



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103650/20 (V)

Held via Cloud Video Platform (CVP) on 22, 23 and 24 February 2021 and 27 July 2021 (and Members' meeting on 28 July 2021)

**Employment Judge: M Sutherland
Members: L Grime
S Lawson**

Mr Derek Kerr

**Claimant
Represented by:
Ms L Doyle, Solicitor**

Outreach Offshore Limited

**Respondent
Represented by:
Mr J Grant, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that –

1. The claim for failure to make reasonable adjustments does not succeed and is dismissed
2. The claim for indirect disability discrimination does not succeed and is dismissed
3. The claim for discrimination arising from disability does not succeed and is dismissed

REASONS

1. The Claimant presented a complaint of discrimination arising from disability, indirect disability discrimination, and failure to make reasonable adjustments.
2. The Claimant was represented by Ms Doyle, Solicitor. The Respondent was represented by Mr Grant, Solicitor.
3. The Claimant gave evidence on his own behalf. The Respondent led evidence from Stuart Finlayson (General Manager) and Elinor McLauchlan (Office/ HR Manager). Evidence in chief was given by recourse to witness statements.
4. The parties lodged an agreed set of documents. The Claimant has dyslexia and has difficulties reading lengthier passages of text. Where lengthier passages of text were referred to in the bundle of documents these were read out to him.
5. Parties made closing submissions.

List of Issues

6. Following discussion the issues to be determined were agreed to be as follows –

Disability (Section 6, Equality Act 2010 ('EA 2010'))

7. Does the Claimant have a mental or physical impairment?
8. Does the impairment have a substantial and long term effect on his ability to carry out normal day to day activities?

Discrimination arising in consequence of disability (Section 15, EA 2010)

9. Did the Respondent treat the Claimant unfavourably by dismissing him?
10. Was he dismissed because of his performance related to design? Did his performance related to design arise in consequence of his disability?
11. Was the dismissal a proportionate means of achieving a legitimate aim?
12. Did the Respondent know, or could they reasonably have been expected to know, that the Claimant had the disability?

Indirect Discrimination (Section 19, EA 2010)

13. Did the Respondent apply to the Claimant a provision, criterion or practice (PCP) of performance standards related to design?
14. Did or would the Respondent apply the PCP to persons who do not share the Claimant's PC?

15. Did or would the application of the PCP put persons who share the Claimant's PC to a particular disadvantage in comparison with persons who do not share it?
16. Did or would the application of the PCP put the Claimant to that disadvantage?
17. Was the application of the PCP a proportionate means of achieving a legitimate aim?

Failure to Make Reasonable Adjustments (Section 20, EA 2010)

18. Did the Respondent apply to the Claimant a provision, criterion or practice (PCP)(s) of: a requirement to work in a noisy environment (an open plan office); performance standards related to design?
19. Did the application of the PCP put the Claimant to a substantial disadvantage in comparison with persons who are not disabled of: having difficulty concentrating on the difficult task of reading and writing which affected his performance; being dismissed for failure to meet the performance standard?
20. Did the absence of the auxiliary aid of voice/text conversion software, put the Claimant to a substantial disadvantage of being substantially slower at reading and writing in comparison with persons who are not disabled which affected his performance?
21. Did the Respondent fail to take reasonable steps to avoid that disadvantage by: giving him a quieter place to work (via noise cancelling headphones and/or home working); providing the auxiliary aid of voice/text conversion software; and/or adjusting the performance standards in recognition of the effect of his disability?
22. Did the Respondent know, or could they reasonably have been expected to know, that the Claimant had the disability and was likely to be put to that disadvantage?

Time bar

23. When did any unlawful act take place?
 - a. Was the complaint presented within 3 months of that date or was the complaint presented outside the limitation period under the Equality Act 2010?
 - b. Do any of the unlawful acts constitute a continuing state of affairs and if so when (if ever) did that continuing act cease?

- c. If any unlawful act occurred outside the limitation period, is it just and equitable to extend the limitation period?

Remedy

24. If the claim is successful on any matter, what declarations should the tribunal make?
25. What compensation should the Claimant be awarded?
 - a. Should the Claimant be awarded compensation for lost pay?
 - b. What injury to feelings compensation should be awarded?

Findings in fact

26. The Claimant was diagnosed as having dyslexia in childhood. Dyslexia is a life-long condition which affects his ability to read and write. The Claimant can read and write shorter passages of text. The Claimant finds it difficult and exhausting to read and write lengthier passages of text with sufficient accuracy. The Claimant uses voice/text conversion software at home to help him read and write lengthier passages text. Noisy environments make it more difficult for him to read and write lengthier text. The effect of his dyslexia on his reading and writing was more than minor or trivial.
27. The Respondent is an engineering company supplying hydraulic lifting equipment for use offshore. The Respondent employees around 23 staff including a General Manager, Stuart Finlayson ('SF, GM') and an Office/HR Manager, Elinor McLauchlan ('EM, HR').
28. The Claimant is an experienced Mechanical Engineer with qualifications in Design for Manufacture. The Claimant was employed by the Respondent as a Mechanical Design Engineer from 6 May 2019 until 17 April 2020. SF, GM was the Claimant's line manager. The Claimant was involved in two main projects during his employment: the mini-LARs (launch and recovery system) project; and the Forsea Robotics project (modification to a remotely operated vehicle launch system). The Claimant's role entailed designing, calculating and drawing 3D models and 2D drawings, using Inventor Professional, of products for manufacture. The Claimant's dyslexia does not affect his ability to design, calculate or draw 3D models or 2D drawings.

29. Reading and writing lengthier text is not a significant part of his role and the need to do so arises only occasionally. A Mechanical Design Engineer will from time to time be required to write a manual for a product. The Claimant was asked to undertake this task once during his employment in October 2019. The Claimant experienced difficulty undertaking this task which was then assigned to another employee. This was not considered as part of the performance issues which led to his dismissal.
30. In his application for work with the Respondent advised that he utilised MS Word to a high level of efficiency and extensive use of email for communications.
31. The Respondent has a Disability Discrimination Policy which notes that “when an employee becomes incapable of carrying out his or her normal duties because of a disability, consideration must be given to reasonable adjustments to the job and working conditions, redeployment and retraining...A Risk Assessment will require to be completed by the H & S Officer and or Office/HR Manager and the employee”.
32. On 7 May 2019 the Claimant completed a medical questionnaire by ticking a box advising that he was not disabled, by ticking a box advising that he had been diagnosed dyslexic, and by stating that ReadIris pro and Dragon dictate [both voice/ text conversion software] are helpful but difficult to use in an open office environment. On 9 May 2019 the Claimant met with EM, HR to discuss the form. During that meeting EM, HR noted on the form that he had not been diagnosed or self-tested for dyslexia but that the Respondent “will look at the reasonable adjustments requested”. Immediately after the meeting EM, HR advised SF, GM that she had asked for confirmation of his dyslexia and that the software will not affect him medically but may help him with productivity.
33. The Claimant was provided with a copy of the Staff Handbook which he then had read out to him using text/voice conversion software at home.
34. EM, HR sought guidance from the British Dyslexia Association website to better understand his condition, its effect and how to adapt their processes.
35. On 13 May 2019 SF, GM conducted a risk assessment with the Claimant in compliance with their Disability Policy entitled “Disability – Dyslexia in the Workplace (Support/ Adjustments)”.

36. "Slower reading ability" was noted in the risk assessment as a significant hazard with a severity rating of "minor" and a likelihood rating of "probable" (i.e. more than occasional). As a risk control measure it was noted that "consideration may be given to software that can assist with reading". SF, GM advised the Claimant that at work he could trial using their existing voice/ text conversion software. The Claimant was subsequently advised at his Personal Development Review on 1 November 2019 that Dragon dictate software was added as an item to the Respondent's 2020 budget which would enable it to be purchased at a cost of about £500 should the other arrangements prove inadequate.
37. "Miscommunication" was noted in the risk assessment as a significant hazard with a severity rating of "reportable" (i.e. very serious) and a likelihood rating of "probable" (i.e. more than occasional). As a risk control measure it was noted that he should "encourage your fellow colleague/suppliers/customers to give you verbal as well as written instructions".
38. "Open Plan Office/ Distractions" was noted in the risk assessment as a significant hazard with a severity rating of "reportable" (i.e. very serious) and a likelihood rating of "frequent". The Respondent rented open plan office space and were unable to offer him a private office. The Claimant was concerned that an open plan office would be noisy and distracting. As a risk control measure it was noted that "no quiet space is available in the office...switch radio off, ask fellow employees for some quiet time, wear headphones to block out noise/ distractions. Work from home where possible..." Noise cancelling headphones were provided.
39. The Respondent has a homeworking policy and regularly accommodates homeworking. The Claimant was advised at interview and subsequently that he could work from home where his preferred voice/text conversion software (Dragon dictate) was available to him. (The Claimant considered that Dragon dictate was superior to the other software available.)
40. The Claimant did not raise any significant issues with the arrangements made to address his concerns during his employment. The Claimant worked from home for two significant periods at his request from 23 July 2019 to 30 September 2019 and from 6 December 2019 to January 2020. He did not raise any issue with

homeworking other than occasional issues with the IT connection and this was noted in his Personal Development Review of 1 November 2019.

41. He did not advise any issues with using his headphones in the office. He did not raise any issue with the voice/ text conversion software available in the office. At his Personal Development Review on 1 November 2019 he raised an issue with “typing screeds of text...I much prefer dictation, however that is impossible in a noisy office environment. Working from home is probably the best way to maximise the efficiency of that situation I would suggest”. It was agreed that “At times when writing manuals or documents working from home periodically could assist in productivity and time management without distraction...”
42. On 1 November 2019 the Claimant provided the Respondent with his Personal Development Review form completed with his comments. He noted that “There is nothing I dislike about working with team Outreach.” He noted that “Working from home could be better supported. Most of that opportunity is excellent. Some sort of assessment might be good to tailor the opportunity to individual requirements”.
43. On 6 November 2019 SF, GM held a Personal Development Review with the Claimant. He discussed issues of timescales and budgets with the Claimant. It was noted that “The Forssea Project was a particular work scope that ran over budget and was delivered late”. It was recognised that some of this arose prior to the Claimant’s start but it also noted that that issues continued thereafter.
44. At a workstation assessment on 21 January 2020 the Claimant raised issues with his chair and his monitor. The Claimant was provided by the Respondent at his request with a new chair, a new monitor and replacement blinds at a cost of about £800. The Claimant also advised at that assessment that “once the office banter gets going, it can be difficult to concentrate”. Following discussion it was agreed that he would wear his headphones to cut out the office noise.
45. On 19 February 2020 the Claimant was provided with a Company Improvement Report regarding problems encountered with the Forssea Project and lessons to be learned from the mistakes made.
46. On 10 March 2020 the Claimant provided the Respondent with his Personal Development Review form completed with his comments. He noted that “The past year has been good...There is nothing I dislike about working with team

Outreach.” He repeated his comments from regarding homeworking from his 1 November 2019 form.

47. On 19 March 2020 the Claimant attended a meeting with SF, GM regarding problems encountered with the Mini Lars project. The Claimant noted that a colleague had failed in his duties regarding key calculations.
48. On 23 March 2020 SF, GM and EM, HR met with the Claimant to discuss his performance. The Claimant was advised: that he was lead designer on Forssea Project; that the design had failed in multiple areas including choosing the wrong materials for the design which resulted in a catastrophic failure; and that this has caused a major financial loss to the client and the Respondent and major reputational loss to the Respondent. The Claimant was also advised: that he was lead designer on Mini Lars Project; that he failed to check critical calculations; that aspects of the design were over-elaborated, structurally unsound, and not cost effective; and that progress on the project was very slow. The Respondent found that the Claimant failed to meet their performance standard related to design because of these failures. At that meeting the Claimant was given an opportunity to respond. He did not assert that any failure in his performance was connected to his dyslexia or a failure to make reasonable adjustments.
49. On 23 March 2020 the Claimant was dismissed with 4 weeks’ notice because of substandard design work. The Claimant’s dyslexia, or something arising in consequence of it, did not affect his performance as a design engineer on these projects.
50. The Claimant was advised of a right of appeal at the meeting but the letter of dismissal did not advise the Claimant of his right of appeal.
51. On 15 May 2020 the Claimant intimated a grievance regarding his dismissal namely that: he was not afforded the opportunity to appeal; the performance issues were not raised with him previously; and their failure to undertake reasonable adjustments had affected his performance. On 21 May 2020 EM, HR replied advising that: he was dismissed because of substandard design work; the standard of his design work was not affected by his dyslexia or failure to make adjustments; and reasonable adjustments were made.

52. The Claimant found his dismissal devastating and it had a significant effect on his emotional wellbeing. The Claimant advised that up until his dismissal he was in a very good position emotionally.
53. Since leaving employment with the Respondents the Claimant has submitted an average of one application a month for various roles including as design engineer, senior design engineers, operations manager and college lecturer. He applied for roles of equal, greater and lesser seniority and pay than his role with the Respondent. The Claimant secured part-time alternative employment on 16 February 2021 with an annual salary of £15,000.

Observations on the evidence

54. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).
55. The Respondent witnesses came across as entirely credible and reliable in their testimony which was fair and measured, and consistent with the documentary evidence.
56. The Claimant came across as mainly credible and reliable in his testimony but there were occasions when his testimony was inconsistent with that of others and more fundamentally was not consistent with the documentary evidence. For example, the Claimant stated in evidence that he was not previously advised of issues with his performance. However it is clear from the documentary evidence that the Claimant was previously advised of issues with his performance.
57. The Claimant stated in evidence in chief that his ability to design was impacted by his dyslexia when he was subjected to working in a noisy environment because this causes mental drain. Beyond a simple assertion the Claimant gave no detailed evidence regarding this mental drain and its effect on his performance. The Claimant had access to headphones to address the noisy environment. The Claimant was entitled to work from home and did so. In any event, the Claimant's position during cross-examination was that that there were in fact no failures in his performance on the Forssea Project or on the Mini LARs Project. He did not assert that there were failures in his performance on these

projects which related to his dyslexia or something arising in consequence of it. The Claimant's dyslexia materially affected him when reading or writing lengthier text. His design work did not regularly entail reading or writing lengthier text. The psychologists' report from 2005 suggested that he had some difficulty multitasking but in cross-examination the Claimant advised that he used project management software to address this.

58. There were no facts from which the tribunal could conclude that the Claimant's dyslexia, or something arising from it affected his performance as a design engineer on these projects. Instead there were facts which adequately and cogently supported the conclusion that the Claimant's dyslexia, or something arising in consequence of it, did not affect his performance as a design engineer on these projects.
59. The Claimant stated in evidence that he was not advised of a right of appeal. EM, HR stated in evidence that she advised the Claimant of a right of appeal at the meeting but she forgot to put it in the letter of dismissal. The Respondent's Disciplinary and Grievance procedure in the Staff Handbook advises of a right of appeal. The letter of dismissal did not advise of a right of appeal. It is considered more likely than not that the Claimant was verbally advised of his right of appeal but that he had simply forgotten given that the Respondent failed to advise him in writing.

Disability status

60. Under s 6(1) of the Equality Act 2010 ('EA 2010') a person has a 'disability' if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
61. The tribunal must determine whether, the Claimant has a physical or mental impairment, whether that impairment affects their ability to carry out normal day-to-day activities, whether that affect is substantial, and whether that affect is long term. The burden of proof is upon the Claimant.
62. The relevant time for the purposes of determining disability status is the time of the discrimination.
63. In determining disability status a tribunal must take into account any aspect of the Guidance on the Definition of Disability (2011) which appears to be relevant.

64. In general normal day to day activities are things people do on a regularly or daily basis such as shopping, reading, writing, getting washed and dressed, household tasks, walking, travelling and social activities. Effect on ability to participate in professional or working life should be considered such as following instructions, interacting with colleagues, using a computer, driving, keeping to a timetable. Where activities are highly specialised, or are only carried out by a particular person or a small group of people, they would not be regarded as normal day-to-day activities.
65. A substantial effect is more than minor or trivial and goes beyond the normal differences in ability which may exist among people. The following factors should be considered when assessing the effect of an impairment on an activity: the time taken, the way in which it is carried out, the cumulative effect of multiple impairments, the cumulative effect across multiple activities, reasonable modification of behaviour to prevent or reduce the effect, and effect of environmental conditions.
66. Under Sch 1 para 2 of EA 2010 “the effect of an impairment is long term if: (a) it has lasted for at least 12 months; (b) it is likely to last for at least 12 months; or (c) it is likely to last for the rest of the life of the person affected”.

Burden of Proof

67. Section 136(2) of EA 2010 provides that “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provisions”.
68. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37, SC*).
69. The burden of proof is considered in two stages. If the Claimant does not satisfy the burden of Stage 1 their claim will fail. If the Respondent does not satisfy the

burden of Stage 2, if required, the claim will succeed (*Igen v Wong* [2005] ICR 935).

Discrimination arising from disability

70. Under Section 15 of the EA 2010 “A person (A) discriminates against a disabled person (B) if— (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim. (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”
71. There are two separate stages (*Basildon & Thurrock NHS Foundation Trust v Weerasinghe* [2016] ICR 305, EAT). The tribunal must determine whether the Respondent treated the Claimant unfavourably because of something. This involves establishing the reason for any unfavourable treatment. The tribunal must then determine whether the something arose in consequence of the Claimant's disability.

Unfavourable treatment

72. Unfavourable treatment requires the Claimant to have been put to a disadvantage (a “relatively low threshold”), but, unlike less favourable treatment, it requires no comparison with how a comparator was or would be treated (*Williams v Trustees of Swansea University Pension and Assurance Scheme* [2019] IRLR 306).

Reason for the treatment

73. The approach to the question as to the reason for the treatment follows the approach taken to direct discrimination. It is for the Claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has treated the Claimant unfavourably because of something arising in consequence of disability (‘Stage 1’ *prima facie* case). Having a protected characteristic and there being unfavourable treatment is not sufficient (*Madarassy v Nomura International Plc* [2007] ICR 867). The claimant must prove a Stage 1 *prima facie* case regarding the reason for the unfavourable treatment by way of “something more”. At Stage 1 proof is of a *prima facie* case and requires relevant facts from which the tribunal could infer the reason.

Stage 2 – rebutting inference

74. If the Claimant satisfies Stage 1, it is then for the Respondent to prove that the Respondent has not treated the Claimant unfavourably because of a something arising from disability (Stage 2). The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (*Laing*). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 *prima facie* case (*Network Rail Infrastructure Limited v Griffiths Henry* 2006 IRLR 865).
75. The tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the unfavourable treatment is fully adequate and cogent (*Laing*).

Something arising in consequence of disability

76. The something must arise in consequence of the Claimant's disability and accordingly does not encompass associative or perceptive discrimination.
77. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. There may be multiple causal links between the disability and the something that causes unfavourable treatment.

Respondent knowledge

78. Discrimination does not arise if the Respondent did not know, and could not reasonably have been expected to know, that the Claimant had the disability. The burden of proof is upon the Respondent. The Respondent must have actual or constructive knowledge of the disability and of the something arising but does not require to know that the something arising arose in consequence of the Claimant's disability (*City of York Council v Grosset* [2018] IRLR 746, CA)
79. The tribunal must determine whether the Respondent knew, or ought reasonably to have known, that the Claimant was disabled. The Respondent must have actual or constructive knowledge of the impairment and the substantial adverse long-term effect on their ability to carry out normal day to day activities. If the Respondent did not know, the tribunal must consider whether the Respondent ought reasonably to have known in the circumstances. The Respondent may be on sufficient notice as to the impairment, or to an adverse effect on activities, to

merit further enquiries. Furthermore an employer may rely on suitable medical opinion on medical issues of the impairment, its likely effect or their duration, but it should not slavishly accept that opinion on the legal issue of disability status (*Gallop v Newport City Council [2013] EWCA Civ 1583, CA*).

Indirect disability discrimination

80. Under Section 19 of the EA 2010 an employer discriminates against the Claimant if –
 - a. It applies a provision, criterion or practice ('PCP') to the Claimant
 - b. it applies, or would apply, the PCP to persons who do not share the employee's disability
 - c. it puts, or would put, persons who share the same disability at a particular disadvantage compared with persons who don't ('group disadvantage')
 - d. it puts, or would put, the Claimant at that disadvantage ('individual disadvantage')
 - e. the Respondent cannot show it to be a proportionate means of achieving a legitimate aim ('objective justification')
81. The burden of proof is on the Claimant to establish a PCP, group disadvantage and individual disadvantage. The burden of proof is then on the Respondent to establish objective justification (*Essop and ors v Home Office (UK Border Agency) and another case 2017 ICR 640, SC.*)
82. The application of a PCP to a disabled Claimant which gives rise to individual disadvantage is likely to give rise to unfavourable treatment because of something arising in consequence of disability (Section 15) and is likely to give rise to a duty to make any reasonable adjustments (Section 19) (*Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, Court of Appeal*).
83. Paragraph 4.5 of the EHRC Employment Code (2011) states that the term 'PCP' "should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions" The term covers a wide range of conduct and is not restricted to written policies.
84. A one-off decision or act could be a PCP if it carried with it an indication that it will or would be done again in future if a similar situation arose. The words 'provision, criterion or practice' carry the connotation of a state of

affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again (*Ishola v Transport for London [2020] EWCA Civ 112, Court of Appeal*).

85. The Claimant must identify the PCP and the comparator group put to disadvantage.
86. The Claimant may establish particular disadvantage by quantitative means (including statistical comparison) or qualitative means (including expert evidence or witness testimony).
87. There requires to be a causal link between the disadvantage and the PCP but not consideration of the reason why the PCP causes disadvantage (*Essop*).

Failure to make reasonable adjustments

88. Under Section 20 of the EA 2010 an employer has a duty, “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”. The duty also arises where the disadvantage is caused by a physical feature or the lack of an auxiliary aid.
89. Section 15 makes allowances for disability whilst Section 20 requires affirmative action (*Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, EAT*).
90. The tribunal must identify the provision, criterion or practice (‘PCP’) applied, the non-disabled comparators, the nature and extent of the disadvantage, and the reasonableness of the proposed adjustment. The burden of proof is upon the Claimant to establish the application of the PCP and the substantial disadvantage. The burden of proof is then on the Respondent to show that the adjustment was not reasonable.
91. The words ‘provision, criterion or practice’ carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again (*Ishola v Transport for London [2020] EWCA Civ 112, Court of Appeal*). A one-off decision or act could be a practice if it carried with it an indication that it will or would be done again in future if a similar situation arose.

92. The purpose of the comparison with people who are not disabled is to establish whether the PCP or absence of an auxiliary aid puts the Claimant to a substantial disadvantage (*Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT*). A substantial disadvantage is one that is more than minor or trivial.
93. What is a reasonable step is to be considered objectively having regard to all the circumstances of the case. Paragraph 4.5 of the EHRC Employment Code (2011) provides that “The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer’s financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer.” There is no onus on the Claimant to suggest adjustments.

Respondent knowledge

94. Under Sch 8 Part 3 of EA 2020 the Respondent is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the substantial disadvantage by the PCP, a physical feature or the absence of an auxiliary aid.
95. The tribunal must determine whether the Respondent knew, or ought reasonably to have known, that the Claimant was disabled. If so, the tribunal must determine whether the Respondent knew, or ought reasonably to have known, that the Claimant was likely to be placed at a substantial disadvantage (*Wilcox v Birmingham CAB Services Ltd [2011] All ER (D) 73 (Aug)*, Employment Appeal Tribunal) If the Respondent did not know, the tribunal must consider whether the Respondent ought reasonably to have known in the circumstances. The Respondent may be on sufficient notice as to the impairment, and its adverse effect, to merit further enquiries.

Claimant’s Submissions

96. The Claimant’s submissions were in summary as follows –

Disability status

- a. The Claimant has less reading and writing abilities than someone leaving primary school; has difficulty organizing his time and multitasking; and the effects of this are likely to be significant in the workplace. The Claimant's day to day activities are adversely affected and he qualifies as disabled.

Time bar

- a. Claims in relation to reasonable adjustments that took place before 23 March should be permitted out with time as a continuing act because these complaints were part of an act extending over a period - there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably (*Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686, CA*). His requests for reasonable adjustments were turned down on a number of occasions throughout 2020. Alternatively these claims should be permitted on a just and equitable basis under s123 (b) of the Equality Act 2010.
- b. He did not wish to push the issue of adjustments for fear of losing his job or being viewed as a nuisance. Further these complaints are linked to his dismissal and are relevant and necessary.

Discrimination arising from disability

- c. His condition affected his ability to read emails quickly, respond to emails via typing where he did not have a quiet environment and adequate dictation software making him slower at working and thus making activities more draining.
- d. This contributed significantly to his ability to undertake his role. The Claimant was dismissed due to performance issues. These performance issues were caused by something arising from the Claimant's disability.
- e. The Respondent knew that the Claimant had dyslexia. The Respondent carried out a risk assessment entitled 'Disability-Dyslexia in the workplace'. The Respondent knew or could reasonably have known that the Claimant was disabled.

Indirect discrimination

- f. The PCP's applied by the Respondent was an open plan office and their performance management procedure. His performance was affected by

noise and by not having Dragon Dictation software. No consideration was given to the effect the Claimant's disability had on his performance. At the dismissal meeting with the Claimant was not given chance to input. He was measured on the same level without adjustment or consideration. Their approach was not proportionate and cannot be objectively justified.

Failure to make reasonable adjustments

- g. An open plan office affects his ability to focus and read effectively. It would similarly affect others with dyslexia. The earphones purchased were not noise cancelling and were chosen by the Respondent. Working from home presented its own challenges due to the server. Reasonable adjustments would have been better earphones or better access at home.
- h. The Claimant was confident in his engineering ability but struggled to perform and communicate effectively without the application of dragon software and a quiet place to work without distractions.
- i. The Respondent was aware of the disadvantage caused by his disability but they made no adjustment to their reasoning to dismiss the Claimant due to performance issues.
- j. In order to eliminate the disadvantage of the performance standard the Respondent should have taken into consideration the difficulties that the Claimant had highlighted throughout his employment, and any effect these may have had on his ability to work, instead of coming to the conclusion, with no input from the Claimant or a professional that they had no bearing at all.
- k. The Claimant had requested Dragon dictation software to assist him to work effectively and at a pace akin to his peers but this was denied without reason. The dictation software already on the Claimant's computer in the office was not adequate compared to Dragon software having regard to quality of output and speed. The failure to implement this software ultimately led to issues with the Claimant's performance.
- l. the Claimant was dismissed from his role due to performance issues that have arisen from failures of the Respondent to implement reasonable adjustments (noise cancelling headphones, dragon dictation and to consider his disability when penalizing him due to his performance).

- m. A dismissal that has arisen due to a lack of reasonable adjustments is an act of discrimination (*Aylott v Stockton-on-Tees Borough Council* [2010] IRLR 994 (CA))

Remedy

- n. If an employer fails to make reasonable adjustments which would have avoided the Claimant being dismissed compensation from that failure takes into account losses flowing from dismissal.
- o. The failure to make adjustments caused him stress; the dismissal affected his mood to such an extent that his relationship broke down with his fiancé and he is no longer in contact with his son.
- p. The Claimant applied for numerous jobs. He secured alternative employment the week before the hearing commenced and as such mitigated his loss accordingly.

Respondent's Submissions

97. The Respondent's submissions were in summary as follows –

Disability Status

- a. The only independent evidence produced by the Claimant was an Educational Psychologist's Report which was more than 15 years old. The Claimant completed a medical questionnaire in which he indicated that he did not have a disability. His dyslexia had at most a very limited effect on his day to day activities. The Claimant had Personal Development Reviews at which he did not indicate that he was disabled. At no stage during his employment did the Claimant indicate that any problems with his performance were due to dyslexia or disability. The Claimant did not mention dyslexia / disability during his employment other than as referred to above. It is not credible that at induction the Claimant ticked "no" to the question "Do you have a disability?" by mistake.
- b. The Respondent did not know and ought not to have known that the Claimant was disabled. The Respondent was aware that he had dyslexia but not that it had a substantial adverse effect on his ability to carry out day to day activities.

Time bar

- c. The Claimant did not continue to request adjustments and these are accordingly time barred.

Reasonable adjustments

- d. The failure to provide Dragon Dictate did not put the Claimant to a substantial disadvantage given that other suitable software was provided. The Respondent agreed to budget for Dragon should it be required.
- e. The Claimant gave evidence that about 20% of his time would be spent dealing with text, the Respondent gave evidence that the correct figure was about 5% of his time. 95% of the Claimant's time was targeted at specific design using CAD and the Inventor 3D modelling programme that is both dimensional and mathematical in concept to create complex images that does not use words. The Claimant was not able to set out any specific examples when he was required to deal with screeds of text.
- f. The Claimant was not seeking adjustment of the performance criteria or the procedure. In any event use of a Performance Development Review was a proportionate method of achieving a legitimate aim, namely to ensure that they had confidence in the standard of the design work being carried out.

Indirect discrimination

- a. Application of the performance criteria did not put him to a disadvantage. His dyslexia did not affect his ability to meet the performance criteria. The Claimant was not asserting a failure to adjust the performance management procedure and did not specify the adjustment sought.

Discrimination arising

- b. At no stage prior to the termination of his employment did the Claimant assert that his performance was connected to his dyslexia. His performance was not something arising from his dyslexia.
- c. The Claimant was involved in two projects that had fairly catastrophic failures. The Claimant gave evidence that the faults in the Forssea and the Mini Lars Projects were entirely due to the faults of others and in no way due to any problems with his own performance.

- d. At his Personal Development Review of March 2020 the Claimant gives himself extremely high scores in a number of areas of performance and nowhere does he suggest that his performance has negatively affected by his dyslexia or any failure to make reasonable adjustments
- e. Concerns about the Claimant's performance were raised at both his Personal Development Reviews and in correspondence regarding the Forsea Project and the Mini Lars Project
- f. The Claimant's performance related to design and would have been unaffected by the adjustments sought

Remedy

- g. No medical evidence was produced in relation injury to feelings, and any award should fall within the lowest of the Vento Bands
- h. The Claimant has failed to mitigate his losses as he should have applied for jobs in other areas of work.

Discussion and decision

Disability status (Section 6 EA 2010)

98. The Claimant has the mental impairment of dyslexia. Dyslexia is a life-long condition which affects his ability to read and write. The Claimant can read and write short passages of text. However Claimant finds it difficult and exhausting to read and write lengthier passages of text with sufficient accuracy. The Claimant uses voice/text conversion software at home to help him read and write lengthier passages text. Reading and writing lengthier passages of text is a normal day to day activity. The effect of his dyslexia on his reading and writing was more than minor or trivial. During the course of his employment with the Respondent, the Claimant was a disabled person by reason of his dyslexia.

Knowledge of disability

99. The Respondent was aware that the Claimant had dyslexia; that it was a life-long condition; and that it affected his ability to read and write. The Respondent knew that the effect of his dyslexia on his ability to read and write was more than minor or trivial. The fact that the Claimant had categorised himself on a medical questionnaire as not disabled is not wholly determinative of the issue. On their risk assessment the Respondent had noted the Claimant's "slower reading

ability” as a significant hazard with a severity rating of “minor” and a likelihood rating of “probable” (i.e. more than occasional) and had noted that software can assist with reading as a risk control measure. The Respondent knew, or could reasonably have been expected to know, that the Claimant was disabled.

Failure to Make Reasonable Adjustments (Section 20, EA 2010)

100. Staff were required to work in an open plan office which was at times noisy and distracting. The requirement to work in an open plan office amounted to a PCP. The requirement to work in that open plan office without adjustments would have affected the Claimant’s ability to concentrate on reading and writing. This would have put the Claimant to a substantial disadvantage in comparison with persons who are not disabled but for any adjustments.
101. In their risk assessment the Respondent noted “Open Plan Office/ Distractions” as a significant hazard with a severity rating of “reportable” (i.e. very serious) and a likelihood rating of “frequent”. As a risk control measure it was noted that “no quiet space is available in the office...switch radio off, ask fellow employees for some quiet time, wear headphones to block out noise/ distractions. Work from home where possible...” The Respondent therefore knew, or could reasonably have been expected to know, that the Claimant was likely to be put to that disadvantage.
102. The Claimant was provided with noise cancelling headphones. He did not advise of any issues with the headphones. The Claimant was permitted to work from home. The Claimant worked from home for significant periods (as well as from the office for significant periods). The Claimant did not raise any issue with homeworking other than occasional issues with the IT connection. The Respondent did not fail to make reasonable adjustments.
103. The Claimant was provided with the auxiliary aid of voice/text conversion software but he was not provided with Dragon Dictate software. The Claimant considered Dragon dictate to be superior. The Claimant was advised that Dragon dictate software would be provided should the existing arrangements prove inadequate. The Claimant worked from the office for significant periods but he did not raise with the Respondent any issue with their existing voice/ text conversion software. Reading and writing lengthier text is not a significant part of his role and the need to do so arises only occasionally. The failure to provide

Dragon Dictate software (instead of the existing voice/ text conversion software) did not put the Claimant to a substantial disadvantage.

104. The Claimant's role entailed designing, calculating and drawing 3D models and 2D drawings, using Inventor Professional, of products for manufacture. The Claimant was required to meet performance standards related to design. Those performance standards amounted to a PCP. The Claimant's dyslexia did not affect his ability to design, calculate or draw 3D models or 2D drawings. The performance standards related to design did not put the Claimant to a substantial disadvantage in comparison with persons who are not disabled.
105. Accordingly the claim for failure to make reasonable adjustments does not succeed and is dismissed.

Indirect Discrimination (Section 19, EA 2010)

106. The design engineer role entailed designing, calculating and drawing 3D models and 2D drawings, using Inventor Professional, of products for manufacture. Design engineers were required to meet performance standards related to design. Those performance standards amounted to a PCP. That PCP would be applied to other design engineers. The Claimant's dyslexia, does not affect his ability to design, calculate or draw 3D models or 2D drawings. Other design engineers with the same disability would be similarly affected. The application of the PCP did not cause group or individual substantial disadvantage in comparison with persons who are not disabled.
107. Accordingly the claim for indirect disability discrimination does not succeed and is dismissed.

Discrimination arising in consequence of disability (Section 15, EA 2010)

108. The Respondent dismissed the Claimant which amounted to unfavourable treatment. The Claimant was dismissed because of his performance related to design. His performance related to design did not arise in consequence of his disability.
109. Accordingly the claim for discrimination arising from disability does not succeed and is dismissed.

Employment Judge: Michelle Sutherland
Date of Judgment: 06 August 2021
Entered in register: 25 August 2021
and copied to parties