# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **AND** | **Respondent** |
|---|---|---|
| Ms R Jandu | | Marks and Spencer Plc |

**Heard at**: London Central **On**: 8, 9, 10, 11 and (in chambers) on 14 March 2022

**Before:** Employment Judge H Stout
Tribunal Member S Pearlman
Tribunal Member N Sandler

**Representations**
**For the claimant:** Patrick Tomison (counsel)
**For the respondent:** Hitesh Dhorajiwala (counsel)

# JUDGMENT

The unanimous judgment of the Tribunal is that:

a. The Respondent contravened ss 15 and 39 of the EA 2010 by discriminating against the Claimant because of something arising in consequence of her disability.
b. The Respondent contravened ss 20 and 39 of the EA 2010 by failing to comply with its duty to make reasonable adjustments.
c. The Respondent did not victimise the Claimant in contravention of ss 27 and 39 of the EA 2010.
d. The Claimant's complaint of unfair dismissal under Part X of the ERA 1996 is well-founded.
e. If the Respondent had not acted unlawfully in the above respects, the Claimant would not have been dismissed.
f. The Claimant's claims of age discrimination, race discrimination and discrimination because of the Claimant's part-time worker status are dismissed upon withdrawal.

# REASONS

1. Ms Jandu (the Claimant) was employed by Marks and Spencer Plc (the Respondent) from 17 March 2013 until she was dismissed with effect from 31 October 2020. The Respondent says that the reason for dismissal was redundancy. The Claimant in these proceedings brings claims for unfair dismissal under the Employment Rights Act 1996 (ERA 1996) and for disability discrimination (including failure to make reasonable adjustments) and victimisation under the Equality Act 2010 (EA 2010).

## The type of hearing

2. This has been a remote electronic hearing under Rule 46.

3. The public was invited to observe via a notice on Courtserve.net. No members of the public joined, but there were some observers connected to the parties. No issues arose with the internet connection/electronic room.

4. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

## The issues

5. The issues to be determined were agreed and recorded in a Case Management Order by Employment Judge Khan on 11 August 2021. Shortly before this hearing, the Claimant withdrew claims for age and race discrimination and discrimination because of the Claimant's part-time worker status. Those claims are formally dismissed as part of this judgment. The Claimant also refined the list of issues in certain other respects, so that the agreed list of issues at the start of this hearing was as follows:

   <u>(1) Unfair dismissal (sections 95 and 98 of the Employment Rights Act 1996 ("ERA 1996")</u>

   1.1 What was the reason or principal reason for the claimant's dismissal? The respondent says the reason was redundancy.

   1.2 If the reason for dismissal was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. This may involve consideration of whether:

   a. The respondent adequately warned and consulted the claimant.

   b. The respondent adopted a reasonable selection decision, including its approach to a selection pool and the selection criteria.

   c. The respondent took reasonable steps to find the claimant suitable alternative employment.

d. Dismissal was within the range of reasonable responses.

(2) Disability (section 6 & Schedule 1 of the Equality Act 2010 ("EA 2010")

2.1 Was the claimant a disabled person within the meaning of section 6 EA 2010 at all relevant times because of dyslexia at all relevant times?

2.2 If so, did the respondent know or could it reasonably have been expected to know that the claimant was a disabled person at all relevant times?

(3) Discrimination arising in consequence (section 15 EQA)

3.1 Did the following things arise in consequence of the claimant's disability:

a. Making mistakes / errors in her work.
b. Not completing work accurately and on time.
c. Communication feeling rushed and not providing more clarity.
d. Struggling with balancing a lot of work.
e. Accuracy and attention to detail requiring extra review time from management.
f. Communication tone.

3.2 If so, did the respondent dismiss the claimant because of any of those things?

3.3 If so, can the respondent show that dismissing the claimant was a proportionate means of achieving a legitimate aim? The respondent relies on the following aims:

a. The need to retain the best talent by selecting those employees who were best suited and most capable to perform the remaining roles following the redundancy exercise.
b. The need to apply fair and consistent standards and metrics to all employees within the selection pool (subject to any reasonable adjustments).

(4) Reasonable adjustments (sections 20 & 21 EA 2010)

4.1 Did the respondent have the following PCPs?

a. A requirement for her performance to be marked against three selection criteria for the redundancy exercise.

4.2 Did any such PCP put the claimant at a substantial disadvantage in compared to someone without the claimant's disability in that she was marked down in the redundancy scoring process (on / around 15 September 2020) which resulted in dismissal?

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

4.4 Did the respondent fail to take such steps as were reasonable to avoid this disadvantage?

a. Discounting any disability-related effects when assessing the claimant against the redundancy selection criteria: Leadership Skills, Technical Skills and Behaviours.

(7) Victimisation (section 27 EA 2919)

7.1 It is agreed that the claimant did the following protected acts:

a. On 2 September 2020 she verbally raised complaints about race discrimination to Lauren Gaskell at the first individual consultation ("IC1") meeting.

b. On 4 September 2020 she verbally raised complaints about race, age and disability discrimination to Lauren Gaskell at the IC2 meeting.

c. On 15 September 2020 she verbally raised complaints about race, age and disability discrimination to Lauren Gaskell at the IC3 meeting.

d. On 21 September 2020 she submitted written complaint of race, age and disability discrimination as part of her appeal.

e. On 2 October 2020 she verbally raised complaints about race, age and disability discrimination to Hannah Waller at the appeal meeting.

f. On 28 October 2020 the letter from her solicitors raised complaints about race, age and disability discrimination to the respondent.

7.2 Did the respondent subject the claimant to any alleged detriments as follows:

a. On/after 2 September 2020, by Lauren Gaskell failing to adequately investigate the concerns of race, age and/or disability discrimination – with particular respect to the disability discrimination complaint, there was no consultation with or seeking of advice from OH.

b. On 15 September 2020, by Lauren Gaskell selecting the claimant for redundancy with effect on 31 October 2020.

c. On/after 21 September 2020, by Hannah Waller and/or Phillip Dale failing to adequately investigate the concerns of race, age and/or disability discrimination at the appeal stage – with particular respect to the disability discrimination complaint, there was no consultation with or seeking of advice from OH.

d. On 2 October 2020, by failing to provide the claimant with a diverse appeal panel as she had requested.

e. On 16 October 2020, by Hannah Waller dismissing her appeal.

f. On 16 November 2020, by Joanna Allen dismissing the complaints raised by her solicitors.

7.3 If so, was this because the claimant did a protected act?

## The Evidence and Hearing

6. We read the parties' witness statements and written submissions and the documents in the liability bundle to which we were referred. We also admitted into evidence one additional document as detailed in the judgment below.

Although the parties had prepared a remedy bundle for this hearing, the hearing was listed for liability only and we did not look at the remedy bundle.

7. We explained our reasons for various case management decisions carefully as we went along.

## Adjustments

8. We agreed to make the following adjustments for the Claimant:
    a. Allowing her additional time as needed to read text from the statements or bundle;
    b. Ensuring that questions were kept short;
    c. Allowing additional breaks during cross-examination (we stopped every hour rather than every 1.5 hours and indicated that we could break more frequently if required).

## The facts

9. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

### Background

10. The Respondent is a well-known retailer with stores across Great Britain. It employs approximately 80,000 people, and approximately 370 people at the site where the Claimant worked.

11. The Claimant was employed by the Respondent from 17 March 2013 as a Layout Planner until she was dismissed with effect from 31 October 2020. The Claimant had also worked for the Respondent previously from around 23 August 1998 but had a six-week break in service in 2013.

12. From 2019 the Claimant's line manager was Miss L Gaskell (Clothing & Home Layout Planning Manager). Prior to that, it was Ms Sharp. The Claimant worked part-time (32 hours per week).

13. The Claimant had particular responsibility for the Menswear Business Unit (BU), which was the second largest unit. Team members are given responsibility for their own time management and can take breaks when required. The Claimant also worked from home two days per week.

The Claimant's alleged disability

14. The Claimant has the specific learning difficulty Dyslexia, which was diagnosed while she was at University studying for a BA in Interior Architecture and Design when she was aged 31 in 2009.

15. A Study Aid and Study Strategies Report was prepared for her in relation to her support needs with the University course dated 8 April 2020. This report was based on an assessment by Roger Makepeace, Chartered Clinical Psychologist in November 2009. The Claimant has lost her copy of that assessment and has not been able to obtain another copy. Elements of the lost assessment are reflected in the Study Aid Report. The Claimant's GP, Dr Rahman, has confirmed by letter dated 10 September 2021 that Dyslexia is a lifelong condition and does not require repeat assessments. We can therefore rely on what the Study Aid Report says about the Claimant's abilities as being still relevant to the events with which this case is concerned. What the Study Aid Report says about the Claimant's needs and adjustments required to pursue a course of academic study is less relevant, but some of the skills required for her job were similar (in particular, preparing presentations is the same in both contexts).

16. The Report states that the Claimant:

    a. *"has the specific learning difficulty known as dyslexia";*
    b. *"has weaknesses in working memory";*
    c. *"has weaknesses in…. her ability to process visual information at speed";*
    d. *"Single word reading is in the below average range";*
    e. *"decoding skills are not well developed"* and *"speed at which she decodes words appears to be slow also";*
    f. *"sentence comprehension is in the below average range";*
    g. *"spelling skills in the low range";*
    h. *"some issues with structure and spelling in her written work";*
    i. *"difficulties with sentence comprehension";*
    j. *"issues with tracking lines of text when reading … slow when reading and needs to reread lines of text";*
    k. *"needs to have a break after 20 minutes of reading due to concentration issues";*
    l. no issues were identified with communication or social interaction.

17. In terms of what the Claimant reported at that time, the Report records that the Claimant did not complete A Level qualifications because she found the workload difficult, and that while employed as an Assistant Buyer for the Respondent before enrolling on the course, she *"experienced issues in her employment with tasks involving reading and replying to complaints. She feels that her listening skills were affected due to her auditory working memory"*. She reported difficulties with identifying *"errors in her work including homophones as well as incorrect spelling, grammar and punctuation. She is also inaccurate when reading. Friends and family support her currently with proofreading"*. It was noted that the Claimant's *"copying*

*speed, spelling issues and working memory would affect note taking"* and that she *"has issues taking notes and listening at the same time"*. The Claimant felt that she did not require support with time management and organisation in relation to her academic course.

18. The Report made recommendations for a wide range of adjustments for the Claimant in the University context including support with proofreading, access to notes prior to taught sessions and additional support when note taking, being informed of assessments in advance to allow her to plan her time effectively to meet deadlines, and a range of computer software. It was also recommended that she have one-to-one support with a specialist tutor for between 1 hour per week or fortnight.

19. The Claimant has also provided us with the British Dyslexia Association Code of Practice for Employers. This provides guidance as follows in relation to the condition of dyslexia generally:-

> • "Dyslexic people can be particularly prone to stress due to managing workloads without effective coping strategies" [pg. 118]
>
> • "Dyslexia can affect organisational, reading and writing skills and also the ability to manage and process information"[pg. 119];
>
> • "Selection criteria should not include fluency, speed of response or ability to process complex information quickly as these will indirectly discriminate against dyslexic candidates" [pg. 123 ].
>
> • "Some dyslexic people need more time to take on board what is being said and to organise a reply. They may have difficulty with verbal fluency and recalling the right word, particularly in the heat of the moment"[pg. 123];
>
> • "Listening, organising what to write and writing while continuing to listen can cause system overload" [pg. 127].

20. The Claimant in her witness statement said (and we accept as it is consistent with what she reported at University) that in childhood (prior to her diagnosis with Dyslexia) she found it extremely hard to concentrate in class at school as she could not understand the text, information or other reading material; she found spelling more difficult than her brothers found it; and she achieved 4 GCSEs at A-C grade with a lot of effort and occasional extra tuition.

21. Regarding her experience at work and during adulthood she said in her witness statement, and maintained under cross-examination, that the following matters appear to her to be connected with her Dyslexia: she has difficulties with reading, particularly long documents; she needs to re-read lines of text a couple of times before she can understand and follow what is being said, which is burdensome and tiring and she requires regular breaks after 15-20 minutes of reading; she finds it difficult to read text from a computer screen and finds it hard to scan or skim text; she struggles to take

notes when someone is talking as she cannot write as fast as the person is talking; she makes spelling mistakes; she struggles to focus and concentrate in noisy environments; she has difficulties managing workload as it takes her longer to do everything; her confidence has been impacted in front of senior people which causes her anxiety as she worries about coming across wrong or not being able to articulate herself properly. We accept the Claimant's evidence as to her perception and experience as being genuine. It has been consistent from what she said in redundancy consultation interviews, through to her claim form, witness statement and oral evidence in these proceedings.

22. In oral evidence, the Claimant told us (and, for the same reasons, we accept) that she is always conscious of her Dyslexia. She uses spell check on the computer but this does not pick up all faults/errors especially regarding sentence construction. Her email style tends to be brief, often bullet-pointed and emails we have seen do contain errors of spelling and construction. The reason her emails contain such errors, and the reason they are brief in style and she does not elaborate on points, is not because she is rushing. She said: *"if I knew that [more detail was required] then I would do that but I didn't – me writing a paragraph is the hardest thing to do as my words are muddled up – that is why I did bullet point – all my emails are very very similar – for me it is not rushed, it might be rushed for someone who can write a lot – I have taken my time to do it"* and *"[not going into enough detail is] because I don't have all the correct long words to say so I link it to what is in my head – [Miss Gaskell] and [Ms Sharp] write amazingly well both of them – I would never write an elaborate email, [mine] were very simple"*.

23. Regarding workload management, the Claimant in evidence said that in the work context her Dyslexia did make it more difficult for her to manage her workload than others as it took her longer to do everything. In oral evidence, in response to it being put to her that in the Study Aid Report she did not report difficulty managing her workload at university, she expanded on this as follows: *"what is on that report is not how my day goes, not every single part of a condition can be assessed like that – if I am slower at reading and writing because I am trying to get my sentences together, I am trying to do the same work in the same time as everyone else but thinking twice as hard in my head"*. When it was suggested by the Respondent that if that was the case why was she always willing to take on more work, she said that she had not seen herself as struggling because prior to the redundancy process as no one had ever suggested she was. She wanted *"to deliver the best results for [Miss Gaskell] as I could as a keen employee would – at no point was I told that I was making errors or struggling with the workload – most days I would say I do still have things to do – this point about why things aren't done – I never got that feedback"*.

24. Miss Gaskell had observed that the Claimant had a very 'compliant' approach to work in that she tended not to challenge or question, but just note what was asked and get on with the task. The Claimant also links that to Dyslexia. She said that her poor working memory affected how she absorbed things and she was always trying to simplify. To make things as simple as possible she always tries to take a checklist approach.

25. Regarding her ability to engage critically with oral and written materials at work, the Claimant said that her Dyslexia could affect that too. Because her working memory affects how she absorbs things, she would often simply make a note of oral information rather than questioning it, and because it takes her longer to read things if something needs to be done at speed or against a deadline, she might not have time to engage critically with information in writing.

What the Claimant told the Respondent about her alleged disability prior to the redundancy process

26. The Claimant told her line managers, Ms Sharp and then Miss Gaskell, that she had Dyslexia. With Ms Sharp the Claimant requested specific adjustments including if she could colour code important parts of emails as her emails were long and the Claimant found she struggled to read all the text. Ms Sharp never did this, despite reminders by the Claimant. Ms Sharp did, however, proof read important emails for all members of the team. The Claimant had also asked her to do this for her in particular because of her Dyslexia.

27. The Claimant also received support with proof-reading and structuring emails from her colleague Ms Stables. The Claimant felt more comfortable asking her than her line manager. The Claimant would ask for support from Ms Stables on a weekly basis.

28. When Miss Gaskell took over as the Claimant's line manager in 2019 the Claimant told her that she had Dyslexia. Miss Gaskell says that the Claimant told her Dyslexia did not impact her work at all. The Claimant disputes this. Mr Dhorajiwala for the Respondent pointed to the fact that the Claimant says in her witness statement she did not tend to 'broadcast' her disability, but we do not see this assists with this point: the Claimant's evidence in that same paragraph was that she was 'open and clear' with everyone at work about her Dyslexia. The issue for us here is whether the Claimant actually told Miss Gaskell that it 'did not impact her work at all' (as Miss Gaskell contends) or simply whether the Claimant did not ask for any adjustments from Miss Gaskell. We find it was the latter. It is implausible that the Claimant would have said that Dyslexia did not impact her work at all as that would have been inconsistent with her Study Aid report, the position she had previously taken with Ms Sharp and everything she has said subsequently.

29. Apart from the above requests to Ms Sharp, the Claimant did not seek any other adjustments for her Dyslexia from the Respondent prior to the redundancy process with which this case is concerned. This was because she did not realise that she may need any additional support as prior to the redundancy exercise no one had ever raised any concerns with her about her performance or her style of communicating.

30. The information that the Claimant gave to the Respondent about her alleged disability during the redundancy process we record at the appropriate point below.

The Claimant's performance assessments prior to the redundancy process

31. The Respondent prior to 2020 had a performance appraisal process with four grades: Missed, Good Performer, High Performer and Exceeding. The Claimant's most recent formal assessment occurred before the events of this claim.

32. The Claimant had no formal 1-2-1s with Miss Gaskell between Miss Gaskell joining in November 2019 and lockdown in March 2020, but they did have informal 1-2-1 meetings approximately every other week. In a 1-2-1 in March 2020 the Claimant alleges that Miss Gaskell said she was a 'High Performer'. Miss Gaskell denies this. She said in evidence to us that she said the Claimant was showing elements of 'high performance'. She said that she would not have said anything more as she was not doing a formal assessment of the Claimant. However, when the Claimant said to Miss Gaskell in her second redundancy consultation meeting (IC2) that she had said she was a 'high performer' the agreed notes record that Miss Gaskell replied that she had said that the Claimant had areas where she performed highly and that the Claimant was *"one of the high performers on the team"*. We therefore find that this is what Miss Gaskell said. It does not follow (and the Claimant does not assert) that Miss Gaskell was formally grading her as a High Performer for the purposes of the Respondent's formal appraisal process, but the words 'high performer' were used, as the Claimant contends.

33. In April 2020 Marino Solomou wrote to Miss Gaskell commending the Claimant for being *"absolutely brilliant in delivering Manchester plans … Technically she has been fantastic … Her level of support is rare and I just wanted to recognise this and convey my appreciation and absolute thanks for this standout individual"*. Miss Gaskell said that the Claimant had a particularly good relationship with Mr Solomou and spent more time working for him than for others on the team.

34. At no point in any 1-2-1 did Miss Gaskell give feedback to the Claimant about her communication tone in emails, or about inaccuracies in plans, or about being overly-compliant when asked by others to do something. Although we have been shown some email examples of where Miss Gaskell felt she was picking the Claimant up on an inaccuracy, we have not been shown (or told about) any examples where Miss Gaskell was explicit in this respect. The closest is page 476 where Miss Gaskell writes: *"Also, how come WW and Lingerie drop grades despite gaining footage?"* which sounds like someone pointing out a mistake. Other examples given by Miss Gaskell do not. Thus page 478 *"can I ask you a massive favour … can you please add text boxes onto each BU just to show the name of BU and sqft? As it is going to Steve* 😉*"* very much sounds like an extraordinary request, and that was how the Claimant understood it. And page 477: *"and I think maybe remove the yellow beauty perimeter panels from where is now Lingerie?"*. Miss Gaskell believed

this to have been an error on the Claimant's part, but the Claimant gave evidence (which we accept) that there is *"no way"* she could have known that was needed without Miss Gaskell saying. She thought maybe Miss Gaskell had got some information about this from a meeting she had gone to that the Claimant had not.

The redundancy process

35. The Coronavirus pandemic beginning around March 2020 significantly affected the Respondent's business.

36. On 1 April 2020 the Claimant and many other employees were placed on furlough. She was paid full pay until end of July, and thereafter 90% of her salary.

37. In around July 2020 the Respondent decided to restructure its business and began a formal process of redundancy consultation with its Business Involvement Group (BIG) in relation to proposed changes to the Retail Operations, Field Support and Property groups. The BIG is the employee representative body for the Respondent.

38. The Respondent's stated aim in restructuring its business was to work *"better, faster and more flexibly"* (194).

39. Selection criteria were agreed with the BIG. Scoring was to be by reference to the 12-month period prior to furlough, against criteria which were weighted as follows:-

    a. M&S Way (Behaviours) – 20%;
    b. Technical Skills – 30%;
    c. Leadership Skills – 50%.

40. The Claimant was a Clothing & Home Planner in a team of 11 and it was proposed that the team would be reduced to six roles. Miss Gaskell managed five members of the team and Ms Taylor managed five. The two teams were pooled together.

41. Prior to the assessment, members of the team were given the opportunity to provide their own evidence for managers to consider during the assessment. The Claimant did so (409-411).

42. The Claimant and her colleagues were then scored by Miss Gaskell and Ms Sharp, with contribution from Sam Coultate (Head of HR) and Nicola Taylor (Planning Manager). They had all been trained on skills and assessment and individual consultations in August 2020 and were supported by Ms Coultate and Ms Taylor who had prior experience in skills assessment. Miss Gaskell had no prior experience of such assessments.

43. Individuals were scored on a four-point scale where 1 corresponded to "Missed", 2 was "Inconsistent", 3 was "Consistent" and 4 was "Exceeds". Assessment was based on qualitative assessment according to descriptors that were set out in the agreed assessment criteria (224-226 / 402-405). The assessment criteria for Technical were intended to be adapted as necessary to specific departments, but there was no specific agreement as to what adaptations should be made for the Claimant's department. Scoring was submitted to HR on an anonymous basis for a consistency check.

44. The Claimant scored 2 on Behaviour and 3 on Leadership and Technical Skills. This gave her an overall score of 70%. Four others scored 100% and were not selected for redundancy. Three others scored 55% and were selected for redundancy. Had the Claimant scored one more point for Behaviour she would have tied with two other members of staff. We have no evidence as to what the Respondent would have done in the event of a tie-break. That point was not reached in the discussion that Miss Gaskell had with her colleagues. Because of the weighting, had the Claimant scored one more point on Leadership or Technical, she would have been retained in employment without the need for a tie-break.

45. In August 2020 the Claimant was notified that she was at risk of redundancy and invited to a first individual consultation (IC1) meeting on 2 September 2020 (414-417). The Claimant was offered the opportunity to bring a companion but chose not to. At this meeting the Claimant's scores were discussed with her and she was given an opportunity to ask questions about the scoring and the process. The Claimant challenged what Miss Gaskell said about her tending not to challenge or debate everything with her line managers, saying that she believed she did with stakeholders. The Claimant was concerned that she had not had feedback previously that she was a poor performer; Miss Gaskell sought to reassure her that that was not the point of the process, which was about calibration against others for the purpose of making a selection. The Claimant raised concerns about whether her selection had been influenced by the fact that she works part-time or her race. The Claimant was keen to emphasise however that this was not about Miss Gaskell. She said *"I have never had a better one to one in my life than the one you gave me so thank you so much for everything you have done and how you made me feel …".* Miss Gaskell directed the Claimant's attention to the vacancies available on the Respondent's careers portal.

46. As with all redundancy consultation meetings and the appeal meeting in this case, the Claimant was provided with notes of the meeting to review and what we have in the bundle are therefore agreed records of all meetings.

47. As is clear from the notes of the meeting, the Claimant was not at this meeting provided with the written commentary on her scores that Miss Gaskell had prepared with colleagues when assessing her. This was provided afterwards.

48. The Claimant was sent a letter dated 2 September 2020 confirming the outcome of the meeting and that there would be a second individual consultation (IC2) meeting on 4 September 2020. Miss Gaskell and the

Claimant exchanged emails between the two meetings, the Claimant asking a number of questions that Miss Gaskell answered. She also asked for examples of mistakes she had made as she felt these had not been pointed out to her so she had had no opportunity to improve. Miss Gaskell indicated that these would be discussed at IC2 (422).

49. On 4 September 2020 there was a second individual consultation meeting (428). The Claimant was accompanied by BIG representative Jos Howell. Miss Gaskell discussed with the Claimant her concerns about unfair/discriminatory treatment and explained that any appeal would deal only with the selection process and if she wanted to complain about historic matters she would need to raise a grievance. They discussed vacancies but the Claimant did not want to apply for them or to discuss vacancies further as she was too upset.

50. At this meeting the Claimant raised her Dyslexia. She said that Dyslexia affected the tone of her emails because: *"it can take me more time and affects the way I write … this affects my reading and writing and for this to be raised as evidence is appalling"*. Miss Gaskell said this was not about the Claimant's Dyslexia. This was her immediate reaction. She has no special expertise in relation to Dyslexia and its effects. It was her personal belief. The Claimant asked for examples on which the assessment had been based. Miss Gaskell indicated that may form part of the appeal process. Miss Gaskell reiterated that none of the assessment was linked to the Claimant's Dyslexia but was because, *"Sometimes communications appear rushed and not thought through before you send, it is not about your ability to send or write email nor about how you have written them and I know your confidence has grown on that"*. The Claimant responded: *"Writing email is worst part of my day, it takes me ages to write an email. Every single email I send out I have always checked and checked again, which is why I sometimes ask for help from my peers and line managers."*

51. The Claimant asked for more examples in relation to what Miss Gaskell had put in the commentary on the scores and Miss Gaskell referred to the Hedge End example (now page 476 in the bundle) where the Claimant had failed to keep square footage and grades consistent when updating a plan.

52. At this meeting, the Claimant also suggested that there had been unconscious bias in the decision-making process as Ms Sharp was involved and on one occasion Ms Sharp had wrongly assumed that it was the Claimant who had sent her a gift of products from India. Ms Sharp had apologised for this but after that the Claimant said she had felt 'singled out'.

53. At the end of the meeting, Miss Gaskell explained that the scores were agreed and supported and could not be changed at this stage. An appeal was where that could be considered. Miss Gaskell emphasised this was not about poor performance, it was all marginal and that the Claimant 'dipped into' excellent and high in some areas. Miss Gaskell indicated that she did not feel she could give any more examples.

54. The meeting had lasted some time and it was unclear at the end whether there should be an IC3, but the Claimant wanted a further meeting and so a third consultation meeting was arranged for 15 September 2020 (435).

55. The Claimant was accompanied to IC3 by Isabel Bielski. The Claimant now raised unconscious bias as to race, age and disability as she said the two oldest members of the team, and the two BAME members of the team, had been made redundant. (It was not correct that the two oldest had been made redundant. Some older people had been retained and four people younger than the Claimant were made redundant.) The Claimant confirmed that she had not applied for any internal roles. At this hearing, she added that she had not felt able to do so as she was so upset about losing the job that she loved and leaving the employer for whom she had worked 'for 22 years'.

56. Regarding her Dyslexia, at this meeting the Claimant said *"in the evidence it says that I sometimes need to think about the tone and audience of my emails, this is direct result of dyslexia and I feel this is unfair and unjust"*. She asked for examples 'other than the Hedge End one' but Miss Gaskell did not give her any, just reiterated that the selection process had not been influenced by race, age or disability. She said *"Regarding the comment re tone in the emails, this is very different, and I am absolutely clear this is not linked to dyslexia. This is not about the forming of an email, or errors or written style, it was relating to the tone for the end user – sometimes when you sent engagement that perhaps didn't reflect the audience or that you had give it the right context or time. It was more around taking on a lot of work at the same time and then maybe perhaps an email would go out with a tone that was not right for the situation – this would again be dealt with on the spot and was on occasion, not always"*. Miss Gaskell took a break from the meeting to take advice from HR and came back reiterating that she was 'absolutely confident' that the selection had nothing to do with the Claimant's age, race or disability.

57. There are notes of Miss Gaskell's conversations with HR on 7 September 2020 (547), but not of any conversation on 15 September 2020. The notes on 7 September do not indicate that Miss Gaskell took any advice about the Claimant's Dyslexia. Miss Gaskell in oral evidence thought she had asked HR about the Claimant's dyslexia and we accept it is possible she mentioned it when she spoke to them on 15 September 2020. However, it is clear that there was no detailed discussion and Miss Gaskell would not have asked for advice on an open basis as her position was that the assessment of the Claimant was unaffected by her Dyslexia.

58. By letter of 15 September 2020 the Respondent notified the Claimant that her employment would be terminated in 7 weeks' time by reason of redundancy and that she would be paid 100% of her salary for the notice period. She was reminded that she was entitled during this period to look for alternative employment and attend job interviews.

59. At the end of the process, six staff remained in employment, one of whom also has Dyslexia. The staff remaining in employment included Mr

Richardson and Ms Murphy from Miss Gaskell's team. Four others including the Claimant and Ms Stables were dismissed. One other member of staff was made voluntarily redundant.

Appeal

60. The Claimant appealed (441). In her appeal form she complained about race discrimination, age discrimination and disability discrimination in the process, and about the assessment of her work, in particular that she had been marked down for behaviour when she had been told not to concentrate on that when providing self-assessment evidence. In relation to disability, what she wrote in the appeal form included the following:-

> As my line managers are aware I have dyslexia. This causes me to get words mixed up and spell incorrectly. I have been very open about this disability with managers and colleagues. I have never been offered any specialist software to assist me with this condition – the only offer of help I was given was a previous manager offering to write emails in different colours and fonts, which was never followed up or actioned.
>
> The dyslexia affects the way I write however this has never been discussed with me. For the 'tone' of my emails to be raised as a key point on the evidence form is extremely upsetting.
>
> My previous line manager of 7 months proof read every single email I sent and never raised the tone of my emails with me. It was mentioned at the last IC meeting that the dyslexia did not play a part in the selection process but the comments in the notes of the meeting state my 'emails can appear rushed and not thought through before they are sent'. This is a direct result of the dyslexia. Because words get muddled I sometimes use the wrong words which can have an impact on the tone. I am aware of this but again, no one has ever spoken to me about this before.
>
> As mentioned, my previous line manager saw every email that I sent so why this was never mentioned - why was I not made aware when I drafted or sent an email that the tone was not right. I question why I was never made aware of times when the tone of emails was wrong. How is a person expected to develop if they are not made aware of where they are falling short? Again, I have repeatedly asked for examples of emails sent by me, in the wrong tone.
>
> I strongly believe that using my written communication in this way as part of the selection process is unfair and unjust. There is no mention of my verbal communication (apart from challenging more) so I am led to believe I communicate well.

61. This text was in a part of the appeal form that did not print out when printed from the Excel file in which it was created and was not in the Tribunal bundle at the start of this hearing. On the print-out it was possible to tell there was text missing as one line of text was incomplete. The Claimant had spotted this printing/viewing problem when submitting the appeal and in "Additional Information" indicated that it was necessary to open the box out in full. After the Tribunal questioned whether there was text missing from the print-out on Day 2 of the hearing, the Respondent provided a complete copy on Day 3, which was after Ms Waller (who heard the appeal) had given evidence. The parties were content to proceed without recalling Ms Waller on the basis that

she knew or ought to have known what was in the complete appeal form. However, we observe that the overwhelming impression is that Ms Waller did not read the text missing on the appeal form because both her decision letter, and her answers in oral evidence, indicated that her understanding of the Claimant's appeal did not include what the Claimant had written in the part of her appeal form that did not print out.

62. Ms Waller (Lead Programme Manager) was appointed to deal with the Claimant's appeal. She did not know the Claimant previously.

63. The Claimant in her appeal form requested a diverse appeal panel *"due to the high level of inconsistency across all areas"*. Ms Waller did not notice the Claimant's request for a diverse appeal panel so no action was taken in relation to it.

64. On 2 October 2020 the Claimant attended a meeting with Ms Waller to discuss her appeal (445). The notes of that meeting, which were taken by a note-taker (not Ms Waller), indicate that Ms Waller asked the Claimant why she believed that her disability had affected the outcome, to which the Claimant is noted as answering: *"RJ explains as in her appeal she believes the tone and email errors have let her down in being selected. She states she has always been transparent about her disability since diagnosed in her 30s whilst at uni and can sometimes take longer to digest emails or has errors within her emails. She has never received negative feedback on her emails before IC"*. Ms Waller maintained in oral evidence that this had not been the Claimant's answer and that the Claimant had in fact said that her Dyslexia only affected her spelling. We reject Ms Waller's evidence in this respect which is inconsistent with the agreed notes of the meeting. It is also implausible that the Claimant said what Ms Waller says she said as it is clear from the Study Aid report that the Claimant has known for over a decade that her Dyslexia affects more than her spelling.

65. Ms Waller has Dyslexia herself but has no special expertise in Dyslexia beyond her own experience.

66. Ms Waller investigated by seeking further evidence from Miss Gaskell about her assessment of the Claimant which Miss Gaskell provided on 7 October 2020 (467). Miss Gaskell gave a detailed commentary on the Claimant's performance, attaching examples of emails and work done by the Claimant. Ms Waller thought that she must have sent Miss Gaskell's further evidence to the Claimant, but it is agreed between the parties that she did not and that the first time these documents were seen by the Claimant was when they were sent to her solicitors in September 2021 as part of disclosure in these proceedings. It follows that the Claimant did not have an opportunity to comment on Miss Gaskell's further evidence, nor did Ms Waller ask the Claimant any questions arising from it.

67. Ms Waller did not interview the Claimant's previous line manager, Ms Sharp, as she was on maternity leave at the time.

68. Ms Waller decided not to uphold the Claimant's appeal and set out her reasons in a letter dated 16 October 2020 (508). This is a detailed letter, but it does not deal with the Claimant's contention that her disability, or weaknesses that are a direct result of her disability, had been unfairly counted against her in the scoring process. The letter deals with the Claimant's points about disability on the basis that her complaint was that her disability had 'influenced' the selection (i.e. in the manner of a direct discrimination complaint). The letter concludes that none of the things for which Miss Gaskell had criticised the Claimant had anything to do with her disability and that because the Claimant had not raised her disability with Miss Gaskell *"as an issue"*, Miss Gaskell had not 'factored it into' her decision-making. Ms Waller uses the same language of 'factoring in' when considering the Claimant's complaint of age discrimination, which further indicates that she did not appreciate that the Claimant's complaint was (in essence) that adjustments should have been made because of her disability, rather than (as with age and race) a complaint that disability had unconsciously influenced the decision-making process. Ms Waller's conclusion that the matters raised had nothing to do with the Claimant's Dyslexia was based on Miss Gaskell's assertion to that effect, and advice from HR. Neither Ms Waller or HR considered it necessary to refer the Claimant for Occupational Health input. Nor did the Claimant suggest this.

69. In her outcome letter Ms Waller further concluded that the Claimant had not been mis-advised or 'set up to fail' with her self-evidence form. The Claimant had not looked at the guidance available on the Respondent's intranet in detail. The Claimant had not been provided with specific feedback on performance issues, other than 'on the spot' corrections in response to work done. The Claimant had had performance reviews with her line manager every other week, but these were not formal or documented. Ms Waller recommended that they should be documented in future.

70. As already noted, Ms Waller concluded that the Claimant's Dyslexia had not been taken into account in deciding to dismiss her. She also concluded that the things that the Claimant was marked down for were not related to her age or her race, although the Claimant's specific instances of racism allegations were passed on to HR to be dealt with separately. In oral evidence Ms Waller denied that she had been 'displeased' by the Claimant's discrimination complaints, or that she had taken any different approach to the appeal as a result of the nature of the complaints made.

Race discrimination investigation

71. The Claimant's complaints of race discrimination between July 2018 and July 2019 were subject to a separate investigation by Mr Dale (Head of Commercial Contract Management CSSC). He met with the Claimant on 26 October 2020 (513). He then investigated by interviewing the three individuals against whom the Claimant had made allegations: Ms Field (C&H Planner) on 29 October 2020 (528); Mr East (C&H Space Strategy, Grading & Analytics Lead) on 30 October 2020 (532); and, Ms Sharp (C&H Layout

Planning Manager) on 16 November 2020 (536). Mr Dale noted that there were inconsistencies between the Claimant's version of events and that of Ms Field, Ms East and Ms Sharp, but he did not think that they were particularly important or that he would be able to resolve them one way or another by re-interviewing the Claimant. He did not re-interview the Claimant, but wrote to her by letter of 18 November 2020 to give her the outcome.

72. He dismissed her complaint about Mr East on the basis that, although he could not be 'certain' that Mr East did not say 'BAME does not have a W' in it as the Claimant had alleged, the context of it was such that there was no racist or racially motivated intent in his comments. As the Claimant submits, Mr Dale did here essentially prefer Mr East's version of events over the Claimant's version of events, both as to what was said and as to the context in which it was said.

73. Mr Dale also dismissed the Claimant's complaint about Ms Sharp assuming that a gift of spa products from a supplier based in South London was from the Claimant. However, he did so on the basis that he considered that Ms Sharp had provided a sufficient, non-racial basis, for her assumption in that she thought they were a Hammam set and the Claimant had previously recommended a Hammam experience and lived in South London. However, Mr Dale's conclusion was nuanced as he acknowledged that without knowing that context Ms Sharp's assumption could reasonably be perceived as offensive and he recommended that she complete Diversity and Inclusion training on her return from maternity leave.

74. Mr Dale found that Ms Field's comment (saying *"no because I'm normal"* in response to the Claimant asking her whether she would be attending an Inclusion & Diversity session) had been inappropriate and ill-judged, although he noted that she had recognised that almost immediately and texted to apologise and acknowledged that this is why she needed more diversity and inclusion training. He also did not consider that the remark was made 'with any racially driven intent'. In oral evidence, he explained that this was because he thought Ms Field would have said the same about any minority Diversity and Inclusion group meeting, such as LGBTQ. He acknowledged that this incident demonstrated why Diversity and Inclusion needed to be a *"clear priority"* and recommended that Ms Field complete that training as a matter of priority.

75. In oral evidence Mr Dale added, emphasising a point at the end of his letter, that the Respondent's policy is for incidents in the first place to be dealt with informally and he felt that this was exactly what the Claimant had done with Ms Sharp and Ms Field as she had challenged the conduct when it happened and had not seen the need to raise it formally at the time.

<u>The scoring in detail</u>

76. Scoring was against assessment criteria agreed with BIG as detailed above.

77. Miss Gaskell's notes recording why she (in agreement with her colleagues) scored the Claimant as she did included many positive points, but also some negative points. We set out the negative points below. The Respondent has not adduced the equivalent evidence for any other employee:-

Leadership - 3

a. *"She works well under pressure and will always want to talk through and explain her work, working hard to get things achieved at pace, although this can often mean mistakes are made when work is sometimes rushed in order to work through a job list"*

b. *"Rita can often show very willing to take on more responsibility but does not always have the time to complete as accurately as could be"*

c. *"Although Rita has improved in her communication style, there are often times when engagement or discussion can feel rushed and she could do more to take time and explain with clarity and more detail as opposed to working through at pace, eg explaining plans, workload and packs to colleagues that Rita has worked on"*

d. *"Rita has a very positive can do attitude, and will work to deliver on time however can often taken on too many tasks and when trying to get everything complete, there can be inaccuracies and a need to review and revisit work"*

Technical Skills - 3

*e. "Rita wants to take on a lot of work at once however can often struggle to balance a lot of work and can end up rushing tasks to get them complete, rather than sharing workload accordingly"*

*f. "Rita will always work to complete tasks on time; however, this often means accuracy and attention to detail are sometimes compromised and there is often a need to go amend areas of a plan, sometimes requiring extra review time"*

Behaviours - 2

*g. "Rita could focus on doing fewer things to a higher standard, rather than taking on a lot of extra workload and completing to an inconsistent standard, e.g. there can be minor errors in some plans which will then need revisiting to correct, particularly evident when workload is high"*

*h. "Rita has a very compliant approach to her work to deliver, rather than debating or challenging – would rarely disagree with a brief and instead would focus on purely delivering the task to be compliant. Similarly, there is often the need for Rita to wait for a decision to be*

*made in order to proceed, rather than make the decision herself or actively problem solve and cut through the red tape. Once Rita has clear instruction, she would come up with a layout to solve a problem"*

i. *"A positive can-do attitude with a desire to get things done and right first time, but as mentioned above, can often say yes to too many tasks, and make little mistakes when rushing"*

j. *"Open to receiving and giving feedback and will challenge in certain situations, could voice her opinion and knowledge more in store plan reviews as sometimes has a tendency to agree with others in the room and go away to get it done, rather than challenging or debating suggestions. For example, there were numerous reviews of Manchester Menswear with the BU and Marketing, and although Rita approached any tasks with positivity to deliver and will always take on people's views with good listening skills, she could have perhaps offered her own view and challenged more in those situations"*

k. *"Although enthusiastic to deliver, Rita doesn't always consider the customer or end user – it is a task that needs to be complete and Rita will complete it, however wouldn't necessarily state. if she didn't agree nor would she challenge a brief or a plan if it wasn't customer focused or the right thing to do – it is more about getting it done and on time"*

l. *"Rita is a naturally creative, innovative individual but does not necessarily apply this to her workload – Rita could think more about new ways to do things and ways to improve, rather than focusing on working through her job list"*

m. *"Rita has grown in confidence when it comes to communication with colleagues and stakeholders, however often needs to think about the 'tone' of the emails and understanding the different levels of the audience and who she is communicating to, as often a different tone or summary style is required"*

n. *"When given a task to complete, Rita will do so and deliver the task on time. However, she won't always think about 'why' – 'why does the task need completing? What is the benefit of the task and what is the end result?' Rita doesn't tend to ask these questions and instead would focus on delivering the task in hand rather than thinking about the end user and end result. For example, when asked to deliver a plan or improve on a plan, Rita would often wait for clear instruction of exactly what to do rather than use initiative to really think about the task and perhaps find a better way to improve. However, Rita does approach every task with positivity and a real can-do attitude"*

78. In oral evidence to this Tribunal, Miss Gaskell accepted that Ms Jandu was a technical expert within her team, particularly on JDA, SketchUp and Excel,

but Ms Murphy was more expert on SketchUp and Ms Nash was more expert on Excel. Mr Richardson was also leading technical-wise in Ms Taylor's team. Miss Gaskell saw him as being 'as proficient as' the Claimant on JDA. Ms Murphy, Mr Richardson and Ms Nash all scored 4 for Technical Skills.

79. At the appeal stage Miss Gaskell gave to Ms Waller detailed notes and evidence about the Claimant's performance that had not been included in the Claimant's original assessment sheet. This included concerns about the Claimant not recording holidays properly which Miss Gaskell acknowledged she had not mentioned previously because it *"wasn't part of the criteria"*. She also referred to the Claimant 'not being a team player', 'not working well with a colleague who was struggling', and to negative feedback about the Claimant from Mr Solomou about plans being inaccurate. What Miss Gaskell says about Mr Solomou's feedback is inconsistent with what Mr Solomou said in his email of 6 April 2020, but Miss Gaskell said (and we accept) that Mr Solomou had given her less glowing reports about the Claimant verbally. She said she would not have made up what she wrote at page 469 and this was her understanding from speaking to Mr Solomou.

80. Miss Gaskell appended to her appeal notes 13 emails as examples, about which we heard evidence as follows. Save where we indicate otherwise, we have in relation to these emails accepted both the evidence of Miss Gaskell and that of the Claimant. They were each giving us their honest perspectives on the emails, albeit that those perspectives were different. For the most part, we do not need to decide which of them was actually 'right' about the emails and we have not attempted to do so:-

81. At page 475 Miss Gaskell provided an email that the Claimant had written to the senior Manchester menswear team with the comment *"an ok email but would have provided more a summary and consequential/impact for those stakeholders to be able to fully review"*. In oral evidence she said she would have expected to see more context about this plan, that there was not enough detail. The Claimant thought that this was all the detail that was needed. It was suggested to her that this was a judgment issue, but she said that not giving enough information is tone as well and not giving more detail was linked to her Dyslexia as it was linked to not having the words or having the confidence to put that in.

82. At page 476 Miss Gaskell provided an example of the Claimant updating the Hedge End Plan plan but getting something wrong in that *"WW and Lingerie drop grades despite gaining footage"*. Miss Gaskell noted that this was a *"not right first time example"*. The Claimant corrected this when it was pointed out.

83. Miss Gaskell submitted evidence of an occasion (page 478) where she had had to ask the Claimant to put text boxes and square footage on a plan. Miss Gaskell said in oral evidence that square footage was 'basic' and should be on all plans, with text boxes being required if the plan was being circulated more widely. In this case, the plan was going to the CEO (Steve Rowe). Miss Gaskell said she thought that the Claimant knew it was going to the CEO and others would have done it automatically. Miss Gaskell did not see this as a

criticism point, but as an example of where she had had to give more guidance to the Claimant than she would have had to do for her colleagues. Miss Gaskell wrote in her email at the time, *"can I ask you a massive favour …"* but she says that is her style. The Claimant did not think it was normal to include business units and square footage. She said this was one plan out of hundreds she did. She was not sure she knew whether it was going to Steve Rowe. She said if she had known it was going to Mr Rowe, she would have added text boxes, so she thought she probably did not know. On this, we accept the Claimant's evidence as there is no suggestion in Miss Gaskell's emails that the Claimant ought to have known it was going to Mr Rowe. In a subsequent email Miss Gaskell also asked her to remove the yellow beauty perimeter panels from lingerie. Miss Gaskell saw this as an oversight, but the Claimant said there is no way she could have known to do that until asked by Miss Gaskell. She also said that if these were oversights, then oversights of this sort could also be related to Dyslexia.

84. At page 480 Miss Gaskell provided an example of an occasion when the Claimant sent her a first draft of a plan, explaining that there was still work to be done on that in counting shirts etc. Miss Gaskell considered that others on the team would have put more information even on a first draft. The Claimant said that she was just sending it to show Miss Gaskell where she was up to by way of an update. She said that she was not trying to rush through a checklist and this was her wanting to achieve the best she could do for her line manager, keeping her line manager updated so that she would be aware what stage the Claimant was at with the work. She said it also helped her with her Dyslexia because she takes steps to manage her poor working memory.

85. At page 481 Miss Gaskell included an example of what she said was the Claimant not providing enough information in relation to a plan for Menswear Manchester Spring, so Mr Davies had to come back with questions about one of the options. Miss Gaskell noted *"more detail and context in the original email maybe would have prevented some of those concerns and questions".* In oral evidence, Miss Gaskell said as it was going specifically to the BU Menswear others would have gone into a lot of detail so that others on the team could understand what was on the plan. It was put to the Claimant that the problem here was her decision not to include enough information in the email, but the Claimant said that this could be related to her Dyslexia because she can miss things out because of her Dyslexia. What someone else might hear and write down, she might not do. It could be linked to her Dyslexia. The Claimant also felt this was a standard email that anyone on the team might have received. The point of a first draft was to start somewhere.

86. At page 483 there was an example of the Claimant not dealing with a query that had been raised about mannequins at the bottom of one email until this was pointed out again several emails later. The Claimant said this could be to do with her Dyslexia as she misses things when reading. She accepted that no one is perfect, and that this was not a major issue. She has missed an icon moving it around and that could be to do with Dyslexia.

87. At page 486 Miss Gaskell included an example of Mr Solomou having to feed back on small errors in plans, but the Claimant said that what he was doing was in fact suggesting improvements to plan. It is a normal process. Miss Gaskell did not raise these issues with the Claimant at the time.

88. At page 487 Miss Gaskell included an example of the Claimant emailing the senior leadership team for a store in Rochdale and her communication tone not being as good as it could be. She noted *"nothing overly wrong with this other than perhaps not enough detail/summary of each CAD and BU that I would expect to go to a head of region and the tone doesn't differ to that of an email to the team, considering it is going to a HOR"*. The Claimant said this was her normal style of email, and concerns about her writing emails like this were never raised with the Claimant by anyone. The Claimant said she believed that this was related to her Dyslexia as this is how she writes. She said she had covered the points, and that *"tone is the way that you read and write and construct a sentence … my tone is writing in this style and it has not been picked up by any line manager in 22 years"*.

89. At page 488 Miss Gaskell put in another email intended to show that the Claimant had not given enough information in a covering email. The Claimant felt that she had put in enough detail as she dealt with the matters that had been discussed on the phone. She said that for her this was a detailed email. Mr Dhorajiwala suggested that this was going to senior stakeholders and needed more detail about CADs and changes to CADs. The Claimant did not consider that was a fair point as the intention was to discuss detail in the next meeting.

90. Likewise, at page 489 Miss Gaskell provided an example of the Claimant providing a layout without having counted the facings. Miss Gaskell considered that this was important because if the facings were not right, there would be no point doing a plan. Miss Gaskell thought she would have raised this with the Claimant, but could not recall a specific instance. The Claimant said that she did not include the facings on this occasion as it was just a mock up for White City where Mr Solomou had asked for a quick plan and specifically said that he did not need to know about facings. She said that is why she mentioned it explicitly in the email, and why Mr Solomou had not come back to her to query this. She said that Miss Gaskell had not been in the meeting with Mr Solomou and did not know what he had asked for. On this, we accept the Claimant's evidence as Miss Gaskell was not in a position to contradict it.

91. In overview in oral evidence, Miss Gaskell did not accept that the Claimant's little mistakes and inaccuracies had affected the Claimant's score. She regarded 3 as good scores. She said she marked the Claimant down on behaviours principally because of failure to challenge and 'cut down on red tape' and felt that was where the score dropped in comparison to other colleagues. Miss Gaskell was clear from the first time that the Claimant raised her disability in the context of the redundancy process at IC2 that the matters she had criticised the Claimant for were not related to her disability. She accepted that if they were, there ought to have been adjustment for that, but

she thought it may not have made any difference to the Claimant's scores as other people scored highly. We observe that Miss Gaskell's suggestion that discounting disability-related factors may not have made a difference to the Claimant's scores was not made in the light of any analysis by her as which factors were related to the Claimant's disability and which were not. It was also not consistent with what she wrote in her notes for the appeal stage, notes which were shared only with Ms Waller and did not therefore need to be 'guarded' in any way. In those notes (469) Miss Gaskell wrote that the ranking of the Claimant had been *"totally marginal – small, minor elements that have meant Rita scored just 1 point under the next colleague", "This is about a few small things that add up and are the difference against other good performers, Rita was ranked accordingly and makes more inconsistent errors than others on the team", "Rita's performance is good but there have been question marks over her consistency and accuracy, Rita was ranked accordingly and makes more inconsistent errors than others on the team"*, *"Others on the team are consistently more proactive, with a higher standard of plans", "I would want to review and glance over a plan from Rita before sending it on – others are consistently more thorough and take time to exact the detail of their plans"*. We consider that Miss Gaskell's notes for the appeal stage are more likely to be reliable as an assessment of the differences between the Claimant and her peers than the after-the-event evidence that she gave to us at this hearing.

Legal proceedings

92. The Claimant instructed solicitors and by letter of 28 October 2020 they sent a letter before claim to the Respondent (522). In the letter they set out the Claimant's allegations of race, age and disability discrimination. They suggested that the Respondent should have considered keeping the Claimant on furlough. They suggested that advice should have been sought from Occupational Health.

93. The Respondent replied by letter of 16 November 2020 (541) denying the allegations. Regarding furlough, the Respondent stated that the furlough scheme was not designed to prolong employment for roles that no longer exist for reasons unrelated to Covid. The Respondent asserted that the reasons the Claimant had been dismissed had nothing to do with her Dyslexia.

94. The Claimant contacted ACAS on 27 November 2020 and the certificate was issued on 23 December 2020. The Claimant commenced this claim on 20 January 2021.

## Conclusions

Disability

*The law*

95. By s 6 of the 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. The term 'substantial' is defined by s 212 EA 2010 as 'more than minor or trivial'.

96. The Tribunal must have regard to the government's guidance *Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011) (the Guidance) insofar is it considers it relevant: EA 2010, Sch 1, para 12. There is also guidance in Appendix 1 to the Code of Practice on Employment published by the Equality and Human Rights Commission (EHRC), which the Tribunal must take into account if it considers it relevant: Equality Act 2006, s 15(4).

97. In *Elliott v Dorset County Council* (UKEAT/0197/20/LA) Tayler J emphasised that the Tribunal must consider the statutory definition, which takes precedence over anything in the EHRC Guidance or Code of Practice and (at [43]): *"The determination of principle is that the adverse effect of an impairment on a person is to be compared with the position of the same person, absent the impairment. If the impairment has a more than minor or trivial effect on the abilities of the person compared to those s/he would have absent the impairment, then the substantial condition is made out."* The focus must be on the identification of day-to-day activities, including work activities, that the Claimant cannot do or can do only with difficulty: *ibid* at [82].

98. The Guidance at D4 states: *"The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis."*

99. The Guidance at B7 states that the account should be taken of how far a person can reasonably be expected to modify their behaviour to prevent or reduce the effects of an impairment on normal day-to-day activities. *"In some instances, a coping or avoiding strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities"*. The Guidance goes on to give the example of someone with allergies avoiding certain foods, or someone with a phobia avoiding the triggering thing. At B9 the Guidance makes clear that where someone avoids doing something that causes pain, fatigue, or substantial social embarrassment, it would not be reasonable to conclude that they were not disabled. At B10: *"In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for*

*example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment*".

100. The question of long-term effect is to be judged at the date of the act of discrimination concerned: *Tesco Stores Limited v Tennant* (UKEAT/0167/19/OO) at [7].

101. When determining whether or not a person has a disability, the Northern Ireland Court of Appeal in *Veitch v Red Sky Group Limited* [2010] NICA 39 at [19] held: *"The presence or absence of medical evidence may be a matter of relevance to be taken into consideration in deciding what weight to put on evidence of claimed difficulties causing alleged disability but its absence does not of itself preclude a finding of fact that a person suffers from an impairment that has a substantial long-term adverse effect."*

*Conclusions*

102. We find that the Claimant has at all material times met the definition of disability for the following reasons:-

103. She has an impairment of Dyslexia, which is a specific learning difficulty which has been medically diagnosed. That impairment has a long-term affect as it is a lifelong condition.

104. We have then considered whether it has a more than minor or trivial effect on her ability to carry out day-to-day activities. We find that all the Claimant's relevant work activities are non-specialised normal day-to-day activities. We find that Claimant's Dyslexia has a more than minor or trivial affect on her ability to carry out the day-to-day activities set out below. In each case, we have concluded that the evidence as it stood even prior to the redundancy process was such that the Claimant met the 'substantial' threshold for disability. However, what happened during the redundancy process provides further confirmation that the threshold is met in the Claimant's case: given that, for the reasons set out later in this judgment, we have concluded that the Claimant's difficulties in relation to each of these day-to-day activities materially counted against her in a redundancy process that resulted in her dismissal, there can be no doubt that the extent of the Claimant's difficulties was 'substantial' within the statutory definition:-

    a. <u>Reading</u> – The Claimant was assessed in 2009 as having (as part of the features of her Dyslexia) below average skills in single word reading, sentence comprehension, issues with decoding and tracking lines of text when reading, weaknesses in her ability to process visual information at speed and needing to take a break after 20 minutes of reading due to concentration issues. She also has weaknesses in working memory, which we infer will (as the Claimant believes) make it harder for her to comprehend longer texts. The difficulties identified in the 2009 assessment remain difficulties for

her. She finds it hard to scan or skim text. All this becomes more difficult for her if she is trying to work at speed or against a deadline. The Claimant's experience in this respect is consistent with the general advice from the British Dyslexic Association about what to expect in relation to people with Dyslexia. Although the Claimant has in general coped at work without adjustments for reading, we accept that its effect on her ability to carry out day to day activities is more than minor or trivial. Her Dyslexia is something of which she is always conscious and for which she is always trying to adjust. It is more difficult for the Claimant to read than for someone without Dyslexia and the extent of that difficulty in the Claimant's case is more than minor or trivial.

b. Writing – The Claimant was assessed in 2009 as having issues with structure and spelling in her written work, and spelling skills in the low range. It follows from her difficulties with reading and writing that she also has difficulties spotting errors in her work, and this is the Claimant's experience. She has always sought assistance with proof-reading. She finds it difficult to take notes as she writes relatively slowly. We infer that weaknesses in working memory also affect her ability to write as it will be harder for her to hold in her head the sense of what she is writing, and this is her reported experience. She finds writing emails hard and it takes her a long time. She struggles to find the right words. She copes/adapts by trying to keep emails short and simple, but she still finds it difficult and 'the worst part of her day'. She uses spell-check, but it does not pick up on all errors. We are satisfied that the effect of Dyslexia on the Claimant's writing is more than minor or trivial.

c. Listening / processing / organisation – The Claimant was assessed in 2009 as having weaknesses in working memory. She considers that these weaknesses affect her listening skills and her ability to process and respond to information orally. Her experience in this respect is consistent with the advice from the British Dyslexia Association which indicates that Dyslexia can affect an individual's organisational skills and ability to manage and process information, and that people with Dyslexia may need more time to take on board which is being said and to organise a reply. The Claimant has sought to cope with these difficulties by seeking to simplify at all times, reducing tasks to checklists, not seeking to challenge or respond 'on the hoof' and using communication with her line manager at the end of a day as a means of marking for herself where she has got to. The effects of these difficulties are apparent in Miss Gaskell's assessment of the Claimant as being 'compliant' and appearing to 'work through a joblist'. We find that the effect of Dyslexia on the Claimant's listening, processing and organisation skills is also more than minor or trivial.

105. We therefore find that the Claimant was at all material times a person with a disability within the meaning of s 6 of the EA 2010.

Discrimination arising in consequence of disability

*The law*

106. In a claim under s 15 of the EA 2010, the Tribunal must consider:
    a. Whether the claimant has been treated unfavourably;
    b. The reason for the unfavourable treatment;
    c. Whether that reason is something arising in consequence of the employee's disability;
    d. Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on;
    e. If so, whether the alleged discriminator has shown that the treatment is a proportionate means of achieving a legitimate aim.

107. The question of whether something arises in consequence of disability is an objective question and does not involve consideration of the mental processes of the alleged discriminator: *Pnaiser v NHS England and anor* [2016] IRLR 170, EAT at [31]. Whether something arises 'in consequence of' is a looser connection than 'because of' and might involve more than one link in the chain of consequences: *Sheikholeslami v University of Edinburgh* (UKEATS/0014/17/JW) at [66].

108. Then the Tribunal must consider what the reason was for the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator. The test is the same as for direct discrimination, i.e. the 'something' must be the conscious or unconscious reason for the treatment, in the sense of having a more than minor or trivial influence on the unfavourable treatment, even if it is not the main or sole reason: *Pnaiser* (ibid) at [31].

109. While it is a necessary element of liability for the employer to have knowledge (or constructive knowledge) of the disability, it is not necessary that the employer should know that the relevant 'something' arose in consequence of the Claimant's disability when subjecting the Claimant to unfavourable treatment: *York City Council v Grosset* [2018] ICR 1492 at [39]. On the question of the requirements for knowledge in this context, what is required is that the employer have actual or constructive knowledge of the facts that constitute the definition of disability under s 6 of the EA 2010. The employer must have actual or constructive knowledge that the claimant has an impairment that has each of the elements of the statutory definition of disability, i.e. that it has a substantial and long-term effect on her ability to carry out day-to-day activities: see *Stott v Ralli Ltd* (EA-2019-000772-VP) at [57]-[58] and the cases quoted therein.

110. An employer also has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate

aim. If the aim is legitimate, the Tribunal must consider whether the means used to achieve it correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end: *Stott v Ralli Ltd* (EA-2019-000772-VP) at [79]. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment on the employee and the reasonable needs of the party responsible for the treatment: *Hampson v Department of Education and Science* [1989] ICR 179, CA and other cases summarized recently in *Department of Work and Pensions v Boyers* (UKEAT/0282/19/AT) at [29] *per* Matthew Gullick (sitting as Deputy High Court Judge). The test is an objective one, not a range of reasonable responses test (*Stott*, ibid, at [80]).

111. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification' and it is unlikely that a disadvantage that could be alleviated by a reasonable adjustment will be justified: *Dominique v Toll Global Forwarding Ltd* (UKEAT/0308/13/LA) at [51] *per* Simler J.

112. The burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation or defence, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not unlawful. The burden is on the Respondent in relation to both the knowledge defence and the justication defence.

*Conclusions*

113. We have considered first whether the Respondent has shown that it did not have the requisite knowledge of the Claimant's disability. We have taken the relevant time in this respect to be 15 September 2020 when the Respondent gave the Claimant notice of dismissal. At that point Miss Gaskell personally knew that the Claimant had Dyslexia. She also knew what the Claimant had told her at IC2 and IC3 about the effect that Dyslexia had in particular on her ability to write and (to a lesser extent) to read. What the Claimant said at that meeting, recorded in our judgment above, made clear that her Dyslexia had a more than minor or trivial effect at least as regards her writing because the Claimant said it 'takes her ages' to write an email, she has to check and recheck them and ask for assistance. That is sufficient to give Miss Gaskell actual knowledge that the Claimant had a disability.

114. We would add that we have considered what constructive knowledge the Respondent would have had if it had made reasonable further enquiries. At the very least, reasonable inquiries would in our judgment have included asking the Claimant for more information, rather than simply immediately denying any link to her Dyslexia as Miss Gaskell and then Ms Waller did. If they had asked, they would have received from the Claimant essentially the

evidence that she has given us in these proceedings which has enabled us to conclude that she experiences a substantial adverse effect on a number of day-to-day activities, not just reading and writing.

115. Although it is not necessary to our decision, we also consider that if the Respondent had acted reasonably, it should have taken advice from Occupational Health (OH) when the Claimant raised that the matters that had led to her being selected for redundancy were connected to her Dyslexia. Although it is not necessary to have medical evidence to show that someone has a disability, it is in our judgment unreasonable for an employer to reject what an employee is telling them about the effects on them of a condition such as Dyslexia without obtaining medical evidence. Neither Miss Gaskell or Ms Waller (or HR) were experts on Dyslexia and neither of them were in a position to dispute what the Claimant was saying about her condition without medical advice. While we cannot be certain as there is still no OH report in this case, if the Respondent sought advice from OH we consider that on the balance of probabilities OH would have given advice consistent with the findings that we have made. This is because OH would probably also have relied on the Study Aid report for the basic assessment of the Claimant's Dyslexia, and would probably have given advice consistent with the guidance from the British Dyslexia Association as to the likely ways in which Dyslexia manifests itself.

116. We have then considered whether any of the 'somethings' that the Claimant relies upon as arising in consequence of her disability did so arise and we conclude as follows:-

    a. *Making mistakes / errors in her work* – The examples of 'mistakes/errors' identified by Miss Gaskell in her evidence in support of her decision fall into different categories, but nearly all of them are, we find, related to the Claimant's disability. The only ones which are not are those where Miss Gaskell had misunderstood the position, such as where Mr Solomou had told the Claimant not to count facings on a plan, or where she thought that the Claimant was aware a plan was going to Mr Rowe, but in fact she was not. Some of these instances of misunderstanding are, however, also related to the Claimant's disability. Thus, the Claimant sending draft plans to Miss Gaskell at the end of a day noting more work to be done on them (eg counting shirts) was part of the Claimant's adopted working method for coping with her disability and keeping track of her own work. Other 'mistakes' in plans were also, we find, related to her disability. Thus the mannequins mistake was a failure to read or absorb in its entirety a long email and therefore related to her Dyslexia. The Hedge End example at page 476 of not updating the grades for WW and Lingerie when increasing their square footage is not one that was put to the Claimant in cross-examination, but her poor working memory did make it harder for her to 'keep tabs on things'. We also note that this error would in part have resulted from not completely reading or taking in some written text and we find that on the balance of probabilities this error was also related to her disability. Even if we

are wrong that the Claimant's failure to put text boxes and square footage on the plan for Mr Rowe, or to remove the yellow beauty perimeter panels, were not 'mistakes' because the Claimant had explanations for them, these sorts of mistakes are, we find, mistakes that on balance of probabilities arise in consequence of her dyslexia. With weaknesses in working memory and reading, she is going to be more likely to make such mistakes, especially where there is time pressure.

b. *Not completing work accurately and on time* – As regards completing work 'accurately', we repeat what we have said above about the reasons for the Claimant's mistakes/errors. As to the 'on time' element, we accept that issues with time management (which may manifest as appearing to 'rush') also arise in consequence of her Dyslexia. There is no dispute that the Claimant was keen to take on more work, but there was no reason for her not to do so as no one had previously raised any issues with the quality of her work, or suggested she ought to concentrate more on what she had. It was therefore not unreasonable for the Claimant to want to take on more work, and to seek to prove herself equal to her non-disabled peers. However, it does not follow that errors or time management issues that arose as a result did not arise in consequence of the Claimant's Dyslexia. Someone who takes longer reading and writing is likely to have more difficulty with time management than someone who does not, especially under time pressure. Organisation was in any event a day-to-day activity that we have found above was substantially affected by her Dyslexia. Not completing work accurately and on time was therefore something that arose in consequence of the Claimant's Dyslexia.

c. *Communication feeling rushed and not providing more clarity* – As to communication feeling rushed, we find that this was directly related to the Claimant's disability. The Claimant's emails do appear rushed because they are brief, often poorly formatted, and contain occasional spelling and grammatical errors (eg at page 480: *"I still need to count formal shirts and all of ess I need to relay"* – sic). However, these are all features that are directly related to the Claimant's disability. It is not because the Claimant did rush because, as she explained, she actually took a long time over writing emails. The Claimant's failure to provide the level of detail or clarity that Miss Gaskell thought appropriate was also, we find, related to her disability. Because writing is so difficult for her, and she finds it hard to think of the right words or to keep track of longer written materials, her coping mechanism is to keep it brief. No doubt if her writing had been criticised at any point before the redundancy process she could have improved what she wrote by taking even longer on emails and asking for even more help, but it does not mean that what we see in the email examples that Miss Gaskell has selected is not a result of the Claimant's disability.

d. *Struggling with balancing a lot of work* – The Claimant did not in 2009 feel that her Dyslexia affected her in this respect in an academic context, but a work context is very different. The modes of learning described in the Study Aid report do not include the need for interaction and responding to other people and communications over the course of a working day as that is not necessary in an academic context. The Claimant also did not believe herself to be struggling in a work context, but that was because no one had previously questioned the quality of the work that she did produce. It does not follow that the difficulties that Miss Gaskell perceived the Claimant to have with managing the work that she took on were unrelated to her disability. We find that those difficulties were related to her disability. Miss Gaskell perceived the quality of the Claimant's work as suffering because she took on too much, but we find that the matters Miss Gaskell identified as the Claimant struggling (principally mistakes and inaccuracies) were related to the Claimant's difficulties with reading, writing and working memory as a result of her Dyslexia, all of which are exacerbated by time pressure.

e. *Accuracy and attention to detail requiring extra review time from management* - This point does not raise anything significantly different to the foregoing. We find it was also something that arose in consequence of the Claimant's disability.

f. *Communication tone* – Although (as the Claimant accepted in cross-examination) tone can in principle be something different to the way an email is formed, or errors in it or written style, in this case we are satisfied that what Miss Gaskell saw as the Claimant's failure to adapt her tone to different audiences was simply a product of the Claimant's Dyslexia. The Claimant has a certain style because she has difficulty writing long passages of text, difficulties with word-finding, sentence structure and spelling, so she keeps everything brief, and her emails use short-hand and bullet points. All these features are what constitute the 'tone' of the emails in the Claimant's case. We have not been shown any examples where the Claimant's 'tone' was brusque or rude or anything of that sort. All the examples are in the same style and tone and it is clear that this is a product of the Claimant's particular style of writing which is a direct result of her Dyslexia.

117. We next consider whether any of those things had a significant influence on the decision to dismiss. This requires us to focus on what Miss Gaskell had in mind. Since the things listed above are all matters that Miss Gaskell referred to in her assessment of the Claimant, and (indeed) account for all of the negative comments that she made in relation to the Claimant's Leadership and Technical Skills and all the negative comments that she made in relation to the Claimant's Behaviours save for those concerning the Claimant's 'compliant approach', we are satisfied that each of the 'somethings' had a more than minor or trivial influence on the Claimant's selection for redundancy and thus her dismissal.

118. Miss Gaskell said she focused on the Claimant's compliant approach as her principal reason for marking the Claimant down on Behaviours, but even if that is the case, it does not mean that the matters that the Claimant has relied on as 'somethings' in these proceedings did not significantly influence her selection for redundancy: the 'somethings' accounted for the vast majority of negative comments made by Miss Gaskell. (In any event, we observe that we have found as a fact that the Claimant's compliant approach was also a manifestation of her disability.)

119. We have then considered whether the Respondent has shown that dismissing the Claimant was a proportionate means of achieving a legitimate aim. The Respondent relies on the following aims:

    a. The need to retain the best talent by selecting those employees who were best suited and most capable to perform the remaining roles following the redundancy exercise;
    b. The need to apply fair and consistent standards and metrics to all employees within the selection pool (subject to any reasonable adjustments).

120. We accept that these are legitimate aims, but we do not find that they justify the selection of the Claimant for redundancy in this case for the following reasons:-

121. *First*, because we consider for the reasons set out below that the Respondent came under a duty to make reasonable adjustments when applying its selection criteria to the Claimant, a duty with which it failed to comply. As the Respondent implicitly recognises by the qualification to its second alleged legitimate aim, fairness may require that reasonable adjustments are made for disabled people.

122. *Secondly*, because the impact of the decision on the Claimant was dramatic: she lost a job she had had since 2013 for an employer she had worked for in total for 22 years. Even if there remains a chance that the Claimant would have been selected for redundancy in any event, the Respondent's approach made it a certainty and that is a very significant impact.

123. *Thirdly,* in contrast, the effect on the Respondent of making adjustments for the Claimant's disability and/or not allowing 'somethings' arising from her disability to influence the selection would have been limited. Even if doing so would have meant that the Claimant was retained and not selected for redundancy, the performance difference between the Claimant and her colleagues was, on the Respondent's case, *"marginal"*. It would therefore have made virtually no difference to the Respondent's business going forward if the Claimant had been retained rather than a colleague.

124. *Fourthly*, and this follows from the foregoing, in our judgment the Respondent's aims could still have been achieved if the effects of the Claimant's disability had been discounted in her assessment. The

Respondent could still have retained the best talent, as determined following a fair and consistent process, it would just have been a process that did not discriminate unlawfully against disabled people, including the Claimant.

125. In dismissing the Claimant the Respondent has therefore unlawfully discriminated against her because of something arising in consequence of her disability.

Failure to make reasonable adjustments

*The law*

126. Under s 20 of the EA 2010, read with Schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person. By section 212(1), 'substantial' in this section also means 'more than minor or trivial'.

127. A respondent is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know both that the complainant has a disability and that he or she is likely to be placed at the relevant substantial disadvantaged (EA 2010, Sch 8, para 20): see further *Wilcox v Birmingham CAB Services Ltd* (UKEAT/02393/10) at [37].

128. In considering a reasonable adjustments claim, a Tribunal must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant: *Environment Agency v Rowan* [2008] ICR 218, EAT at [27] *per* Judge Serota QC. The Tribunal must also identify how the adjustment sought would alleviate that disadvantage: *ibid,* at [55]-[56]. The nature of the comparison between disabled and non-disabled people is not like that between claimant and comparator in a direct discrimination claim: it is immaterial that a non-disabled person with all the characteristics of the disabled person but for the disability would be treated equally, what matters is whether *"the PCP bites harder on the disabled, or a category of them, than it does on the able-bodied"* as a result (for example) of the disabled person being more likely to be disadvantaged by the PCP than a non-disabled person: see *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160 at [58].

129. The concept of a PCP does not apply to every act of unfair treatment of a particular employee. A one-off decision can be a practice, but it is not necessarily one; all three words connote 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 at [38] *per* Simler J.

130. The duty to make reasonable adjustments may (indeed, frequently does) involve treating disabled people more favourably than those who are not disabled: cf *Redcar and Cleveland Primary Care Trust v Lonsdale* [2013] EqLR 791.

131. What is reasonable is a matter for the objective assessment of the Tribunal: cf *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments, nor with the employer's reasoning: *Royal Bank of Scotland v Ashton* [2011] ICR 632, EAT.

132. Carrying out an assessment or consulting an employee as to what adjustments might be required is not of itself a reasonable adjustment: *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664, EAT.

133. Although the EA 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should generally have regard, including but not limited to:

    a. The extent to which taking the step would prevent the effect in relation to which the duty was imposed;
    b. The extent to which it was practicable for the employer to take the step;
    c. The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities;
    d. The extent of the employer's financial and other resources;
    e. The availability to the employer of financial or other assistance in respect of taking the step;
    f. The nature of the employer's activities and the size of its undertaking;
    g. Where the step would be taken in relation to a private household, the extent to which taking it would: (i) disrupt that household or (ii) disturb any person residing there.

134. Under s 136 EA 2010, the Claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may even be as late as the tribunal hearing itself. Once that threshold has been crossed, the burden shifts to the Respondent to show that the proposed adjustment is not reasonable: *Project Management Institute v Latif* [2007] IRLR 579, EAT.

*Conclusions*

135. There is no dispute that the Respondent operated a PCP of requiring the Claimant's performance to be marked against the three selection criteria adopted for the purposes of the redundancy exercise. That PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled because all the negative comments that were made about her performance in the application of that PCP were related to her disability and it was thus her disability that placed her at the substantial disadvantage of being selected for (or at greater risk of selection for) redundancy. Further, it is more likely that someone with Dyslexia or another specific learning difficulty would be marked down in the assessment carried out in the way that the Respondent carried out this exercise, than would be the case for someone without a specific learning difficulty. In this respect, it is immaterial that someone else with Dyslexia was in the same exercise not selected for redundancy. We have received no evidence about that individual at all. Dyslexia does not affect everyone equally and the fact that one person was not disadvantaged by their Dyslexia in this exercise does not mean that people with Dyslexia would in general not be more likely to be disadvantaged than non-disabled people, or that the Claimant's Dyslexia was not the cause of the substantial disadvantage to her. In this respect, it is significant that the Claimant's experience of Dyslexia corresponds closely to the British Dyslexia Association's description of what is 'typical' dyslexic. Anyone else with those same characteristics would likely also have been marked down for the same traits as the Claimant and thus not have done as well in this assessment as their non-disabled colleagues.

136. We have already decided above that the Respondent at the relevant time knew or ought to have known that the Claimant was disabled. We further consider that the Respondent knew or ought to have known that the Claimant had been placed at the substantial disadvantage we have identified. We find that the Respondent knew or ought to have known that the Claimant had been placed at that substantial disadvantage, because the Claimant had told Miss Gaskell and then Ms Waller the essence of what she has told us. To the extent that Miss Gaskell and Ms Waller did not have actual knowledge of all elements of the substantial disadvantage suffered, we find that they ought to have done. Had they asked the Claimant for more information rather than denying that there was any link to her disability, the Claimant would have given them most of the evidence that she has given us. That suffices for constructive knowledge. Further, had they referred the Claimant to OH, for the same reasons as we gave when considering knowledge in the context of the s 15 claim, we consider that on the balance of probabilities OH would have expressed views similar to the conclusions that we have reached on the basis of the evidence before us.

137. We therefore consider that the Respondent had come under a duty to make reasonable adjustments. The adjustment proposed by the Claimant is that the Respondent should have discounted any disability-related effects when assessing the Claimant against the redundancy selection criteria. We agree that this would have been a reasonable adjustment. It would have cost the

Respondent nothing. The difference between the Claimant and her peers was, on the Respondent's own evidence, marginal. Whatever the effect of discounting any disability-related effects on the outcome for the Claimant (i.e. whether it resulted in her being selected for redundancy or not), the Respondent would still have retained a strong workforce. On the other hand, discounting the disability-related effects would have wholly removed the disadvantage that the Claimant was suffering because of her disability. If she was nonetheless still selected for redundancy, it would not have been because of her disability.

138. For all these reasons we find that the Respondent has failed to comply with its duty to make reasonable adjustments for the Claimant's disability.

Victimisation

*The law*

139. Under ss 27(1) and s 39(2)(c)/(d) EA 2010, the Tribunal must determine whether the Respondent has treated the Claimant unfavourably by dismissing her or subjecting her to a detriment because she did, or the Respondent believed she had done, or may do, a protected act.

140. A protected act includes (so far as relevant in this case) bringing proceedings under this Act or making an allegation (whether or not express) that a person has contravened this Act (ss 27(2)(a) and (c)). An act is not protected if it is done in bad faith (s 27(3)).

141. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [34]-[35] per Lord Hope and at [104]-[105] per Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123) agreed with Lord Hope.)

142. In deciding whether the reason for the treatment was the protected act, we apply the same approach as for direct discrimination, i.e. whether the protected act was subconsciously or consciously a more than minor or trivial influence on the act complained of: *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls. The protected act must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]).

143. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has

acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38

144. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] per Lord Hope.

*Conclusions*

145. It is agreed that the Claimant did the following protected acts:
    a. On 2 September 2020 she verbally raised complaints about race discrimination to Lauren Gaskell at the first individual consultation ("IC1") meeting.
    b. On 4 September 2020 she verbally raised complaints about race, age and disability discrimination to Lauren Gaskell at the IC2 meeting.
    c. On 15 September 2020 she verbally raised complaints about race, age and disability discrimination to Lauren Gaskell at the IC3 meeting.
    d. On 21 September 2020 she submitted written complaint of race, age and disability discrimination as part of her appeal.
    e. On 2 October 2020 she verbally raised complaints about race, age and disability discrimination to Hannah Waller at the appeal meeting.
    f. On 28 October 2020 the letter from her solicitors raised complaints about race, age and disability discrimination to the respondent.

146. We have considered each of the alleged detriments in turn and conclude as follows:-

    a. *On/after 2 September 2020, by Lauren Gaskell failing to adequately investigate the concerns of race, age and/or disability discrimination – with particular respect to the disability discrimination complaint, there was no consultation with or seeking of advice from OH.*

    We find that the reason that Miss Gaskell did not personally investigate the Claimant's allegations of race, age and/or disability discrimination is not because the Claimant made those complaints, but because Miss Gaskell did not consider that the Claimant's scores could be changed at that stage, because historic grievances needed to be subject to a separate process and because she was convinced that the things she had taken into account in the Claimant's assessment had nothing to do with her Dyslexia. While the approach to historic grievances is understandable, there has been no

explanation as to why Miss Gaskell could not have initiated a review of the Claimant's scores, and it was unreasonable for Miss Gaskell not to seek advice from OH (or for HR not to advise her to do that). However, unreasonable treatment is not to be equated with victimisation. We cannot see that complaints of any other sort by the Claimant would have been treated any differently and we find that the fact that they were protected acts played no part in how they were handled by Miss Gaskell. This was not victimisation.

b. *On 15 September 2020, by Lauren Gaskell selecting the claimant for redundancy with effect on 31 October 2020.*
The selection of the Claimant for redundancy followed inevitably from Miss Gaskell's application of the assessment criteria. The Claimant's complaints had nothing to do with it. This was not victimisation.

c. *On/after 21 September 2020, by Hannah Waller and/or Phillip Dale failing to adequately investigate the concerns of race, age and/or disability discrimination at the appeal stage – with particular respect to the disability discrimination complaint, there was no consultation with or seeking of advice from OH.*
In our judgment, Mr Dale *did* adequately investigate the Claimant's race discrimination complaints. Mr Dale interviewed all witnesses to the Claimant's grievances and in fact partly upheld the Claimant's grievances, recommending equality and diversity training for Ms Field and Ms Sharp. The fact that Mr Dale did not revert to the Claimant and preferred Mr East's evidence over hers is explained by his view that re-interviewing the Claimant would get him no further and the common tendency for those hearing internal grievances to prefer the evidence of the 'accused' in situations of simple oral dispute. There is no sense in which Mr Dale's approach was influenced by the fact that this was a protected act rather than any other form of complaint.

However, Ms Waller did not adequately investigate the race, age or disability discrimination complaints. So far as race and age were concerned, she confined herself to asking Miss Gaskell about this, but did not look more widely at colleagues' scores to consider whether there were adequate explanations for why the Claimant had scored less than her younger/White peers. And so far as disability is concerned, Ms Waller did not seek further information from the Claimant about the effects of her Dyslexia (or read the information the Claimant provided, or take proper note of what the Claimant told her in the appeal hearing) and rejected what the Claimant was saying about the effects of her Dyslexia without seeking advice from OH. We have considered very carefully whether Ms Waller's failures in this regard were so unreasonable as to lead us to draw an inference that victimisation was the reason for them, but we decline to do so for the reasons set out below in relation to the claim about Ms Waller's dismissal of the Claimant's appeal.

d. *On 2 October 2020, by failing to provide the claimant with a diverse appeal panel as she had requested.*
The reason Ms Waller did not arrange a diverse appeal panel for the Claimant was because she did not notice the request. There is no basis for drawing an inference that this was because of the protected acts. It is much more likely to be genuine oversight, possibly related to Ms Waller's own Dyslexia.

e. *On 16 October 2020, by Hannah Waller dismissing her appeal.*
There were a number of significant short-comings in Ms Waller's handling of the Claimant's appeal. She accepted without question what Miss Gaskell said about the Claimant's race, age and disability having nothing to do with her scoring and did not investigate further, either by exploring with the Claimant, or looking more widely at colleagues' scores to consider whether there were adequate explanations for why the Claimant had scored less than her younger/White peers; she did not seek advice from OH about the Claimant's disability; she failed to give the Claimant an opportunity to comment on Miss Gaskell's evidence; she did not read and/or listen to and/or deal properly with the Claimant's appeal insofar as it concerned discrimination arising from disability and/or reasonable adjustments; she failed to notice the Claimant's request for a diverse appeal panel. However, unreasonableness is not to be equated with victimisation, although it may provide the basis for an inference. The initial burden remains on the Claimant to adduce evidence from which we could conclude, in the absence of any explanation, that the fact that the Claimant had complained about discrimination played a more than minor or trivial part in the handling of her appeal. We find that the degree of unreasonableness is not so great as by itself to provide the basis for drawing an inference of victimisation. Ms Waller's handling of the appeal was poor and unfair but the errors are not beyond the bounds of those that are explicable by inexperience, poor HR advice and lack of attention to written materials (possibly connected to Ms Waller's own Dyslexia). There is no other evidence from which we could draw an inference that the reason for the unreasonable treatment was the Claimant's protected acts as there are no evidential comparators in this case. We therefore find that the Claimant has not discharged the initial burden of proof. Even if she had discharged that initial burden, in this case the other factors we have mentioned provide the most likely explanation for the unreasonable treatment in this case in our judgment.

f. *On 16 November 2020, by Joanna Allen dismissing the complaints raised by her solicitors.*
This is just an instance of the parties taking up positions in pre-claim correspondence. There is no separate detriment here that could be said to be influenced by the Claimant having raised discrimination complaints: the likelihood is that the Respondent would have denied whatever claims were raised at this point.

Unfair dismissal

*The law*

147. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996 (ERA 1996). Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), i.e. in this case redundancy, or some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss (cf *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330, cited with approval by the Supreme Court in *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731 at [44]). There is no dispute here (subject to the arguments about disability discrimination) that the reason for dismissal was 'redundancy' within s 139(1)(b)(i) ERA 1996.

148. If dismissal is for a potentially fair reason, then the Tribunal must consider whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee (s 98(4)(a)). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s 98(4)(b)). At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111.

149. As this is a redundancy dismissal, the principles in *Williams v Compair Maxam* [1982] ICR 156 apply. They are as follows:

    (1) The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

    (2) The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

(3) Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

(4) The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

(5) The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

150. We note that although selection criteria must not depend solely on the opinion of the person making the selection, there is no rule of law that they must be exclusively objective: see *Nicholls v Rockwell Automation Ltd* UKEAT/0540/11/SM at [31]-[32], referring to *Mitchells of Lancaster v Tattersall* (UKEAT/0605/11/SM) where a sole criterion of 'business skills' was used: *"…it is not the law that every aspect of a marking scheme has to be objectively verifiable (by which we mean verifiable independently of the judgment of management) as fair and accurate. If overall the redundancy criteria were reasonable… then the fact that some items were not capable of objective verification is not fatal to the scheme… Selection criteria are not to be limited to those which can be the subject of box-ticking exercises"*.

151. Once a Tribunal is satisfied that there was a fair system of selection without overt signs of unfairness, it is not for the Tribunal to embark on a detailed critique of the individual items of scoring: *Rockwell* ibid at [28]. The question is whether the selection criteria were reasonably applied.

152. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at [48].

153. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid), but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. This is particularly the case in a redundancy dismissal where the *ACAS Code of Practice on Disciplinary and Grievance Procedures* does not apply. The Court of Appeal has recently confirmed that in such cases the absence of an appeal or review procedure does not of itself make a dismissal for redundancy unfair and it would be wrong to find a redundancy dismissal unfair *only* because there was no appeal procedure. However, it is one of many factors to be considered in applying a test of overall fairness: *Gwynedd Council v Barratt* [2021] EWCA Civ 1322 at [38].

154. There is also no right for the employee to be permitted to bring a companion to redundancy consultation/dismissal meetings. Section 10 of the Employment Relations Act 1999 does not apply in redundancy cases: see *Heathmill Multimedia ASP Ltd v Jones and Jones* [2003] IRLR 856 and *London Underground v Ferenc Batchelor* [2003] ICR 656.

*Conclusions*

155. There is no dispute that the sole or principal reason for the Claimant's dismissal was redundancy within the definition in s 139 of the ERA 1996. The sole issue for us is whether it was fair in all the circumstances for this employer to dismiss her for that reason. We have decided it was not, for the following reasons:-

    a. In selecting the Claimant for redundancy, the Respondent failed to make reasonable adjustments for her disability and discriminated against her because of things arising in consequence of her disability.

    b. The Respondent is a large, well-resourced and long-established high street retail chain. There is no reason why it cannot be expected to comply with generally applicable employment law principles.

    c. Even had the Respondent not unlawfully discriminated against the Claimant in its application of the selection criteria, we consider that its application of the selection criteria in this case was unfair. We acknowledge that Miss Gaskell was not assisted in this by the selection criteria that had been agreed with BIG. These selection criteria made it difficult for managers to apply them fairly and objectively. While we accept that the criteria were acceptable in the light of the case law we have identified above, they contained no purely objective elements and left a great deal of scope for subjective opinion. The narrative descriptors for the three criteria were 'sprawling' addressing multiple elements within each single criterion, an approach which is liable to lead to a loss of objectivity. While in principle we accept the Respondent's submission that a single aspect of an individual's performance might be relevant to all three criteria, it does not follow that it was fair to treat a single aspect as being relevant to all three. In this case, Miss Gaskell allowed her perception that the Claimant was prone to 'rushing' and 'inaccuracies' to count against her in relation to all three criteria. We note that the criteria themselves indicate that these factors may be relevant to both Technical skills and Behaviours (although why they needed to be included in Behaviours is unclear), but they do not feature as specific criteria in relation to Leadership. Miss Gaskell appears to have considered them relevant to the Claimant's 'accountability' for her work, but it was in our judgment unfair for her to do so. Having already marked the Claimant down twice for 'rushing' and 'inaccuracies' there was no need to go out of her way

also to mark her down for this in relation to Leadership. The focus should have been on the specific agreed criteria. Miss Gaskell's approach was outwith the range of reasonable responses.

d. Even if the Claimant were not disabled, we further consider that it was unfair for the Respondent to decide against her that what she was saying about the link between her Dyslexia and the things for which she had been marked down was incorrect without obtaining advice from Occupational Health on that. The Respondent's failure either to accept what the Claimant was saying or seek expert opinion on it was unfair and gave rise to an appearance of closed minds and a bias against the Claimant. Miss Gaskell and Ms Waller were not experts on Dyslexia. Their assumption, without any investigation at all, that the Claimant was either lying or mistaken about the link with her Dyslexia was outwith the range of reasonable responses.

e. Ms Waller's failure to share with the Claimant at the appeal stage all of the material provided by Miss Gaskell was unfair. It is a basic principle of natural justice that a person should see the case they have to meet. Although the ACAS Code of Practice does not apply to redundancy dismissals, and there is no requirement to have an appeal stage, it is still important that an employer follows a fair process. Some employers would have dealt with such evidence as part of the consultation process leading up to the decision to dismiss. This employer chose to adopt a procedure of not allowing challenges to the marks at the dismissal stage, and only allowing consideration of them at the appeal stage. Having decided to adopt that process, the Respondent needed to follow it through fairly. It did not do so. The Claimant was therefore deprived of the opportunity to provide comments on the material Miss Gaskell supplied to Ms Waller. Had she had that opportunity, we are satisfied that it would have made a difference because the Respondent would then have had before it the benefit of the Claimant's case more in the form that it has been presented to us, and on the basis of which we have concluded that the scoring of the Claimant was discriminatory and unfair.

f. A further element of unfairness arose in Miss Gaskell advancing at the appeal stage prejudicial information about the Claimant not recording holidays correctly (etc) which, by her own admission, were not part of the assessment criteria.

g. Finally, we record that we do not consider that the Respondent's failure to consider putting the Claimant on furlough gives rise to any unfairness. The furlough scheme was there to protect jobs on a temporary basis for those who would have jobs once the pandemic was over. It was not intended as a way of artificially extending jobs that an employer had decided it no longer required.

156. It follows that we find that the Claimant's claim of unfair dismissal is well-founded.

Polkey

157. The question of whether the Claimant would have been dismissed in any event, or whether any *Polkey* deduction should be made to her compensation was not one of the issues that the parties had agreed should be determined at the liability stage. At the end of the hearing on liability, Mr Tomison in his closing submissions invited us to determine this issue on the basis of the evidence that we have heard. Mr Tomison pointed out that, in the absence of evidence from the Respondent as to how other inviduals were scored, if we found in favour of the Claimant we should conclude that she would (at least) have scored a 4 for Technical and therefore been retained in employment. Mr Tomison observed that the parties were supposed to have completed disclosure as to both liability and remedy some time ago, the Respondent had not disclosed any documents relating to scoring of other individuals and therefore plainly did not consider that they were relevant to remedy. Moreover, although the hearing was listed for liability only, the parties had attended ready to deal with remedy as well if there was time.

158. The Respondent objected to us deciding the *Polkey* point at this stage. Mr Dhorajiwala submitted that this was a remedy issue, and although pleaded by the Respondent, it had not been on the list of agreed issues for this hearing. He further submitted that the Respondent would want to adduce evidence as to how other individuals were scored at the remedy stage and that it was appropriate for the Respondent to have that opportunity.

159. At the hearing we nonetheless invited Mr Dhorajiwala to address us specifically on the question of whether the Claimant would have scored 4 for Technical if Miss Gaskell had not taken account of the matters said to arise from her disability, lest we concluded in deliberations that it was fair to determine that issue in the circumstances. Mr Dhorajiwala then did make submissions on this issue.

160. We have considered very carefully whether we should determine the *Polkey* issue now, at least so far as the Technical score is concerned. We take into account that the Respondent was surprised by the issue being raised at the end of the liability hearing by the Claimant. We take into account the Respondent's expressed wish to adduce further evidence on this issue. However, we also bear in mind that it was not possible to list the Remedy Hearing until 9/10 November 2022 and that a delay in determining this particular *Polkey* issue would leave open for a further eight months a significant issue for the parties, require Miss Gaskell to give further evidence and reduce the prospects of the parties reaching a settlement of the case without the need for a further hearing. All those consequences would, of course, have to be suffered if it were not possible for us fairly to determine this issue on the basis of the evidence we have heard.

161. However, we consider that we can fairly determine the issue as to whether the Claimant would have scored a 4 on Technical if there had been no

unfairness or discrimination on the basis of the evidence we have heard. In this respect, we heard evidence from Miss Gaskell about the technical ability of others in her team; we also have Miss Gaskell's own words as provided to Ms Waller at the appeal stage about the very narrow margin between the Claimant and her colleagues and it being only minor issues that had resulted in her being marked down; we can see from Miss Gaskell's assessment notes that the issues that resulted in the Claimant being marked down on Technical were **only** the issues that we have found should have been discounted because they related to her disability. Any further evidence that Miss Gaskell could give us at the November hearing would be after-the-event justification and would require her to contradict what she herself wrote and said at the time if it was to serve the Respondent's argument. In our judgment, there is very little purpose to be served in giving such evidence. The weight we could give it would be absolutely minimal.

162. Further, we are satisfied that the Respondent did in fact have the opportunity to bring to this liability hearing the evidence that it now says it wishes to adduce in relation to remedy on this issue. The Respondent has, unusually, chosen to defend itself in this case without disclosure of anything other than 'bare' scores of other individuals. That is so even though this was until very shortly before the hearing a claim involving claims of race and age discrimination in which those other individuals were actual or evidential comparators. The evidence would also have been relevant even to a decision purely on liability in an unfair dismissal case. For example, our view as to the unfairness that arose in relation to scoring the Claimant may have been different if we had seen the way the scoring had been done for the Claimant's colleagues. It is, however, a matter for the parties what evidence they choose to adduce in a case (subject to the case management powers of the Tribunal). In this case, the Respondent has chosen not to adduce evidence about the assessment of other individuals, but it had the opportunity to adduce that evidence if it wished.

163. As it is, we have heard evidence relevant to the *Polkey* issue so far as the Technical score is concerned, the necessary questions to enable us fairly to determine the issue were put to Miss Gaskell in cross-examination, the Respondent has had an opportunity to make submissions on the issue and the further evidence it wishes to adduce could reasonably have been expected to have been brought to this hearing (especially given that the parties were at the outset of the hearing taking the position that remedy could be dealt with at this hearing if there was time). In the circumstances, we consider that it is in the interests of justice, fair and in accordance with the overriding objective (in particular potentially avoiding delay and expense for the parties) to determine the *Polkey* issue now, so far as it concerns the Claimant's Technical score.

164. Our conclusion on the *Polkey* issue can be shortly stated: as already noted, Miss Gaskell's position at the appeal stage was that the ranking of the Claimant had been *"totally marginal – small, minor elements that have meant Rita scored just 1 point under the next colleague", "This is about a few small things that add up and are the difference against other good performers, Rita*

*was ranked accordingly and makes more inconsistent errors than others on the team", "Rita's performance is good but there have been question marks over her consistency and accuracy, Rita was ranked accordingly and makes more inconsistent errors than others on the team"*, *"Others on the team are consistently more proactive, with a higher standard of plans", "I would want to review and glance over a plan from Rita before sending it on – others are consistently more thorough and take time to exact the detail of their plans"*. It is plain from what Miss Gaskell wrote at the time that it was just the elements that she had noted in her assessment of the Claimant as negative points that had led to her being marked down by 1 point. So far as Miss Gaskell's Technical assessment of the Claimant was concerned, the only negative points identified in relation to the Claimant were aspects of her performance that were related to her disability and which we have found should, by law, have been discounted. Had they been discounted, it is apparent from Miss Gaskell's contemporaneous written evidence that the Claimant would have scored a 4 on Technical as the 'minor differences' between her and her colleagues would have had to be discounted. Miss Gaskell's suggestion in oral evidence that ignoring the disability-related elements may not have changed the Claimant's score was, we find, after-the-event speculation through the distorting prism of defending legal proceedings. It is actually clear that if the clock was rewound and the assessment carried out fairly, discounting the shortcomings related to the Claimant's disability, she would have scored a 4. Had she scored a 4 on Technical, she would have remained in employment and not been made redundant.

165. We note that, by analogy of reasoning, the Claimant ought also to have scored one point more on Leadership and Behaviours as well, but we do not need to determine that in order to determine the *Polkey* issue because one point more on Technical would have sufficed.

**Overall conclusion**

166. The unanimous judgment of the Tribunal is:

    a. The Respondent contravened ss 15 and 39 of the EA 2010 by discriminating against the Claimant because of something arising in consequence of her disability.
    b. The Respondent contravened ss 20 and 39 of the EA 2010 by failing to comply with its duty to make reasonable adjustments.
    c. The Respondent did not contravene ss 27 and 39 of the EA 2010 by victimising the Claimant.
    d. The Claimant's complaint of unfair dismissal under Part X of the ERA 1996 is well-founded.
    e. If the Respondent had not acted unlawfully in the above respects, the Claimant would not have been dismissed.

**Remedy**

167. The Remedy Hearing will take place on 9 and 10 November 2022 in accordance with the provisional listing made at the hearing. The parties must liaise to ensure that they are ready for that hearing. If directions are required, they must apply to the Tribunal in good time.

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Employment Judge Stout
Date: 21/04/2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

22/04/2022.

FOR THE TRIBUNAL OFFICE