EMPLOYMENT TRIBUNALS

Claimant : MISS G LAWRENCE

Respondent : GUY'S AND ST THOMAS' NHS FOUNDATION TRUST

Heard at: Croydon by cloud video platform On: 16 to 20 August 2021

Before: Employment Judge Nash
Ms Y Batchelor
Mr C Wilby

Representation
Claimant: Mr A Carter of counsel
Respondent: Mr A Ohringer of counsel

JUDGMENT

1. The respondent did not fail to comply with a duty to make reasonable adjustments under sections 20 and 21 Equality Act 2010. The reasonable adjustments claim is dismissed.

2. The respondent did not victimise the claimant under section 27 Equality Act 2010 in respect of provision of a reference.

3. The respondent victimised the claimant under section 27 Equality Act 2010 in respect of a referral to its fraud department.

4. The clam for sex discrimination is dismissed upon withdrawal.

5. The claim for disability harassment is dismissed upon withdrawal.

6. The respondent shall pay the claimant the sum of £4,000 as compensation for injury to her feelings.

7. The respondent shall pay the claimant the sum of £1,068,71 as interest on her award for injury to feelings.

8. Accordingly, the total payable by the respondent to the claimant under this judgment is £5,068.71.

9. The respondent's application for a costs award under Rule 76 of the Employment Tribunal Rules of Procedure is refused.

10. The claimant's application for a costs award under Rule 76 of the Employment Tribunal Rules of Procedure is refused.

REASONS - LIABILITY

Procedural history

1. Following a one-day early conciliation period on 17 November 2017, the claimant presented her claim under 2300185/2018 to the Tribunal on 13 January 2018.

2. The issues were identified at the first preliminary hearing on 19 June 2018. There was a second preliminary hearing on 25 March 2019. A third preliminary hearing in front of Employment Judge Hyde on 23 July and 11 September 2019 considered a deposit and a strike-out application by the respondent. There was a final and fourth preliminary hearing on 13 July 2020 which confirmed that the issues were agreed.

This hearing

3. In respect of witnesses, the Tribunal heard from the claimant herself. For the respondent, it heard from:-

   Mr Adam Fitzgerald, at the time a Practice Development Nurse;
   Mr Richard Jones, at the time, a Matron; and
   Ms Lyn Williams of the respondent's Human Resources department.

4. The Tribunal had sight of witness statements for all witnesses and an agreed bundle. There was some delay as the documents had not been effectively provided to the Tribunal in advance, but this did not disrupt the hearing in practice.

5. At the beginning of the hearing the Tribunal advised that, unfortunately, although the matter had been listed for eight days, the Tribunal itself was only available for five days.

6. Fortunately, the parties had agreed between themselves a timetable which envisaged evidence closing on the fourth day. In the event, a number of complaints and some witnesses were significantly reduced on the first day. It therefore proved possible for the Tribunal to deliver a liability Judgment on the fourth day and a remedy judgment and costs decision on the fifth day.

7. The parties had agreed adjustments for the claimant to give evidence, she would give evidence for about forty-five minutes at a time followed by about a five-minute break. This the Tribunal did throughout the hearing and the parties confirmed that worked satisfactorily.

8. One further matter arose during evidence. During Ms Williams's evidence, whilst she was on oath, she was mistakenly sent an email from one of the respondent's staff. It was unclear at first whether this email had been received by Ms Williams, because the sender had recalled after two minutes. Ms Williams told the Tribunal that she had not looked at her email. With the consent of the claimant, a Ms Firth of the respondent entered Ms Williams's room to check Ms Williams's email; Ms Firth confirmed that this email had never been received. Ms Williams further confirmed that she had not looked at her emails overnight. The claimant was content to proceed on this basis.

<u>The Claims</u>

9. The complaints before the Tribunal were for

   a. disability discrimination in respect of reasonable adjustments under Sections 20 and 21 of the Equality Act 2010; and
   b. unlawful victimization under Section 27 of the Equality Act 2010.

10. The first preliminary hearing on 19 June 2018 settled the issues in the claim form submitted on 13.1.18. On 26 June the claimant sought to amend her claim to add complaints of reasonable adjustments, and victimisation. The respondents objected to the claimant's application to amend on 27 July 2018 saying that there had been no reference to such complaints in the lengthy preliminary hearing. The claimant did not dispute this. The Tribunal, on 14 January 2019, rejected the claimant's amendment application.

11. The claimant then brought those complaints - including the victimisation and reasonable adjustments claims - to the Tribunal by way of a second ET1, under case number 2300737/2019 submitted on 27 February 2019. The two claims were listed together.

12. The complaints of harassment on the grounds of disability and sex discrimination were dismissed upon withdrawal at the start of the hearing.

<u>The Issues</u>

13. The Tribunal had sight of an agreed list of issues dated 6 January 2020 at page 165 of the bundle as follows:-

    <u>Background</u>
    1. This list of issues has been prepared pursuant to the directions of E] Hyde at preliminary hearings on 23 July 2019 and 11 September 2019.

    2. All claims of discrimination, harassment, victimisation and unfair dismissal brought in the claimant's two Claims and which are not referred to below are withdrawn and have been or are to be dismissed by the Tribunal.

    <u>Disability</u>
    3. Was the Claimant a disabled person by reason of dyslexia?

    4. It is accepted by the Respondent that the Claimant was disabled by reason of back pain until February 2018.

Reasonable adjustments (1)

5. It is accepted that the Claimant was required to undertake an assessment in November 2017 as part of the process for considering candidates for a band 6 position and was given 15 minutes to read the scenario on which she was assessed. It is also accepted this was a PCP.

6. Did this PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled (due to her dyslexia)?

7. Did the Respondent know or ought it reasonably to have known that the Claimant was:
a. Disabled due to her dyslexia; and;
b. Placed at the substantial disadvantage by the PCP

8. Would extending the reading time by 25% have been a reasonable adjustment?

Reasonable adjustments (2)

9. It is accepted that the Claimant was required to undertake administrative duties recording patient information and details of treatment and medication as part of her role. It is accepted this was a PCP.

10. Did this PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled (due to her dyslexia)?

11. Did the Respondent know or ought it reasonably to have known that the Claimant was:
a. Disabled (due to her dyslexia); and;
b. Placed at the substantial disadvantage by the PCP

12. Did the Respondent fail to make reasonable adjustments? The adjustments the Claimant refers to are the provision and maintenance of an operational laptop and ancillary aids including the provision of suitable software and necessary training, and undertaking a work station assessment.

13. The alleged failure occurred for the purposes of s.123 EqA in October 2017.

14. This complaint was made in the Claimant's amendment application presented on 27th June 2018 and in the Claimant's Second Claim presented on 27 February 2019. Is the claim out of time?

15. Was the Claimant subject to the following treatment in relation to the provision and fixing of a laptop:
a. In October 2017 — as set in paragraph 4 (page 3) of the First Claim.

16. Did that treatment constitute harassment?

17. If so, was it related to disability (dyslexia in respect paragraph 4)?

18. These complaints were made in the Claimant's First Claim presented on 13 January 2018. Are the claims out of time?

Harassment — sex

19. Was the Claimant subject to the treatment in August 2017 as set out in paragraph 12 of her First Claim?

20. Did that constitute harassment?

21. If so, was it related to sex?

22. This complaint was made in the Claimant's First Claim presented on 13 January 2018. Is the claim out of time?

Victimisation

23. It is accepted that the Claimant's grievance dated 23 November 2017 was a protected act.

24. Was the Claimant subjected to the treatment set out in paragraphs 4 and 5 of the Amended Second Claim relating to the refusal by the Respondent to provide a reference to her new employer and subsequently providing a
negative and/or bad reference relating to her character because of that protected act?

25. These complaints were made in the Claimant's Second Claim presented on 27 February 2019.

14. There was a dispute about issue 5 of the list. The claimant contended that issue 5 amounted to an admission by the respondent that it had given the claimant only fifteen minutes to prepare for interview. The respondent denied that this was an admission and that its case was that the claimant was given more than fifteen minutes.

15. The Tribunal heard contentions from the claimant and the respondent. Whilst the drafting was not perhaps as clear as it might be, in the view of the Tribunal, issue 5 referred to the respondent's original arrangements for the interview – that all candidates were given 15 minutes time - before the claimant sought an extension. This was evident from the discussions at the earlier preliminary hearing. Both parties agreed that the claimant had been given more than fifteen minutes. What was in dispute was how much extra time she had been given and whether this was enough. Accordingly, the Tribunal did not find that the respondent had made the admission.

The Facts

Background

16. The respondent is a South London NHS Trust and the claimant is a state registered nurse. The claimant had previously been employed by the respondent but left to do a degree.

The claimant's dyslexia

17. At university the claimant was given a dyslexia assessment (page 185). The assessment was carried out under DFES Guidelines for the Assessment of SPL in Higher Education.

18. The assessment stated that the claimant had mild dyslexia and that adjustments would be provided. The claimant was found to be, for most things, such as verbal and reading comprehension, spelling, speed of writing and copying, in at least the average range. It was stated that "in spite of adequate literacy attainment levels… her rate of reading is slow and this hampers her attempts at study, research and note taking. When dealing with reading and writing tasks, particularly when working under timed conditions she may still be at a relative disadvantage."

19. According to the assessment, she would suffer some level of inefficiency in deciphering written text, and she had issues with spelling and proof-reading. She would be at a slight disadvantage in written exams because of errors with writing and forgetting. There would be slowness in continuous reading. Her presentation deteriorated under pressure. There was a disparity between her ability and performance which could place her at a disadvantage studying from textbooks, taking notes and written work.

20. The assessment recommended the use of Dictaphones and additional time in her exams so that she could check her written work. She was given 25% extra time in written exams - because of the stress of writing under pressure.

21. In summary, the claimant was found to have a learning difficulty and the reasonable adjustments were additional time for written exams, flexibility with deadlines and allowance in marking - it is assumed - for spelling and grammar.

22. The claimant agreed that this assessment reflected the difficulties caused by the dyslexia at that time. There was no suggestion that the dyslexia had changed since this period.

23. Following university, the claimant applied for a job with the Trust. She was sent for a pre-recruitment occupational health assessment on 22 April 2014. This reported that the claimant said that she had no problems with dyslexia in her current role but that might change in the new role with the Trust. Occupational Health (OH) suggested that if the claimant came across difficulties, it might be advisable to refer her for a work-based dyslexia assessment and that she be reviewed. OH said that she was likely to be protected by the Equality Act.

24. In addition to the disadvantages caused by dyslexia identified above, the claimant said that her dyslexia caused her difficulties in concentrating in noisy environments. This was not mentioned in the university assessment or by occupational health.

<u>The claimant's role with the respondent</u>

25. The claimant started work for the respondent on 12 May 2014 on the wards. She suffered from very significant back problems, which the respondent agreed amounted to a disability at least until February 2018. She also suffered from stress and anxiety which the respondent also agreed amounted to a disability.

26. The claimant took sick leave in October to November 2014. She received a first written warning for high sickness absence levels on 7.7.15. As a result of health difficulties in her role, she moved to work for the Home Team in September 2015.

27. The Home Team works with patients in the community rather than in hospital. Essentially the change took the claimant away from the wards and gave her a more autonomous role.

28. The claimant was absent sick from the Home Team role from 25 March 2016 to 30 July 2016. On 8 July 2016 the claimant had a discussion with her then manager (at page 444) about her return to work. The discussion focused on the claimant's back problem but there was a reference to dyslexia and a suggestion of a referral to Access to Work in this regard.

29. The claimant was signed off sick again from 25 July to 15 August. The claimant attended OH on 19 July 2016 (page 450). This led to an agreed phased return to work and there was a reference that Access to Work were arranging an assessment in respect of her dyslexia

30. The Tribunal had sight of the Access to Work grant letter of 7 September 2016 which said that the claimant reported the following issues: reduced reading at speed which meant she needed additional time to absorb and assimilate, difficulties with writing and articulating written communication, difficulty with listening and writing simultaneously, short-term memory problems and difficulties with concentration with background noise. Access to Work recommended a technological solution - Dragon Voice Recognition software plus training, noise cancelling headphones, a laptop, a Dictaphone and training, and a text help reading package plus training.

31. The Access to Work agreement was due to be signed and returned by 6 October 2016 but was delayed by about a month due to an oversight on the Claimant's part.

32. Because of her high sickness levels, the claimant attended a step 2 sickness advisory meeting on 2 November 2016, recorded by a three page letter on 11 November. The letter concentrated on the claimant's back problem but there was one paragraph referring to implementing Access to Work recommendations for dyslexia.

33. At about this time, Mr Jones took over as the claimant's manager.

34. The claimant was absent sick from 21 December 2016 until 27 March 2017 because of her back problem and associated surgery.

35. There was, on 9 February, a further sickness advisory meeting. The claimant said that in this meeting she was told that all the equipment arranged via Access to Work was ready for her return. There was a very brief reference in a lengthy letter to dyslexia, but most of the letter was concerned with the claimant's back condition and its effects.

36. The claimant duly returned to work on 27 March 2017 on a phased return. The Access to Work laptop had arrived. Because the claimant was hot-desking, the laptop needed specific software installed. However, it turned out that the software had not arrived and had not been installed. Mr Jones said that he had not realised this and had not expected the Access to Work equipment to need any installation or set up.

37. Mr Fitzgerald, although he had no direct responsibility for this, tried to get the equipment working by involving the IT department. However, it proved difficult to get the laptop working and the software installed. It was not clear to the tribunal – or to any witness – what the problem was. There was a suggestion that it was an IT systems issue. The evidence pointed to Mr Fitzgerald's spending some time and effort to get the equipment working. We saw a large number of emails between service delivery and IT, and to a lesser extent, the home department, about the problem.

38. On 27 June 2017 (page 480) the claimant sent an email via her phone to Mr Jones about a number of concerns that she had at work. This was mainly about the way her colleagues were speaking to her and what she thought colleagues were saying about her. There was no reference to dyslexia, any issues with her carrying out the daily admin parts of the job, or the lack of adjustments to help her to carry out these functions.

39. The same day the respondent's Mr Agegunna again chased the IT service desk about the outstanding software. He told IT that this was needed to enable a member of staff to carry out her job effectively. He said that it was a dyslexia matter and had been delayed too long. Mr Jones, in cross-examination, accepted that this matter probably was delayed too long but he did not think anything more could have been done. There were further log-ins on the matter from the IT service desk on 18 July and there were Datix incident reporting - which means the matter was escalated.

40. At a later grievance investigation, it was said that the team had made all efforts to put the reasonable adjustments in place but were slowed by IT issues. The grievance found that the IT matter should have been escalated but there was no malicious intent. Mr Fitzgerald's told the grievance investigator that the problem was that different IT departments did not work together. For instance, an engineer had attended, but could not install the software. He mentioned a licence problem.

41. Finally, on 14 August 2017 the respondent said that the laptop was set up with the software installed. Although an amount had been set aside for training in the Access to Work budget. there was no allowance made in the claimant's rota for four half-days training and any further training. Mr Fitzgerald, however, told the Tribunal that it was in fact not possible to use the original software (Dragon dictation) with the respondent's systems so the

claimant would have to use an in-house version, for which there were no trainers. It was suggested to the claimant that she try and set up training with others using the software.

42. The claimant signed out the Access to Work equipment on 5 October 2017. She was provided with a Dictaphone, headphones, a chair and a wheeled bag.

<u>The Claimant's application for a Band 6 post</u>

43. The claimant applied for a Band 6 post, in effect a promotion, in October 2017.

44. Mr Jones made a referral to Occupational Health in respect of the claimant on 15.10.18. This stated that the claimant had triggered stage 3 sickness management on 4.1.17 (due to high sickness levels). There was a reference to Access to Work recommendations for dyslexia, but this was unclear what it meant.

45. The claimant was shortlisted for interview for the Band 6 post. The interviewers were Mr Jones and Mr Fitzgerald. Due to circumstances, the claimant was the only candidate on the day of the interview on 3 November 2017.

46. The interview process was as follows.

47. Candidates were provided with three short written scenarios and were given fifteen minutes to prepare an oral answer. They were permitted to make notes. Candidates then had an interview which included oral presentations on the scenarios, and various standard questions. Candidates were marked only on what they said at interview, not on their notes.

48. When this was explained to the claimant, she asked for more time on the day to prepare her oral presentation because of her dyslexia. The respondent's case was that the claimant was given five extra minutes. Mr Jones' evidence was that he said something to the effect of, 'we need to give her extra time' and Mr Fitzgerald said, 'this has already been done'. Mr Fitzgerald's evidence was that he had monitored this on his phone.

49. The claimant's case was that she was only given two minutes extra time, which was not enough to avoid the disadvantage caused by her dyslexia.

50. Before the Tribunal, she said that she had no way of measuring the time. There was no clock in the room, and she did not bring a watch. The claimant's account in her grievance (written shortly after the interview), said that she was timed from 9.45 to 10.02. That was not consistent with what the claimant said before the Tribunal, that she had no way of monitoring the time.

51. The Tribunal had sight of a handwritten note by Mr Fitzgerald on the claimant's notes, "given five minutes". Mr Fitzgerald said that he had recorded time on his phone.

52. The tribunal considered the conflict of evidence and on the balance or probabilities decided that the respondent gave the claimant five extra minutes, not two. This decision was for the following reasons.

53. The respondent had a contemporaneous note that the claimant was given five minutes. It was not suggested that, at the time this note was made, there was any dispute about the amount of time. The claimant had asked for more time and the respondent gave more time.

54. Further, the claimant's evidence about timing was not consistent. She said before the Tribunal that she had no way of measuring the time. In her grievance she gave very precise timings. In contrast, Mr Fitzgerald's account of the timing was consistent and Mr Jones' evidence was consistent with this. Mr Fitzgerald's account that he used his phone to keep time was plausible as this is a common way of time keeping.

55. After the interview Mr Jones and Mr Fitzgerald determined that the claimant was not appointable.

The claimant's complaints and grievance

56. The respondent's evidence was unclear about why it took two weeks to tell the claimant that she was not appointed. Mr Jones said that he found the claimant somewhat intimidating, and he feared her reaction. In the event, this turned out to be justified, as the claimant shouted when he phoned her, and on 14 November threatened him with legal action.

57. The Tribunal accepted Mr Jones's account because this was consistent with the claimant's behaviour, as illustrated by a WhatsApp message she sent on 18 November 2017. This was a highly personally abusive message addressed to Mr Fitzgerald personally but sent to the Home Team's group WhatsApp. In the message the claimant threatened to take him to court, said his nursing registration was in the balance and "shouted" (by using all caps) that he was racist. He received this message at home and stated that he was very upset.

58. The claimant said that at this time she was hearing voices, was erratic and suffering a mental breakdown.

59. The claimant went absent sick shortly after this. The respondent concluded, in light of her conduct, that she was unfit for clinical work until she was cleared by OH.

60. The claimant sent a number of further emails to different managers containing threats to have Mr Jones and Mr Fitzgerald struck off.

61. The claimant submitted a formal grievance to the respondent on 23 November 2017. Ms Williams of Human Resources (HR) managed the grievance. An external HR consultant, a Ms Wyse, was tasked with the investigation. She carried out a very thorough investigation including interviewing the claimant, Mr Fitzgerald and Mr Jones (who by this time had

left the respondent). The claimant continued to say that Mr Jones and Mr Fitzgerald should be investigated by their professional body.

62. The claimant sent a WhatsApp message to apologize, but only to one colleague.

63. On 13 January 2018 the claimant presented her first Employment Tribunal claim. She remained absent sick. It was not clear from either parties' evidence when the claimant's sick leave came to an end and what her status was after that. Nevertheless, it was agreed that she could not return to work until she was cleared by OH.

The Lloyds Pharmacy job

64. The claimant applied for a job with Lloyds Pharmacy in early 2018. There was no evidence that the Tribunal could find as to what stage had been reached in the respondent's redeployment or return process.

65. On 22 February the claimant received a job offer from Lloyds. On 26 February Lloyds made a request for a reference to the respondent, of which Ms Williams was aware.

66. The Tribunal sent the first ET1 to the respondent on 23 February 2018. On 1 March 2018 the claimant accepted the Lloyds job offer. The respondent instructed solicitors in the tribunal proceedings no later than 23 March 2018.

67. The reference request went to the respondent's dedicated reference HR team, who asked Lloyds to provide the claimant's written consent. The Tribunal saw an email from Lloyds to the respondent on 8 March 2018 stating that the consent was attached. However, the tribunal accepted the respondent's case that the consent was not attached, as the email did not have any attachments. The claimant's evidence was that she had told a manager to expect a reference request.

68. On 12 March 2018 Lloyds emailed the claimant's consent but according to the face of the email this was sent, presumably in error, to the claimant and not to the respondent. The tribunal, based on the email evidence, accepted that the respondent did not receive the consent. The respondent operated an automatic ten day cut off period, after which reference requests were closed. Ten days elapsed after the Lloyds request without the consent being received, so the respondent closed the reference request on its system.

69. On 19 March 2018 Ms Wyse rejected the claimant's grievance.

70. On 23 March 2018 Lloyds emailed the claimant to say that it was still waiting for a reference from the respondent. Ms Williams, when giving evidence to the appeal on the claimant's grievance, said that the consent form was received on 11 April.

71. Ms Williams then wrote to another department in HR, HRSS, asking what reference requests had been received for the claimant since January that year.

72. On 27 March 2018 the claimant appealed the rejection of her grievance.

73. The Tribunal saw a copy of an undated factual reference, but there was no evidence as to whether this was sent to Lloyds. The respondent's case appeared to be they did not know when and if they did this. From the claimant's email of 26 March, it appeared that the respondent had not provided any reference before that date. In the event, Lloyds asked the claimant for alternative evidence of employment with the respondent, such as pay slips, and the claimant started work with Lloyds on 9 April 2018, part-time.

74. The claimant's situation with the respondent at this point was unclear. She remained employed but could not return to work until cleared by OH. She was on a full-time contract and was receiving full pay. It was not clear that she was on sick pay. There was some discussion that she was on annual leave. Ms Williams said that the claimant was marked down as 'other absence' and the manager had agreed that - as they were waiting for redeployment - the claimant would receive full pay. The claimant said that she was not clear what her situation was.

75. The respondent referred the claimant to OH on 16 April 2018. There was no evidence about this from the respondent. In the view of the Tribunal there must have been some consideration about the claimant coming back to work on a redeployment. Mr Jones had referred to redeployment earlier because of the claimant's difficulties in performing her duties due to her back condition. The OH report (page 947) discussed reasonable adjustments but made no mention of dyslexia. OH stated that the claimant was fit to return but due to a breakdown of working relations with her colleagues needed redeployment. She should return at 25% at first and work her way up. However, it might take longer than planned to get back to full time and it might never prove possible.

76. Ms Williams referred the claimant's employment with Lloyds to the respondent's internal fraud team on 19 April 2018. There were no documents in the bundle concerning this referral, the actions of the department fraud or any interactions between HR and the fraud department.

77. Ms Williams was asked whether she had spoken to the claimant's managers before making the referral. She said that she would informally discuss matters with a manager before going to fraud but could not remember doing so on this occasion. In the view of the tribunal, her evidence was extremely vague.

78. The respondent's case as to why it referred the claimant to fraud was not consistent. In the appeal decision, it was recorded that Ms Williams had referred because the claimant was working elsewhere whilst on sick. At the Employment Judge Hyde hearing, the respondent's case was that it was concerned that the claimant was working elsewhere whilst on sick. However, before the tribunal, Ms Williams said that the claimant was not referred because she was absent sick. Her motivation was whether the claimant was working for another employer whilst working for the Trust.

79. The Tribunal had sight of the claimant's contract of employment which stated, in the context of Working Time Regulations and the 489 hour working week,

> You are expected to devote the whole of your time and attention and ability during working hours to the duties associated with your role. You should not therefore accept any other employment that would actually or potentially put you in breach of any of your duties with the respondent by causing conflict of interest or which would give rise to any Health and Safety concerns.

80. It was agreed that it was very common for NHS staff, including nurses, to work for other employers whilst employed by the respondent. Ms Williams said that some staff knew that they needed to get permission or inform the respondent (it was unclear which) if they had another job, but some staff did not know this. The tribunal was not taken to any policy or other documents informing staff that they had to tell the respondent if they worked elsewhere.

81. No later than 27 April (the respondent did not provide any documents), the respondent's fraud department contacted Lloyds about the claimant working for them, whilst she was still the respondent's employee. Lloyds interviewed the claimant on 27 April about the allegation that the claimant was employed full-time elsewhere. Lloyds told the claimant that the respondent's HR was concerned and had written to them. The claimant told Lloyds that she had told the respondent that she was working for Lloyds. She said, "the respondent will have to fit my shifts around Lloyds". However, at this point, the respondent was looking at redeployment and was expecting her to work her way up to full-time work if possible.

82. Lloyds took no action against the claimant in respect of these allegations.

The Applicable Law

83. The applicable law is found in Sections 6, 20, 21 and 27 Equality Act 2010 as follows

> 6 Disability
>
> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> 20 Duty to make adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) 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.
>
> …

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Submissions

6 The Tribunal had sight of skeleton arguments from both parties and written submissions from the respondent. In addition, both parties made oral submissions.

Applying the Law to the Facts

Was the Claimant a Disabled Person?

82 The first issue was whether the claimant was a disabled person under section 6 Equality Act at the material time by reason of her dyslexia. There was no dispute that dyslexia constituted an impairment.

83 Under section 6(1), the burden of proof is on the claimant to show that she satisfies the definition.

84 The tribunal took into account the Equality Act 2010: Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability. It also took into account the ECHR Code of Practice.

85 The tribunal reminded itself that it must determine whether the claimant was a disabled person at the material time; the opinion of the occupational health doctor that she was probably covered by the Equality Act is not determinative.

86 The only medical evidence was the assessment from the university. This took place several years prior to the events material to the claim, although there was no evidence that the effects of the dyslexia had changed over this time.

The Access to Work report was based on what the claimant reported about her condition and its effects; there was no evidence that Access to Work assessed the claimant's condition. The recruitment OH report was also based on what the claimant reported. Whilst both were relevant to the claimant's account of her conditions and its effect over time, they did not constitute independent medical evidence.

87 There was no dispute that the claimant's dyslexia was a lifelong condition. The issue was whether it had a substantial, that is more than minor or trivial, adverse impact on her ability to carry out normal day-to-day activities.

88 There was no question that reading and writing was a normal day to day activity. The Tribunal duly considered whether or not her dyslexia had a more than minor and trivial impact on her ability to read and write. The claimant had been assessed by the university as having mild dyslexia and as being within the average range in all measures - sometimes low average and sometimes high. She also had good coping mechanisms particularly in respect of reading and writing tasks.

89 The Tribunal applied the guidance in *Goodwin v Patent Office 1999 ICR 302, EAT*:-

> 'What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.'

90 The focus for the tribunal is on what a claimant cannot do.

91 The Code (and the Guidance in similar terms) explain that "substantial" in section 6 can be understood as: "The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

92 However, this does not mean that the tribunal should compare the claimant's ability to carry out normal daily activities, with that of a group of people. According to *Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522, EAT*, the comparison is with what a claimant could do if they did not have the impairment.

93 In the view of the Tribunal the claimant narrowly discharged the burden on her of showing that her dyslexia had a more than minor or trivial effect on her reading and writing, particularly under time pressure. She gave evidence in particular that stress made her performance worse and the more so if she was reading or writing with a tight timeframe or if the matter was important. This was corroborated by the university assessment which proposed adjustments to assist her with this effect. Comparing this with what the claimant could do if she did not have dyslexia, the Tribunal found that the effect was substantial.

94 The Tribunal went onto consider if her dyslexia had a substantial effect on her ability to comprehend and concentrate in a noisy environment. The claimant stated that she was neuro-atypical. The tribunal accepted that comprehending and concentrating in a noisy environment was a normal day to day activity. There was no reference to this in the university assessment and there was very little if any reference to this in the considerable contemporaneous material provided by the claimant - including the grievance, grievance interview, and numerous emails. The tribunal did not find that the claimant had discharged the burden of showing that her dyslexia had a substantial impact on her ability to comprehend and concentrate in a noisy environment.

95 Accordingly, the tribunal found that the claimant was a disabled person by reason of the adverse effect on her reading and writing.

<u>Reasonable Adjustments Claim</u>

96 The tribunal directed itself in line with *Project Management Institute v Latif* 2007 IRLR 579, EAT as to the burden of proof in a reasonable adjustment case. The burden of proof shifts once the claimant has established that the duty to make reasonable adjustments had been triggered and that there were facts from which it could reasonably be inferred — absent an explanation — that the duty has been breached.

97 The first provision criterion or practice (PCP) relied on was the amount of time provided in the interview for the claimant to prepare her answers. The Tribunal had made a finding of fact that the claimant was given an extra five minutes to prepare. It was the claimant's case that five minutes was sufficient additional time and, accordingly, the PCP was not made out. This complaint was dismissed.

98 The Tribunal went on to consider the second PCP – the claimant being required to undertake administrative duties recording patient information and details of treatment and medication as part of her role. It was agreed this was a PCP. It was agreed that the claimant had to record patient information, treatment and details of medication as part of her role. The question for the

Tribunal was, did this PCP put the claimant at a substantial disadvantage in comparison to those who did not have dyslexia because of her reading and writing issues.

99 The Tribunal's difficulty was the paucity of contemporaneous references from the claimant about the impact of her disability on the administrative part of her role.

100 The claimant said in her tribunal witness statement that her difficulties in reading and writing resulted in her having to work long hours. She was not able to be precise about this. The respondent disputed her account. According to a letter from Mr Jones of 9 February 2017, the claimant had been marked on the rota as staying late only three times since August 2016. There was no contemporary or objective evidence of hours worked by the claimant. In the circumstances where the claimant did not provide details of hours and Mr Jones had provided detail at the time, the tribunal preferred Mr Jones's evidence.

101 The contemporaneous evidence showed that the claimant saying that she was struggling with the admin part of the job, but she did not give any reasons as to how and why. For instance, she did not say, "I could not do the notes because of my dyslexia or because I was slow with reading and writing under pressure". She said that she was spending double the time on written work but there was no other evidence of this, and it did not fit with Mr Jones evidence that she rarely stayed late. In her disability impact statement, the claimant gave an account of how another disability - her back condition – also adversely affected her carrying out her admin duties, in that she suffered pain whilst sitting for prolonged periods.

102 The tribunal reviewed the contemporaneous evidence as to the effects of dyslexia on reading and writing in the claimant's role.

103 There was a three page 11 November 2016 letter to the claimant recording the 2 November sickness meeting. This recorded considerable discussion about the claimant's sickness absences but contained only one paragraph relating to the dyslexia and delays in implementing the Access to Work recommendations.

104 On 9 February 2017 the claimant attended another return to work interview - with Mr Jones. The claimant was returning from long-term sick. At this point, the claimant had been in post since September 2015 and there was no suggestion that her duties had changed over this time. By this point, the claimant had been off sick from 25 March 2016 until 13 July 2016, she returned for a couple of weeks in July and was then absent sick again until August when she returned for another four months; she was then absent sick from 23 December 2016. So, in effect, by February 2017 the claimant had been in post and doing – or trying to do - the job for about a year in total - although not continuously.

105 Mr Jones wrote to the claimant on 9 February 2017 to record this meeting. The letter contained 14 substantive paragraphs and went into detail about the claimant's sick record and any barriers to her working effectively. There was

one sentence related to dyslexia and the Access to Work recommendations. When the claimant was asked if there was anything contributing to her sickness, she did mention anything which might relate to dyslexia but gave a different explanation. She said that she was leaving late because she felt she was allocated inappropriate patients and that she was let down by another team and struggled with the patient's weight. There was the first reference to redeployment to a different role. However, there was no indication that this was because difficulties caused by dyslexia, but because of the limitations imposed by the claimant's serious back condition.

106 The tribunal had sight at page 480 of a lengthy email from the claimant to Mr Jones of 27 June 2016 in which she raised a number of concerns and complaints. She made a specific complaint about her chair, but the crux of the email was the way she was spoken to by other staff, and how this was causing her stress. She went into detail about brief interactions with colleagues; for instance, what she thought colleagues might be saying about her. She gave a specific detailed example. She had returned to the office early and so had the opportunity to assist another member of staff; she took exception to the tone of voice and the way in which she was spoken to.

107 In this email, the claimant expressly stated that she was being victimized and referred to the Equality Act. However, there was no reference to any issues in carrying out the basic daily duties of reading and writing. She gave a very detailed account of how she had time spare in which to help a colleague. But she made no reference to problems with keeping up with notes or having difficulties with computers and the like.

108 The tribunal found that the claimant felt very strongly about the contents of this email because she chased Mr Jones on 15 August referring to a conversation that they had had about it two weeks before. She said that these matters were important and need to be addressed; if not she would escalate to senior management or HR. This was evidence that when the claimant had concerns about problems at work, she was willing to persist if there was no satisfactory response or resolution and was willing to escalate. The tribunal also had sight of a large number of further emails from the claimant to the respondent related to these issues.

109 At this time there were a number of emails between respondent employees - including Mr Fitzgerald – dealing with the difficulties in fulfilling the IT recommendations. Finally, Mr Fitzgerald informed the claimant that the IT was read to use and she needed to start the training. The claimant's reply was, "I will go through training when I get time in the office". The tribunal accepted that it may well have been challenging for the claimant to find time in her busy day to go through the training. However, there was no indication in this email of any need to do the training so that she would be able to do her job more effectively, or that she has not been able to do her job effectively up to that point because of the lack of equipment or training. This was accordingly not consistent with the claimant's experiencing difficulties with the reading and writing parts of her job.

110 At this point, the claimant's laptop went missing, it appeared in about the last week in October. The claimant did not send an 'all hands' email enquiring

about it until 7 November. This again was not consistent with the claimant experiencing difficulties with the reading and writing parts of her job.

111 The claimant sent a three and a half page email on 9 November 2017 to her new manager, Ms Miller. This dealt mainly with her interactions with other staff and the Band 6 job interview. The claimant included considerable detail about the personal interactions, including a lengthy account of interactions on 7 November. During this, there was reference to the fact that it took the claimant longer to prepare her notes, but this was in the context of the interactions with the colleague, rather than it being a free-standing issue. There was no reference to her not having a laptop, software or needing IT and /or training in order to carry out her job because of any issues with reading and writing.

112 The Tribunal had sight of a further email from the clamant on 12 November (p578) to Ms Miller. The claimant stated that she was suffering from stress and anxiety, and was on anti-depressants; she asked for an urgent meeting. She said that she was suffering from racial abuse, victimisation and harassment of her and other members of staff, and something drastic needed to be done. There was an allegation that she had been the victim of racial discrimination. She complained that she was told that she was too glamourous to be a nurse. The allegations contained considerable detail, for instance the claimant referenced the colour of trainers worn by staff. The claimant said that she had sent a claim to ACAS and would be making an Employment Tribunal claim for race discrimination and victimisation. The email also referred to the Band 6 interview. There was no reference to her experiencing difficulties or being disadvantaged because of the reading and writing. That day the claimant sent Ms Miller a copy of the cartoon which inaccurately portrayed an all-white team.

113 The claimant sent an email on 13 November to a UNISON rep, stating that she wanted to make an Equality Act claim for victimization, bullying harassment and racial discrimination. The tribunal found that this did not refer to any disability issues.

114 The claimant sent a further two-page email on 16 November stating that she was taking the matter extremely seriously. She provided a reasonably lengthy list of what she wanted the respondent to do, including :- paying her compensation and upgrading her to Band 6; colleagues being suspended and to be brought before the NMC, the regulatory body, with a view to being struck off; five senior staff to resign. There was no reference to any issues in carrying out her duties because she was having problems with reading and writing and her needing the recommendations implementing.

115 On 15 November the claimant sent an email addressed to “all” referring to race discrimination, the interview, and being undermined by her manager. There was no reference about any issues with IT, the laptop, the software or reading and writing. There was a further email that day to Ms Miller again raising the interview result, which did not mention issues with reading and writing and any failure to implement the recommendations.

116 On 17 November 2017 the claimant had a meeting with the Head of Nursing. The Tribunal had sight of minutes running to three and a half pages. We were not told who wrote these but there was no challenge to their accuracy. The claimant raised a wide range of complaints and the tribunal accepted that this was a lengthy meeting.

117 The meeting was notably wide-ranging. For instance, the claimant stated that the OH doctor thought she was aggressive. Her UNISON rep looked as if he was "smoking weed" and had thought she was aggressive. She had apologized to the union for her behaviour, which was due to feeing ignored. The claimant raised racial equity in her team, health and safety, the Band 6 interview, the WhatsApp cartoon, criticisms of her personal appearance, her hair, her shoes, her being glamorous, and a failure to amend her working hours.

118 This meeting gave the claimant an opportunity to involve senior management and she raised a very wide range of issues. However, she mentioned no difficulties with reading and writing - core components of her role - or any issue with the IT, including the laptop or software, or any complaint about how the respondent had managed the Access to Work recommendations.

119 It was agreed an independent person would look at the matters raised by the claimant.

120 On 20 November 2017 the claimant sent a further email to Ms Miller. This referenced many issues including the interview, her failure to be appointed to the Band 6 role, the all-white cartoon, and her wanting colleagues struck off. There was no mention of any issues relating to reading and writing – daily core components of her job.

121 On 23 November 2017 the claimant sent her eight-page grievance. The grievance was wide-ranging. For instance, she raised issues on behalf of other members of staff. She provided details about daily matters, for instance, handovers and how she felt that she had been undermined. She referred the dyslexia disadvantaging her, in respect of the interview arrangements but not her admin duties. The grievance contained considerable detail; she recounted in detail an incident when a colleague was suspended for going into another colleague's handbag. She referred to the all-white cartoon. She did refer to the laptop but only that Mr Fitzgerald gave her "a cheeky smile" about it. There was suggestion that without the laptop and equipment, she had any difficulties in carrying out daily core components of her role – reading and writing.

122 On 13 January the claimant submitted a claim to the Employment Tribunal. She enclosed her grievance as the statement of her claim.

123 The claimant was interviewed for the purposes of the grievance on 12 January 2018 (page 839). The tribunal found that this was a very lengthy interview because the written report was eleven pages long. The claimant brought up the dyslexia without prompting when she was asked about the racial make-up of the interview panel. She did not bring up the reading and

writing at this point. When she was directly questioned about the impact of dyslexia on her daily job, she replied in a few sentences that there was a disadvantage, that she was slow to type, she needed the IT to catch up when the computer read back to her. This led to a short discussion about the respondent's failure to deliver this.

124 When the claimant was asked at the end what resolution she wanted, she referred to her earlier list of recommendations which were wide-ranging - including wanting colleagues struck off, compensation, promotion, review of her interview notes and redeployment. There was no reference to her needing the IT and software working to help her carry out her duties on a daily basis. She made no suggestion that anyone in the respondent needed disability training. She did not suggest that the Trust review the way in which it dealt with reasonable adjustments particularly in respect of the IT department and/or that the Trust needed to ensure the effective and timeous implementation of Access to Work reports.

125 The claimant made no complaint of a failure to make reasonable adjustments about her admin role when she made her claim to the Tribunal in January 2018. It was first mentioned to the Tribunal in the June 2018 preliminary hearing.

126 The tribunal found that the contemporaneous evidence did not indicate that the claimant's dyslexia had had a more than minor or trivial impact on her ability to carry out the basic functions of her job in reading and writing particularly under pressure. This was because she showed little concern when, on her case, it was an ongoing and daily issue. The evidence showed that the claimant was far from reluctant to raise issue with management. She did so on a number of occasions and forcefully. She persisted when dissatisfied with the response. She was prepared to raise issues which did not relate to her personally, but which she felt affected colleagues. She asked for the respondent to take many and very significant steps.

127 In meetings and emails she went into considerable detail about daily parts of the job - how handovers happened, how tasks were handed out. Yet there were only passing mentions of issues with reading and writing.

128 In the view of the Tribunal, if the claimant's disadvantages with reading and writing, especially under pressure, was causing her more than minor or trivial difficulties in her work, she would have brought this to her employer's attention. This was particularly when the respondent had delayed and failed to implement the Access to Work recommendations. The respondent's delays gave her a clear cut and evidenced cause for complaint. The respondent itself accepted that it was taking too long. The tribunal took into account that the claimant had, in effect, a lot on her plate – a serious back condition, conflicts with colleagues and a mental health crisis. She was worried about issues of racial injustice. However, the references to the laptop and software, let alone reading and writing, were infrequent and overwhelmingly overshadowed by other issues, including issues which did not relate to her personally. The evidence viewed as a whole was inconsistent with the admin part of claimants' role causing her more than minor or trivial disadvantage, by reason of her dyslexia.

129 Accordingly, the Tribunal found that the claimant had not discharged the burden of showing that the PCP of her admin duties put her at a substantial disadvantage due to her issues with reading and writing especially under pressure, and therefore the duty to make reasonable adjustments did not arise.

130 However, the respondent was supposed to be implementing the Access to Work recommendations and it accepted that it should do so. Accordingly, to assist the parties, the Tribunal considered what it would have decided had the duty to make reasonable adjustments been triggered.

131 In the view of the Tribunal, if the duty was triggered, the respondent would have failed to comply for the simple reason that there was a significant delay when it failed in effect to provide the laptop and the IT that had been recommended.

132 The tribunal's concern was heightened as this appeared to be a systemic failing, rather than an individual failing. For instance, Mr Fitzgerald invested time in trying to resolve the matter although it did not appear he bore any responsibility. However, there was no evidence or indication that anyone was responsible for the process; no one took ownership and, perhaps unsurprisingly, it therefore did not get done. In the view of the Tribunal the respondent may well wish to consider reviewing how it progresses Access to Work recommendations and grants, together with of how it deals with reasonable adjustments on behalf of its staff.

133 If the tribunal had found that the respondent had failed to comply with such a duty to make reasonable adjustments, it would then have gone on to consider the timepoint. The claimant did not contend that there was a continuing act; her case was purely that it would have been just and equitable to extend time. The clamant did not lead any evidence as to why time should be extended.

134 According to *Bahous v Pizza Express Restaurant (Ltd)* UKEAT/0029/11/DA, had the tribunal found that the respondent failed with a its duty under s21 Equality Act, this would weigh heavily in determining if it should exercise its discretion to extend time.

135 However, this would have been outweighed by the fact that the claimant had submitted a Tribunal claim in January 2018 without including the section 21 claim. There was no reason why the claimant could not have submitted the section 21 claim in time. The Tribunal did not accept that the claimant was delayed in submitting her claim because of stress or illness caused by the respondent's conduct towards her. The respondent's conduct did not stop her submitting her January 2018 ET1.

136 Accordingly, the tribunal would have found that the claimant had not discharged the burden on her of showing why time should have been extended to permit the tribunal to consider the reasonable adjustments complaint.

Victimisation

137 It was accepted that the grievance was a protected act. The case turned on causation.

138 The essential question is what, consciously or sub-consciously, motivated the decision-maker. In *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, the House of Lords instructed tribunals to look for the core reason, the real reason, for the employer's action. In *Nagarajan v London Regional Transport* [1999] IRLR 572 the House of Lords told tribunals to ask if whether the protected act has a significant influence on the employer's decision making, whether consciously or sub-consciously. In *Villalba v Merrill Lynch* & Co Inc [2007] ICR 469 EAT stated, 'If in relation to any particular decision, a discriminatory influence is not a material influence or factor then in our view, it is trivial.'

139 The Tribunal firstly considered the reference. The Tribunal found that what caused the failure to provide the reference was two failures on the part of Lloyds. As a result, the matter was closed down due to the respondent's system. This provided a full explanation as to what happened. Further, there was no explanation as to who would have carried out such victimisation. Was it supposed to have been Ms Williams and if so, how did she so when there was a separate HR department? On the evidence, the case was simply not made out.

140 The tribunal then considered the referral to the fraud department. It was not disputed that Ms Williams had referred the claimant to the fraud department. Therefore, the tribunal had to consider her motivation. It was not disputed that she was involved in managing the grievance process.

141 The Tribunal was not satisfied with the respondent's account of the referral to fraud, because it was not consistent. Before Employment Judge Hyde it was said that the referral was made because the claimant obtained another job when she was absent sick. However, before the Tribunal Ms Williams' evidence was not entirely consistent with this. After considerable questioning, she said that the claimant's being on sick leave was irrelevant - she made the referral because the claimant had got another job whilst she was working 37.5 hours for the respondent. However, she went on to say that the fraud investigation might reveal if the claimant was working whilst on sick.

142 The Tribunal had other concerns about the respondent's case. The tribunal found it hard to understand why, if the respondent had concerns, it did not start by raising the matter with the claimant - carrying out a fact-finding or an investigation. The tribunal accepted that, in some circumstances telling a suspected employee of a referral to the fraud department before starting enquiries might prejudice the investigation. However, the tribunal saw no indication that this was an issue here.

143 The Tribunal was told that the fraud department was part of the respondent; it was not contracted out. However, the bundle contained nothing in writing about the fraud process. Further, there was no record from HR of the referral

to fraud. The tribunal was struck by the lack of documents which might have evidenced or indicated an alternative explanation for the decision to refer to fraud. This was in circumstances where it would be difficult for the fraud department to carry out an investigation or establish matters which might lead to a disciplinary without keeping records.

144 There was evidence that written documents were created by the respondent, according to the minutes of Lloyds' own investigation. Lloyds received something in writing from the respondent's "HR", which may have been either HR or the fraud department.

145 The Tribunal noted with respect to the respondent's motivation, that the claimant was, to put it very simply, taking up a lot of time and making numerous and wide-ranging complaints. In the view of the Tribunal, the respondent and Ms Williams viewed the claimant, subjectively, as an on-going problem. At the time the referral was made to fraud, there was no sign that the problem was going to go away – the claimant had just appealed the rejection of her grievance. If the claimant were found culpable of fraud, this could well bring the matter to a speedy conclusion.

146 The Tribunal found that it was the totality of the claimant's history with the respondent which influenced Ms Williams. From the point of view of the respondent, the claimant, to put no finer point on it, had caused the respondent a lot of difficulties and threatened to cause considerably more. She had a poor sick record. She had raised over a long period numerous complaints for herself, and also purported to make complaints on behalf of others. She had sent an entirely inappropriate WhatsApp message to another employee. This employee told the investigator that he was very upset and, in effect, complained that the respondent was not doing enough to protect him. The claimant was making threats to individuals and to the respondent. She had complained about both her managers, Mr Jones and Ms Miller, and she had threatened to and, indeed, had escalated matters. She had put in a lengthy grievance which led to a lengthy external investigation. This was thorough including interviews with ex-employees such as Mr Jones. She then had appealed against the rejection of this grievance. She had brought a claim to the Employment Tribunal which was on-going.

147 Further, she was currently absent on full-pay and according to occupational health, she needed to be redeployed, in effect for a second time. Redeployment might be challenging due to the claimant's having complained about two successive managers. Further, the respondent had to manage a phased return to work with no guarantee of success. Finally, the claimant was working elsewhere, which might well not help her phased return.

148 The tribunal found it difficult to disentangle the effect of grievance from the effect of everything else. It was the totality of how the respondent and Ms Williams perceived the claimant which led to the decision to refer to fraud. The Tribunal nevertheless found that the grievance was a material influence on Ms Williams's decision. Ms Williams had been personally involved in the grievance when she had not been involved in many other matters. The claimant was appealing the grievance outcome. This had already been a lengthy and a costly matter and was not yet finished. Further, the grievance

and the difficulties shed a light on the difficulties potentially posed by the in-coming Employment Tribunal proceedings. In these circumstances, the Tribunal found that the grievance was a material factor and did have an influence on Ms Williams' decision to refer to fraud.

149 The Tribunal accepted that the decision to refer to fraud constituted a detriment. It was a one-off act and, happily, there did not appear to have been any adverse consequences. Nevertheless, the fraud department of the NHS contacted the claimant's new employer who unsurprisingly investigated her. No new employee wants a fraud department ringing their new employer to make enquiries about them.

150 Having found the victimisation claim to have been made out in respect of the referral to fraud, the Tribunal then went on to consider the timepoint. The act complained of occurred on 19 April 2018 and the claim was not presented until 27 February 2019. It was accordingly a little over seven months out of time, more than twice the original three-month time limit.

151 The tribunal considered whether it was just and equitable to extend time. According to the leading case of *Buckland v Bournemouth University* [2010] EWCA Civ 121, the burden is on the claimant and exercise of the discretion should be the exception, rather than the rule.

152 Within three months of the act complained of, on 27.6.18, the claimant had sought to bring this complaint to the Tribunal by applying to amend her claim. The claimant was not legally represented throughout and therefore it was reasonable for her not to understand that she was, in effect, taking a risk by applying to amend, rather than making a new claim in time. This risk proved fatal as in January 2019, over six months later, the Tribunal rejected her amendment. She therefore had no choice but to make a fresh claim out of time.

153 The tribunal found that it was just and equitable to extend time for the following reasons. The claimant had an existing claim at the tribunal and then, on her case, experienced a further unlawful act. She attempted to bring that complaint to the Tribunal within the three-month period. The Tribunal waited, in effect, until the time limit has expired and then told her that she has failed in her application to amend. She then promptly submitted a new claim.

154 In the opinion of the Tribunal this in itself would be sufficient ground to extend time. The fact that the tribunal has found the victimization claim to be made out, was a further, although not determinative factor.

155 Accordingly, the tribunal exercised its discretion to extend time to consider the victimization complaint because it was just and equitable to do so.

REASONS - REMEDY

1. The sole issue on remedy was the amount of any award for injury to feelings for the act of victimization relating to the referral to the fraud department. It was agreed that there was no financial loss.

2. The Tribunal heard further oral evidence from the claimant and submissions from the parties.

3. The tribunal reminded itself that an award for injury to feelings is intended to compensate a claimant for the anger, stress and upset caused by unlawful treatment. It is compensatory not punitive, and the focus is on the actual injury suffered and not the gravity of the acts.

4. In respect of the general principles, these are laid out in *Prison Service v Johnson [*1997] IRLR 162, [1997] ICR 275 as follows:-

   ‘(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation should not be allowed to inflate the award.

   (2) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could ... be seen as the way to untaxed riches.

   (3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.

   (4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind.

   (5) Finally, tribunals should bear in mind... the need for public respect for the level of awards made.’

5. An award of injury to feelings is made in line with the bands first set out in *Vento v Chief Constable of West Yorkshire* 2003 [IRLR102]. This divided injury to feelings compensation into three bands, the top band, the middle band and the lower band.

6. The Tribunal found that the award in this case should fall in the lower band. This was a one-off act of discrimination with specific and discrete consequences. The Tribunal reminded itself that it must consider the injury to the claimant rather than the respondent’s act, and that different individuals react in different ways to what may be a very similar act. However, a one-off act is, all things being equal, likely to result in a lesser injury to a person’s feelings than a long catalogue of mistreatment. There was no evidence that

this was not the case here. The tribunal determined that an award in the lower band was appropriate.

7. According to the 23 March 2018 addendum to the Presidential Guidance, the award should therefore be between £900 and £8600. This includes the 10% uplift pursuant to *Simmons v Castle* [2012] EWCA Civ 1288.

8. The Tribunal considered what injury had been caused by the referral to the fraud department. The claimant's evidence was that at this time, April 2018, she was already extremely upset. The Tribunal had also found in its liability judgment that the claimant was very distressed by a number of other things. She felt that she had been the victim of race discrimination and that there was a culture of race discrimination generally in the respondent, that she had been the victim of sex discrimination, that she had unjustly failed to be appointed to a post, and she felt strongly enough about these matters that she wanted colleagues to be referred to a professional body and subject to serious investigation.

9. The Tribunal looked at the WhatsApp message in November 2018 as evidence of the distress suffered by the claimant. The claimant explained that she was mentally unstable at the time and accepted that this message was entirely inappropriate. Nevertheless, she did not row back from the beliefs behind that WhatsApp message, for instance, that a colleague had discriminated against her, and it was unfair that she was not promoted. This was shown by her later emails, her grievance and her statements in the grievance investigation.

10. However, the Tribunal was satisfied that the referral to the fraud department was, to some extent, a discrete point. At this point, the claimant was trying to put some distance between herself and the respondent. It may have been that she saw Lloyds as, in effect, a lifeboat in case things did not work out with the respondent.

11. The problem for the claimant was that her problems at the respondent followed her to Lloyds. This, the Tribunal accepted, would have resulted in further and discrete injury to her feelings. This involved her in an investigation at Lloyds. The Tribunal accepted that the claimant started to feel it would be difficult to escape from the situation at the respondent and harder to make a fresh start.

12. The tribunal also took into account that the claimant was still seeking to remain employed by respondent, as shown by her employment not coming to an end until about a year later. At the time of the referral to fraud, the tribunal did not find that she envisaged a permanent break with the respondent.

13. The Tribunal did not accept the claimant's case that the fraud referral caused her embarrassment and humiliation when she was redeployed in the Trust. There was no evidence or reason to believe that the fraud referral had in any way become common knowledge. The only people with direct knowledge would be those in HR and the fraud department. This was in contrast to earlier matters where a large number of people had been involved in the

investigation, the grievance process, and had been copied into WhatsApp messages.

14. The Tribunal accepted that although the claimant was cleared of wrong-doing by Lloyds, she would reasonably fear that Lloyds might be cautious going forward. She would fear that mud might stick. The claimant would naturally be sensitive to any questioning by Lloyds which might relate to her integrity, even if this this was nothing more than normal management.

15. The claimant relied on a 10 August 2020 Lloyds email stating that a spot-check had discovered an error on her part. She contended that this was evidence of a continuing wariness by Lloyds towards her. Lloyds, in effect, were checking up on her because of the damage done to her reputation by the respondent. However, the tribunal did not accept this. The email was more than two years after the claimant had been exonerated. Further, the claimant, on her case, had worked for Lloyds for two years with no disciplinary problems. She was promoted the month after the August 2020 email and, in her view, was doing well.

16. The Tribunal found that the wariness of Lloyds towards the claimant would – on the balance of probabilities - have dissipated over time, as the claimant settled in. After a number of months and in less than a year, she would have, in effect, got her feet under the table, in that Lloyds would judge her on her performance, rather than on what the respondent had said. Nevertheless, it was understandable that the claimant would continue to be worried about this for some time.

17. The Tribunal accepted that the claimant experienced embarrassment, humiliation and worry when the fraud department contacted Lloyds. This was made worse by the fact that she was investigated by Lloyds, although exonerated.

18. The Tribunal agreed with the respondent that it was not straightforward to disentangle the sense of hurt caused by the act of victimization, from everything else that was going on between the claimant and respondent. Nevertheless, the Tribunal concentrated on the effect of what had happened at Lloyds, as opposed to what was happening with the respondent.

19. The Tribunal accepted that the claimant genuinely believed that it was the grievance which led to the referral to fraud. This was the way she put her case.

20. Accordingly, taking all these matters into account, the Tribunal determined on an award sitting just below the mid-point in the lower band - being £4000. The Tribunal considered the amount of money in the claimant’s hands, as an SRN, and found that this was an appropriate award to make.

REASONS - COSTS

1. Following the Tribunal's decision on remedy, both parties made costs applications.

2. The costs application by the respondent was set out in Mr Ohringer's submissions on costs provided on the final day of the hearing on 20 August 2021. The summary of the application was:-

   a. That the Claimant brought multiple complaints by two separate ET1s.

   b. The Claims were in such disarray that it was necessary to hold six Preliminary Hearings.

   c. Most of the complaints were withdrawn in a piecemeal fashion during the PHs.

   d. Four of the complaints which were maintained were made subject of deposit orders and the Claimant paid two of them.

   e. The Claimant was represented by counsel and solicitors since at least the PH on 23 July 2019 but she stated that she had received some legal advice from her union solicitors at the outset of the case.

   f. Without prejudice communications [save as to costs].

3. The claimant's application for costs, was said to be based upon the respondent's failure to make disclosure of documents going to the two victimisation complaints being, firstly, the delay over the reference and secondly, the referral to fraud.

4. The Tribunal considered the costs orders together. It directed itself according to the decision of the Court of Appeal in *Yerrakalva v Barnsley Metropolitan BC* [2012] ICR and reminded itself that Tribunals are, in essence, a no costs jurisdiction. Costs do not normally follow the event in the Employment Tribunal as they do in the Courts. The case law tells us that a costs order is the exception rather than the rule. This is consistent with various other elements of Tribunal litigation, such as a lack of Legal Aid.

5. Nevertheless the 2013 Rules of Procedure gives the tribunal jurisdiction to award costs as follows:

   76.— When a costs order or a preparation time order may or shall be made

   (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

   (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; [...]

   (b) any claim or response had no reasonable prospect of success…

6. A Tribunal must apply a three-part test. It must firstly consider whether there are grounds for making a costs order or to put it another way, whether its jurisdiction to award costs has been triggered. If so, it must then consider whether it should exercise its discretion to award costs. Thirdly, if it does decide to exercise its discretion, it must determine the appropriate sum, taking into account under rule 84, if requested by the potential paying party, the party's ability to pay.

7. As submitted by the respondent, the Court of Appeal in *Yerrakalva* set out the tribunal's task as to unreasonable conduct:-

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had." (Para. 41)

8. The respondent's application for costs was made under Rule 76 of the 2013 Rules of Procedure. The respondents contended under Rule 76(1)(a) that the claimant had acted unreasonably in the bringing and the way in which she conducted the proceedings and, further or in the alternative, under Rule 76(1)(b) that the claim had no reasonable prospect of success.

9. For the claimant, Mr Carter relied solely on Rule 76(1), unreasonable conduct.

<u>The respondent's application</u>

10. The respondent applied for costs in respect of four failed complaints – sex harassment, disability harassment, the reasonable adjustments complaint in respect of the interview, and the victimization complain in respect of the reference.

11. The Tribunal proceeded on the basis that the respondent's application in respect of costs was moderate and conservative, and it accepted that this was far from the actual costs incurred by the respondent.

12. The Tribunal considered the specific acts of the claimant that were said to be unreasonable. The Tribunal firstly considered the claimant's conduct in respect of the <u>sex harassment</u> complaint. Unlike in the disability harassment complaint, no deposit order was made by Employment Judge Hyde. The unreasonable conduct relied upon was the claimant notifying the respondent on the Friday, the last working day before the first day of the hearing, that she was withdrawing this complaint. The tribunal accepted that by this time, the respondent had spent a considerable amount of time preparing.

13. The respondent relied on the comments of Mummery LJ In *McPherson v BNP Paribas* [2004] ICR 1398 that, although withdrawal of a claim alone would not constitute unreasonable conduct:

> I agree … that tribunals should not follow a practice on costs which might encourage speculative claims, by allowing applicants to start

> cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction. (Para. 29)
>
> …The crucial question is whether, in all the circumstances of the case, the claimant withdrawing the claim has conducted the proceedings unreasonably. (Para.30)

14. The tribunal did not accept that the claimant was treating the sex harassment complaint as a speculative complaint brought in order to obtain a settlement. She brought a number of other complaints which she argued at hearing. There was no reason to think that the claimant thought that the sex harassment complaint would be more likely to pressure the respondent to settle.

15. The tribunal took the view that it would have been more unreasonable for the claimant to have either pursued this complaint before the Tribunal or withdrew it without warning at the beginning of the hearing. By the claimant explaining that she was withdrawing the complaint on the Friday, the attendance of the two witnesses who were specific to the sex harassment complaint could be avoided.

16. The Tribunal also had regard to the case law whereby Tribunals must be at least cautious of appearing, in effect, to punish parties who have withdrawn poor cases. There is a risk of inadvertently encouraging parties who have realized the weakness of their case, or part of it, to plough on, thereby taking up the time and resources of the Tribunal and their opponent, through fear of a costs award. Accordingly, the tribunal, narrowly found that the claimant's conduct did not trigger the tribunal's jurisdiction to make a costs award because it was unreasonable.

17. As to no reasonable prospect of success, this argument failed before Employment Judge Hyde, who heard detailed submissions on the point, which we did not.

18. The Tribunal then considered the <u>disability harassment</u> complaint. The situation was the same in that the claimant notified the respondent on the last working day before the hearing that she would withdraw the complaint. The difference was that EJ Hyde had made a deposit order.

19. Rule 39(5) did not apply on these facts because the tribunal had not decided the complaint. The making of a deposit order where rule 39(5) does not apply, does not automatically render the claimant's conduct unreasonable. In the tribunal's opinion, a deposit order is a factor to be weighed in the balance.

20. The Tribunal noted that there was a considerable but not complete overlap of evidence with the reasonable adjustment complaint, because both the disability harassment and the reasonable adjustments complaint related to the respondent's failure to provide the laptop and the necessary software - including Mr Fitzgerald's role. The disability harassment complaint would require evidence from Mr Fitzgerald who was already before the Tribunal

giving evidence on most if not all of these matters. Accordingly, there was less prejudice to the respondent in preparing for a complaint which was not pursued.

21. As with the sex harassment complaint, the Tribunal was influenced by the fact that the claimant did not pursue this matter before the tribunal and mitigated costs and difficulties by withdrawing on the Friday before the hearing.

22. For the same reasons as for the sex harassment complaint, and in a complaint where the respondent was put to less prejudice, the tribunal did not find that the claimant's conduct was unreasonable, and accordingly its power to award costs was not triggered.

23. In respect of no reasonable prospects of success, this complaint to some extent overlapped with the reasonable adjustments complaint. The tribunal found that there were failings by the respondent in how it dealt with the Access to Work recommendations, but these were systemic, not individual. In the circumstances, it could not be said that there were no reasonable prospect of success.

24. The Tribunal turned to the reasonable adjustment claim in respect of the interview. This was also the subject of a deposit order. The respondent properly accepted in its submissions that the deposit order was made on different grounds than those which led this tribunal to dismiss the complaint. The reason the deposit order had been made was that the factual dispute between the parties (basically two minutes versus five minutes) was potentially de minimis or negligible. This Tribunal did not consider the substantial disadvantage point because it found that the facts were not made out. Accordingly, Rule 39(5) did not apply.

25. When determining whether the claimant's conduct was reasonable, the Tribunal noted that this complaint included a conflict of evidence. That could only be resolved, in the final analysis, before the Tribunal. The Tribunal, when making this finding of fact, did not find that anyone had lied or deliberately misled the Tribunal. The Tribunal had simply preferred the evidence of the respondent to that of the claimant. In the opinion of the Tribunal, it was not unreasonable for the claimant to proceed to the Tribunal to find out whose evidence was preferred.

26. In respect of the submission that this complaint had no reasonable prospect of success, the tribunal rejected this on the same reasoning.

27. Finally, the tribunal considered the victimisation complaint in respect of the reference. This was not the subject of a deposit order.

28. The Tribunal had found that there was a delay by the respondent in providing the reference. In the view of the Tribunal, it was unclear as to how much the claimant knew that the delay was due to Lloyds' mistakes, essentially Lloyds sending a consent form to her and/or failing to send a consent form to the respondent.

29. What had happened with regard to the reference was a matter of evidence before the tribunal. The claimant was not making entirely unreasonable allegations; the Tribunal had found that the respondent had victimized the claimant in connection with the Lloyds' employment in another way. The tribunal accepted that the claimant did not knowingly mislead the tribunal in respect of the reference. It would have been difficult for her to do so because, in effect, she knew little about what was going on with respondent.

30. It could not be said that there was no reasonable prospect for the same reasons. This was a matter on which the claimant could reasonably ask the tribunal to hear the evidence and make a determination.

31. Accordingly, the Tribunal did not find that there was unreasonable conduct or that there was no reasonable prospect of success in respect of these four complaints. Its power to make a costs order was not triggered.

32. However, for the assistance of the parties, if there had been unreasonable conduct or no reasonable prospect of success and the discretion to award costs was triggered, the tribunal would not have exercised that discretion for the same reasons as set out above.

33. Accordingly, the respondent's application for a costs order was refused.

<u>The claimant's application</u>

34. The claimant submitted that the respondent had committed unreasonable conduct by way of failures in disclosure. This, the tribunal understood, was in respect of two issues. The first issue was that the respondent had failed in or refused a disclosure request of all documents and emails between Lloyds and the respondent. It later transpired that Lloyds had contacted the respondent. The claimant contended that a consent form was received by the respondent on 11.4.18, as stated in the grievance stage 2 appeal.

35. The Tribunal took into account that this was a large bundle of well over 1100 pages. The claimant had brought or sought to bring a number of complaints which had changed over a significant period of time. Some were added later. Some had been withdrawn, some very close to the date of the hearing. In these complaints she had made very significant disclosure requests and it was accordingly not entirely surprising that documents might go astray.

36. The tribunal was not persuaded that that any failure to provide the consent form received on 11.4.18 was material to the case. By this point the reference was delayed. More importantly, it was unclear what the 11 April document was, and who had provided it to the respondent – the response to the grievance only stated that a consent form was received.

37. The Tribunal then turned to the second limb of the application - the lack of documents concerning the referral from HR to fraud. The Tribunal had taken the lack of documents into account in making its determination on victimization. However, this was one of a number of factors leading to its decision. The difficulty for the tribunal in judging the reasonableness or

otherwise of the respondent's conduct was that it simply did not know what, if any, were the respondent's disclosure failures and the reasons for this.

38. Accordingly, the Tribunal did not find that this power to make a costs award was triggered.

39. Nevertheless, in order to assist the parties, if the tribunal had found that its power to award costs was triggered, because the respondent had behaved unreasonably, it would not have exercised its discretion to award costs for the following reasons.

40. The claimant had brought a large number of complaints over a significant period of time. Some complaints were added later, some were withdrawn. She had made very significant requests for disclosure. In those circumstances, it was unsurprising that there may have been some issues with disclosure.

41. Further, the respondent's disclosure, or issues with it, did not prejudice the claimant. She succeeded in her victimization complaint with regard to the referral to fraud. There was no indication that undisclosed documents would have affected the tribunal's findings on the reference victimization complaint.

42. Accordingly, the Tribunal did not grant the claimant's application for costs.

____

Employment Judge Nash
Date: 26 October 2021