EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Miss Humma Rashid	Parliamentary& Health Service Ombudsman

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Manchester on 30 & 31 October and 2 November 2018.

EMPLOYMENT JUDGE Warren
Members Ms L Atkinson
Ms V Worthington

Representation
Claimant: in person
Respondent: Ms R White

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claims of direct disability discrimination, discrimination arising from disability and a failure to make reasonable adjustments are well founded.

2. The respondent directly discriminated against the claimant because of her protected characteristic of disability (dyslexia) in contravention of section 13 of the Equality Act 2010.

3. The respondent discriminated against the claimant because of something arising in consequence of her disability in contravention of section 15 Equality Act 2010.

4. The respondent failed to make reasonable adjustments for the claimant who was a disabled person at the material time in contravention of section 20 of the Equality Act 2010.

REASONS

Background and Issues

1. By an ET1 presented to the Tribunal on 20 December 2017 the claimant alleged direct discrimination (disability), discrimination arising out of her disability and a failure to make reasonable adjustments. The respondent denied the claims but later accepted that she was, at the material time, a disabled person because she was dyslexic.

2. At a preliminary hearing on 28 March 2018 the parties were ordered to prepare a list of issues. These were included in the trial bundle at pages 40 and 41

The Evidence

3. We heard evidence from the claimant on her own behalf. On behalf of the respondent we heard evidence from Mrs. Catherine Olney – Falzon (claimant's first line manager), Mrs. Jessica Guandalini (claimant's second line manager), Mrs. Gillian Hodgson (countersigning officer to the claimant), and Mr. Steven James, (interim HR director).

4. Having considered all the evidence, we have not found it necessary to prefer the evidence of one witness over another. It seemed to us that all the witnesses were generally doing their best to be truthful.

5. However, we had grave concerns over the lack of minutes in the moderation meeting and the fact that the spread sheets used at that meeting are missing.

6. Further, there are no minutes or notes of the meeting of 22 June 2017 when Mrs. Guandalini discussed the change of the claimant's grade to 'not satisfactory', and even more surprising, meeting on 6 July 2017 to discuss the reasonable adjustments against her regrading, chaired by an assistant director and with a union representative present.

7. There was an agreed bundle of documents. References herein in brackets refer to the excellent clear pagination.

8. We have decided the case on the evidential test 'the balance of probabilities'

The Facts

9. The claimant applied for employment with respondent, and was offered a role as a project officer. The respondent is a statutory body which provides an independent complaints handling service for complaints which have not been resolved by government departments or the NHS in England. The claimant's role was to investigate complaints and produce written outcomes. She was initially employed for a fixed period of four months, which was later extended by a further five months to 31 August 2017.

10. At the start of her employment she and her colleagues were the subject of coaching and quality assurance because they were all new to this type of work.

11. The claimant's first line manager was Catherine Olney- Falzon.

12. Before the claimant began work on 5 December 2016, she completed a health form (p.77) in which she declared that she was dyslexic. She did not specify any adjustments. In her evidence she explained that she did not ask at that stage for any adjustments because she did not know how her condition would impact on the work that she would be expected to do, as she was unaware of the details of that work.

13. She had been diagnosed with dyslexia at University in 2010, and had been given reasonable adjustments to assist her. Her diagnosis can be summarised as literacy and numeracy span borderline to low- average range and with significantly delay in relation to her level of general cognitive ability in respect of reading (p.442).

14. It was pointed out in that report that she would take much longer than a non- dyslexic person to read information, make adequate and relevant

notes and express her ideas concisely. She would take longer to write essays and assignments and find it more difficult to proof read her written work.

15. She had worked as a paralegal in the meantime, and explained that she had not needed any adjustments to enable her to work successfully.

16. Her university report had been obtained for these proceedings (p 438)

17. The respondent did not see the report before these proceedings.

18. Because of the claimant's declaration on her health form (p.77) there was a note dated 20 December attached to the form indicating that she should be referred to Occupational Health. She was so referred and had a telephone meeting with them.

19. A fitness certificate was issued (page 92) and sent to Rachael Lewis and Mo Khan, indicating that some reasonable adjustments had been identified. The certificate itself explained that the claimant was dyslexic and advised the manager to meet with her to discuss whether any adjustments were needed for example allowing extra time to read and write documents.

20. The fitness certificate was annotated on 22 December 2016 with a request to inform the human resources Business Partner for the area by scanning the form, so that action could be taken i.e. because some reasonable adjustments had been identified

21. This did not happen. The claimant's line manager never saw the fitness certificate and was unaware of the annotated instructions. She was also unaware of the evidence provided by the claimant on the questionnaire (p77)

22. The claimant began work. She started to have 1:1s with Mrs Olney - Falzon. The records of the 1;1 meetings are contained in the bundle. The records are detailed about each 1:1 meeting. The first meeting was held on the 10 January 2017 and the claimant disclosed that she was dyslexic to her manager. Mrs Olney-Falzon said she would record it, and to flag it if there were any problems, or if she needed anything

23. At this stage (p.96) Mrs Olney - Falzon indicated that she was pleased with the claimant's performance so far, and noted that as an improvement point she should focus on speeding up. There was some discussion about

the future – at this stage the claimant was on a 4-month contract and there were major structural changes occurring later in the year for the respondent. The claimant said that she would like to stay with PHSO, a message she repeated at many of her subsequent meetings with her line manager. She was reassured by Mrs Olney-Falzon who indicated that further information about the reorganisation was imminent.

24. The claimant's role involved receiving complaints, gathering evidence, and drafting reports. The final report had a target date of 13 weeks from receipt of the complaint, although this time could be extended. In the early days of her work therefore she was undertaking some analytical work in establishing what questions needed answering to enable a final report to be prepared. It is fair say her report writing workload increased as her cases progressed to final report.

25. The claimant was coached by a number of different senior caseworkers, and her work quality assured ("QA'd ") by others.

26. Mrs Olney – Falzon's evidence is that up to the point when she ceased to be the claimant's line manager, she was satisfied that the claimant was sitting in the middle of a cohort of around 11 new project workers. She had no real concerns at this stage. The claimant had completed some of her case load by then.

27. At each 1:1 the claimant had been praised for the progress she had made – she was particularly good at case management and client contact by telephone.

28. On 9 February 2017 the claimant was told that she was doing well, and was on a learning curve over her writing style. She was given plenty of positive feedback and reassurance. There was no indication by Mrs Olney Falzon of any concern at all. The claimant was, at each1:1 meeting invited to discuss adjustments. This was not unique to her, and was part of every 1: 1 with every member of the team. She believed she was doing well and didn't therefore see any need for adjustments.

29. A week later, on 16 February (p112) in a further 1:1, she was again praised for having her casework in good shape and for her forward planning. Her latest piece of clinical advice when QA'd came back with nothing but minor changes.

30. There then appears to be a 10 week review (p.117). It is unsigned and undated. It must have been completed by the claimant's line manager Mrs

Olney-Falzon, but she makes no reference to it in her statement, and it must have predated March 2017, as she ceased to be the claimant's manager at that point.

31. The review makes reference (p117) to the claimant's writing style not always being clear and requiring significant amendment at first touch, but noted that it did not usually require repeated reviews. It was identified as an area for development. Her grammar was described as poor. The claimant however responded well to feedback, and improvement could be seen. Apart from writing style the review was positive. There was no reference to dyslexia in that review, and no evidence of any discussion about this.

32. On 3 March the claimant was advised that her contract was to be extended to 31 August 2017.She continued to receive coaching and 1:1s with no significant feedback.(p.149). The claimant's line manager changed on 1 March 2017 to Mrs Guandalini (p.155) and a 1:1 was held on 10 April 2017.

33. When discussing development needs, the claimant expressed concerns that her work when submitted looked correct to her but when she received feedback and corrections, it reflected negatively on her. The claimant expressed concern that she had dyslexia and needed to check her work several times. She was reassured by Mrs Guandalini who said that she was progressing cases well, was one of the newest starters and her work should get stronger as she gained more experience. The action points made no comment on the quality of the claimant's written work.

34. Mrs Guandalini gave evidence that she had no management experience to this point but was a senior caseworker. On 9 May 2017 a coaching session (p166) made no reference to any concerns.

35. On 11 May 2017 the claimant completed a self- assessment form for her mid probation review. (p.170) The claimant completed her part in a positive tone. She recognised her own development and said that she had learned that the PHSO writing style is different and that she changed her documents to reflect it. She appeared unaware of any concerns about her development, learning or output. (p.172)

36. Mrs Guandalini then completed her part of the form, and indicated that the claimant was continuing to develop her written skills and that their way of writing reports was quite specialised. Mrs Guandalini concluded that the claimant's confidence and skills should develop with time and experience.

37. In answer to a question from the panel Mrs Guandalini confirmed that she said nothing which would have alerted the claimant to her performance issues. Mrs Guandalini also confirmed that she had given the claimant the wrong impression about her performance.

38. p.173 – Mrs Guandalini commented under ‘quality objectives’, that the claimant’s writing style was not always clear and she recognised it. She was working hard to ensure that her submitted work was to a good standard with minimal corrections needed.

39. It was noted that the claimant herself was concerned about the number of corrections she received through the QA process. Mrs Guandalini acknowledged this and indicated it was an area for improvement.

40. Mrs Guandalini discussed the feedback with the claimant on the 12 May 2017 and advised her that she was marked as ‘satisfactory’, ticking the box as she did so, on the form.

41. Mrs Guandalini made a mistake. She should not have given the claimant her grading, because the matter had to go to a moderation. Moderation was a meeting chaired by the claimant’s countersigning officer Ms Hodgson and at which the gradings of all staff were discussed.

42. Ms Hodgson in her evidence also accepted that the respondent did not do as well as they should in being explicit with the claimant so that she could understand her weakness in report writing as she went along.

43. After this meeting there was a first discussion about the need for adjustments for the claimant’s dyslexia.

44. Up to this point the claimant had been unaware that she needed adjustments. She had no measure of her written work being any different to her colleagues. Nothing significant had been said to her. She was aware that she was receiving criticism, which she took positively. She did not however appreciate (and the respondent’s witnesses confirmed that she had no reason to appreciate) that her written work was not improving at the rate of her colleagues. She was therefore unaware that her dyslexia was impacting on her work. The managers on the other hand were aware that her work was not improving at an acceptable rate, were aware of her dyslexia, and did nothing about it.

45. The moderation meeting was not minuted. It took place on June 2017. There was a spread sheet of comparative grades. The spreadsheet is missing. Mrs Guandalini was still saying at that point that the claimant's standard was in the middle of her team of 8. She clearly had no concerns about marking the claimant as 'satisfactory'.

46. In the meeting the claimant's grade was reduced to 'needing improvement' as a result of feedback about her writing style, spelling and grammar, when compared to others in her position.

47. Her report was amended by Ms Hodgson, who added a comment that 'she was progressing well against her throughput and output objectives and responding well to feedback on her casework'. There were concerns with the quality of report writing and the amount of re-work and correction required to meet standards. To quote "currently the standard produced by Humma is below an acceptable level"

48. Ms Hodgson mistakenly believed that the claimant had recently disclosed that she had dyslexia. To quote "we are working with her to understand how this may have impacted upon her work and what reasonable adjustments are to be made to help. While this work is ongoing and we are waiting for Humma to provide us with the information require to help her it is appropriate to mark her as 'improvement needed' as currently her written work does not meet the standard we require".

49. At this stage the respondent began to take the claimant's dyslexia a little more seriously. She was asked what adjustments she needed. She genuinely did not know.

50. It was agreed that the claimant would suggest interim adjustments. On 21 June 2017 the claimant completed a dyslexia questionnaire which she sent to her line manager and HR. This was a form of self-reporting and her score showed signs of moderate or severe dyslexia. (p206)

51. On 5 July 2017, as agreed in an earlier meeting, the claimant produced a list of suggested adjustments, and in her evidence agreed that these were, in the main, implemented fairly swiftly thereafter.

52. On 6 July Ms Hodgson advised Mrs Guandalini that she should collate all feedback, and document it. It was not the first time the claimant had been told she needed to improve, and Mrs Guandalini was to reaffirm that the claimant's contract came to an end on 31 August 2017. She further asserted that the assessment by Access to Work needed to be done and

the output considered before reasonable adjustments could be considered to support the increase in quality standards.

53. The eventual Access to Work report made recommendations which were far in excess of the claimant's suggestions. It is clear that technology has moved apace in supporting dyslexic workers.

54. There was meeting held on 20 June 2017. The claimant and her colleagues were advised that if at the mid year review, they received a 'satisfactory' grade, they would receive an offer of a permanent position in the new organisation, from 1 September onwards.

55. The claimant was delighted. She had said all along that she wanted to stay with the respondent long term. She knew that she had received a grade of satisfactory. She assumed therefore she would get a long- term position.

56. The claimant was completely unaware that her written work was causing concern. She knew she needed to improve, but had been reassured throughout that she was on a learning curve. She accepted criticism positively, and her line managers reflected that she learned from such feedback. She had no way of understanding that her work was causing real concern. Further she was unaware herself that her dyslexia may be affecting the quality of her work, even when she raised it. She gave evidence that she would formulate what she wanted to say, but was unaware that what she wrote did not always reflect a logical and coherent analysis of the case, until such time as it was pointed out to her in QA. At that stage the respondent witnesses confirmed that they were reassuring her that the respondent's style was different, and that she was improving, and it would take time to develop.

57. Immediately after the meeting however, the claimant was taken to one side by Mrs Guandalini and advised that her marking had been changed to 'needing improvement' – which meant that she was not being offered a permanent position. The claimant was very upset.

58. Mrs Guandalini and Ms Hodgson began to discuss steps to be taken to adjust for the claimant to see if she could reach the satisfactory grade. However, at this point a divide began which remained until after the claimant resigned.

59. The management team over the next few weeks discussed extending her fixed term contract, keeping a permanent vacancy for her, and obtaining

an Access to Work report, to ensure that appropriate adjustments could be made. It is clear that they fully intended to support her to see if she could meet the requirement of 'satisfactory'. It seemed to the Tribunal that this may have been realistic, because on 22 May 2017 Mrs Guandalini QA'd a report for the claimant and said "I think the background reads very clear (sic) and links well with the analysis. Please proceed….".

60. However – there was a series of failures in the communication chain. The end result was that 1 week before the claimant's fixed term contract ended, she had no idea what the future held and had been told by Mrs Guandalini and Ms Hodgson that her contract would end on the 31 August 2017.

61. This was completely wrong. Mrs Guandalini had received an email on 16 August from Katie O'Connor, HR business partner, asking to have discussion about the claimant's case. Attached to the email was an email from Keith Parker who was an interim HR business partner indicating that Mrs Guandalini needed to pick up the Access to Work report (p.363), meet with the claimant, set realistic targets and extend her contract by 2 months. Mrs Guandalini initially said in her evidence that she had not seen this email.

62. In cross examination it was pointed out that she had acknowledged that she had read it, in an email to Katie O'Connor, later that day, but she had not at that stage seen the Access to Work report. She did not remember this email, and confirmed that she did not extend the claimant's contract by 2 months, or tell the claimant what had been recommended by Mr Parker.

63. The claimant was, therefore, as of the 16 August, unaware that anything was being done to give her time to demonstrate any improvement as a result of even the interim adjustments which had been made.

64. The Access to Work report was received about a week before the claimant's contract was due to expire. It made a detailed assessment of the impact of the claimant's dyslexia on her work, and made a very specific and focussed set of recommendations for adjustments.

65. The report made recommendations for 12 reasonable adjustments costed at £3,700, and offered to pay 2/3rds of the cost. The recommendations included training for managers and colleagues on issues related to dyslexia.

66. The Access to Work report explained that the claimant had difficulties including spelling, grammar and punctuation when placed under pressure, and she struggled with retention of information when reading for long periods, and the structuring of written work.

67. Her other issues revolved around multi-tasking, and applying thought processes to written text.

68. The claimant was becoming increasingly anxious, which affected her ability to focus and affectecd her performance. She feared she might lose her job as her contract was due to finish on 31 August 2017.

69. The claimant's evidence explained her anxiety - her sleep was affected, and she felt she was monitored more and scrutinised more closely. She told the respondent in an email of 5 July that, under stress, her dyslexia could become more pronounced.

70. Ms Hodgson sent an email to Mrs Guandalini suggesting that all of the claimant's feed- back and 1:1s should be collated with tracked changes on her draft reports in preparation for a meeting on 6 July 2017. The claimant commented that Ms Hodgson attended the meeting with a black folder containing the feedback. The claimant felt it was obvious that Ms Hodgson was determined to show she was incompetent She, in her evidence, made the point that if that was the case she should have been informed of significant work issues much earlier.

71. As the claimant had heard nothing from her line manager or anyone else about the future, she started to look for other work, received an offer elsewhere at a lower salary and accepted it. She handed in her notice to leave on the 31 August 2017.

72. However, prior to that it must have been evident that she was becoming increasingly stressed by her situation. Her union representative (p.350) was chasing the respondent for an answer to her situation explaining how stressed she was. In the meeting on 6 July the claimant became too distressed to continue. The meeting ended, and no one in the management team undertook any subsequent check on the claimant's condition. No minutes were kept of the meeting and whilst Ms Hodgson and Mrs Guandalini admitted in evidence that the claimant was very distressed, neither mentioned it in their witness statements.

73. p. 382 Ms Hodgson emailed Katie O'Connor, after receiving both the Access to Work report and the claimant's resignation. She refers to the

claimant's resignation in the following terms 'whilst the individual issue has been resolved here'. Ms Hodgson's comments on the Report suggest the recommendations were systemic and not individual, a statement with which the Tribunal disagrees – the report is very specific with reccomendations which appear to tackle the claimant's issues). In particular there is reference to the way that the claimant structures her work with specific recommendations for software which would assist her in structuring her reports.

74. The claimant had applied for various other roles within the organisation, of which there were many (around 90). She was not successful in any application. The respondent witnesses confirmed that with a grading of 'needs improvement' she would not be successful.

75. At the point of resignation, the respondent witnesses who were involved at the time all accepted that there was no effort made to either find out the detail of why she had resigned, or to ensure that she was aware that her contract could have been extended, and further adjustments put in place to enable her to attempt to achieve 'satisfactory', and take the permanent role reserved for her. Her resignation was simply accepted.

76. The claimant began work at a lower rate of pay for another organisation on 5 September 2017. She had felt she had no option as no one had suggested to her that there was even a hope of extension or permanence until she received the disclosure in this case. Indeed, in the meeting on the 6 July Ms Hodgson made it clear that her contract would end on 31 August 2017.

77. The Tribunal noted that the first time the claimant became aware that Mr James had reserved a case worker position for her after 31 August 2017, was in cross examination in this case. He explained that there were 65 vacancies to be filled post 31 August, and only 62 or 3 would be recruited. He confirmed that the claimant was unaware of this.

78. After her resignation the claimant lodged a grievance which was dealt with, with her agreement, in writing.

79. There was no copy of the grievance contained within the bundle. Her grievance was not upheld, and she appealed.

80. p.435 Mr James handled the appeal. He confirmed in his outcome that the claimant's disability of dyslexia was not in dispute. He concluded that no

adjustments were made to her working environment between December 2016 and May 2017. No steps were taken to proactively discuss it with her and consider reasonable adjustments at an early stage. He accepted that this was a procedural fault on the part of the respondent, and may have had an impact on her performance during this time. By June 2017 steps were being taken to introduce interim adjustments, with steps being taken to consider longer term adjustments. He considered the steps then taken to be reasonable. He found no evidence to support her contention that such failure led to her poor performance and so found thsat she was not discriminated against. He confirmed that her grievance had identified a failure on the part of the respondent to identify and agree reasonable adjustments at the earliest opportunity.

81. In his evidence Mr James went much further. He acknowledged that the claimant did not know about any potential extension to her contract, or of a vacancy being held for her, or the contents of the Access to Work assessment received the day before she resigned. He acknowledged that the claimant was in a stressful situation, and no one had the conversation with her to tell her that there was some relief coming. There was a failure of communication, set in the context of a major reorganisation taking effect on 1 Septemnerber 2017. Her resignation was accepted and the vacancy was released.

The Law

82. Section 13 Equality Act 2010 provides that a person (A) discriminates against a person (B) if, because a protected characteristic, A treats B less favourably than A treats or would treat others. The provisions protecting those in employment are contained in section 39 in the Act.

83. Section 136 contains the burden of proof provisions namely that if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the tribunal must hold that the contravention occurred.

84. In Igen Ltd V Wong 2005 EWCA Civ 142 the Court of Appeal considered and amended the guidance contained in Barton v Henderson Crosthwaite Securities Ltd 2003 IRLR 332 on how to the previous similar provisions concerning the burden of proof.

(1) It is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an

act of discrimination against the claimant which is unlawful. These are referred to as
"such facts"

(2) If the claimant does not prove such facts the claim fails
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. (4) In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inference it is proper to draw from the primary facts found by the tribunal.
(5) It is important to notice the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage the tribunal is looking at the primary facts proved by the claimant to see what inferences of secondary fact could be drawn from them and must assume that there is no adequate explanation for those facts. These inferences can include any inferences that may be drawn from any failure to reply to a questionnaire or to comply with any relevant code of practice. It is also necessary for the tribunal at this stage to consider not simply each allegation but also to stand back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.
(6) Where the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the proscribed ground, then the burden of proof shifts to the respondent and it is for the respondent then to prove that it did not commit, or as the case may be, is not to be treated as having committed that act.
(7) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities that the treatment was in so sense whatsoever on the proscribed ground. This requires a tribunal to assess not merely whether the respondent has proved an explanation for such facts, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not a ground for the treatment in question.
(8) Since the facts necessary to prove an explanation will normally be in the possession of the respondent, a tribunal will normally expect cogent evidence to discharge that burden of proof.

85. The tribunal has applied the guidance offered by the Employment Appeal Tribunal in Laing v Manchester City Council 2006 IRLR 748 and Network Rail Infrastructure v Griffiths-Henry 2006 IRLR865. The reasoning in the former decision has now been approved by the Court of Appeal in Madarassy v Normura 2007 IRLR 246 CA.

86. Section 15 EQA a person A discriminates against a disabled person (B) if
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Reasonable adjustments

87. The duty to make reasonable adjustments arises where

(a) the employer applies a provision criterion or practice which places a disabled employee at a substantial disadvantage in comparison with persons who are not disabled and
(b) the employer knows or could reasonably be expected to know of the disabled persons disability and that it has the effect in question.

The duty is to take such steps as it is reasonable, in all the circumstances, to take to avoid the provision criterion or practice having that effect.

In Environment Agency v Rowan 2008 IRLR 20 the EAT stated that when considering a failure to comply with a similar duty under Disability Discrimination Act 1995 duty the tribunal must identify:

(a) the provision criterion or practice applied by or on behalf of the employee

(b) the physical feature of premises occupied by the employer

(c) the identity of the non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the claimant which may require a consideration of the cumulative effect of (a) and (b) above.

Our conclusions against the agreed issues

88. Whether the claimant was treated less favourably because of her disability contrary to section 13 Equality Act?

89. *By amending the claimant's probationary review from 'satisfactory' to 'improvement needed'*

90. The comparator was identified someone whose circumstances are identical to the claimant, save for her disability. Counsel for the respondent made the point that the real issue with the claimant's work was her inability to analyse the evidence and produce a structured report based on the material provided to her. Counsel further asserted that the claimant had failed to provide evidence to the Tribunal to support her case that this failure was directly caused by her diagnosed disability of dyslexia.

91. Our conclusions are firstly, that there was evidence of QA criticism of the claimant's spelling and grammar which the respondent did not seem to dispute was caused by her dyslexia. The claimant gave credible evidence that she would formulate a sentence or paragraph in her mind which made perfect sense, but, once she had written it down, others would argue that it was not logical, and she asserted this was because of her dyslexia.

92. We found evidence in support of her case in the conclusions of the university report at p. 442 – it was suggested she used mind mapping to organise her thoughts, and that additional help may be needed with organisation., She needed extra time to read information, make adequate and relevant notes and to express her ideas concisely. It would be harder for her to proof read, and she would need to read information repeatedly.

93. We found further evidence in support of her case in this regard in the respondent's own Access to Work assessment.

94. We therefore conclude that the claimant has, on the balance of probabilities satisfied us that her ability to analyse a case as described by Counsel for the respondent is impacted by her disability of dyslexia

95. *The claimant, at the time of the mid-year probationary review, was one of a team of eight being managed by Mrs Guandalini. She placed the claimant in the middle of her team in terms of performance. She told her she was marked as satisfactory. The claimant therefore, understood that whilst she needed to improve her report writing skills, she was doing well. In theory therefore if her writing skills improved she would move to the upper end of the group, in performance terms. All other 7 in the group were marked as satisfactory, including those underneath her in the list. This only changed when Ms Hodgson became involved as counter signer and in the moderation process. It was only after the meeting between the claimant and her line manager on 13th May that Ms Hodgson became aware of the claimant's disability.*

96. On the face of it, the claimant has satisfied us that outwith further credible explanation from the respondent (which was not forthcoming), there is a case of direct discrimination in the change in the box marking. This is the one area where we struggled to believe Ms Hodgson and Mrs Guandalini. There were no minutes in support of the meeting and their accounts were surprisingly unfocussed. The one piece of evidence that may have assisted has been lost. This is the spread sheet on which the moderation team were working. We were given no specific evidence in support of the down grading decision, to account for the fact that others were performing less effectively in other areas of work, but were not downgraded. This appeared to target the claimant alone, in relation to her writing skills which the respondent knew or should have known were being impacted by her disability.

97. We therefore find that the claim of direct discrimination is well founded.

98. *Whether the relevant circumstances of the comparator, including abilities, were materially different from those of the claimant*.

99. We have found it difficult to assess the comparator's circumstances because of the lack of notes and loss of the spread sheet, and so we have relied on Mrs Guandalini's account of the rankings of her team and have not found the relevant circumstances to be materially different.

Discrimination arising from disability

100. *Was the claimant treated unfavourably because of something arising in consequence of the claimant's disability contrary to section 15*

EQA?

101. We have found that the something which arose from the claimant's disability was her inability to write grammatically correct coherent reports with accurate spelling to the standard required by the respondent. She suffered unfavourable treatment by being downgraded and thus losing her secure position of a permanent role with the respondent. She suffered anxiety and distress as well as stress, all of which was completely caused by the respondent failing to advise her of their plan for her future

102. *Whether the respondent knew or could reasonably have been expected to know of the claimant's disability?*

103. The respondent conceded that they knew or ought to have known about her disability from December 2016. This was conceded by Mr James in his response to her grievance, and in his evidence. The tribunal does not accept the respondent's argument that the claimant did not complain about the lack of reasonable adjustments. She had not been provided with a clear enough steer (which is also accepted by the respondent) that the standard of her work was so low as to be impacting materially on her performance. Had the respondent provided a clear assessment of her abilities before June 2017, then she may have pushed the issue harder. As it was when she did try to raise the issue, she was gently reassured by her line manager.

104. *A delay in considering reasonable adjustments.*

105. This led to a substantial delay in considering reasonable adjustments – to the point that the impact of those adjustments could not possibly have been assessed until weeks or months after the claimant's contract had expired. There was an attempt to undertake some reasonable adjustments, but these were without the benefit of a professional assessment, they were simply the claimant's best guess. When compared with the subsequent A t W report, it is clear that her best guess fell far short of what could be done to assist.

106. The delay did cause her considerable distress as she could see the 31 of August approaching and no-one was willing to explain to her the options being considered for her future. We were really dismayed at this lack of communication and the callous disregard for her welfare by her line manager and in particular her countersigning officer (an assistant director).

107. *A delay in implementing reasonable adjustments?*

108. We need add little to the above. The delay started in December 2016, it continued in May, and in fact the A t W report was not received until 21 August, 10 days before the end of the claimant's fixed term contract. There was never realistically a hope of the reasonable adjustments being introduced, (unless the claimant had been given the proposed extended contract) and yet the report made recommendations which on the face of it ought to have

alleviated her situation considerably particularly in relation to her report writing.

109. *Amending the claimant's probationary review from satisfactory to improvement needed?*

110. We have found that the claiamnt's ability to meet the standard of report writing was impacted by her disability. It arose from her dyslexia, reducing her grade from 'satisfactory' to 'improvements needed' after she had been told that her grade was 'satisfactory', was unfavourable treatment. It was more than trivial because it led to her believing that she, like colleagues, would be offered a permanent position.

111. *Was the treatment a proportionate means of achieving legitimate aim*

112. The legitimate aim relied on is ensuring that written work is prepared to the required standard and that employees are rated in appraisals according to their performance.

113. We do not find this was proportionate because had the respondent resolved the issue of adjustments sooner, then her assessment would have reflected her supported ability, and there would have been time for her to complete a plan for improvement before her fixed term contract came to an end.

Reasonable adjustments

114. Whether the respondent failed to comply with a duty to make reasonable adjustments?

Whether the respondent applied a PCP and if so whether it put the claimant at a substantial disadvantage in comparison with persons who were not disabled contrary to section 20 (3) EA

115. The PCP relied up on is the requirement to produce written investigation reports in accordance with the respondent's template and to process customer evidence to generate such report. We agree with the parties' assessment if the PCP

116. The disadvantages relied on are: -

- A reduction in the speed in which work can be completed.
- A hampered ability to produce written work in accordance with the template.
- Difficulty reading and processing information.

Whether the respondent took such steps as it was reasonable to take to avoid the disadvantage?

117. Steps eventually taken were: -

- A 25% reduction in caseload
- Time allowed to write down notes following verbal instructions
- Feedback was discussed verbally
- The claimant was allowed to schedule calls with customers to concentrate on her written work
- The claimant was allowed to print documents rather than read them on screen.
- She was given a fixed desk with change of screen and anti-glare screen filter

These steps were taken as a result of the claimant being asked in the interim what she thought might help. It is agreed that these were introduced promptly in July 2017.However that was 7 months too late.

118. The steps the claimant alleges should have been taken are: -

- A proper assessment at the outset of her employement with a view to providing her with relevant aids to assist her in completing her tasks relevant to her role and in particular with regards to reading, collating/processing data and investigation report writing namely: -
- Implementing software
- Providing other aids such as coloured overlays and visual screening
- Considering a reduced caseload
- Giving additional time to complete her caseload
- Additional training to the claimant and her colleagues.

119. We agree, simply by following the objective and independent Access to Work review undertaken and sent to the respondent on the 21 August 2017.

120. *The respondent should have given the claimant a 'satisfactory' review rather than an 'improvement needed'.*

121. We are puzzled by the evidence given by the respondent as it appeared to us to be inconsistent. The claimant's line manager, who knew her best, and received every piece of feedback that she had been given rated her as satisfactory and told her so. Common sense would suggest therefore that she should have been rated 'satisfactory'

122. Whether she should have told her about her rating is a different issue. We recognise though that this was her line manager's assessment at the time.

123. *Her line manager in the moderation meeting had her mind changed. It is clear from Ms Hodgson's comments on her mid-year probationary review, and in subsequent emails, that she did not consider the claimant to be satisfactory*.

124. No one seems to have taken account of the fact that the claimant had been told she was satisfactory, and that at least 3 others were also failing in elements of their work. The moderation meeting was, for the Tribunal clouded in mystery. The answers given were vague and unsupported by any documentary evidence.

125. In these circumstances it is difficult to decide whether a reasonable adjustment would have been to leave her as 'satisfactory'. We conclude it would be fair to the claimant, or a reasonable adjustment, to leave her marked as her line manager had assessed her, at least when 3 others in the team were assessed as satisfactory and yet fell below her in the team rankings.

126. *It would have assisted if the respondent had given the claimant an opportunity to discuss the decision to change her mid probationary review and provide her with proper reasoning.*

127. We do find that there was a meeting on 29 June (p246) at which the change of marking was explained to the claimant. She was not directly given the chance to argue that her marking should be changed back but she was given a full explanation, and advised of help which would now be offered by way of reasonable adjustments.

128. *The respondent should have extended the claimant's fixed term contract indefinitely until such time as the claimant's performance could be assessed following the fair implementation of the reasonable adjustments (above)*

129. We agree. The irony is that so far as Mr Janes and Mr Parker were concerned, that is exactly what they had planned. Unfortunately the line managers were not proactive, despite repeated chasing. Mrs Guandalini acknowledged that she had read Mr Parker's email setting out his plan, at least in part. She could not explain why she had done nothing, and why she could not remember either her email of acknowledgement or the original email. We have heard no evidence to suggest that Ms Hodgson did anything positive to move the process forward in real terms, or to ensure that the claimant was given accurate information about her future. Her inactivity was of concern to the Tribunal in circumstances where she evidenced the claimant's distress and stress, when the claimant left the meeting in tears.

130. *Whether the respondent knew or ought to have known that the claimant was likely to be placed at a substantial disadvantage in comparison with persons who are not disabled.*

131. The respondent did know at the outset that the claimant was dyslexic, and there are references to reasonable adjustments form the outset. However, the line manager was not made aware of this, and although told by the claimant that she was dyslexic, did not react as the poor standard of the claimant's written work became evident. The claimant rightly makes the point that she was unaware of how her work was progressing when compared to others, and was reassured that she was on a learning curve, and that it took time to learn the respondent's style, and that as a dyslexic she had no way of understanding the quality of her own work

132. It is easy with hindsight for the Tribunal, with all of the information available to us, to say that the respondent should have been aware. We bear in mind that the respondent did not see the university assessment.

133. However, as the claimant's written work developed and did not improve, it ought to have alerted the claimant's manager to the issue. We therefore consider that the respondent failed and should have known that the claimant was likely to be placed at a substantial disadvantage. That likelihood increased as the weeks went by, and others were offered permanent posts, even though on some competences, the claimant performed at a higher level. The pressure increased even further upon her as 31 August approached and it seemed to her as though she had no future with the respondent beyond that.

134. Having read the A t W report and her university assessment, it would seem likely that the software and adjustments suggested would have given her every assistance in the production of properly analysed reports, particularly the mind mapping software which was suggested to address her analytical skills issues arising from her disability. If the claimant had received the extra time to use the software she could have been properly assessed against her peers. We find this failure to make proper adjustments particularly difficult to comprehend. It must have been obvious to the respondent that she as being placed at a substantial disadvantage.

Employment Judge Warren

Signed on 14 January 2019

Judgment sent to

Parties on

21 January 2019
