EMPLOYMENT TRIBUNALS

Claimant:	**Mr J Ellsbury**
Respondent:	**Peninsula Business Services Limited**
Heard at:	**Newcastle Employment Tribunal**
On:	**7-10 March, 27, 28 March; and 30 March 2023 (deliberations)**
Before:	**Employment Judge L Robertson** **Mr S Wykes** **Mrs D Newey**
Representation	
Claimant:	**in person**
Respondent:	**Mr Samson, counsel for the respondent**

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is:

1. The claimant's claims that the respondent failed to make reasonable adjustments fail. Although the Tribunal upheld his claim in relation to the coping skills training, that claim is dismissed as it was brought out of time and it was not just and equitable to extend time;

2. The claimant's claim that the deduction made from his wages in respect of training costs amounted to an unlawful deduction from his wages and/or breach of contract fails; and

3. The Employer's Contract Claim brought by the respondent in respect of the balance of training costs succeeds. The claimant is ordered to pay £430.16 to the respondent.

REASONS

The claimant's claim

1. By a claim form presented on 1 March 2022, the claimant, Mr Ellsbury, brought complaints arising out of his employment by the respondent which ended on 4 November 2021. Several of his complaints had been dismissed on withdrawal before the final hearing. By the time of the final Hearing, the claimant's remaining complaints were as follows:

    1.1. failure to make reasonable adjustments under the Equality Act 2010 ("`the Equality Act"); and

    1.2. in respect of a deduction made to recover training costs under a training agreement, breach of contract or unlawful deduction from wages.

2. In the respondent's grounds of resistance to the claim, the respondent had brought an Employer's Contract Claim against the claimant for the balance of the training costs which had not been recovered. The claimant disputed the Employer's Contract Claim (as to which, see further below).

3. The claimant confirmed that he was not pursuing any application to amend his claim to include a claim in respect of an alleged failure to provide him with a payslip for the payment that had been made to him in or around April 2022.

The Hearing

4. The claimant represented himself at the hearing. The respondent was represented by Mr Samson of counsel.

5. The parties had prepared an agreed bundle of 475 pages. There was some correspondence between the parties on the Tribunal file in which the claimant had asked the respondent for additional information: this was discussed and the parties confirmed that nothing was outstanding. There were some corrections to the bundle contents during the hearing. Also, during the course of the hearing, several additional documents were produced and it was agreed that they would be added to the back of the bundle. The final bundle was 481 pages.

6. There was a Chronology and a document listing the key people, key documents and providing a glossary, both of which had been agreed between the parties. The respondent had also prepared an Opening Note.

7. The claimant gave evidence on his own behalf.

8. The respondent called two witnesses:

    8.1. Danielle Oakley, Associate Director of HR Advisory;

    8.2. Natalie Cullen, Advisory Home-Based Team Leader.

9. At the start of the hearing, we enquired about whether any adjustments might be needed to the process. The claimant informed that his dyslexia is such that he has reduced cognitive processing speed and, particularly if he is required to process new information, that can lead to extreme fatigue. He said that we would probably notice his speech changing if that were to happen, but he might need a later start time one day to help his recovery. We asked the claimant to

inform us if he needed a break or changes to the times of the hearing as the hearing progressed.

10. On the first day of the hearing, the claimant had not prepared all of his cross-examination questions for the respondent's witnesses. Although it was unclear why he had not done so in advance of the hearing, we were able to agree the order of evidence so as to accommodate both preparation and rest time in light of the above. As the hearing progressed, start and finish times were discussed and agreed.

11. The parties had exchanged witness statements in the case. The respondent had prepared supplementary witness statements for Ms Oakley and Ms Cullen and, on the evening of 5 March 2023, had made an application for those to be admitted into evidence. The claimant received the application and the statements on 6 March 2023. Copies had been given to the panel. Mr Samson explained that the supplementary statements responded specifically to the areas of the claimant's own witness statement with which the respondent disagreed and were the areas on which the claimant would face cross-examination. Mr Samson informed that he had served supplementary statements to assist the claimant because of his dyslexia, so that he was not ambushed by the questions that he would face in cross-examination, despite that approach being to the respondent's disadvantage. The claimant had some concerns that he did not know that he could produce a supplementary statement and about the advantage that he thought this might give to the respondent's witnesses and the increased preparation he had to do. It was agreed that the panel would review them and then reach a decision as to admissibility. We accepted Mr Samson's submissions as to the benefit this gave to the claimant in view of his dyslexia and agreed to accept them; as noted above, steps were taken to ensure that the claimant had time for preparation.

12. There was a discussion at the start of the hearing about the respondent's position that the claimant had not submitted a valid Response to the Employer's Contract Claim because he had not used a form ET3. The respondent sought judgment in default. We concluded that the claimant had filed a valid Response to the Employer's Contract Claim and gave oral reasons for this decision at that time.

13. The claimant's request to take notes whilst he gave oral evidence was refused and we gave oral reasons for this at the time. We were satisfied that he was given the opportunity to clarify his position fully in response to each question during cross-examination and also had the last word at the end of his oral evidence.

14. We heard the evidence in relation to liability with a view to giving oral judgment later in the week and then hearing evidence in relation to remedy if appropriate. In the event, Mr Samson's cross-examination of the claimant continued until 10 March 2023. We made clear to the claimant that he must not feel under any pressure to limit his cross-examination questions to the limited time available. In the event, we heard the evidence of Ms Oakley on 10 March 2023. The hearing was adjourned part-heard and we heard from Ms Cullen on 27 March 2023. We heard the parties' oral submissions on the morning of 28 March 2023. There was then insufficient time for the panel to deliberate and reach a judgment. Judgment was reserved.

Issues

15. The issues were agreed at the start of the hearing as follows:

Time

15.1. Were any of the claims for disability discrimination presented out of time? If so:

15.1.1. Was there conduct extending over a period?

15.1.2. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

15.1.3. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

15.1.3.1. Why were the complaints not made to the Tribunal in time?

15.1.3.2. In any event, is it just and equitable in all the circumstances to extend time?

Disability

15.2. Did the claimant have a disability as defined under section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

15.2.1. Did he have a physical or mental impairment? The claimant relies on dyslexia. The respondent accepts this diagnosis.

15.2.2. Did it have a substantial adverse effect on his ability to carry out day-to-day activities? The respondent disputes this.

15.2.3. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment? Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures? The respondent disputes this.

15.2.4. Were the effects of the impairment long-term? The Tribunal will decide:

15.2.4.1. Did they last at least 12 months, or were they likely to last at least 12 months?

15.2.4.2. If not, were they likely to recur.

The respondent says this is for the Tribunal to decide.

Reasonable adjustments

15.3. The claimant alleges that the respondent should have made four adjustments.

15.3.1. Did the respondent apply a provision criterion and/or practice ("PCP")(s)? The respondent accepted that it applied PCPs (summarised as follows, but set out more specifically in the Respondent's Further Information:

15.3.1.1. For employees to complete the training recommended by Access to Work outside of their working hours (although, as set out in the Further Information, this is not a blanket approach);

15.3.1.2. Not to provide homeworkers with two large monitors in addition to their laptop;

15.3.1.3. To require employees to meet targets for salary bandings, although it is not expected that an employee will immediately hit their performance level within the salary banding, but it is a requirement that they work towards hitting the key performance indicators and they can show that they are doing this throughout their probationary period; and

15.3.1.4. Not scheduling DSE breaks for staff or, in the alternative, not scheduling DSE breaks for homeworkers.

15.3.2. In relation to each adjustment sought:

15.3.2.1. Did the application of any such PCPs put the claimant at a substantial disadvantage in relation to a relevant matter compared to a person or persons who were not disabled? The claimant's position is set out in the Orders made at the case management hearing on 12 August 2022 and his Further Particulars.

15.3.2.2. Did the respondent take such steps as were reasonable to avoid the disadvantage(s)? The claimant's position is set out in the Orders made at the case management hearing on 12 August 2022 and his Further Particulars. The respondent contends that it did.

15.3.2.3. Did the respondent not know or could the respondent not reasonably be expected to know that the claimant had a disability or was likely to be placed at the disadvantage(s)? The respondent accepted that it knew of the claimant's disability from 8 July 2021. The respondent disputes that it had knowledge of any substantial disadvantage.

<u>Breach of contract/unauthorised deduction from wages</u>

15.4. Did the respondent make unauthorised deductions from the claimant's wages and/or was the respondent in breach of contract by making deductions from the claimant's wages as follows:

15.4.1. Deducting the claimant's training fees?

15.4.2. If so, are any sums due and owing to the claimant in that regard?

Breach of contract – Employer's Contract Claim

15.4.3. Was the claimant in breach of contract by failing to repay any outstanding training fees and, if so, what sums are recoverable by the respondent in that regard?

15.4.4. For the purposes of responding to the Employer's Contract Claim, the claimant disputed that the training agreement was enforceable on the following grounds:

15.4.4.1. Paragraph 2 of the training agreement was unenforceable because of section 142 of the Equality Act 2020 as it amounted to unlawful indirect disability discrimination. The Tribunal will decide:

15.4.4.1.1. Did the respondent have a PCP in the form of a requirement, under paragraph 2 of the training agreement, a requirement to successfully complete the training within 8 months and a requirement not to leave the respondent's employment within two years of completion of that training?

15.4.4.1.2. Did the respondent apply that PCP to the claimant?

15.4.4.1.3. Did the respondent apply the PCP to persons who did not have a disability?

15.4.4.1.4. Did the PCP put persons with a disability at a particular disadvantage when compared with persons who did not have a disability in that employees with a learning or sensory disability were more likely to struggle with productivity targets and therefore to resign or be dismissed and, in turn, be at greater risk of financial loss because of the training agreement?

15.4.4.1.5. Did the PCP put the claimant at that disadvantage?

16. There was a discussion at the start of the hearing about the extent to which the claimant could rely on his argument that the training agreement was unenforceable under section 142 of the Equality Act 2010. Having considered the pleadings and other relevant documentation, we confirmed that the claimant had not pleaded this in relation to his claim but had done so in his response to the Employer's Contract Claim. As such, we confirmed that we would only consider this issue in relation to the Employer's Contract Claim.

17. There was also a discussion at the start of the hearing about the claimant's position that the training agreement was unenforceable as it amounted to a

penalty clause. Again, this had been referred to in the claimant's response to the Employer's Contract Claim but not in his claim. Following discussion, it became clear that the claimant's argument was based on having misread the training agreement and understood that the agreement only said that it covered the costs of providing CIPD Level 7 training, but in fact it required him to repay the costs of all of the training he received from the respondent (that is, over and above the cost to the respondent of providing the CIPD qualification) if he left the respondent's employment for any reason. We confirmed that this argument was not adequately pleaded in either the claim or the response to the Employer's Contract Claim and we could not therefore consider it and gave oral reasons for this at the time. During the course of the hearing, however, the claimant accepted that this had been a misunderstanding on his part and, as such, this argument could not have succeeded in any event.

Findings of fact

Findings of fact relevant to the issue of disability

18. The claimant relies on a mental impairment in the form of dyslexia. He produced a disability impact statement as part of these proceedings (pages 43A-C).

19. A KMG and Remploy General Learning Disability Assessment report ("the GLDA report") from 2013 was also in the bundle (pages 388-399). That report was prepared by Dr Mark Cheesman, a Chartered Occupational and Health Psychologist and Registered Practitioner Psychologist, at the request of one of the claimant's previous employers. It was based on an assessment which took place around 8 years before the events this claim is about. The report makes clear that it was not prepared for Court proceedings. Its author did not give evidence to the Tribunal. Nevertheless, we are content to take its contents into account as it is directly relevant to the claimant's diagnosis and therefore is likely to assist the Tribunal in considering the issue of disability. However, we have attached limited weight to its contents as its author was not cross-examined, it was based on an assessment which took place several years before his employment by the respondent and we are not qualified to interpret it.

20. The claimant had not disclosed any other medical records in relation to his dyslexia: it was unclear whether there were any.

21. We accept the claimant's evidence that he has dyslexia. That was not disputed and it was supported by the GLDA report.

22. The claimant's dyslexia is a lifelong mental impairment and we accept that it was diagnosed in 2013 following an assessment by Dr Cheesman. That is consistent with the GLDA report which concludes (page 392) that, "a diagnosis of dyslexia is appropriate with a significant deficit in processing speed (low average range) compared to the other three WAIS IV indices." The claimant's processing speed was assessed as being in the 14th percentile – described as being in the low average range.

23. In the disability impact statement, the claimant states, and we accept, that his ability to multi-task and to read both in his personal life and at work is detrimentally affected by his dyslexia. We accept the claimant's evidence that,

because of the difficulties he experiences with reading, he is unable to read for pleasure. He needs to re-read text and is prone to fatigue caused by reading. Although the GLDA report states that the claimant's reading speed is in the superior range for sight word efficiency (a timed task reading normal words) and in the average range for phonemic decoding efficiency (timed nonsense words), the GLDA report reaches a conclusion (page 392) that, "there was also a weakness with reading nonsense words which also indicates that there are likely to be difficulties with phonological processing. The poor speed of reading and phonological processing difficulties may explain why he reports that he struggles with reading although the strength of his reading comprehension suggests that he does understand what he is reading to a high level."

24. The GLDA report also recommends additional reading time. Taking into account this conclusion and recommendation, we are satisfied that the GLDA supports the claimant's position that his dyslexia causes him to struggle with reading as described above.

25. We note that the holistic report (as to which, see below) records that the claimant told the assessor that he finds it easier to read than process information given to him verbally. However, we find that simply having that preference does not mean that the claimant is not impacted in the ways described above. The GLDA report also recommends that, due to the claimant's processing speed, multi-tasking should be minimised (392). Again this supports the claimant's evidence that he finds multi-tasking difficult as a result of his dyslexia.

26. We accept the claimant's evidence that medication is not available for dyslexia and that he had not undergone any coping strategies training between the GLDA report and the training he received from Posturite during his employment by the respondent. We are therefore satisfied that these matters were likely to have impacted upon him in the same way at the time of the events the claim is about.

27. For completeness, we are not persuaded that the claimant's ability to socialise with people is detrimentally affected by his dyslexia. His CV suggests that he has carried out several roles which have required him to interact with different groups of people. There was also insufficient persuasive evidence on which to find that the claimant's reported difficulties with using "smaller mobile devices" to book train tickets and holidays or his difficulties in remembering names arose from his dyslexia. We also had no medical evidence to support such findings.

28. The claimant was absent from work on 15 July and from 31 August until the end of his employment. The reasons given in his self-certification absence form and fit notes from his GP are: work-related stress (350), stress at work causing fatigue, low mood, poor appetite and malaise (406A); and stress at work (415). It appears that the claimant is saying that his dyslexia is associated with stress and anxiety – he states, variously, that his GP and his coping strategy trainer, had told him that his stress was likely to be because his sympathetic nervous system had gone into overdrive as a result of, in summary, working beyond his capabilities. The Posturite trainer, in his summary coaching report, stated that the effects of stress on an individual with dyslexia were more exaggerated: areas that are already challenging can become overwhelming leading to a further increase in anxiety and stress. However, the Posturite trainer (Mr Baird)

does not appear to be medically qualified and did not give evidence during the hearing.

29. We are not persuaded that stress and anxiety form part of the claimant's dyslexic condition (as opposed to being a consequence of difficulties he was experiencing, whether related to his dyslexia or not). We have no direct medical evidence to support such a finding. Further, in view of the point in time at which the claimant indicated that he suffered from stress-related symptoms, the Tribunal found it more likely that the claimant suffered a stress-related reaction to adverse events or circumstances which had occurred at or outside of work.

Findings of fact relating to the claimant's employment by the respondent

30. The claimant's CV (which he produced during the course of the Tribunal hearing) stated that:

    30.1. Between 1998 and October 2014, he worked for British Telecommunications plc. For the last four years of that employment, he worked as a HR Case Adviser which included supporting managers with absence, performance, disciplinary and grievance matters.

    30.2. Between 2002-2010, he was released from his employment by British Telecommunications plc for union duties as a CWU Clerical Executive Member/Branch Chairperson. During this time, he was elected to the National Clerical Executive and his CV referred to having been a national representative. During the hearing, he confirmed that he had a NVQ Level 2 qualification in trade union law and negotiating skills and had completed other training in relation to employment law. The CV also states that he gained a working knowledge of employment and equal opportunities legislation and assisted individuals in presenting their cases at Employment Tribunals. We accept his evidence that, as a local trade union representative, he dealt with contentious cases which had the potential to be pursued in the Employment Tribunal.

    30.3. Between 2014-2017, he worked as a HR Case Manager providing support to the Metropolitan Police Service in relation to staff (who were employed under contracts of employment) and Police (who, he explained during the hearing, were engaged under specific Regulations). His role included advising in relation to absence, performance and disciplinary matters.

31. On 2 December 2020, the claimant attended an interview for the respondent's Senior Employment Consultant role with Ms Oakley. Ms Oakley's interview notes appear at pages 51N-S of the bundle.

32. We prefer Ms Oakley's cogent and persuasive evidence (which is consistent with the interview notes) that she explained to the claimant that the role was in a fast-paced call centre environment with targets which directly correlated to salary bandings, and that the claimant would be assessed based on the quality of advice he provided and his productivity. The claimant was inconsistent about this in his evidence.

33. Ms Oakley also discussed with the claimant that the first 8 weeks in the role would be spent in training, and the claimant confirmed that he was keen to obtain the CIPD Level 7 qualification. Although Ms Oakley believed that the claimant was unlikely to meet all of the respondent's key performance indicators for band 4 ("KPIs"), she wanted to offer him the role as she believed that he had particular strengths that he would bring to it.

34. The claimant told Ms Oakley during the interview that he would need Dragon software and would need funding from Access to Work because he had dyslexia. He also informed Ms Oakley that he had previously been funded by Access to Work. The interview notes make this clear.

35. At the time of the interview, the claimant did not refer to the GLDA report or provide a copy of that to Ms Oakley. That was because he believed that, as a disabled person, he needed to be careful how much information to give at the interview stage because of concern about being discriminated against. He accepted that he did not go into further detail about his disability because he feared disadvantaging his opportunity.

36. Two days later, on 4 December 2020, the claimant was offered the role. The offer letter appears at pages 51T-V. Based in part on the claimant's experience, he was offered a starting salary of £33,000. The applicable KPIs were set out in the letter. The respondent later realised that an error had been made in the letter, in that the claimant had been offered a salary within band 5 but the KPIs were for band 4 (see page 136B). No steps were taken to correct that error at any stage.

37. The offer was stated to be conditional on the claimant entering into contractual terms set out in: the individual statement of main terms of employment (pages 52-55); Employee Handbook (pages 56-130); restrictive covenant agreement (pages 131-134); and the training agreement (pages 135-136).

38. The statement of main terms incorporates the employee handbook into the claimant's contract of employment. In the statement, there was a probationary period of 6 months. There was a term to the effect that the probationary period could be extended or an employee's employment could be terminated if performance did not reach the required standard or the employee was not suitable for the role (page 53).

39. The statement also required the claimant to undertake the respondent's induction training. The statement pointed out that the induction training supported the CIPD Level 7 qualification (page 54). It also stated that the training agreement required repayment by the employee of the cost of the training on a sliding scale in the event of the termination of employment within a particular timeframe after commencing the training.

40. Although the evidence was not always consistent about this, we prefer Ms Oakley's cogent evidence that the respondent's induction training was compulsory but the CIPD Level 7 qualification was not. We also accept Ms Oakley's cogent evidence that all of the induction training sessions supported the CIPD Level 7 qualification: the claimant also accepted this during his evidence.

41. Under paragraph 1 of the training agreement, the claimant agreed to undertake the training delivered by the respondent. The claimant accepted that that training was said to *include* (our emphasis) working towards and submitting a personal report to obtain the CIPD Level 7 qualification. The claimant accepted during the hearing that he had misread the training agreement and had thought that it only related to the CIPD training. In the same paragraph, the claimant agreed to remain in the employment of the respondent's group for a minimum of two years from the date of confirmation of successful completion of CIPD level 7. The claimant was not required to remain within the same role.

42. Under paragraph 2 of the training agreement, it is said that completion of the training and accreditation process would end at the latest by 8 months after the commencement of the training – in fact this was extended as the claimant had been experiencing health issues for which he was undergoing investigations in relation to his physical health (page 321).

43. In the same paragraph, the claimant agreed that, "*If I leave my employment at any time (for any reason including dismissal) before the end of two years after the date of confirmation from DMS of successful achievement of the DMS Accredited CIPD Level 7 Award in Employment Law, I undertake to refund the Group £1200 or a proportion based on the following scale.*"

44. The obligation to repay is said to arise if an employee leaves his employment within a particular timeframe and we find that the obligation arises on the termination of employment. There followed a sliding scale which set out the percentage that an employee would be required to repay, depending on the length of time they remained in the respondent's employment after obtaining the CIPD Level 7 qualification. According to the sliding scale, 100% of the training fee is repayable if an employee leaves their employment up to 12 months after the date of confirmation from DMS that the employee had obtained the CIPD Level 7 qualification.

45. Paragraph 5 deals with what happens if funding is withdrawn. Funding was not withdrawn in the claimant's case and so that paragraph is irrelevant.

46. Paragraph 6 refers in particular to paragraphs 1 and 2. In paragraph 6, the claimant agreed that, "*in the event of my failure to refund the appropriate proportion of the funding received, […], I agree that the Group has the express right to deduct any outstanding amounts due under this Agreement from my salary during my notice period and from my salary, or any other payments due to me on the termination of my employment in accordance with the legislation currently in force and regardless of any previous practice or arrangements. Should my final pay be insufficient to cover the total amount outstanding, I agree to make a separate payment within 30 days after my employment has ended or to repay in accordance with a repayment schedule which may be agreed with the Group. Should I fail to make payment within 30 days or in accordance with the agreed repayment schedule, I understand that the Group may take legal action to recover the amounts outstanding."*

47. The claimant signed the statement of main terms and the training agreement electronically on 4 December 2020.

48. The claimant was also referred by the respondent to Health Assured. This led to an assessment by an occupational health adviser and a report being

prepared on 7 December 2020 (page 136A). This was only a few days after the claimant's interview, and before his employment began. Although that report is not clearly worded, it refers to an underlying medical condition covered under the Equality Act and recommends that Dragon software be provided as a reasonable adjustment. This was the same issue as was discussed at interview and it is therefore clear that the condition referred to was the claimant's dyslexia.

49. The claimant's employment by the respondent started on 4 January 2021. He worked in the advisory team, with Ms Oakley as his manager.

50. As a result of the discussions at interview, Dragon software was provided at the start of the claimant's employment (page 141, 180). Several people in the advisory team had dyslexia and several of those individuals used Dragon software.

51. We find that there was, in reality, an acceptance on the part of Ms Oakley that the claimant had dyslexia and a consensus between the claimant and Ms Oakley to take steps to accommodate his dyslexia from the start of his employment. The claimant thought that he got on well with Ms Oakley and, as a new starter, tried to allow time for the respondent to resolve issues as he did not want to "rock the boat."

52. As noted above, the induction training took place over the first eight weeks of the claimant's employment. The claimant attended all the training sessions. This is clear from pages 469A-F. The claimant accepted that, during this eight week period, no substantive contact with the respondent's clients was measured in any way.

53. On 8 January 2021, the claimant completed a Legal and HR Skills and Knowledge Self-Assessment Form (pages 181-188) which he submitted to Ms Oakley. In this form, he graded his skills and knowledge in specific areas of employment law and soft skills. This included stating that he had no experience in redundancy or TUPE but that he was fully competent to undertake complex work in relation to the majority of areas of unlawful discrimination. As to speed reading and touch typing, he stated that he had no experience and that he had dyslexia and reduced cognitive function.

54. The claimant was also assessed by Access to Work on 9 January 2021. He arranged this assessment directly. Following that assessment, the claimant was sent the Access to Work Holistic Workplace Assessment report (pages 189-204). We shall refer to this report as the "holistic report."

55. The holistic report was based on the information that the claimant gave to the assessor about his condition and the impact of that condition on his ability to complete work tasks. The report recommended the following adjustments in relation to his dyslexia and gave an explanation as to why these might help the claimant in his work:

    55.1. Disability awareness support in the workplace for a minimum of six delegates;

    55.2. Four training sessions to assist the claimant with work-related coping strategies, each to last for three hours;

55.3. Dragon Professional Individual;

55.4. Headset;

55.5. Audio switch;

55.6. Roll bar mouse (this related to a rotator cuff injury and not dyslexia);

55.7. Additional monitor (the same size as his existing additional monitor); and

55.8. Additional time to complete reading.

56. The Dragon software, headset and audio switch were recommended as the claimant indicated that he was better able to express himself verbally. These items enabled him to dictate his notes. Additional time was recommended to complete notes as he would need to dictate notes of each call after it had ended, and (unlike typing notes) could not do so whilst still on the call. An additional monitor was recommended because the claimant indicated that he found it easier to read and work from larger monitors (rather than a smaller laptop screen). The larger monitor was recommended so as to allow him additional screen space to display and better organise his computer systems and programs which he used regularly. There was also a recommendation that additional time be given to complete reading and that his targets be adjusted accordingly: this was in response to the claimant's report that he is slower to process information.

57. It became common ground during the hearing that Ms Oakley and Ms Cullen did not receive the holistic report during the claimant's employment. This meant that they did not see recommendations F (for an additional monitor) or G (for additional time to complete reading and adjusted targets). It was only in May 2021 that Ms Cullen saw reference to recommendation F in Mr Rowlands' email and the attached equipment list.

58. The claimant had his first probationary review meeting with Ms Oakley on 11 January 2021 (pages 205-207). The initial problems with IT equipment and being unable to access the respondent's systems had been resolved and he had begun his training. It was noted that he, "potentially might need training with how to do the role with the dragon software and potential adjustments in line with dyslexia needs." The claimant was to continue the training. During the induction training sessions, the claimant observed that office-based employees had two large monitors, whereas he and other homeworkers worked from a laptop screen and one large monitor. Office-based workers had a desktop computer rather than a laptop.

59. On 18 January 2021, the claimant's second probationary review meeting took place (pages 209-211) during which Ms Oakley noted that the claimant, "would really like two monitors the same size rather than a laptop and one monitor to help with dyslexia and create more room on desktop for taking notes etc." No explanation as to how an additional monitor might help with his dyslexia is given. The claimant was to continue with the training and there was a note from Ms Oakley, "all positive so far," and a note from the claimant, "still enjoying it."

60. On 1 February 2021, at the end of week 4 of his employment, he had a further probationary review meeting with Ms Oakley (pages 212-215). Having had four full weeks of training, he was to start taking some calls. There is a note that he still needed the headset and that the Access to Work process was in place.

61. The next day, when completing a health and safety checklist for home working in relation to the claimant (page 215A), Ms Oakley noted that the headset was outstanding. She also noted, "Access to work may make a recommendation for an additional monitor to use as a second screen rather than the laptop." It is clear from that that she had not seen any documentation from Access to Work by that point in time.

62. On 12 February 2021, Access to Work sent the claimant and the respondent the letters which appear at pages 216-223 and 224-226 respectively. The letter sent to Ms Oakley simply set out the items which Access to Work would fund by way of a grant, summarised as follows:

    62.1. Disability awareness support in the workplace for a minimum of six delegates;

    62.2. Four coping strategies training sessions, each to last for three hours;

    62.3. Dragon Professional Individual;

    62.4. Headset;

    62.5. Audio switch;

    62.6. Roll bar mouse.

63. The claimant's letter dealt with the additional monitor but stated that the DWP's support would not cover the cost of the additional monitor. This was because it was considered to be a standard item of office equipment. However, the letter explained that the claimant's employer should provide the monitor if he needed it as a standard item and as a reasonable adjustment. The claimant signed his letter on 19 February 2021.

64. On 22 February 2021, Access to Work sent an email to Ms Oakley. That email, in summary, gave permission for the respondent to purchase the agreed items and attached the claim form and instructions for completing it (page 227-235). The evidence was inconsistent in relation to this but we find that the letter and email sent to the respondent by this point in time did not refer to the additional monitor or additional reading time; the equipment list at pages 236-245 is not in the listed attachments to that email. Ms Oakley unfortunately overlooked the funding offered for the disability awareness support.

65. In our judgment, Ms Oakley had recognised that the claimant may require an additional monitor and Ms Oakley was open to arranging this if it was needed; we do not accept that she was asked to provide one and refused on or around 22 February 2021. Indeed the claimant conceded this in his submissions.

66. On 2 March 2021, Ms Oakley carried out the claimant's fourth probationary review meeting (pages 246-253). This was the first occasion on which there

was a review of the claimant's performance against the band 1 targets. He was exceeding some targets and not meeting others. We accept the claimant's evidence that he did not indicate that he might need adjusted targets at this meeting as he did not know enough about the work or his speed of work and, therefore, whether he would be able to meet his targets at this early stage.

67. The claimant did not raise any concerns about reasonable adjustments between that meeting and his email of 6 May (as to which, see below).

68. Ms Cullen became the claimant's line manager on 10 May 2021 but there was a period of handover and crossover between her and Ms Oakley. On 4 May 2021, Ms Cullen emailed the claimant in relation to the coping strategies training to be provided by Posturite. In that email, and her email of 6 May 2021 (page 269), Ms Cullen confirmed to the claimant that he needed to complete his coping strategies training outside of his working hours (page 266). She informed the claimant that that had been the respondent's position for all others undertaking this or similar training but offered to speak to the claimant about it if he had any queries.

69. Ms Cullen's email of 6 May 2021 also provided to the claimant a breakdown of his performance statistics for the previous day. She gave positive feedback as well as areas to work on, so as to improve those statistics.

70. The next day, the claimant responded to Ms Cullen and asked her to reconsider the position in relation to training (page 269). He explained that his dyslexia was related to reduced cognitive function and affected the ability to multi-task, and he was exhausted and in need of rest at the end of the day. He indicated that he was concerned that his ability to successfully complete his probationary period could be affected (although was unclear by what) and informed that it was starting to cause anxiety. He offered to provide additional medical evidence of his disability if required.

71. Having reviewed the position and discussed the matter with the claimant, on 12 May 2021, Ms Cullen confirmed that the respondent would allow the claimant to complete 50% of the coping skills training during working hours. This was a decision taken by Ms Oakley and another colleague. Ms Cullen informed the claimant, in summary, that this was a departure from the respondent's usual practice so as to help to support the claimant within his employment by the respondent (page 270). Ms Cullen encouraged the claimant to liaise with the respondent's workforce planning team to ensure the dates of the training sessions could be accommodated in line with the respondent's business requirements. The claimant agreed to that as a pragmatic solution, although he thought that all of the training should be done during his paid working time.

72. The respondent is a large employer with significant resources. The cost of the training and several other adjustments given to the claimant were funded by Access to Work. The claimant worked in a large team of 163 people with a sophisticated workforce planning team. The workforce planning team ensured that the team was adequately staffed to respond to calls and meet its service level agreements with its clients, taking into account matters such as training, annual leave and unplanned absences. Its work was finely balanced. It was a busy period of time as employers were facing the challenges of the COVID-19 pandemic and the respondent was in receipt of a large number of calls each day with many of its employees working from home.

73. The reasons for the '50/50 split' were that, if an individual employee was absent, that had an impact on other colleagues who needed to read up on the absent employee's cases before being able to advise. It also had an impact on clients' experiences (because they needed to deal with more than one person). Ms Oakley acknowledged that the same situation would also arise if an employee was sick or on annual leave, but pointed out that planned absence allowed the workforce planning team to ensure that sufficient resource was in place.

74. Ms Cullen worked with the respondent's workforce planning team to arrange for the claimant to undertake the coping strategies training. Ms Cullen informed the claimant (page 298) that as it was only going to be the claimant "off the line", he should book the sessions and the respondent would authorise "what ever is best."

75. The claimant had not received an additional monitor by the middle of May 2021. On 13 May 2021 (page 271), he asked Ms Cullen to arrange for a review as to whether the two screens he was using (a laptop and one additional monitor) met the requirements of the DSE Regulations. His explanation was that the laptop and monitor were at different heights and distances, and the keyboard took up too much desk space. Ms Cullen raised this with Mark Rowlands (Group (UKI) Internal Health and Safety Technical Advisor) who reviewed the claimant's updated DSE checklist with him.

76. The claimant accepted that, during that discussion, Mr Rowlands had told him that he was expected to take breaks. Following his discussion with the claimant, Mr Rowlands provided support to the claimant with his homeworking, including providing access to e-learning in relation to display screen equipment ("DSE"). Mr Rowlands followed that discussion with an email to Ms Cullen (page 274) on 19 May 2021 in which he referred to the claimant having a disability and to reasonable adjustments having been made following an Access to Work report. Mr Rowlands' email stated that he had attached that report from February 2021. It became common ground during the hearing that the attached report was that at pages 236-245, not the holistic report itself (which, as noted above, the respondent did not receive during the claimant's employment). We find that Mr Rowlands was sent the document in the process of carrying out his assessment; he sent it on to Ms Cullen which, in context, indicates that he had just been sent it. Mr Rowlands recommended that an additional monitor be provided to support the claimant with his disability.

77. Two days later, on 21 May 2021, the respondent sent an additional monitor to the claimant (page 277A).

78. When the claimant was asked, during the Tribunal hearing, to explain why he wanted the additional monitor and how he thought it might help him in light of his dyslexia, the claimant informed us (and we accept) that he wanted the additional monitor so that he could fit a large spreadsheet onto the screen and move between different documents more quickly and easily without needing to reduce the size of the text so that it was not possible to read. He accepted that he would not have known about the large spreadsheet in question in his meetings with Ms Oakley on 11 and 18 January 2021.

79. On 7 June 2021, Ms Cullen sent the claimant his "stats" for the previous week. Her email said, "well done John," and gave him some areas to work on (page 301).

80. On 14 June 2021, the claimant's fifth probationary review meeting took place between the claimant and Ms Cullen (page 305-308). In that review, Ms Cullen discussed the claimant's performance against the band 1 KPIs. It was clear that the claimant was not meeting all of the requirements of Band 1 by that time. Ms Cullen stated in the record of that discussion that, "John is currently scored against Band 1 but needs to achieve Band 4. John needs to be moving through the bandings in order to meet probation requirements." The claimant informed that his iron levels had returned to the required level but he had been "extremely tired over the months" and his health was still being investigated. The claimant informed Ms Cullen that he struggled with multi-tasking and said that a reduction in targets of up to 15% would also help. Ms Cullen responded that multi-tasking would always form part of the role and that the claimant was already on reduced targets in that he was required to meet Band 1 KPIs. It was acknowledged that the coping strategies training might well help the claimant and they would review how it helped him at the next meeting. Ms Cullen allowed the claimant to use the 'advice support' mode for up to ten minutes after a call finished which, in essence, took him 'off-line'.

81. A performance improvement plan was put in place following that meeting (page 310, 328-329). The period of the plan was 14 June to 4 October 2021. There were to be regular reviews during that period, and the 'desired outcome' was, in summary, that the claimant would progress through the KPIs for one salary banding each month and consistently achieve the KPIs for Band 4 by the time the plan was concluded at the beginning of October 2021. The performance improvement plan was to be reviewed on a monthly basis and updated (pages 328-329).

82. Ms Cullen sent the performance improvement plan and the note of their 14 June meeting to the claimant (page 310). In that email, Ms Cullen informed the claimant that, "the timescales are something to work towards and it will be reviewed and can be extended if needs be, it is to ensure we have a plan and a focus point for you moving forward."

83. As to the coping skills training, it became common ground between the parties that the claimant carried out all of the 12 hours of this training during his scheduled working hours. He booked the training with Posturite directly and booked the time away from his normal duties via the respondent's workforce planning team. The training sessions took place on 22 June, 7 July, 10 and 24 August 2021. The claimant accepted during the course of the hearing that the training provided some personal benefit to him. He booked six hours of annual leave, which was essentially sacrificing annual leave to 'pay for' 50% of the time he had spent in training during his working hours – 1.5 hours of annual leave on 22 July and 4.5 hours on 11 August.

84. The claimant's six month probationary review meeting took place on 5 July 2021. At that meeting (pages 314-323), Ms Cullen reviewed the claimant's performance against the KPIs and commented that, "John over the last 2 weeks I would say has started to improve in terms of hitting Band 1 requirements…John is also undergoing multi-tasking training from access to

work and is on his second this week and hopefully this again will help him increase his overall performance and start to move through the bandings."

85. The claimant's probationary period was extended by three months to 4 October 2021. In the record of the meeting, Ms Cullen stated, "Extending as John needs to be moving through the bandings for me to pass the probation and as of yet he isn't hitting band 1 however he is improving based on the PIP being put in place."

86. The claimant amended the notes of the meeting, so as to document that he felt that, adjustments to targets, "may eventually need to be considered." This can be seen from his email at page 324.

87. The respondent sent a letter to the claimant on 6 July 2021, which confirmed that his probationary period had been extended (page 325-326). The letter stated, "you are required to be moving through the salary banding structure to evidence improvement of your overall performance to ensure that you are working towards achieving Salary banding 4." The approach set out in the letter reflected the performance improvement plan. The letter went on to state, "the reason I have extended your probation, as discussed in the meeting, is that as you have failed, at this time to achieve 4 of the 7 KPI's. I feel it is only fair to allow you further time and support in order to achieve the required KPI's, as otherwise I feel I would be setting you up to fail meeting the expected KPI's in line with your current salary banding. I have every faith that you will be able to achieve these in the period and I will be here to support you with any further assistance you may need….Please note we do reserve the right to terminate your contract of employment, either during the extension period or at the end of it. However, I have every confidence that this will not turn out to be the case."

88. The claimant accepted that the letter was not threatening when viewed with hindsight but said that he could not disregard how he felt at the time. He accepted, however, that he did not read the letter properly at the time.

89. On 8 July 2021, the claimant emailed Ms Cullen (page 343B-343D). He referred to a discussion with Ms Cullen the previous day about the GLDA report. He accepted during the Tribunal hearing that that was the first time that he had mentioned the existence of the GLDA report. He informed Ms Cullen that he had discovered the previous day that his cognitive function was only in the 14th percentile and that was significantly lower than he had appreciated. He included extracts from the GLDA report in his email. Those extracts set out Dr Cheesman's overall conclusions and recommendations, but not the detailed analysis or results behind those conclusions. He asked that its recommendations be implemented to assist with dyslexia. He offered to send the GLDA report in full to occupational health and accepted during the Tribunal hearing that, without the kind of information contained within that report, the respondent could not have known what adjustments he might need. However, we accept that he recognised that Ms Cullen was unlikely to have the specialist knowledge to be able to interpret the analysis.

90. The same day, Ms Cullen thanked the claimant for the information he had given and summarised the support which the respondent had put in place to accommodate the claimant's dyslexia. Ms Cullen reiterated that the respondent was required to be moving through the banding system to achieve all requirements set for Band 4, but acknowledged that it can take time to

achieve this after starting employment. Ms Cullen emphasised that the claimant was aiming to achieve Band 1 targets but was paid at Band 4. She indicated that she would continue to monitor the claimant's performance and set new targets taking into account all the information provided.

91. There was a further exchange of emails between the claimant and Ms Cullen on 9 and 12 July 2021 (pages 342-343). The claimant sought clarity as to his targets, and Ms Cullen confirmed that he was only being expected to achieve Band 1 targets at that point in time and therefore his targets had been reduced. She stated that he was required to achieve those and further progression towards band 4 targets in order to pass his probationary period. Ms Cullen emphasised the adjustments that had been made and the respondent's interest in the claimant successfully passing his probation.

92. The claimant reported that he would be absent from work on 15 July 2021 due to work-related stress (page 350). That day, Ms Cullen made a referral to Active Care (the provider of the Employee Assistance Programme ("EAP")) for them to support the claimant in line with their day 1 stress intervention tool.

93. The next day, the claimant returned to work. Ms Cullen held a return to work meeting with him (page 357-358). During that meeting, the claimant informed Ms Cullen that he was feeling under pressure to meet targets and because of the performance improvement plan. He also told Ms Cullen for the first time that he had not been taking his DSE breaks. We accept her evidence that she had not known that the claimant was missing breaks prior to that. Ms Cullen reassured the claimant that she wanted him to achieve his targets and invited him to ask for any further support that he needed. She also emphasised that the claimant was responsible for ensuring that he was taking breaks away from his computer and to inform her if he was not doing so. Ms Cullen told him to use the work modes to mark himself unavailable for DSE breaks. The claimant agreed to the referral to the EAP.

94. All employees within the advisory team were required to take DSE breaks. As to the respondent's approach to advisory team breaks, the respondent scheduled employees' lunch breaks but not other breaks. This was because it was not considered possible to predict when an employee might need a refreshment or comfort break, nor was it possible to predict whether at any given time an employee would be in the middle of a call with a client. As such, breaks other than lunch breaks were left to individual employees to manage themselves. Employees selected the relevant 'work mode' to mark themselves unavailable for that period. There was no specific 'work mode' for DSE breaks but an employee could select the relevant mode for the break he or she was taking (comfort break or refreshment break) and that would count as a DSE break. The claimant accepted that he could get up and walk around at any time and could select the refreshment break mode, for example, just to have a DSE break. It became common ground during the course of the hearing that taking breaks led to an adjustment in productivity and working time.

95. The claimant's position as set out in his further particulars was, in summary, that where disabled persons were struggling to meet targets and fearful that they would not pass their probationary period, they were less likely to take the necessary breaks and, in turn, more likely to suffer fatigue, sickness absence and leave their employment. We do not accept that the claimant's dyslexia made him less likely to take breaks or to be able to manage his own breaks

than other, non-disabled employees in those circumstances. We also do not accept that disabled persons were less likely to take breaks than non-disabled persons in those circumstances. There was insufficient persuasive evidence on which to base such findings.

96. On 12 August 2021, Ms Cullen held a review meeting with the claimant pursuant to the performance improvement plan (pages 370-374). The claimant informed Ms Cullen that he was suffering from stress, fatigue and loss of appetite. The claimant said that, having spoken to his Access to Work coach, he understood this could be because he was being forced to work at the maximum of his cognitive ability. The claimant accepted that he had not been able to speak to the EAP on either of the two occasions that they had called him but confirmed that he would call them. Ms Cullen encouraged him to contact the EAP and to inform her if there was anything else that she could do to support him.

97. They reviewed the claimant's performance over the review period. It was clear that the claimant's performance significantly exceeded several of the band 1 KPIs but was more than 15-20% below several other band 1 KPIs. The claimant's evidence was that the removal of the stress of achieving the band 1 KPIs could have helped him to improve his performance.

98. Ms Cullen informed the claimant that, although he had not hit all of the KPIs for Band 1, he was, "hitting a lot of the requirements and I am really pleased and he should be….it is understood he may not hit the advice actions requirement on a regular basis but on the basis he is improving in other areas this is what we need to see." The claimant told Ms Cullen that he still believed that each of his targets needed to be reduced by 15-20% as a reasonable adjustment. Ms Cullen responded by saying that the claimant's targets had been reduced and, although he was paid at Band 4 (in fact it was Band 5) he was only being asked to achieve Band 1 at that time and, "a review would then take place." There followed a discussion about adjustments that were already in place, and points for the claimant to work on during the next review period. The claimant indicated that his cognitive function was 14%. The meeting concluded with Ms Cullen advising the claimant that she was pleased with his progress and encouraged him to try to continue with this.

99. On 16 August 2021, Ms Cullen sent details of the claimant's latest performance statistics to him (page 379). She told the claimant, "well done," and that he had hit a lot of the KPIs for Band 1. She gave him one area to work on and emphasized that he had done well.

100. On 20 August 2021, Ms Cullen sent the claimant his performance statistics relating to the previous day and commended him on his performance against the 'actions per hour' KPI, saying that it was his, "best yet." She appeared to say that calls were relatively high and gave him two areas to work on.

101. Following the claimant's absence on 15 July 2021, Ms Cullen had arranged for a stress risk assessment to take place. That was carried out by Mr Rowlands with the claimant on 23 August 2021 (pages 382-387). The report recommended that an up-to-date assessment in relation to the claimant's dyslexia be carried out.

102. On 31 August 2021, the claimant reported that he would be absent from work as he was exhausted. The next day, he submitted a fit note from his GP stating that he was not fit for work for one month due to stress at work causing fatigue, low mood, poor appetite and malaise (page 406A). In his email to Ms Cullen, he informed her that the GP had said that, as his symptoms related to the sympathetic nervous system being in overdrive, it may take a month to settle back down (page 406).

103. On 1 September 2021, Ms Cullen referred the claimant to Active Care for a Day 1 Stress Intervention (page 407-409). The claimant spoke to Active Care on 2 September 2021, following which the report at pages 411-412 was provided. The report describes the information provided to the assessor by the claimant about his symptoms and the adjustments that had been made to his role. The claimant reiterated his wish that his targets be reduced by 15% to reflect that the additional reading time reduced the time he had for other tasks. He also reported that he had only been able to take a lunch break. He informed the assessor that other employees had left because they could not cope with the pace and intensity of the role and sought recognition that the role amplified his disability.

104. Ms Cullen spoke to the claimant on 30 September 2021. Her note of that call is at page 413. The claimant informed her that the thought of returning to work made him stressed and feel sick, and he needed to decide whether he could return to work with the pressure as it was at that time. He said that he would be submitting another fit note. Ms Cullen advised the claimant that he could do the job and that he was a valued consultant. She emphasised that measures had been put in place to help him and that she would continue to support him. She also referred to the stress risk assessment and said that they would discuss this on his return which might also help, and the claimant acknowledged this. The claimant was not aware that an up-to-date report on his dyslexia had been recommended from this discussion. They discussed contact during the claimant's sickness absence and Ms Cullen asked the claimant to let her know if there was anything else that she could do.

105. The claimant's fit note stated that he was unfit for work for the next six weeks due to stress at work (page 415).

106. On 14 October 2021, Ms Cullen invited the claimant to an informal welfare meeting to take place on 20 October 2021 (pages 416-417). The claimant referred to having had severe anaemia. The claimant gave evidence that he had been told that the anaemia had caused the fatigue. He agreed that an occupational health assessment could be carried out, although he indicated that he felt that should have been done in May 2021 and that he had had to, "fight so hard," for the adjustments that had been made.

107. They discussed the issue of reduced targets. Ms Cullen advised that an up-to-date occupational health report was needed, as well as a discussion with workforce planning team, before any decision was made on the issue of reduced targets. This is evidence that Ms Cullen was open to adjusting the claimant's targets but needed specific information before doing so. She agreed to send information about reduced targets to him to consider in the meantime. It was agreed that he would send the summary coaching report he had received from Posturite to Ms Cullen and that they would discuss the stress risk assessment on his return to work. Ms Cullen commented in the notes that she

appreciated that the claimant found it difficult to look at different font sizes: this is the first time that this is mentioned in the contemporaneous evidence. The notes of the meeting are at pages 432-433.

108. The claimant was sent a copy of the referral to occupational health and consent form around one week after that meeting. He signed the consent form on 21 October 2021. The referral form referred to the claimant's dyslexia, the adjustments that had been made (including a reduction in performance statistics) and the expectations of the role. Specifically, the referral stated that the claimant was required to achieve, "quite specific targets for his role…the expectation is that John is moving through the banding system working towards hitting his salary banding level 4 but is struggling to progress through these bandings. Currently John has been set targets to achieve the KPI's for band 1 and then this will be reviewed with the objective of moving through the banding structure to reach the KPI's for his salary band whilst providing any support needed."

109. We accept Ms Oakley's evidence that the respondent's approach is for employees with dyslexia to be referred to occupational health for guidance on reasonable adjustments after around six months' employment. Her view was that, before then, that step would be premature because it took around six months to get to grips with the role and to see the impact of support provided to employees during that period.

110. The claimant sent the summary coaching report he had received from Posturite to Ms Cullen (pages 420-430). That report outlined some adjustments which the respondent might consider to assist the claimant but in very general terms.

111. The claimant resigned on 28 October 2021, giving notice that his employment by the respondent would end on 4 November 2021. He informed Ms Cullen that he had taken the decision because he had lost confidence that the respondent would adjust his targets as necessary to support his disability and remove the negative impact on his health and wellbeing. He disputed that his targets had already been adjusted (as had been noted in the referral to occupational health), noting that all new starters were required to achieve Band 1 and that was no different for him. He explained that the additional reading time reduced the time he had left to achieve his targets and that was an unrealistic expectation on him. He did accept that Ms Cullen had expressed a willingness during their most recent meeting to consider adjustments to the targets for Band 4 in the future. He also expressed the view that the results of his stress risk assessment had been unreasonably deferred.

112. On 1 November 2021, Ms Cullen telephoned the claimant and emphasised that she wanted him to return and encouraged him to reconsider his resignation. The claimant indicated that he would not reconsider (page 446). Ms Cullen followed up with an email on 3 November 2021, asking the claimant to reconsider his resignation and informing the claimant that she was keen to discuss the concerns he had raised within his resignation email to find a way forward with his employment. Ms Cullen reiterated that, to pass a probationary period, the expectation is that employees are moving through the banding system towards their paid salary banding targets. She expressed the view that the aim had always been for the claimant to achieve Band 4 targets, but that they had reduced his targets to band 1 initially to build his confidence

and performance in the role. She also stated that it had been acknowledged that he may not reach the targets associated with band 4 and that the respondent was happy to explore adjustments accordingly in line with an expert medical report. She also explained that the appointment to discuss the results of his stress risk assessment had been cancelled due to urgent diary commitments. She explained that she had been due to discuss the results with the claimant but had been unable to do so because of his sickness absence.

113. On 11 November 2021, Ms Cullen asked the claimant whether he had reconsidered his resignation (page 450). The claimant responded that he would not retract his resignation (page 452).

114. The claimant's employment by the respondent ended on 4 November 2021. By that time, he had not submitted his personal CIPD report and had not therefore obtained the CIPD Level 7 qualification. That was the only matter outstanding before he could obtain that qualification.

115. On 19 November 2021, the respondent wrote to the claimant and accepted the claimant's resignation (page 455). The letter stated that, in accordance with the training agreement, the claimant was required to repay £1,200 which covered the cost of the CIPD training and registration fees, referred to the fact that he had not completed the qualification, and advised the claimant that the sum would be deducted as agreed from his final pay.

116. The respondent deducted £769.84 from the claimant's pay in or around November 2021.

117. The claimant disputed the deduction. Ms Cullen responded by email on 25 November 2021 (page 466) giving a breakdown as to the calculation of the £1,200 training fee. We were also referred to a more detailed breakdown at page 469G. Ms Cullen informed the Tribunal, and we accept, that the correct figures were those set out at page 469G. We find that a proportion of the £1,200 related to the sum paid by the respondent to DMS (a training provider) in respect of the CIPD Level 7 qualification, and the remainder related directly to the respondent's internal training costs. The cost of each internal training session is, in summary, the average salary cost of the person providing the training for the training session.

118. Following a period of ACAS early conciliation between 13 January and 2 February 2022, the claim was brought on 1 March 2022. The response was filed on 14 April 2022 which included an Employer's Contract Claim for the balance of £430.16.

119. In or around April 2022, the respondent made a further payment to the claimant in the sum of £430.67. The date of this further payment was not clear but appeared to have been around the time the respondent filed its response to the claim. It is unclear why the balance of the training costs (£430.16) was not deducted from that payment.

120. The claimant asserted that employees with a learning or sensory disability were more likely to struggle with productivity targets and therefore leave their employment by the respondent sooner (whether because they resigned or were dismissed). There was no cogent evidence that this was the case for employees other than the claimant, although we do accept that the

claimant's resignation was related in part to his dyslexia. We accept Ms Oakley's evidence that the respondent employs other individuals with dyslexia in the same team as the claimant worked. We have found that Ms Oakley considered that the claimant was unlikely to be able to meet all of the KPIs for his salary banding when she recruited him; however, that did not necessarily matter and employees were ultimately set bespoke targets following a period of adjustment and monitoring. There was no evidence that employees with dyslexia or another disability struggled to meet their KPIs or that the claimant was treated differently to other colleagues who were experiencing difficulties. We accepted Ms Oakley's evidence that no other employees were being managed on a formal basis for not meeting those targets (whether that be through formal capability or disciplinary procedures), and that she was not aware that anyone had ever been dismissed or managed formally for not meeting their KPIs. We also prefer Ms Oakley's cogent and persuasive evidence that she was not aware of any employee's employment being terminated by the respondent because they had not successfully completed their probationary period. As for the claimant, no formal capability or disciplinary process was begun and no warnings were given in relation to his performance.

121. There was also no evidence that employees with a learning or sensory disability were less likely to complete training. In contrast, Ms Oakley's evidence (which we accept) was that the respondent takes a flexible approach and provides support to enable training to be completed, recognising that there is a large number of people within the department with different needs and adjustments.

122. We accept Ms Oakley's cogent evidence that not all new starters begin on band 1 targets; individual employees naturally perform and start at different points. All employees work toward their KPIs for their salary banding but do not necessarily hit those. Ms Oakley was unaware of many employees working towards band 1 KPIs for the period the claimant did.

123. The claimant's evidence was that he did not bring his claim sooner because he had not appreciated until later in his employment that there was a pattern of resistance to implementing reasonable adjustments on the part of the respondent. The claimant appeared, from his evidence, to accept that he knew that there were time limits for bringing claims to an Employment Tribunal and that he chose not to bring a claim sooner. In view of his previous roles as a trade union representative and an HR Adviser for significant periods of time, as well as the intensive training that he had received at the start of his employment by the respondent, the claimant will have known about the existence of time limits.

124. As for the complaint about the coping skills training, the claimant had taken a pragmatic decision to proceed with the 50/50 split in relation to training time. In light of these findings, we also find that the claimant chose not to pursue this complaint earlier than he did, within the time limit. We also find that, had the claimant not subsequently had concerns about what happened later in his employment, he would not have brought a complaint in respect of the coping skills training issue.

Law

125. The statutory provisions engaged by the complaints of unlawful disability discrimination are contained in the Equality Act 2010.

Section 4 The protected characteristics

The following characteristics are protected characteristics –

Age;
Disability;
Gender reassignment;
Marriage and civil partnership;
Pregnancy and maternity;
Race;
Religion or belief;
Sex;
Sexual orientation.

Section 6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

Section 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to- -

(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,
(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column. … Schedule 4 Part 5 (work) Schedule 8 …'

Section 21 Failure to comply with duty

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 123 Time limits

(1) Subject to section 140B Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

Schedule 1

4. Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

…

5. Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply—

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

126. The first issue for the tribunal to consider is whether or not the claimant's dyslexia amounted to a disability as defined in Section 6 of the Equality Act 2010 and if so, whether the respondent knew or ought to have known about that disability. The duty to make reasonable adjustments does not arise if the employer does not know and could not reasonably be expected to know that the employee is disabled: Schedule 8 paragraph 20(1)(a).

127. For that purpose, the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in Section 6 of the Equality Act 2010. Those facts have three elements to them, namely (a) a physical or mental impairment which has (b) a substantial and

long-term adverse effect on (c) his ability to carry out normal day to day activities. Whether those elements are satisfied in any case depends also on the clarification as to their sense provided by the guidance in Schedule 1. The employer must have actual or constructive knowledge of the facts constituting the disability for the purposes of s.6 Equality Act 2010; it need not be aware that, as a matter of law, the consequence of such facts is that the employee is a disabled person: Gallop v Newport City Council [2014] IRLR 211 at para 36.

140. In 2011 the Equality and Human Rights Commission produced a "Code of Practice on Employment" ("the Code") to accompany the Equality Act 2010. The Code was brought into effect on 6th April 2011. The purpose of the Code is to provide a detailed explanation of the Equality Act to assist courts and tribunals when interpreting the law and to help lawyers, advisors, trade union representatives, human resources departments and others who need to apply the law and understand its technical detail. Whilst the Code does not impose legal obligations, it is well recognised that it should be used in evidence in legal proceedings brought under the Equality Act. The employment tribunal must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

141. Appendix 1 of the Code deals with "the meaning of disability". The key elements which supplement the above are as follows:-

(4) What does 'impairment' cover? It covers physical or mental impairments. This includes sensory impairments, such as those affecting sight or hearing.

(5) The term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities.

(8) A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

(9) Account should be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment or because of a loss of energy and motivation.

(10) An impairment may not directly prevent someone from carrying out one or more normal day to day activities but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day to day activities, the person may have the capacity to do something, but suffer pain in doing so, or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.

(14) What are 'normal day to day activities'? They are activities which are carried out by most men or women on a fairly regular basis and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard or performing a skilled or specialised task at work. However, someone who is

affected in such a specialised way but is also affected in normal day to day activities would be covered by this part of the definition.

(15) Day to day activities thus includes – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading or taking part in normal or social interaction or forming social relationships, nourishing and caring for oneself. Normal day to day activities also encompass the activities which are relevant to working life.

(16) Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (that is, the impairment has been cured).

142. In Vicary v British Telecom [1999] IRLR 680 (at para 15), it was held that the decision as to whether a person is disabled is one for the Tribunal to make and not for any medical expert. The burden of proving disability lies upon the claimant. In McNicol v Balfour Beatty Rail Maintenance Limited [2002] IRLR 711 it was stated (at para 19) that, "the essential question in each case is whether, on sensible interpretation of the relevant evidence, including the expert medical evidence and reasonable inferences which can be made from all the evidence, the applicant can fairly be described as having a physical or mental impairment."

143. In Hill v Clacton Family Trust Limited [2005] EWCA Civ 1456 the Court of Appeal said (at para 33), "No court or tribunal would come to a decision on the question of mental impairment without giving careful consideration to the medical evidence called before it. That evidence must, however, be considered in the context of the totality of the evidence and the decision is that of the Tribunal not of an expert, however qualified he may or he may not be."

144. In Morgan v Staffordshire University [2002] ICR 475 the Employment Appeal Tribunal held that the obligation upon the claimant to prove a mental impairment should not be taken to require a full consultant's psychiatrist report in every case.

145. Sections 20 – 21 of the Equality Act 2010 impose upon an employer an obligation to make reasonable adjustments where a disabled person is placed at a substantial disadvantage as a result of a provision, criterion or practice, physical feature of the employer's premises or the absence of an auxiliary aid. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

146. In order for the duty to arise, the employee must be subjected to a substantial disadvantage in comparison with persons who are not disabled. "Substantial" as defined in section 212(1) means "more than minor or trivial". The threshold is set deliberately low. The disadvantage is comparative, so it is no answer to a claim to show that persons who are not disabled are also

disadvantaged by the PCP. In Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT (Scotland), the EAT explained (at para 48) that the purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. The duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled.

147. Para 20(1)(b), Sch 8 EqA and paragraph 6.19 of the EHRC Code make it clear that an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The Code states that an employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment.

148. It is important to keep in mind the whole of section 20(3). The elements within that are designed to link together. The purpose of identifying a PCP is to see if there is something about the employer's operation which causes substantial disadvantage to a disabled person in comparison to persons who are not disabled. The PCP must therefore be the cause of the substantial disadvantage. Wide though the concept is, there is no point in identifying a PCP which does not cause substantial disadvantage: Secretary of State for Work and Pensions v Higgins [2014] ICR 341, at para 35.

149. The claimant will have the benefit of the "reverse burden of proof" in Section 136 of the Equality Act 2010. In Project Management Institute v Latif [2007] IRLR 579 (at para 54 and 55), the EAT held:

> "*Whilst it is for the claimant to identify and prove the PCP, the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.*
>
> *We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.*"

150. The duty arises once there is evidence that the arrangements placed the disabled person at a substantial disadvantage because of his or her disability: Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 at paras 63. Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step: Griffiths at para 65. The question whether the proposed steps were reasonable is a matter for the ET and has to be determined objectively: Griffiths at para 73.

151. The three month time limit set out in section 123(1)(a) is not absolute. An employment tribunal has discretion to, in essence, extend the time limit for presenting a complaint where it thinks the complaint was brought within such other period as the Tribunal thinks just and equitable. Although this is a broader discretion than is the case in unfair dismissal claims, it is not without limits. In Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 (at para 25), the Court of Appeal stated:

> *"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

152. There is no requirement for exceptional circumstances to exist before time may be extended, simply that it must be just and equitable to do so. In exercising the discretion, tribunals may have regard to the checklist in section 33 of the Limitation Act 1980, as modified by the EAT in British Coal Corporation v Keeble and others [1997] IRLR 336. That checklist refers to the prejudice to each party and to having regard to all the circumstances, including the length of and reason for the delay, the extent to which the cogency of evidence is likely to be affected by the delay and the promptness with which the applicant acted once he or she knew of the facts giving rise to the cause of action. There are other factors in addition to these and their relevance depends on the facts of each individual case. A tribunal need not consider all the factors in every case: Department of Constitutional Affairs v Jones [2008] IRLR 128, CA. However, it must not leave a significant factor out of account. The balance of prejudice and the potential merits or demerits of the claim are relevant considerations which must be weighed in the balance before reaching a conclusion on whether to extend time: Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT at para 17.

153. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, it was held that section 123 gave the tribunal the widest possible discretion to extend time, with no list of factors to consider. However, the length of and reasons for the delay would almost always be relevant, as would prejudice to the respondent. The discretion's width meant that there was limited scope to challenge it on appeal, unless the tribunal had erred in principle (paras 18-20).

154. That case also held that there was no justification for reading into s.123 a requirement that the tribunal had to be satisfied that there was a good reason for the delay, let alone that time could not be extended absent an explanation from the employee. Whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal ought to have regard. However, the identification of reasons and the weight given to them were matters for the tribunal (paras 25-26).

Law relating to unlawful deductions from wages

155. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

156. The Employment Tribunal has jurisdiction to deal with claims for breach of contract by employees, where that claim arises or is outstanding on termination of the employment. If an employer is in breach of contract, the former employee is entitled to damages for that breach. The employer can pursue an Employer's Contract Claim against a former employee where that employee first brought a claim for breach of contract against that employer.

157. As to section 142 of the Equality Act, a contractual term is unenforceable in so far as it constitutes, promotes or provides for treatment of that or another person that is of a description prohibited by the Equality Act. Following the decision of the EAT in Dziedziak v Future Electronics Ltd [2012] 2 WLUK 800, EAT (at para 42), the burden of proof is on the claimant in relation to the issues set out at 15.4.4.1. Only if he does that successfully, does the burden pass to the respondent to show the PCP is objectively justified.

Submissions

158. After the evidence had been concluded, the claimant and Mr Samson made submissions, which addressed the issues in this case. It is not necessary for us to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from our findings and conclusions below. Suffice it to say that we fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to our decisions.

Conclusions

Conclusions in relation to the claim and Employer's Contract Claim concerning the training agreement

159. Prior to the commencement of his employment, the claimant signed the statement of main terms and training agreement and agreed to the terms. It was his decision whether to accept the respondent's job offer and enter into the associated contractual terms. In the event, he chose to do so without first reading the documentation in full. As was pointed out by Employment Judge Aspden at the case management hearing in August 2022, it is not for the Tribunal to simply relieve the claimant of the effect of terms which favour the respondent.

160. We have found that, under paragraph 2 of the training agreement, the claimant's obligation to repay the relevant amount of his training costs arose when his employment terminated for any reason. This is clear and the claimant agreed to its terms. According to the sliding scale, he was required to repay 100% of the £1,200 training costs because he left after the training had started but within 12 months of gaining the CIPD Level 7 qualification. He had

completed the training but had not gained the qualification by the time his employment ended.

161. The obligation to repay the training costs was not, in our judgment, affected by the fact that the claimant had not obtained the CIPD Level 7 qualification within the maximum period of eight months specified in paragraph 2. As we have found, an extension had been agreed to the timescale for completing the training. That had the effect of varying that requirement. In any event, in our judgment, the obligation to repay the £1,200 training fee was not conditional upon the claimant having completed the training within the original eight month timescale.

162. The obligation to repay the training costs was also not affected by the fact that the respondent made a separate payment to the claimant in or around April 2022 from which the balance of £430.16 was not deducted. As we have already concluded, the obligation to repay the £1,200 training fee arose under paragraph 2. Paragraph 6, which sets out the mechanics for obtaining repayment if the claimant has not repaid the £1,200 of his own volition, does not in our judgment affect or remove the primary obligation to repay the training fee which is set out in paragraph 2.

163. We also conclude that the claimant's argument that paragraph 2 of the training agreement was unenforceable because of section 142 of the Equality Act as it amounted to unlawful indirect disability discrimination fails. The respondent had a PCP in the form of a requirement, under paragraph 2 of the training agreement, to successfully complete the training within 8 months and a requirement not to leave the respondent's employment within two years of completion of that training. The respondent applied that PCP to the claimant and to persons who did not have dyslexia within the advisory team. However, there was no evidence that the PCP put persons with a disability at a particular disadvantage when compared with persons who did not have a disability. There was no evidence that employees with a learning or sensory disability were more likely to fail to complete their training or to struggle with productivity targets (particularly taking into account that employees were ultimately set bespoke targets following a period of adjustment and monitoring) and therefore to resign or be dismissed and, in turn, be at greater risk of financial loss because of the training agreement. As such, the training agreement is not unenforceable as a result of section 142 of the Equality Act.

164. We conclude that the obligation to repay £1,200 in respect of training costs to the respondent arose on termination for any reason. Although the claimant argued that enforcing the training agreement would be a breach of natural justice, we do not accept that. We conclude that the claimant had specifically agreed to repay that sum and to a deduction being made from his final pay if he had not already repaid it. That amounted to consent within the meaning of section 13(1)(b) of the Employment Rights Act 1996. As such, the deduction in the sum of £769.84 from his final pay was not in breach of contract and did not amount to an unlawful deduction from his wages. His claims for breach of contract and unlawful deduction from wages fail.

165. In light of our conclusions above, we also conclude that the claimant owes the respondent the balance in the sum of £430.16. The claimant submitted in his closing arguments that the Employer's Contract Claim should be struck out for being vexatious: we reject that argument as the respondent is

contractually entitled to repayment of this sum and the Employer's Contract Claim is not therefore vexatious. The Employer's Contract Claim for this sum succeeds.

Disability

166. The claimant relied on a mental impairment in the form of dyslexia. We accepted his evidence that dyslexia was diagnosed in 2013. We are satisfied that dyslexia is a mental impairment within the meaning of the Equality Act.

167. We have found the claimant's ability to multi-task and read to have been detrimentally affected by his dyslexia. We conclude that reading and multi-tasking are day-to-day activities.

168. As to whether there was a substantial adverse impact on his ability to carry out day-to day activities, we conclude that there was. The effect was more than minor or trivial. It was such that he became fatigued by reading such that he was unable to read for pleasure and additional reading time was recommended to accommodate his condition. Further, it had been recommended that the requirement to multi-task should be minimised.

169. We have found that the impact of these matters would have been the same at the time of the events the claim is about as they were in 2013. Dyslexia is a lifelong condition and we accepted the claimant's evidence that medication is not available for dyslexia and that he had not undergone any coping skills training between the GLDA report and the training he received from Posturite during his employment by the respondent.

170. As such, we conclude that the claimant had a disability at all relevant times.

Knowledge of disability

171. The respondent accepted that it could reasonably be expected to know of the claimant's dyslexia from 8 July 2021. This was the date on which the claimant provided an extract of the GLDA report.

172. As we have found above, however, the claimant notified the respondent of his dyslexia prior to the start of his employment. It was clearly discussed at interview.

173. There was an assessment by an occupational health adviser from Health Assured, leading to a report being prepared before the claimant's employment began. We have found that the report, which refers to an underlying medical condition covered under the Equality Act and recommends that Dragon software be provided as a reasonable adjustment, was referring to the claimant's dyslexia.

174. As a result of the discussions at interview, Dragon software was provided at the start of the claimant's employment. Ms Oakley gave oral evidence that several people in the same team had dyslexia and several of those individuals use Dragon software.

175. We have found that there was, in reality, an acceptance on the part of Ms Oakley that the claimant had dyslexia and a consensus between the

claimant and Ms Oakley to take steps to accommodate his dyslexia from the start of his employment.

176. We conclude that the respondent had actual or constructive knowledge from the claimant's interview that the claimant had (a) a mental impairment which had (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day to day activities. The respondent was aware that the claimant had dyslexia from his interview and that it impacted upon him to such an extent that Dragon software helped him and had previously been recommended. The respondent would have known that dyslexia was a life-long condition and therefore had a long-term effect on his abilities.

Coping skills training

177. The respondent accepted that it was a PCP of the respondent for employees to complete the training recommended by Access to Work outside of working hours.

178. The next issue is whether the PCP put the claimant at a substantial disadvantage compared to someone who did not have a disability. We conclude that it was more likely that Access to Work would recommend training for a person with dyslexia than a person who did not have dyslexia. The PCP put the claimant at a substantial disadvantage compared with someone who did not have dyslexia in that the claimant would spend a proportion of his rest time or annual leave in carrying out the training. The claimant's coping skills training was for a total of 12 hours, to be carried out in three-hour blocks of time. The loss of that rest time or annual leave was more than a minor or trivial disadvantage.

179. We conclude that the respondent knew or could reasonably have been expected to know that the claimant was likely to have been placed at that disadvantage by 7 May 2021. The claimant had told the respondent on 7 May 2021 that, as a result of his dyslexia, he was exhausted at the end of the working day and really needed his rest. With that in mind, he asked the respondent to reconsider its position in relation to the training. The respondent did reconsider its position and agreed an adjustment. Ms Cullen informed the claimant on 12 May 2021 (page 270) that this was to help support the claimant within his employment.

180. The respondent was therefore required to take such steps as it was reasonable to have to take to avoid the disadvantage. As to what steps were reasonable to avoid the disadvantage, we are required to conduct a holistic assessment where several adjustments had been made (as was the case here).

181. We have found that, after the claimant raised the matter with the respondent, the respondent had agreed that 50% of the coping skills training could be completed during working time without the need for such time to be taken as annual leave or worked back. In fact, it was common ground between the parties that the claimant carried out all of the 12 hours of his coping skills training during his scheduled paid working hours. He booked the training with Posturite directly and booked the time away from his normal duties via the workforce planning team. He also booked annual leave to, essentially 'sacrifice' it to cover the six hours of training which were to be at his own cost.

Therefore, the potential disadvantage for the claimant to do the training after the end of his working day was removed.

182. The issue is whether the respondent had taken such steps as it was reasonable to have to take to avoid the disadvantage. The claimant's position was that he should have been allowed to complete all 12 hours of the training in his working time without the need for the time to be worked back or annual leave used.

183. We have found that the respondent is a large employer with significant resources. The cost of the training and several other adjustments given to the claimant were funded by Access to Work.

184. The claimant worked in a large team of 163 people with a sophisticated workforce planning team. The workforce planning team ensured that the team was adequately staffed to respond to calls and meet its service level agreements with its clients, taking into account matters such as training, annual leave and unplanned absences. Its work was finely balanced. It was a busy period of time as employers were facing the challenges of the COVID-19 pandemic and the respondent was in receipt of a large number of calls each day with many of its employees working from home. However, we are not persuaded that the respondent could not reasonably have accommodated the remaining six hours of the claimant's training within its workforce planning, and without requiring the claimant to use part of his holiday entitlement.

185. Although the training was likely to have provided the claimant with some personal benefit, the training was being provided with the specific purpose of assisting the claimant in his employment by improving his multi-tasking skills. We do not accept that, simply because there was a degree of personal benefit to the claimant in carrying out the training, that meant that he should do a proportion of the training in his own time. The disadvantage to the claimant was that he was required to, effectively, 'sacrifice' six hours of his holiday entitlement. The loss of almost a day's holiday entitlement is significant.

186. We therefore conclude that the respondent breached its duty to make reasonable adjustments in this respect. However, for the reasons set out below, we have concluded that this complaint is to be dismissed for being out of time and time will not be extended.

187. Section 123(1) of the Equality Act provides that proceedings may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. If we conclude that the claim was brought outside of the primary time limit at section 123(1)(a), we must consider whether the claim was brought within such other period as we think just and equitable. This is a jurisdictional matter.

188. Section 123(3) of the Equality Act provides that, where the complaint is about a failure to do something, the time for bringing the complaint starts to run from the decision not to do that thing. This complaint relates to a failure to do something – a failure to allow the claimant to carry out all of the coping skills training within his working time, without the requirement to work the time back or take annual leave. Section 123(3) applies to this complaint. We conclude that the decision was taken on 12 May 2021 as it was confirmed to the claimant

on that day (page 270). It was clear to the claimant on 12 May 2021 that the respondent was not complying with its duty.

189. The time for bringing this complaint therefore started to run on 12 May 2021. ACAS early conciliation started on 13 January 2022 which was after the expiry of the primary three month time limit in section 123(1)(a). The time limit for bringing this complaint is not therefore extended by the period of ACAS early conciliation pursuant to section 140B of the Equality Act. The time limit for bringing this complaint therefore expired on 11 August 2021. The ET1 was presented on 1 March 2022 and was therefore just under seven months outside of the primary three month time limit at section 123(1)(a). Pursuant to section 123(1)(b), therefore, this complaint can only proceed if we conclude that the claim was brought within such other period as we think just and equitable.

190. We note that the period between 12 May 2021 and the claimant's resignation was a period of concentrated activities. However, we have found that the claimant agreed to proceed on the basis that he would carry out all of the training during working time and sacrifice 50% of the time from his holiday entitlement. There is no evidence that he raised any discontent about this matter after May 2021. He did not raise it in his resignation letter. When asked why he had not brought his complaint about the matter sooner, his reasons related to subsequent matters which he was unhappy about. We note that, as his other complaints fail, the claimant cannot rely on section 123(3)(a) as there was not unlawful conduct extending over a period. We conclude that the reason that he did not bring a complaint sooner was that he agreed to it and had moved on. We have found that he would have been aware of the existence of time limits. Even if he did not know precisely the detail of those time limits, he had a duty to act promptly in checking them and then pursuing his concerns. The claimant chose not to bring his complaint earlier than he did, within the time limit. Had he not subsequently had concerns about what happened later in his employment, he would not have brought a complaint in respect of the coping skills training issue.

191. In any event, he did not act promptly – his concerns about his targets not being adjusted were clear when the performance improvement plan was put in place on 14 June 2021, and about his probationary period being extended on 5 July 2021. He raised his concerns about DSE breaks in July 2021. Nevertheless, he waited until 13 January 2022 to contact ACAS to commence early conciliation and until 1 March 2022 to bring his claim. It cannot be said that he acted promptly once he believed that there was a pattern of resistance to reasonable adjustments.

192. As to the prejudice that each party would face by the decision, we note that the respondent would have needed to participate in these proceedings in any event to respond to the complaints which were arguably brought within the primary three month time limit. The cogency of its evidence did not appear to have been affected by the delay in bringing the claim. The sole disadvantage that the claimant identified was that, if his otherwise meritorious complaint was not allowed to proceed, there would be an impact on his Vento compensation.

193. It is for the claimant to satisfy us that the complaint was brought within such other period as was just and equitable. He was given ample opportunity to do so by the Tribunal. We are entitled to take into account all of the circumstances in reaching our decision, including the length of and reasons for the delay.

There is no requirement that the Tribunal must be satisfied that there was a good reason for the delay or that time could not be extended without an explanation for the delay. Although the claimant would face the greater prejudice if this otherwise meritorious complaint were not allowed to proceed, this was a lengthy delay (just under seven months), he would have been aware of time limits, and the reason for the delay was, in essence, that the claimant had changed his mind about wanting to pursue a claim. Having weighed these factors in the balance we conclude that the complaint was not brought within such other period as was just and equitable. It would amount, in essence, to allowing the claimant to change his mind after several months had passed, long after the expiry of the primary time limit and it is not just and equitable to allow him to do so.

Additional monitor

194. The respondent accepted that it was a PCP of the respondent not to provide homeworkers with two large monitors in addition to their laptop; rather, to provide one large monitor in addition to their laptop.

195. As to whether the PCP put the claimant at a substantial disadvantage compared to someone who was not disabled, the claimant's position as set out in his further particulars was, in summary, that individuals with learning and sensory disabilities were more likely to suffer from fatigue due to having to process information from screens with different text sizes and multiple windows. In the claimant's case, his position was that that contributed to his probationary period being extended and his productivity results should have been disregarded until the second monitor had been provided.

196. The Tribunal did its best to encourage the claimant to explain, during his evidence, any difficulties he encountered in connection with his dyslexia as a result of the PCP. In our findings of fact, we found that the claimant wanted the additional monitor so that he could fit large documents onto the screen and move between different documents more easily without needing to reduce the size of the text so that it was not possible to read it. Applying the case-law, it is clear that we must be satisfied that the PCP put the claimant at a substantial disadvantage compared to persons who were not disabled. We considered our findings and conclusions about how the claimant's dyslexia affected him. However, there was insufficient persuasive evidence that, by not being provided with an additional (second) monitor, the claimant's dyslexia meant that he was affected differently or to a greater extent than other, non-disabled, persons, who would also need to carry out the same tasks and ensure the text was not too small to read. We therefore conclude that the PCP did not have the effect of producing the relevant disadvantage as between those who are and those who are not disabled.

197. We are confident in our conclusion but, even if we are wrong on that, we conclude that the respondent did not know and could not reasonably have been expected to know that the claimant was likely to be placed at that disadvantage until 18 May 2021. We are required to consider the matter at the time, not with hindsight.

198. Until May 2021, the respondent had only been told that Access to Work might make a recommendation for an additional monitor to be provided. The

issue was not dealt with in the letter to Ms Oakley. We have found that the respondent did not receive the holistic report during the claimant's employment.

199. However, the claimant asked for an additional monitor from a DSE Regulations perspective on 13 May 2021. By the time Mr Rowlands spoke to the claimant about the issue on 18 May 2021, he had received a copy of the Access to Work recommendations at page 236. We found that the document at page 236 was received by Mr Rowlands in the process of the assessment about the additional monitor in mid-May 2021. As the respondent was, from that point in time, aware that an additional monitor had been recommended as an adjustment to accommodate the claimant's dyslexia, we conclude that the respondent knew or could reasonably have been expected to have known that the claimant was likely to be placed at a substantial disadvantage. Mr Rowlands then recommended an additional monitor be provided and it was sent to the claimant within days. As such, we conclude that if the respondent was required to take the step of providing an additional monitor, it did so once they had the requisite knowledge and there was no failure on its part to make a reasonable adjustment in this regard.

200. We therefore conclude that the claimant's claim in this regard fails.

Targets

201. The respondent had a PCP of requiring employees to meet targets for salary bandings. It was not expected that an employee would immediately hit their performance level within the salary banding, but it was a requirement that they worked towards hitting the KPIs and then to demonstrate that they were able to move through the bandings (that is, the KPIs for the bands) in order to pass their probationary period. Employees moved through the bands at different speeds.

202. As to whether the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, the claimant's position as set out in his further particulars was in summary that individuals with a sensory or learning disability were less likely to be able to achieve unadjusted band 1 targets and therefore to pass their probationary period.

203. We have found that Ms Oakley considered that the claimant was unlikely to be able to meet all of the KPIs for his salary banding when she recruited him; however, that did not necessarily matter and employees were ultimately set bespoke targets following a period of adjustment and monitoring. There was no evidence that other dyslexic colleagues struggled to meet their KPIs or that the claimant was treated differently to other colleagues who were experiencing difficulties. We accepted Ms Oakley's evidence that no other employees were being managed on a formal basis for not meeting those targets (whether that be through formal capability or disciplinary procedures), and that she was not aware that anyone had ever been dismissed or managed formally for not meeting their KPIs.

204. We have found that the claimant was appointed on salary band 5 but that, due to an error, lower targets for band 4 were set out in his offer letter. The respondent's aspiration was that the claimant would achieve his band 4 targets as soon as possible after the completion of his training and probationary period, but the only requirement on him was to move through the bandings in order to

pass his probationary period. In the event, he had not achieved all of the KPIs for band 1 by the time he resigned.

205. Although the claimant relied on the performance improvement plan in support of his claim, he had been placed on the performance improvement plan in order to assist him to meet the KPIs for band 1 and to move through the KPIs for the salary bandings, so as to pass his probationary period. Indeed, the performance improvement plan was a supportive measure and it did help him to improve his performance. No formal capability or disciplinary process was begun and no warnings were given in relation to his performance.

206. The claimant also pointed to having been told of the possibility of his employment being terminated if he did not pass his probationary period. That was no different from any other employee who had not yet passed their probationary period. Also, he was reassured by Ms Cullen that she had every confidence that that would not turn out to be the case and, importantly, his performance was improving.

207. For the above reasons, we conclude that the PCP did not put the claimant at the substantial disadvantage contended for compared to someone without a disability.

208. We are confident in our conclusion but, even if we are wrong on that, we conclude that the respondent did not know and could not reasonably have been expected to know that the claimant was likely to have been placed at that disadvantage. We have considered that the claimant had completed a Legal and HR Skills and Knowledge Self-Assessment Form on 8 January 2021 (pages 181-188) in which he had stated that he had dyslexia and reduced cognitive function. We have also noted the Code which makes it clear that an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The Code states that an employer must do all they can reasonably be expected to do to find out whether this is the case; what is reasonable will depend on the circumstances; and this is an objective assessment.

209. However, there was a period of around six months in which new starters were getting to grips with the job, and receiving managerial support to assist with performance against KPIs. During much of the period in question, the respondent was aware that the claimant had been experiencing physical health issues – he was undergoing medical investigations and had had severe anaemia which had led to fatigue. He had demonstrated an ability to exceed some KPIs and his performance against the other band 1 KPIs was improving following the introduction of the performance improvement plan. The claimant's probationary period had been extended to give him further time in which to meet the band 1 KPIs with the benefit of a significant amount of support.

210. Adjustments to the claimant's targets had not been ruled out – the respondent planned to obtain a specific up-to-date report on his condition. The respondent had informed the claimant that his stress risk assessment would be properly evaluated with him and further adjustments would be considered with the benefit of an up-to-date medical report. The respondent was also entitled to look at the adjustments holistically – it acted reasonably in continuing to

monitor the impact of the other adjustments and support being provided. This was particularly in light of the fact that the claimant's performance was improving. As such, we have concluded that the respondent did not know and could not reasonably have been expected to know that the claimant was likely to have been placed at that disadvantage.

211. If the respondent was required to take such steps as it was reasonable to have to take to avoid the disadvantage, we conclude that it did so.

212. The respondent needed to ensure that it could meet service level agreements with clients which required responses within a set period of time. The quality and accuracy of advice was also important. It was reasonable for the respondent to monitor its employees' performance and require them to meet targets which were relevant to its ability to meet its service level agreements. Targets were set on a bespoke basis following an initial period of adjustment and monitoring and it was those bespoke targets which employees were required to meet.

213. As to what steps were reasonable to avoid the disadvantage, we are required to conduct a holistic assessment where several adjustments have been made. We conclude that, given that the claimant's performance was still improving (and, notably, he had been suffering from fatigue due to low iron levels prior to May 2021, which could well have detrimentally affected his performance), it was not reasonable to adjust the claimant's targets below the band 1 expectations at that point. The respondent provided a significant amount of support (including the performance improvement plan) and adjustments to assist the claimant and was monitoring their impact. Adjustments to the claimant's targets had not been ruled out – the respondent planned to properly review the stress risk assessment and obtain a specific up-to-date report on his condition and then review the position. Bespoke targets could have been considered once that had been done, and those might have taken into account any impact of additional reading time which the claimant still needed on his ability to meet any particular target.

214. In any event, it was not reasonable for the respondent to lower the claimant's band 1 targets in the way the claimant suggests. Doing so would not have meant he would have met all band 1 KPIs.

215. The claimant's claim in this regard therefore fails.

DSE breaks

216. The respondent accepted that it was a PCP of the respondent not to schedule DSE breaks for employees within the advisory team.

217. As to whether the application of that PCP to the claimant put him at a substantial disadvantage compared to non-disabled persons, the claimant's position as set out in his further particulars was, in summary, that where disabled persons were struggling to meet targets and fearful that they would not pass their probationary period, they were less likely to take the necessary breaks and, in turn, more likely to suffer fatigue, sickness absence and leave their employment.

218. We did not accept that the claimant's dyslexia made him less likely to take breaks or to be able to manage his own breaks than other, non-disabled

employees. We also did not accept that employees with a disability were less likely than employees without a disability to take breaks in the circumstances described in the claimant's further particulars. All employees in the advisory team were required to take DSE breaks. This requirement was reiterated to the claimant on at least two occasions, and the claimant was positively encouraged to take appropriate breaks.

219. As such, we are not satisfied that the requirement that employees ensured they took appropriate breaks away from their computer screens disadvantaged the claimant in connection with his dyslexia compared to non-disabled persons. For these reasons, we conclude that the PCP did not put the claimant at the substantial disadvantage contended for compared to someone without a disability.

220. We therefore conclude that the claimant's claim in this regard fails.

L Robertson

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Employment Judge L Robertson

26 May 2023

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