Case Number: 2205177/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR D KENDALL**
MR R BABER

BETWEEN:

Mr A Dickson

Claimant

AND

QBE Management Services (UK) Limited

Respondent

ON: **20, 21, 24, 25 and 26 May 2021**
IN CHAMBERS: **27 May and 8 June 2021**
Appearances:
For the Claimant: **In person**
For the Respondent: **Mr T Cordrey, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The clamant does not meet the statutory definition of disabled with the conditions of OCD, anxiety, dyslexia or ASD.
2. The claims for unfair dismissal and disability discrimination fail and are dismissed.

REASONS

1. By a claim form presented on 3 October 2019 the claimant Mr Andrew Dickson brings claims of unfair dismissal and disability discrimination in terms of disability related harassment, failure to make reasonable adjustments and discrimination arising from disability.

2. We asked the claimant at the outset of the hearing if there were any

particular adjustments we needed to make for this hearing in order to accommodate his medical conditions? He said there was nothing that he requested. We said that he could ask for a break at any time if he needed one.

This remote hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

5. The parties able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.

6. The participants were told that is was an offence to record the proceedings.

7. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

8. The issues in the case were identified at a case management hearing before Employment Judge Khan on 21 August 2020 and were discussed and confirmed with the parties at the outset of this hearing. This included some slight refinement of the claim for discrimination arising from disability by confirming what it was that arose from the claimant's disability and the respondent confirming the legitimate aim relied upon in the section 15 claim. We also confirmed with the claimant what was the "relevant time" for the disability discrimination claims. The issues were confirmed as follows:

<u>Time limits (jurisdiction) section 123 Equality Act 2010 (EQA)</u>

9. If any of the claims were brought outside the primary limitation period, taking account of the dates of early conciliation:

    a. Has the claimant shown that they constitute conduct extending over a period?
    b. If not, has the claimant presented his claim in such other period as the employment tribunal thinks just and equitable?

<u>Disability (section 6 EQA)</u>

10. The respondent accepts that the claimant was disabled at all relevant times by reference to moderate depression.

11. Was the claimant disabled at all relevant times as defined in section 6 of the EQA with the following conditions?

    (1) Dyslexia
    (2) Autism Spectrum Disorder ("ASD")
    (3) Anxiety
    (4) Obsessive Compulsive Disorder ("OCD")

The respondent's knowledge of disability

12. In respect of (1) – (4) above, did the respondent know, or could it reasonably have been expected to have known, that the claimant was disabled at the relevant time? The relevant time is from mid 2017 until 4 July 2019.

Disability related harassment (section 26 EQA)

13. Did the respondent engage in the following unwanted conduct?

    a. In/around March 2018 Damian McCue alleged that the claimant did not understand software testing.
    b. On at least five occasions in 2018 Mr McCue likened the claimant to Will Ferrell characters, in particular from the film Step Brothers.
    c. Mr McCue was overly critical of the claimant of the coding he produced – the claimant was ordered to provide the further information on this allegation as set out in the Case Management Order of 21 August 2020. This allegation was withdrawn in closing submissions and we were not required to make a finding on it.
    d. Mr McCue demeaned the claimant in that he denied the claimant the opportunity to participate in business analysis work in November 2017 and he subsequently criticised the claimant (during the Performance Improvement Plan ("PIP") from August 2018 to January 2019) for not demonstrating the skills denied to him by this lack of opportunity.
    e. In December 2018 / January 2019 Mr McCue alleged that there was a misalignment between the claimant perception of his performance and that of others in the 2018 year-end performance appraisal.

14. If so, did it relate to the claimant's disability or disabilities? The claimant says that allegation (a) related to depression and anxiety; allegations (b), (d) and (e) to depression, and allegation (c) to depression, anxiety and OCD.

15. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading,

humiliating or offensive environment for him?

Failure to make adjustments (sections 20 and 21 EQA)

16. It is agreed that between August 2018 and January 2019 the respondent applied the PCP of a PIP process under the Capability Policy to the claimant.

17. Did this PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that he was given informal and formal warnings, including a final written warning, because he was unable to meet the PIP objectives? The claimant says that he was unable to meet these objectives because of impaired communication and executive function which related to depression, dyslexia, ASD and anxiety.

18. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

19. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The claimant relies on the following steps:

    a. Depression: (i) encouragement from peers/supervisors.
    b. Dyslexia and ASD: (i) the provision of meeting notes or to be allowed to record meetings; (ii) the provision of agendas for meetings; (iii) for meeting participants to speak one at a time; (iv) for stakeholders to have been informed about the claimant's disabilities.
    c. Anxiety: (i) informal counselling; (ii) scheduled calm / quiet periods during the day.

20. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Discrimination arising from disability (section 15 EQA)

21. Did the following things arise in consequence of the claimant's disability? The claimant said at this hearing that what arose from his disability was impaired communication and impaired function and this affected the perception of his performance which was deemed negative.

    a. The PIP process was applied to him.
    b. The outcome of the PIP process.

22. Did the respondent treat the claimant unfavourably because of something arising in consequence of his disability when it dismissed the claimant? The claimant says that he was dismissed because the redundancy selection criteria were materially influenced by the perception of his performance.

23. Save for in relation to depression, knowledge of disability is disputed across the claim.

24. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The aim relied upon is that of retaining as an outcome of the redundancy exercise the Actuarial Development Analyst with the best (i) customer focus, (ii) technical performance and knowledge, (iii) 2017 appraisal rating and (iv) 2018 appraisal rating. The burden of proving this defence lies with the respondent.

Unfair dismissal

25. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent relies on redundancy which is a potentially fair reason under section 98(2)(c) ERA. The claimant does not accept that there was a genuine redundancy situation.

26. If so, was the dismissal fair or unfair in accordance with section 98(4) ERA and, in particular, did the respondent in all respects act within the band of reasonable responses? The claimant complains that:

    a. The selection criteria were unfair in that they were based on the role profile expectations of a Senior Actuarial Analyst instead of an Actuarial Development Analyst.
    b. The selection criteria were applied to him unfairly in that they were materially influenced by his perceived performance.
    c. There was an unreasonable failure to redeploy him.

Remedy

27. If the claimant succeeds in whole or part, to what remedy is the claimant entitled? This will include consideration of whether, if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed (the *Polkey* issue).

Witnesses and documents

28. The tribunal heard from the claimant. For the respondent the tribunal heard from 4 witnesses: (i) Mr Damian McCue, Actuarial Systems Manager and the claimant's line manager (ii) Mr Kevin Moore, Head of Change and Mr McCue's manager (iii) Mr Kyle Ware, Actuarial Development Analyst and (iv) Mr Colum D'Auria, the Chief Actuarial Officer.

29. There was a bundle of documents of just under 600 pages. There was a cast list and a chronology from the respondent.

30. On the afternoon of day 3 the respondent made an application to re-call witness Mr Ware as they wished him to correct some evidence as to the date of his promotion. Unanimously we refused this application for the following reasons: (i) counsel for the respondent had an opportunity to re-examine Mr Ware at the conclusion of his evidence on day 2, (ii) the witness confirmed that he had read his statement and there was nothing in it that he wished to correct, (iii) counsel and the witness had now discussed his evidence and (iv) we had asked for disclosure of the relevant documents which we considered were likely to confirm the date of the promotion.

Findings of fact

31. The claimant worked for the respondent as a Senior Actuarial Development Analyst. His dates of service were from 1 September 2016 to 4 July 2019. The respondent is an insurance and reinsurance company listed on the Australian Stock Exchange.

32. The claimant worked in the Central Actuarial Team which is responsible for projecting future insurance claims and determining what reserves are required. The team in which he worked develops software and processes and review the actuarial systems and process in place. They assist the actuaries in interpreting large amounts of data. The work requires broad technical knowledge and coding ability

33. When the claimant joined on 1 September 2016 the team consisted of Mr Damian McCue as the Manager and two Actuarial Development Analysts, the claimant and Mr Kyle Ware. When the claimant was recruited it was intended that he was to be more senior to Mr Ware as Mr McCue, who had interviewed him, understood him to have more actuarial experience. The claimant was placed on level 4; Mr Ware was on level 5 (level 4 being the higher grade).

34. Mr Ware was promoted to level 4 and there was an issue as to the timing of his promotion to this level. Both Mr Ware and Mr D'Auria said in their witness statements that he was promoted in early 2019. As set out above, the respondent wished to recall Mr Ware on this issue and we refused the application for the reasons stated above. We saw the relevant documents which showed that Mr Ware was promoted with effect from 1 April 2018 to Senior Actuarial Analyst (letter confirming promotion dated 17 May 2018 from Mr McCue to Mr Ware). Based on the documentary evidence, we find that Mr Ware was promoted in April 2018 and not in early 2019.

35. When the claimant joined in September 2016, Mr McCue was on secondment to another team although he was still responsible for managing the Actuarial Development Team. He held weekly meetings and fortnightly 1:1 meetings with the claimant and Mr Ware. He did not spend as much time with the claimant at the outset as he would have liked for the purposes of training and supervision. Mr Ware dealt with the

"*onboarding*" process for the claimant. Mr McCue's evidence was that had he not been on secondment when the claimant joined and been able to assess the claimant "*properly*" from the start, the claimant would not have passed his probationary period.

36. Mr McCue took the view that the claimant did not have as much experience as he had indicated at interview, as he received complaints from the actuarial specialists that the claimant was not able to ask the right questions or that his suggestions were not appropriate.

37. As part of the recruitment process the claimant was medically assessed and he disclosed that he had depression managed with medication. This was set out in a placement assessment report dated 27 July 2016 at page 130, from Medigold Health Consultancy. Mr McCue had a discussion with the claimant about this. The claimant confirmed that he was able to control his condition with medication, he said his depression was mild and that it did not affect him personally or professionally (Mr McCue's statement paragraph 6). Mr McCue was challenged on this during cross examination and he said: "*Yes, you really downplayed it".* We find that the claimant did not alert the respondent at this stage to any substantial disadvantage as a result of this condition. The claimant also accepted in evidence that he did not ask for any adjustments during the early stages of his employment.

38. The claimant accepted that Mr McCue told him about the Employee Assistance Programme (EAP) which could provide counselling support. The claimant also accepts that at no time did he take this up. He said he was signed off sick with depression from 12 to 27 September 2018 and said it would "*probably have made sense*" for him to use the EAP, but he did not.

39. The claimant accepted that he did not tell the respondent that his depression affected his ability to communicate.

The conditions relied upon by the claimant

40. In addition to depression, which is admitted as a disability, the claimant relies upon dyslexia, OCD, anxiety and ASD.

41. The only period of sick leave of more than 4 days taken by the claimant during his employment, was from 11 to 27 September 2018 for depression. The sick note for this period was at page 150. The claimant had about 26 other days of sickness absence between 30 January 2017 and 15 March 2019, usually for one or two days. His sickness record was at page 70 of the bundle. The reason for the absence was rarely stated on his record. When it was recorded, it was not related to the any of the conditions relied upon as disabilities in these proceedings.

Dyslexia

42. In February 2018 the respondent sought a Dyslexia Vocational Evaluation (DVE) for the claimant which took some time to arrange, through their OH provider Unum. The claimant was assessed on 28 March 2018 and the report was prepared on 6 April 2018 by Ms Karen Curtis, a Vocational Rehabilitation Consultant (page 142-149). The claimant said he had a diagnosis of dyslexia from the age of 15 when he lived in the Washington DC area, but he produced no documentation to support this. The claimant had produced other medical reports from his childhood, which were in the bundle (pages 116-125) from the late 1970s into the 1980s.

43. The result of the DVE was on page 137. The claimant was given scores which came out at average, high average or above average. His verbal reasoning and comprehension scores were both 99%. The conclusion of the report was that the claimant showed "*negative*" for traits of dyslexia. The method of testing in the report was said to be 98% accurate. The report said it was *"hard to pick out any specific areas to work on*" but that the one issue which was specifically highlighted was his reading speed. This was said to be 65% which was described as "*completely normal*" and within the average range.

44. The claimant in his disability impact statement said that dyslexia caused him to read and write "*very slowly*" but this was not consistent with the DVE report. The claimant also asserted in his statement that he had poor spelling; the report said he had average spelling. The claimant said in his statement that he had difficulty with information that was written down yet the report scored him at 99% for this. The claimant said there was disagreement between himself and the expert and denied that he was exaggerating the effects of the condition upon him.

45. The claimant asked for an amendment to the report and there was a case conference to discuss this on 27 April 2018 between the claimant, Ms Mison from HR, Mr McCue and the assessor Ms Curtis. A revised report was produced (page 146) saying: "*Although traits of Dyslexia were not identified in Mr Dickson's Dyslexia Vocational Evaluation on this occasion, this does not change or supersede his original diagnosis received at School at 15 years old, and therefore adjustments and support should still be offered to support Mr Dickson with his dyslexia."*

46. It was put to the claimant that the amendment to the report was based on a false premise, because he had misreported that he had a diagnosis from age 15. He denied this.

47. In his witness statement at paragraph 1(a)(i) the claimant said in relation to the condition of dyslexia: "*No documentation within the bundle definitively proves or disproves the claimant was disabled".*

48. We find that on a balance of probabilities, the claimant does not satisfy the burden of proof in relation to the condition of dyslexia. The DVE

assessment showed he was "*negative*" for dyslexia and he performed either at an average level or well above average including at 99% on some aspects. The only reason that the DVE assessor suggested that the claimant be treated as having the condition and adjustments made for him, was because he said that he had a diagnosis from childhood. This was a diagnosis that neither the assessor nor we have seen and it was the only reason for amending the report.

49. The evidence that we have seen shows that the claimant tested negatively for dyslexia and his own statement says that there is nothing to prove or disprove that he has the condition – the burden of proof being upon him. Even if he had or has the condition, the test results show that he manages well and we find that it does not have a substantial adverse effect on his ability to carry out the day to day activities as measured in the report, such as reading speed, verbal reasoning or comprehension.

50. For these reasons we find, on a balance of probabilities and on the evidence before us, that the claimant does not meet the definition of disabled with the condition of dyslexia for the relevant period.

Obsessive Compulsive Disorder ("OCD")

51. In relation to Obsessive Compulsive Disorder ("OCD") the claimant relies on a single entry in his medical records for 8 January 2009 which, under the heading, "*Problem"* says *"obsessive-compulsive disorders*". It said no more than that. It gives no indication of the severity of any such condition, how long it had lasted or was likely to last or what was the prognosis.

52. The claimant said in evidence that the condition of OCD was for him "*the least concerning of all the disabilities claimed".* He also accepted that the only medical evidence in relation to this was the one line entry in the GP records from 8 January 2009 mentioned above. The claimant accepted in evidence that he did not ask for any adjustments in relation to OCD.

53. The claimant did not mention this condition when he went through his pre-employment checks with Medigold. He did not refer to this condition in his ET1. He referred to it for the first time in his Further Particulars after the preliminary hearing in August 2020.

54. It was put to the claimant that OCD did not have a substantial adverse effect on his ability to carry out normal day to day activities and if it had, he would have asked for adjustments. He said he did not know he could ask for adjustments but we find that he did because there were continual discussions with him about adjustments and OH reports suggesting adjustments for other medical conditions relied upon.

55. What the claimant said about the effect of this condition upon him was that the effect varied in frequency in terms of obsessive thoughts and severity of compulsive behaviours. We had very little evidence from the claimant to assist us on what this meant in practice.

56. We had one entry in the medical records from 2009 and nothing to assist us on the severity of the condition or how long it had lasted. There was very little detail in the disability impact statement. The claimant described this as the least concerning of the conditions he relied upon. We find that he has not discharged the burden of proving disability in relation to OCD and our finding is that he was not a disabled person with this condition during the material time of his employment with the respondent.

57. During 2018 at a social event there was a discussion of coding styles and Mr McCue accepts that the claimant said "*that's my OCD*". He thought it was a jovial comment as he says that coders can be a bit "*precious or particular*" about their coding styles. Mr McCue asked the claimant if he was serious and the claimant replied "*no, not really*". We find that even if we are wrong and the claimant had this condition which amounted to a disability, this comment made in a jovial social setting was not enough to give the respondent knowledge of the condition. The claimant did not disclose the condition anywhere else.

Anxiety

58. There was one reference to anxiety in the claimant's GP records, from 14 January 2009 saying "*mixed anxiety and depressive disorder".* It did not state the severity of the anxiety or how long that condition had lasted, separately to depression. On 12 October 2009 we saw an entry in an OH report from an OH Physician (page 128) stating that the claimant was "*no longer feeling anxious*". This was nine months after the first GP entry relating to anxiety.

59. The claimant did not rely on anxiety in his ET1. We find based on the unchallenged evidence of Mr McCue that the claimant did not mention this condition to him. The claimant told the DVE specialist on 28 March 2018 that he had a long history of depression but he did mention not anxiety (report page 136).

60. In his disability impact statement the claimant set out the effects of anxiety in general terms. He said the effect on his day to day activities varied. He said: "*During a bad period the claimant can suffer from a panic attack, fail to function or exhibit a fight or flight response. During good periods the effect of the impairments are limited to impairment of executive function and feeling constantly on edge*". The statement described symptoms but did not focus on how the condition affected his ability to carry out normal day to day activities.

61. The only evidence we had as to the length of the condition was to be found from the medical records with the first entry on 14 January 2009 and the entry on 12 October 2009 saying that the claimant no longer felt anxious, a period of nine months.

62. The claimant mentioned in an OH consultation with Bupa on 8 February

2019 that he was having symptoms of "*stress and anxiety"* about his Performance Improvement Plan (PIP). The extent of any anxiety was not set out in the Bupa report. It is common and understandable for an employee to experience stress and anxiety when being performance managed. We find that this was a reaction to the adverse life event of being performance managed (see ***J v DLA Piper*** (below)). The performance management process ceased on 5 March 2019, a month after the claimant disclosed this in the OH consultation.

63. In his evidence we found that the claimant sometimes grouped "*depression and anxiety*" together. The case law mentioned above recognises that there can be a "*looseness*" with which some medical professionals and lay people use terms such as "*depression", "anxiety*" and "*stress*". (judgment paragraph 42). We find that the claimant has not discharged the burden of proof of showing that he had a separate mental impairment of anxiety, or that if he had that condition, that it met the threshold of a disability.

64. We find that the claimant does not satisfy the burden of proof that he had the condition of anxiety during his employment with the respondent from 2016 to 2019, which had a substantial and long term adverse effect on his ability to carry out normal day to day activities. The medical records disclosed the condition in 2009 for about 9 months. This does not meet the definition of long term and was many years before he was employed by the respondent.

65. Even if we are wrong about this, in terms of the respondent's knowledge of this condition, the claimant said that it had to be "*reasonably inferred*" that he had anxiety. He was not certain whether he told the respondent about it and he did not challenge Mr McCue's denial of knowledge of this condition. The claimant said in evidence "*maybe they didn't know*". We find that they did not.

Autistic Spectrum Disorder (ASD_

66. On or around 20 December 2017, the claimant informed Ms Mison in HR that he was awaiting a diagnosis of ASD. Ms Mison emailed OH on 20 December 2017 saying "*A newly appointed employee has advised he is awaiting a full diagnosis from the NHS of period from December 2017 to October 2018* (page 197). The claimant did not have a formal diagnosis of this condition and still did not have such a diagnosis at the date of this hearing.

67. On 15 June 2018 Mr McCue emailed Ms Mison (page 245) to say that the claimant had still not taken forward his GP appointment for an ASD assessment.

68. On 16 October 2018 in an email to Ms Mison (page 349) the claimant showed some confusion on the matter saying: "*Additionally, I do not have autism per se. However, I likely measure within the spectrum of an autism*

spectrum disorder. Where on the spectrum is unknown as no formal diagnosis has been made to date. However, it is plausible to be somewhere in the neighbourhood of ADHD. I previously stated that it might have been Asperger syndrome which is also within the same spectrum."

69. The claimant said he was getting advice on the condition from his ex-wife who is not medically trained and works in school with children who have the condition. He confirmed that he had not done much research on the condition. It was put to him that if the condition had a substantial adverse effect on his ability to carry out normal day to day activities, he would have done some research and would have pursued more actively a formal diagnosis.

70. On 6 November 2018, following a referral by his GP, the claimant was sent a Questionnaire to complete for the Psychological Medicine and Integrated Care Services at South London and Maudsley NHS Foundation Trust. The claimant completed the Questionnaire on 19 November 2018. He was still waiting for a referral as at the date of this hearing.

71. On 8 February 2019 the claimant told the OH Physician Dr Morello that he had been "*advised from a friend that he might suffer with autism spectrum disorder and/or ADHD*".

72. The OH report from Dr Morello of 8 February 2019 said (page 158): "*Based on my assessment, it would appear that some of his difficulties are related to communication and behaviours. Therefore, in order to establish whether he needs reasonable adjustments or workplace adjustments he will need an assessment carried out by the National Autistic Society who undertakes both assessment and workplace assessments".* This was not a diagnosis of ASD but a recommendation that an assessment be carried out.

73. In his disability impact statement the claimant said that one of the effects of the condition upon him was that he "*gets anxious or upset about unfamiliar situations and social events".* Both Mr McCue and Mr Ware described the claimant as very social. We heard evidence that the claimant often attended work-related social events and enjoyed the company of his colleagues. Mr Ware and Mr McCue said that the claimant was very sociable both in and out of the office, everyone knew him and he would join colleagues at the pub after work. We find on a balance of probabilities, based on Mr Ware and Mr McCue's evidence, that the claimant readily engaged in social activities and he overplayed the symptoms of this purported condition in his witness statement.

74. The claimant relied in his disability impact statement on the effect of ASD on his ability to communicate and interact with other people, but accepted that there was no medical evidence to support this.

75. The claimant has no diagnosis of ASD. He has relied upon what he has

been told by non-medical individuals and this is not enough for us to find that he has the condition. We found the respondent's submission persuasive that if this was a condition that had a substantial and long term adverse effect on his ability to carry out normal day to day activities, he would have been more proactive in following the assessment via his GP. From at least December 2017 to June 2018 he did not do so.

76. The burden is on the claimant to prove disability. We had no medical evidence to support the contention that the claimant has ASD. He relies on two non-medical people expressing the view that he might have the condition, which does not assist us. We have found that he has overplayed in evidence the symptoms he relied upon. We are unable to find that the claimant was disabled at the relevant time with ASD.

Performance issues

77. Mr McCue said that there were performance issues with the claimant from the start of his employment. As we have found above, had Mr McCue not been on secondment when the claimant started, he would probably not have passed his probationary period. On his return from secondment Mr McCue began the task of managing the claimant's performance.

Performance reviews in 2017

78. The claimant's Mid-Year review for 2017 was at page 79. In the Manager's Overall Reflection comments, Mr McCue said:

> "*Andrew and I have talked a lot this year about his projects so I have been surprised by his comments that he had not understood the tasks as I have felt that I have continually been reinforcing what's required of him…… We will also start documenting our conversations so Andrew has a proper record of what we have discussed and whats required of him.*
> *Andrew is a senior member of the team, he needs to take responsibility for his understanding of whats required and where he feels there is ambiguity he needs to raise this, we have also discussed and agreed that where he needs help he needs to anticipate this and ask and not wait until theres a problem."*

79. In the Employee Overall Reflection comments, the claimant said:

> *"I feel that my immediate performance has been negatively impacted by the following two issues. Firstly inaction by others has impaired me making progress on several of my objectives. Secondly it seems that I have misunderstood what is expected of me on several of my objectives."*

80. The claimant did not mention any disability that he thought was affecting his performance. The claimant scored a 2, which equated to partially met expectations.

81. In November 2017 Mr McCue told the claimant that he was on track for a 2 for his year-end appraisal. Mr McCue accepts that it was at this point that the claimant told him that he had dyslexia and Aspergers, diagnosed as a child. The claimant was referred to the respondent's OH provider Unum for a dyslexia assessment and they agreed to set up a case conference via Bupa to see how they could best support the claimant.

82. On 28 November 2017 Mr McCue emailed Ms Mison (page 194) to say that the claimant had said he had dyslexia and ASD and this might be affecting his performance. He told Ms Mison that he was keen to see what they could do to "*level the playing field*" for the claimant. He thought this might be contributing to the problems with his performance. Mr McCue decided to delay the start of any Performance Improvement Programme (PIP) pending these assessments.

Occupational Health and dyslexia assessments and adjustments made

83. A Bupa conference call took place on 21 February 2018 between the claimant and the OH Physician, Dr Morello (report at page 134). Dr Morello said that the claimant would need to be assessed by a Chartered Psychologist specialising in Asperger's syndrome who may also be able to identify frequently occurring conditions such as dyslexia, dyspraxia and ADHD. Dr Morello concluded by saying:

> *"A workplace assessment will help the employer to identify what adaptations could be made to ensure Mr Dickson is reaching his full potential, advice on management techniques and ways to communicative effectively. Workplace assessment addresses the following issues: current issues and concerns, description of current position and the expectation of the role, social interaction, communication, flexibility of thoughts, sensory issues, recommendation for ongoing support, recommendation for reasonable adjustments to the workplace and role (in accordance with the Equality Act)."*

84. As we have found above in relation to the condition of dyslexia, in February 2018 the respondent sought a Dyslexia Vocational Evaluation for the claimant which took some time to arrange, through their OH provider. The claimant was assessed on 28 March 2018 and the report was prepared on 6 April 2018 by Ms Curtis, a Vocational Rehabilitation Consultant (page 142-149).

85. Also as we have found above, the claimant sought a revision to the report and this was done on 27 April 2018. Mr McCue and the claimant had a discussion following the revised report. The claimant was given the opportunity to choose the recommendations that he wished to accept.

86. Also in around April 2018 Ms Mison contacted the National Autistic Society (NAS) to seek some guidance, the claimant having said that he was waiting for an assessment and diagnosis of ASD. The NAS sent Ms Mison

some Guidelines with a view to implementing their recommendations, notwithstanding that the claimant did not have a diagnosis. There was a certain amount of overlap between the DVE assessment report and the NAS Guidelines.

87. Mr McCue sought to implement the NAS Guidelines in the following ways:

    a. The Guidelines recommended that all communications should be in writing but said that the issue should be discussed with the individual concerned. Mr McCue and the claimant discussed this and they agreed that the claimant would confirm a verbal conversation in writing and he would confirm a written communication verbally. Mr McCue said that this helped when the claimant followed this practice but that he did not follow it consistently.
    b. The claimant was provided with Microsoft Project to help him plan and prioritise his tasks. They also implemented a web based management tool called JIRA to help the claimant with his tasks. The claimant agreed to use his Outlook calendar for reminders and deadlines.
    c. To help the claimant avoid distraction during his day Mr McCue suggested that he use noise cancelling headphones, take some quiet time in the office library and worked from home at least once a week. The claimant did not take up these options.
    d. Mr McCue kept the weekly team meeting agenda and format and the same each time.
    e. Mr McCue ensured that feedback was timely structured and clear so that he could give guidance to the claimant on what he could do differently.

88. Mr McCue continually reminded the claimant that he needed to review the DVE recommendations and come back to him or Ms Mison to discuss what needed to be implemented. In the absence of the claimant doing so, Mr McCue held a meeting on 3 July 2018 so that adjustments could be agreed in the light of the report. At that meeting the claimant agreed to follow up the ASD assessment through his GP. Mr McCue's handwritten note of that meeting was at page 246.

89. It was at this point in early July 2018 that Mr McCue decided that it was time to commence an informal PIP process and to prepare some objectives are for this.

90. On 12 July 2018, following the discussions on 3 July, Mr McCue drew up a table which he emailed to the claimant (page 248) setting out the recommended adjustments to see how the claimant wished them to be implemented, He asked the claimant to give his input to say whether he was happy with the adjustments and asked him whether there were any other adjustments he wanted the respondent to make.

91. This included giving the claimant additional time for reading and writing

work to allow him to fully process information, either Mr McCue or a colleague proof reading the claimant's written work if he wished this. Mr McCue would do this but they were to identify a colleague who would do this when Mr McCue was not available. Mr McCue agreed to provide the claimant with text-to-speech software to help him. They agreed that there would be verbal discussions to confirm written communications and vice versa. The claimant was to create diary reminders for deadlines.

92. Mr McCue agreed to set aside 2 hours every Wednesday morning for training and learning for all team members. It was up to the claimant to access this if he wished. The claimant was to avoid multitasking where possible and to make use of lists, bullet points and highlighting in his written notes. The claimant was also to request notes or action points from meeting organisers or to provide them when he was the meeting organiser. He declined the option of having coloured overlays for his screen but this would have been provided had he wished

93. On 16 July 2018 Mr McCue met with Ms Mison to go through the adjustments that had been discussed and sent this to Ms Mison on 17 July (page 257).

The informal PIP process

94. In July 2018 as a result of performance concerns, Mr McCue put the claimant on an informal performance improvement plan (PIP). He drafted the PIP in conjunction with Ms Mison from HR and they added in the DVE recommendations. The PIP document commenced at page 258. It gave the period of the plan as from 23 July 2018 to 14 September 2018 with review dates on 3 and 24 August and 7 and 14 September. The performance issues related to:

    a. timekeeping
    b. communication and understand tasks and requirements
    c. planning, prioritisation and time management tasks
    d. lack of knowledge related to system support appeared
    e. maintain BAU work (Business As Usual).

95. These objectives remained the same throughout the PIP process.

96. On 20 July 2018 Mr McCue held the first informal PIP meeting with the claimant. The claimant agreed in evidence that he understood the five objectives set in the PIP and we find that he did. The claimant also agreed that he did not say in that meeting that it was unfair to set those objectives because of any impairment he had.

97. The first review meeting took place on 3 August 2018 and Mr McCue confirmed the outcome in writing (page 269 onwards). Mr McCue felt that the claimant had not engaged with the process or made a sufficient effort to try to address the issues. The claimant had met the 1st and 5th objectives but in Mr McCue's view, there were still some way to go on the

other three objectives.

98. Mr McCue asked the claimant if he had heard back from his GP in relation to the ASD assessment. The claimant had not heard anything about it and expected it to take some time.

99. The second review meeting took place on Friday 24 August 2018 and once again Mr McCue felt that the claimant had not made sufficient effort. Mr McCue took advice from Ms Mison and decided, in the light of the lack of improvement, it was time to move straight into a formal PIP. This was done immediately after the Bank Holiday weekend on Tuesday 28 August 2018. Mr McCue sent an email to his managers Mr Moore and Mr D'Auria on 28 August 2018 saying: *"Just a brief note to let you know that I am asking HR to transition Andrew's informal PIP to a formal PIP. This comes after the five week review meeting on Friday where it was clear that Andrew isn't meeting the PIP objectives*" (page 289).

The formal PIP

100. On 29 August 2018 Mr McCue sent the claimant a Formal PIP template asking him to make sure that he read through the objectives again and to make sure that the DVE recommendations were implemented into his normal working day. Mr McCue said that the first objective had to be met by the first review date of 7 September 2018. The PIP template was at page 291.

101. By 4 September 2018 the claimant had chosen the text to speech software that he wanted, having been given a choice and this was ordered for him (page 315). Mr McCue said that the claimant hardly used it. The claimant said it was useful for some things, but not for example to deal with programming language. Nevertheless, we find that the text to speech software was provided as recommended.

102. The first formal PIP review meeting took place on 7 September 2018 (pages 320 – 327). The claimant failed two of the objectives in that review: to arrive in the office and be ready for work at 9am each day and to identify knowledge gaps in supported systems and models.

103. On 11 September 2018 the claimant was signed off sick for two weeks with depression (doctor's note page 150). Mr McCue had noticed a change in the claimant and sent him home to arrange an urgent appointment with his doctor. The claimant had reduced his medication, which he said was to alleviate some of the side effects. The claimant returned to work on 27 September 2018 and assured Mr McCue that he was feeling fine and that his medication was now under control. Mr McCue advised the claimant to make a follow-up appointment with his GP and confirmed to Ms Mison in HR that he had done so, (email 27 September 2018 page 329).

104. Due to the claimant's sickness absence, the second review meeting did

not take place on 21 September. It was postponed until 10 October 2018. This was the final review meeting, the record of which was that pages 341-347. Out of the 5 PIP objectives, Mr McCue considered that the claimant had met objectives 1 and 5 but had not met objectives 2, 3 and 4. The result of this was that the claimant was invited to a formal meeting under the respondent's Capability Procedure, which was to take place on 22 October 2018. He was invited to that meeting by a letter from Ms Mison dated 16 October 2018 (page 351-353).

105. In that letter Ms Mison said that in working on the objectives Mr McCue made adjustments for his "*reported dyslexia and autism".* She referred to the dyslexia assessment in March 2018 and said that various recommendations had been implemented. In addition Mr McCue had followed guidance issued by the NAS. This was notwithstanding that there had been no diagnosis of autism/ASD. Ms Mison summarised the outcome of the PIP process.

106. On the evening of 16 October 2018 the claimant asked Ms Mison for a copy of his role description so he could understand whether he was "*compliant with the expectations of [his] role*" (page 348) and he was provided with this. It was in this email that he stated (as set out above) "*Additionally, I do not have autism per se. However, I likely measure within the spectrum of an autism spectrum disorder. Where on the spectrum is unknown as no formal diagnosis has been made to date. However, it is plausible to be somewhere in the neighbourhood of ADHD. I previously stated that it might have been Asperger syndrome which is also within the same spectrum*."

<u>The capability hearing of 22 October 2018</u>

107. The capability meeting took place on 22 October 2018, chaired by Mr McCue who was accompanied by Ms Mison. The claimant attended and was not accompanied. He had been advised of his statutory right to be accompanied (page 353). The claimant was provided with an Agenda for this meeting. The notes of the meeting started at page 374.

108. The outcome of the capability hearing was that following the failure to achieve the objectives of the formal PIP dated 28 August 2018, the claimant was given a first written warning with a duration of 12 months (page 386).

109. In the outcome letter dated 30 October 2018 Mr McCue addressed the matters raised by the claimant in the hearing. The claimant had expressed surprise that the respondent would consider offering him support according to the NAS Guidelines when he did not have a diagnosis. Mr McCue said that they wanted to support him in the best way which is why they had followed the advice (page 386). Mr McCue wanted to follow these guidelines in the interim, until an assessment for ASD had been carried out. He said they would also refer the claimant back to OH (Bupa) to see how they might support him in the meantime and again referred the

claimant to the EAP for free confidential telephone counselling.

110. We saw from a note of a meeting on 2 November 2018 between the claimant and Mr McCue that there were other occasions when the claimant's work performance and his timekeeping was affected by alcohol consumption (note page 388). The claimant admitted that this happened on a couple of occasions.

The second formal PIP

111. A second formal PIP commenced on 21 November 2018. The template prepared by Mr McCue was at page 393-399. The same five objectives were used. Mr McCue met with the claimant to go through the objectives with him at the start of the second formal PIP.

112. The first review meeting in the second formal PIP took place on 5 December 2018 and did not go well. During the PIP period Mr McCue offered to provide the claimant with training but the claimant rejected this saying that he preferred to do his own "*self-training*" which he would document. The claimant assured Mr McCue that his self-training was in progress but he was unable to document it or show Mr McCue how he was progressing with his training plan. We find that the respondent was ready and willing to provide training but the claimant chose not to engage with this. Ms Mison arranged for a Learning Specialist to talk to the claimant about appropriate training by way of further support (email page 435).

113. On 11 December 2018 the claimant sent an email to Mr McCue's line manager, Mr Kevin Moore, saying: "*Reporting to Damian is not conducive to me being able to maintain a reasonable degree of mental health. Can we have a discuss to see whether anything positive can be done?"* (page 438). They spoke on 11 December when Mr Moore asked the claimant to set up a meeting and book them a meeting room. When the claimant had not done this by 13 December, Mr Moore reminded him. By 19 December 2018, with no meeting having been arranged, Mr Moore emailed to ask whether the claimant still wanted the meeting. The claimant still did not set up the meeting.

114. On 2 January 2019, the first working day of the New Year, the claimant emailed Mr Moore to say that he had been attacked and had been to hospital and asked if he could have the day off as holiday. Mr Moore said there was no need for the claimant to take it as holiday and said of course he could have the day off.

115. On Friday 18 January 2019 Ms Mison wrote to the claimant inviting him to the second performance review meeting under the formal PIP process (page 458) to take place on 24 January 2019. It was be heard by Mr Moore. The claimant was sent an Agenda for the meeting.

116. Prompted by the letter of 18 January, that same evening the claimant contacted Mr Moore to ask for a meeting prior to 24 January to discuss his

reporting line to Mr McCue. This was the meeting that Mr Moore had asked the claimant to set up when they spoke on 11 December. Mr Moore agreed to the meeting which took place on 23 January 2019, the day before the second formal PIP review meeting.

The meeting between the claimant and Mr Moore on 23 January 2019

117. The claimant prepared a document for the meeting on 23 January titled "*Disatisfaction.txt*" which we saw at page 454 of the bundle. In that document he complained, amongst other things, about the PIP being overly critical and that he thought it was a means to terminate his employment. The document set out his view that reporting to Mr McCue "*was not conducive to [his] mental health" and that he found Mr McCue "condescending at times*". He said that to his knowledge there were four job options to explore and he wanted to stay at the respondent without reporting to Mr McCue.

118. The claimant raised the possibility of working in a maternity cover role. The postholder was a qualified actuary in a senior reserving role. The claimant is not a qualified actuary. It is a 6 year process to qualify and the claimant had just failed the first part of the exams in that six year process achieving a mark of 25%. We find it was not a role he could have filled. Ultimately the respondent did not engage any maternity cover for this role.

119. The claimant did not hand the "*Dissatisfaction"* document to Mr Moore at the meeting on 23 January. He read from it, Mr Moore made some notes but he was not given the document, or a copy of it. Mr Moore said that having subsequently seen the *"Dissatisfaction"* document in these proceedings, it contained more than the claimant had said during their meeting. For example, he said that the claimant had not told him in 23 January meeting that he found Mr McCue "*condescending" or "demeaning*".

120. Just after that meeting on 23 January Mr Moore emailed his line manager Mr D'Auria and Ms Mison to say that the claimant was interested in roles outside the Actuarial Development Team (page 474a) and asking if they could discuss this.

The second formal PIP review meeting

121. The second PIP review meeting took place on 24 January 2019, with the claimant, Mr Moore and Ms Mison in attendance. The claimant again read from a document he had drafted and emailed it to Mr Moore later that day (page 480 with the covering email at page 479). In that document he said that he had been diagnosed with dyslexia and that he had "*repeatedly alleged that I have a diagnosable medical condition, adult autism spectrum disorder*." He said that there had not been any attempt to identify whether he might display any specific symptoms or any attempt to implement work to mitigate the negative effect of specific symptoms. The "*specific symptoms*" were not identified. He described the PIP as a "*performance*

perfection plan... with anything less than perfection being failure". The claimant also said: *"I also have been diagnosed with depression. I will react in a cause and effect scenario differently due to this. And my past performance has been impacted by my depression being out of control. I do not see that the fact of the matter has been taken into consideration in the slightest"*

122. The outcome of the second formal PIP meeting was a final written warning was (page 483) dated 1 February 2019, which was to last for 12 months.

123. The claimant was offered a right of appeal against that warning and he agreed that he did not take up that option. He said in evidence that this was because he was "*frustrated by the process".*

OH assessment in 2019

124. The claimant had an OH assessment on 8 February 2019 with Dr Morello, a Consultant OH Physician. A report was produced dated 22 February 2019. The report said that the claimant was fit for normal duties, that the claimant had been assessed for dyslexia and that a workplace assessment had been carried out. The claimant advised the OH physician that most of the recommendations had been followed up but he had noticed that he did not always receive written confirmation following verbal communication. Mr McCue did not agree when he read it in the report, because they had agreed that it was the claimant's responsibility to confirm his understanding in writing after a verbal instruction.

125. Mr McCue did not agree with a number of things the claimant had said to the OH physician. He did not agree that the claimant had received no coaching or mentoring; Mr McCue provided regular 1:1 meetings. Mr McCue did not agree that most of the DVE recommendations had not been followed up.

126. Dr Morello recommended a workplace assessment and said it would appear that some of the claimant's difficulties were related to communication and behaviours. He said that in order to establish whether the claimant needed reasonable adjustments he would need an assessment carried out by the NAS who undertake both assessments and workplace assessments. Dr Morello advised that the respondent temporarily suspend the PIP until the claimant was assessed.

127. As a result of this OH report, the PIP process was suspended.

128. On 5 March 2019 Mr McCue told the claimant it had been agreed that the respondent would fund an assessment for an ASD diagnosis for him and they would suspend the PIP process and reinstate it after this assessment (email at page 512) incorporating any adjustments. This was to be organised by Ms Mison. It was later clarified that it was a workplace assessment that they agreed to fund and not a diagnostic assessment. We find that it was not the respondent's responsibility to pursue a clinical

diagnosis for the claimant.

129. On Monday 18 March 2019 Mr McCue carried out a return to work interview after the claimant had been absent from work for one day on Friday 15 March 2019. The claimant candidly admitted that he had been out for drinks with colleagues the night before and had overslept. He said he would not be coming in that day as he felt "*down*" (return to work interview note page 160). The claimant accepted in that meeting that there was a correlation between alcohol and depression and a correlation between going out drinking and other lateness and absences. The claimant did not mention in that meeting any of the other conditions upon which he relied as disabilities.

130. The PIP process did not recommence prior to the termination of the claimant's employment.

Reasonable adjustments

131. The claimant relies upon the respondent applying a provision, criterion or practice (PCP) of a PIP process, which the respondent admits it applied.

132. The claimant says that the application of the PIP put him at a substantial disadvantage in comparison with persons who are not disabled in that he was unable to meet the PIP objectives and was given informal and formal warnings. The claimant says he was unable to meet the objectives because of impaired communication and executive function which related to depression, in respect of which disability is admitted, dyslexia, ASD and anxiety. The claimant did not rely on OCD for his reasonable adjustments claim.

133. We asked the claimant what he meant by "*executive function*". He said that to him it meant organising, planning, communicating, taking in information and thinking processes.

134. We have made findings above that the claimant did not meet the statutory definition of disability in relation to dyslexia, ASD or anxiety. For that reason alone, the reasonable adjustments claim must fail in relation to the adjustments he contends for in relation to any other condition than depression.

135. In relation to depression it was put to the claimant in cross-examination that he did not tell his employer that depression affected his ability to communicate. He replied "*I don't think I would have".* We find on the claimant's own evidence that he did not put the respondent on notice to any substantial disadvantage in relation to his communication skills.

136. In relation to knowledge of any other substantial disadvantage as a result of depression, we find that the respondent knew or ought reasonably to have known from the information given to Mr Moore on 24 January 2019 (document at page 480) that the claimant's performance was substantially

impacted by this condition. The claimant said: *"I also have been diagnosed with depression. I will react in a cause and effect scenario differently due to this. And my past performance has been impacted by my depression being out of control. I do not see that the fact of the matter has been taken into consideration in the slightest".*

137. In the event that we are wrong about our findings that the claimant was not disabled with dyslexia, ASD or anxiety, we have gone on to consider whether the respondent took such steps as were reasonable to avoid any substantial disadvantage relied upon. The respondent chose to make adjustments based on the DVE assessment and they had also taken steps to follow the Guidelines published by the NAS.

138. We have made a finding above that even if the claimant had the condition of anxiety, such that it met the definition of disability, the respondent did not have knowledge of it. Thus we find that they could not reasonably have been expected to know that he would have been placed at a substantial disadvantage in relation to that condition. The reasonable adjustments claim additionally fails for that reason in relation to anxiety.

139. The adjustments contended for in relation to anxiety were for informal counselling and scheduled calm/quiet periods during the day.

140. The claimant told the tribunal that what he meant by informal counselling was not the sort of counselling that he had the opportunity to access through the Employee Assistance Programme, but more in the way of managerial counselling. We have made a finding that Mr McCue made himself available on Wednesday mornings for two hours if the claimant wanted any work-related training or assistance and that he also had regular 1:1 meetings with the claimant. We found Mr McCue to be a considered and thoughtful manager and we find that in any event this adjustment was made.

141. In relation to scheduled calm and quiet periods during the day we find based on Mr McCue's evidence, that it was for the claimant, at his level of seniority, to plan and manage his own day. Mr McCue had made suggestions to him so that he could find quiet moments during the day such as using noise cancelling headphones or using the work library, in which people were not allowed to speak. This would allow him to have some quiet time and avoid distractions. We find that these adjustments were made for the claimant, but that he failed to take advantage of them.

142. The reasonable adjustments claim in relation to anxiety therefore fails for these reasons, in the event that we are wrong in our finding that he did not meet the statutory definition of disability.

143. The adjustment contended for by the claimant for his depression was for encouragement from peers and supervisors. We find that the claimant received considerable guidance, support and encouragement from Mr McCue over the period of his employment. By way of example the

claimant was given positive comments in his 2017 mid and end year reviews, such as "*Andrew has done a good job*" (page 79) , "*Andrew has started off well"* (page 81), *"the deployment has gone well"* (page 85) and "*Andrew has a lot of positive attributes and a wealth of experience to offer*" (page 88). We find that Mr McCue gave encouragement where it was needed and that this adjustment was made.

144. We have gone on to consider the adjustments contended for in relation to dyslexia and ASD, in the event that we are wrong as to our finding on disability status. These were (i) the provision of meeting notes or to be allowed to record meetings; (ii) the provision of agendas for meetings; (iii) for meeting participants to speak one at a time; (iv) for stakeholders to have been informed about the claimant's disabilities.

145. Meeting notes: In relation to meeting notes we have found above that in discussions with Mr McCue in July 2018 it was agreed that the claimant was to request notes or action points from meeting organisers, or to provide them when he was the meeting organiser. There were no examples of the claimant requesting meeting notes and that request being denied. We find based on Mr McCue's evidence that had the claimant told him that he was not being provided with meeting notes on request, that he would have dealt with this. The claimant was able to take his own notes in meetings and did not say that he had difficulty in taking notes.

146. Mr McCue often suggested to the claimant that he bring a pen and paper with him to meetings, so that he could take notes if he wished. The DVE report did not indicate any particular difficulty for the claimant with notetaking and there was no recommendation that he should have someone else present to take notes for him. The claimant had an average score (bundle page 138) in relation to activities involving note taking.

147. We find that this adjustment was made but the claimant did not always engage with it to ensure that he received the support that he wanted.

148. Recording meetings: We were not taken to any recommendation, whether in the DVE report or OH reports or anywhere else, that the claimant should be afforded the facility of recorded meetings. Had the claimant requested this, which he did not, we find on Mr McCue's evidence (statement paragraph 58) that he would have been allowed to record meetings. The claimant admitted in evidence that never made a request to record a meeting. He said in evidence that this was something he thought of while drafting what he thought would have been reasonable adjustments.

149. Agendas for meetings: The claimant also contended for the provision of Agendas for meetings. Mr McCue's evidence was that not all meetings needed an Agenda, for example in their weekly 1:1 meeting, this was an opportunity for the claimant to raise anything he wanted to raise. The claimant was told by Mr McCue that he should ask the meeting organiser for an Agenda for a meeting if he wanted one. His evidence was that repeatedly the claimant did not ask for this.

150. The claimant considered that it was the chairman of the meeting who should provide an Agenda. We find that not all meetings are this formal and that if the claimant wanted an Agenda, all he needed to do was to ask for one. If such a request was denied, it was open to him to refer this to Mr McCue, whom we find would have intervened.

151. We accepted Mr McCue's evidence and find that the claimant did not complain during his employment about the lack of Agendas for meetings. We find that had the claimant needed an Agenda for a meeting and had asked for this, it would have been provided. As we have found above, Mr McCue also kept the Agenda for the weekly team meeting the same each time. We find that Mr McCue was looking for ways to "*level the playing field*" for the claimant - as he said in his email to Ms Mison on 28 November 2017 (page 195).

152. Meeting participants to speak one at a time: The claimant contended for an adjustment of meeting participants to speak one at a time. Mr McCue's evidence was that it was often the claimant who spoke over others in meetings and Mr McCue had to ask him to allow others to speak. We were not taken to any recommendation of this nature, whether in the DVE or OH reports. In his December 2017 appraisal it was recorded that the claimant had a "*bad habit of interrupting"* (page 88). We find that if people did speak over one another, which happens across business situations, Mr McCue was quick to remind meeting participants to speak one at a time. We find that it was an adjustment that was made within the respondent business.

153. Informing stakeholders: The claimant also contended for the adjustment of "*stakeholders*" being informed about his disabilities. He did not suggest how this would have avoided any disadvantage to him. We agreed with Mr McCue's evidence that this was not something the respondent could have done without the express permission of the claimant. Had the claimant wanted this to be done, he could have authorised the respondent to share his confidential medical information with third parties but we saw no recommendation as to this and the claimant did not request it. It was also open to the claimant himself, to inform those with whom he interacted, about his conditions.

154. We find that the respondent made such reasonable adjustments as were required for the claimant whether or not he met the definition of disability.

Discrimination arising from disability

155. The claimant said that what arose from his disability was impaired communication and impaired function, which led to a negative view of his performance, such that the PIP process was applied. The unfavourable treatment relied upon was the application of that process and the outcome of that process.

156. We have found above that the claimant did not have impaired communication arising from the admitted disability of depression.

157. It is not in dispute that the PIP process was applied and that the claimant received a first and final written warning under the respondent's capability process. The claimant also relies upon his dismissal as the unfavourable treatment because he said the redundancy selection criteria were materially influenced by the perception of his performance. The unfavourable treatment relied upon took place, in terms of the warnings given and the dismissal with performance having been taken into account in the redundancy selection criteria.

158. On knowledge of disability we have also found above that even if the claimant met the definition of disability with the condition of anxiety, the respondent did not have knowledge of this. We have also found that the respondent did not have knowledge of the condition of OCD even if the claimant met the definition of disability with this condition.

159. The claimant was put on a PIP due to poor performance. We have considered the extent to which the reason for placing the claimant on the PIP was because of impaired communication and/or what he described as impaired function.

160. The respondent offered the claimant training to assist him with his performance. The claimant did not take this up. The claimant was told that he could speak to the Learning and Development Team about training opportunities. He said he only saw one training opportunity but that it amounted to 105 hours and he was not prepared to set aside that much time. We find that had he wished to take that training, it would have been provided. The claimant told Mr McCue that he preferred "*self-training*" but he made little or no commitment towards that. When Mr McCue asked him what he had done, the claimant could not produce evidence to show that he had engaged in any self-learning or training.

161. We find that many of the claimant's performance issues could have been assisted if he had engaged with the support he was offered, including text to speech software, time management software, asking for Agendas for meetings or identifying his own training needs and then engaging with that training. He could also have taken advantage of Mr McCue's offer to be available for 2 hours every Wednesday morning to assist members of the team.

162. During the first informal PIP the claimant was given an objective to identify gaps in his knowledge and to produce a plan to address this. By the second informal review date on 24 August 2018 he had hardly progressed this. By 7 September 2018, which was the first review on the formal PIP, it was noted that no further progress had been made on this (page 326).

163. We find that there was a lack of engagement by the claimant with the support that was available to him, such that the warnings were issued. We

find that it was the failure to engage in steps that would have helped him with his performance, that contributed to the warnings he was given.

164. Even if we are wrong about this and the reason for the warnings was something arising from his disability, we find that this was a proportionate means of achieving a legitimate aim. The respondent took steps to make adjustments for and to assist the claimant in performing his role. This is not a case of an employer ignoring the claimant's stated difficulties, but an employer seeking to "*level the playing field*" for an underperforming employee. Ultimately performance management is needed when an employee is not meeting the requirements of their role and this was dealt with considerately by the respondent. We find that it was a proportionate means of achieving a legitimate aim of having employees who could meet the requirements of their role, with such adjustments as were necessary.

Selection for redundancy

165. Our finding of fact below, is that the reason for dismissal was redundancy and it was not a capability dismissal. Nevertheless we have considered whether the claimant's selection for redundancy was materially influenced by the perception of his performance and in turn whether this was because of something arising from his disability.

166. We find that in choosing the selection criteria, the respondent focused on the role that they wished a postholder to perform in the department going forward and the criteria that would be appropriate for that post. They understandably wanted the best person for the job and in common with many employers across the country, they included performance as a criterion.

167. We find that they did not choose performance as a criterion with a view to making it more difficult for the claimant or because of anything arising from his conditions but because they wanted to retain the employee who could best perform in the new role. It is a recognised and commonly used criterion in redundancy selection.

168. There were four selection criteria, set out below on our findings on unfair dismissal. Mr Ware scored a total of 44, the clamant scored a total of 15. For technical performance and knowledge Mr Ware scored 12, the claimant scored 3. Even removing the technical performance and knowledge criterion, Mr Ware comfortably scored higher. If also removing the end of year performance ratings, Mr Ware scored significantly higher. For end of year performance for 2017 and 2018 the claimant scored 9 and Mr Ware scored 21.

169. Even if performance related scoring was disaggregated, the claimant would still have been selected for redundancy above Mr Ware. We find that the claimant was not selected for redundancy because of something arising from disability. He was selected for redundancy because he scored less well in every category.

170. Had it been necessary to consider, in relation to the redundancy dismissal, whether the respondent had a proportionate means of achieving a legitimate aim, we would have found in the respondent's favour. The legitimate aim relied upon, was in short form, that of retaining the best qualified person to fit the role after the redundancy process. It is a legitimate aim when reducing headcount in a redundancy exercise to wish to retain the best performer(s) for the benefit of the business going forward. Scoring against the well-recognised and commonly used selection criteria is a proportionate means of achieving that aim.

171. The claim for discrimination arising from disability fails.

The disability harassment allegations

172. Allegation (a) was that in or around March 2018 Mr McCue alleged that the claimant did not understand software testing. Mr McCue accepts that he told the claimant that he did not understand how to test software adequately. He said this was in the context of a specific change for which he was responsible. He denies making a blunt statement that he did not understand software testing "*full stop*". Mr McCue said that the comment was about the claimant's inadequate understanding, in response to him having failed to design an adequate test strategy and that he was unable to describe the required tests (his witness statement paragraph 51).

173. Mr McCue was not challenged by the claimant on the circumstances in which he made the comment. We find it was related to one specific task and not a general comment that he did not understand software testing. We consider that this was a reasonable management comment which was not made with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. If it had that effect, we consider that in these circumstances, a line manager making this comment to an employee he supervised, it was not reasonable for the comment to have had that effect. In addition we find that it was not a comment related to any disability.

174. Allegation (b) was that on at least five occasions in 2018 Mr McCue likened the claimant to Will Ferrell characters, in particular from the film Step Brothers. Mr McCue agreed that in mid-2018 he likened the claimant to the comic actor Will Ferrell on about two occasions, but no more than that. He said this was in the context of the claimant telling funny stories where Mr McCue thought that his expressions and mannerisms reminded him of this actor. Mr Ware was present when these comments were made and agreed, as the way in which the claimant told his stories reminded him of Will Ferrell as well. It was not until a few days after the comment was made that the claimant viewed the comment as "*unkind*" but he did not say why he found it unkind. He had not previously seen the film Step Brothers and had to watch it. It was after seeing the film, he formed a view that the comment was "*not favourable to him*" but again he did not say why he thought the comparison with this actor was unfavourable to him.

175. We find that this comment was not disability related. The claimant did not tell us why it was a disability related comment and we find that it was not. We could not see any connection between likening the clamant to Will Ferrell and his depression, being the condition relied upon for this allegation. The claimant did not meet the initial burden of proof. Even if the claimant did not like the comparison with this actor, we find that it was not disability related harassment.

176. Allegation (c) was withdrawn by the claimant in closing submissions.

177. Allegation (d) was that Mr McCue demeaned the claimant by denying him the opportunity to participate in business analysis work in November 2017 and criticising the claimant during his PIP from August 2018 to January 2019 for not demonstrating the skills said to have been denied to him by this lack of opportunity. In his witness statement paragraph 54, Mr McCue was not sure what the claimant was referring to with this allegation. It was put to the claimant that his duties were reduced with a view to supporting him. The claimant said he was not informed of this.

178. We find that Mr McCue was seeking to assist the claimant by restricting him to the core duties of his job and not expanding upon this so that he could consolidate and improve before moving on to anything else. We find that Mr McCue's purpose was that of seeking to support the claimant by not expanding upon what he was required to do, when he was struggling with the role. We find that Mr McCue was engaging in legitimate management actions and if the claimant considered that this had the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, it was not reasonable in the circumstances for it to have this effect. We also find it was not disability related.

179. Allegation (e) was that in December 2018/January 2019 Mr McCue alleged that there was a misalignment between the claimant's perception of his performance and that of others in the 2018 year-end performance appraisal. Mr McCue accepts (statement paragraph 55) that he stated in the claimant's 2018 year-end appraisal that there was a disconnect between the claimant's perception of his performance and his actual performance, as perceived by Mr McCue and others. We saw this in the year end appraisal at page 104.

180. We find that in making this comment, Mr McCue was carrying out a legitimate managerial action of appraising the claimant's work at year end. This was Mr McCue doing his job as a line manager with an underperforming employee. This comment was not made with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The purpose was to seek to drive an improvement in his performance. If it had that effect it was not reasonable in these circumstances for it to have that effect when it was a legitimate managerial comment and it was also not

related to any disability.

181. The claim for disability related harassment fails.

The dismissal

182. During 2018 and into 2019 the respondent made a decision that certain processes for categorising and sorting data were no longer to be performed by the Actuarial Development team had were moved to the Data Management and Analysis (DMA) team in Operations. As a result the workload in the Actuarial Development team had reduced. We saw a Redundancy Business Case at page 538 of the bundle. This stated that following this transition of work from the Actuarial Development team to the DMA team there was less need for resources within the Actuarial Development team.

183. The claimant considered the business case for redundancy to be a sham. We find that there was genuine redundancy situation. The claimant has not been replaced.

184. On 6 February 2019 Ms Chogri in HR sent Mr McCue draft redundancy selection criteria and a generic role profile which he was to amend to reflect the responsibilities of the role they would need going forward. Mr McCue used the generic role profile of the claimant's role of Senior Actuarial Analyst to create a job description for the role they needed – pages 499a – 499d. With the move of data work to the DMA team the role going forward was to be more systems focussed.

185. The claimant complained that the role profile for the new role was based upon the job expectations for a Senior Actuarial Analyst rather than an Actuarial Development Analyst. We find that it was for the respondent to make the managerial decision as to what role they needed going forward and they were not required to base this on any pre-existing role. It was a stand-alone new role.

186. The selection criteria were initially (i) customer focus; (ii) technical performance and knowledge; (iii) leadership and people management and (iv) year-end performance rating (pages 550 - 551). Mr McCue, Mr Moore, Mr D'Auria and Ms Chogri met to discuss the criteria and decided to remove the leadership and people management criterion as the role had no management responsibilities. They decided instead to include the performance ratings for 2017 and 2018, rather than just use the previous year's ratings as had been their usual practice. They were aware that the claimant was being performance managed and he had received the lowest possible rating for 2018. We find that it was beneficial to the claimant for the criteria to include the 2017 performance rating as his rating for that year was better than for 2018.

187. The final selection criteria were: (i) customer focus; (ii) technical performance and knowledge; (iii) 2017 year-end performance rating and

(iv) 2018 year-end performance rating. We consider that the selection criteria were standard, to be found in many businesses and we find nothing unfair in the selection criteria. Performance is a legitimate criterion.

188. The job profile was sent to the claimant on 25 March 2019. As part of the role responsibilities, set against Technical Performance and Knowledge was "Integration Services". The claimant said that as this was outside the scope of his role he was prejudiced within this category as he said he had been "*excluded*" from working within Integration Services. This was what the respondent required for the job going forward and we find that they were entitled to consider the claimant and Mr Ware against this.

189. It is not in dispute that the Actuarial Development team consisted of three people, Mr McCue as the manager with Mr Ware and the claimant as the Actuarial Development Analysts. By 2019 both the claimant and Mr Ware were on grade 4, Mr Ware having been promoted, on our finding, on 1 April 2018.

190. On 25 March 2019 Mr Colum D'Auria met with the claimant and Mr Ware and put them at risk of redundancy. This was confirmed by letter of the same date (page 557).

191. The claimant and Mr Ware were individually scored against the selection criteria by Mr McCue, Mr Moore and Mr D'Auria from 5 (excellent) to 1 (poor). Ms Chogri then added the scores together. Mr Ware scored 44 and the claimant scored 15 (pages 566-567).

192. As a result of the scoring exercise, the claimant was told on 27 March 2019 that he had provisionally been selected for redundancy subject to the consultation process.

193. The first redundancy consultation meeting took place on 29 March 2019 The claimant had shown some interest in some current vacancies and was put in touch with one of the Recruitment Business Partners. He was asked to check for any new vacancies that might arise.

194. Also on 29 March Ms Chogri emailed the claimant (page 574) to give him a link to the list of all open roles at the respondent. He was given the name of the Recruitment Business Partner but said he did not contact him because he no longer had access to his email once he was on garden leave. The claimant accepted in evidence that if he did not have the email address he could have phoned to find out the name of the person to contact. The claimant said in evidence that by this point he had decided that he did not want to work for the respondent ever again. He said in evidence that he had "*given up".*

195. The claimant does not take issue with the consultation process in this redundancy exercise. It was the claimant, who at the second consultation meeting on 3 April 2019, said that he had no further questions and wished to close the consultation. In his own words (Further and Better Particulars

paragraph 7(h), bundle page 34) he "*elected to cease consultations*". He was asked if he was sure about this and he was clear about his decision.

Alternative employment

196. The claimant's case is that the respondent failed offer him any suitable alternative employment. His case is that a project called Project Scarab was recruiting for two positions requiring similar or identical skills to his own and that Mr D'Auria was "*fully aware of this*". The claimant said that the project was due to run throughout 2019 and 2020.

197. The claimant also said that there were opportunities outside the Actuarial Development team which he could have carried out. He says these were:

    A. Finance Project & Data Development team role vacated by Eddie Holder in February 2019
    B. Finance Support Analyst role vacated by Mr C Boateng in March 2019
    C. Financial Operations Business Analyst role vacated by Kunal Amin in July 2019
    D. Two roles on Project Scarab.

198. On the Finance Project role vacated by Mr Holder, it was discussed between the claimant and Mr Moore on 23 January 2019 at the end of the PIP when the claimant was expressing dissatisfaction with reporting to Mr McCue. Mr Holder was a coder, doing a similar job to the claimant, in the Finance team. The claimant was asked to speak to the relevant individuals and to come back to Mr Moore if there was anything he wanted to pursue. The claimant did not do so. He said he did not know who the relevant people were, but he did nothing to find out.

199. The claimant said that in relation to the Finance Support Analyst, he found out about the role from a Mr Boateng who was leaving in March 2019. The claimant does not know whether there was an intention to refill the role when Mr Boateng left. He does not recall seeing such a role on the vacancy list he was shown during the consultation period.

200. In relation to the Financial Operations Business Analyst role vacated by Kunal Amin in July 2019, the claimant accepts he did not apply for it. He said he did not become aware of this until October 2019. The claimant does not know whether there was an intention to refill the role when Mr Amin left.

201. In relation to Project Scarab, on 27 March 2019 Mr D'Auria sent an email to the claimant advising him to speak to a colleague called Mr Niraj Shah, who led the Project, about potential roles in that project (page 571) as he thought that resource may be required for this. He told the claimant to let him (Mr D'Auria) know if he could be of any help. The claimant said he did speak to Mr Shah and sent his CV but no role specification was provided and he complains that the role was not advertised. The email

submitting his CV was not in the bundle. The claimant accepts that he did not take Mr D'Auria up on his offer of help. We find that the claimant did not pursue the role.

202. The claimant said he applied for a role in Project Scarab but says he did not hear back. He considered the roles were "*hidden*" from him because they were in a different part of the Group of companies but he accepts he was told about them. We find they were not hidden as he suggests, because he knew about them.

203. There were no potentially suitable vacancies within the Actuarial Development team itself and the claimant does not assert that there was any such role.

204. The claimant accepted that he did not contact the Recruitment Business Partner, he did not take up Mr D'Auria's offer of help, he did not follow up with Mr Shah his application to Project Scarab and he did not take up Ms Chogri's offer of help (page 574).

205. The dismissal letter dated 4 April 2019 (page 576) made it clear that the claimant could still apply for other roles at the respondent during his notice period. He did not do so.

206. The claimant admits that by late March 2019 he had decided he did not want to work for respondent. We find that no matter what role was identified he had decided that he did not want it. We find that the respondent complied with its duty to offer suitable alternative employment and the claimant did not engage with the process.

207. We find that there was a genuine redundancy situation; there were fair selection criteria, that the claimant and Mr Ware were scored by 3 managers against the criteria, this was overseen by Ms Chogri in HR and that the claimant scored very substantially below Mr Ware. There was no issue on consultation and the claimant chose not to engage with alternative employment because he had decided he no longer wished to work for the respondent.

208. For the above reasons we find that the reason for dismissal was redundancy and the dismissal was fair. The claim for unfair dismissal fails.

The relevant law

Disability

209. Section 6 of the Equality Act provides that a person has a disability if that person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

210. The burden of proof is on the claimant to show that he is disabled in relation to each impairment relied upon.

211. Under section 212(1) of the Equality Act 2010 "substantial" means more than minor or trivial.

212. In ***J v DLA Piper 2010 IRLR 936 (EAT)*** the EAT drew a distinction between two states of affairs which can produce broadly similar symptoms, such as symptoms of low mood and anxiety. The first state of affairs is a mental condition which can be referred to as 'clinical depression' and an impairment under the Equality Act and the second is not a mental condition but a reaction to adverse circumstances, such as problems at work – which can be referred to as 'adverse life events'.

Discrimination arising from disability

213. Discrimination arising from disability is found in section 15 Equality Act 2010:

> *(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,*
>
> *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.*

214. The approach to be taken in section 15 claims is set out in ***Pnaiser v NHS England 2016 IRLR 170 (EAT)*** by Simler P at paragraph 31. This case also addresses the burden of proof in section 15 cases. Under section 136, once a claimant has proved facts from which a tribunal could conclude that an unlawful act of discrimination has taken place, the burden shifts to the respondent to provide a non-discriminatory explanation. In order to prove a prima facie case of discrimination and shift the burden to the employer, the claimant needs to show:

a. that he or she has been subjected to unfavourable treatment;

b. that he or she is disabled and that the employer had actual or constructive knowledge of this;

c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment;

d. some evidence from which it can be inferred that the 'something' was the reason for the treatment.

215. If the prima facie case is established and the burden shifts, the employer can defeat the claim by proving either:

a. that the reason or reasons for the unfavourable treatment was not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or

b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

216. 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 (judgment paragraph 31b).

<u>The duty to make reasonable adjustments</u>

217. The duty to make reasonable adjustments is found under section 20 EqA. They duty comprises three requirements. Subsection (3) is 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.*

218. The EAT in ***Royal Bank of Scotland v Ashton 2011 ICR 632*** held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment.

219. This case was considered by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ*** on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

220. Under section 21 of the Equality Act a failure to comply with section 20 is a failure to make reasonable adjustments. Section 21(2) provides that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that disabled person".*

221. In deciding whether an employer has failed to make reasonable adjustments, as set out by the EAT in ***Environment Agency v Rowan 2007 IRLR 20,*** the tribunal must identify:

> *(a) the provision, criterion or practice applied by or on behalf of an employer, or;*

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

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

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

222. On the burden of proof, the EAT in ***Project Management Institute v Latif 2007 IRLR 579*** (Elias P as he then was) held that the claimant must not only establish that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. It is necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.

223. In relation to knowledge of disability, knowledge of the disadvantage and reasonable adjustments Schedule 8 paragraph 20(1)(b) of the Equality Act provides:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know - …..that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

224. In ***Newham Sixth Form College v Saunders 2014 EWCA Civ 734*** the Court of Appeal (Laws LJ) said in relation to knowledge of the substantial disadvantage: *"[the] nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP*" (judgment paragraph 14).

<u>Disability related harassment</u>

225. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*

226. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

227. In ***Grant v HM Land Registry 2011 IRLR 748*** the CA (Elias LJ) said:

> *Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. (para 47)*
>
> and
>
> *I do not think that a tribunal is entitled to equate an uncomfortable reaction to humiliation. (para 51).*

<u>The burden of proof</u>

228. Section 136 of the Equality Act deals with the burden of proof and provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

229. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

230. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He

suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

231. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

232. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

233. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

<u>Unfair dismissal/redundancy</u>

234. A redundancy situation is defined in section 139 ERA as follows:

> *"…an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to ……. (b) the fact that the requirements of that business (i) for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish."*

235. In relation to the redundancy process the tribunal must not conduct an over-minute analysis. Neither should the tribunal carry out a new scoring exercise itself. The Court of Appeal in ***British Aerospace plc v Green 1995 IRLR 437*** said (judgment paragraph 3):

> "*Employment law recognises, pragmatically, that an overminute investigation of the selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge – namely a swift, informal disposal of disputes*

> *arising from redundancy in the workplace. So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him."*

236. In terms of the pool for selection, this is primarily a matter for the employer to determine. It is difficult for an employee to challenge this if the tribunal considers that the employer has genuinely applied its mind to the problem – see ***Samels v University of Creative Arts 2012 EWCA Civ 1152***.

Conclusions

Disability status

237. For the reasons set out above we have found that the claimant did not meet the statutory definition of disabled with the conditions of dyslexia, ASD, anxiety or OCD in the period from the commencement of his employment in September 2016 to the termination of his employment on 4 July 2019.

Harassment related to disability

238. For the reasons set out above, we have found that on allegations (a), (b), (d) and (e) there was no disability related harassment. Allegation (c) was withdrawn.

239. These were very serious allegations against Mr McCue and we find that the claimant did not meet the first stage of the burden of proof in section 136 Equality Act, such that the burden of proof did not pass to the respondent. We find that Mr McCue was acting appropriately as a conscientious line manager in relation to a member of staff who was not meeting the aims and objectives of the role to which he was appointed. A line manager has, at times, to say and do things that the employee may find difficult, but this does not mean that it amounts to unlawful disability related harassment. The comparison with the actor Will Ferrell was not related to the disability of depression and we could see no way in which this was a disability related comment.

Failure to make reasonable adjustments

240. Our findings above are that the respondent was continually looking for ways to assist the claimant and make adjustments for him, regardless of whether he had a specific diagnosis of a particular condition. Mr McCue at the outset was looking for ways to "*level the playing field"* for him. They arranged the DVE assessment, OH assessments and obtained the NAS Guidelines. They discussed these with the claimant to obtain his input and sought to implement the relevant recommendations. For example, they obtained speech to text software for him and programmes to help him with prioritising and organisation. There was a lack of engagement on the part of the claimant with the adjustments that were made for him. We find that

to the extent that the duty to make reasonable adjustments arose, bearing in mind our findings on disability status, that the respondent complied with its duty to make reasonable adjustments.

Discrimination arising from disability

241. Our finding above is that the performance warnings were not imposed because of something arising from the claimant's depression or because of anything arising from any of the other conditions he relied upon. The warnings were given because the claimant did not engage with the support with which he was provided and thus his performance did not improve. We have also found that performance management was a proportionate means of achieving the legitimate aim of having employees who could perform the requirements of the role.

242. The dismissal was for redundancy and not capability. Even removing performance related criteria the claimant scored well below Mr Ware and would have been made redundant in any event. The redundancy criteria used were a proportionate means of achieving the legitimate aim of retaining the employee best suited to the role going forward.

243. The claim for discrimination arising from disability therefore fails.

Unfair dismissal

244. We have found that the reason for dismissal was redundancy and that the dismissal was procedurally fair.

245. The claimant contended that the selection criteria were unfair because they were based on the role profile of a Senior Actuarial Analyst instead of an Actuarial Development Analyst. Our finding is that the respondent is entitled to carry out the redundancy exercise based on the role that the business requires going forward and not base it on the role that anyone was performing at the time.

246. The claimant also contended that the selection criteria were unfairly applied to him because they were materially influenced by his performance. Again our finding is that it is legitimate for an employer to take performance into account when they are deciding who is suitable for the one role going forward and it is reasonable for them to wish to retain the best performing employee for the future.

247. The claimant contended that there was an unreasonable failure to redeploy him. Our finding is that this was not the case. The claimant was encouraged to apply for available roles and he did not take up the options and offers of help made available to him. Our finding of fact, based on the claimant's own evidence, was that he had made a decision that he did not want to work for the respondent any longer. There can be no unreasonable failure to redeploy him when he had made this decision. On his own evidence, he would not have accepted any offer of alternative

employment.

248. The claim for unfair dismissal therefore fails and is dismissed.

249. As a result of our findings above, it was not necessary for us to make any findings on any time limitation point.

_____

Employment Judge Elliott
Date: 8 June 2021

Judgment sent to the parties and entered in the Register on: 08/06/2021.

_____ for the Tribunal