a percentile score of 12% for spelling/homophone which was in the low average range; 34% for spatial recognition within the average range; 12% for verbal reasoning which was low average; 12% for reading speed which was low average; 45% for directional awareness which was average; 78% for digit span going forwards which was average; 17% for digit span in reverse which was low average; and 34% for comprehension. The percentile scores were not clinical measures but a guideline to aid decisions concerning support. The average percentile rank was 50% with half the population scoring between 25 and 74.
13. The conclusion was that the assessment did show the Claimant positive for some dyslexia traits. Remploy suggested that the method of assessment was accurate although a further assessment by an educational psychologist/specialist teacher could be undertaken. The assessment indicated that the Claimant would benefit from support in spelling and grammar and may need extra time in examination situations. The 17% for the reverse digit span showed a poor short term memory but it appeared to the assessors that he had developed good organisational skills and coping strategies to compensate. Given the low reading speed range, it was strongly recommended that the Claimant be provided with reading materials prior to team meetings, when receiving instructions or prior to training days to be able to read documents and presentations a couple of times to comprehend the required information. Whilst the Claimant had already

developed many coping strategies, the following adjustments might be beneficial:

- 13.1 The Claimant reported that extra time allowance would assist him to conduct his work more effectively; he explained that he felt he needed more time to understand job instructions.
 - 13.2 It was recommended to explore a software installation on his laptop, for example Read and Write. This software reads out written instructions so that they can be heard.
 - 13.3 Using a coloured background; a self-assessment had indicated use of the colour purple in a computer overlay assisted.
 - 13.4 Communicate instructions one at a time and in a quiet location.
 - 13.5 Where possible, the Claimant to be given written information in advance, particularly any materials for instructions and training courses.
 - 13.6 The Claimant would be able to assimilate information better in a quiet environment with no distractions.
 - 13.7 Use of digital recorders, e.g. dictaphone as a memory aid and for retaining important instructions.
 - 13.8 Use of instant spell checker on his computer.
 - 13.9 A workstation assessment to identify suitable software.
 - 13.10 Condition management; it was said that it was important the Claimant continued to manage his dyslexia condition by providing awareness to colleagues and customers when required and additional links to dyslexia information were provided.
14. That information was sent to the Respondent. Many of these recommendations found themselves in the original issues identified at the Preliminary Hearings. We mention above with which of these were actually developed in the case as issues before us.
 15. Mr Thomas acknowledges that he did receive the report, although he was unable to identify the email sending the report. He could identify the email sending the interim report and we have seen that. The Claimant says he did not receive this final report. He did know that he had been subject to a dyslexia assessment and he knew that there would be and were indeed recommendations from it. He accepts that the Read and Write software was put on his computer. If he did not receive the report, which is a surprising contention, he would have been able to obtain a copy if he so chose.

16. We have seen the Claimant's coaching plan for September 2012. All engineers have a coaching plan. This is not performance management; this is day to day management. The Claimant had been given an IPOP target of 85%; that is the efficiency measure referred to above. We see his outcomes in the lead up to September. In the week commencing 16 July 2012 he averaged 15 jobs per day with an IPOP of 75.73%. In the week commencing 23 July 2012 he averaged 15 jobs per day with an IPOP at 76.36%. In the week commencing 30 July 2012 he averaged 16 jobs per day with an IPOP at 77.06%. In the week commencing 6 August 2012, 18 jobs per day with IPOP at 89.3%. The fifth week of the assessment should be recorded as 13 August, it seems that he did 15 jobs per day with IPOP at 69.43% and the sixth week would be the week beginning 20 August 2012, 15 jobs per day with an IPOP at 60.98%. The target being 85%, this caused Mr Thomas concern.
17. On 25 September 2012, still under the coaching plan, the last four weeks reviewed showed the Claimant achieving an average of 13 jobs per day with IPOP of between 52 and 72% and well below the 85% target set. The Claimant said he wanted more time for his jobs as he had dyslexia. In evidence Mr Thomas was unclear whether the 85% target was any adjustment. It does seem given that the IPOP average of 100% is the average achieved by the engineers at the particular exchange, then 85% is some adjustment. Mr Walton informed us, and we accept, that 85% would be the equivalent of allowing an extra hour. Whilst that was said, we have not seen a calculated adjustment reducing an IPOP target to allow the Claimant a calculated greater time. We accept that 85% does generate extra time but we do not see a considered calculation of that anywhere.
18. This coaching plan then was almost one year on from the report. We are told, and we accept, that the Read and Write software was introduced on the computer. In terms of allowing extra time we simply have the 85% target but, as we say, no calculation in terms of time as to how this related to the needs of his dyslexic traits.
19. We see that on 5 October 2012 Mr Thomas sent the Claimant an email relating to 'dyslexia campaign targets' which seemed to have been the subject of an event that the Claimant might attend by way of a conference call. The note is not clear, save that it is clear that Mr Thomas was communicating with the Claimant on the subject of dyslexia.
20. The Respondent has helpfully prepared both a chronology and a table of IPOP targets and performances. To save time in terms of the content of the findings, we simply append at appendix 1 the chronology and at appendix 2 the table of targets and outcomes and confirm that there has been no challenge to these by the Claimant and that they are accordingly true on the balance of probabilities.
21. What is important is to trace references to dyslexia in the contemporary paperwork in the course of both the coaching plans and performance management. On 1 November 2012, there was a meeting between the

Claimant and Mr Thomas to consider the initial formal warning. The Claimant had moved to Ealing from Acton by this time, and in terms of support, numbers had been written on the floor and on the exchange equipment blocks. Mr Thomas expanded on this saying he had written the location of local bar pairs on the floor, as well as marked exchange equipment blocks and ISDN locations on the equipment side of the frame, as the Claimant had requested help to find terminations. Mr Thomas had also put ISDN information on the wall opposite the Claimant's desk so that the Claimant could have easy access to the information required. At that time, the Claimant had achieved 14 jobs per day, some two below target and around 70% on IPOP, below the then 80% target set. There was reference by the Claimant to taking longer on the jobs because he was checking and re-checking.

22. Whilst dyslexia here is not expressly referred to, taking extra time is. At the same meeting, the Claimant raised issues of stress, as to which Mr Thomas said he would look at this in the process of coaching. We see from HR notes that in October and November 2012 Mr Thomas was in close contact with HR on the subject of what appropriate adjustment should be for dyslexia. For example, there is reference on 13 November 2012 to discussion as to what font size to provide information to the Claimant concerning his performance improvement plan.
23. We do not however seem to have reference in the paperwork to a meeting between Mr Thomas, HR and the Claimant with specific reference to the Remploy recommendations and agreeing a way forward. Mr Thomas' attempt - and to his credit he identified the problem in the first place - in terms of making adjustments for the dyslexia, which condition seems to be accepted by HR and Mr Thomas in the HR notes, were not as direct as might have been helpful.
24. Mr Knight became the Claimant's line manager in 2013. He took the Claimant out of performance management with the consequence that we have no data for 2013. We can only assume that the Claimant was performing satisfactorily. All engineers have a coaching plan and we see that the coaching plan in December 2013 had an IPOP target of 90%. The performance improvement plan indeed was closed by Mr Knight on 19 December 2013.
25. So, whilst dyslexia, or at least dyslexic traits, was at the forefront of Mr Thomas' concerns and subsequent management, under Mr Knight in 2013 we have no mention of it.
26. The HR notes that we have seen suggest that problems with the knee were leading to absence in that year. The Claimant was off in connection with his knee between 22 February 2013 and 28 June 2013. There was a home visit by Mr Knight on 21 June 2013 and a phased return to work plan was agreed with effect from 25 June 2013.

27. There was a referral to occupational health in December 2014 which the Claimant told us he understood was to do predominantly with the knee.
28. There was a meeting to consider an initial formal warning on 3 June 2014. The last 13 weeks performance data were considered. It is standard within the Respondent that performance is considered over a 13-week period in the process of day to day management and coaching. The team target in terms of IPOP had been 108% but the Claimant was given 87% which was thought to be achievable. The Claimant, however, had not been hitting that target. The rationale for the decision to give him a warning on 12 June 2014 states that the Claimant had agreed to a 90% IPOP target but had only delivered 85.1%. His tests on completion target, which is the communication of the outcome of the work upon completion, was 90% but the Claimant had been achieving 84.5%. Two tasks had failed to meet quality standards: one task had a loose jump on a block that may have caused a short-circuit. The second was checked one day after it was completed and the insulation on the jumper wire was damaged and the copper core was exposed. An initial formal performance warning was given.
29. The occupational health referral resulted in a report dated 15 December 2014. The report was written by Dr Sharon East-Miles, a consultant occupational health physician working for Health Management Limited. The background to the referral was described as being that the Claimant had been failing to meet targets and had mentioned that he struggled to achieve them because of his illness. He had suffered from knee problems for some time and was absent last year for a knee operation but instead had a steroid injection. The referral also stated that the Claimant got tired towards the end of the day and he suffered from dyslexia but it is unclear how much that affects him in his role. The employer would like an assessment of the impact of his illness on his performance.
30. The Claimant told Dr East-Miles that he had suffered from a painful swelling of the knee for a year and after attending hospital it was confirmed that he had torn the right meniscus, or cartilage, in his knee. The hospital told him that they would not operate but when his symptoms persisted his GP gave him a steroid injection. This reduced the swelling and he got relief for about three months. The steroid injection had been given seven months previously. However, the knee had started to swell and was painful again. The pain was not long lasting. He has not been back to the GP since the injection but he had a physiotherapist who gave him a 6-week course of therapy and strengthening exercises to do.
31. The Claimant also stated that he had a test for dyslexia and software was ordered which helps him with reading. His dyslexia affects his spelling and his ability to recognise numbers but he did not feel that that was a particular problem at the time.
32. The bulk of the referral was to do with the knee and the report is consistent with that. Dr East-Miles expressed her opinion on dyslexia as follows: the dyslexia did not appear to be an issue for his work at present. Accordingly,

the Respondent was not being told that dyslexia was a relevant matter at this point. Neither the Claimant, it seems, nor the consultant occupational health physician was making anything of it.

33. There was a meeting to consider a final formal warning on 10 February 2015 between Mr Knight, the Claimant and his CWU representative. He was delivering IPOP of 76% as against the target of 90%. The IPOP target had then been reduced to 85% so as to discount any support he had received from Nigel Silkstone, a fellow engineer. The results in respect of tests on completion were above target. He had one attributable repeat report. He had three attributable early life failures. His quality checks were otherwise defect free.
34. Reference was made to the occupational health report and the fact that dyslexia was stated not to have a major impact on its ability to deliver efficient performance. There was discussion at the meeting that the Claimant had always had an issue with the size of the frame at Ealing and would benefit from a move to a smaller frame nearer to where he lived. This was put forward as a solution to the knee problem. The union representative said that the Claimant would need a couple of weeks to acclimatise himself at any new site before being performance managed as adjustment to the new site would be needed because of the dyslexia problem. That was the extent of reference to dyslexia as requiring any sort of adjustment in this meeting.
35. There was an appeal against the formal performance warning. The appeal was rejected by Michael Steer on 11 March 2015. Again, there was reference to the OH report. The Claimant said he attended an OHS referral because of the knee and bladder issue. The OH report had stated that this would affect his performance if required to work at lower levels and if squatting, it may take longer to complete work. That was all in connection with the knee. The Claimant also confirmed that he was dyslexic but this did not affect his work as he was supported with software to help him in his daily duties. So that was the position expressly adopted by the Claimant.
36. There was a performance document relating to a formal Performance Improvement Plan ('PIP') we have seen. This was for the period 19 March 2015 to 1 April 2015. The improvement actions were to deliver a minimum of 85% IPOP over a two week plan. The target was reduced from 100% to 85% as the Claimant has a recognised medical condition. It is unclear whether that condition was dyslexia or knee.
37. There is no further reference to dyslexia that we can see, substantial or otherwise, in the remaining performance management process including dismissal and the appeal.
38. Mr Walton dismissed the Claimant in the Claimant's absence. The Claimant was signed off with stress. The Claimant asked that Mr Walton make his decision in the Claimant's absence. This he did in an email dated 29 July 2015 and no criticism can be made of Mr Walton proceeding in the

Claimant's absence. Prior to the dismissal the Claimant's lay representative under the title of Direct Legal Services had corresponded with the Respondent but had not raised the issue of dyslexia. The only explanation for that can be that the Claimant did not raise it with him. As we have observed above, the issue did not come into this case until an amendment after the initial claim form.

39. There were other complaints about the Claimant's performance. Complaints about the Claimant's performance in this case are not restricted to efficiency speed measures. There are also complaints about the quality of the work. There are references to early life failure. An early life failure is a number which describes how many jobs completed by an engineer later failed for some reason. These can be attributable and non-attributable to the engineer. Attributable means that the early life failure was caused by something the engineer did or did not do. Non-attributable means it was not the fault of the engineer. If an engineer seemed to have frequent attributable early life failures, it would be a concern of quality performance. Similarly, in respect of repeat reports. Early life failure was in 28 days of an initial installation. Repeat reports appear to be the need to repeat work outside an initial 28 day period. Attributable repeat reports, we are told, ought to be zero or at least infrequent. Section 4 of Mr Walton's rationale deals with the performance record. At the initial formal warning stage the Claimant agreed to a 90% IPOP target but only delivered 85.1% and this meant he had not delivered the levels of completed tasks the business expects. The agreed target of tests on completion was 90% and the Claimant delivered 84.5% which meant that he had closed tasks without a test result as agreed between the Respondent and the communication providers. During this period, the Claimant also had two tasks that were checked that failed to meet the quality standards. One task had a loose jump on a block that may have caused a short circuit causing another customer to be taken out of service. The second was checked one day after it was completed, and the insulation on the jump wire was damaged and the copper core was exposed.
40. At the final formal warning stage during his formal PIP the Claimant exceeded the IPOP target agreed in the PIP targets but failed to maintain these in the following coaching plan. His performance improvement plan delivered 90.07% IPOP weekly average and in the following coaching plan it dropped to 76.03% against a target of 85%. The Claimant informed Mr Walton that during his PIP he did receive help from Mr Silkstone who undertook co-op tasks on his behalf which accidentally inflated his IPOP performance.
41. Non-attributable early life failures were a target in his PIP and he met this target. In the follow up coaching plan, analysis showed three ELFs were attributable to him after analysis. These failures, said Mr Walton, were a cost to the business and caused dissatisfaction to customers and communication providers.

42. Non-attributable repeat reports were a target the Claimant delivered in his PIP but in the following coaching plan one was attributable. This failure, explained Mr Walton, represents a cost to the business and causes dissatisfaction from customers and communication providers.
43. The fact that the Claimant did not complete all of his allocated work every day had generated a high level of end of day further tasks. Those had to be re-allocated late in the day and sometimes generated failures as resource was not always available to complete the tasks within the agreed timeframes.
44. Mr Walton dealt with some of the matters that had been raised in the course of the performance management on the Claimant's behalf but none of these related to dyslexia. They also were not developed by Mr Solanke in the course of the hearing before us. So, for example, Mr Walton rejected the suggestion that there had been no step by step goal plan which included steps required to improve performance or a realistic timeframe to achieve the improvements. On the contrary, he found that those things were provided. He also found that there were resources available to develop the improvements. The Claimant had had coaching from Mr Maggi. The line manager was also available should the Claimant have needed help. The amount of work available was there to ensure targets could be achieved. In terms of health there was an up to date OHS report and it is said that the target was reduced accordingly in view of the OHS report. This suggests possibly that reduction from 100% to 85% was more to do with the knee than the dyslexia, although we cannot be sure of that.
45. Mr Walton decided to terminate on the grounds of inefficiency and arising from unsatisfactory performance and quality.
46. We have seen from the HR notes that on 29 September 2015 HR record visiting the Claimant the day before with his dismissal letter. HR explained to him about the rationale for the decision and how it was constructed but they did not go through it as the decision was eight pages long and as HR record it "with Michael's dyslexia it would be difficult for him to fully understand it on a single read-through".
47. That is the only reference to dyslexia around the dismissal process.
48. The appeal was heard by Mr Andy Parham, who is the general manager for UK South. The Claimant did participate in the appeal hearing, which took place on 11 November 2015 and there were grounds of appeal, which we have seen. There is no reference in the appeal grounds to dyslexia. The Claimant did argue that there had been no adjustments made for his knee problem. He argued that the impact on his knee was not to do with the productivity, but the amount of distance he had to work and the long drive to work. The appeal hearing was recorded and we have the detailed minutes of it. We accept from Mr Parham that the issue of dyslexia was not raised before him. He, as with Mr Walton, had sight of the occupational health

report dated 15 December 2014, saying that dyslexia was not a problem. The appeal was rejected.

49. The heads of appeal dealt with by Mr Parham were that the coaching plans did not include how performance could be improved; that feedback on coaching visits was not provided to the Claimant; that the support offered by Mr Silkstone was not appropriate; that task time for Ealing was not given; that there had been no target adjustment made for the knee issue before the occupational health report; that acclimatisation at Cricklewood was compromised due to time out for meetings; that quality issues were not documented. Mr Parham dealt with each of those in turn. Of course, he did not deal with the issue of dyslexia: it was not raised.
50. The Claimant had also raised the matter that his representative, who was a friend of Ronnie Knight, had spent 30 minutes chatting socially before a formal warning meeting. The representative was a qualified CWU representative. It was agreed that it was not good practice for the representative to have a 30-minute chat with Ronnie Knight before the hearing, but his conclusion was that this was not material in any sense to the way in which the Claimant had been managed. That was a conclusion open to Mr Parham to take.
51. As to the coaching plans: Mr Parham looked into the coaching plans both formal and informal. He could see clear evidence of coaching plans constructed over the period that provided actions and how the Claimant could achieve them. Examples of "how" were given. Feedback furthermore had been given to him on coaching visits. It was correct that Mr Silkstone had worked with the Claimant on occasions, there had been a direction that if an engineer was free, that support should be given to a colleague. None of that altered the fact that over the longer period of assessment, Mr Silkstone had not been implicated in any performance figures relating to the Claimant. Mr Parham concluded that the Claimant was shown how he could see his task times in Ealing in the IPOP page. The data was there for the Claimant to see if he wanted. In terms of a target adjustment made for the new issue, Mr Parham seems to have assumed that the reduction to 85% was to do with the knee. As we have already observed, no where did it say, at least from 2014 onwards, that it was to do with dyslexia. In terms of acclimatisation at Cricklewood, the Claimant was given 8.5 days in total of acclimatisation time with the new frame in Cricklewood. Given that he had worked as a frame engineer for ten years, it was Mr Parham's conclusion that 8.5 days was a reasonable amount of time. In terms of the documentation on quality issues, the checks were recorded on the FPQ system and feedback was given. They were also recorded on his coaching plan.
52. Mr Parham came to the conclusion that the original decision to terminate the Claimant's employment was the correct decision. In his view, the evidence clearly suggested that despite constant support and help, the Claimant had failed to maintain a satisfactory level of performance. Coaching support was offered and delivered, as well as support from his line manager with clear

instructions on what and how was needed to deliver the performance required.

53. After the claim to the Employment Tribunal had been issued, and the matter of disability discrimination amended into the claim, the Claimant unilaterally obtained a further report in respect of dyslexia. This was not managed by the Tribunal. It was not, for example, the result of a jointly instructed letter of instruction. The Respondent however, has not objected to the inclusion of the report and accordingly we have read it. We read it of course, bearing in mind that it was not present to inform anyone over the relevant time.
54. The report was prepared by Linda Kennedy, who is a specialist teacher holding an approved qualification. The report is dated 26 July 2017. The Claimant was given a diagnostic assessment. He was asked to complete a range of standardised assessments to measure his performance and identify areas of strength and weakness in reading, spelling and underlying ability. All assessments were carried out in a quiet room. A test to determine word reading efficiency found the Claimant to be in the bottom 1 percentile for sight word reading and word reading efficiency and in the 3rd percentile for phonemic decoding. Phonemic decoding requires a candidate to read a number of non-words that can be accurately decoded in 45 seconds, which is designed apparently to assess the individual's ability to use their phonemic awareness to decode. For spelling, he was in the 34th percentile. He was given a wide range intelligence test to test underlying ability for verbal analogies, vocabulary and sum. His performance was described as borderline for verbal analogies, low average for vocabulary and borderline for sum. The percentile ranks were respectively 3, 16 and 5. He performed better in another vocabulary test: 84% for matrices, 83% for diamonds and 88% for sum. For a digits forward test, he was in the 37th percentile, letters forward 25th percentile, digits backwards 50th percentile, letters backward 9th, manual imitation 16, composite, memory and concentration in the lowest percentile; but above average with 91% for visual selective reminding.
55. Ms Kennedy's conclusion was that there is evidence that the Claimant had specific learning difficulties, although he scores in the average range for reading. There was evidence with difficulty with auditory processing, auditory work in memory and the speed of processing, as well as visual processing. His speed and fluency did not reflect his underlying ability and contributed to his slower pace of work. Poor scores for fluency and retrieval and the auditory working memory being in the low average range, all indicated dyslexia-type difficulties. An additional time allowance should be offered for exams, a dictaphone would help with accuracy and memory, learning to touch type would maximise efficiency at work.
56. Again, this report is of limited value in the chronology of matters, as it was not available to the Claimant or manager at the time. However, there are elements of it which resonate with the original Remploi report.

Discussion and Conclusions

Disability

57. Was the Claimant a disabled person? There is evidence of a mental impairment in the form of dyslexic traits. In this regard, we think it most reliable to look at the Remploy testing back in October 2011. The Claimant was in the 12th percentile for spelling/homophone, the 12th percentile for verbal reasoning, the 12th percentile for reading speed and 17th percentile for reverse digits. Those measurements were all described as low average. Whilst he had other readings in the average range, the concentration of low average range readings justified a finding at the time of dyslexic traits. For the avoidance of doubt, we do not distinguish between a finding of dyslexic traits and dyslexic condition; it seems that the language of those looking at the issue of dyslexia is to express them in terms of dyslexic traits. We find that on the balance of probabilities, the Claimant shows he had, indeed has, dyslexia.
58. The next question then is whether he shows a more than trivial (which is the meaning of substantial) interference with normal day to day activities. Following Paterson v Metropolitan Police Commissioner, we accept that normal day to day activities include normal work activities and processing cables and cable numbers would amount to normal work activities for the Claimant. The question, then, is was there a substantial (more than trivial) long term adverse effect on his ability to carry out such normal day to day activities. We have taken into account the Claimant's disability impact statement; of course, we remind ourselves that this was completed when a Claimant knows there is going to be an Employment Tribunal determination on whether he is a disabled person and the timing will present a temptation to emphasise all that might be favourable to him. On balance, we accept from him, that he struggled to complete his work in the times allocated by reason of an impaired ability mentally to process information. There is a considerable body of evidence that he would struggle on a sustained basis to hit IPOP targets given. He was never given an IPOP target of 100%, which was the average, which seems of itself to acknowledge that there was difficulty in him hitting the average.
59. On balance, then, we think the Claimant does demonstrate he was a disabled person.
60. Furthermore, the Respondent knew or ought to have known that. Both as to the fact of the dyslexia and the disadvantage of the Claimant needing more time to process information. Mr Thomas suspected it. The Remploy reports confirmed it. HR was fully aware. We now have to determine whether the disability discrimination causes of action relied upon were made out.

Discrimination arising from disability

61. In terms of section 15 discrimination arising from disability: the dyslexia did not explain the non-time related performance issues. So, for example, the criticisms of quality that the Respondent had in terms of the defective connections in terms of soldering and the like are not explained by dyslexia. The early life failures and the repeat requests similarly are not explained by dyslexia. The failure to achieve IPOP might be, at least in part. In so far as failure to achieve IPOP targets is concerned, then on the balance of probability we are of the view that this did arise from his disability.
62. The real question for us is whether the Respondent can justify its targets as a proportionate means of achieving a legitimate aim. Plainly regulating output of performance of the workforce is a legitimate aim, even with disabled workers. The question is whether it is proportionate in the Claimant's case to have the IPOP targets set. We have no doubt that it is proportionate to have quality related targets, which as we say do not impact on the dyslexia.
63. We note in particular that from 2014 onwards, the Claimant himself was not saying that his dyslexia was proving an obstacle to hitting the IPOP targets. We note that Mr Walton and Mr Parham had before them the 2014 occupational health report, which expressly said that dyslexia was not impacting on performance. We note this even though we the Tribunal think it likely that dyslexia may have played a role. The point is however that the Claimant was not saying that. In that scenario, having an 85% target, in our judgment was proportionate. We note Mr Walton's evidence that if you take off the 15%, that amounts to giving the Claimant an extra hour per day. On the evidence we have, the adjusted target was achievable. It was proportionate. Sustained failure to hit targets, speed and quality, led to the Claimant's dismissal. Dismissal was the logical, ultimate outcome of the performance management in this case. The Respondent justifies it because (a) the Claimant was not saying dyslexia needed to be taken into account; (b) the 15% adjustment representing an extra hour a day was sufficient to accommodate any disadvantage (about which the Claimant was silent).
64. Accordingly if there was discrimination arising from disability, as we have found there likely was, it was in this case justified.

Reasonable adjustments

65. Turning to the reasonable adjustments claim, this has been imperfectly set up by the Claimant and his representative in the list of issues. The PCP was not to require the Claimant to perform at the same level as his non-disabled colleagues. Any adjustment, in terms of efficiency from 100%, meant that

that was not the case, 100% being the average performance. There was a PCP to perform at an adjusted level, which varied from 90% to 80%, but in the main was 85% in terms of IPOP.

66. That was not a PCP which applied to comparable non-disabled people putting the Claimant at a substantial disadvantage. To our collective mind it itself amounted to an achievable adjustment. The extra hour that Mr Walton mentioned, as confirmed by Mr Parham, ought to have been adequate. Extra time was allowed to conduct work effectively whether that was intentionally to accommodate dyslexia as it might have been in 2011/12 or whether it simply facilitated extra time as it did from 2014 onwards.
67. We cannot ignore the fact that from 2014 onwards, the Claimant was not suggesting that his dyslexia was preventing him from achieving this target.
68. The Claimant was not subject to a substantial disadvantage in terms of any position on upgrading of laptops. His failure to hit targets in terms of quality and output was not in any way undermined by any failure to update his laptop with reasonable promptness.
69. The disability passport might have been a good idea, but we note the primary responsibility is on the Claimant to register a disability passport on the Respondent's intranet. We know that the Claimant did not regard himself as disabled by reason of dyslexia in 2014 and 2015, because he never mentioned it as an issue. That best explains why no disability passport was filled in.

Unfair dismissal

70. The Respondent does establish the potentially fair reason of capability. The lack of capability was manifested in two ways. Unsatisfactory performance in terms of output, even after adjustment, but also importantly in terms of quality. This was demonstrated by the ELFs and the repeat returns amongst other matters.
71. Procedurally there was a long and careful procedure followed by the Respondent in terms of performance managing the Claimant. The appended chronology and target history show this. Both in terms of informal management, including coaching plans, and also in terms of formal management, the problems were made clear to the Claimant. He was given opportunity to address those performance concerns and regrettably he was not able to sustain satisfactory performance over the relevant periods. There were periods when he performed satisfactorily, but not on a sustained basis.
72. Capability is the correct concept here, there is no question of misconduct or anything like it for which the Claimant could be or should have been

punished. Dismissal was an option open to the Respondent at the conclusion of the long process.

73. The decision to dismiss was a reasonable one in all the circumstances of the case. For the reason shown by the Respondent of lack of capability.

Employment Judge Smail

Date: ...10 October 2017.....

Sent to the parties on:

.....
For the Tribunal Office

Appendix 1

CHRONOLOGY

Date	Event	Page no.
14 Mar 2005	C begins employment with R	188
04 Oct 2010	Coaching plan – 13 weeks – Ken Thomas	211
13 Dec 2010	Coaching plan – 13 weeks – Ken Thomas	212
13 Apr 2011	Enable referral – Ken Thomas	214
6 Jun 2011	Enable Interim Report – Ken Thomas	213-223
24 Oct 2011	Remploy Dyslexia Evaluation Report – Ken Thomas	224-235
16 July 2012	Coaching plan – 6 weeks – Ken Thomas	236 & 245
6 Sept 2012	Coaching plan – 6 weeks – Ken Thomas	237-244
12 Nov 2012	Initial Formal Warning – Ken Thomas	268-274 & 283-288
12 Nov 2012	Performance Improvement Plan – Ken Thomas	276-279
22 Nov 2012	Coaching visit – S Nagi	290-294
Dec 2012	Ronnie Knight becomes C's manager	N/A
19 Dec 2012	Performance Improvement Plan closed – Ronnie Knight	295
16 Dec 2013	Coaching plan – 6 weeks – Ronnie Knight	311 & 314- 322
12 Jun 2014	Initial Formal Warning – Ronnie Knight	331-336
19 Jun 2014	Performance Improvement Plan – Ronnie Knight	339-345
21 Aug 2014	Performance Improvement Plan closed – Ronnie Knight	346
11 Sept 2014	Coaching plan – 6 weeks – Ronnie Knight	349-356
8 Dec 2014	Coaching visit – S Nagi	357-358
15 Dec 2014	OHS report – Ronnie Knight	359-361
25 Jan 2015	13 week performance review – Ronnie Knight	362
27 Feb 2015	Final Formal Warning – Ronnie Knight	363-375
19 Mar 2015	Performance Improvement Plan – 3 weeks - Ronnie Knight	381-389

26 Mar 2015	Final Formal Warning Appeal refused – Michael Steer	377-380
24 Apr 2015	Performance Case Review – Ronnie Knight	390-391
6 May 2015	R invites C to “resolution meeting” – Mark John	392-393
7 May 2015	C commences sickness absence (stress)	395
21 May 2015	R postpones resolution meeting at C’s request – Mark John	394
22 July 2015	R invites C to rescheduled resolution meeting – Ross Walton	418-419
29 July 2015	C informs R of non-attendance at resolution meeting	421
28 Sept 2015	R dismisses C with 10 weeks’ notice – Ross Walton	424-435
29 Sept 2015	C appeals dismissal	436
5 Oct 2015	R invites C to appeal meeting – Andy Parham	437
23 Oct 2015	R postpones appeal meeting at C’s request – Andy Parham	443
3 Nov 2015	C submits grounds of appeal	445-448
11 Nov 2015	Appeal hearing – Andy Parham	450-485
1 Dec 2015	Dismissal appeal refused – Andy Parham	488-500
7 Dec 2015	C’s employment terminates	508

Appendix 2

TABLE OF iPOP TARGETS AND REVIEWS

No.	Date of review	Target	Achieved	PASS/FAIL	Page ref
1	16/07/2012	85%	75.73%	FAIL	245
2	23/07/2012	85%	76.07%	FAIL	245
3	30/07/2012	85%	91.11%	PASS	245
4	06/08/2012	85%	77.06%	FAIL	245
5	13/08/2012	85%	69.43%	FAIL	245
6	20/08/2012	85%	60.98%	FAIL	245
7	10/09/2012	80%	73%	FAIL	258
8	19/09/2012	80%	61%	FAIL	258
9	24/09/2012	80%	66%	FAIL	255
10	10/10/2012	80%	68%	FAIL	256
11	15/10/2012	80%	81.93%	PASS	275
12	22/10/2012	80%	79.35%	FAIL	275
13	29/10/2012	80%	78.57%	FAIL	275
14	05/11/2012	80%	73.27%	FAIL	275
15	18/03/2014 (8 week review)	90%	85.1%	FAIL	322
16	19/06/2014	85%	99%	PASS	342
17	26/06/2014	85%	81.37%	FAIL	342
18	03/07/2014	85%	87.59%	PASS	343
19	10/07/2014	85%	84.26%	FAIL	343
20	17/07/2014	85%	88.02%	PASS	344
21	24/07/2014	85%	95.83%	PASS	344
22	13/08/2014 (6 week review)	85%	90.07%	PASS	345
23	17/09/2014	90% (85%)*	72.45%	FAIL	351
24	24/09/2014	90% (85%)*	71.74%	FAIL	351
25	01/10/2014	90% (85%)*	69.19%	FAIL	351
26	08/10/2014	90% (85%)*	84.91%	FAIL	353
27	15/10/2014	90% (85%)*	65.71%	FAIL	353
28	22/10/2014	90% (85%)*	84.38%	FAIL	354
29	25/11/2014 (6 week review)	85%	76.03%	FAIL	354
30	29/10/2014	85%	83.61%	FAIL	362
31	05/11/2014	85%	84.54%	FAIL	362
32	12/11/2014	85%	79.85%	FAIL	362
33	19/11/2014	85%	77.84%	FAIL	362
34	26/11/2014	85%	78.61%	FAIL	362
35	03/12/2014	85%	83.85%	FAIL	362
36	10/12/2014	85%	90%	PASS	362
37	17/12/2014	85%	79.43%	FAIL	362
38	24/12/2014	85%	80.06%	FAIL	362
39	07/01/2015	85%	81.48%	FAIL	362
40	14/01/2015	85%	83.98%	FAIL	362
41	21/01/2015	85%	88.15%	PASS	362
42	28/01/2015	85%	76.57%	FAIL	362
43	30/03/2015	85%	82.07%	FAIL	384
44	09/04/2015	85%	82.40%	FAIL	386
45	15/04/2015	85%	89.44%	PASS	387
46	24/04/2015 (3 week review)	85%	84.64%	FAIL	391

*Target retrospectively reduced from 90% to 85% (see page 355 of the bundle)