Case No: 2203709/2021

EMPLOYMENT TRIBUNALS

Claimant: Ms A Alexis

Respondent: Westminster Drug Project

Heard at: London Central **On:** 18.19, 20, 23 & 24 May 2022

Before: Employment Judge H Grewal
Ms M Foster-Norman and Mr S Pearlman

Representation

Claimant: In person

Respondent: Mr M Williams, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaints of failures to make reasonable adjustments on or after 16 December 2020 are not well-founded;

2 The Tribunal does not have jurisdiction to consider any complaints about failures to make reasonable adjustments before 16 December 2020;

3 The complaint of unfair dismissal is not well-founded;

4 The complaint of disability discrimination under section 15 of the Equality Act 2010 is not well-founded;

5 The complaints of harassment related to disability under section 26 of the Equality Act 2010 are not well-founded.

6 The complaint of victimisation under section 27 of the Equality Act 2010 is not well-founded, and

7 The Claimant is not entitled to statutory redundancy pay.

REASONS

1 In a claim form presented on 15 June 2021 the Claimant complained of unfair dismissal, disability discrimination and made a claim for statutory redundancy pay. Early Conciliation ("EC") was commenced on 5 May 2021 and the EC certificate was granted on 4 June 2021.

The Issues

2 We agreed at the outset of the hearing that the issues we had to determine were those identified at the preliminary hearing 20 October 2021. They were as follows.

Disability Discrimination

2.1 Whether the Claimant was disabled at the material time by reason of dyslexia. It was conceded at the hearing that she was disabled at the material time.

Disability-related harassment

2.2 Whether the following acts occurred:

(a) At a meeting on 18 February 2021 Mr Pink said to the Claimant "Do you think this is a pick and mix" and "semantics are at play";

(b) In the appeal hearing on 17 March 2021 Ms Cooper said "Do you need your hand held?"

2.3 If they did, whether they amounted to harassment under section 26 of the Equality Act 2010.

Failure to make reasonable adjustments

2.4 Whether the Respondent applied a provision, criterion or practice ("PCP") of asking questions in a redundancy selection exercise;

2.5 Whether such a PCP put the Claimant at a substantial disadvantage in comparison with persons who were not disabled because she could not process information in the same way;

2.6 Whether the Respondent knew or could reasonably have been expected to know that the Claimant was disabled and that she was likely to be placed at a disadvantage by the PCP;

2.7 If the answer to all the above is in the affirmative, whether the Respondent failed to take such steps as it was reasonable to take to avoid the disadvantage.

2.8 Whether the Tribunal has jurisdiction to consider the complaint having regard to the time limits for presenting such complaints.

Section 15 complaint

2.9 Whether the Respondent dismissed the Claimant because it perceived her as being unmanageable in relation to her challenges in respect of reasonable adjustments;

2.10 Whether such a perception arose in consequence of the Claimant's disability;

2.11 Whether the Respondent knew or could reasonably have been expected to know that the Claimant was disabled;

2.12 If the answer to all the above is in the affirmative, whether the Respondent has shown that dismissing the Claimant was a proportionate means of achieving a legitimate aim.

Victimisation section 27 Equality Act 2010

2.13 Whether the Claimant's grievance of 13 October 2020 was a protected act;

2.14 If it was, whether the Claimant dismissed her because she had done that protected act.

Unfair Dismissal

2.15 What was the principal reason for the dismissal? The Respondent contended that it was some other substantial reason of such a kind as to justify dismissal, namely an irretrievable breakdown of trust and confidence. It relied, in the alternative, on redundancy.

2.16 Whether the dismissal was fair.

Redundancy payment

2.17 Whether the Claimant was entitled to statutory redundancy pay.

The Law

3 Section 15 of the Equality Act 2010 ("EA 2010") provides,

> "*(1) A person (A) discriminates against a disabled person (B) if –*
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(2) Subsection(1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

4 Section 20(3) EA 2020 provides that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty to make reasonable adjustments does not arise if the employer does not know, and could not reasonably have been expected to know that the disabled person has a disability and is likely to be placed at the disadvantage (Schedule 8 paragraph 20 EA 2010).

4 Section 26 EA 2010 provides,

"*(1) A person (A) harasses another (B) if –*
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of –
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

5 Section 27(1) EA 2010 provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act. Making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010 is a protected act (section 27(2)(d)).

6 Section 98 of the Employment Rights Act 1996 ("ERA 1996") provides,

"*(1) In determining … whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling under subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason fall under this subsection if it –
…
(b) relates to the conduct of the employee;

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in 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, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

7 The effect of **section 123** and **section 140B of the Equality Act 2010** is that in the present case a complaint of discrimination about any act that occurred before 6 February 2021 will not have been presented in time and the Tribunal will not determine it unless it consider it just and equitable to do so. A failure to do something is to be treated as occurring when the person in question decided on it (section 123(3)(b) EA 2010).

The Evidence

8 The Claimant gave evidence in support of her claim. The following witnesses gave evidence on behalf of the Respondent – Nichole Donoher-Phillips (Service Manager), Eleanor Lyden-Vieten (Area Director), Anna Whitton (Chief Executive Officer), Guy Pink (HR Consultant) and Abigail Cooper (Head of Quality and Compliance). Their positions given in brackets are those that they held at the material time. The documentary evidence in this case comprised just under 600 pages.

Reasonable adjustments for the Claimant at the hearing

9 The hearing was conducted in person because the Claimant had requested that as an adjustment. The Claimant had also asked for certain reasonable adjustments before the hearing which we were able to make. We directed that all questions and answers should be clear, concise and should avoid legal jargon (this applied to the Tribunal as much as it did to the witnesses and counsel). We made it clear that if the Claimant did not understand any question or answer that she should ask for it to be repeated. We agreed that the Claimant could make notes of what was said and read those to herself before asking the next question or before answering the question that she had been asked. We noted that the Claimant might close her eyes either when speaking or listening as that helped her focus on what was being said. On the first day I explained to the Claimant the procedure at the hearing. On the first day we adjourned at 10.45 a.m. and we directed the Respondent's counsel to send to the Claimant later in the day a summary of the topics on which he would ask her questions and the order in which he would do so. We sat short days – we finished at 3.58 on the first day, 3.30 on the second day and 12.25 on the third day. The Claimant, therefore, had 2.5 days to prepare her closing submissions. The Respondent sent the Claimant its closing submissions before she prepared hers. We had a short break every morning and every afternoon. We reserved our decision because we considered that it would easier for the Claimant to process the decision if she had it in writing and time to digest it.

Findings of Fact

10 The Respondent is a registered charity which supports adults affected by drug and alcohol abuse. It provides services in London, and the South East and North West of England. It is funded by local authorities, donations, grant funding and corporate support.

11 The Claimant commenced employment with a charity called Turning Point on 4 January 2010 as a receptionist/secretary. In March 2014 her title was changed to Service Administrator.

12 On 1 April 2015 the Claimant's employment transferred to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006. After joining the Respondent the Claimant's job title was amended to Receptionist Administrator. The Claimant worked in the Respondent's Brent service which had two sites – one was known as Cobbold Road and the other as the Willesden Centre. For the latter part of her employment the Claimant was primarily based at the Cobbold Road site.

13 On 1 August 2018 the Claimant informed the Respondent's HR function that she had dyslexia and asked it whether it provided any assistance with working to someone in that position.

14 The Respondent referred the Claimant to Dyslexia Assessment and Consultancy ("DAC") to obtain an assessment of her difficulties and what support could be provided to her in the workplace. The Claimant was assessed on 26 March 2019 and a Diagnostic Assessment report was provided. The report confirmed that the Claimant had dyslexia and stated, among other things,

> "*Anne-Marie has weaknesses in the following areas; working memory, the ability to manipulate information in the mind; phonological awareness, understanding the sound structure of language that underpins efficient literacy and a difficulty in information processing speed when working with a written code.*
>
> *Anne-Marie's dyslexia means that she finds it difficult to remember information and work under timed conditions."*
>
> *"In summary, Anne-Marie finds it challenging to read unfamiliar text accurately, plan and organise her thoughts, proof-read for errors and find the correct word to use when speaking and writing. She is more likely to remember how to complete a task if she is shown how to do it and is able to take notes. Her difficulties are likely to be compounded under time pressure or during periods of stress."*

It recommended that a Workplace Needs Assessment be carried out and recommended the following,

> *"Assessment & Examination Adjustments*
>
> *If Anne-Marie attends further training, or undertakes professional or academic examinations, it is recommended that she receive 25% additional time allowance to compensate for her slow reading speed and decoding difficulties…*

These arrangements should apply for all future examinations, interviews and assessments, whether of an academic or professional nature."

15 A Workplace Needs Assessment was carried out by DAC on 7 May 2019.

16 In Autumn 2020 the Respondent proposed a restructure of the Brent service. At that time there were three Receptionist Administrators working in the Brent service. It was proposed that those roles should be removed and replaced with one Receptionist based at the Cobbold Road site and one Administrator based at the Willesden Centre.

17 On 17 September 2020 management informed the three Receptionist Administrators of the proposed restructure and how it would impact upon their roles. On 21 September Ms Donoher-Phillips had an individual consultation with the Claimant. All three employee affected by the restructure expressed an interest in applying for the two new roles. It was decided that the selection for the roles would be based on competitive interviews for the two roles.

18 On 2 October 2020 Martyna Kabia, HR Operations Manager, sent the Claimant an email informing her of the date and times of the interviews and the composition of the panel. The interviews were to take place on 8 October – the one for the Receptionist at Cobbold Road at 12 and the one for the Administrator at Willesden at 2.30 p.m. The panel would comprise Ms Donoher-Phillips and two managers from outside Brent – Cyd Veins and Mohammed Juned. The Claimant was informed that Ms Donoher-Phillips would be present at Cobbold Road and the other members of the panel would join via MS Teams and the Claimant was given the option to attend in person or remotely via Teams. It was a short email and Ms Kabia concluded by saying,

"*Should you require any support for the interview, please contact me or Nichole as soon as possible."*

The Claimant responded that she had no preference as to how she attended the interview. She did not say that she needed any support or any adjustments.

19 The Respondent used competency based questions and all candidates were asked the same questions and their responses were recorded. There were nine questions in each interview. The Respondent had drafted exemplary responses to each of the questions and the candidates were scored against that standard.

20 The Respondent had experience of interviewing applicants with dyslexia and an adjustment that they had previously made was to send to the candidate the interview questions fifteen minutes before the start of the interview. The only adjustment recommended for interviews in the Claimant's DAC report was to extend the length of the interview. There was no recommendation for questions to be provided in advance for either interviews or examinations. As the Claimant had not requested any adjustments, Ms Donoher-Phillips decided to send the Claimant the questions at least fifteen minutes before the start of her first interview and she sent them to her work email. Unfortunately, she did not tell the Claimant in advance that she would do that. She assumed that as the Claimant was working at home she would see the email with the questions. She briefed the other two panel members that the Claimant was dyslexic. They were all conscious during the interview that they would need to

ensure that the Claimant understood the questions and to provide her additional time to answer the questions. The Claimant attended her interview via MS Teams.

21 At the start of each interview Ms Donoher-Phillips introduced the panel and asked the candidates to ensure that they had a pen, paper and a glass of water available. She encouraged the Claimant to take notes if that would assist her. She also explained that the interview questions could be repeated and that she could go back to a previous question if she wanted to. At the start of the Claimant's first interview, Ms Donoher-Phillips referred to the email that she had sent to the Claimant with the interview questions and the Claimant said that she had not seen the email. Ms Donoher-Phillips advised her that she would do the same before the second interview at 2.30 p.m. and asked the Claimant to look out for the email. At the start of the second interview the Claimant confirmed that she had received the interview questions before the interview. The Claimant's answers in both interviews were short and limited in content. Some of the questions were repeated and/or reframed and at the end of some of her answers the Claimant was asked if she had anything further to add.

22 The interviews were scored. Each answer was given a score between 0 and 3. 0 signified "poor", 1 "needs to develop answer", 2 "competent" and 3 "excellent". Each panel member noted the responses to the questions and scored the candidates individually. The maximum score that a panel member could award a candidate was 27. The Claimant received very low scores. She received a score between 0 and 1.5 on each of the questions. Her average overall score for the Administrator role was 3 and for the Receptionist role was 4. The other two candidates received an average overall score of 16 for the Administrator role and 17 for the Receptionist role.

23 On 9 October Ms Donoher-Phillips and Ms Kabia met with the Claimant. They informed her that she had not been successful and gave her verbal feedback as to why she had not been successful. She was also told that the redundancy consultation process would start. The Claimant requested the feedback in writing and also asked for the notes of her interviews, what answers they expected and her scores and those of the other candidates.

24 On 13 October, before the Claimant received that information, she sent an email to Ms Donoher-Phillips and Ms Kabia raising a grievance in respect of the interviews held on 8 October 2020. She said that the reasonable adjustment put in place for the interviews did not take into account her disability based on the following factors – 15 minutes was not adequate time for her to read and digest the questions and a reasonable adjustment would have been to have given her the questions 24 hours before the interview. She said that 15 minutes before the interview she had informed Ms Donoher-Phillips that the adjustment provided was not reasonable and would not give her adequate time to prepare.

25 Ms Kabia responded that they had agreed to provide her with certain information in writing and if she had any questions or wished to meet with them again after she had reviewed the information, a further meeting would be arranged. If she still wished to raise a grievance after reviewing the interview documentation, she would allocate an independent investigation officer to investigate her grievance. The Claimant's response was that she wanted the grievance that she had raised to be progressed and that she would raise another grievance, if she wanted to, after she had reviewed the interview documentation.

26 On 16 October Ms Donoher-Phillipps sent the Claimant the notes of her interviews, the sample answers, the scores for the Claimant and other candidates and written feedback about the Claimant's performance at both interviews.

27 On 26 October the Claimant was informed that Jo Winstanley (HR Consultant) would investigate her grievance about the failure to make reasonable adjustments. Ms Winstanley interviewed the Claimant on 5 November 2020. The Claimant said in essence that 15 minutes was not sufficient time for her read and digest the questions and that she had, in any event, not seen the questions before the first interview because she had not been told that they would be sent to her and had seen them just ten minutes before the second interview and she had not known what they were. The Claimant said that she would require 24 hours to read and digest the questions. Ms Winstanley asked the Claimant why in her response to the email inviting her to the interview (which had asked her to let them know if she required any support for the interview) the Claimant had not said what adjustments she required. The Claimant responded that she did not see that and the words "reasonable adjustments" had not been mentioned in the email.

28 Ms Winstanley also interviewed Ms Donoher-Phillips and Mr Juned. They confirmed that the panel had been aware that the Claimant was dyslexic and that the Claimant had been sent the questions 15 minutes before each interview. She had said at the first interview that she had not seen them and she had been told to look out for them before the second interview. It had been made clear to her that she could have asked for questions to be repeated or reframed and there was nothing to stop her making notes if she had wished to do so.

29 Ms Winstanley produced a short investigation report on 24 November. On 27 November she invited the Claimant to a grievance hearing on 11 December. She sent her the investigation report and told her that the grievance would be heard by Eleanor Lyden-Vieten. She was advised that she had at the right to be represented at the hearing by either a work colleague or a trade union representative. She was reminded that the matter was to be treated in the strictest of confidence and should not be disclosed or discussed with colleagues "*other than your representative."*

30 When the Claimant raised her grievance, the redundancy process was put on hold pending the outcome of the grievance. Unfortunately, that was not communicated to the Claimant and on 16 November she inquired what was happening in respect of that that. On 23 November Ms Donoher-Phillips explained to her that it had been put on hold pending the outcome of her grievance.

31 The grievance hearing took place on 14 December 2020. Ms Lyden-Vieten was accompanied by Mr Wheelhouse, HR representative. The Claimant was not accompanied. She said that she had been confused by the letter which said that she could bring a representative but should not disclose or discuss the case with anyone. Mr Wheelhouse explained that it was alright to discuss the case with a work colleague if that colleague was her representative but not with any other colleagues. The Claimant confirmed that she was happy to continue unaccompanied. The hearing lasted 2.5 hours. It took place in person at the Claimant's request as she said that she had internet connection problems at home. They went through each point in the investigation report. The Claimant said that she should have been offered support in a separate email and not in the email inviting her to the interview because she

could no be expected to read everything in the email due to dyslexia. She said that in any event the Respondent should know what support she required without any input from her. She had read some of the DAC report but not all of it. Even if she had read all of it, because of her short-term memory she would have forgotten it in a few minutes. She was asked what her basis was for stating that she needed to see the interview questions 24 hours before the interview. The Claimant was not able to point to any medical evidence or any other advice to support that but said that it was her belief that she required that. She also said that interviewing only her again would not be an acceptable outcome. All three candidates should be interviewed again.

32 Ms Lyden-Vieten sent the Claimant the grievance outcome on 16 December 2020. She did not uphold the Claimant's complaints that having the questions 15 minutes in advance on the interview was not a reasonable adjustment and that a reasonable adjustment would have been to give her the questions 24 hours before the interview. She noted that the DAC report had stated that the Claimant should receive 25% extra time for formal interviews and assessments, and that as the interviews in question were an hour long each, 25% equated to 15 minutes. There was no medical evidence or any basis to support the Claimant's assertion that she needed 24 hours to read and digest the questions. However, she accepted that the Claimant had not been told in advance of the interviews that she would be receiving the questions 15 minutes before the interviews. She upheld that part of her grievance. She recommended that the Claimant be offered the opportunity to be interviewed again for the two roles, that she be given the questions 15 minutes before the interviews, and that she could take pen and paper into the interview to take notes during the interview. She advised that if the Claimant was unhappy with the outcome she had the right to appeal within ten days.

33 On 31 December 2020 the Claimant sent a response to the grievance outcome. The response comprised 10.5 typed pages. The Claimant stated that her DAC report said that the time allowed for any examination or training should be extended by 25% but it did not say anything about how long before an interview she should be provided with the questions. Hence her interview should have been 15 minutes longer but the report did not say anything about how long she should be given for preparatory work prior to the interview. That point was repeated several times. She said that the remedy proposed of giving her the questions 15 minutes before the interview made her feel bullied and harassed and was discriminatory. The Claimant also said that she had not said that she had not read the reference to support in the email of 2 October but had said that due to her dyslexia she had missed it. She maintained that having 24 hours to read and digest the questions would be a reasonable adjustment.

34 The appeal was to be heard by Anna Whitton, the Respondent's Chief Executive Officer. On 12 January 2021 Ms Whitton invited the Claimant to a grievance appeal hearing on 14 January. She advised the Claimant that she could bring a work colleague or a trade union representative as a companion to support her at the hearing. The Claimant responded that she was not a member of a trade union and that she could not bring a work colleague because Mr Wheelhouse had told her that she should not discuss the matter with other members of staff. She asked whether she could bring a solicitor to accompany her. Ms Whitton replied that she could not bring a solicitor and repeated that she could bring a work colleague or a trade union representative.

35 Ms Whitton heard the appeal on 14 January 2021. She was accompanied by Mr Wheelhouse. The Claimant was not accompanied. There was a conversation again to the effect that she was entitled to speak to a work colleague who was supporting her at the hearing but was not allowed to discuss her grievance with other colleagues. The Claimant confirmed that she was happy to continue without a companion. The Claimant confirmed that she felt sending the questions to her 24 hours before the interview would be a reasonable adjustment. She confirmed that she needed that time to read and digest and repeat. She also said that she did not see the difference between 15 minutes and 24 hours as she would forget anyway. She asked whether, if she was interviewed again, the questions would be the same as before. Ms Whitton responded that if they did that the process would not be fair. The Claimant had by that stage not only had many weeks' notice of the questions but had also been provided with the sample answers. Ms Whiton asked the Claimant what outcome she wanted and the Claimant replied that she just wanted to have her job and to be treated fairly. She should not have to go through this process. Ms Whitton confirmed that the recruitment process had been paused and that the successful candidates had not been confirmed in the new roles.

36 Ms Whitton sent the Claimant the grievance appeal outcome on 15 January 2021. Ms Whitton upheld parts of the Claimant's grievance that had not been upheld at the first stage and allowed her appeal to that extent. She accepted that 15 minutes was not sufficient time for the Claimant to read and digest the information provided prior to an interview. That was based on the difficulties outlined in the DAC report regarding information processing speed when working with a written code and difficulties working under timed conditions. She also agreed that the Claimant should have been informed more effectively and in advance regarding the proposed reasonable adjustment, a fact which had been acknowledged at the original hearing. However, she did not agree that providing the Claimant with specific interview questions 24 hours before the interview would be a reasonable adjustment. Her view was that that would give the Claimant an unfair advantage over other candidates. She upheld the decision that the Claimant should be re-interviewed. The process had been put on hold and the outcome of the Claimant's fresh interviews would inform the next step of the process, namely which of the three candidates should be appointed to the available two roles. She recommended that the Claimant be interviewed again using different questions but ensuring parity by using the same scoring matrix and process. She recommended that the length of the Claimant's interviews be extended by between 15 and 30 minutes and that she be given question headings and summary of competencies sought 24 hours before the interview (but not the specific questions) and that someone meet with her 24 hours before the interview to talk through that document. She also made the same recommendation as before relating to using pen and paper and making notes. She also recommended that the learning from the grievance be discussed within the HR team to support continuous improvement of the Respondent's recruitment practice. She concluded by saying that her letter was the final outcome and there was no further right to appeal and that the recruitment panel would contact her to arrange the interview.

37 The outcome letter was sent to the Claimant at 12.34. Between 1.28 and 2.24 she sent Ms Whitton three emails. In the first one she asked Ms Whitton to provide evidence that the other candidates had been informed that the process had been put on hold. She said that if she was going to be asked different questions the process would not be fair if all three candidates were not interviewed again and that she should be provided the specific questions and not just question headings or summary

competencies. She also asked to be allowed to send a copy of her email to the Chairperson of the Respondent as she felt that only her being interviewed again when the questions had been changed was an unfair process.

38 In the second email she asked Ms Whitton to clarify whether the other two candidates had been told that they no longer held the positions to which they had been appointed or their starting in that role had been paused. It is not at all clear what the Claimant is trying to say in the third email. She asked for evidence that the there would still be parity even thought the questions were changed and then talked about how the original reasonable adjustment could not be changed and should remain the same. She asked again to forward all her emails to the Chairperson "*in order for her to validate your outcome as original I was concerned with the scoring process of which Symon failed to discussed or outcome in the original outcome letter"* [sic].

39 Before she had received a response from Ms Whitton, the Claimant at 3.36 p.m. sent an email to Ms Batliwala, the Chairperson, the subject of which was "FW: Discrimination – Unfair process." She said that she had complained about an interview process and that Ms Whitton had looked at the case and had decided to "*upheld the re-interview"* which the Claimant felt was flawed for a number of reasons which she set out. The Claimant then sent her another two emails.

40 The Claimant sent her emails on the Friday (15 January 2021). Ms Batliwala, who is not based at the Respondent's office and is not a full-time employee, responded on the following Tuesday (19 January). She said in her response that she had spoken to Ms Whitton but it is clear from her response that she had not fully understood the position in relation to the Claimant's grievance. She stated "*I understand that your grievance will not be upheld".* That was partially correct. Part of the Claimant's grievance, namely that she should be given the interview questions 24 hours before the grievance as that was a reasonable adjustment, had not been upheld. It was clear that the Claimant continued to be unhappy about that. Part of the Claimant's grievance, however, had been upheld. However, the Claimant was not happy with the recommendations that had been made as a result of part of her grievance being upheld. Ms Batliwala told the Claimant that there were no further grounds for her to appeal. Ms Batliwala then said,

> "*Your contribution to WDP has been highly valued over the years, and I can only hope that you will take something positive away with you from WDP that reflects your years here, in the same way that you have left an enduring positive impression on the organisation."*

Ms Batliwala was clearly under the impression that the Claimant was going to be leaving. It is not entirely clear whether that was because she thought that the Claimant's grievance had not been upheld (and, therefore, the decision that she was redundant would stand) or because she felt that the Claimant did not accept the recommendations of the grievance appeal and would not agree to the re-interview (which would have the same effect – the decision that she was redundant would stand). In either case, there was no further right to appeal to her and Ms Whitton's decision was final.

41 On 20 January the Claimant sent Ms Batliwala two further emails. In the first one she said that Ms Batliwala's response to her indicated to her that the Board had

been aware of and was in agreement with the unfair treatment to which she had been subjected. In the second one she asked Ms Batliwala her reason for upholding Ms Whitton's appeal decision. She then repeated her disagreement with and objections to what Ms Whitton had said.

42 On 20 January Ms Whitton sent the Claimant a letter responding to the Claimant's emails to her. She said that under the Respondent's policy her letter had been the final outcome with no further opportunity to appeal. However, she thought that it would be helpful to provide further information. She said that they could not use the same questions because the questions and the example answers had already been given to the Claimant. They would ensure that there was appropriate alignment between the questions asked at the re-interview and the competencies that needed to be demonstrated. As a result the scoring matrix used across all the interviews would be consistent and fair. She said that she did not agree that if they were giving the Claimant information 24 hours in advance of the interview, that had to do what had been done before, which was to provide her with the specific questions. That would give her a significant advantage over the other candidates and would not be fair. She said that another option, if the Claimant preferred it, would be to provide her with the specific questions one hour before the interview. She concluded the letter by saying,

> "*From the communications that you have sent over the past few days, it would appear that you have a lack of trust or confidence in the options being presented to you and moreover in the grievance process itself, which is a concern. I assure you that I have considered your concerns fully through the appeal. We do now need to progress to conclude the restructure process, for the benefit of all candidates including yourself. I have set out the options available to you in the email that accompanies this letter. Please take your time to consider these and respond to confirm your preference. The deadline for this is 5pm on Friday 22nd January 2021."*

43 In the email, to which the letter was attached, Ms Whitton said,

> "*Given what you have expressed verbally and in multiple emails including your most recent, it would be good to understand whether you want to continue with the restructuring process. We would like you to, but I don't think it is right for me to ignore your repeated feedback that you consider both individual members of the team and WDP as a whole to be acting unfairly towards you. Employment relationships function on an inherent contract of trust and confidence between parties, we cannot function well together if you don't think the beliefs that you have communicated about the organisation can change. I recognise that we have a role in building your confidence in the employment relationship, however this requires a mutuality of obligation. Perhaps you could answer that question of whether you believe this mutual trust and confidence can be rebuilt, before we spend more time organising next steps in the recruitment process."*

She then set out what the Claimant's four options were. These were:

(i) Continue in line with the recommendations set out in the grievance appeal outcome letter;
(ii) Continue with the recommendations set out in the grievance appeal outcome letter, but with one change – the Claimant receives the questions

one hour before the interview instead of the information 24 hours before the interview;

(iii) Continue in line with the recommendations set out in the grievance appeal outcome letter but with no information provided before the interview;

(iv) Opt out of the restructuring process and enter a redundancy consultation process.

44 On 22 January the Claimant responded to Ms Whitton's email and letter of 20 January. The response comprised five typed pages. She said that she did not believe that mutual trust and confidence between her and the Respondent had been breached or broken down and she wanted to continue with the restructuring process. She rejected options (iii) and (iv). As far as the first two options were concerned she said that as the Respondent had not accepted her reasonable adjustment to provide her the questions 24 hours before the interview,

> "*I cannot nor I am able to make a decision between these two options (being options 1 and 2) … Therefore I am handing back to WDP to decide which of the options mentioned (this being Options 1 and 2) that they wish for me to undertake, based on the fact that WDP have placed the onus on me. However, I am prepared to attend whatever interviews whether it is the two options mentioned or any other that WDP may decide and will try to do my best, but I do not accept or agree with Option 1 and 2, nor do I think it is fair but I will go through with either of the aforementioned interviews put before me in order to conclude the recruitment process.*
>
> *I am not refusing to attend any of these two options (being Option 1 and 2) although each discriminates against me based on the fact that WDP is refusing to agree to provide the questions 24 hours in advance in orders for me to "read and digest"…"*

In the next four pages the Claimant went through the points that had been made in Ms Whitton's email and letter and set out why she disagreed with each of them.

45 On 3 February Ms Whitton wrote to the Claimant that she had read through what she had sent and Guy Pink would contact her the next week to follow up.

46 On 9 February 2021 Mr Wheelhouse sent the Claimant a letter from Guy Pink. Mr Pink said that he was an HR consultant engaged by the Respondent to chair a meeting with her. He said that the purpose of the meeting was to discuss whether her continued employment with the Respondent was tenable in light of the matters set out in his letter. He summarised the primary concerns that he wished to address with her as being (i) her perceived unmanageability (ii) her rehearsing of complaints that had already been dealt with and her inability to accept the grievance outcome (iii) her actions were causing an unsustainable demand on HR and management (including executive) time and resources (iv) the belief that relations, trust and confidence between her and the Respondent had irretrievably broken down. He described the formal procedure under which the hearing was being held as being that of "some other substantial reason" for dismissal. He briefly set out some background in a page, and then over the next six pages set out in some detail the Respondent's concerns. These related to the Claimant's reaction to the grievance process and, in particular, her response to the outcome of the grievance appeal. Although she had been told by the CEO that her decision was final and there was no further appeal, the

Claimant had sent a number of emails to her and had sought her consent to copy those to the Chairperson. Before the CEO had had an opportunity to respond, the Claimant had sent five emails to the Chairperson headed "Discrimination -unfair process". The four options put forward by Ms Whitton were either rejected or tagged by her as discriminatory. He said that the correspondence that he had seen indicated that any outcome, save the Respondent giving the Claimant one of the two roles, would be met with further allegations of bullying, harassment and discrimination. He invited the Claimant to a meeting on 18 February 2021 to consider whether the matter was capable of being resolved or trust and confidence between the Claimant and her employer had irretrievably broken down. He sent the Claimant a pack of documents which he intended to refer to at the hearing and advised her that she could be accompanied by anyone of her choice, but not a solicitor or a legal advisor. The Claimant was given paid special leave to prepare for the hearing.

47 The Claimant confirmed that she would attend the meeting but then sent Mr Pink a number of emails asking him why the meeting was being held. She said that she had "*not refused"* the grievance appeal outcome and was waiting for Ms Whitton to decide whether to pursue option 1 or 2 (both of which she had described to her as being not fair and discriminating against her). Mr Pink told the Claimant that he did not intend to reply to the points that she had raised because he thought that his letter was clear and she would have the opportunity to make representations at the meeting and to offer him suggestions and assurances as to how things could be resolved. The Claimant said that she might get a friend or family member to accompany her and MR Pink asked her to let him have the details of the person concerned.

48 The meeting took place on 18 February 2021. The Claimant was not accompanied. Mr Pink was accompanied by Mr Wheelhouse. The Claimant said that she did not think that the interview questions should be changed and she should be asked the same questions. The Claimant said that she had not refused options 1 and 2; she accepted them with the caveat that they were not suitable and discriminatory. Mr Pink said "*I am not sure that is clear to me but I think there is some semantics at play here, you are saying to are not refusing but conversely you are not accepting."* At one stage when the Claimant said that she had selected options 1 and 2 Mr Pink laughed and said, "*These are not pick and mix."* The Claimant said that mutual trust and confidence had not broken down and that it was all "*about procedural processes."* The Claimant said that she had felt bullied and harassed by Ms Lyden-Vieten and Mr Wheelhouse at the grievance hearing. The Claimant was asked a number of times why she had gone to the Chairperson when she had been given a final decision by the CEO and it was suggested to her that she did not accept Ms Whitton's decision. The Claimant maintained that that was not the case. She had not said that she would not do what Ms Whitton had proposed, but she was confused about the process and wanted her to look at the reasonable adjustment and wanted to raise her concerns. The Claimant was asked if the Respondent considered mediation might be a way of resolving issues, whether she would be agreeable to that and the Claimant responded "*whatever WDP decides."*

49 Mr Pink sent the Claimant his decision on 23 December. He said that the Claimant had a statutory and contractual right to bring a grievance and to appeal the outcome. However, her reaction to the appeal outcome had made it clear that she was not prepared to accept the outcome or any outcome that did not accord with all her demands. She had challenged the decision of the CEO by repeatedly sending

her emails challenging her decision and had then raised the matter with the Chairperson by sending her repeated emails. Although the Claimant had said that she was not refusing options 1 and 2 it was clear that she did not accept them because she thought that (i) not asking her the same questions as she had been asked before was unfair (ii) re-interviewing only her was unfair (iii) not giving her the specific questions 24 hours before the interview was unfair and (iv) therefore, both those options discriminated against her. It was clear to him that if the Respondent chose one of those options and restarted the redundancy process, the Claimant would challenge that decision and the outcome of that decision if she was not successful. The Respondent had spent considerable time and resources dealing with the Claimant's complaints and it was clear that if the redundancy process proceeded, with the view the Claimant had expressed on the options, that it would have to spend more time and resources on dealing with her. Delaying the process was not fair on the other two candidates or the organisation which needed the structure to be operative. The views that the Claimant had expressed had made it clear that she had no trust or confidence in the senior managers (including the CEO and the Chair of the Board) and senior HR professionals. He had considered alternatives but felt that none of them was a viable option and concluded for the reasons given above that the employment relationship could no longer be sustained. His decision was to terminate the Claimant's employment with 11 weeks' notice. Her employment would, therefore, end on 11 May 2021 but she was not required to work her notice period. She was advised of her right to appeal his decision.

50 The Claimant appealed the decision. Her appeal comprised 26 typewritten pages. The appeal was heard on 17 March 2021 by Abigail Cooper, the Respondent's Head of Quality and Compliance. Mr Wheelhouse was present. The Claimant was not accompanied. She said again that she was confused about asking a colleague to accompany her because the letters had said that she should not discuss the grievance with her colleagues. This point had been raised several times before by the Claimant and it had been made clear to her what it meant. She confirmed that she was happy to go ahead. The Claimant recorded the hearing and produced a transcript of the hearing. At no stage in the hearing did Ms Cooper say, "*Do you need your hand held?"* The Claimant accepted in evidence that the comment had not been made.

51 Ms Cooper sent the Claimant her decision on 9 April 2021. She dismissed the appeal and upheld the decision to dismiss the Claimant. She said, among other things,

> "*Whilst the purpose of our meeting was not to revisit the outcome of the grievance process, I believe that your perception of that process as being unfair is central to this whole process and consequently requires some consideration here. Having reviewed the information it would appear that what was being offered was not in my view discriminatory nor unfair, and might, reasonably, have been seen as an attempt to offer over and above what might have been reasonably interpreted by your DAC report, whilst taking into account WDP's responsibilities to all candidates in the redundancy process.*
> *Therefore, the information reviewed does indicate to me that it is reasonable for* [Guy Pink] *to have interpreted your behaviour as unmanageable."*

"I agree with his view that you were not happy to abide by the terms set out by [Anna Whitton] *for the re-interview process, nor were you intending to accept the outcome of the process."*

"The fact that you state that you do not believe that there is anything about your behaviours that has contributed to the current circumstances is important. It could be interpreted as demonstrating that, despite the strong language used about discrimination and unfairness and your refusal to accept [Anna Whitton's] *decision, that you do not appreciate the seriousness with which all parties have to take this matter or the implications of your behaviours and the need for them to change."*

52 On 14 April 2021 the Claimant raised a formal grievance about the Respondent's failure to make reasonable adjustments and victimsation. She said that although she had said that she was willing to attend a re-interview the Respondent had proceeded to dismiss her. She had referred the matter back to the Respondent because she had been confused by what was being offered. The Respondent should have made a reasonable adjustment to ensure that she understood what was on offer. She also said that the Respondent had victimised her by dismissing her because she had raised a grievance about failure to make reasonable adjustment and what she had said in the course of that grievance process.

53 On 27 April 2021 Marina Deeny met with the Claimant to discuss her grievance. She sent her outcome letter to the Claimant on 11 May 2021. She did not uphold her grievance.

Conclusions

Disability-related harassment

54 Ms Cooper did not say to the Claimant at the appeal hearing "Do you need your hand held?". Mr Pink at the meeting on 18 February referred to there being "some semantics at play" in reference to the Claimant trying to make a distinction between refusing and not accepting and, in response to the Claimant saying that she had selected two of the options offered to her said "these are not pick and mix". The Claimant might have perceived that as unwanted conduct, but it is clear from the context in which those two comments were made, they had nothing to do with the Claimant's dyslexia. They did not have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if the Claimant perceived it as having that effect, taking into account her perception and all the circumstances of the case, it is not reasonable for the conduct to have had that effect. The comments do not amount to harassment related to disability under section 26 of the Equality Act 2010.

Failure to make reasonable adjustments

55 It was not in dispute that the Respondent applied a practice of interviewing people (asking questions) in a redundancy selection exercise. It was equally not in dispute that the Respondent knew that the Claimant was disabled and that that practice put her at a substantial disadvantage in comparison with persons who were not dyslexic because she could not process information in the same way. It knew that because the Claimant's DAC report had said that she had weaknesses in the ability to

manipulate information in her mind and that she found it challenging to organise her thoughts and find the correct words when speaking, and that these difficulties were likely to be compounded under time pressure or during periods of stress. The only adjustment recommended in the DAC report for interviews and examinations was to extend the time of those by 25%. That adjustment was recommended to compensate for the Claimant's slow reading speed and decoding difficulties. It did not recommend as an adjustment for either an interview or an examination that the Claimant should be provided the questions in advance.

56 In deciding what adjustments it was reasonable to make to avoid the advantage the Respondent took into account what the DAC report said, its own previous experience of making adjustments for interviews of dyslexic candidates and it gave the Claimant an opportunity to ask for whatever support she considered necessary. Although the DAC report did not make any recommendation that the Claimant should be given the questions in advance of the interview, the adjustment made by the Respondent was entirely in keeping with the adjustment recommended by the DAC for examinations. The effect of the DAC recommendation was that the Claimant should be given one hour and fifteen minutes to do an examination that was ordinarily one hour long. It considered that an extra fifteen minutes was sufficient to compensate for the Claimant's slow reading speed and decoding difficulties. That was considered to be sufficient extra time for her to read and digest the information. In those circumstances, it is difficult to see why giving the Claimant the questions in advance of the interview and fifteen minutes to read and digest them would not be sufficient to compensation for her slow reading speed and decoding difficulties. The Respondent is making the same adjustment for an oral interview as is recommended for a written examination. We are satisfied that on the evidence before it the Respondent took such steps as were reasonable to avoid the disadvantage. However, as was recognised at the grievance hearing, it did not implement that adjustment effectively because it did not tell the Claimant in advance that it was making that adjustment and hence she did not get the full benefit of it. That, however, was corrected in the grievance outcome on 16 December 2020 when it was decided that the interviews would be held again with the adjustment being properly implemented.

57 The adjustments made in the grievance appeal outcome on 15 January went considerably beyond what was recommended in the DAC report and what the Respondent normally provided as adjustments for dyslexic persons. The adjustments were that the interviews would be extended by up to 50% and that the Claimant would be given the question headings and summary of competencies to be covered in the interview in writing 24 hours before the interview. The effect of the further option given on 20 January was to give the Claimant 100% extra time (one hour) to read and digest the questions and 50% extra time to do the interview. If DAC considered fifteen minutes sufficient time to compensate for the Claimant's slow reading speed and decoding difficulties in a written examination, an extra one hour to compensate for that in an oral interview is more than reasonable.

58 There has been no failure to make reasonable adjustments since 16 December 2020 when it was decided to re-interview the Claimant. Any complaint about any failure to make reasonable adjustments before that time was not presented within the primary time limits. We considered that it would not be just and equitable to consider that complaint out of time because the Respondent had remedied the defect by 16 December as a result of which the Claimant did not suffer any disadvantage.

Unfair Dismissal, discrimination arising from disability and victimisation

59 We considered these three complaints together because they all relate to the Claimant's dismissal. It was not in dispute that the Claimant's grievance of 13 October 2020 was about a failure to make reasonable adjustments and that that amounted to a protected act.

60 We have found that the Respondent dismissed the Claimant because her response to the grievance appeal outcome (which upheld her grievance and proposed adjustments that went way beyond what was required) demonstrated that the Claimant would not accept any outcome that did not meet her wholly unreasonable demands, she did not accept the decisions of her senior managers, she would continue to challenge and disagree with everything they said and would end up taking up a lot of the Respondent's time and resources, the restructure process would be held up indefinitely, and she did not trust the organisation's senior managers, its Chairperson and HR personnel. All those factors indicated that mutual trust and confidence between the Claimant and her employers had broken down and the employment relationship had become unsustainable. That amounts to some other substantial reason of such kind as to justify the Claimant's dismissal. We do not accept the Claimant's argument that she had accepted the grievance appeal outcome and all she was doing was seeking clarification of things she did not understand. It is clear from the emails that she sent to both Ms Whitton and Ms Batliwala after she received the grievance appeal outcome that she was disagreeing with the outcome and challenging aspects of it and that she regarded options 1 and 2 as being unfair and discriminatory.

61 The Claimant was not dismissed because she had complained of failure to make reasonable adjustments on 13 October 2020. The Respondent had taken that matter seriously, a number of different people had spent many hours dealing with it, had taken on board what the Claimant had said and had agreed to make adjustments that were more than reasonable. Her complaint of victimisation is not made out.

62 Part of the reason for the dismissal was that the Claimant was seen as being unmanageable. The facts that gave rise to that conclusion had nothing to do with the Claimant's dyslexia. The Claimant's failure to accept the grievance appeal outcome and her continued challenges to it by sending numerous emails to the CEO and the Chairperson was not connected with her dyslexia. She understood what she had been told. She had time to read and digest it. She simply did not agree with it and accept it. The Claimant was not dismissed because of something arising out her disability.

63 We then considered whether in all the circumstances the Respondent acted reasonably in treating the reason (at paragraph 60 above) as a sufficient reason for dismissing the Claimant. We concluded that that the Respondent genuinely and reasonably believed that the trust and confidence necessary between employer and employee had irretrievably broken down and the employment relationship was no longer sustainable. Before it reached that conclusion it had conducted as much investigation as was reasonable in all the circumstances. Mr Pink had looked at all the evidence that the Respondent had which led it to that belief and the evidence put forward by the Claimant to support her belief that that was not the case. The Claimant had been give all the evidence by the Respondent, she had been given

paid leave and adequate time to prepare her response to it and had been given the opportunity to put forward her arguments against it. The decision to dismiss was within the band of reasonable responses open to a reasonable employer in the circumstances of this case. The Claimant had been afforded a right of appeal. We concluded that the dismissal was fair.

64 As the Claimant was not dismissed because she was redundant, she is not entitled to statutory redundancy.

Employment Judge - Grewal

Date: 25th July 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

25/07/2022

FOR THE TRIBUNAL OFFICE