Case Number: 1806293/2017

1805354/2018

EMPLOYMENT TRIBUNALS

Claimant:	**Mr J Bulloss**		
Respondent:	**Shelter, the National Campaign for Homeless People Limited**		
Heard at:	**Sheffield**	**On:**	**2, 3, 4, 5, 8 and 10 October 2018** **12 November 2018** **In Chambers**
Before:	**Employment Judge Little**		
Members:	**Mr M D Firkin** **Mr A J Senior**		

Representation

Claimant:	In person (accompanied by PSU volunteers)
Respondent:	Ms K Walmsley (DWF LLP)

RESERVED JUDGMENT

1. The complaint of failure to make reasonable adjustments succeeds.
2. The complaint of discrimination arising from disability succeeds.
3. The Tribunal has jurisdiction to hear the complaints of harassment related to disability, direct disability discrimination and those aspects of the victimisation complaint which, in each case, were presented out of time, because it is just and equitable to extend time.
4. The complaint of harassment succeeds.
5. The complaint of direct discrimination succeeds.
6. The complaint of victimisation fails and is dismissed.
7. The complaint of unfair dismissal succeeds.
8. By consent Case Number 1805354/18 is dismissed on withdrawal.

REASONS

1. **The complaints**

In the claim which Mr Bulloss presented to the Tribunal on 16 November 2017 the complaints were:-

- Disability discrimination – failure to make reasonable adjustments.
- Discrimination arising from disability.
- Victimisation.
- Unfair dismissal (constructive).

At a preliminary hearing on 11 May 2018 Employment Judge Lancaster permitted the claimant to amend that claim so as to add various alleged detriments in respect of the existing victimisation complaint and to add the following two new complaints:-

- Harassment related to disability.
- Direct disability discrimination.

2. **Claim Number 1805354/2018 and the amendment**

When the claimant provided further and better particulars of his first claim (in response to an order made by Employment Judge Drake at an earlier preliminary hearing for case management) the claimant also made what amounted to an application to amend. The further and better particulars and the amendment are set out in a pleading which the claimant filed on 16 February 2018. The new complaints arose from various internal emails that the claimant obtained copies of under a subject access request. He had received those documents on 5 February 2018 – some time after the employment had terminated as the effective date of termination was 23 November 2017.

At the same time as he made the amendment application the claimant also presented his second claim where the details of claim replicated the proposed amendment. It was noted by Employment Judge Lancaster at the May 2018 preliminary hearing that having granted the amendment, the second claim was withdrawn and that would be formally dismissed in due course at the final hearing.

3. **The claimant's disabled status**

The impairment which within these proceedings the claimant contends render him a person with a disability within the meaning of the Equality Act 2010 is dyslexia. He begins his details of complaint thus –

"The claimant suffers from dyslexia".

Ultimately, but only after the claimant had been required to provide an impact statement and some medical evidence, the respondent conceded that the claimant had at all material times been a person with a disability. That concession was made in its solicitors letter of 9 March 2018. However the respondent continued to dispute that it had knowledge or should have been expected to have knowledge of that disability at the material time.

Within the claimant's witness statement and during his cross-examination, the claimant makes various references to a further impairment which he says he has, attention deficit hyper activity disorder (ADHD). That was particularly when the claimant ascribed impulsivity as a reason for various actions on his part. As we have pointed out to the claimant, ADHD has not been put forward by him as an additional disability and obviously the respondent has not conceded that that is a disability for the purposes of these proceedings.

4. **The relevant issues**

It appeared that these had not been formally defined earlier although the respondent had produced a draft list for an earlier preliminary hearing. It was agreed with the parties on the first day of our hearing that the following appeared to be the relevant issues.

Reasonable adjustments

4.1. Did the respondent apply the following provisions, criteria or practices ? -

4.1.1. That Telephone and Online Advice Service (TOAS) advisors would, when undertaking web chat work, type at speed and with a high level of accuracy for spelling and grammar.

4.1.2. That those existing TOAS advisors who had been chosen to exclusively undertake web chat work had to pass a 4 (or 5) week trial during which their written work/chats would be scrutinised and subjected to a quality chat.

4.1.3. That if TOAS advisors did not meet the required web chat standards they would be re-deployed to give advice over the telephone (telephone/voice) on shifts.

4.2. If there were one or more of those PCPs, did they put the claimant at a substantial disadvantage in comparison with persons who are not disabled.

4.3. Did the respondent know, or should it reasonably be expected to have known, that the claimant was disabled and/or that he was likely to be placed at the disadvantage?

4.4. If so, did the respondent take such steps as it was reasonable to have to take to avoid the disadvantage?

In paragraph 7 of the claimant's further and better particulars document of 16 February 2018 he sets out eight adjustments which he contends would have been reasonable adjustments.

Discrimination arising from disability – Equality Act 2010 section 15

4.5. Did the respondent treat the claimant unfavourably by examining his web chat work during the trial period on a daily basis and increasing the monitoring of him during that period?

4.6. If so, did the need to scrutinise his work in this way arise in consequence of his disability?

4.7. If so, can the respondent show that that treatment was a proportionate means of achieving a legitimate aim?

We should add that the latter issue was not specifically addressed in the respondent's grounds of resistance or it's amended grounds of resistance.

When we asked Ms Walmsley about this at the beginning of the hearing she said that the legitimate aim was to provide an adequate service of advice to clients (visitors) via online web chat.

Victimisation

4.8. Did the claimant do one or more of the following protected acts? -

4.8.1. At a return to work meeting on 31 July 2017 with his line manager Ms Jackson, the claimant referring to his belief he may suffer from dyslexia which was negatively impacting upon his work performance.

4.8.2. Circa 22 or 23 August 2017 the claimant saying something similar to Ms Jackson and that the respondent should implement reasonable adjustments.

4.8.3. During a meeting with Andrea Deakin on 4 October 2017, the claimant saying that he believed the respondent should have done more to support him in the web chat role by making reasonable adjustments.

4.8.4. On 9 October 2017 (page 227) and 11 October 2017 (page 228) the claimant sending the respondent emails in which he challenged the decision to re-deploy him to telephone work and challenged whether the respondent's proposed approach to reasonable adjustments fitted "with the law".

4.9. If one or more of these protected acts was done, was the claimant subjected to the following detriments because of those protected acts?

4.9.1. Failing the web chat trial.

4.9.2. Alleged deliberate and wilful disregard of his disability during the web chat trial period.

4.9.3. Criticising the claimant's performance during that trial.

4.9.4. Unreasonable scrutiny during the trial.

4.9.5. Refusing to support the claimant in any web chat activities on his return to work and returning the claimant to telephone work.

4.9.6. What the claimant contends were adverse or derogatory comments made about him in various internal emails which he saw on 5 February 2018 as the result of a subject access request.

Harassment

4.10. Did the respondent engage in unwanted conduct related to the claimant's disability when the five emails in respect of which the claimant complains (the result of the SAR request) were written?

4.11. If so, did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

4.12. If the conduct had that effect, was it reasonable for it to have that effect having regard to the claimant's perception and the other circumstances of the case?

Direct disability discrimination

4.13. Was the claimant treated less favourably when, after the event he discovered the content of the SAR emails?

4.14. If so was that because of his disability?

Knowledge of disability

4.15. At the material time did the respondent know or should it reasonably be expected to have known that the claimant was a person with a disability?

Time issues

4.16. As the complaints of harassment, direct discrimination and some aspects of the victimisation complaint appear to have been presented out of the normal three month time limit, would it be just and equitable to extend time so as to give the Tribunal jurisdiction?

Constructive unfair dismissal

4.17. Did the respondent commit a fundamental breach of the contract of employment?

The claimant contends that the implied term of trust and confidence was breached because of the respondent's treatment of him in the latter part of the time he undertook the telephone advice role, during the trial period for the web chat role and in the circumstances of the respondent's decision to return the claimant to the telephone role where he had begun to experience problems with shift work, having failed him on the web chat trial.

4.18. Whilst we were told that the respondent is not arguing that the claimant affirmed or forgave any breach which may have occurred, it is disputing that the claimant's resignation was because of any breach. Although it is not pleaded, Ms Walmsley told us that the respondent's case was that the real reason for the claimant resigning was to undertake a law diploma course at a university.

4.19. If the claimant was constructively dismissed was that dismissal fair?

Whilst the grounds of resistance refer to some other substantial reason the precise reason within that category is not pleaded. Ms Walmsley on our enquiry told us that it was the claimant's extended period of absence and his failure to engage with the respondent.

The Tribunal thought that it would assist the parties and in particular the claimant if it provided to the parties a copy of the Judge's manuscript note of the issues as set out above.

5. **Evidence**

The claimant has given evidence and Dr P F Tyerman has given evidence on his behalf. Dr Tyerman is the father of the claimant's partner. His evidence deals in particular with a facet of the case whereby the respondent queried the claimant's GP (not Dr Tyerman and a doctor from a practice which Dr Tyerman has no connection with) had described the claimant's condition rendering him unfit for work as dyslexia.

The respondent's evidence has been given by Ms T Jackson, web chat team leader and the claimant's line manager for some of the material time; Ms A Deakin, operations manager of the respondent's national helpline; Ms M Primarolo, HR advisor and Mr S Moore, head of telephone and online services.

6. **Documents**

The Tribunal have had a three volume trial bundle running to some 1154 pages. However the key documents are in the first volume. The second and third volumes comprise the complete transcripts of the claimant's web chats during the trial period together with the complete library of "shortcuts" a tool for use when conducting web chats.

7. **The Tribunal's finding of fact**

7.1. The claimant's employment commenced on 1 September 2014. The claimant's job role was trainee telephone advisor. It is obvious that the claimant in due course ceased to be a trainee, but he continued to be a telephone advisor.

7.2. The telephone advisor role involved some shift work because it was necessary to have the phones covered during the early evening (up to 8pm) and on Saturdays from 9am to 5pm. There was a rota. Some weeks the claimant would be working core hours, either 8.30am or 9am to either 4.30pm or 5pm. However in another week the claimant might be working a shift which ran 12 midday to 8pm. The claimant received an out of hours allowance of £1578 per annum.

7.3. The claimant was issued with a revised statement of the principle terms and conditions of his employment in April or May 2016 (see pages 91 to 94 in the bundle). The claimant was now described as a telephone advice service advisor.

7.4. On 24 August 2016 Ms Deakin wrote to the advisors (see page 129). She informed those individuals that their job title had changed. The change was to telephone and online advice services advisor (TOAS). Ms Deakin explained that the reason for this was so that the respondent could recruit advisors who were able to work on web chat as well as on the telephone. She explained that the change of job title did not mean that the existing advisors would automatically be expected to work on web chat although it was anticipated that there would be an increase in need for online advice and expressions of interest would be sought for that.

7.5. The new job description (prepared essentially it appears for the purposes of external recruitment) is at pages 95 to 99. The main objective of the role is described as delivery of a professional impartial pragmatic and outcome focused telephone and online advice service to shelter clients. One of the key responsibilities for all telephone advisors was described as "answer enquiries by telephone and online chat".

7.6. On 10 April 2017 Ms Deakin sent an email. It was addressed to a substantial number of advisors but for some unexplained reason not the claimant. The claimant does not complain about this omission. The email seeks expressions of interest to work on web chat. The email went on to explain that telephone (voice) and web chat advice were roles which had different skill sets and rather than undertake a mix the respondent intended to keep the roles separate.

7.7. On 10 May 2017 the claimant had a routine review meeting with his then line manager Mr McNallen-Jones. A note of this appears on page 130. Mr McNallen-Jones records that the claimant told him that things were getting hard on shifts and that the claimant may have to look to go on to core hours. The main reason for this was given in the note as that the claimant's partner had sleeping issues with the result that when on shifts the claimant hardly saw his

partner. Mr McNallen-Jones went on to show the claimant the form he would need to complete for a formal flexible working request but the claimant said that he preferred to speak to someone, presumably Mr McNallen-Jones, first before filling in the forms. The claimant was told that in any event the chances of such a request succeeding might be pretty low because the respondent struggled for late cover. Mr McNallen-Jones said that he would send an email to Ms Deakin to seek her views.

7.8. Mr McNallen-Jones duly sent that email (page 131) and on 12 May 2017 (page 131) Ms Deakin replied. She said that unfortunately she could not agree any flexible working requests that involved reducing or removing out of hours work. Resource for out of hours work was at minimum level and the respondent had frequently had to offer overtime in order to keep the service open. She had declined a flexible working request that day for the same reason.

7.9. On 31 May 2017 the claimant sent an email to Ms Jackson and Ms Deakin (page 132a). The claimant had just found out that the web chat team were looking to expand and he wondered if he could be added to the list of those interested. The claimant acknowledged that he had not expressed interest previously but went on to write that his circumstances had changed somewhat. He did not explain how.

7.10. On 9 June 2017 a further review meeting was conducted between the claimant and Mr McNallen-Jones. A note of that meeting is at page 134. The claimant said that he was not himself at the moment and there was a lot going on. However the claimant said that it was not work related as such but he had come to the conclusion that he needed to come off a shift pattern because that was starting to affect him. He said that when you are on lates you don't go out and just become a hermit for a week living on your own. Mr McNallen-Jones confirmed that the claimant's name had been put on the list of those interested in doing web chat. In the web chat role there was no shift work. It was core hours only.

7.11. On 13 June 2017 Ms Deakin sent an email to the nine employees who had expressed an interest in the web chat role (p. 135). Five were to be chosen and the method adopted by the respondent was to draw names out of a bag. The claimant was one of the five successful candidates. Ms Deakin's email went on to inform those successful candidates that they would be given a four week trial period. She went on to add -

"We know that the skills for web chat are very different to the skills needed for voice, and web chat might not be suitable for everyone. At the end of the four week period we will confirm these advisors' place on the web chat team. If anyone does move back to voice, we will replace them with advisors who expressed their interest but weren't chosen this time".

7.12. Training was provided to the five successful candidates on the new system including 'shortcuts'. The shortcuts are an online library of pre-prepared paragraphs giving advice on a huge range of topics (there are some 1300 shortcuts) which a client might raise during a web chat. The appropriate shortcut would be located by entering command words or doing a search. Sometimes the shortcut is a request for further information from the client. The respondent's rationale for having this system of shortcuts was that, as the name suggests, it would minimise the need for the web chat advisor to "free type" as the

respondent puts it and secondly it would achieve consistency of advice/response.

7.13. The claimant's training began in the week commencing 3 July 2017. However in the period 7 to 11 July the claimant was away from work because of pre-arranged annual leave.

7.14. The successful candidates were notified by Ms Deakin's email of 3 July 2017 (page 137) that what was described as a four week trial period would commence on 17 July 2017. As the claimant has pointed out, in fact the trial period was virtually five weeks because the respondent used a calendar month rather than a four week period. Ms Deakin's email went on to reiterate that the respondent knew that the skills for web chat were very different to the skills needed for voice and so web chat might not be suitable for everyone. The candidates were given notice that if they failed the trial period they would be returning to 'voice' including shift work, as before.

7.15. During his time on web chat the claimant's line manager became Ms Jackson as she was the web chat team leader.

7.16. During the trial period Ms Jackson and a colleague selected multiple chats at random and fed those back informally to the individual advisors during one to one meetings. That was in addition to the formal monitoring of four chats each per advisor per week.

7.17. On Ms Jackson reviewing the chats produced by the claimant she noticed that there were often spelling and grammatical errors and that the claimant had been free typing rather than using the appropriate shortcuts. She also observed what she thought were unnecessary and prolonged sentences. On 5 July 2017 she had provided the claimant with some online grammar exercises for him to complete. As we have mentioned, it appears we have transcripts of every web chat the claimant undertook during the training and trial period. Within volume one we also have a sample of those transcripts which flag up the perceived errors (see pages 164 to 178). One of the comments, presumably entered by Ms Jackson is:

"James has been asked numerous times not to use "in terms of " repeatedly throughout the chat because the sentence following this is usually unnecessary. He is free typing and unnecessarily editing an existing shortcut, where if he had used it stand alone it would have still made sense and there would have been no errors". (See page 164).

Another comment is:

"Sentence is confusing and unnecessary as there is a shortcut". (Page 168).

There are also references to the claimant using the wrong pronoun or switching the pronoun mid-sentence.

7.18. Despite these concerns about spelling, grammar and failure to use shortcuts properly, the respondent acknowledges that the substance of the advice which the claimant gave was good and that was reflected in a positive feedback from his clients. There is no record of any client (or 'visitor' as they are referred to in the transcripts) complaining about the standard of English language used. Nevertheless the respondent says that there was a concern that advice was not being given in the clearest terms and that poor spelling and

grammar would reflect adversley on the respondent's standards overall as a large national charity.

7.19. On 24 July 2017 the claimant came into work but then reported that he did not feel well as he had a headache, stomach ache and was having hot flushes. The claimant acknowledges (paragraph 18 of his witness statement) that it was not until later that he learnt from his GP that these were anxiety related signs and symptoms. In any event we have not seen any report from the claimant's GP to that effect. Ms Jackson gave the claimant permission to go home. 24 July was a Monday and the claimant was then absent for the remainder of the week.

7.20. Accordingly he returned to work on Monday 31 July and a return to work meeting was conducted by Ms Jackson. Her note of that meeting is on page 142 and the salient part reads as follows:

"James is now back at work and feels much better. He feels fit enough to be back at work. This is not a recurring issue [although what the issue is is not described] and there is nothing that I or Shelter can do to prevent recurrence of the issue. He tells me that learning web chat as a new skill has taken it out of him and he has felt a little run down. He is not used to writing so much. He tells me that he suspects that he may be dyslexic and is considering having a test".

7.21. In an email which Ms Jackson sent to her line manager Ms Deakin the same day (page 144). She records further information which the claimant gave her in addition to the reference to feeling a bit run down she records that the claimant said that the web chat work had made him very tired. She goes on to say to Ms Deakin that if the claimant would rather return to voice that would be permissible. However the claimant had said that he did not want to do that because he found voice exhausting as he had to work shifts and had to work out different transport times for different days. That stressed him out, whereas working on web chat meant that he could set off at the same time each day and get the same bus. Ms Jackson goes on:

"He didn't disclose to me any condition that would make having to have uniformity and structure in his day (sic)".

The claimant had of course referred to the possibility of dyslexia and the claimant's case is that one of the adverse effects of that condition is confusion if there is not a regular routine and a difficulty in assessing time needed for travel on public transport.

7.22. The claimant's account of the return to work meeting on 31 July 2017 is contained in paragraph 20 of his witness statement. He says that he disclosed that he struggled with proof reading chats for correct spelling, grammar and other errors and that he believed that that was due to dyslexia. Further he says that those difficulties resulted in his fatigue and therefore his absence from work in the preceding week. The claimant goes on to say that Ms Jackson informed him that he would need to organise a dyslexia assessment. The claimant comments that he did not think that that was correct, by which he means he felt that should have been the obligation of the employer. However he acknowledges that he did not express that view to Ms Jackson at that time.

7.23. Although it is not something that appears to have been discussed with the claimant during the return to work meeting, when Ms Jackson wrote her email of the same date to Ms Deakin she posed the question:

"What should we do about his QSMs (Quality Standards and Monitoring) in terms of marking and the possibility of dyslexia. She (sic) we carry on as we were until we get any confirmation of a diagnosis?"

7.24. Ms Deakin's response to Ms Jackson is also at page 144 and reads as follows:

"Absolutely we should carry on as we were. If he has got dyslexia he might not be the best person for web chat regardless of the shift issue. Even if he had a dyslexia diagnosis we'd probably put him back on a voice team if it meant that his written work wasn't to the required standard. The fact that shifts stress him out is no reason to keep him on web chat if he isn't suitable. He knew the job involved shifts when he applied".

7.25. The claimant contends that what he said to Ms Jackson during the course of the 31 July return to work meeting constituted a protected act (that is as defined by the Equality Act 2010 section 27(2)) for the purposes of his victimisation complaint. Further the email exchange between Ms Jackson and Ms Deakin on 31 July 2017 is one of the documents which the claimant received as a result of his SAR and so it is, within his amended claim, a detriment, less favourable treatment and/or harassment he alleges.

7.26. It is common ground that it was at the 31 July meeting that the claimant first mentioned the possibility of him having dyslexia.

7.27. On 18 August 2017 there was a routine review meeting conducted by Ms Jackson and notes of that meeting are at pages 147 to 148 in the bundle. In that note Ms Jackson records that the claimant said that he was fine and had nothing specific to discuss. He had no health and safety or work related stress issues. He felt a lot more comfortable on chats since he came back from leave and felt he was making less errors and was more comfortable with the shortcuts. Ms Jackson told him that the trial period had now ended and Ms Jackson and a colleague had the day prior discussed everyone's progress. In relation to the claimant she said that there was no real issue with the quality of the advice given but that there were a number of issues with spelling, grammar and the general writing on most of the chats. In anticipation of this meeting Ms Jackson had pulled off the claimant's 10 latest chats which she wished to discuss with him. In seven of those there were what she described as numerous errors and she told the claimant that the respondent could not continue with that level of issues on chats because it did not look good for Shelter and the service. Whilst Ms Jackson said that she could have ended the trial that day, she was going to give the claimant a further week to improve. Before us the claimant contends that giving him another week was not so much an extension to the trial period as merely providing him with part of the time that he missed because of annual leave and then sick leave.

7.28. The note goes on to record that the claimant admitted that he had an issue with his written English. Ms Jackson records that he told her that he may be dyslexic but had not been tested for it. However of course Ms Jackson would already know that because of the return to work meeting. When considering the 10 transcripts during the course of that meeting Ms Jackson referred to a number of recurring issues such as the failure to use full stops, using semi colons instead of apostrophes and mixing up of tenses and gender. She also said that there were long sentences which rambled and were 'riddle like' in their composition.

Ms Jackson commented that luckily, none of the clients had picked up on that and the claimant had received good feedback scores from the clients.

Ms Jackson went on to set out arrangements for the additional trial period. She would sit in with the claimant the following Monday morning to give him some side by side coaching. She would also feedback on five other chats conducted on the Monday, other than the ones that she had coached with the claimant. The claimant suggested that it would help him if he could sit with another web chat advisor and Ms Jackson said that he could try and book some development time. However she felt that that should be no more than half a day because the claimant needed to demonstrate that chats conducted on his own had improved. Finally Ms Jackson said that if the claimant was struggling for a word and she was at her nearby desk he could ask her for help. The claimant said that it would be sad for him if he was not able to stay on web chat because he really wanted to be able to do it.

In cross-examination Ms Jackson said that the things that she had suggested during the course of this meeting were reasonable adjustments. However in paragraph 42 of Ms Jackson's witness statement she says:

"At this point (August 2017) the claimant had not been diagnosed with dyslexia and the duty to provide adjustments in our opinion did not arise".

That view of the extent of the respondent's obligation is one shared by the relevant witnesses before us and in particular it's HR advisor Ms Primarolo.

7.29. On Monday 21 August 2017 the claimant received the one to one coaching which Ms Jackson had promised. As this was not actually a meeting, Ms Jackson did not prepare any notes, but on 23 August 2017 she did send an email to Ms Primarolo (page 185) in which she said that the claimant had improved on the Monday after she had sat with him doing coaching for an hour. However transcripts that she had looked at for Tuesday 22 August had multiple errors. We will return to that email and Ms Primarolo's response.

The claimant contends (paragraph 43 of his witness statement) that during this coaching session he pointed out that he was certain that he was dyslexic and he reported that he had spent the weekend prior to that working out what additional techniques might assist him and what reasonable adjustments might help. That included a request that he be allowed to use Microsoft Word to structure his replies. The claimant contends that spell checking and grammar checks were not available on the web chat software which the respondent used (Snapengage). The claimant also says that during the course of the coaching session Ms Jackson said that that request could not be granted because it would take too long and lengthen the time taken to complete a chat thus ruining it's flow. The claimant contends that what he said to Ms Jackson during this coaching session was a further protected act.

7.30. On Tuesday 22 August 2017, having arrived at work, the claimant sent an email to Ms Jackson at 9.15 (see page 181) in which he explained that he had requested leave because he was feeling really fatigued. He went on to say that he thought that that was related to his dyslexia and if he stayed on at work he would only make mistakes. He wished to continue under the trial period as extended.

7.31. Ms Jackson acknowledged that email and said 'No problem', although it would be reducing the amount of time he had to improve his chats. She

reminded him that if he felt the extension of the trial was too much he could request going back to the phone sooner rather than later. The claimant responded to that email by his of the same date and timed at 9.41 in which he said that his difficulty had been fatigue rather than stress. He was frustrated this absence would reduce the time for him to prove his capability but he went on to say that they both knew he was capable of the job. He added "even more so when adjustments are made for my dyslexia".

The claimant went on to write:

"I'm particularly concerned that you may feel my difficulties/dyslexia will limit my job opportunities and would like to discuss this with you at some point, as due to changes in my life I am not able to return to shift work".

In cross-examination the claimant confirmed that his reference to job opportunities meant opportunities within the respondent.

7.32 In response to this Ms Jackson asked the claimant to confirm whether he now had a diagnosis of dyslexia. She also requested more information as to why he felt he would not be able to return to shift work. The claimant responded (page 182) saying that he was still hoping to obtain a formal diagnosis but because of financial constraints and having only recently realised the seriousness of his difficulties that might take a little time. He reiterated that he believed that the dyslexia issues were seriously affecting his ability to perform on web chat. He then went on to explain what the difficulties were in relation to returning to shift work. Shift work imposed a strain on personal and social relationships and he did not want to sacrifice those relationships anymore. The specific change which he had alluded to was that his granddad had recently fallen ill and the claimant was now responsible for providing support to him, including shopping which could only be done during reasonable hours and with public transport only. He could not see how he could support his grandfather if he returned to shift work.

7.33 Ms Jackson responded (page 183). She said that until there was a dyslexia report which explained the nature and seriousness of the claimant's condition it might be that there will be no alternative but to transfer the claimant back to the phones. They would have regard to any report provided which would permit them to assess whether they could offer any adjustments to accommodate that diagnosis. With regard to the return to shift work and the issue regarding the claimant's grandfather, the claimant was told that he would need to make a flexible working request.

7.34 The claimant then sent a further email at 15.24 (page 184). He included the following:

"I'm not sure if you are aware of the guidance around disabilities such as dyslexia but from my understanding you are able to put some adjustments in place prior to a diagnosis. It (the guidance) suggests that this is because a disability is assumed to be true until disproved, and some simple adjustments may resolve all the issues. I appreciate that this might be an unusual situation but wondered whether there was any possibility of this option, rather than transferring my (sic) back to the phones and then back to chats following my report".

In any event the claimant thought that he had made significant improvements on web chats and so hoped that he might pass the trial.

7.35 We now return to the email exchange on the same date (23 August 2017) between Ms Jackson and Ms Primarolo. In an email timed at 16.19 Ms Jackson asked Ms Primarolo if she knew of any guidance around dyslexia. Ms Primarolo replied saying that she did not have too much information about dyslexia but she could have a look, although it wouldn't be until the next week. She went on to write:

"However it is strange it is only coming to light now he does not want to go back to shift working".

When the claimant read that passage in this email exchange (another fruit of the SAR) he took exception to it and he now contends that it was less favourable treatment and additional detriment and/or harassment.

7.36 Returning to Ms Jackson's email of 23 August timed at 16.36 (page 185) having noted that there had been multiple errors in the claimant's work on the Tuesday she said that she had been going to reply to the claimant saying that she was taking advice about pre-diagnosis adjustments but even if there were adjustments that could be made it might still not be feasible to make adjustments on web chat. That was because the written content was seen by clients and that was something "which we can't allow with multiple errors".

In the meantime Ms Primarolo had sent to Ms Jackson a link to the British Dyslexia Association website and in particular the section which dealt with reasonable adjustments. This six page document is now in the bundle at pages 281(a) to 281(f). It was introduced by the claimant halfway through day five.

7.37 On 29 August 2017 a meeting took place between Ms Jackson and Ms Deakin to consider the outcome of the claimant's trial period. The decision was taken that the trial period had failed and so the claimant would be returned to phones. There are no minutes of this meeting.

7.38 On the same day Ms Jackson informed the claimant that he would be going back on the phones the following day. Ms Jackson reported the conversation that she had had with the claimant to Ms Deakin in her email of 29 August (page 194). She said that having told the claimant he did not say much but was expecting to go back on the phones the next day. Ms Deakin's evidence is that it had ultimately been her decision that the claimant would be moved back to the telephone advice role (see paragraph 21 of her witness statement).

7.39 At 12.23 on 29 August the claimant sent an email to the respondent's resource team (HR) asking what notice period he needed to give and also enquiring whether there was any leave available that day to start as soon as possible. That was because he had just had some news which meant that he was not fit or well enough to be at work at present – in other words the return to the phones (see page 195). The claimant was advised that the notice period he had to give if he wished to leave his job would be one month and there was not any annual leave available.

7.40 The claimant left work at approximately 11am on 29 August saying that he was poorly and he did not attend work the following day. The claimant subsequently provided the respondent with a fit note dated 30 August 2017 which certified the claimant as not being fit for work because of anxiety states. He was signed off to the 6 September 2017 (see page 198). In the event the claimant's sickness absence continued up to 25 September 2017 and during that absence other fit notes were provided. In a fit note issued on 26 September

2017 the claimant's GP certified that he might be fit for work if that was a phased return with amended duties. The condition on that fit note (page 215) is described as dyslexia/stress/anxiety.

7.41 On the claimant's return to work on 25 September 2017 a return to work meeting was conducted by Claire Marlow as Ms Jackson was not in the office at that time. Ms Marlow's note of that meeting appears at pages 218a to 281c. Ms Marlow recorded the reason for the claimant's absence as anxiety and stress. She believed that had arisen due to a recent move to the web chat team where the claimant became aware that he might be affected by dyslexia. She noted that the claimant felt that that was not dealt with in a supportive way and that had made his symptoms worse. The claimant had told Ms Marlow that he had now had a test done privately which did indicate dyslexia. The claimant wanted to return, but on a phased basis. It is noted that the claimant also said that he would need support via Access to Work and adjustments and that was something that he would be discussing with his union representative. He intended to talk to his manager Ms Jackson about that when he had looked into it more.

7.42 After a brief period with a phased return, by Wednesday 4 October 2017 the claimant was not feeling well and thought that the phased return might not be working. He informed Ms Jackson of this state of affairs in an email of that date timed at 9.36 (see page 220). In the event the claimant could not obtain a doctor's appointment that day and so remained at work.

7.43 On the same day, 4 October, Ms Deakin came to the claimant's desk and asked him if he had five minutes to have a chat. They went to a part of the open plan office where there was some comfortable seating. There are no formal minutes of this important meeting, but at 10.14 that day, following the meeting, the claimant sent an email to Ms Deakin asking if she could confirm in writing what had been said. He said that because of his dyslexia he struggled to remember things in the short-term. Ms Deakin replied (see page 222) and sought to summarise the discussion. She had during the meeting explained that the considerations leading to the decision to return the claimant to the voice team had been:-

- The claimant's existing job description (TOAS advisor) allowed the respondent to move advisors between helpline voice and helpline web chat and that could be done at their discretion without any change to terms and conditions of employment.
- At the beginning of the trial period all those taking part had been told that if they did not suit the skill set they would be returned to voice and to that effect 30 days' notice of potential change back to shift work had been given.
- It had been identified throughout the trial that there were a number of recurring issues with the claimant's chats which had been fed back to him and were detailed in what was described as his review document (that is presumably the note of the 18 August meeting).
- The quality of the claimant's chats have been unacceptable despite what was described as an extra week of extended support.

- The claimant's performance on voice fully met all of his objectives and any disability had not affected his performance on the phones.
- Management would always consider reasonable adjustments when a disability was recognised but owing to the nature of the TOAS role which covered voice and web chat they reserved the right to move advisors between teams dependant on business need.

7.44 The claimant responded to this email (page 223). He wanted to check that the reasonable adjustment made due to his dyslexia was to be back on voice not on web chat. He also sought confirmation that there was no longer an option for him to return to web chat because of his dyslexia. He also enquired who Ms Deakin had sought advice from in relation to reasonable adjustments in the workplace, especially following his diagnosis.

7.45 Ms Jackson and Ms Deakin discussed this response from the claimant in their emails of October 5 which appear on page 224. Ms Deakin indicated to Ms Jackson that as far as she was aware "we haven't discussed reasonable adjustment with James so have not sought advice". Ms Jackson informed Ms Deakin that she had spoken to Marie (Primarolo) about reasonable adjustments before the Claimant went back (presumably to work after sickness absence) and "she said we would need a diagnosis to know the nature of his dyslexia and what adjustments were necessary. She also agreed that a reasonable adjustment would be for him to go back to voice". However in an email of 11 October which Ms Deakin sent to Ms Primarolo she reported that the claimant's return to voice had *not* been done as a reasonable adjustment, although she had in an email which we will deal with below informed the claimant that a return to voice *could* be a reasonable adjustment but that was not the reason for the move back to voice in his case.

7.46 After the email exchange between Ms Jackson and Ms Deakin on 5 October, Ms Deakin sent an email to the claimant and a copy appears on page 225. Ms Deakin acknowledged that during his time on web chat he had told his manager that he was feeling fatigued and mentally and physically drained by the job. As of the return to work meeting on 17 July and the immediate aftermath, the respondent had not made any reasonable adjustments to account for the claimant's dyslexia because there was no diagnosis. She acknowledged that the claimant had pointed out that a diagnosis was not necessary before reasonable adjustments could be made. However advice had been sought from HR and from the British Dyslexia Associations website, both of which had stated the importance of a specialist report before reasonable adjustments are considered because there were many different forms of dyslexia. HR had also advised that because of the nature of the TOAS role it was possible to transfer people between departments without giving a reason. Transfer of someone to a work stream that suited their skills better could however be a reasonable adjustment. The claimant was informed that if there were any reasonable adjustments necessary now that he was back on voice he should let them know. However the option to move back to web chat was not something that the respondent would consider. That was because there was an alternative suitable option which was already within the claimant's job description.

7.47 Apparently unbeknown to the claimant, Ms Deakin had had a meeting with the claimant's union's steward Ms E Ward on 2 October 2017. It seems that it was Ms Ward who had asked Ms Deakin to meet with the claimant informally,

as would subsequently take place on 4 October. It was in those circumstances that Ms Deakin reported back to Ms Ward in an email of 4 October 2017 (see page 219). She noted having spoken to the claimant he was still not happy and believed that the respondent could have done more to support him in web chat. She went on to write:

"I didn't say this to him but from a business point of view why would we invest money for reasonable adjustments that are not necessary because his dyslexia does not affect his ability to perform effectively on the phones".

This is a further email which the claimant would ultimately see as a result of his SAR. Again it is now said to be less favourable treatment, a detriment and/or harassment.

7.48 On 9 October 2017 the claimant sent an email to Human Resources to whom he had forwarded Ms Deakin's email of 5 October. The claimant commented that he did not believe that what he had been advised fitted with the law. He asked what advice had been given (page 227). Ms Primarolo replied to that email (also 227) saying that the information provided had been correct. Once the claimant provided the dyslexia report his manager would be able to look at whether they could make any reasonable adjustments in the voice role. The claimant could not move back to web chat. It was important for him to let his manager have the report.

7.49 The claimant replied to Ms Primarolo's email by his of 11 October (page 228). He said that that was not his understanding of the law and he enquired how he should challenge that and would it be a grievance. He referred to the Equality Act which he believed stated that only a court could decide what was a reasonable adjustment. The claimant says that this a further protected act.

Ms Primarolo replied to him saying that without a diagnosis it would be difficult to consider any adjustments. She enquired whether the claimant actually had a report.

7.50 The claimant replied to Ms Primarolo by an email timed at 12.13 (page 229). The claimant said that he was confused by the information he had received. He had been told verbally that the adjustment would be to be placed back on voice. However he had then been told by both Ms Primarolo and Ms Deakin that no adjustments had been considered because the respondent was awaiting the claimant's assessment/report. He could only conclude that moving him back to voice was not considered to be reasonable adjustment. He complained that during a significant part of the trial period he had been assessed at a time when there was a suspicion of dyslexia. He believed that he should not have been assessed without adjustments being in place.

7.51 Ms Deakin sought further advice from Ms Primarolo in her email of 11 October 2017 (page 231). We have briefly referred to this above. Ms Deakin went on to point out that if they were to make reasonable adjustments for the claimant that would be in relation to his voice work. Although Ms Deakin was presumably seeking advice from Ms Primarolo, Ms Deakin appears to be advising Ms Primarolo that "in terms of reasonable adjustments for someone with a recognised disability, if one task is deemed to be more suitable than another because of the disability then this would be the adjustment we could make".

She went on to write:

"James' medical report/diagnosis has not been offered to us nor have we requested it" [in fact the respondent had been requesting it]. She went on "we haven't needed to request it because there are no issues with his performance on voice. If James feels he needs reasonable adjustments, we will consider these on receipt of his medical report/diagnosis report based on the current tasks he is performing which in his case is delivery of advice by voice".

She suggested that the claimant be asked which bit of law he didn't think had been followed because Ms Deakin believed that she was acting within the law. She concluded her email by asking whether she was right in thinking that provided there was a task covered by the job description that someone could perform to the required standard, despite having a disability it was not necessary to consider other tasks to suit preferences.

In what is probably a response to this email, Ms Primarolo wrote to Ms Deakin on 13 October (pages 233 to 234). From direct contact that she had had with the claimant she noted that he still thought that he should be on web chat and she noted that the claimant's medical report (see below) was suggesting software. Ms Primarolo assumed that the respondent's systems would not be able to take that on, but she said they should wait to see what Access to Work would say once the claimant came back to work. She went out to point out that it was only reasonable adjustments and so when or if Access to Work came in it would be necessary to ensure that a manager was present.

7.52 In the meantime in a second email of 11 October 2017 to Ms Primarolo (see page 232) the claimant provided what he described as a dyslexia report to her.

7.53 That report is authored by Justine Webb of the Sheffield Dyslexia Centre. It is described as a psychological report. It appears at pages 200 to 212 in the bundle. The first four pages are a summary of findings and that report is signed and dated 22 September 2017 by Ms Webb at page 203. It was these pages which the claimant provided to the respondent. There is a second report or possibly a second part of the same report which is described as a confidential psychological report for the claimant which runs for a further nine pages and this was not disclosed.

7.54 Ms Webb concluded that the claimant did have dyslexia. Her recommendations included one that the claimant might benefit from specialist software and a period of work based coaching via Access to Work. He would also be likely to benefit from extra time for any reading and writing tasks and from having a colleague to proof-read work. It would be helpful to confirm verbal instructions in writing. It was suggested that the claimant would also benefit from using a pocket sized electronic spellchecker or a spell check facility on a PC or some specialist spell checking software.

7.55 Mr Moore, from whom we have heard and who was Ms Deakin's line manager had sight of this report as did Ms Deakin and Ms Primarolo. On 13 October 2017 (page 233) Ms Deakin sent an email to Ms Primarolo asking her to make it clear that if the claimant did contact Access to Work they would be assessing him on his voice role. She went on:

"Having this report shouldn't mean we have to move him back to web chat tasks when there are other tasks involving minimal writing that he can do that fall within

his job description. In fact it seems to me that the report demonstrates that a role with minimum writing, ie voice, is more suitable for him".

7.56 Mr Moore's comments, having read the report, were contained in his email of 11 October. He believed that the report suggested that a reasonable adjustment would be to continue to deploy the claimant to voice in order to minimise his exposure to written communications with the clients (however the report does not suggest that in fact). Mr Moore believed that a reasonable adjustment would be to ensure that exposure to written work was minimised whether possible. Accordingly the claimant's deployment should be to voice related advice activities which fell within the remit of his role profile. We should add that Mr Moore had written to Ms Deakin on 11 October in response to Ms Deakin having indicated to him that he might have to hear a grievance (eg the reference the claimant had made to a grievance in an earlier email). Mr Moore's response (page 235) included the following:

"I struggle to see how, given the lack of quality displayed by him on webchat, a reasonable adjustment involving a move back to a function that he struggles to deliver against can support".

This was a further document which the claimant saw as a result of his SAR and accordingly it is now part of his amended claim. We should add that because of the timing of this email it must have been sent prior to the time when the claimant had sent the report to the respondent on 11 October.

7.57 On 16 October 2017 Ms Primarolo wrote to the claimant (see page 239). She noted that the claimant was not happy about returning to the voice team but she understood that there had been significant issues with the claimant's performance during what was described as an extended trial period on web chat. The decision to place the claimant back on to the voice team was not made as a reasonable adjustment. It had been explained in advance that he would return to the voice team if he did not meet the required web chat standards and that is what had happened. If the claimant required reasonable adjustments then that could be considered on his return to work but that would be in relation to the voice team work. It was reiterated that advisors could be moved between voice and web chat tasks to suit the resource needs according to advisor ability to perform the tasks and regardless of the advisor preference. People's preferences were only recognised as a courtesy rather than a necessity.

7.58 On 13 October 2017 the claimant had sought a reference from the respondent for his application to undertake a law diploma course. The respondent's evidence is that they assumed that that was a full time course, but the claimant's evidence to us was that in fact it was a part time course and he intended to continue working whilst undertaking the course.

7.59 On 24 October 2017 the claimant tendered his resignation. That was contained in an email of that date addressed to Ms Primarolo and to Mr McNallen-Jones. A copy is at page 242. The claimant gave the reason for his resignation as:

"… because I do not believe the organisation dealt with serious issues affecting me relating to discrimination appropriately, legally or with regard for my well-being. This has meant I feel incapable of working with the individuals who dealt with this and feel I have no option but to leave".

Ms Primarolo formally acknowledged the resignation but made no comment as to the reason expressed by the claimant.

7.60 For reasons which the Tribunal have found hard to understand, the respondent became exercised about the fit note which the claimant submitted on 19 October and therefore a matter of days before his resignation. That fit note is at page 240. It signed the claimant off until 23 November 2017 which would be the expiry of the claimant's notice period. He had given a months notice. The condition referred to in that note is simply 'dyslexia'. Ms Primarolo decided that it would be appropriate to take up this matter with the claimant's GP and accordingly wrote to the practice on 6 November 2017 (page 245). She helpfully provided the doctor with a definition of dyslexia but went on to comment that she was unclear why the doctor had stated that the claimant was unfit to work, because there were no issues with his work. Ms Primarolo sought an explanation as to why the doctor had stated dyslexia as a reason for non-attendance at work. Unsurprisingly the doctor was unwilling to provide this information without written consent from the claimant. In a subsequent telephone conversation between the surgery and Ms Primarolo she informed the practice that the claimant had resigned and that he was pursuing a claim in the Employment Tribunal (see page 248). Noting that the claimant had in fact begun proceedings and would be representing himself Ms Primarolo noted that that would be worse "because they [unrepresented claimants] are given more leeway". It appears that the respondent also considered raising the issue of the dyslexia fit note with the General Medical Councill. The claimant became aware of the 6 November 2017 letter to his GP again as a result of the SAR and it is therefore added to the list of things which in his amended claim he says he was appalled to discover.

7.61 We need to deal with the rather confusing position as to whether or not the respondent's web chat software already had a spell check and grammar check facility. It is the respondent's case that it did and that was via Google Chrome. We note however the comment which Ms Primarolo made to her concern that any additional software might not fit with the respondent's system. The respondent has put into the bundle an example of this spelling check system in operation for a piece of written work (web chat) undertaken by another advisor, Laura. This is at pages 275b and 275c. It shows that where Laura has misspelt or mistyped the word 'generally' the tool has underlined that misspelling. Likewise the word shorthold which presumably the tool believed should be two words.

7.62 In paragraph 35 of his witness statement the claimant suggests that a reasonable adjustment would have been to allow him to use standard features within Microsoft Word, already, he believes freely available on Shelter's computers. In paragraph 46 of his witness statement the claimant notes that in the respondent's grounds of resistance they contend that spelling and grammar check were features of the Snapengage software which he was using. The claimant, who describes himself as very computer literate, says that this is simply not true. He would have noticed the spellchecker and he would have known it existed if anyone had mentioned it to him, which he believes, if it was, they would have done when he requested the use of Word [although we are not entirely sure when he did specifically make that request] - in any event certainly when issues were raised with regard to his spelling. He also points out that Ms Jackson had not referred to that system or tool within Snapengage during

the course of the meetings about the standard of the claimant's work. The claimant had received no training about using the spelling and grammar checker if it existed. The claimant goes on to say that he has subsequently been in touch with Snapengage who have confirmed to him that no spellchecking support is provided within their software. Although we do not have the claimant's enquiry to Snapengage we do have in the bundle Snapengage's response to the claimant which is on page 275a and is dated 10 September 2017. This says that what the claimant is "encountering" is in fact the spell check that is now being incorporated in most internet platforms. The writer confirms that Snapengage does not have a spell check function but most computers and internet functions have this.

8 The parties' submissions

8.35 The claimant's submissions

The claimant's written submissions begin by expressing a concern that whilst the respondent is a charity it should not be treated more leniently for that reason. The claimant goes on to state that his case is a simple one and he then concentrates on the reasonable adjustments aspect of his claim which he summarises as the respondent having a responsibility to fully assess his disability and provide adjustments, yet they did not. The claimant contended that he could have done the role with adjustments but the respondents appeared to want the easier option of moving him on to the 'phones'. That was not the best adjustment. He did not accept that other adjustments would not have been effective.

8.36 The respondent's submissions

Ms Walmsley has prepared very lengthy written submissions (36 pages). In respect of the respondent's knowledge of the claimant's disability it was contended that the earliest date when the respondent knew or should have known about the disability was 11 October 2017 when it received a copy of the claimant's psychological report which contained the diagnosis of dyslexia. It could not have been as early as 31 July 2017 because the claimant himself did not know whether he was dyslexic at that date. At that stage the matter was no more than a suspicion. Ms Walmsley contended that there was no positive onus in law on an employer to implement measures to diagnose an employees' suspected disability. It should be noted that the respondent had consulted the British Dyslexia Association website which indicated that specialist advice was essential to determine the most appropriate adjustments for a particular individual.

In any event the information contained within the psychological report indicated that the claimant's ability was no worse than average for his age range and his impairment was therefore relative to his abilities. We were referred to the case of **Toy v Chief Constable of Leicestershire Police** to support the proposition that an employee's suspicion or strong belief that he was disabled could not amount to constructive knowledge of the employer. Because the claimant was a 32 year old graduate who had been employed for three years without difficulties being raised the respondent was entitled to reasonably believe that the claimant did not have a disability unless there was proper evidence and explanation to the contrary. Ms Walmsley sought to contrast the position in the Tribunal where the claimant had been able to bring the claim and cross-examine respondent witnesses.

In the context of reasonable adjustments itself the submissions go on to refer us to various paragraphs in the EHRC code. With regard to the PCPs which the claimant contended applied in this case, the respondent denied that the first (typing at speed with a high level of accuracy for spelling and grammar) existed. There was no particular requirement to type at speed and the response time to client enquiries was merely within a reasonable period. The respondent denied that there was a requirement that there was no more than one spelling mistake per month. We observe that although the claimant may have made reference to this, that is not the PCP on which he relies, which instead is a high level of accuracy for spelling and grammar.

The respondent also denied that the second PCP (the requirement to pass a four week trial period for web chat work) existed because in fact in the claimant's case the period had been seven weeks overall although five weeks taking into account the claimant's sickness and annual leave absence.

The respondent did accept that the third PCP (re-deploying unsuccessful web chat trial candidates to telephone work) existed.

As to substantial disadvantage, whilst the claimant contended that this was loss of opportunity for career progression and loss of opportunity to potentially improve his written work, the respondent's case was that the web chat format was the same job role as that of the telephone format.

The respondent submitted that in any event any substantial disadvantage was redressed because there was a spell check function within the SnapEngage via Google Chrome. The respondent contended that the claimant had failed to use that function.

In any event the alleged PCPs ceased to apply once the claimant was moved back to phones. In the meantime various adjustments had been made (see paragraph 53 of the submissions). Whilst the claimant had suggested a number of potential reasonable adjustments in his further and better particulars, none other than the spell check software had been requested by the claimant at the material time. In any event without the benefit of the psychological report to assess the claimant's specific detriment and abilities it would not have been possible for the respondent to make any other reasonable adjustments than had been made.

The written submissions go on to deal with the relevant law with regard to discrimination arising in consequence of disability. With regard to the alleged detriment, it was denied that the respondent had examined the claimant's work on a daily basis. Any additional examination of his work was an attempt to support him. If detrimental treatment was found, the respondent contended that that was not in consequence of the claimant's dyslexia. There had always been monthly reviews and any additional reviews were to assist the claimant in improving his written work.

Finally it was contended that there was a legitimate aim – providing housing law advice to lay clients and third parties and that advice needed to be of a certain standard to ensure that the client could properly understand it. In these circumstances the scrutiny of the claimant's work was a proportionate means of achieving that aim.

The written submissions then review the law in relation to victimisation. The respondent denied that the claimant had done any protected acts.

Turning to deal with the time issue (which is relevant to the aspects of the claim which were allowed to be added by amendment) the respondent contended that those complaints were out of time having regard to the date when the various letters or emails were written and which were subsequently provided to the claimant as part of his Subject Access Request. Although the claimant had promptly made his application to amend (and presented his second claim) once in receipt of that material, Ms Walmsley pointed out that the claimant had not made his Subject Access Request until 26 December 2017 (resulting in the material being provided to him on 5 February 2018). The Tribunal had heard no evidence as to why the claimant had waited until 26 December 2017 to make his SAR application. During the course of the Tribunal's chambers meeting we checked our notes and it appeared that this question had never been put to the claimant by Ms Walmsley, or for that matter the Tribunal.

The written submissions then go on to deal with the merits of the amended claim if it is permitted to proceed on the time point.

The submissions then deal with the constructive unfair dismissal complaint, again setting out some law. It was denied that the respondent had fundamentally breached the contract of employment. On page 33 of the submissions there are set out 27 ways in which it is contended the respondent acted reasonably towards the claimant.

Even if there was a fundamental breach, the respondent did not accept that the claimant had resigned in consequence of that. The reason for his resignation was being moved back to shift work, even though the respondent was entitled to do that. In any event the respondent contended that it was likely that the claimant would have resigned in any event so that he could start a law diploma course in January 2018 (however the Tribunal note that the claimant's evidence was that this was a part-time course and that he would have intended to continue working *and* do the course).

If the Tribunal found that the claimant was constructively dismissed the respondent contended that there was a fair reason for that dismissal which was the claimant's conduct in failing to engage with the respondent for the nine reasons set out in page 35 of the written submissions.

In the section headed 'Conclusion' Ms Walmsley explained that the respondent's case was plain. It was unaware of the claimant's dyslexia and/or was unaware of the exact nature and extent of the claimant's dyslexia. Accordingly the duty to make reasonable adjustments did not arise. If any PCPs were found to exist the respondent would say that those were put in place at a time when the claimant himself was unaware of his disability. Substantial disadvantage was denied but if it did exist the respondent was not aware of it. In any event steps had been taken. Ms Walmsley goes on to request the Tribunal to consider the evidence within the bundle at face value without attaching "any hidden meaning or reading into it any secret agendas". We are not entirely sure what this means. The respondent could only consider the information that was put before it at the time and that information was wholly lacking. It was not reasonable to expect the respondent to guess deeper reasons behind the information provided. The claimant's perception of the respondent's actions was not a reasonable one because he asked the Tribunal to view every action, comment and event as motivated by some sort of malice. We should add that we were not sure that that really was the claimant's case.

9 The Tribunal's conclusions

9.35 At the material time did the respondent know or could it reasonably be expected to know that the claimant was disabled?

Knowledge, or what could be described as constructive knowledge, is a necessary pre-requisite for liability in respect of the discrimination complaints Mr Bulloss brings – with the exception of the victimisation complaint. With regard to the reasonable adjustments complaint there is a further element of knowledge required namely that the claimant was likely to be placed at a substantial disadvantage by the PCP. This is a point we will return to when dealing with the merits of that complaint.

The respondent's case is that the earliest date when it knew or ought to have known of the disability was on or about 11 October 2017 when it received a copy of the psychological report completed by Justine Webb which confirmed a diagnosis of dyslexia and gave some explanation of how that condition affected the claimant.

The claimant's case is that the respondent should have realised that the claimant had a disability no later than 31 July 2017 when, in the return to work meeting conducted on that day, the claimant told Ms Jackson that he suspected he might have dyslexia and was considering having a test.

In the case of **Gallop v Newport City Council** [2014] IRLR 211, to which we have been referred, the Court agreed with the joint view of counsel before it that what the employer must be aware of, actually or constructively, are the facts constituting disability as now defined by section 6 of the Equality Act 2010. Those facts are a physical or mental impairment and the substantial and long-term adverse effect which that impairment has on the employees ability to carry out normal day to day activities. It was not necessary for the employer to know that as a matter of law the consequence of such facts being present was that the employee would be a disabled person as defined in the legislation.

We have also directed ourselves to the Equality and Human Rights Commission (EHRC) Code of Practice on Employment (2011). In particular we have considered paragraph 6.19. Whilst we appreciate that this is directed at knowledge in the context of the duty to make reasonable adjustments we consider it something which can inform our approach to the overall question of knowledge in this case. The paragraph reads as follows:

> "*For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must however do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."*

Applying these principles and guidance to the case before us we find that as of 31 July 2017 the respondent was aware that the claimant suspected he might be dyslexic. We consider that this was a sufficient indication to put the respondent on enquiry that the claimant may have a mental impairment. It is to be noted that the claimant reiterated his belief that he may have dyslexia at the review meeting

which took place on 18 August 2017 with Ms Jackson. As to knowledge of substantial and long-term adverse effects on the ability to carry out normal day to day activities, we acknowledge that the respondent did not have before it something akin to an impact statement. However they were obviously aware of the difficulties which the claimant was encountering in producing written work to the standard which the respondent required. Specifically difficulty in spelling, the correct use of grammar and construction/composition. This was obviously the case because of the concerns which the respondent was expressing about the claimant's progress on the web chat role. We find that the respondent's standards in terms of spelling, grammar and so on were not particularly high. It follows that the claimant was not being expected to communicate in written form to any higher standard than would be expected in his everyday life when he would need to communicate with friends or organisations in written form.

We have also taken into account the sentiments expressed by Ms Deakin in her email of 31 July 2017 to Ms Jackson. She was replying to Ms Jackson's enquiry as to whether now there was a possibility of dyslexia, it would be appropriate to carry on with monitoring the claimant's work within the trial period until any confirmation of a diagnosis was provided. Ms Jackson's reply is that "*Absolutely we should carry on as we were. If he has got dyslexia he might not be the best person for web chat … even if he had a dyslexia diagnosis we'd probably put him back on a voice team if it meant that his written work wasn't to the required standard."*

We have also taken into account the approach which this respondent took to it's duty to make reasonable adjustments in an appropriate case. We refer for instance to a comment of Ms Deakin in her email of 5 October 2017 to the claimant (page 225) when she wrote:

> *"At this stage we had not made any reasonable adjustments to account for your dyslexia as we had no diagnosis."*

We will return to this issue, but for present purposes we are satisfied that the respondent was exhibiting both in it's correspondence to the claimant and even more so in it's internal correspondence, a reluctance to accept that reasonable adjustments should be considered which, in our judgment is now reiterated as the respondent tries to shield itself from liability by denial of knowledge. Contrary to the guidance given in the EHRC Code, we find that this employer did not do all that they could be reasonably expected to do to find out whether Mr Bulloss had a disability. Instead they were prepared to wait until the claimant obtained, at not insubstantial financial cost, the psychological report.

It follows that we find the respondent did have constructive knowledge of the claimant's disability as of 31 July 2017.

9.36 <u>Reasonable adjustments – did the respondent have actual or constructive knowledge that the claimant was likely to be placed at a substantial disadvantage by the PCPs?</u>

We appreciate that dealing with this question now pre-supposes that there were PCPs. As will appear below, we find that there were. It is more convenient to deal with this aspect of knowledge at this juncture. For the same reasons that we have set out above we find that the respondent also had this aspect of knowledge as of 31 July 2017.

9.37 Did the respondent have the provisions, criteria or practices (PCPs) which the Claimant alleges ?

We have set out the PCPs which the claimant contends existed in the section above which deals with the issues. The only PCP which the respondent accepts was in place is the third – that if TOAS advisers did not meet the required web chat standards they would be re-deployed to advice over the telephone (voice).

With regard to the first alleged PCP – that TOAS advisers on web chat work would type at speed and with a high level of accuracy for spelling and grammar, the respondent appears to be focusing on the 'speed' issue. They say that there was only a requirement for a response to a visitor's enquiry to be within a reasonable time. With respect we consider that the respondent is taking a rather pedantic view here by focusing on the speed issue as quite clearly there was a requirement for the written advice to be of a good standard in terms of spelling and grammar. Whilst the Judge conducting the case management hearing interpreted what the claimant was contending for as "a high level of accuracy" again we consider that it would be a pedantic and unrealistic approach to find that there was no PCP simply because the requirement may have been that spelling and grammar should be at a reasonably acceptable standard rather than a high level. The claimant for instance was not employed as a journalist or author.

We are surprised that the respondent denies that the second PCP existed – the requirement for web chat trial candidates to pass the trial period of four or five weeks. The approach which Ms Walmsley takes in her written submissions (paragraph 40) is that this PCP was not implemented in the sense that taking into account training work before the trial period itself and the one week extension granted, the claimant actually had seven weeks trial on web chat. Again we consider that this is taking a much too narrow view and is unrealistic. It is clear that the respondent had the provision that there would be a trial period for the new web chat recruits (see Ms Deakin's email to them of 3 July 2017 – page 137). We also bear in mind that the claimant contends that because of his sickness absence and some annual leave, the effect of giving him an 'extension' of one week was really only to restore four actual weeks in the business on trial.

In the circumstances we find that all the web chat candidates were subjected to a trial period of four weeks or thereabouts. If, which is debatable, the claimant had a little longer, that it is immaterial.

It follows that we find that all three PCPs to have been in existence at the material time.

9.38 Did those PCPs put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

We find that they clearly did do so. The claimant's dyslexia meant that he could not produce written work to the standard required by the respondent under the first PCP. That in turn led to the claimant failing the trial period (the second PCP).

We take the view that the third PCP (re-deployment to voice if web chat trial failed) is perhaps more accurately to be regarded as a consequence of the second PCP and the claimant's failure to meet it rather than a PCP in its own right.

We therefore find that the claimant was put at substantial disadvantage and that in those circumstances the duty arose to take such steps as it was reasonable to have to take to avoid the disadvantage.

9.39 Did the respondent discharge that duty?

As we have noted in our findings, there was some confusion both internally and in communications with the claimant as to whether returning him to telephone advice (voice) was a reasonable adjustment or whether there was no need for a reasonable adjustment because the claimant could simply be re-deployed to that other aspect of his overall role. Ultimately it was the latter position which prevailed.

Whilst we accept that the claimant's job description (pages 95 to 99) embraced both telephone advice and web chat advice, that should not mean that a disabled employee who wishes to undertake web chat work rather than telephone work should be denied reasonable adjustments to do the latter and instead, without further consideration, be returned to telephone work. The claimant had valid reasons for wanting to progress to web chat work other than simply the convenience of set hours rather than shifts. He saw web chat based advice as the future and he wanted to progress his career and indeed secure it by acquiring the skills necessary to undertake that type of work work. He wished generally to improve the standard of his written work in a work context. In those circumstances and particularly where it is common ground that the actual housing law advice the claimant gave was very good, the duty to make reasonable adjustments must extend to a specific role within the overall role of advisor. Whilst the employer had a discretion to deploy the claimant where it thought fit, it is clear from the internal correspondence which has now been seen that the respondent wished to avoid its duty by simply returning the claimant to voice work. As Ms Deakin put it in her 4 October 2017 email to the claimant's union representative *"why would we invest money for reasonable adjustments that are not necessary because his dyslexia does not affect his ability to perform effectively on the phones*" (page 219). So too Mr Moore's observation in his email of 11 October 2017 to Ms Deakin:

> *"I struggle to see how, given the lack of quality displayed by him on web chat, a reasonable adjustment involving a move back to a function he struggles to deliver against can support"* (page 235).

We observe that although Mr Moore refers to "lack of quality" that clearly could not be a reference to the actual advice provided, but only to the prose the claimant had used.

We note with concern the cynicism of Ms Primarolo's comment in her email of 23 August 2017 to Ms Jackson (page 185) that it was strange that the claimant's dyslexia was only coming to light now that he did not want to go back to shift working.

We have also noted the respondent's defensive position and indeed we believe erroneous position, that they could not contemplate *any* reasonable adjustments until the claimant provided a diagnosis and report. The respondent's position is expressed in Ms Deakin's email of 5 October 2017 to the claimant (page 225) where she explains to the claimant that at that stage the respondent had not made any reasonable adjustments because there was no diagnosis. She went on to note that the claimant had said that they did not need a diagnosis to make

reasonable adjustments. Ms Deakin goes on to say that the respondent had sought guidance from HR and from the British Dyslexia Association Website. *"Both state the importance of a specialist report before reasonable adjustments are considered as there are many different forms of dyslexia and different ways that these should be dealt with*".

When writing to Ms Primarolo on 11 October 2017 (page 230) Ms Deakin expressed the view that - "*if one task is deemed to be more suitable than another because of the disability then this would be the adjustment we could make".* To the contrary, we find that in an appropriate case adjustments should be made to the aspect of a job which the employee, for good reason, prefers and in respect of which the employer accepts that he has the ability to do.

Further we note that when writing to Ms Deakin on 13 October 2017 (page 233) Mr Moore expressed the view that a reasonable adjustment would be *"to ensure exposure to written work is minimised wherever possible*". That indicates that the respondent was ignoring the opportunity to make reasonable adjustments so that written work – the expression of the advice which the claimant was experienced and qualified to give - could be properly conveyed to the clients/visitors.

Whilst we accept that a medical or occupational health report could suggest reasonable adjustments which had not previously been thought of, or suggest refinements to existing reasonable adjustments and that recourse could be had to organisations such as the British Dyslexia Association, that does not mean that an employer is absolved of the duty to make reasonable adjustments until that specialist information or even a diagnosis is to hand. Instead an employer is required to take on board what the employee himself considers would assist him in the workplace. The approach adopted by this respondent is indicative of a wish to avoid the cost and inconvenience of having to make reasonable adjustments, under the belief that there was an expedient and 'no cost' alternative which was simply returning the claimant to telephone work.

9.40 <u>Was what the claimant proposed by way of adjustments reasonable?</u>

Whilst the respondent, perhaps with the benefit of retrospect, considers that it did make reasonable adjustments (see paragraph 53 of the respondent's written submissions – and this includes extending the trial period and providing side by side coaching) there was no attempt made to address the reasonable adjustments which the claimant was requesting at the time.

The psychological report, which the respondent had a copy of by 11 October 2017 made various recommendations as to how adjustments could be made for the claimant. These included specialist software; a period of work based coaching via Access to Work; a work based consultation; extra time for reading and writing; support with the written aspect of his job, for example having a colleague proof read work; written confirmation of verbal instructions and provision of a quiet place for reading or writing anything that was complex. Reference was also made to such specialist aids as a pocket sized electronic spell checker, spell check facility on a PC or a specialist spell checking software. (See pages 201 to 202). We consider that these were all potentially reasonable adjustments which the respondent should have explored and as indicated earlier we do not consider that the respondent only had to start considering reasonable adjustments when it got to the report.

The claimant has also set out in paragraph 7 of his further and better particulars (filed 16 February 2018) other suggested adjustments.

It is clear however that the respondent was set against even contemplating adjustments for the web chat role on the basis that it considered that it had the easier course of sending the claimant back to telephone advice. It is to be noted that, apparently without any technical enquiries, Ms Primarolo assumed that any additional software was unlikely to work with the respondent system (see p 233-234). A similarly negative approach to reasonable adjustments is indicated in Ms Deakin's email to Ms Primarolo of 13 October 2017 (page 233) where reference is made to the possibility of the claimant contacting Access to Work and if he did they would be assessing the claimant on his voice role. Having the claimant's report, Ms Deakin wrote, should not mean that the respondent had to move him back to web chat roles when there are other tasks he could do which did not involve writing. We note from a further email on the same date which appears at page 238 that there was some anxiety about not describing the voice role as the claimant's substantive role and acknowledgement that his actual substantive role covered both voice and web chat. Ms Primarolo's email also refers to the need to make sure that if there was a visit by Access to Work they should be closely monitored. We infer that this indicates a desire by the respondent to inhibit the role of any such advisor and the effectiveness of adjustments they might suggest.

Our conclusion is that because the respondent adopted the position that being able to return the claimant to voice work absolved it from any duty to make reasonable adjustments, it was in breach of the duty to make reasonable adjustments.

9.41 Discrimination arising from disability

Here the claimant contends that the unfavourable treatment was increased monitoring and examination of his work when undertaking the web chat trial period. This therefore covers similar territory to the reasonable adjustments complaint. We accept that this was unfavourable treatment because no-one would wish their work to come under such scrutiny. Whilst the respondent has open to it the potential defence that this treatment was a proportionate means of achieving a legitimate aim, we conclude that that is a defence which cannot succeed in circumstances where we have found there to be a failure to make reasonable adjustments.

9.42 The victimisation complaint

Did the claimant do one or more protected acts?

We have referred to the four matters which the claimant contends were protected acts when setting out the issues (paragraph 4.8 above). With the exception of the first purported protected act, we find that the other three were protected acts within the meaning of the Equality Act 2010 section 27(2).

Was the claimant subjected to detriments?

These are set out in paragraph 4.9 above and it seems to us that it is not controversial that these things did occur.

Was the claimant subjected to those detriments because he had done the protected acts?

We find that the claimant has not discharged the initial burden of proof which is on him to prove that this is the case. It appears that the claimant has sought to pursue matters under the heading of victimisation which are also the subject matter of other, more apt, complaints in this claim.

10 **Harassment**

10.35 Time issue

As we have noted above, the harassment complaint was allowed as an amendment on 11 May 2018. The unwanted conduct which the claimant complaints about is the content of various internal emails, the first being dated 23 August 2017, the next three dating from October 2017 and the final item dated 6 November 2017. As time runs from the date of the act to which the complaint relates (Equality Act 2010 section 123) not raising a Tribunal complaint about these matters until 16 February 2018 (when the amendment application was made) means that these complaints are ostensibly out of time.

In these circumstances we need to consider whether it would be just and equitable to extend time. The claimant's evidence is that, unsurprisingly, he was unaware of this internal correspondence at the time it was written. He was obviously not copied into it and there is no suggestion that the email which the respondent wrote to his union representative came to his attention at the time either. The claimant only became aware that this correspondence existed when he got the result of his Subject Access Request on 15 February 2018. He had made that request on 26 December 2017.

The respondent's submissions are that it would not be just and equitable to extend time because the claimant could have made the SAR request considerably sooner than 26 December 2017. Having carefully considered our note of the evidence we cannot find this question being put to the claimant and so we simply do not know why he made the request in December 2017. It is not permissible to speculate as to what might have been the catalyst for him taking this action when he did or not taking it sooner. We do however take into account the clamant could not have anticipated that such damning and embarrassing correspondence would be the result of that request. Obviously there is no time limit (as far as we are aware) on making an SAR request. It is also clear that the claimant acted expeditiously once in receipt of the internal correspondence because he made his amendment application on the following day. We also take into account that although it is rather difficult for the respondent to successfully do so (in fact we find they have failed to do so) the respondent's witnesses have been able to address these matters, which are in each case, discrete matters.

In all the circumstances we consider that it would be just and equitable to extend time, so we have jurisdiction to entertain the harassment complaint.

10.36 Was there unwanted conduct?

The passages in the internal email correspondence which the claimant complains about are as follows:-

- The comment by Ms Primarolo in her 23 August 2017 email to Ms Jackson (page 185) "however it is strange it (dyslexia) is only coming to light now he does not want to go back to shift working".
- Ms Deakin when writing to the claimant's union representative on 4 October 2017 (page 219) "why would we invest money for reasonable adjustments that are not necessary …."
- Mr Moore's "I struggled to see how" comment in his email to Ms Deakin of 11 October 2017 (page 235).
- Ms Deakin's comments to Ms Primarolo in her email of 13 October 2017 (page 233) "having this report shouldn't mean we have to move him back to web chat tasks …"
- Ms Primarolo's letter of 6 November 2017 to the claimant's GP (page 245) querying whether dyslexia should have been given as the reason for the issue of a fit note.

We find that in each case this can properly be described as unwanted conduct related to disability because no disabled person would wish themselves, their condition or the possibility of making reasonable adjustments, to be referred to in the dismissive and cynical terms which that correspondence discloses. Nor would a person with a disability wish to learn that the veracity or existence of the disability itself was being called into question. It is clear in each case that the conduct was related to the claimant's disability.

10.37 Did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating etc environment for him?

We find that it did not have that purpose because the respondent and in particular the author of the various emails/letters did not appear to consider that they would ever be seen by the claimant. They were perhaps taking a risk in writing to the claimant's union representative and GP as, one might have thought, one or both of those recipients could have informed the claimant. In the event they did not.

10.38 Did the conduct have the effect of violating the claimant's dignity or creating an intimidating etc environment for him?

Here we are required by section 26(4) of the Equality Act 2010 to take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have had that effect. We should add that we consider that the conduct could only have had the effect of violating the claimant's dignity rather than creating an intimidating environment for him. That is because by the time the claimant was aware of this correspondence he had not been an employee of the respondent for some three months.

Having regard to the claimant's perception, we find that what he discovered when he saw this correspondence confirmed his belief that the respondent had not taken his disability or the need to make reasonable adjustments for it seriously. Having regard to the unfortunate content of

those items of correspondence, which we have described as dismissive and cynical, we find that it was reasonable that it violated the claimant's dignity. He was not being oversensitive and the matters he was concerned about were not trivial. Accordingly we find that the harassment complaint succeeds.

11 **Direct disability discrimination**

As we have noted, the alleged less favourable treatment is the same material which we have found to be harassment. As we have found that complaint to succeed nothing very much is now to be added by the consideration of this further complaint directed at the same subject matter. However for the sake of completeness we take the view that despite not anticipating that this correspondence would come to the claimant's attention, writing such emails and letters was nevertheless treatment of the claimant (despite the fact that he was unaware of it at the time) and that it was unfavourable treatment and it was because of his disability. Accordingly we find that this complaint succeeds also although obviously the claimant will not be entitled to a separate remedy in respect of both harassment and direct disability discrimination.

12 **Unfair dismissal**

12.35 Was there a fundamental breach of the contract of employment?

We are satisfied that there was because the implied term of trust and confidence had been breached by the respondent's approach and attitude to reasonable adjustments as documented above. Clearly the claimant cannot rely upon the material which only came to his attention as a result of the post-resignation SAR request but he does not do so. We are satisfied that a fundamental breach of the contract of employment had occurred.

12.36 Did the claimant resign in response to that breach?

As we have noted, the respondent's grounds of resistance did not suggest otherwise, but when discussing the issues at the beginning of this hearing Ms Walmsley told us that the respondent now contended that the claimant's real reason for resigning was so that he could undertake a diploma law course at a University. The claimant accepts that he did intend to pursue such a course. However he has explained to us that contrary to the respondent's misapprehension, this was not a full-time course and he would have intended to continue working for the respondent, if circumstances had been different, whilst undertaking the diploma course. We accept this explanation. We are satisfied that the overriding reason for the claimant's resignation was expressed in his resignation email (page 242) namely that he did not believe that the respondent had dealt with serious issues affecting him with regard to discrimination appropriately, legally or with regard to his well-being. We therefore find that there was a constructive dismissal when the claimant resigned on 24 October 2017. We note that the respondent does not argue that there was any affirmation, even though the claimant in effect gave notice so that the effective date of termination was 6 November 2017. He was of course absent from work throughout that illness. We would not

have found that the fact that the claimant gave notice equated to affirmation. He believed that he was required under his contract to give that notice.

12.37 Was the constructive dismissal unfair?

As we have noted, the grounds of resistance simply referred to any dismissal that was found being fair because of some other substantial reason. However what that reason was, was not given. When we enquired of Ms Walmsley at the beginning of this hearing she told us that it was the claimant's extended period of absence and his failure to engage with the respondent.

We find that the respondent has not shown a fair reason for the constructive dismissal. Whilst the claimant had had absences from work, no formal capability process had begun against him. We are not entirely sure what "failing to engage with the respondent" means. The true position seems to be that it was the respondent who was failing to engage with the claimant on the issue of reasonable adjustments. We detect that the respondent felt that the claimant was somewhat to blame for the delay in obtaining and presenting to them the psychological report. However the claimant has explained that he had to work out how he was going to pay for that report first. Of course there was also the potential for the respondent to commission it's own report. In any event we find that no fair reason has been established for this constructive dismissal with the result that the unfair dismissal complaint also succeeds.

Employment Judge Little

Date 7th December 2018