Case Number: 1600685/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr Michael Young

Respondent The Intellectual Property Office

Heard at: Cardiff **On:** 6, 7, 8 & 9 March 2017

Before: Employment Judge S Davies
Members: Mr W Horne
Ms C Lovell

Representation:
Claimant: In person
Respondent: Ms L Wynn Morgan, counsel

JUDGMENT

It is the unanimous decision of the Tribunal that all complaints are dismissed.

REASONS

Claims
The Claimant brought claims of:

1. unfair dismissal;
2. direct discrimination because of disability, sex and sexual orientation;
3. indirect discrimination related to disability;
4. harassment related to disability; and
5. victimisation.

Issues

1. The issues for the purposes of discrimination were identified, in part, in a Scott Schedule provided by the Claimant. The Respondent's list of issues set out the legal tests applicable to the discrimination complaints. We also considered whether we had jurisdiction to hear some of the complaints because of jurisdictional (time limit) issues.

2. Regarding unfair dismissal, which complaint was added at the Preliminary Hearing on 18 November 2016, we were to consider whether there was a fair reason (the respondent contends conduct) and whether the dismissal was within the range of reasonable responses for this employer.

The hearing

3. We heard evidence from the Claimant and his witness Mr Mole, Trade Union Representative. For the Respondent, we heard from Ms Chalmers, Deputy Director, Mr Coleman, Divisional Director, Mr Thorpe, Deputy Director and Mr Elbro, Divisional Director.

4. The Claimant represented himself throughout, but had the benefit of pro bono representation at a case management Preliminary Hearing held on 18 November 2016, at which the various forms of discrimination were explained. Following the Preliminary Hearing I set out in writing in the Case Management Order (pages 40 – 42), the relevant tests that apply to the different forms of discrimination.

5. At the start of Day 1 of the hearing we held a Preliminary Hearing in private, in order to carry out case management with regard to the Scott Schedule and deal with an application to amend the claim. We found it necessary to explain, again, the different forms of discrimination and checked with the Claimant that he was happy to proceed on the basis of the information set out by him, following the November 2016 Preliminary Hearing, in the Scott Schedule.

6. During the Preliminary Hearing on Day 1, we ascertained the provision, criterion or practice (PCPs) that the Claimant relied upon for the purposes of his indirect discrimination complaints. We also asked the Claimant to identify any 'protected acts' that he relied upon with regard to complaints of victimisation, explaining the test under Section 27 Equality Act 2010 (EqA).

7. Regarding disability, although referred to within the Scott Schedule, the Claimant did not wish to pursue complaints on the basis that his 'exhaustion' was a separate disability from his depression and dyslexia. He acknowledged it rather, as a symptom of his other conditions.

Application to amend

8. The claimant's application to amend his claim was declined in respect of allegation 5 and accepted for allegation 16 (adding a complaint of direct discrimination because of sex and/or sexual orientation).

9. Reasons were given orally for our decision on the application.

Rule 50 application

10. Following the Preliminary Hearing in private, we held a short adjournment and then dealt with an unopposed application by the Respondent under Rule 50 for various measures in light of an allegation of sexual misconduct (allegation 16). The application culminated in us making a restricted reporting order, which concludes with the promulgation of this Judgment. Reasons were given orally for our decision on the application.

Questioning of witnesses

11. Prior to witnesses giving evidence, we explained the process of cross examination and confirmed to the Claimant that he would need to challenge disputed matters of evidence with the Respondent's witnesses. The Claimant chose initially not to ask questions; only asking a limited number of questions after the panel had put their own questions to witnesses.

Documents

12. We informed the parties that we would only read documents that we were taken to. During submissions, the Claimant provided us with an annotated version of page 53 indicating which page numbers he relied upon.

Factual background

13. The Claimant was employed as a patent examiner, at career grade C2, from 2000 until his dismissal for gross misconduct with effect from 7 November 2016.

14. Patent examiners worked within teams reporting to Deputy Directors. At the times material to the claim, the Claimant reported to Mr Thorpe from 2010, moving to Ms Chalmers' team in October 2014 and then moving back to Mr Thorpe's team in March 2016.

15. The Claimant worked predominantly from home; three days a week with two days spent in the office and was subject to a home working agreement from 2014. When working at the Respondent's office, he worked in an open plan setting. The Claimant expressed a preference for

home working and this recurred as a theme throughout his claim. He expressed having difficulty with concentration when working in open plan due to noise levels.

Homeworking review

16. A review was carried out of his home working agreement on 22 January 2015 (page 108). The Claimant requested home working be increased from three days to four, whereas Ms Chalmers sought to reduce the level of home working to two days a week because she had concerns about the Claimant's performance, his presence at the office during working days, time keeping and communication of his whereabouts (for example when due at group meetings and on training courses).

17. The Claimant complained about the decision to reduce his home working days, with the support of his trade union representative Mr Mole. We note that Mr Mole supported the Claimant throughout various issues during his employment.

PIP

18. Ms Coleman became involved and a meeting was held on 2 February 2015, the outcome of which was to maintain the status quo, with home working at three days per week, subject to conditions set out in a letter at pages 110 and 111. One of those conditions was a personal improvement plan (PIP) to be monitored after an initial three-month period. The PIP / performance management process usually covers a 12-month period as a maximum, but the Claimant's was extended, by mutual agreement, to allow the Claimant further time to improve his performance. There were elements of the PIP that the Claimant was successful with however there was a deterioration of his relationship with Ms Chalmers and it was agreed that he would move back to Mr Thorpe's team. Performance concerns remained once that move took place.

19. A final review of performance was carried out at the end of July 2016 when Mr Thorpe recommended a further three-month trial period following a recent dyslexia diagnosis. Subsequently the Claimant sought an extended one year trial period rather than that 3 months (page 224).

20. The PIP process forms the basis of many of the Claimant's complaints and we deal with that in more substance in our conclusions.

Patent application

21. The Claimant became unwell and was absent from work from 8 August 2016 onwards, never returning to the work place. Whilst he was absent he

applied for a patent registration. His application was noted by the Respondent's Formalities Team (page 357) and referred to Mr Thorpe, as the Claimant's manager, to ensure compliance with internal procedures applicable to employees making such applications. Mr Thorpe emailed the Claimant to check compliance on 3 October (page 375).

22. The Claimant's response to this query, at page 376, is the incident that led to dismissal. It contained an allegation, raised for the first time, about an incident in the office urinal against an unspecified person and used offensive language. Mr Thorpe's response was to offer the Claimant the opportunity to retract his email as he felt he had 'crossed a line'. He was particularly concerned by the words the Claimant had used; he had addressed Mr Thorpe with the phrase "*you massive cunt*".

23. Separately, the Claimant emailed his trade union representative and HR making an oblique reference to an allegation against Mr Thorpe, at page 377. At page 379, on 4 October 2016, Mr Thorpe referred the matter to his line manager, Mr Elbro. The Claimant subsequently provided a description of the alleged incident in the urinal in an email of 10 October 2016 (pages 398 to 400). The Respondent commissioned an external investigation into the allegation by consultants. Mr Thorpe was interviewed personally, as well as providing his comments in writing on the Claimant's written account, starting at page 402. The Claimant declined to participate personally in the investigation, relying solely on his written account. The consultant was unable to reach a conclusion on the allegation in question and recommended no further action.

Dismissal

24. The Claimant was invited to attend a disciplinary hearing, held at Chepstow Town Hall, chaired by Mr Elbro. The Claimant attended with representation from two trade union representatives. There is a note of the meeting at page 455. Mr Elbro dismissed the Claimant for gross misconduct, in particular, 'very offensive behaviour', confirming this in writing in a letter of 7 November 2016, at page 447, and offering a right of appeal.

25. The appeal meeting was scheduled at the IPO's offices; the Claimant declined to attend on the basis he did not want to attend the offices again and had no faith in the process. This was communicated in an email of 8 November, at page 453, in which the Claimant confirmed he wished the Respondent to take a decision in his absence. The appeal was subsequently dismissed; this was communicated in a letter of 15 November, at page 456-7.

Disability

26. With regard to the Claimant's disabilities, the Respondent conceded that the Claimant was a disabled person within the meaning of Section 6 Equality Act 2010 because of his depression and dyslexia, at all material times, save that the Respondent was only on notice of his dyslexia from the point of diagnosis in the dyslexia report dated 16 June 2016.

The law

The relevant legislation we referred to follows.

Section 98 Employment Rights Act 1996 Unfair Dismissal

Section 98(2)(b) Employment Rights Act 1996 (ERA) provides that "conduct" is a potentially fair reason for dismissal. The burden of proof is on the Respondent to show the reason for dismissal.

Section 98(4) ERA provides that where the employer has shown conduct, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

shall be determined in accordance with equity and the substantial merits of the case.

Section 13 Equality Act 2010 (EqA) Direct Discrimination

13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 19 Eq A Indirect Discrimination

a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to relevant protected characteristic of B
For the purposes of subsection 1, a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-
A applies, or would apply, it persons with whom B does not share the characteristic,
it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

it puts, or would put, B at that disadvantage and
A cannot show it to be a proportionate means of achieving a legitimate aim.

Section 26 Eq A Harassment

a person (A) harasses another (B) if –
A engages in unwanted conduct related to a relevant protected characteristic, and
the conduct has the purpose or effect of
violating B's dignity or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…..

in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
the perception of B;
the other circumstances of the case;
whether it is reasonable for the conduct have that effect.

Section 27 Eq A Victimisation

A person (A) victimises another person (B) if A subjects B to a detriment because—(a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.
Each of the following is a protected act—
bringing proceedings under this Act;
giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
making an allegation (whether or not express) that A or another person has contravened this Act.

Section 123 Eq A time limits

proceedings on a complaint within section 120 may not be bought after the end of –
the period of 3 months starting with the date of the act to which the complaint relates, or
such other period as the Employment Tribunal thinks just and equitable.

(3) For the purposes of this section –
conduct extending over a period is to be treated as done at the end of the period;

27. We were not referred to any case law authorities.

28. Before dealing with each allegation in the Scott Schedule, we make some overarching comments about the claims.

Indirect discrimination

29. The Claimant has presented no evidence of disadvantage experienced by others with depression and/or dyslexia generally. Without this evidence, we cannot say that the claimant and others experienced the same symptoms and disadvantage because of any PCPs applied by the Respondent. This is a necessary element of the Section 19 EqA test. This requirement was highlighted to the Claimant at paragraphs 7.3 and 7.4 of the Case Management Order at the Preliminary Hearing (page 41 onwards).

30. It is for the Claimant to prove his complaints; without that evidence the Section 19 complaints cannot succeed and are dismissed.

Victimisation

31. Section 27 EqA requires the Claimant to identify a 'protected act' within the meaning of Section 27(2); he has not. Victimisation in the legal sense is a detrimental act carried out in retaliation for a claimant doing a protected act. Without identifying this necessary element of the test, the complaints of victimisation cannot succeed and must be dismissed.

Inferences

32. With regard to drawing inferences of discrimination, the Claimant needs to establish facts upon which we can conclude that discrimination took place, in the absence of any explanation to the contrary from the Respondent. If he does, then the burden of proof switches to the Respondent, who must provide a non-discriminatory explanation. That explanation is only required if the facts are established first.

33. Even if the Claimant had established facts from which we could draw an inference of discrimination, we are satisfied with the Respondent's non-discriminatory explanation for the actions and steps that they have taken. We have adopted a 'reason why' approach when looking at the evidence and considering the Respondent's actions.

Protected characteristic

34. To bring any complaint of discrimination, it is necessary to demonstrate a link with a protected characteristic and we note that such a link is largely absent from the Scott Schedule allegations, save for those matters that we refer to specifically below. Discrimination complaints cannot be well-

founded if what is complained of amounts to unreasonable treatment unconnected to a protected characteristic.

Jurisdiction

35. We are only able to consider complaints because legislation permits us to do so; legislative time limits are strictly applied in the Tribunal. Generally speaking, complaints brought outside of a 3-month time limit cannot be considered.

36. The Claimant has not given evidence of any 'just or equitable' reason for an extension of time beyond that three-month period.

37. A 'course of conduct' under Section 123 has not been established. This would require discrimination by the Respondent's witnesses and another person, who did not appear, Mr Sean Dennehey. We observed the evidence and there seemed no suggestion of discriminatory intent on behalf of the Respondent's witnesses.

38. We note that in his ET1 the Claimant indicated that he is "*not the only one being treated this way, I would estimate that there are another 25 at least, although the lack of other similar tribunal applications I would put down to the fact that most people just stoically get on with it, no matter what is thrown at them*" (Page 23). This comment is indicative of a situation where the Claimant was not treated less favourably than others in the office.

39. In conclusion, we consider that the Tribunal lacks jurisdiction to consider those complaints arising prior to 24 May 2016, taking into account early conciliation with ACAS.

Remaining complaints

40. When taking into account those overarching conclusions, it is only complaints of harassment and direct discrimination which arose on or after 24 May 2016 that remain for consideration. We provide our comments in respect of each allegation in any event.

Scott Schedule

(1) **My boss placing me in a particularly noisy part of the open plan office**. 1 January 2015 to 1 April 2016. Indirect discrimination, harassment and victimisation (disability – depression).

The home working agreement does not stipulate the reasons why home working was granted for the Claimant. The Claimant maintains that this measure was adopted for many

employees for cost saving reasons. We do not have sufficient information to draw conclusions as to the specific reason it was put in place for the Claimant in 2014, albeit that the Respondent has suggested that it was to address his concerns about working in open plan. The dyslexia report, at page 302, recommends home working, but that was not issued until 16 June 2016.

We note that regular reviews were carried out with the Claimant; the following passages refer to the open plan issue:

- page 110 in January, the Claimant comments that the working environment has become quieter since Christmas;
- page 118 in March, a suitable desk is to be identified by Barney, another manager;
- Page 120 in April, the Claimant indicates he has decided to use his allocated desk;
- Page 122 in May, the Claimant indicates he had no further concerns and is using his headphones for noise cancelling; and
- page 137 in June, Ms Chalmers identified a suitable desk away from noise.

In light of these comments recorded in the reviews and the Respondent's witness evidence that steps were taken to accommodate the claimant's concerns, we consider that the allegation is not established factually.

With regard to harassment, there is no evidence of any intent or effect to create a prohibited environment for the Claimant. On an objective basis, the respondent's actions cannot be viewed as amounting to harassment.

(2) **My boss constructing a PIP with an unachievable, circa 30 conditions to be met within an unfeasibly short period of time**. 13 February 2015 to 13 June 2015. Indirect discrimination, harassment and victimisation (disability – depression).

We were not provided with sufficient evidence to support this assertion. Having reviewed the PIPs, we consider they contain clear language, supported by headings indicating the area for improvement and timed deadlines. We take into account Mr Mole's evidence that in his view the objectives set were reasonable and not uncommon. The objectives and periods for achievement appear to us to be in line with the managing poor

performance procedure at pages 70 – 78. In summary, we consider that facts underlying this allegation are not established.

(3) **My boss not being willing to indicate which of the 30 PIP conditions could reasonably be taken to be the most significant**. 13 February 2015 to 13 June 2015. Indirect discrimination, harassment and victimisation (disability – depression).

At page 114 the PIP includes dates for compliance with targets which, to us, indicates that his manager gave the claimant an order of priority. The Claimant has not established the facts (nor a PCP) of Ms Chalmers being unwilling to identify and prioritise targets. The written documentation suggests that she did do this. We also note the review periods, at page 76, and that the Respondent appears to have given the maximum period available within the policy. Again, we conclude that the facts underlying the allegation are not established.

(4) **My boss using my purported failure to meet conditions of the unachievable PIP to move me into the poor performance system**. 5 June 2015. Indirect discrimination, harassment and victimisation (disability – depression).

We refer to our conclusions above regarding the PIP; the consequence of failing to meet targets, is to be moved on to warnings under the poor performance management system. A first written warning was issued on 19 June 2015. Accommodations were made for the Claimant in terms of extending the review periods prior to this stage. The Claimant acknowledged in evidence that there were some genuine concerns with regard to his work, but sought to minimise matters such as time keeping by characterising transgressions as a 'minor infringement'. We conclude that performance concerns were escalated appropriately with support from management and from the trade union. The facts underlying the allegation are not established insofar as the conditions being unachievable and we are satisfied that the respondent had a non-discriminatory reason for escalating matters under the poor performance system.

(5) Complaint not permitted to proceed in amendment application.

(6) **My boss, stating observation of me using social networking/Internet shopping on my computer. Using this observation to justify calling up detailed data on my computer usage and using that to accuse the same thing again**. 15 July 2015 to 20 July 2015. Indirect discrimination, harassment and victimisation (disability – depression)

Ms Chalmers asserts she was conducting a normal walk around of her team in the open plan office and says that she noticed, what she believed to be the Claimant viewing a shopping site during working hours. She tried to attract the Claimant's attention, but was not able to do so as he was wearing his noise cancelling headphones and she did not deem it appropriate to touch him to attract his attention. The ET1 and the Claimant's witness statement suggest that Ms Chalmers came up covertly. The Claimant's version of events lacked consistency between his oral evidence and that which was recorded in an email at page 150. The email indicates that he had not seen Ms Chalmers, whereas in oral evidence he suggested that he had. When questioned about this difference, the Claimant provided another account, suggesting he caught a 'glimpse of her dress' as she was leaving.

After this incident, the records of the Claimant's computer use were produced, at Ms Chalmers request, on which he was asked to comment (pages 148 onwards). Subsequently the Claimant was exonerated of any wrong doing, but this was after, as he says, having to spend a day and a half going through the material.

The PCP that the Claimant sought to establish is the observation and obtaining of the data. This did not appear to be contested factually but crucially we can see no link between those actions to depression or any explanation of disadvantage linked to disability.

We do not consider that the actions of Ms Chalmers amount to harassment, they appear to be usual management actions, although it may have been more effective to deal with the issues by questioning the Claimant at the time he was observed about what he was doing.

(7) **My boss instructing me to be in the office on Christmas eve and New Year's Eve 2015 failing to fill in the Christmas leave spreadsheet quickly enough**. 5 November 2015. Indirect

discrimination, harassment and victimisation (disability – depression).

The request for employees to complete a spread sheet with their request for Christmas leave was sent out in November (pages 194 – 196). The spreadsheet was sent to the team in general for completion; the Claimant acknowledges that he did not complete the spreadsheet within the time frame allocated. Ms Chalmers viewed the spreadsheet after the deadline had passed and communicated by email to the team that Christmas cover would be provided by those two individuals who had not sought to book leave in the spreadsheet. The Claimant took exception to this and sent a strongly worded email to Ms Chalmers, which he later apologised for at page 194.

No link to depression is explained with regard to this allegation. The Claimant mentioned difficulty with deadlines but did not expressly link that to his depression. In any event when we look at the reason why Ms Chalmers took the steps she did we are satisfied with her non-discriminatory explanation, that she was putting in place planning for cover during the Christmas period; the Claimant had not responded, so she assumed he was available. On an objective assessment, this cannot amount to harassment.

(8) **My boss speculating on which mental conditions I might have**. 27 to 28 January 2016. Direct discrimination (disability – depression and dyslexia).

Ms Coleman held a meeting in November 2015 with Mr Mole where they discussed as an issue, that there appeared to be a lack of shared understanding between Ms Chalmers and the Claimant with regard to the PIP objectives. A pre-review meeting between Ms Coleman, Mr Mole and HR was held on 19 January prior to a review on 22 January 2016. The Claimant was not present at either of these meetings between Ms Coleman and Mr Mole, where the possibility of neuro-diversity issues as a factor was raised by Ms Coleman.

We accept Ms Coleman's evidence that she was trying to ascertain whether there was some medical explanation underlying the Claimant's approach or dealings with Ms Chalmers which required investigation. It had been noted that his communication style was on occasion inappropriately rude and unprofessional, for example, in the emails regarding

Christmas leave. The topic of neuro-diversity was raised during the review meeting of 22 January 2016 and is noted in summary form at page 229 of the meeting minutes. Ms Coleman then set out in a letter to the Claimant the gist of the wording that she used at the meeting, and we accept her evidence in this regard, which appears at page 230 as follows,

"*ask that you accept referral to occupational health service for an assessment of whether there are any reasonable adjustments that we need to make to help you going forward. In our discussion, I referred to behaviours that may be characteristic of Asperger's Syndrome, which can be found among highly intelligent people in science, engineering and mathematical fields (among others) and may go undiagnosed. However, I recognise that only skilled professionals can make such an assessment. My intention is simply to ensure that we are not missing any underlying issues that may affect your performance and behaviour at work, and that a reasonable employer would take into account*."

We consider that a complaint of direct discrimination cannot be successful in the circumstances. The comparator would be a person who did not have depression or dyslexia but who was displaying inappropriate or unprofessional behaviours to a manager. There is nothing to suggest that Ms Coleman's actions would have differed where she had similar concerns about behaviours falling outside the norm of professional working etiquette in investigating possible medical explanation. Her actions were not because of the claimant's disabilities.

We note that the Claimant was genuinely upset by the suggestion made by Ms Coleman that he may have Asperger's Syndrome, which he has now been tested for and does not have. It may have been prudent for the Respondent to simply enquire whether the Claimant would attend an occupational health assessment to check for any underlying medical issues, without naming a particular condition, as this approach is less likely to cause offence.

(9) **An assignment of a zero-point output below 1.4 for my grade.** Still in effect in the period 24 May 2016 to 7 November 2016. Indirect discrimination, harassment and victimisation (disability – depression and dyslexia).

This imposition in the change in the points system affected output scores by which performance was rated. The change was applied uniformly to all staff and therefore was a PCP applied by the Respondent.

The Claimant suggested that the PCP affected him adversely as he was unable to meet the required output score but accepts that a 10% adjustment was made in recognition of his depression. Once dyslexia was also diagnosed, following the occupational health assessment suggested by Ms Coleman, the adjustment was increased to 25% in total.

We were provided with no evidence of the impact of the PCP on others with depression. As far as dyslexia goes, Mr Thorpe gave evidence that he is aware of four other employees who receive a 10% discount to account for their dyslexia. When taking this evidence into account the Claimant appears to have been treated more favourably, in that his discount for dyslexia increased his total discount by 15% (rather than 10%).

The Respondent adjusted its targets to take both medical conditions into account. Even if the Claimant had established evidence of disadvantage to him and others sharing the condition, which is not, we conclude that the Respondent established a legitimate aim of satisfactory performance standards and encouraging and facilitating improvement and therefore any indirect discrimination could be justified.

We dismiss the harassment complaint. The change was not aimed at the Claimant personally, as he acknowledged, nor is it action 'related to' his medical conditions. The change was imposed prior to the dyslexia diagnosis and so cannot have had such intent in that regard and his depression was accommodated with a discount as part of the process.

(10) **My boss permanently blocking requested increase from 3 to 4 days' homeworking and attempting to reduce to 2 days' homeworking**. Still in effect in the period 24 May 2016 to 7 November 2016. Indirect discrimination, harassment and victimisation. (Disability – depression and dyslexia).

We consider this allegation refers to a decision taken in 2015 and therefore is brought out of time. It is a decision (to hold the status quo at three days' homeworking) with continuing consequences. We were not referred to evidence of the

Claimant seeking to increase his working from home days to four per week after the intervention of Ms Coleman in February 2015. In any event the PIP remained in place as a condition and he had not successfully obtained the performance standards required in this PIP. The Respondent has a non-discriminatory explanation for action, in the performance requirements of the PIP.

(11) **My boss verbally raising the option of me being given separate office with walls and a door as opposed to open plan**. Still in effect in the period 24 May 2016 to 7 November 2016. Indirect discrimination, harassment and victimisation (disability – depression and dyslexia).

In the Claimant's witness statement, he indicates that a verbal discussion on this topic took place during the first 3 – 4 months of his first period working with Mr Thorpe. We conclude therefore that even if established, this conversation took place prior to 2014 when he was managed by Ms Chalmers. Mr Thorpe could not recall any such discussion but indicated that separate offices were currently provided for Deputy Directors, although this was about to change, and staff who used voice recognition software. We consider that any complaint is brought significantly out of time.

(12) **My boss diverting me to 36 of the longest, most complex medical exams**. Still in effect in the period 24 May 2016 to 7 November 2016. Indirect discrimination, harassment and victimisation (disability – depression and dyslexia)

Ms Chalmers manages a team of medical examiners; their jobs are stored within a virtual repository in date order and are coded depending on the particular type of patent that they relate to. Ms Chalmers unchallenged evidence was that she indicated to the Claimant that he should work predominantly on mechanical type patents, which suited his previous experience, and that he was empowered to reject exams that he felt were outside of his abilities.

It was agreed that when the Claimant came to work for Ms Chalmers team that he had an insufficient case load to keep him fully occupied and that is why he was allocated some medical exam work. The Claimant was required to do three exams per month (page 112). Once an initial exam is carried out any amendments are returned to the same patent

examiner, but we accept that the initial selection of which exams to work on was a matter for the Claimant.

We accept Ms Chalmers evidence that the Claimant was engaged on a mixed case load and not solely medical work. When the Claimant moved to Mr Thorpe's team the Claimant took some of his ongoing medical exam work with him. Latterly Mr Thorpe instructed him to work only on amendments, as he had a back log of 49. Mr Thorpe's evidence was that only 9 of those 49 amendments were medical; he felt that of those 9, 3 were urgent and so requested that the Claimant complete those and send the other 6 back to Ms Chalmers team (emails at pages 347 – 349).

The Claimant maintained his position in evidence that he was diverted onto 36 of the longest and most complex medical exams. This evidence conflicts with that of both managers; neither recognised the figure of 36, who maintained that he worked on a mix of medical and non-medical exams. Ms Chalmers rejected the suggestion the Claimant had raised with her concerns that he was being left with the most complex work and that no other examiners wanted to do it. Ms Chalmers referred us to reports indicating that other examiners were carrying out medical work (at pages 254 onwards).

We accept the evidence that the Claimant had choice about which exams he worked on within his proficiency. We also find based on Mr Thorpe's oral evidence and emails, that he was asked to return some medical amendments to Ms Chalmers, which he failed to do. We refer to this in more detail below when we deal again with Mr Thorpe's actions. In conclusion, we consider this allegation is not factually established.

(13) **Being placed on an intensive, time-consuming and tiring poor performer system shortly after being diverted onto the medical subject matter**. Still in effect the period 24 May 2016 to 7 November 2016. Indirect discrimination, harassment and victimisation (disability – depression and dyslexia)

This allegation relates to the poor performance system and we refer to our comments made above, particularly at allegation 4.

(14) **The poor performer system used for micro-interrogation of anything, such as timekeeping, homeworking, instant**

availability via telephone or email, when I should take my annual leave, rarely missed meetings all treated as exceptionally serious disciplinary issues. Still in effect in the period 24 May 2000 16th 7 November 2016. Indirect discrimination, harassment and victimisation (disability – depression and dyslexia).

Again, we refer to our previous comments and Mr Mole's comments about PIP targets. We note that the Claimant sought to minimise matters such as time keeping, communicating his whereabouts and requests for annual leave. It appears that the Claimant did not follow the Respondent's rules in these areas. The Respondent legitimately treated these as serious issues; a reasonable approach, particularly where a home working agreement is in place. The Claimant complained of the 'high intensity and the vigour' of the review process, but we note that he asked for more time within which to improve and was given it. We consider that the facts underlying this allegation are not established.

(15) **My administration under the poor performer being extended beyond the official 12-month limit three times in additional three month tranches. This being exceptionally tiring and probably contributing significantly to my eventual medical leave with exhaustion**. Still in effect in period 24 May 2016 to 7 November 2016. Indirect discrimination, harassment and victimisation (disability – depression and dyslexia).

That the period was extended beyond 12 months in three month tranches is factually agreed but we note that in fact the Claimant himself requested extensions, indeed towards the end he asked for a further year (at page 334). Mr Palmer, the staff counsellor intervened on his part, at page 345, and we also saw requests for extensions at pages 343 and 188. In any event an extension of time in the poor performance process would be granted to offer the Claimant further opportunity within which to improve. The extensions were of benefit to the Claimant and sometimes given at his request. We consider that the facts are not established to support an allegation of discrimination.

(16) **My boss exposing himself to me in the first-floor gent's toilets.** 8 May 2016. Direct discrimination (sex and sexual orientation, the claimant identifies as bisexual).

The accounts given of this incident amount to one word against another as there are no witnesses, other than the claimant and Mr Thorpe. It is relevant to consider the circumstances of reporting the incident as they can have a bearing on credibility. We note that there was a delay in the Claimant reporting this incident of over five months. There is also no mention of it in the original ET1, which we think is a notable omission for an incident as extraordinary as that described. We also note the timing of when the incident was first reported; it took place following Mr Thorpe's contact with the Claimant asking for confirmation that he had complied with the internal process for employees applying for patent registration. At page 386, in an email of 5 October 2016, the Claimant refers to the incident in the following terms to Mr Elbro: "*The act I describe is far more serious than getting upset by and swearing at someone for doing it*." However, we note he is suggesting that his action, swearing in an email, is directed at Mr Thorpe some five months after the incident in question. We consider it surprising that the Claimant would continue to work under Mr Thorpe's management through May, June and July, including a detailed review of his performance by Mr Thorpe at pages 311 – 316, without ever once raising concerns about this issue.

Mr Thorpe strenuously denies the allegation. Although Mr Thorpe referred to unspecified and undated previous allegations regarding the Claimant in paragraph 3 of his witness statement he confirmed that there was no supporting evidence of such incidents in the bundle and as such we place no weight on this suggestion in Mr Thorpe's witness statement.

Having reviewed the Claimant's account at page 398 onwards we are not persuaded of the credibility of the suggestion that he would stand engaged in conversation with Mr Thorpe for a minute or more, whilst at the same time having noticed in his peripheral vision a 'rapid and exaggerated up and down motion' of Mr Thorpe's hand on his penis (page 399). We think it unlikely, that having noticed such action, that a person would remain in conversation for as long as a minute or more.

When taking into account credibility and consistency issues, we note other areas of the Claimant's evidence where there has been a lack of consistency: Ms Chalmers and observation of computer use and the complaints with regard to being in the quiet area of the office. We find that the Claimant's account

lacks credibility and on the balance of probabilities the facts underlying the allegation are not established and the complaints fail.

We also note, although it is not strictly necessary to do so, that the Claimant's complaint of sexual orientation discrimination would have been doomed to fail as Mr Thorpe was unaware of his sexuality until he had seen the papers in the Tribunal claim.

The remaining Scott Schedule allegations deal with events around the time of the dyslexia diagnosis and the matters that follow.

(17) **My boss instantly seeking a way to block work output discount just recommended by dyslexia assessor**. 20 June 2016. Direct discrimination (disability – dyslexia).

Following the Claimant's assessment of mild dyslexia, he informed Mr Thorpe and HR by way of an email of 16 June 2016, at page 283, that the tester advised a 25% reduction in targets to take account of his dyslexia and depression cumulatively.

Mr Thorpe accepts that he asked the Claimant whether the assessment had been performed by the 'lady who usually did them for the office'. Mr Thorpe's experience of managing four other employees with dyslexia was that a 10% discount was normal and he was therefore querying the 25% suggestion. Once however the recommendation had been explained and the report viewed by Mr Thorpe, as he had not seen it at this stage, he agreed to the 25% adjustment (page 316).

When we considered the reason why Mr Thorpe asked the question we accept that there is a non-discriminatory explanation for his action.

(18) **I was challenged as to whether I could see an "obvious" dyslexia based mistake in something I had written. I could not.** 21 June 2016. Direct discrimination (disability – dyslexia).

Mr Thorpe accepts that he sent an email of 20 June 2016 to the Claimant (pages 288-9) which related to a patent exam for a coffee machine. Mr Thorpe had noticed a typographical error in the record of the search statement, albeit the on-line search performed by the Claimant had been conducted correctly. In

his email Mr Thorpe says. "*P.S. Obvious typo in search statement. You may have an earlier version of the prose document somehow, but I don't see a typo in the search statement*."

The wording of the email differs to that asserted in the ET1, at page 23, in which the Claimant phrases it as, "*Can you spot the obvious spelling mistake in this search statement?"* The Claimant suggests that Mr Thorpe was setting him some kind of test, but that is not how the email reads to us.

Mr Thorpe confirmed that he wrote this email following the Claimant communicating his mild dyslexia diagnosis by email. Mr Thorpe explained that he had not had previous concerns with regard to the Claimant's spelling and was not aware whether spelling in particular was an issue for the Claimant in light of his dyslexia. He had not seen the written report at this stage.

In hindsight Mr Thorpe recognised that he could have used different wording in the email and instead just pointed out the spelling mistake in terms.

As for direct discrimination, we need to consider a non-dyslexic employee in materially similar circumstances. There was no suggestion that Mr Thorpe would have highlighted the typo in a different way for them. When looking at the reason why, we accept the non-discriminatory explanation put forward by Mr Thorpe.

(19) **My boss forcing me to change a report I had written that was not wrong in order to say that a mistake been made. Repeated on several occasions. The example case having exhausted all technical discussions been told verbally to change it "because I'm Phil Thorpe".** 7 July 2016 to 12 July 2016. Indirect discrimination, harassment and victimisation (disability – depression).

Even if Mr Thorpe did ask the claimant to change a report or make the comment, "*because I'm Phil Thorpe*" which he denies, we do not consider we need to determine this dispute. We can see no basis for a harassment complaint, as no link is demonstrated to depression.

(20) **My boss requested to see dyslexia report intended only for HR and myself. With a view to finding something in it to try**

and justify attempting to reduce my 25% discount. 18 July 2016 to 19 July 2016. Direct discrimination (disability – dyslexia).

Mr Thorpe sought permission to see the dyslexia report. HR sought permission on his behalf (emails pages 309 – 310), the Claimant was initially resistant to the request, suggesting '*mild dyslexia 25% output bump all he really needs to know*'.

On further query, with regard to the level of adjustment the Claimant agreed to release the report on 19 July 2016. It appears to us it would be a reasonable management request to see such a report so as to fully understand the recommendations made in respect of a particular employee, in order to consider on a fully informed basis whether it would be reasonable to facilitate such adjustments. We note that following sight of the report, Mr Thorpe agreed to the 25% adjustment.

When we consider the reason why he sought sight of the report we consider that there is a non-discriminatory explanation. We do not think that his actions would have been any different in respect of a non-disabled employee for whom a report had been written.

(21) **My boss not mentioning several further support adjustments discussed in the dyslexia report as options**. 18 July 2016. Direct discrimination (disability – dyslexia).

Mr Thorpe's evidence, which we accept, was that usually on receipt of such an occupational health report he would sit down with the employee together with HR and discuss the adjustments proposed to see which ones could reasonably be accommodated. Mr Thorpe did not have sight of the dyslexia report until after 19 July and the Claimant went on sick leave on 8 August. Therefore, Mr Thorpe said there was no opportunity for them to sit down and go through the recommendations at such a meeting. We accept that explanation as plausible and non-discriminatory within the time frame concerned, also taking into account that Mr Thorpe was the author of the review report issued on 25 July which report would have had relevance to a proper consideration of the recommendations. In any event Mr Thorpe implemented the recommended adjustment of 25% and the Claimant has not presented any evidence to suggest that the Respondent would not have implemented further adjustments had such meeting

taken place. When we consider the reason why, we find there is a non-discriminatory explanation.

(22) **My boss instructed me verbally to go back and work "only on medical amendments**". 3 August to 4 August 2016. Direct discrimination (disability – depression and dyslexia).

We refer to pages 347 – 349 and note that Mr Thorpe instructed the Claimant to work solely on amendments on the basis that he had 49 outstanding. The phrase Mr Thorpe uses in his email is: '*includes the A61 cases which we are transferring back to Susan'* (page 349) The implication we take from the word 'includes', is that the work did not consist solely of medical amendments. At page 348, the Claimant says himself "*the large stack of amendments, medical and otherwise*" (our emphasis) which implies again that the amendments were not solely medical and contradicts the Claimant's assertion to the contrary. We also note at page 329, that the Claimant acknowledges that medical exams were taken off him.

We consider that the facts underlying this allegation are not established.

(23) **My bosses forcing an email conversation on me, disciplinary meeting and a summary dismissal, all whilst I was on sick leave and a week or so before the preliminary hearing of this tribunal**. 3 October to 7 November 2016. Direct discrimination (disability – depression and dyslexia).

We note that an internal policy was in place with regard to employees seeking to register patents and that Mr Thorpe properly raised this issue with the Claimant. The communication by email was sent to his work address and also the email address provided on the patent application form, in order to check compliance with internal procedures.

The claimant has not linked the language he used in the email to Mr Thorpe to his medical conditions. We can see no link to disability. We will deal with the reason for dismissal below, but when considering the reason why the claimant was dismissed, we accept the Respondent's non-discriminatory explanation for the action that it took.

Unfair dismissal

41. We conclude that the Claimant was dismissed for 'conduct', a potentially fair reason under Section 98 ERA. Our focus was on the email at page 376 and the language used by the Claimant which was deemed "very offensive behaviour".

42. We note that there was no challenge to the process by which dismissal was carried out under the disciplinary procedure. We conclude that a proper process was afforded to the Claimant, who was permitted to attend the disciplinary hearing with the support of two trade union representatives. We also note that the hearing was held at a neutral venue, Chepstow Town Hall.

43. Mr Elbro conducted the dismissal meeting and noted that the Claimant apologised and referred, by way of mitigation, to the pressure of the PIP performance process. He concluded that the Claimant was not remorseful and lacked an appreciation of 'how far over the line he had gone' (paragraph 34 g-h witness statement) and his partial retraction of the email 15 hours later (page 381) and an apology 2 days later (page 388) were not sufficient to mitigate his actions. We consider that conclusion was open to him in light of the timing and content of the Claimant's actions. The wording of the retraction supports Mr Elbro's conclusion, as it does not reflect proper understanding of the seriousness of the issue: "*Phil thank you for your artificial deadline set is a time when I would be unlikely to be awake. I retract the reaction. But not the description of the event. Mike*"

44. We note that the Claimant did not raise the alleged urinal incident as mitigation during the course of his dismissal meeting, which seems inconsistent with the Claimant's comments to Mr Elbro in email of 5 October 2016 (page 386) in which he seems to suggest that his use of language is a response to the alleged incident.

45. The appeal was dealt with on paper at the Claimant's request; it was dismissed.

46. When considering the range of reasonable responses, we must not substitute our view for that of the Respondent. We consider that the content of the email sent to Mr Thorpe was so offensive that it amounts to gross misconduct and therefore can result in dismissal without a previous warning. Although a formal warning is not required for the dismissal to be fair, we note that, during the PIP process and otherwise, the Claimant was told on several occasions that his communications were impolite and unprofessional, yet these indications did not restrain the Claimant's choice of language (eg page 347).

47. In summary, we conclude that dismissal was fair and within the range of reasonable responses of a reasonable employer.

48. In summary all claims are dismissed.

49. In conclusion, we would like to thank the witnesses and both parties for the dignified manner in which they have dealt with the sensitive allegation 16.

Postscript

50. Following promulgation of the oral judgment with reasons the Claimant has sent email correspondence to the Tribunal office indicating that he wished to appeal on 10 March 2017, attaching a lengthy letter, and subsequently that he did not wish to appeal on 12 March 2017.

51. If the claimant does wish to appeal he must do so to the Employment Appeal Tribunal and information about this process and fees has been sent with the judgment.

52. It is not clear from the claimant's correspondence whether he wishes to apply for a reconsideration by the Employment Tribunal of its judgment, which he can request under Rule 71 Employment Tribunal Rules of Procedure 2013, on payment of the appropriate fee or obtaining remission. If the claimant is requesting a reconsideration, he should write to the Tribunal to confirm his intention.

_____

Employment Judge S Davies
Dated: 3 April 2017

JUDGMENT SENT TO THE PARTIES ON

10 April 2017

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

.....

.....

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.