



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Lopez-Moreno

**Respondent:** Wharfedale Facilities Management Limited

**HELD by** CVP

**ON:** 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup>, 22<sup>nd</sup>  
24<sup>th</sup> (in private) and 27 September  
2021

**BEFORE:** Employment Judge Lancaster  
**Members:** J Noble  
D Wilks

## REPRESENTATION:

**Claimant:** In person, assisted by his wife E Lopez-Moreno  
**Respondent:** J Munro, Peninsula Business Services Ltd

**JUDGMENT** having been sent to the parties on 4 October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, taken from the recording of the oral judgment delivered immediately upon the conclusion of the hearing:

## REASONS

1. The unanimous decision of the Tribunal is that the claims of discrimination do not succeed. The claimant will receive some of the monies claimed but the substantive complaints of various forms of disability discrimination fail.

### Background facts

2. This has not been an easy case for anybody involved. It has clearly been stressful for the parties and we would also preface our Judgment by saying that

it has been painful for the Tribunal to observe the replaying of a breakdown in a very close friendship and personal relationship between the claimant and his wife on one side, and on the other the principal shareholder and owner of the respondent company, Mrs Kinsey, and her husband. In particular on what is a potentially key point as to the credibility of the witnesses the two sides have given diametrically opposed factual accounts. That is on the issue of whether or not the claimant specifically and expressly informed Mrs Kinsey that he suffered from dyslexia, which he does and which has been held to constitute a disability for the purposes of this claim. (The Claimant also suffers from auditory reduction as a result of an explosion which serving in the army in Afghanistan, but there has been no dispute that the Respondent knew of this condition). As a result of that direct conflict on the evidence accusations have been made that one side or the other are telling lies about this matter, and clearly both of them cannot be correct in giving such different accounts as to what happened.

3. The background to this case is that Mrs Kinsey formed the respondent company in March 2018. In the previous year she had successfully brought a pregnancy discrimination complaint against her former employer and had invested the compensation from that claim in starting her own business. She started it with a friend Mr Joe Stanley who has also given evidence. Mr Stanley however did not himself invest any money in the business but the allocation of shares was 70% to Mrs Kinsey and 30% to Mr Stanley. Mr Stanley was described as the managing director. Shortly afterwards Mrs Kinsey was in conversation with the claimant and his wife. They had met some seven years earlier in 2011 and in particular Mrs Lopez-Moreno and Mrs Kinsey were very close friends. At that point the claimant was still a serving officer in the army but there was discussion as to whether he would leave the services and join Mrs Kinsey in her new business venture. Very rapidly that conversation moved on to a job offer which in fact came from Mr Stanley and it was for the position of operations manager. That offer letter is from June of 2018 so very shortly after the matter was first broached in conversation. There was a reason for putting an offer in writing very early and that was because it would assist the claimant in negotiating his departure from the army. They would have required to see confirmation that he had a job to go to and they considered that was suitable and that would facilitate the process. But there were clearly still ongoing discussions to be had.
4. We have an exchange of text messages then in around June where there is reference to the hope on the part of Mrs Kinsey that her friend, the claimant, would not only join the business as its operations manager but would very shortly become a director. That was expressed as either his having a particular area of the business within his control or potentially the offer of shares. Both the claimant and his wife conceded that they did not understand the difference between being a director on the board of a company, with statutory legal obligations, and having the title "director" in a job description. There was talk about what his salary, which on the initial offer was £24000 per annum, might rise to if the business was successful and figures in the order of £60,000 for an operations manager were then discussed.
5. We are satisfied however that those discussions in the summer of 2018 certainly did not have any contractual effect. It is talk of the aspirations that both of them had for the business they were about to embark upon together. There was certainly no certainty as to any offer on the part of Mrs Kinsey that

she would, as is now alleged, transfer 10% of the total shares in the company or 10% of her own shares (which of course would be 7% of the total) to the claimant without him investing in the business either. It is instructive to note the claimant's initial response to that suggestion that he may become a director which was that it was "silly" and confirming "you pay me what you think is appropriate if we make a success of this and I realise it will be a long term venture we'll see what happens". And certainly by the time the claimant did start work for the respondents on 26 October 2018 there had been no concluded contractual agreement that he would ever in fact be made a board director nor receive any shares in the business. Indeed the claimant's own evidence indicates that that alleged promise was not the reason why he joined the respondent company. He does record a subsequent conversation, but this was in around November 2018, where he says there was further discussion about a possible shareholding. That was of course after he had already started employment. He was quite clearly prepared to join as the operations manager without any indication that he would in fact receive any shares. We note of course also that any such discussions were with Mrs Kinsey on a personal basis. It is not for the respondent company to dictate that its principal shareholder should or should not dispose of any of her holding to another person.

6. So apart from the lack of certainty as to what may or may not have been agreed, we are firmly convinced that there was no intention to create contractual relations at that stage as a result of these discussions about potential shareholdings in the future.
7. At this point when the claimant joined the business, on Companies House the only two shareholders and directors recorded were the claimant and Mr Stanley. That remained the position until Mr Stanley resigned in October 2019. However we have seen evidence of board meeting minutes from early that year, from August 2018, which indicates that although not registered with Companies House Mrs Kinsey's husband and her father-in-law were also described as board directors, and it is also clear that her father-in-law Mr Paul Kinsey had by this stage invested money into the business. He also invested further monies. In particular we note that around the end of the claimant's employment in January of 2020 he is recorded (in an exchange of WhatsApp messages between Mrs Lopez-Moreno and Mrs Kinsey) as having again injected cash to enable bills to be paid at that juncture.
8. When the claimant joined the business it was not therefore with any concluded contractual offer that he would in fact become a director or a shareholder, and the board at that point was Mrs Kinsey, her husband, her father-in-law and Mr Stanley. Very shortly afterwards as the business was starting to take off and they achieved new larger contracts, his title was changed from operations manager to operations director. That would be entirely in accordance with the aspirations expressed by Mrs Kinsey some few months earlier that he may have an area of the business that was designated to him. But it was simply a title, and he was never also, officially or unofficially, on the board of the company. Mrs Lopez-Moreno similarly was employed by the business on a part time basis and given the title of "head of people". In the designation of roles there was clearly a recognition of the personal relationship as much as any acknowledgement or particular expertise or experience.

9. Upon being given that title of operations director rather than manager the claimant's salary went up from the original offer of £24000 per annum to £27,000, and that is recorded in the written statement of terms and conditions which was signed by him in February of the following year 2019. At the same time on that document it is also recorded that there would be a bonus of "£300 if targets met". That is imprecise as to when that bonus would be paid and certainly there is no indication of what any targets may have been. There had in earlier discussions been talk of a possible payment of commission if any particular contract was secured by the claimant, or indeed any other employee, but in reality that never seems to have happened. Bonuses evidently were paid on an intermittent basis. We have not seen all the pay slips but we have seen some that certainly shows in the financial year from April of 2019 bonuses were paid. By the time the claimant left in January the following year that was a total of £1400 over the entire period. They were certainly not paid every month and the only inference we can properly draw from this is that there was a discretionary additional bonus on top of salary loosely connected to the general performance of a company rather than to any specific targets met by an individual, and that on occasions the claimant did receive such bonus payments.
10. As well as receiving those bonuses intermittently on top of his £27,000 increased salary, certainly from July 2019, when we have the payslip, it is apparent that his annual salary had increased once more to £28,000 per annum, again paid in equal monthly instalments. Nobody is at all clear as to the circumstances in which the claimant was accorded these pay increases. Then in October 2019 we can see that his salary increased again to a total of £30,000 per annum. So in the course of one year from joining the business in October 2018 to October 2019 he had received three substantial pay increases and his basic salary had increased from £24,000 to £30,000, which is an uplift of 25%. That does not support the contention that the claimant was denied the opportunity to progress within the respondent company.
11. As the business was starting to increase others were taken on. in particular around August of 2019. Mrs Kinsey's husband Anthony started to take a more active part in the business although he was not paid as an employee until some few months after that. He did not become a noted director at Companies House until January the following year, where he is also recorded as being a minority shareholder. And upon somebody leaving the business a friend of Anthony Kinsey's, James Humphries, was appointed to also work in operations alongside the claimant but with a subsidiary job description. It is right that the claimant was not consulted about the strategic decision to bring somebody else in, but he was clearly aware of the proposed change and appeared to have no problem with that as recorded in the contemporaneous exchanges and messages between him and Mr Humphries, although he now complains that this is evidence of his being side-lined and not afforded the proper status that should have been accorded to him as a nominal director of the business.
12. But at the same time the business was increasing it is also apparent that there were logistical problems. This is a cleaning business sending out operatives, mostly self-employed, to work at various sites and the contemporaneous documents record that there were a number of issues as to whether operatives

were properly allocated and whether equipment was available, and there were recorded customer issues that needed to be addressed.

### **The issues**

13. So that is the general background to this dispute. The claimant's case is that because of his dyslexia and his alleged inability therefore to carry out certain tasks he became the subject of increasing frustration on the part particularly of Mrs Kinsey and that is why from October 2019 onwards he says he was subjected to a campaign of derogatory and belittling treatment excluding him from the opportunity of advancement in the company and ultimately leading to his dismissal. The issues were set out in the Summary attached to a case management order made by Employment Judge Shulman following a preliminary hearing on 20<sup>th</sup> August 2020. At a subsequent hearing on 26<sup>th</sup> March 2021 Employment Judge Wedderspoon allowed a number of amendments identified within a schedule ordered by Judge Shulman by way of further particularisation. All of those allowed amendments were, however, characterised by Judge Wedderspoon as clarifying specific acts which formed part of the general allegation of poor continuing discriminatory treatment as set out in the originally pleaded case. Judge Wedderspoon also identified a time point, which had apparently been overlooked at the earlier hearing; any allegation before 18<sup>th</sup> January 2020 are potentially out of time. The relevant sections of Judge Shulman's Summary (where the relevant legal provisions are also referred to) are now reproduced in the end note to this decision<sup>1</sup>.
14. And as we have said a key factual issue in this case is whether or not it had expressly been disclosed by the claimant and/or his wife to Mrs Kinsey that he suffered from dyslexia. This is an extraordinary position to be in given the longstanding friendship. As is rightly pointed out by the claimant it would, on the face of it, be extremely surprising if his friends had not known of his condition. But equally it would be similarly surprising if in those circumstances if Mrs Kinsey and others denied their knowledge of that fact. Particularly as we have no reason to doubt Mrs Kinsey's evidence that she has personal experience of those suffering from dyslexia. Her own sister was also employed part time in the business with this condition and as a result Mrs Kinsey was prepared to install appropriate software on her sister's computer. She was also prepared to be proactive when it came to her attention that a number of the operatives were having difficulty accessing or processing information on the online training necessary for their COSH certification, and therefore she engaged a particular tutorial company to assist. In those circumstances had she been directly aware of any needs on the part of the claimant it would be similarly surprising if she had not been prepared to undertake any changes that may have been thought necessary.

### **Section 136 Equality Act 2010/"the reason why" test**

15. Ultimately, although the question of knowledge of disability is material on the claim under section 15 of the Equality Act and on the claim for failing to make reasonable adjustments, the principle significance of this factual dispute in the overall context of this claim is whether amounts to the claimant having proved a fact from which we could, absent any explanation, conclude that he has been subject to unlawful discrimination under the Equality Act.

16. After weighing up the evidence we are satisfied that the claimant has not proved that as a relevant fact. He has not been able to establish that Mrs Kinsey is indeed deliberately concealing the extent of her knowledge. Had he done so that proven fact would, we consider, have been sufficient to shift the burden of proof to the respondent to show that any deterioration in the relationship that ultimately led to the termination on 21 January was not as a result of the claimant's underlying impairment.
17. The reason why we conclude that the claimant is unable to meet that primary burden of establishing that fact is that in three key areas within the relevant period we consider that Mrs Kinsey has proved herself before us to be a credible witness. In particular there are, in relation to those three areas, contemporaneous documents that corroborate her factual account, so that it is not simply one person's word against another. Because we are able to make critical findings on the evidence in favour of Mrs Kinsey, we are entitled to and do also conclude that on balance her evidence on the hotly disputed issue, where there is, however, no clear documentary support one way or the other, is also more likely to be credible. Or, at least there is insufficient evidence to mean that we should prefer the claimant's account over hers. And those three key areas are from the start of December, the middle of December and the circumstances around the dismissal in January.
18. Firstly at the start of December Mrs Kinsey called a business meeting to discuss what were perceived as increasingly problematical areas in the operations department of the business. The email setting up that meeting was sent out to the operations team on 6 December. At that stage it is complimentary of the work that the team have been doing immediately prior to that but it identifies that there are increasing issues. As we have said there were as the business was expanding logistical problems coming to light that needed to be sorted out.
19. We should also observe that contextually at around this time Mrs Kinsey was in the relatively early stages of pregnancy. The contemporaneous documents indicate that that pregnancy was not always running smoothly, and yet she was still working full time. And within the structure of the company although Mrs Kinsey no doubt would have wished others to take more responsibility (and indeed expressed that very clearly in one of her email communications) ultimately she was "the boss" and she has been described in the evidence as "hands on". She took responsibility and did intervene when she thought it necessary. Again, without going into detail, in a number of her communications she expressly acknowledges the fact that she may not wish to do so., and that's she may be coming across as somewhat heavy handed, but that she considers it her duty as being responsible for the company to intervene where necessary.
20. In that context she set up an operations meeting which was used to define the remit of various members of the operations team. The minutes of that meeting were taken by Mrs Lopez-Moreno. It is now contended that that is evidence that the claimant was struggling because of his dyslexia and that changes to the business therefore needed to be made in order to enable him to continue in his role. That is not evident at all in the email setting up that meeting nor in the minutes. This is a purely logistical problem and one which clearly Mrs Kinsey was endeavouring to resolve. She expressed that she wished to have these matters sorted out before the end of the year and that she believed they could be sorted out. And that again, in our view, is an entirely credible account. It was

Mrs Kinsey taking the initiative to address issues across the entirety of the operations team as she saw it. There was nothing identified at that point that indicated that the claimant was in any particular difficulty because of his dyslexia. And that fixes the initial credibility of Mrs Kinsey within the relevant time frame as at around the beginning of December, when these issues began to come to a head.

21. The next key issue where we find Mrs Kinsey to be a credible witness is in relation to an altercation that took place on 18 December. That was shortly before the business closed down for the Christmas vacation on the 20<sup>th</sup>. It is clear that there was a dispute between Mrs Kinsey and the claimant regarding decisions that he had taken in relation to a particular project at Gore Street in Manchester. The issue was to how much work was allocated to the cleaners, and whether that was therefore cost effective. There is no dispute that in the course of that discussion Mrs Kinsey voiced the opinion that this would be bankrupting the business if they carried on. But again we are satisfied that that is not, as is now suggested, a criticism specifically of the claimant. It is certainly not a criticism of him in connection with any problems in processing information as a result of his dyslexic condition. It is simply a disagreement between two senior members of the company, but where one of them is ultimately in charge, as to decisions that had been made. Indeed in the course of the evidence both the claimant and also his witness Ryan Thompson confirmed that that dispute was not as a result of the claimant having failed to process information or having misunderstood information because it was in a written form or sent by email or for any other reason, but that he had taken a decision on the basis of what he understood the information, properly processed, to be. Mrs Kinsey disagreed with that assessment. So there is nothing on the face of it whatsoever to do with his dyslexia.
22. And that is specifically corroborated by the exchanges that Mrs Kinsey engaged in at the end of that day with Mr Thompson. There she apologises again for perhaps for having come across in a heavy handed way and indicates quite clearly the issue was not solely with the claimant, though ultimately, because of his position as operations director, it would have been expected that he would have identified these issues beforehand and avoided her having to intervene. In his response to that communication, where also Mrs Kinsey expressly refers to herself being highly emotional and upset during the course of that day, Mr Thompson appears to be entirely in agreement with her assessment and is indicating that it is quite right for her as the owner of the company to intervene where she sees issue of this nature. Certainly nothing is identified to indicate that he, Mr Thompson, thought it was specifically directed at the claimant or connected to the claimant's disability, of which Mr Thompson says he himself was perfectly well aware.
23. Those issues arose around the same time as there was also an exchange of WhatsApp messages between Mrs Kinsey and Mrs Lopez-Moreno regarding potential issues, not about the claimant but about James Humphries and decisions taken by him. But again in the course of that discussion there is nothing whatsoever that makes any allusion to any of those operational difficulties being as a result of the claimant's dyslexia. And indeed we observe in the entirety of the WhatsApp exchanges between the two women there is never any allusion to any of those matters.

24. So again that contemporaneous written evidence confirms, in our view, that the evidence of Mrs Kinsey is entirely plausible and credible when she says it was only around the middle of December that any particular issues started to emerge within the team. We also observe that the business was clearly in substantial cash flow difficulties at this time. On 19 December there is a lengthy email sent out by Mrs Kinsey where she itemises in detail the monies that are still outstanding to the company and it substantiates that she was clearly feeling the financial pressure at that point. That would explain her concerns expressed on 18 December that what she believed to be bad business decisions were potentially “bankrupting the company”.
25. Mrs Kinsey it is right does not mince her words. She is not averse to using bad language and she is certainly not shy about making her feelings known. But none of those expressed views either at 18 December, which is the key event, nor on any other occasions are, we are satisfied, anything to do with the claimant’s specific difficulties as a result of his dyslexia. If Mrs Kinsey refers to business decisions having been made as showing a “lack of common sense” that is a figure of speech that she evidently uses frequently. It is a yard stick by which she asks members of her teams to evaluate their decision making. It is not, as the claimant would now allege, a specific criticism of him because of his alleged slowness in processing information.
26. None of the matters that have been prayed in aid from the documentation to suggest this was directed to the claimant in fact bear that out in context. There are issues about, for instance, whether or not sufficient thought had been given to sending a team to Hull on one morning at the end of November, and whether the equipment had been ordered in advance or whether it was appropriate to leave that decision until the morning itself. There are clearly expressions of annoyance and irritation on the part of Mrs Kinsey but addressed, without exception on the recorded documentation, to the entire team and on occasions including Mr Kinsey as well. As we say it blew up in the middle of December, at a time when the business was under specific financial pressure and where identified difficulties in the operations team had been identified at the earlier meeting on the 9<sup>th</sup> and were still waiting to be addressed.
27. The third key element within the relevant narrative where we find Mrs Kinsey to be entirely credible is in relation to the circumstances at the end of the claimant’s employment.
28. No doubt the claimant was upset at being challenged as he had been on 18 December and indeed on other occasions. But there is no indication on the part of Mrs Kinsey that she did not wish these matters to be resolved and to sort out the difficulties within her operations team, and indeed to confirm the position of the claimant as her operations director within that structure. But clearly she was aware that there appeared to be a deterioration in the relationship between the two of them, and she recalls that specifically in a communication to Mrs Lopez-Moreno on 9 January 2020. That is three days after the business had returned following the Christmas break on 6 January. She records then that the claimant was not talking to her. She therefore did not perceive that he was still as committed to going forward with the business as he had been. And she it was who therefore sought to set up a personal meeting between Mr and Mrs Lopez-Moreno and herself and her husband to try and



resolve the difficulties, they of course being a friendship group as well as involved in business.

29. There is one particular event that can be identified around this period that may indicate why Mrs Kinsey perceived this change of attitude on the part of the claimant. Following the return on 6 January Mr Kinsey, again clearly in our view as a continuation of the ongoing discussions about sorting out difficulties within the team and making it more efficient, has sought to have a meeting with everybody and invite their views as to the way forward. He had also expressed in a follow up email his view that if anybody was not any longer committed to the business they could leave with no hard feelings.
30. That informal meeting on the 6<sup>th</sup> was, however, not particularly productive and so Mr Kinsey then sought to arrange one to one meetings with the various members of the team, a form of appraisal to follow. Quite clearly the claimant took exception to the fact that he was being treated alongside the other employees. He thought that as a nominal director he should have been afforded special treatment. He believed that he should not simply have been involved in that discussion and invited to express his view within an open office meeting, but that he should have been afforded special treatment. He was clearly upset by what he saw as a derogation of his perceived status within the business, and as we have opined that may therefore explain why it was observable on the part of Mrs Kinsey that he did not seem to be communicating with her.
31. The informal meeting between the four in fact took place on 16 January. It is repeatedly referred to as being on the 13<sup>th</sup>. That is clearly incorrect. We can date it from the exchange of WhatsApp messages. This was not however, as the claimant now alleges in the amended particulars, a failure to investigate his complaints of harassment and victimisation when he attempted to raise his concerns about being pushed out because of the limitations imposed upon him by his disabilities. The issues regarding perceived difficulties with Mr Humphries were raised again. We accept Mrs Kinsey's account as being credible that when that was raised, and after Mr and Mrs Lopez-Moreno had left, that therefore led to an argument between her and her husband because of course Mr Humphries had been brought into the business as Mr Anthony Kinsey's friend. That sounds entirely plausible.
32. We also accept Mrs Kinsey's account that there were some concerns raised by the claimant as to why she was interfering, as he saw it, in the operation side. That is consistent with her acknowledged increased intervention as recorded from the 9<sup>th</sup> December onwards. That would explain the background to her explaining her greater involvement by reference to the claimant's particular concern that operatives would contact her in the first instance rather than him. At that point we accept Mrs Kinsey's evidence that she raised the issue of the claimant's communications skills, in that he may be perceived as speaking down to those members of staff so that they felt more comfortable in approaching her. That is not, as the claimant now seeks to characterise it, a criticism of his communication skills generally and certainly not a criticism arising from any aspect of his dyslexia. It is in a specific context.
33. Again we accept as entirely plausible Mrs Kinsey's account that that meeting appeared for the most part to have resolved the issues, that she received a hug from the claimant and that he said he did not wish to upset her and he would

hope the matter could then progress. That it did not we accept is partly as a result on the following day, 17 January, of Mrs Kinsey sending a text message. Although we do not now have it is clear that she resorted to bad language in relation to one particular invoice where there appears to have been a mistake made by the claimant, inviting him to “read the Fucking invoice”. But the context of that, again we accept, has nothing to do specifically with the claimant’s disability. We also note from the WhatsApp exchange messages between the claimant’s wife and Mrs Kinsey that that same day the 17<sup>th</sup> she records that she had been up all night dealing with difficult invoices, not only the one where she had identified a mistake made by the claimant. There were still clearly significant financial issues within the company and the text to the claimant, e sent at that time of pressure on the business, was part of that context that she was trying to sort out those difficulties.

34. That was on the 17<sup>th</sup>. On the 18<sup>th</sup> it appears that Mrs Kinsey had a hospital appointment. That was a Saturday. The 19<sup>th</sup> was a Sunday and it then became apparent that there were further particular logistical difficulties for the following Monday. Therefore Mrs Kinsey set up a specific WhatsApp group amongst the operations team, and including also Mr Kinsey, to deal with what she described as “the vans issue”. This in particular was because a number of the operatives were not currently permitted to drive the vans at that point because of failed drugs tests and therefore there was an urgent need to ensure that the teams and equipment were transported to where they needed to be the following week. That is the context in which the claimant was rostered to drive, not that he was demoted to be a “cleaner” as he now purports, but that it was necessary to identify that he and James Humphries were still in a position to drive the vans. This evidently placed huge difficulties upon them and Mrs Kinsey at that point was, apart from being upset, also indicating that she was having to take the lead in organising these matters because they have not been satisfactorily addressed in advance.
35. There had been due to be an operations team meeting that Monday the 20<sup>th</sup> but it was postponed to the following day the 21<sup>st</sup>. In the course of the 20<sup>th</sup> it is right that the claimant sought to contact Mrs Kinsey by text and asked her to speak to him on the phone and she declined to do so. But in saying that she did not wish to speak to the claimant at that juncture, and certainly that she did not want to have a phone conversation, is not to say that she was bullying or belittling him because of his disability. It is simply at that stage and in those circumstances she did not wish to have that telephone conversation. She was certainly prepared to meet with him and discuss issues in person, and indeed did so the following day on the 21<sup>st</sup>. And indeed it is accepted by the claimant that although she did not immediately get back to him on the 20<sup>th</sup> she did eventually contact him and indicated she accepted they did need to speak but the only issue she particularly wished to address at that point on the 20<sup>th</sup> was the ongoing issue about the invoice that she had raised in intemperate terms on the 17<sup>th</sup>.
36. Again not mincing her words throughout the exchanges on the vans WhatsApp group and at the meeting then convened on the Tuesday Mrs Kinsey did describe the problem that had arisen through what she saw as lack of foresight and planning as a “shitstorm”. But again that is not directed at the claimant. It is a comment on operational difficulties and we repeat in the context where Mrs

Kinsey was constantly throughout her communications accepting that she may not, in taking on this responsibility, be managing the situation properly but felt under an obligation to seek to resolve the issues because ultimately, as we say, it was her business and she was responsible for dealing with the strategic and financial constraints that resulted from operational difficulties.

37. We then come to the later events on the 21<sup>st</sup>. Mrs Kinsey and the claimant were prepared to meet, not on the business premises but in an adjacent public house. He asked to speak to her in private. Mr Kinsey therefore left the meeting at that stage. Again we accept as credible the account given by Mrs Kinsey as to how that meeting progressed. That is that the claimant said that he had issues with her personally and that he did, as he has admitted in evidence, accuse her of lying to him on a number of issues. One was an apparently insignificant issue about the timings of Mr Kinsey leaving home on a particular day, another an ongoing issue about whether or not the claimant had at some stage been copied in to chains of emails recording customer concerns which he and Mr Thompson alleged had never in fact been copied to them. Again we accept as plausible Mrs Kinsey's account that she sought to turn her laptop round to show him that indeed he had at some point been copied into those exchanges, they did exist and they were real and genuine customer concerns. But the claimant persisted in accusing her of having lied to him and therefore when asked what that meant for their ongoing relationship he said that that it meant they could not work together.
38. At the conclusion of that initial meeting in the pub we are satisfied therefore that both parties understood that that effectively meant that the working relationship was at an end. The claimant had accused Mrs Kinsey of lying to him, he had accepted that their relationship had effectively broken down and that meant that he could no longer continue as an employee of the company which she owned.
39. There are two further pieces of evidence that in our view corroborate Mrs Kinsey's account, one is her description of her being visibly upset at that point so that the landlady came and asked if she was alright, which has the ring of truth about it. The other is recorded in her subsequent written communications with Mrs Lopez-Moreno where she is clearly extremely upset at the accusations that she had been lying.
40. Immediately after that first meeting Mrs Kinsey sent an email. She therefore sets out her reiteration of the fact that there had been issues the claimant needed to address and that it was not right to accuse her of not having showed him that information. So that corroborates the account that she had already tried to show him this information on screen and he had not accepted it then, so she had put it in a communication immediately afterwards. She also records the confirmation that the relationship had broken down and therefore that he would be exiting the business. We add at this point that again we accept Mrs Kinsey's evidence that on that realisation that they could no longer continue to work together the claimant suggested that his exit from the business should also involve a pay out similar to that that Mr Stanley had received in October when he resigned as a director and received compensation for his 30% shareholding. But of course the claimant was in a different position in that he had never actually received shares, never been a board member. He still apparently thought that it would entitle him to a financial settlement at the end

of employment, and that expression of his belief at that time is consistent with the claim subsequently presented to this tribunal.

41. Within the email when Mrs Kinsey referred to the exit from the business, she indicated therefore that it would of course involve the working of two weeks' notice in accordance with the written terms and conditions, but that she would be prepared to allow the claimant to leave immediately if that were more convenient to enable him to secure alternative work. She does not use the phrase "resignation" within that first email. The claimant then spoke to his wife about it, he then went back to speak to Mrs Kinsey. Clearly we accept that he had not intended in terms to say "I am resigning" but when he went back it was not in any conciliatory frame of mind, but again to confront Mrs Kinsey. He said, was she therefore dismissing him? That resulted in a further altercation where again Mrs Kinsey used bad language indicating that he must think she was "fucking mental" if he was trying to suggest that, when it was he who had initiated the conversation about her lying and the acceptance that the relationship was at an end. At that point the claimant, again we accept Mrs Kinsey's account, sought inaccurately to interpret that as her accusing him of being mental or stupid.
42. So again with regard to what happened at the end of the relationship we find Mrs Kinsey's account to be credible. That is that she did not in any way initiate this departure from the business, she was seeking to avoid a breakdown in relationship, as evidenced by her email of 9 January, she had sought and initiated a meeting to try and deal with that issue but it was the claimant who antagonised her by accusing her of lying in circumstances where necessary the relationship could not continue.
43. It is not necessarily helpful to try and analyse this in terms of a resignation or dismissal, nor indeed a mutual termination. There was a common acceptance that having expressed those views the only outcome was the end of the employment relationship. That was confirmed by Mrs Kinsey's email sent in the time between the two meetings in the pub and then also in subsequent emails, between n the claimant and Mr Kinsey.
44. Looking at that pattern of factual events, where we accept Mrs Kinsey's evidence over the key period, it enables us to answer the crucial question which is why did anything happen in this case? That is not because the claimant was disabled, it is not because of something arising in consequence of his disability and it is not the alleged campaign of derogatory and belittling treatment excluding him from the opportunity to advance in the company nor a general campaign of bullying related to his disability. The claimant has not established that Mrs Kinsey is lying about knowledge of his dyslexia, and nor has he proved any other facts from which we could conclude that there has been a contravention of the Equality Act.

### **Reasonable adjustments**

45. Whether or not anything had ever been said specifically to indicate that the claimant was dyslexic, others in the company clearly knew of that, not least of course the claimant's wife. In those circumstances it will be sufficient that the respondent company could be said that they should ought to have known the claimant did suffer from dyslexia. The more important question in the context

of the reasonable adjustments claim is what actual effect that had on the day to day working. The claimant says he has some difficulties in composing emails. We can well understand that, some difficulties obviously in assimilating information that is in a written form, but he had administrative assistance, particularly in the person of Mr Thompson who took over from the previous assistant Miss Crowther who went on maternity leave, Mr Thompson had access to the claimant's emails and was therefore able to monitor the position. There is no suggestion that any point where the claimant asks for assistance from anybody in the office for any reason that that was ever denied or refused him. And there is no indication that any further alleged difficulties resulting from his dyslexia and the inability to process information were ever identified or brought to the attention of the respondents.

46. As we have said we are quite satisfied looking at the totality of the evidence that the reason why the claimant was challenged about his performance was not because of particular issues relating to his dyslexia but because of perceived errors of judgment or lack of common sense in making decisions which he had taken, in the common expectation that he had assimilated and was in fact acting on all information that was relevant. The claimant has been unable, and nor have any of his witnesses, specifically to identify any instance where he says he was communicated to by email that caused a particular problem and he needed therefore the information to be expressed in an alternative form.
47. This necessarily is an email based business. Customers and clients will communicate by email. Those were often as we can see looking at the disclosed papers be as a follow up to telephone conversations or as an alternative where it is proved impossible to actually speak to somebody by phone. In order to keep a proper record those emails will necessarily be copied to a large number of people. But nowhere is it identified that there was a specific issue in the claimant receiving information in this form that led to a particular error, let alone that he was criticised for that. We have referred to the issue about the comments about his communication skills being in a specific context. It also appears to be an incident of his condition that at times he is forgetful, but equally in an increasing busy working environment where everybody was inundated with work and emails, again we prefer the evidence of the respondent that such comments about forgetfulness were in the context that matters were being missed across the whole of the term and were not ever intended to, and could not reasonably be construed only as a criticism or harassment of the claimant.
48. The indirect discrimination claim adds nothing to a failure to make reasonable adjustments claim. The reasonable adjustments claim is specified to be the application of a provision criterion or practice of the efficient running of the business including proper documentation of data. But it is hard to see how that is a provision criterion or practice that can be adjusted. There was also, we are satisfied, no actual requirement that communication be in writing. It was a mixture of communications. As we say that was necessarily by email, it was also by WhatsApp messages or by text messages or by oral discussions and team meetings. The claimant did engage with all of these methods, and in particular the text and WhatsApp exchanges are in "real time". On one occasion Mrs Kinsey did express, in perfectly measured terms, a wish that members of

the team should not engage in overlong conversations as this was decreasingly efficiency of the business, but that is not in any way suggesting that they should not ever communicate orally nor is it any indication that the claimant was prevented from doing so. Nor did he ever indicate that that would place him at a disadvantage. He was still able to engage in the variety of forms of communication within the business. It is acknowledged there was some difficulties in breakdowns of communication but efforts were made to sort those out and ensure that information was passed to the relevant member of the operations team as soon as possible including the claimant. At no stage, we repeat, has it ever been identified that the respondent could have known that he was said to be particularly disadvantaged. It was sought to be raised only after the events of the 21<sup>st</sup> January, which were not the engineering of the situation where the claimant could be manipulated into a position where he accused Mrs Kinsey of lying such she could then use that as a claim that he had resigned, but rather an unfortunate breakdown in relationships instigated by his insistence that she was telling lies.

### **Monetary claims**

49. As we indicated there are however some matters where the claimant will succeed financially. The contract provided for two weeks' notice, it also had a specific PILON clause. In her email on 21<sup>st</sup> Mrs Kinsey had indicated that the claimant should work his two weeks' notice but she would allow an alternative. The following day he received confirmation that his alleged resignation was accepted. He replied to that agreeing to the effective termination being effected by way of a handover meeting, which took place on the 24<sup>th</sup>. There was at that stage an indication that as he was saying he wished to take up the offer of leaving immediately he would be paid four weeks. But that was not what the contract allowed. Subsequent communication almost immediately afterwards on 4 February from Mr Kinsey indicated that that was a goodwill gesture only. But having decided to bring into effect the PILON clause the respondent cannot justify not paying the two weeks' contractual notice, so the claimant is entitled to two weeks' gross pay because it is of course taxable.
50. He is not entitled to the further gratuitous two weeks' notice. The respondent purported not to pay that additional sum because of an alleged breach of a non-competition clause in the signed agreement. It is debatable whether that in fact is applicable or enforceable, but as that additional payment is entirely discretionary the respondent is not obliged to make it. And there was no consideration for payment for that further two weeks.
51. The claimant has not received any payment for the alleged further bonus due. His claim has been unspecific as to whether that was due in November or October of 2019. In neither of those months did he receive a bonus, but equally the claimant has not established any facts or basis on which he was entitled to a bonus. As we have said at the start of this Judgment the indications are that this was a discretionary payment dependent upon general performance of the company, and if it was discretionary there was no obligation to pay it even though the issue has been clouded by what was a subsequent unhelpful exchange about whether or not "targets" as yet unspecified had been met.

52. in terms of the expenses claim we have heard no evidence at all about on what basis the claimant could recover for the Christmas meal of fish and chips. We have had no evidence at all about whether he had paid a sum to a contractor which due to be reimbursed, so we cannot find for him on those matters. But he has alleged that he was due expenses unpaid and submitted in the ordinary course of the employment's business, that is the sum of £72.05 and that is recorded as three expenses claims submitted in January 2020 shortly before or at the time of the termination and which are simply shown as unpaid without reason. As there is not any explanation as to why should not recover expenses submitted in the proper course we award in the sum of £72.05. There is no breach of contract in relation to shares, as we have said there was no contractual intent and that would have bene a private arrangement between him and Mrs Kinsey in any event.

### Summary conclusion

53. For those reasons analysing on the basis as best we can of the evidence we have heard and accepted corroborated by contemporaneous documents we find the claimant has not established any facts from which we could conclude that he has in fact been discriminated against in any of the forms alleged, but rather the reason why matters took place is in accordance with the evidence given by Mrs Kinsey and it is fully explained by her concerns generally about the operational matters, the financial constraints upon the business, and in terms of the termination ultimately by her clear upset at the accusations made against her notwithstanding her previous indication that she would wish to restore that relationship to its previous state. Nor has the claimant shown either that there in fact was, nor that the respondent had or ought to have had any knowledge of a particular disadvantage to him arising out of its customary working practices and which could therefore have been ameliorated by any reasonable adjustment. There are, of course therefore no proven acts of discrimination that would be within time. So for those reasons as we say we conclude that only the two monetary claims for two weeks pay in lieu of notice in accordance with the pylon clause and limited amount of quantifiable expenses of £72.05 succeed, all other claims are now dismissed.

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Employment Judge Lancaster

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Date 20<sup>th</sup> October 2021

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**<sup>i</sup> The Complaints**

1. The claimant is making the following complaints:
  - 1.1 Direct discrimination - disability;
  - 1.2 Discrimination arising from disability;
  - 1.3 Indirect discrimination - disability;
  - 1.4 Harassment - disability;
  - 1.5 Failure to make reasonable adjustments;
  - 1.6 No notice pay;
  - 1.7 Unauthorised payment of wages (salary, bonus and expenses).

**The Issues**

2. The issues the Tribunal will decide are set out below:

1. **Wrongful dismissal / Notice pay**

- 1.1 What was the claimant's notice period?
- 1.2 Was the claimant paid for that notice period?
- 1.3 The respondent maintains that the claimant resigned.

2. **Direct disability discrimination (EA section 13)**

- 2.1 Did the respondent do the following things:
  - 2.1.1 Engage in a campaign of derogatory and belittling treatment, excluding the claimant the opportunity and dismissing him.
- 2.2 Was that less favourable treatment?



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The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who he says was treated better than he was. Comparison will be by way of hypothetical comparator.

2.3 If so, was it because of disability?

2.4 Did the respondent's treatment amount to a detriment?

### 3. **Discrimination arising from disability (EA section 15)**

3.1 Did the respondent treat the claimant unfavourably by:

3.1.1 Engage in a campaign of derogatory and belittling treatment, excluding the claimant the opportunity (sc to progress) and dismissing him.

3.2 Did the following things arise in consequence of the claimant's disabilities:

3.2.1 The claimant suffered anxiety and stress because of his disabilities.

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.4.1 The efficient running of the business including proper documentation of data.

3.5 The Tribunal will decide in particular:

3.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 could something less discriminatory have been done instead;

3.5.3 how should the needs of the claimant and the respondent be balanced?

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- 3.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disabilities or either of them? From what date or dates?

4. **Indirect discrimination (EA section 19)**

- 4.1 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP:
- 4.1.1 The respondent required communications in writing.
- 4.2 Did the respondent apply the PCP to the claimant?
- 4.3 Did the respondent apply the PCP?
- 4.4 Did the PCP put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic?
- 4.5 Did the PCP put the claimant at that disadvantage?
- 4.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
- 4.6.1 The efficient running of the business including proper documentation of data.
- 4.7 The Tribunal will decide in particular:
- 4.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;
- 4.7.2 could something less discriminatory have been done instead;
- 4.7.3 how should the needs of the claimant and the respondent be balanced?

5. **Reasonable Adjustments (EA sections 20 & 21)**

- 5.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disabilities or either of them? From what date?
- 5.2 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:
- 5.2.1 The efficient running of the business including proper documentation of data.
- 5.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disabilities?

5.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

5.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

5.5.1 More oral discussions.

5.6 Was it reasonable for the respondent to have to take those steps and when?

5.7 Did the respondent fail to take those steps?

## 6. **Harassment related to disability (EA section 26)**

6.1 Did the respondent do the following things:

6.1.1 Bullying.

6.2 If so, was that unwanted conduct?

6.3 Did it relate disability?

6.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

## 7. **Unauthorised deductions**

7.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?