RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms D Holmes**

Respondent: **London Borough of Tower Hamlets**

Heard at: **East London Hearing Centre**

On: **5, 6, 7 November 2019; 22 November 2019 (in chambers)**

Before: **Employment Judge Gardiner**

Members: **Mr T Burrows**
Mrs S Jeary

Representation

Claimant: Mr David Stephenson, Counsel

Respondent: Ms Robin White, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's application to amend the claim to include a claim for breach of contract is granted.**

2. **The claim for breach of contract succeeds.**

3. **All other claims fail and are therefore dismissed.**

REASONS

Introduction

1. Until the end of her employment on 9 July 2018, the Claimant was employed by the Respondent. She claims that the circumstances in which her employment ended

amount to an unfair dismissal. She also brings claims for wrongful dismissal, discrimination arising from disability contrary to Section 15 of the Equality Act 2010 and a failure to make reasonable adjustments under Section 20 of the Equality Act 2010. By way of amendment, she also seeks to add a claim of breach of contract.

2. The Tribunal has heard evidence from the Claimant herself and from Shazia Hussain, Divisional Director (Customer Service), Sasta Miah (formerly Head of Learning, Organisational and Cultural Development) and Michelle Vincent (HR Business Partner). There was an agreed bundle of documents before the tribunal running to 601 pages, including pages added during the Tribunal hearing. On the first day, the Respondent applied for a witness order in relation to Mr Angus Taylor, who had acted as the Claimant's union representative at several meetings, including a meeting in January 2018. For reasons given orally at the time, the Tribunal rejected this application.

3. At the start of the case, the Tribunal was provided with Chronologies drafted by both counsel, namely Mr Stephenson, Counsel for the Claimant, and by Ms White, Counsel for the Respondent. Evidence and submissions was heard over three days. At the end of the third day, the parties handed in written closing submissions and amplified those submissions orally. The Tribunal took a further delay to deliberate and reach its conclusions. Supplementary submissions were received from Mr Stephenson, Counsel for the Claimant, after the end of the third day, but before the Tribunal reconvened in Chambers to deliberate. Those were specific his application to amend to include a claim for breach of contract.

4. Before the start of the hearing, there was no agreed list of issues for determination at the Final Hearing. At the same time as the Tribunal read the witness statements and the documents referred to in those statements, the parties discussed the issues and prepared a manuscript list of issues. This was discussed and was refined. It was reduced to typed form on the morning of the third day. It was subsequently further amended in that two of the suggested reasonable adjustments were withdrawn and a claim was added indicating that the Tribunal should also consider whether there should be a *Polkey* reduction in the event that the unfair dismissal claim succeeded.

The issues

5. The agreed list of issues was worded as follows:

1. The Claimant's dyslexia is conceded to have been a disability at all relevant times.

S20/21 EqA Reasonable Adjustments

2. Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant namely the requirement:

a. If redeployed, to undergo and successfully complete the redeployment trial period;

b. Complete set tasks within specified time scales;
c. Communicate effectively with colleagues.

3. If so, did it place the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant contends that she was placed at a substantial disadvantage because persons with dyslexia would be less able to meet the requirements, and are therefore placed at a greater risk of:

   a. Not being able to perform to the standard required for the role;

   b. Failing her redeployment period;

   c. Being dismissed.

4. If so, did the Respondent take reasonable steps to avoid the disadvantage? Did the Respondent or was the Respondent required to make the following adjustments;

   a. Providing clarity of tasks the Claimant was required to complete;

   b. Providing a sufficient period of time (ie 6 months) for the Claimant to learn the day to day requirements of the role;

   c. Providing written confirmation of verbal instructions in a timely manner, ie within 24 hours or as soon as [possible] thereafter.

S15 EqA Discrimination arising from disability

5. Did the Respondent subject the Claimant to unfavourable treatment? The Claimant relies upon the following acts/omissions as founding her claim under Section 15 EqA 2010:

   a. Mr Miah's negative assessment of her trial period on or around 05.07.18;

   b. Mr Miah's failure to confirm the Claimant in the redeployed role on around 05.07.18;

   c. Her dismissal on or around 09.07.18

6. If so, did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disability? The alleged 'something arising in consequence' of the Claimant's disability is her;

   a. Performance;
   b. Conduct/behaviour

7. If that is the case, is it justified as a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is the need to have an employee in place competent to perform the role.

Dismissal

8. Was the Claimant dismissed or was there a mutually agreed termination?

9. If the Claimant was dismissed, what was the reason for the dismissal? The Respondent asserts that it was for some other substantial reason.

10. Was the reason one of the potentially fair reasons in Section 98 ERA 1996?

11. Did the Respondent follow a fair procedure?

12. Was the decision to dismiss within the reasonable range of responses for a reasonable employer?

13. Should any reduction be made under Polkey v A Dayton Services Limited to reflect the chance that the Claimant would have been fairly dismissed in any event?

6. This list of issues did not feature a claim for wrongful dismissal or a claim for breach of contract. At the end of closing submissions, the Tribunal raised with the parties whether there was a claim for wrongful dismissal, given that this did not feature in the list of issues, but appeared to be raised in the ET1, where the Claimant had ticked the box saying she was entitled to notice pay; and to arise on the evidence. At that point, the Claimant indicated that she wanted to bring a claim for both wrongful dismissal and breach of contract. On behalf of the Respondent it was conceded that the Claimant could bring a claim for wrongful dismissal but argued that a claim for breach of contract was a potentially new claim which would require an amendment. The Tribunal directed that written submissions should be made on that issue and those submissions provided in advance of the day identified by the Tribunal for the Tribunal's deliberation. Written submissions were sent to the Tribunal by Mr Stephenson, Counsel for the Claimant. The Respondent chose not to lodge any further submissions, merely indicating by email that it objected to any amendment being made to the claim to introduce a claim for breach of contract.

Factual findings

7. The Claimant had been employed by the Respondent since 27 July 2010. Under her employment contract, at clause 10, she was entitled to receive one week's notice for each year of continuous service up to a maximum of twelve weeks. As at the date on which the Claimant's employment ended, she was entitled to eight weeks' notice, given that she had been employed by the Respondent for eight full years.

8. As a result of a restructure that took place in 2016, the Claimant was appointed to a new role of Business Development Manager (Community Engagement and Learner Support) from 1 November 2016. This role was graded at PO4. In that role her line manager was Kate Pitman. The Claimant was unhappy about the way in which Ms Pitman managed her team and felt that Ms Pitman was treating her unfairly.

9. During the period from November 2016 until May 2017, the Claimant had 22 days sickness absence. By the end of April 2017, this had triggered an informal sickness absence review process. On 23 May 2017 the Claimant started a period of sickness absence which was recorded by the Claimant's GP on the Fit Note as due to work-related stress. The Claimant attributed this to Ms Pitman's behaviour towards her. She remained on sick leave until 13 November 2017.

10. In the interim she had been referred to occupational health and a report was prepared on 5 June 2017. She also discussed her sickness absence at various review meetings. On 13 June 2017, the Claimant lodged a formal complaint under the Combatting Harassment and Discrimination (CHAD) procedure in which she raised several issues about Ms Pitman's conduct.

11. On 1 September 2017, by way of potential outcome to the CHAD, a mediation took place, aiming to restore the working relationship between Ms Pitman and the Claimant. A draft mediation agreement was prepared. It was not ultimately signed, because the Claimant considered that it did not fully take account of Ms Pitman's behaviour and referred to matters of flexible working that she thought should be outside the scope of the mediation process.

12. The Claimant returned to work on 13 November 2017. Around the time of her return, there was a meeting between the Claimant and Ms Pitman, brokered by Ms Hussain. Ms Hussain was the Divisional Director, Customer Service, with overall responsibility for the Service in which both she and Ms Pitman were working at this point. Ms Hussain offered support through weekly three-way meetings with the Claimant and Ms Pitman. She agreed a work plan for the Claimant with targets for her to meet. The Tribunal has not been shown this work plan.

13. Initially the Claimant was on a phased return to work in which she worked 50% of the time at home and 50% of the time in the office. From the start of December 2017, it was agreed that she would only work one day each week at home.

14. Despite the input of Ms Hussain, the working relationship between the Claimant and Ms Pitman did not improve. On 14 December 2017 there was an hour-long meeting. During this meeting the Claimant complained about the working relationship with Ms Pitman. She wanted to discuss how she might continue to work for the Respondent but not be line managed by Ms Pitman. There was an initial discussion about her options, in general terms. The Claimant continued to work in her role in Ms Pitman's team.

15. A further meeting took place on 22 January 2017 attended by the Claimant and her union representative as well as Ms Hussain and Ms Vincent. At this meeting, three

options were offered to the Claimant. The first option was to continue with her current role as part of Ms Pitman's team. The second option was to be placed on the redeployment list within the Respondent for a period of 16 weeks. The third option was to resign and receive two months' notice pay. The Claimant's position at that meeting was that she did not want to resign, nor did she want to continue working with Ms Pitman. It had been suggested by the Respondent that there was a binding agreement reached at the meeting about the Claimant's future employment. The Tribunal rejects this. Whilst the Claimant indicated a preference for option 2, it was envisaged that there would be further discussions before any agreement was concluded, as is clear from subsequent correspondence.

16. In cross-examination, for the first time, Ms Hussain said that, following this meeting, she sent an email to the Claimant recording the options offered at the meeting. This detail did not feature in her witness statement. It is not a document that was included in the bundle. None of the documents in the bundle cross refer to such an email, which the Tribunal would have expected given the content of the subsequent correspondence referring to the three options. On the balance of probabilities, the Tribunal concludes that no such email was sent at the time.

17. The first email after the meeting on 22 January 2018 is likely to be the email from Ms Hussain to the Claimant on 6 February 2018 in which she refers to the meeting and her recollection that she and the Claimant had agreed that the Claimant would come back to her with her chosen option by the beginning of February 2018. This is a further reason why no binding agreement was reached at the January meeting. In the 6 February 2018 email, Ms Hussain asked the Claimant to indicate which option she would like to be considered.

18. The Claimant responded in an email on 7 February 2018. She stated she would like opportunity (b) which she described in the following terms :

> Up to 16 weeks as a provisional redeployee providing me with prioritised access to vacancies in the Council (as with other redeployees) with a view to me securing another position.

19. Her email asked for this offer to be confirmed in writing with further information to be provided about the process and the start/end dates.

20. Four weeks later, on 5 March 2018, the Claimant was sent a letter by email, incorrectly dated 1 March 2018. The letter was written and signed by Ms Hussain. It set out the three options. In relation to the second option, that of redeployment, she was offered support for CV writing and interview training. In relation to the third option, she was offered only one months' pay and an agreed reference. Option 2 was explained as follows:

> Normally redeployment would be sought after a period of 12 weeks, after which, if alternative employment is not secured, then arrangements would be made to end your contract of employment with this Authority. However, I agreed that if you were to consider this option I would extend the redeployment period to a maximum of 16 weeks.

> During this period you would be placed on the Council's redeployment list to be considered for any suitable alternative employment. In order to be able to do this you would be required to complete an Employee Profile form and return it to People resourcing to enable a job matching to take place. I would also draw your attention to the My Career Portal, being advertised on the intranet, which is part of the wider employee wellbeing initiative to ensure that staff are supported and have the skills and access to the right tools when looking at new responsibilities in an existing role as well as trying out a new role in the Council or elsewhere.
>
> Should you need further 121 interview training then I could ask HR to facilitate this. As a redeployee you would have access to the Council's Redeployment Portal which would allow you to submit your Profile electronically, and view vacancies which are held for redeployees only.
>
> You raised concerns about option 3 and I agreed that if you chose to take option 2 and it was not successful then option 3 would be pursued to leave with 2 months' pay without working it.
>
> We originally agreed that you would confirm with me what your preferred option would be by the beginning of February 2018. I have not had any confirmation from you and would be grateful if you could formally get back to me within 1 week of receiving this letter.

21. Option 2 was the redeployment option. It is clear from the wording of the letter that the Respondent's redeployment policy was to apply in the event that the Claimant elected to pursue Option 2. Option 3 was "leaving with 1 month pay and an agreed reference", although the penultimate paragraph cited above increased this to 2 months' pay in the event that Option 2 was unsuccessful.

22. The Claimant responded to this letter on 9 March 2018. She confirmed she would like to take the second option. She referred back to her email of 7 February 2018 in which she said had initially indicated that this was her preference.

23. On 14 March 2018, Ms Vincent, HR Business Partner, sent a letter to the Claimant by email. With the letter was sent an employee profile form for the Claimant to complete and guidance for its completion. The letter was headed 'without prejudice', although Ms Vincent claimed in her evidence that the inclusion of this was an error.

24. The 14 March 2018 letter referred to the redeployment period as being for a period of 16 weeks from 19 March 2018. This was longer than the standard redeployment period of 12 weeks. The letter stated that this period would run until 6 June 2018. This was an error because a period of 16 weeks from 19 March 2018 would in fact run until 9 July 2018. Ms Vincent's letter explained the mechanics of the redeployment process, including that the Claimant's salary would be protected for a period of two years if she was redeployed to a lower graded post up to two grades below her current post.

25. The letter concluded with the following words:

> As agreed at the meeting with Shazia where the options available were discussed, if alternative employment is not found during this redeployment period, then a

legal document will be drawn up for you to leave the organisation with two months' pay.

26. The reference to the meeting with Shazia was a reference to the meeting on 22 January 2018. In the absence of any contemporaneous record, it is unclear whether there was any reference at the January meeting to a legal document, or discussion as to its contents. There was no reference to such a legal document in the letter sent on 5 March 2018, which is the earliest correspondence from the Respondent after the date of the meeting.

27. The Respondent's Redeployment Policy has the following relevant features:

> The HR Business Partner will notify the employee of commencement of the redeployment period, and serve notice of termination of employment due to redundancy …. The notice of termination of employment will run concurrently with the redeployment period.
>
> The trial period is to determine whether the new role is suitable and will, in the first instance, be for a period of four weeks. During the trial period, the notice period will not be suspended.
>
> The trial period can be extended by a maximum of four weeks for the purpose of allowing further time for retraining and to maximise transferable skills.
>
> The new manager should meet with the employee weekly during the redeployment trial to:
>
> - Discuss progress
> - Identify any weaknesses and the means by which to address them
> - Discuss and arrange suitable training
> - Keep written records of the meetings and agreed actions
>
> Typically, employees remain at work during their notice periods as this is when the redeployment search is carried out. There may be occasions during the notice period when an employee is expected to carry out alternative duties, elsewhere in the Council, that are not necessarily included in their job description.

28. The Claimant completed the Employee Profile form and identified six roles on the vacancy list that were of potential interest. She was offered and attended interviews for two roles. She accepted the role of Learning, Organisational & Cultural Development Practitioner in the Resources Directorate.

29. In an appointment letter sent to her on 27 April 2018, she was told that the role would start on 8 May 2018 and be subject to the following terms and conditions:

(1) It was to be paid at Spinal Point 44, which was the top of the PO4 spinal point range;

(2) She would be expected to work for 35 hours a week;

(3) The appointment was subject to a four-week trial period, although the recruiting manager could request to extend the trial period to eight weeks if this was deemed necessary to assess suitability.

30. The letter stated that "if the recruiting manager is able to show that the employment offered is not in fact suitable, they can ask to terminate the arrangement". It ended that the letter constituted an amendment to her terms and conditions of employment.

31. In this role, the Claimant was expected to report to Mr Sasta Miah, Head of Learning, at Grade PO6. Mr Miah conducted a review meeting at regular intervals, roughly on a weekly basis. The purpose of the review meetings was to check on how she was performing in this new role. He documented her tasks and her progress on a template which was completed after each review meeting.

32. By 7 June 2018, the Claimant had been performing the role for four weeks, albeit she had had a period of one week on annual leave. At the meeting on 7 June 2018, Mr Miah informed the Claimant that the probationary period was to be extended by a further four weeks. As documented on the template, one of the reasons for the decision to extend the probationary period was to provide the Claimant with the opportunity to demonstrate her potential for the role. In particular, Mr Miah noted that the Claimant had not completed a specific task by the deadline he had set, namely to put together a list of potential external suppliers to undertake a staff survey.

33. On 7 June 2018, a conversation took place between the Claimant and Denise Sage, People Resourcing Advisor, who had responsibility for the redeployment process. This was followed on 8 June 2018 with an email from Debbie Southgate, Employee Resourcing Team Leader, offering the Claimant the option of being placed on gardening leave as an alternative to continuing with the extended trial period working for Mr Miah. The Claimant was told she could be released early and she could be paid "up until your notice period together with any payments mentioned previously". It is implicit in this phraseology that Ms Southgate considered the Claimant had been given notice with a predetermined end date. The email was copied to Angus Taylor, her union representative. The Claimant chose to continue with the trial period rather than take up this option.

34. The first record in the bundle showing that Mr Miah's template entries recording the review meetings were actually sent to the Claimant is an email sent on 8 June 2018. The Tribunal finds that this was the first occasion on which the Claimant was sent written feedback on her progress. She would have been given verbal feedback at each meeting consistent with what was documented. From this, she would have understood why her probationary period was to be extended.

35. On the same day, 8 June 2018, the Claimant was considering applying for a different role with the Respondent on a lower grade, and enquired if her pay would be protected.

36. On 14 June 2018, the Claimant's regular review meeting was conducted by Diane Lomas, in Mr Miah's absence. Ms Lomas had worked alongside the Claimant over the trial period since it had started, although had not been his line manager. She and Mr Miah had split the managerial roles within this section of the HR department. At the meeting, the Claimant complained that she felt that her 1:1s with Mr Miah had been negative and she was not clear what was expected of her. She told Ms Lomas she felt that the trial might be failing and wanted to know what she could do to prevent that being the outcome. The Claimant told Ms Lomas that she felt three members of the team were not supporting and helping her. In so stating, she was accepting that her relationships with other team members were not as effective as they should be. Ms Lomas told the Claimant her perspective was that the Claimant could come across as a "bull in a china shop" and was quick to confront others rather than listening and taking a step back to think about what has been said before responding.

37. During this meeting, the Claimant raised with Ms Lomas that it would be helpful if the notes made during the review meetings were in future sent during the week after the meeting took place. This had not been raised previously with Mr Miah as something she required, still less had she explained rationale for her receiving a written record. It was always open to the Claimant to speak to Mr Miah in the open plan office to check with him, if she was uncertain about a particular verbal instruction.

38. On 14 June 2018, the Claimant asked Denise Sage to confirm that the end date of her notice period would now be extended and asked for confirmation of what the new date would be. Again this shows the Claimant considered she had been given notice. Ms Sage's response was that her new trial end date was 6 July 2018.

39. There were two more review meetings conducted by Mr Miah, namely on 20 June 2018 and on 28 June 2018. At the meeting on 20 June 2018, as recorded in the notes, Mr Miah specifically raised with the Claimant that her communication style needed to change. He gave her particular examples. He also spoke to the Claimant about her soft skills and relationship building when interacting with colleagues. An action point was noted that the Claimant needed to work on her behaviours, specifically thinking an issue through before making a decision, consulting with others and taking on board feedback.

40. At this meeting on 20 June 2018, or during a conversation between the Claimant and Mr Miah around this time, the Claimant referred to her dyslexia as a reason why she was not as effective in her communications with colleagues as Mr Miah was expecting. She had previously provided Mr Miah with a copy of a report carried out by Elaine Chamberlain, Chartered Psychologist, following an assessment on 9 November 2009. This was around nine years earlier. Mr Miah commented that the report on which the Claimant was relying was rather old and perhaps a more up to date report should be obtained. The Claimant did not do so.

41. The meeting on 28 June 2018 focused on particular tasks and did not concentrate on the behavioural aspects of the Claimant's performance that had been discussed the previous week.

42. On 5 July 2018 Mr Miah conducted a final meeting with the Claimant. The Claimant would have known that this meeting would be considering the outcome of the extended trial period, but had not been told what the outcome would be in advance of the meeting. There was no email or letter inviting the Claimant to this meeting or informing her that she was entitled to bring a representative.

43. In advance of the meeting, Mr Miah had prepared a detailed written assessment of the Claimant's performance against the person specification for the role that the Claimant was occupying. Against the headings of "Knowledge" and "Qualifications & Experience", he considered that it had not been possible for him to assess the Claimant in the time available, but envisaged that these competencies could be met in time. Under the heading "Achieving Results" he set out a balanced assessment of the tasks that the Claimant had undertaken, listing the responsibilities that the Claimant had assumed. He noted that "one area that was of concern was whether the Claimant was a team player". He added that on a few occasions she had demonstrated a reluctance to undertake tasks that were administrative in nature and had frequently questioned the rationale for doing so. He said that "she struggled to move on from the argument and get on with the task".

44. Under the heading "Engaging with Others", he noted that she was a strong communicator and was able to articulate herself well, but said that this did not translate into building effective rapport with people. He said she had a tendency to dominate the conversation space and to make others feel that their professional opinion was not valued. He recorded it was crucial for a person in this role to have these soft skills and deal with situations in a tactful and sensitive way.

45. Under the heading "Valuing Diversity" he said that whilst he thought that the Claimant valued diversity, she did not understand its practical application. Where there were views that she did not agree with, this could come across most strongly in a way that could seem to create conflict and not a collaborative solution focused approach.

46. Under the heading "Learning Effectively" he was positive about her ability to undertake training for her professional development, but noted that she was not a reflective practitioner taking on feedback and adapting her style.

47. Under the heading "Ability to attend occasional evening and weekend work when required", he said that she had made it apparent on a few occasions that she does not consider it to be her role to work outside of core hours.

48. He then summarised his concerns in several paragraphs at the end of his written document. This included reference to the fact that the Claimant had raised the issue of her dyslexia by way of excuse for certain performance concerns. He wrote that he had seen the Claimant's dyslexia report - which was the report from 2009 - but recorded that this was not in his view an issue relevant to her performance. He stated that the work pace had been gentle from the outset and she had been given sufficient time to complete tasks. He said that the Claimant had never previously raised with him that she did not understand the tasks she had been given, and the necessary adjustments had been made to her workstation to enable her to work effectively.

49. His conclusion was that he did not think that this had been a successful trial and as a result he was unable to confirm the Claimant in her position.

50. There is no reference in the written template to the Claimant not understanding the tasks that she had been asked to perform, or to the Claimant having to ask for these tasks to be clarified.

51. Having heard evidence from both the Claimant and from Mr Miah, the Tribunal is satisfied that what was documented on this template, accurately recorded Mr Miah's assessment of the Claimant's performance. The Tribunal considers that the Claimant did have difficulties in her behaviour and her interaction with her colleagues. Mr Miah appeared to the Tribunal to be a fair minded individual. As he said in his evidence, it would have been easier for him to have overlooked the Claimant's weakness and to have confirmed her in the position on a permanent basis. At the time, he had secured alternative employment, and was due to be leaving the Respondent's employment within the next few months.

52. Mr Miah's evidence about the Claimant's underperformance is substantiated to some extent by the contemporaneous record made by Ms Lomas. In addition, the Claimant herself accepts that she had some difficulties, which she attributes to her dyslexia.

53. The issues documented by Mr Miah were raised by him with the Claimant at the final meeting with Mr Miah on 5 July 2018. The Claimant did not bring a union representative with him to the meeting. By the end of the meeting, the Claimant would have been fully aware that she had failed the trial period in that role. After the meeting, the Claimant went to find Ms Vincent. Ms Vincent and the Claimant had an unscheduled conversation. The Claimant was upset, having just had her trial ended by Mr Miah. By way of reassurance, Ms Vincent told the Claimant not to worry and that her employment was not at an end. The Respondent would contact the Claimant to set out the next steps.

54. On Friday 6 July 2018, the Claimant had a day of annual leave, which had been booked at an earlier stage. On the same day, the Respondent probably invited the Claimant and her representative to attend a meeting on 9 July 2018 to discuss her employment, given that the trial had been unsuccessful. Because of her annual leave, the Claimant was unaware of the meeting until she received a call from her union representative on Monday 9 July 2018 asking why she was not at the planned meeting. Prompted by this call, the Claimant travelled from home to the office, and a meeting went ahead to discuss the Claimant's position.

55. The meeting on 9 July 2018 was attended by the Claimant, her union representative, Mr Angus Taylor, Ms Hussain and Ms Vincent. There are no notes in the bundle documenting what was discussed at this meeting, nor is there a letter or email following the meeting recording its contents. The Claimant was told that, as her trial period had been unsuccessful, her employment would end. There was a discussion about a written settlement agreement recording the basis on which the employment would end, although that settlement agreement had not been prepared. The intention was it would be

sent out to the Claimant in due course. In the meantime, the Respondent told the Claimant she should contact a solicitor.

56. In late August 2018, the Claimant received a P45 in the post. This was dated 31 July 2018. It recorded that the last date of the Claimant's employment was 9 July 2018.

57. On 30 August 2018, the Claimant emailed Ms Vincent on advice from her solicitor. The email subject was headed "P45 received". It stated that she was extremely shocked to have had little communication from Ms Vincent since the meeting on 9 July 2018, and was even more surprised to have received her P45 without any other correspondence. She stated she had not been offered the right to appeal her dismissal which was in breach of the Respondent's own policy, natural justice and the ACAS Codes of Practice. She alleged that she had been unfairly dismissed, discriminated against because of her disability and had been unfairly dismissed for having raised protected disclosures. The Tribunal notes that detriment or dismissal for making protected disclosures has not been raised by way of complaint in these proceedings.

58. Ms Vincent responded the next day in which she said that the Claimant had not been dismissed but had entered into an agreement to leave the Respondent. As a result, she had no right of appeal. Ms Vincent apologised that the proposed settlement agreement had not been sent to the Claimant. She stated that the matter was with Legal and she had been chasing for it to be finalised. The Tribunal has not been shown the proposed settlement agreement, which was apparently sent to the Claimant in September 2018.

59. The Claimant was paid her salary until 9 July 2018 but no received no further payment.

The Claimant's health

60. The Claimant was diagnosed with dyslexia when she was aged 17. The information as to the difficulties posed by her dyslexia shared with the Respondent was contained in the report of Elaine Chamberlain prepared following an assessment in November 2009. The Tribunal considers that this report is the best evidence as to the manifestation of her dyslexia, albeit it described the position eight or nine years before the events which are the subject of these proceedings.

61. The report seeks to distinguish between what the Claimant herself describes as the effects of her dyslexia and what in Ms Chamberlain's clinical assessment was the extent of the dyslexia and its difficulties with everyday living.

> Due to her slow and effortful reading, Ms Holmes is likely to take longer than others do to read large amounts of written material and will need to exert more effort. This effort is likely to lead to high levels of mental fatigue and fluctuating attention.
>
> A relative weakness in her working memory …. can present a number of difficulties. Examples include

- Difficulty understanding and remembering spoken information (such as instructions, requests or telephone messages) particularly under time pressure or if there is a large amount of information to process. This can make it difficult to benefit fully from traditional training, particularly where large amounts of information are delivered in a spoken format.

Anxiety and information processing difficulties can work together to produce a "snowball" effect. For example, if an individual struggles with an information processing task, he or she might well become upset and anxious. The more anxious he or she becomes, the more inefficient his or her information processing is likely to become …

Dyslexia is one of the so called "hidden disabilities". Unlike a physical impairment, it affects mental processes in subtle and complex ways that are not obvious to the casual observer. It can therefore be difficult for dyslexic people and those around them to understand why they cannot perform work tasks in the same way as others do. This can lead to unrealistic expectations, misunderstandings, discomfort and frustration on all sides if not addressed.

Recommendations

Working from home to complete complex tasks might also be appropriate

Ms Holmes might benefit from receiving coaching and feedback on her communication style to help her develop a more relaxed approach.

Monitoring should be undertaken with sensitivity and with an awareness of the risk of "pathologizing". This is the tendency to view errors as being due to the effects of the specific learning difficulty rather than to normal, human fallibility. Ms Holmes is likely to make the odd spelling error or misunderstand a message on occasion. However, we all do and it is only when such events happen with such frequency or severity that they adversely affect her work performance should they be considered a problem needing attention.

62. The above assessment and recommendations do not indicate that the Claimant's difficulties are as severe as she herself described, as recorded on page 10 of the report. In particular, Ms Chamberlain does not endorse the Claimant's contention that she can appear brusque as a result of her difficulties in communication. We do not consider that her dyslexia causes her to come across as "too direct, easily frustrated, angered or annoyed" as the Claimant claims in her witness statement. The only reference to frustration in the report of Ms Chamberlain is that a lack of understanding on the part of colleagues as to the difficulties experienced by someone with dyslexia can lead to frustration on all sides if this is not addressed.

63. In her witness statement, the Claimant says that she needed to work from home because she would often read documents aloud to herself, and this was easier to do at home than in the office. However, the Claimant had agreed to return from her lengthy period of sick leave in November 2017 working only one day per week at home. There is no record during the period from early December 2017 until the end of her employment that she had specifically asked her employers if she could work for more days each week from home. In the Tribunal's view, this need to read documents aloud was not a particular problem for her in either her previous role as part of Ms Pitman's team or her role working for Mr Miah.

Legal principles

S15 : Discrimination arising from disability

64. Section 15 of the Equality Act 2010 is worded as follows :

> (1) 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
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

65. Guidance on the application of this section was given by Simler J in the Employment Appeal Tribunal in *Pnaiser v NHS England UK* [2016] IRLR 170 at paragraph 31:

> (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
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> (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
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> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any *prima facie* case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).
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> (d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable

> treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
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> (e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
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> (f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
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> (g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.
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> (h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.
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> (i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

66. In *Homer v Chief Constable of West Yorkshire* [2012] ICR 704, the Supreme Court considered the basis on which unfavourable treatment can be justified as a proportionate means of achieving a legitimate aim. At paragraph 20, Baroness Hale, referring to the Court of Appeal case of *Hardys & Hanson v Lax* [2005] ICR 1565 at para 31, said it was not enough that a reasonable employer might think that a proposed course of action was justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

S20/21 : Reasonable adjustments

67. Section 20(3) of the Equality Act 2010 is worded as follows :

> The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

68. In *Environment Agency v Rowan* [2008] IRLR 20, the EAT (Judge Serota QC) gave guidance as to how a Tribunal should approach a claim based on an alleged failure to make reasonable adjustments. At paragraph 27, the EAT emphasised that the employment tribunal must identify the provision, criterion or practice applied by or on behalf of the employer, and the nature and extent of the substantial disadvantage suffered by the claimant. An employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process.

69. The Claimant bears the burden of proof of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred – absent an explanation – that the duty has been breached. The onus is on the Claimant to identify in broad terms the nature of the adjustment that is said to be reasonable.

70. When considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be a chance of the adjustment alleviating the disadvantage. There does not have to be a good or real prospect of that occurring.

71. In order for a tribunal to find that there has been a failure to make a reasonable adjustment, the tribunal must first ask whether the employer knew that the employee was disabled and that his disability was likely to place him at a substantial disadvantage. If not, then the tribunal must ask whether the employer ought to have known both that the employee was disabled and that his disability was liable to place him at a substantial disadvantage.

Unfair dismissal

72. In order to decide an unfair dismissal claim, the Tribunal must first decide whether the Claimant has been dismissed, or whether the Claimant's employment has terminated by mutual agreement.

73. A dismissal is defined by Section 95(1) Employment Rights Act 1996 as follows:

> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –
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> a. The contract under which he is employed is terminated by the employer (whether with or without notice).

74. The test is as proposed by Sir John Donaldson in *Martin v Glynwed Distribution Limited* [1983] ICR 511 at page 519G :

> "….Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment?"

75. The relevant legal principles were discussed at length by HHJ Eady QC in *Khan v HGS Global* Limited UKEAT/0176/15/DM (decision 16.11.15) and paragraphs 17-26 were cited to the Tribunal. This includes reference to *Birch and Humber v University of Liverpool* [1985] IRLR 165 which clarified that Section 95 ERA is directed to the situation where employment is terminated by the employer alone. In circumstances where it is terminated by the mutually, freely given consent of the employer and the employee, it is terminated by employer and the employee, and therefore is not terminated by the employer alone.

76. If there has been a dismissal then the Tribunal has to consider the reason for the dismissal and assess whether the reason was a potentially fair reason. Here the reason relied upon by the Respondent is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (section 98(1)(b) Employment Rights Act 1996). It is said that the reason, if there is a dismissal, is the Claimant's refusal to work under the management of Ms Pitman, and the absence of any other suitable employment for the Claimant to perform.

77. If there is a dismissal, then the Tribunal must assess whether the dismissal was fair or unfair by considering whether the employer acted reasonably or unreasonably in treating it as a substantial reason for dismissing the employee. At that stage, there is a neutral burden. The role of the Tribunal is to assess both whether the dismissal decision and the procedure followed in reaching that decision was within the band of reasonable responses in all the circumstances. It is not for the Tribunal to substitute its own decision.

Application to amend

78. As to the Claimant's application to amend, this is an application to amend to add a claim for breach of contract. The claim is that in the event that there was an agreed mutual termination, part of the agreement was that the Claimant would be entitled to receive two months' pay, as promised in the letter of 1 March 2019. The factual basis for such a claim was referred to in the Grounds of claim at paragraph 31) (c), although it was not specifically raised as a separate claim until the very end of the Final Hearing, during closing submissions.

79. The Respondent objects to the proposed amendment, but sets out no reasoned basis for the objection other than it is raised at a very late stage in the proceedings.

80. In *Selkent Bus Company Limited v Moore* [1996] ICR 836, the Employment Appeal Tribunal (Mummery J presiding) gave guidance as to how Tribunals should approach amendment applications. Essentially the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing the amendment. The circumstances include the nature of the amendment, considering whether the proposed amendment is the making of entirely new factual allegations which changes the basis of the existing claim, or adding a new label to facts already pleaded. They also include the timing and manner of the application. Amendment applications should not be refused solely because there has been a delay in making it. Whilst it is relevant to consider why an

application was not made earlier, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment.

81. Applying the factors set out in *Selkent v Moore*, we consider that it would be appropriate to grant the Claimant's application to amend the claim to include a claim for breach of contract. The claim for breach of contract stands or falls on the same documents that the Tribunal has had to construe in order to determine an issue always requiring the Tribunal's decision, namely whether the contract terminated with the Claimant's dismissal or by mutual agreement. Albeit it has been raised at the last possible moment, the Respondent is not prejudiced by the late introduction of this issue. No prejudice has been advanced by Respondent's counsel or by the Respondent when responding to the Claimant's amendment application.

Basis on which contract terminated

82. By early 2018, the Claimant had decided she did not want to continue her role working for Ms Pitman. She did not want to resign her employment with the Respondent if there was another option. She chose the redeployment option offered in the letter dated 1 March 2018, sent to her on 5 March 2018. The Respondent's offer was accepted by the Claimant's email dated 9 March 2018. In so doing, she was agreeing that the redeployment policy would govern the process that would be followed in her case. This meant that she was agreeing she would be treated as having been given notice at the point at which her redeployment started, just as if the redeployment period applied because her original role was redundant. That notice would expire at the end of the redeployment period, unless any redeployment trial was successfully passed in the meantime. Her hope was that she would be offered and would pass a trial in a different role.

83. The Claimant argues that she had no choice but to take the redeployment option. In fact, she had three choices – (1) persist in her role with Ms Pitman, where she was already being monitored under the sickness absence procedure, and was potentially at risk of dismissal if there were further absences (2) resign her employment (3) accept the possibility that a suitable role would be identified during the redeployment period and she would pass the trial. She made the third choice, referred to in the paperwork as option 2.

84. When the Claimant obtained the role working for Mr Miah on a trial basis, it ought to have been clear to her from the policy that her notice continued to apply and she was still on notice. Whether she fully appreciated the consequences, this was the effect of agreeing to be placed on the redeployment process. It was only if the trial was successfully completed that the Claimant would assume the position she had been working on a trial basis, but in a permanent capacity, effectively revoking the notice.

85. As stated above, the agreement reached in correspondence between the parties was concluded by the Claimant's acceptance in her email of 9 March 2018. Although the start date for the redeployment period had not been specified at that point, it was agreed that it would start as soon as practicable.

86. This agreement was not superseded by the correspondence from Ms Vincent on 14 March 2018. The letter of 14 March merely clarified that the agreed 16-week redeployment period would start on 19 March 2018, which the Redeployment Policy stated would be clarified (as quoted above). In so doing, as the HR Business Partner, Ms Vincent was notifying the employee of the start date as the Policy envisaged, as set out in paragraph 27 above.

87. It was not necessary, on the Tribunal's analysis, for the Respondent to serve a separate document on the Claimant formally giving her notice under her contract. Firstly, because the Claimant and the Respondent were agreeing to this Process, and its inherent features, rather than it being imposed on the Claimant process. Secondly, such notice was inherent in the Redeployment Policy.

88. The Claimant has argued that she was a vulnerable person at the time of this potential agreement because of her disability and because of stress, anxiety and depression. As a result, the Claimant argues she should not be held to any agreement unless the agreement was clear and obvious. However, she had a union representative available at all time and her dyslexia did not prevent her from taking the necessary time to consider the offer set out in the letter dated 1 March (sent on 5 March). She took four calendar days before responding with her agreement. At this point, whilst she may have been upset at continuing to work with Ms Pitman, there is no evidence that she was suffering any medical condition that could be characterised as anxiety or depression, so as to negate the existence of a binding agreement. Her email of 9 March 2018 was 'clear and unequivocal' acceptance of the Respondent's offer in the letter dated 1 March 2018.

89. The Tribunal's analysis of the Claimant's departure is that, by agreement, she was on 16 weeks' notice to end her employment on 9 July 2018 unless there was a successful trial of an alternative position provided as part of the redeployment process. As a result, she was agreeing to bear the risk that no suitable alternative employment was secured during the notice period or that she would fail the trial period in any such role. Taking this risk was preferable for her in circumstances where she did not want to continue working with Ms Pitman, nor did she want to resign.

90. As a result, the Claimant's departure was by mutual consent in the circumstances that came to apply to her employment. She was not dismissed within Section 95(1) of the Employment Rights Act 1996, and therefore is unable to bring a claim for unfair dismissal.

91. She was paid for her contractual notice pay, because she was given and paid for 16 weeks' notice starting on 19 March 2018, substantially in excess of the 8 weeks required by her employment contract.

92. If the Tribunal is wrong in relation to mutual termination, then the Claimant was dismissed on notice when she was redeployed from her substantive position working for Ms Pitman. At that point, she was given 16 weeks' notice. There was some other substantial reason justifying the Claimant's dismissal, namely her refusal to work for Ms Pitman and the fact that the Respondent did not have another suitable work for the

Claimant to perform. She had been unsuccessful in showing the Respondent that she was able to perform the role which she had been offered on a trial basis.

Failure to make reasonable adjustments

93. It was agreed between the parties that the Respondent applied a provision to those employees who were subject to the Redeployment Policy and who were offered a trial period in an alternative role, that they would need to complete the trial period successfully to secure a permanent role. Whilst the Claimant's dyslexia could have placed her at a substantial disadvantage whilst undergoing trial periods in other roles managed by other line managers, we do not find that Claimant was placed at a substantial disadvantage by her dyslexia in relation to the trial period for this role. This is because, as recorded by Mr Miah on his template at the conclusion of the trial period, the work pace had been gentle and she had been given sufficient time to complete tasks. It was presumed that she would be able to acquire the necessary knowledge and qualifications & experience for the role and any deficiencies in these respects were not held against her. In addition, the trial period in the Claimant's case was extended from the standard four weeks to a period of eight weeks so that the Claimant had ample opportunity to prove she was able to suit the behaviours required of the role. The Claimant's dyslexia was not the reason why she was unable to perform to the standard required for the role (and therefore why she failed the trial period, and so was dismissed when her notice expired). It was her behaviour resulting from the way she chose to interact with her colleagues, rather than behaviour that resulted from her dyslexia. If she was brusque with colleagues, this was not a consequence of her dyslexia.

94. The other alleged PCPs at 2(b) and 2(c) of the List of Issues are not in fact separate PCPs but features of the PCP at 2(a), namely that "if redeployed, the Claimant should undergo and successfully complete the redeployment trial period".

95. If the Tribunal is wrong as to substantial disadvantage, it is necessary to consider the adjustments said to be reasonable adjustments that should have been provided at paragraph 4 of the List of Issues.

96. In relation to the specific reasonable adjustments suggested by the Claimant that remained in issue at the conclusion of the case:

(1) We do not accept that it would have been reasonable, as a reasonable adjustment, for the Respondent to provide further clarity in relation the tasks she was required to complete, beyond the clarity that was already provided. In the Tribunal's view it is telling that the Claimant did not ask for further clarification in relation to any particular task;

(2) We do not accept that a longer period of time, still less the period of six months suggested by the Claimant for the first time midway through these proceedings, was necessary, as a reasonable adjustment, to enable the Claimant to have a fair opportunity to show that she was suitable for the role. The aspects of the role that may have required longer time in post, namely 'Knowledge' and 'Qualifications & Experience' were not held

against her. She had sufficient opportunity to show that her people skills were to the level required by the role. The Claimant had already been provided with double the normal timespan for a relevant trial period;

(3) We do not accept that the Respondent should have provided written confirmation of specific verbal instructions in a timely manner ie within 24 hours or as soon as practicable thereafter, as a reasonable adjustment. Although the Claimant was not provided with the template notes prepared by Mr Miah until about a month after the trial period had started, we do not consider that this placed the Claimant at a substantial disadvantage. The tasks set by Mr Miah were relatively straightforward and should have been sufficiently clear to the Claimant, and the Claimant could have checked with Mr Miah between review meetings if she was unclear. From midway through the extended trial period she was provided with the notes of the review meetings shortly after each of those meetings took place.

Discrimination arising from disability

97. Mr Miah reached a negative assessment of the Claimant's performance over the eight-week long trial period. He did so, based on his assessment of the Claimant's behaviour and general performance as documented at length in his thorough and balanced assessment of her performance dated 5 July 2018. The Tribunal does not consider that the faults recorded by Mr Miah were a consequence of the Claimant's dyslexia. Rather they were a consequence of the Claimant's behaviour and her interaction with others. The Claimant's attempts in these proceedings to explain her underperformance by reference to her dyslexia is consistent with Ms Chamberlain's warning about the risk of pathologizing, namely the tendency to view errors as being due to the effects of the specific learning disability rather than to normal, human fallibility.

98. In any event, if the performance for which the Claimant failed the test period was in part the consequence of her dyslexia, the Tribunal considers that the decision to fail the Claimant was a proportionate means of achieving a legitimate aim. The Respondent was entitled to expect that those employed in this relatively senior role had the 'people skills' to be able to interact successful with colleagues at different levels of the organisation. The Claimant had not demonstrated over a consistent period that she had the necessary skills in dealing with people to discharge the role satisfactorily.

Disposal

99. As a result of our decisions, all claims fail apart from the claim for breach of contract. On the tribunal's calculation, the Claimant is entitled to the net equivalent of £7108.50 gross, representing 2 months' pay. This is because the Claimant's gross annual salary was £42,651.

100. In these circumstances, the Tribunal does not anticipate that a Remedy Hearing will be necessary. If for some reason a Remedy Hearing is required, the parties are to request one, with reasons.

Employment Judge Gardiner
Dated: 27 November 2019