Case Number: 1805309/2022
1805713/2022
1802602/2023

EMPLOYMENT TRIBUNALS

Mr Z Rahman — Claimant

Mr S Algunaldi (1)
Ms S Kazmi (2)
Capita (3) — Respondents

Heard: BY CVP **On: 16 to 20 October 2023**

Before:
Employment Judge JM Wade
Ms J Lee
Mr M Taj

Representation:

Claimant: **In person**
Respondent: **Mr Caidan, counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The claimant's complaints concerning holiday pay and unfair dismissal against the first and second respondents are dismissed, having been previously withdrawn by the claimant against those respondents.
2. The claimant's reasonable adjustments complaint against the first respondent is dismissed for the reasons below.
3. The claimant's Section 15 and harassment complaints against the second respondent are dismissed for the reasons below.
4. The claimant's complaints against the third respondent remain to be discussed at a hearing on 24 November 2023, subject to separate Orders.

REASONS

Introduction

1. The claimant was employed as an agent in the third respondent's call centre from July 2021 until May 2022. He presented three claim forms, one against the manager who dismissed him, the first respondent, one against his line manager, the

second respondent, and one against the employer. The two manager claims were duly served, resisted and subject to case management resulting in this hearing. The claimant withdrew complaints of unfair dismissal and holiday pay against the managers.

2. The claim against the employer was lost by the Tribunal's digital system and although later found, the employer did not have service of it until the first day of this hearing. Those employer allegations remain to be determined and the circumstances were the subject of a separate consent order.

Issues

3. The complaints remaining against the first and second respondents were of disability discrimination. A preliminary hearing determined that the claimant was a disabled person at all material times by reason of learning difficulties – dyslexia. The claimant was not a disabled person by reason of physical chest pain – as explained in a separate judgment and reasons.

4. The consequence of that judgment was that some of the claimant's reasonable adjustment case against the first respondent concerning physical disability could not proceed, and is dismissed for that reason.

5. The way the claim was discussed, understood and recorded in case management (which the claimant had the opportunity to change but did not do so) was as follows:

> 5.1. A claim of discrimination by failure to make reasonable adjustments against the first respondent only (the claimant being adamant he did not want to join the employer to that claim), which gave rise to the following questions:
> 5.2. Did the first respondent know, or could he reasonably have been expected to know that the claimant was disabled by reason of dyslexia? From what date?
> 5.3. Did the first respondent - Mr Algunaidi – have a PCP of call handlers being required to perform their full duties up to a sufficient standard to pass a probationary review?
> 5.4. Did this PCP put the claimant at a substantial disadvantage compared to someone without his disability because there was a focus on him finding out and absorbing information to do his job where reading took him 50% longer than a person without dyslexia and he needed help understanding what was written and complaints had to be transcribed.
> 5.5. Did the respondent know or could he reasonably be expected to know that the claimant was placed at this disadvantage?
> 5.6. What steps could have been taken to avoid the disadvantage? The claimant suggests:
> 5.6.1. Allowing the claimant more time to deal with complaints and other aspects of his role (dyslexia)
> 5.6.2. a manager ensuring that his work had been correctly completed and checked - the claimant says that when a method of

checking was introduced around March 2020 his work was still not checked by his managers (dyslexia)

5.6.3. giving the claimant an opportunity to ask questions and receive feedback (dyslexia)

5.6.4. allowing the claimant to take breaks during review meetings - the claimant says he was not allowed sufficient breaks which would have assisted him with his physical impairment and given him an opportunity to discuss matters with his representative in circumstances where he was struggling to process information due to his dyslexia.

5.6.5. The claimant maintains that, when he needed to leave the review meeting on 9 April, he was told by the first respondent that he had enough for the claimant to be dismissed without the claimant continuing in the meeting in circumstances where the first respondent considered that the claimant had used up most of the meeting on breaks.

5.6.6. He maintained that he was told at the continuation of the meeting on 23 April that he had already had a lot of breaks and there would be no further breaks allowed

5.6.7. allowing the claimant to be accompanied by his union representative at review meetings to assist in his understanding of the process (dyslexia) (the claimant maintains that his representative was removed from a continuation of a video review meeting on 23 April)

5.7. Was it reasonable for the respondent to have to take those steps and when?

5.8. Did the respondent fail to take those steps?

6. Claims of section 15 disability discrimination and harassment against the second respondent (again the claimant being adamant he did not wish to join the employer as a respondent). It was accepted that by January 2022 the second respondent knew of the claimant's dyslexia. This gave rise to the following questions:

6.1. Did the second respondent, Ms Kazmi

6.1.1. Criticise the claimant as part of a campaign to dismiss him (see the further particulars below)

6.1.2. from February 2022 holding daily discussions with the claimant about his performance elevating inconsequential matters to more significant issues as a form of bullying

6.1.3. shortly prior to the termination of the claimant's employment, shouting at the claimant when he was talking to a customer – placed on mute

6.2. If the Tribunal finds this conduct happened, did 6.1.2 and 6.1.3 relate to the claimant's dyslexia? (harassment)

6.3. Were 6.1, 6.2 and 6.3 because of the need to provide the claimant with reasonable adjustments and/or because of the claimant's performance issues – speed, accuracy and need for breaks? (Section 15)
6.4. There was no justification defence pleaded.

7. The claimant's further particulars of criticism said this:
   7.1. Being told "that's not the process" virtually every day in an aggressive way without being told what the process was;
   7.2. On occasions not getting a reply from Ms Kazmi;
   7.3. Ms Kazmi requiring the claimant to raise IT issues himself through "tickets";
   7.4. Ms Kazmi not replying when the claimant complained that he was fed up, having gone to find a desk top computer in a different building and then being criticised;
   7.5. On 8 December being told off aggressively by Ms Kazmi about taking his break at the wrong time;
   7.6. On 10 December and other occasions was being asked to attend a different building for a meeting;
   7.7. When doing mandatory training being asked to screen share on 11 December by Ms Kazmi and treated like a child;
   7.8. On 30 December being told off by Ms Kazmi;
   7.9. On 14 February Ms Kazmi mentioning the claimant's dyslexia, when she was previously aware of it;
   7.10. In a documented discussion Ms Kazmi not updating the claimant's comments on an incident where he had been away from calls for three hours searching for a new head set;
   7.11. In February 2022 being asked to log of and speak to Ms Kazmi virtually every day;
   7.12. In early March 2022 Ms Kazmi requiring the claimant to stay on a call with her while he found a functioning PC.
   7.13. In March 2022 the claimant took leave he was so frightened of Ms Kazmi's reaction to a mistake he had made.

Limitation

8. Given the dates of the claimant's ACAS certificate and claim against Ms Kazmi, the Tribunal will have to consider whether her conduct extended over time, if the last act is in time, and/or whether to extend time. ACAS conciliation was 7 August to 18 September, with the claim on 18 October 2022. Events alleged before 8 May 2022 against Ms Kazmi are on the face of it out of time.

9. It was accepted in the respondent's opening submission that the claimant's claim against Mr Algunaidi was in time as far as it alleged that his decision to dismiss the claimant on 9 May was the real complaint discernible in the claim and statement. As the claim was framed above, the alleged failures were up to and including 23 April only. ACAS conciliation commenced on 14 July 2022 –

allegations against Mr Algunaidi from 15 April are in time. Conciliation ended on 25 August with the claim presented on 24 September 2022.

Hearing and Evidence

10. The Tribunal had a hearing file of over 700 pages. Around two hundred pages of the file were "MS teams chat" between the claimant and the two respondents. The overarching impression of those chats is of typical manager/team member supervision and support conducted in a responsive and supportive manner. However, it is also clear that the claimant was frequently seeking leave, was frequently off sick and was generally absorbing of manager time. The Tribunal invited the claimant to consider those records and discuss any points he wished to raise with the respondent witnesses the following day.

11. The Tribunal also had a transcript of the two meetings Mr Algunaidi conducted with the claimant, and again, it was apparent from that meeting that the only behaviour which could be described as violating of dignity, was the conduct of the claimant's representative towards Mr Algunaidi. The alleged comments of Mr Algunaidi within the claimant's claim form do not appear in the transcript in terms - the contents of the claimant's claim reflects his interpretation of Mr Algunaidi's words.

12. The parties had also exchanged witness statements. The claimant's statement was very short and with only one specific date reference – namely February 2022. He also provided two statements from former colleagues but they two were very short and they did not attend.

13. The respondents provided their own statements and Mr Holmes, their further witness, adduced documentary evidence concerning the claimant's grievance and appeal.

14. Mr Caiden helpfully provided his skeleton submissions in advance at the start of the hearing. That enabled the claimant to know the position that was going to be taken, and that questions would be about those matters. It was far more helpful to him as a litigant in person than lengthy closing submissions on the last day.

15. The claimant's evidence session was approximately four hours, with a break each hour. Mr Caiden efficiently put the respondents' cases, and the claimant agreed with aspects of them. The Tribunal assessed the claimant's evidence as lacking any insight into the reality of his situation while working for the employer. Given the claimant's dyslexia, and acknowledging the brevity of his statement, the Tribunal gave him the opportunity to "role play", that is to explain and demonstrate the tone of voice in which he alleged Ms Kazmi had shouted at him or berated him. His account simply confirmed the impression Ms Kazmi made as a witness – it was highly unlikely she would berate and shout in the way the claimant' alleged (albeit his witness statement fell short of making good that allegation), or otherwise bully him.

16. The claimant had the opportunity to ask the respondents questions which he had prepared. He did not suggest to them that they were liars – as he had alleged in his grievance. The Tribunal put to them his case as clarified in case management.

17. The Tribunal assessed the respondents and Mr Holmes as being witnesses of truth. They gave straightforward evidence when asked questions by the claimant and the Tribunal. The Tribunal accepted their oral evidence, supported as it was, by a wealth of documentation, in which there was no corroboration for the impression the claimant gave of Ms Kazmi and Mr Algunaidi.

18. The Tribunal also placed some weight on the written evidence of the claimant's two former colleagues – we did not discount it entirely - albeit the evidence was not challenged. The evidence described limited matters which were in the chain of events– it is the interpretation of those events on which the parties differ.

Findings of Fact

19. The claimant commenced employment with the employer, Capita Business Services Limited, on 12 July 2021 as a call centre agent working on a contract for a banking client. The claimant declared in his medical questionnaire that he considered himself disabled but did not identify the reason why and said he did not seek any adjustments.

20. The claimant had compulsory training known as being "in cadets" and was then released to his line manager, Ms Kazmi. She met him regularly in "one to ones" at least every month and provided coaching by call listening together – at least six or more times over her management of him - or other on the job training as appropriate.

21. There were four performance standards - or "KPIs" against which all agents were managed. The included a standard that 80% or more of calls were to be resolved without transfer – known as FTR. Average handling time – AHT – was another measure of performance. Those standards reflected the standards set by the banking client, along with other matters including the approach to complaints. Ms Kazmi emailed the team's performance against those standards to each of them weekly.

22. The claimant was affected by both family Covid and a physical condition giving him pain in his chest. From the start of his employment until his three month probationary review in November 2021, he had four spells of absence. One spell lasted most of September and October. In short, for a new recruit, he was present very little in those first four months and applying his training was disrupted.

23. On 27 November his probationary period was therefore extended by Ms Kazmi until 12 April 2022. She also referred the claimant to occupational health which recommended parking for him on site, being able to use the lift as he could not walk upstairs without pain in his chest, and a location near the exit. That meant he was in a quieter area away from his team and Ms Kazmi. She often used teams messaging to communicate

rather than walking across the floor – she had ten to fifteen agents to supervise and in the later phase of her management of the claimant, was pregnant.

24. The times at which agents took breaks were scheduled in advance because of the need to have a certain number of agents available to customers. Ms Kazmi emailed the times to agents in her team. On 8 December by teams message Ms Kazmi explained the claimant needed to take his break at the allotted time of 10.30. She did not do so aggressively, but politely. She then asked him to log off so she could talk to him to explain why that mattered.

25. On 10 December the claimant was pressing to take some holiday and he had also moved computer to a different building because of a screen issue. The same day he had dealings with Ms Kazmi about his computer, and how to raise an IT "ticket" to get a matter resolved. Mandatory training was also required around this time and Ms Kazmi had to ensure all her agents completed it. She allocated the claimant extra time on 11 December to make sure he did it. He said he would need more time if there was reading involved and he was given the time. Ms Kazmi asked him to share screens to help make sure the training was completed – it was a tool she used with all agents so she could help them locate the right materials or tools. She was not treating the claimant like a child. The training had to be done; she was trying to be helpful.

26. In December Ms Kazmi documented a discussion with the claimant about booking holidays, break times, and IT tickets, and how to have complaints checked by a manager if she was not there. On 30 December the claimant was in regular teams chat with Ms Kazmi and was asked to go and see her about an operational issue – again – that was normal management – she did not shout at the claimant and was not aggressive. He was then off sick until 3 January and his absence was logged as potential coronavirus - albeit reported as a stomach issue – that was agreed in a return to work meeting on 5 January 2022.

27. The claimant had call coaching in January and that month he was asking about transferring departments – to disputes - because it might be easier. Ms Kazmi indicated that was not available at that time. He also asked about part time shifts, and again, they had not been made available at that time. He did not link either of those requests to his dyslexia.

28. During the times when he was at work in 2021, his KPIs were a little below requirements and because those measures linked to Capita's client contract, they had to be managed. On occasions Ms Kazmi told the claimant his approach "was not the process", because it was not and the employer had to follow very clear client requirements about banking processes. On occasions she did not respond to him immediately, because she was engaged in other work or engaged with other agents.

29. Ms Kazmi first became aware that the claimant was dyslexic in early 2022. The claimant had mentioned he was dyslexic. When Ms Kazmi was not available Mr Algunaidi, a longstanding manager, was available to the claimant instead, and the

claimant also sought approvals from other managers in her absence. Neither Mr Algunaidi nor other managers had sight of the claimant's one to one documents, documented discussions or other line manager information and Mr Algunaidi did not know the claimant was dyslexic until he read documents in preparation for a meeting in April 2022.

30. The claimant had a number of IT related issues which prevented him working at times. They included not being able to source an adequate head set. Ms Kazmi frequently asked the claimant to screen share if he was in difficulties, and occasionally went across to his desk, and she also visited another site when the claimant appeared to be away from taking calls because of an IT issue. In summary, there were times when Ms Kazmi felt that without close supervision, the claimant would lose a lot of call time, and put the respondent's achieving is contract requirements in jeopardy. The contract also required live listening or sampling of calls, and Ms Kazmi did this, as well as listening back to difficult calls with the claimant and coaching him on ways to improve.

31. The claimant found the level of scrutiny in this environment difficult, but it was necessary and applied to everyone given the business environment in which Ms Kazmi and Mr Algunaidi were operating. He had attended work for most of December 2021 and January 2022 and met performance targets, He was then absent again in the first half of February and his performance dipped, particularly in relation to transfers.

32. Ms Kazmi developed a tool to require agents who did not meet call targets to keep a log of those calls where they transferred customers or short calls which ended without the customer speaking – of which the claimant had many in January. It was a basic list document to use in coaching and she asked the claimant to send the log each day. She applied that to any agent she managed who had that difficulty. It was a new tool in the business and she offered it to other managers. Again the claimant found that requirement oppressive. A colleague outside Ms Kazmi's team in another building did not know of it. The claimant considered he was being singled out in that respect. He was not.

33. The claimant also had call coaching about a customer in financial distress. In mid February, between absences, he was not meeting all required standards. In particular on or around 18 February the claimant had taken a call from a customer, the call had gone on without resolution, he had sought help via teams, Ms Kazmi had been unclear whether matters were resolved and went over to his desk. By that stage he had another customer on hold and she whispered to him to seek to give advice, believing he was still on the initial difficult call. The claimant found that unhelpful and alleged originally that he was shouted at – he was not – and then that Ms Kazmi had "a go at him". She did not. She was trying to support him and to make sure that the customer issue was resolved and she had not known that the claimant had moved on from the problematic call.

34. Similarly in notes of a documented discussion, Ms Kazmi included reference to the claimant's dyslexia – that was not an inaccurate note – the claimant had "mentioned his dyslexia" on previous occasions - notably a teams chat in January – but he had not sought to discuss it in any more detail – simply saying he needed more time.

35. Equally, when she made notes she provided them to the claimant and he was able to email back with any corrections – his communications were on the file.

36. There were a number of documented discussions with the claimant but on 3 March Ms Kami documented that he had not been completing the transfer tracker every day.

37. On 4 March Ms Kazmi drew the claimant's attention to further training requirements and again he indicated extra time was needed – she responded that they could go through it tomorrow if he needed extra support. She was supportive in her communications. Ms Kazmi did ask the claimant to remain on a call with her while equipment was located – it was a difficult time in March trying to have new laptops in place for her team and it took time. She understood that was frustrating.

38. She also sent him an invitation to his probation review to take place on 19 March, which he sought to reschedule, because his union representative was not available.

39. On or around 4 March the claimant also contacted other managers on site seeking to meet with them to talk about Ms Kazmi's management of him. He considered he was being bullied. He had leave in March booked on 11 and 12 March but he took more leave than his entitlement after 6 March, returning to work on 19 March.

40. Meanwhile his probation meeting was rescheduled to 9 April to enable a representative to attend. On 19 March he emailed an operational manager, to whom Ms Kazmi reported, this time expressly seeking a change of manager.

41. On 24 March the claimant had a March one to one with Ms Kazmi and expressed himself to be confident on a number of issues, where coaching had taken place. He was also recorded as having completed his mandatory training for the quarter. They discussed a particular transfer and why that needed improvement and they discussed his upcoming probationary review.

42. On 24 March he described himself to the operational manager with whom he had been corresponding as being on the point of resigning but unable to do so until his business was up and running. That was consistent with the impression the claimant made in his communications – that he was reluctant to be employed by the respondent.

43. In March the claimant had taken a customer call in which he approved the provision of call costs, not realising that he had to have manager approval, and he considered he would be subject to criticism from Ms Kazmi for that.

44. Again, he took sick leave from 31 March until 6 April giving the reason as a sore throat again when he spoke to Ms Kazmi.

45. On the day of his probationary review - 9 April - he wrote to Ms Kazmi saying he had raised a grievance for the way she was bullying him and not taking his disabilities seriously, and about his rights of representation. He told her to reschedule the meeting to the 15th of April as requested. Instead, the first respondent Mr Algunaidi took the meeting commencing at 5pm and the claimant's representative made himself available.

46. The meeting was fractious. The first part was spent arguing about the documentation that the union representative had available to him; the first respondent sought to chair the meeting in a polite and courteous way, sitting in a room with the claimant, in person, with a note taker and the claimant's union representative joined remotely. The representative was not an employee on site.

47. It took an half an hour or so before the union representative agreed, after a break, that he had the claimant's occupational health report. The claimant also sought breaks in the meeting and they were granted. There were discussions about the substance of the claimant's disabilities, as he explained them, and his work, and absence, but by 7 pm the meeting had not concluded and the claimant was due to end his shift and wanted to leave.

48. After an episode of disagreement about who had requested the meeting time, during which Mr Algunaidi again had to put up with the representative being aggressive when he, the representative, was in the wrong, Mr Algunaidi said that if the claimant refused to reschedule the meeting before the end of his probation period – ie before 12 April – he could make a decision based on all the information he had. In the context of the claimant requesting the meeting time "as late as possible" (without saying he could not, in fact, stay late), and it having been rescheduled from March at the claimant's request - that comment was a reasonable one.

49. During this meeting the union representative was at times rude and unprofessional to the first respondent. Matters were not concluded when the claimant left. The first respondent said the meeting needed to be reconvened before the 11th of April - the 12th being the end of the claimant's extended probation period.

50. In the early hours of 10 April, the claimant sent an email to the first respondent and a number of other senior managers setting out again his two disabilities and complaining about the date given for his probationary review, and having to deal with matters quickly, given his dyslexia and the second respondent threatening to hold the probationary review on his day off.

51. The claimant emailed again concerning an invitation for a probationary review on his day off, indicating the second respondent was also a bully and that he should be

automatically passed because his probationary review had not been held during his extended probationary period.

52. The result of these emails was that the probationary period was extended again, it was agreed the meeting would not take place when the claimant was not scheduled to be at work and the meeting was re-arranged to resume on 23 April. The invitation letter said to the claimant that if he did not attend a decision would be made in his absence.

53. The claimant then took sickness absence from 14 to 16 April in relation to chest pain.

54. When the meeting re-convened on 23 April at around 2pm, again the union representative was remotely connected with a notetaker. The claimant began the meeting by objecting to the meeting being chaired by the first respondent, because he had been told a decision could be taken in his absence and he objected to him.

55. The first respondent again handled matters professionally explaining that a separate grievance process was not something he could address, but he was charged with undertaking the claimant's review and he would proceed.

56. There was then an attempt to conduct a lengthy and considered discussion of all aspects of the claimant's performance and his sickness absences and his health and disability over the course of his employment. However, after several very difficult episodes with the union representative, he was again exceptionally rude and disruptive, calling the respondent the "worst manager". Having been warned several times by the first respondent, the representative was ultimately disconnected.

57. The last point of dispute in the meeting was that the claimant had been referred by his manager to occupational health for advice about adjustments in connection with dyslexia, and that appointment was yet to take place in May.

58. After discussion with the claimant, which recognised his distress at events, and that he had said he was "done" and handed in his badge, the first respondent sought to clarify whether the claimant was resigning but was unable to be clear about that.

59. There was, in parallel, the commencement of an investigation of the claimant's grievance allegations of bullying against the first and second respondents, and the alleged failure of an operations manager to address matters earlier. His statement was about these matters was sent to the manager with charge of the grievance on 5 May 2022.

60. The grievance involved interviews of relevant staff - the claimant did not put forward any other witnesses that he considered should be spoken to - and a thoughtful 10 point decision was provided to the claimant on 9 May 2022. His grievances were not upheld.

61. On the same day Mr Algunaidi wrote to the claimant setting out at length the outcome of his probationary review. Mr Algunaidi recorded that the claimant's performance on three key KPIs had been discussed in the meeting, and that as far as adjustments for dyslexia were concerned, the claimant simply sought more time to undertake tasks. Mr Algunaidi said he believed dyslexia could have impacted on the claimant's performance in those areas.

62. As for attendance, he set out at length (because there were so many absences) the reasons for those absences, and the return to work meetings completed after them. Mr Algunaidi discounted absence in connection with Covid, as was the respondent's policy, and he then set out the adjustments that had been made in connection with the claimant's chest condition. He set out 45 working days' absence over six occasions, three of which included chest pains or inflammation, and others for stomach/throat/dizziness during the claimant's probationary period (discounting the Covid absence). Those absences alone meant that his attendance was unsatisfactory during probation and his employment would be terminated.

63. The claimant then appealed the outcome of his grievance and an outcome was given on 17 June, which accepted and confirmed that the claimant was dismissed, "solely on absence", which was a point of his appeal. The appeal also addressed that the claimant had said that two of his absences were linked to his manager's treatment of him. The claimant's evidence to this Tribunal was that stress caused by his manager's treatment of him brought on chest pain. Industrial experience tells us that when people are under strain and stress, their physical health can also deteriorate. Nevertheless, Mr Algunaidi's decision to dismiss the claimant was because of the need for staff who can attend sufficiently, to enable the respondent to maintain its contracts – without sufficient staffing, contracts are lost and others are out of work as a result.

The Law

64. Failures to make reasonable adjustments

65. Section 39 (5) imposes the duty to make adjustments on employers and Section 20 explains it:

> (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.*

66. Section 21 deals with failure to comply with the duty:

67. *(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.

69. *An employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement (Schedule 8, paragraph 20 (1) of the 2010 Act).*

70. The Tribunal potentially answers two questions: did the employer know about both disability and likely disadvantage; if not, ought the employer reasonably to have known? In Ridout v TC Group [1998] IRLR 628 the claimant had photo sensitive epilepsy. Her application form for a job said she had that disability. When she attended for interview she was put in a room with no windows illuminated by fluorescent strip lights. She attended wearing a pair of sun glasses hanging on a cord around her neck. She did not say the lighting in the room was a problem for her although she did comment on the lighting as she walked into the room in terms which the Tribunal found could merely have been to explain why she had dark glasses. The respondent did not realise that it should take any further steps. In the Judgment Morison P set out as one of the submissions made by the claimant that:

    "*The onus in this case was on the prospective employee to inform the prospective employer of a disability but that once he or she has done that the onus passes to the employer to make such enquiries as are necessary to satisfy himself that he can discharge his duties under section 6 (the predecessor of section 4A). Such enquiries may simply be limited to making further enquiries of the employee. The submission made to us was that the appellant, having discharged the onus on her at the first stage, the prospective employer failed to take two opportunities to consider their position first on receipt of the application form and secondly when she arrived for interview".*

71. That submission was rejected. The EAT said:
    "*Subsection 6 requires the Tribunal to measure the extent of the duty, if any, against the actual or assumed knowledge of the employer both as to the disability and its likelihood of causing the individual a substantial disadvantage in comparison with persons who are not disabled … It seems to us they were entitled from the material before them to conclude no reasonable employer would be expected to know without being told in terms by the applicant that the arrangements which he in fact made in this case for the interview procedure might disadvantage this particular applicant for the job. As it was said in argument, this form of epilepsy is very rare".*

72. And later:

"*We accept what Counsel for the appellant was saying that Tribunals should be careful not to impose on disabled people … a duty to 'harp on' about their disability … It would be unsatisfactory to expect a disabled person to have to go into a great long detailed explanation as to the effects their disablement had on them merely to cause the employer to make adjustments which he probably should have made in the first place. On the other hand, a balance must be struck. It is equally undesirable that an employer should be required to ask a number of questions about a person suffering from a disability as to whether he or she feels disadvantaged. There may well be circumstances in which that question would not arise. It would be wrong if, merely to protect themselves from liability, the employers … were to ask a number of questions which they would not have asked of somebody who was able-bodied. People must be taken very much on the basis of how they present themselves".*

73. As to the type of adjustments that were envisaged by the 2010 Act, the guidance from the 1995 Act is rehearsed in the Code. The Tribunal must take into account those parts of the Code which appear to be relevant.

74. At paragraph 6.28: whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular to:
    the extent to which taking the step would prevent the effect in relation to which the duty is imposed;
    the extent to which it is practicable for him to take the step;
    the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;
    the extent of his financial and other resources
    the availability to him of financial or other assistance with respect to taking the step;
    the nature of his activities and the size of his undertaking.

75. At paragraph 6.33, the following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments

    allocating some of the disabled person's duties to another person;
    transferring him to fill an existing vacancy;
    altering his hours of working or training;
    assigning him to a different place of work or training;
    allowing him to be absent during working or training hours for rehabilitation, assessment, or treatment;
    modifying procedures for testing or assessment;
    providing supervision or other support.

76. We also note that the purpose of the statutory code, approved by parliament, is to provide a detailed explanation of the 2010 Act and to provide practical guidance on compliance. In Spence-v-Intype Libra Elias P (as he then was)

summarised the position in relation to reasonable adjustments under the 1995 Act at paragraphs 43 and 48:

"We accept that the concept of reasonable adjustment is a broad one, but we do not consider that this assists the argument. The nature of the reasonable steps envisaged in s4(A) is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice. That is in fact precisely what Lords Hope and Rodger say in the paragraphs relied upon; the duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise… In short, what s4(A) envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work."

77. Section 15 Discrimination

78. In section 15 cases, the key question is the reason why the claimant was subjected to the alleged unfavourable treatment. Section 15 says:

(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

79. The "something arising in consequence of B's disability" sometimes has to be proven by a claimant, or sometimes is accepted by an employer. The Equality and Human Rights Commission Code of Practice on Employment ("the Code"), at paragraph 5.9, also gives examples of consequences of disability, including an inability to use certain work equipment, walk unaided or a need to follow a restricted diet.

80. In T-Systems v Lewis (UKEAT/0042/15/JOJ) His Honour Judge Richardson sets out a four stage test for Section 15 discrimination:
There must be a contravention of Section 39(2)

There must be unfavourable treatment

There must be "something arising in consequence of the disability"; and

The unfavourable treatment must be because of the "something".

This means at stages 3 and 4 the Tribunal sometimes has to look at two different ways in which facts in the case relate to each other. The first is: does the "something" arise in consequence of disability? Stage 3 can sometimes be straightforward, and sometimes complicated.

81. Stage 4 is whether the unfavourable treatment was because of the "something". "Because of" at stage 4 means that the "something arising" operated on the mind of the person making the decision (consciously or sub-consciously) to a significant (that is material) extent. See Lord Justice Underhill at paragraph 17 of IPC Media Limited v Millar UKEAT/0395/12 SM and at paragraph 25. The Tribunal, as its starting point, has to identify the individual(s) responsible for the decision or act or behaviour or failure to act which is being complained about. It does not matter whether the putative employer has knowledge that the something arose in consequence of disability, provided there is knowledge of the disability itself - City of York v Grosset [2016] ICR 1492 CA. See also the full guidance in Pnaiser v NHS England [2016] IRLR 710 EAT at 31. "A Tribunal may ask why A treated the claimant in the unfavourable way alleged....alternatively it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment". Motive is irrelevant.

82. Harassment

83. Section 40 prohibits harassment by employers and section 26 relevantly provides:-

> (1) *A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *…….. (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account*
>
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*

Limitation

84. Section 123(1) of the Equality Act 2010: "Proceedings on a complaint within section 120 may not be brought after the end of - (a) the period of three 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."

85. Those periods are extended by the ACAS conciliation provisions where conciliation is commenced within the relevant time either by the "stop the clock" provisions or providing a further month from the close of conciliation.

86. Time runs from the date of the alleged discriminatory act (but lack of knowledge is relevant to the grant of an extension) - see Mr GS Virdi v Commissioner of Police of the Metropolis and another [2007] IRLR 24 EAT; In the case of a failure to make a reasonable adjustments, an omission time runs from the date when a person does an act inconsistent with making the adjustment; or on the expiry of the period in which the person might reasonably have been expected to do it (Section 123(4)). See Matuszowicz v Kingston upon Hull City Council [2009] EWCA Civ 22 on the exercise of discretion in such circumstances.

87. The Tribunal also considers "forensic prejudice" in assessing the prejudice to each party from an extension of time - see Wells Cathedral School Ltd v Souter EA 2020 000801 JOJ.

88. Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132 makes clear that the Tribunal is entitled to consider the merits of a claim in the exercise of its discretion.

89. The Act confers the widest possible discretion on the Employment Tribunal in determining whether or not it is just and equitable to fix a different time limit Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640. That said the power of the Tribunal is a discretion, to be exercised judicially, assessing relevant factors and the weight to be given in each case. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time. Robertson-v-Bexley Community Centre 2003 IRLR 434 CA.

90. If there are circumstances which would otherwise render it just and equitable to extend time, the length of extension required is not of itself, a limiting factor unless the delay would prejudice the possibility of a fair trial see Afolabi -v- Southwark LBC 2003 EWCA Civ 15.

91. In exercising discretion under the Section 123 (1)(b) case law has also established that the Tribunal must consider the length of, and reasons for, delay, and must consider the prejudice to both parties.

92. Section 33(3) of the Limitation Act 1980 contains a helpful list of other matters which might need to be considered (in personal injury and other claims with longer time limits), but also for the Tribunal to bear in mind if relevant:

    the extent to which the cogency of the evidence is likely to be affected by the delay;

the extent to which the party sued had cooperated with any requests for information;
the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Discussion and Conclusions

1805309 – 22 the claim against Mr Algunaidi

Did the first respondent know, or could he reasonably have been expected to know that the claimant was disabled by reason of dyslexia? From what date?
Did the first respondent - ie Mr Algunaidi – have a PCP of call handlers being required to perform their full duties up to a sufficient standard to pass a probationary review?
Did this PCP put the claimant at a substantial disadvantage compared to someone without his disability because there was a focus on him finding out and absorbing information to do his job where reading took him 50% longer than a person without dyslexia and he needed help understanding what was written and complaints had to be transcribed.
Did the first respondent know or could he reasonably be expected to know that the claimant was placed at this disadvantage?

93. Mr Algunaidi was not the claimant's manager. He was one of a number of managers from whom the claimant sought assistance, if Ms Kazmi was not available. Mr Algunaidi was helpful to the claimant during exchanges with him. He could not reasonably have known of the claimant's dyslexia from direct communication from the claimant; he could only reasonably have known if Ms Kazmi had told him. Given that all the claimant asked of Ms Kazmi was more time, and Mr Algunaidi was not taking any management decisions in relation to the claimant's employment before April 2022, it was not reasonable of him to have been informed earlier than that.

94. The date from which it was reasonable for Mr Algunaidi to know of disability was when he needed to know, on or around 9 April, when he read in for the purpose of taking the claimant's probationary review meeting. He also knew, having listened at length to the claimant in those two meetings, that the claimant was at a potential disadvantage in meeting the performance standards than someone without dyslexia. Before his reading for those meetings, the claimant was entitled to his privacy, and no doubt Ms Kazmi would have been criticised had she relayed his information to Mr Algunaidi before 9 April.

95. The employer had a PCP of minimum performance standards to enable it to provide its service to clients, otherwise there were potential financial penalties, or worse, losing a contract. All agents were made aware of those standards or PCPs – they were applied by sending statistics out weekly to each team, and discussing them during reviews and meetings.

96. The PCP alleged in this case is achieving the standard to pass a probationary review. It cannot be said such a PCP put the claimant at a disadvantage in relation to a relevant matter – namely maintaining his employment - because it was not applied to him. Mr Algunaidi's evidence , which we accepted, was that it was similarly disapplied in other cases, on a case by case basis, taking into account disability and other factors. Applying the language of the statute, it cannot be said that the claimant was put at a disadvantage by a probationary performance PCP because it was disapplied to him.

97. If we are wrong and the duty to make adjustments arose (and we do not find it did), then Mr Algunaidi made reasonable adjustments during the conduct of those meetings; he conducted discussions professionally and with warmth for the claimant and with breaks; he did not berate him for his performance; he gave the claimant's representative latitude to advise and consult with the claimant, notwithstanding the representative's rude and unprofessional behaviour. As to the other alleged adjustments, they were not for Mr Algunaidi to make, he was not the claimant's manager at the material times. Ms Kazmi, in any event, had provided more time for the claimant by extending his probationary period, by supporting him with training and allowing him more time for tasks when necessary.

98. The claimant's claim against Mr Algunaidi is dismissed.

<u>1802602 – 22 – the claim against Ms Kazmi</u>

99. Notwithstanding the limitation issue, we have made chronological findings to address the substance of the claimant's complaints. We consider the claimant has an unjustified sense of grievance about each matter that he alleges. Ms Kazmi did not criticise the claimant as part of a campaign to dismiss the claimant, or elevate inconsequential matters to bully him, and she did not shout at him. In context and for particular operational reasons she had to raise matters with him and she did so using appropriate tools and in appropriate and reasonable ways. She had sought support for his dyslexia from occupational health and if his attendance had been satisfactory, he would have passed his review and no doubt any recommendations to help with dyslexia would have been implemented.

100. It was Ms Kazmi who facilitated return to work adjustments, such as parking and location, in connection with his chest pain, and she was responsive to the claimant's numerous requests for leave, hours changes or other management interventions. When he raised a bullying allegation against her she was then the subject of an investigation of those matters, and her documentation and discussions with the claimant was scrutinised and she was interviewed. Nothing in these events or her accounts of matters gives rise to doubt about her evidence.

101. Ms Kazmi's conduct towards the claimant was not related to his disability, it did not have the purpose of violating his dignity or creating the Section 26 environment for

him. It was not reasonably to be perceived as having that effect – it was reasonable management.

102. The matters she tackled with him did not arise from dyslexia – shouting at a customer, taking three hours to locate equipment, transferring customers or having very short calls – for example. She did not insist he saw her daily in February – he was not present every day in February and when he was present there were ordinary requests to address matters as they arose and there was a documented and transparent discussion of real issues.

103. In short, in considering whether to extend time, having made the findings of fact we have made, we consider the factors in the direction above, including that no case to extend time was presented by the claimant. Ultimately, we consider the prejudice to him in not extending time to enable the complaints to be determined and the prejudice to Ms Kazmi.

104. There is no last act of Ms Kazmi which is in time – she ceased involvement after the April review by Mr Algunaidi - her earlier conduct could not come to be examined as discriminatory conduct extending over time on the findings we have made. She has a complete limitation defence.

105. We have found there is no merit in the complaints against Ms Kazmi because as alleged, they are exaggerated o false and we would not uphold those complaints. There is therefore no prejudice to the claimant in not extending time to determine those complaints; there is inherent prejudice to Ms Kazmi in losing a limitation defence. In those circumstances we do not extend time.

106. The claim against Ms Kazmi is also dismissed.

Employment Judge JM Wade

20 October 2023