EMPLOYMENT TRIBUNALS

Claimant: **Charlotte Khatso**

Respondent: **London Borough of Hackney**

Heard at: **East London Hearing Centre**

On: **21, 22, 23, 27, 28 and 29 February 2024**

Before: **Employment Judge Mack**
Members: **Ms A Berry**
Ms S Harwood

Representation

Claimant: **Finnian Clarke (Counsel)**
Respondent: **Catriona MacLaren (Counsel)**

JUDGMENT having been sent to the parties on 14 March 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. These are the Tribunal's reasons, given orally at the hearing on 28 February 2024. On 19 March 2024 the respondent requested written reasons.

2. The claimant brought five claims against the respondent. These are:

    a. direct discrimination on the grounds of disability (section 13 of the Equality Act 2010 ("the Equality Act");

    b. discrimination arising from disability (section 15 of the Equality Act);

    c. failure to make reasonable adjustments (section 20 of the Equality Act);

d. unfair dismissal (section 94 of the Employment Rights Act 1996 (“the Employment Rights Act”)); and

e. less favourable treatment under The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("the Fixed-term Regulations").

3. In summary, the claims allege that the respondent treated the claimant unfairly because she had disabilities and because she was employed on a fixed-term contract. The respondent, the London Borough of Hackney – again in summary – rejects these claims: it says that it treated her fairly. It denies treating her unfairly because of her disabilities or because she was on a fixed-term contract.

Issues

4. The issues for the Tribunal to determine were identified at page 8 of the Case Management Orders. The Case Management Orders were made by the Tribunal at the Preliminary Hearing on 30 May 2023. Elaboration of the matters identified in the issues was provided in subsequent correspondence (which was in the agreed bundle (to which see below)).

Procedure

5. The claimant was represented at the hearing by Mr Clarke. The respondent was represented by Ms MacLaren. The Tribunal read the statements of, and heard evidence from, the following witnesses:

a. The claimant;

b. Jane Havemann, the claimant’s line manager at all relevant times;

c. Jennifer Wynter, Assistant Director, Benefits and Homelessness Prevention Service;

d. Chris Trowell former interim director, Regeneration; and

a. Emily Dathan, Senior HR & OD business partner in Regeneration. (During the relevant period Ms Dathan was named Emily Cooper).

6. The Tribunal considered the documents from an agreed 705 page bundle and a 51 page supplementary bundle.

7. There was also an agreed cast list and an agreed chronology, both of which the Tribunal referred to.

8. The Tribunal received and considered written submissions from the claimant and the respondent. The Tribunal heard oral submissions from the representatives for the claimant and the respondent.

Findings of fact

9. The relevant facts are as follows. Where the Tribunal has had to resolve any conflict of evidence, the findings indicate at the material point how it has done so.

Employment Status

10. The claimant started employment with the respondent on 27 July 2020. Her employment ended – and the Effective Date of Termination – was 30 September 2022. Her employment ended at the expiry of her fixed term contract.

11. The claimant's first contract was for one year from 27 July 2020. In February 2021 the claimant applied for a new Project Manager position with the respondent, to which she was successfully recruited. This had a contract end date of March 2022. The respondent subsequently extended the contract end date to September 2022.

Work of department

12. While employed by the respondent the claimant worked across two teams: these were the Estate Regeneration Team and the Housing Supply Team. Her work on the Housing Supply Team project was overseen by Rachel Bagenal; her work on Estate Regeneration Team projects was overseen by Jane Havemann. Ms Havemann was also the claimant's line manager. Although Ms Havemann changed roles during the time that the claimant worked for the respondent, Ms Havemann remained the claimant's line manager until the claimant's employment with the respondent ended. Ms Havemann told the Tribunal that it was preferable for her to retain continuity of management due to the claimant's particular circumstances (primarily her ill health and time away from work, discussed in more detail below).

13. The key projects that the claimant worked on during the period of her employment were:

    a. Tower Court;
    b. Lincoln Court;
    c. St Leonards Court; and
    d. Marian Court.

    These projects sat within the Estate Regeneration Team, with the exception of Lincoln Court. Lincoln Court sat within the Housing Supply Team and was therefore overseen by Ms Bagenal.

14. The claimant was moved to work on the Tower Court and St Leonard's Court projects from April 2022.

15. As part of her Project Manager role the claimant on occasion visited site.

16. The claimant said in her statement (which was not contradicted by the respondent) that the "Respondent's Regeneration team relies increasingly on digital communication to instruct processes and share information via the Respondent's Intranet which hosts a

myriad of links, digitised newsletters, and emails." The Project Manager role description included - as a specific aspect of the role of Project Manager - to maintain and update records in relation to projects. Therefore, the Tribunal is satisfied that the respondent required the claimant to use its IT equipment and software throughout the period of the claimant's employment with the respondent.

17. The work of the Regeneration department was busy with often moving and tight internal and external deadlines. The work of the department was also undertaken in the context of uncertainty with respect to funding and increasing construction costs.

Disability/medical conditions

18. The claimant is dyslexic. The respondent agrees that the claimant's dyslexia is a disability within the definition at section 6 of the Equality Act. The claimant was formally diagnosed as dyslexic in 1996. The claimant informed the respondent that she is dyslexic before she started work with the respondent. A 'Fitness to Work' report was prepared about the claimant by Andrea McGrellis and provided to the respondent; this report was dated 8 June 2020. This report stated that the claimant had "declared a condition likely to be covered by the Equality Act 2010. however [sic] no adjustments are currently required." Ms Havemann received a copy of this report.

19. From August 2021 the claimant began experiencing significant abdominal pain, bleeding and fatigue. In September 2021 the claimant was diagnosed with fibroids. The claimant had a biopsy in June 2022 and had an operation to remove the fibroids scheduled for August 2022. The operation did not, however, proceed before the claimant left employment with the respondent; this was for medical reasons. The respondent agrees that the claimant's fibroids are a disability within the meaning of disability in the Equality Act.

20. The Tribunal received evidence about other medical conditions that the claimant had during her employment with the respondent. These were a cycle accident in 2021; Covid, followed by symptoms of long Covid in 2022; asthma; and eczema. However, the claimant does not rely on these as disabilities and therefore, they do not form part of her claim.

Sickness absence and procedure

21. The claimant was absent on sickness leave on six occasions between August 2021 and June 2022.

22. The reasons for the claimant's sickness absences were recorded in the respondent's HR system (which was referred to as 'iTrent' or 'HR Systems'). iTrent enabled a line manager to record the reason for sickness absence. We accept the evidence of Ms Havemann that iTrent allowed a line manager to record only one reason for each sickness absence. The reasons for C's absence were recorded as follows:

    a. June 2021 – gastrointestinal problems;
    b. 27/9/21 – 8/10/21 – injury, fracture;
    c. 8/11/21 – 10/11/21 – injury, fracture;

d. 15/2/22 – 18/2/22 – Covid-19 sickness;

e. 22/2/22 – 11/4/22 – genitourinary and gynaecological disorders;

f. 13/6/22 – 27/6/22 – genitourinary and gynaecological disorders.

23. The record of the claimant's absence between 22 February 2022 and 11 April 2022 was later amended at the claimant's request to include reference to Covid. While the recorded reason for this absence was the topic of a significant amount of evidence during the hearing, the Tribunal does not consider that it is relevant to the issues it had to determine in this case. This is because – as discussed in the next paragraph - the respondent accepted during the hearing the correctness of the claimant's calculation of her remaining sickness absence entitlement for the relevant period.

24. On 25 July 2022 the respondent invited the claimant to a Stage 1 sickness absence meeting, in accordance with the respondent's Management of Sickness Absence Policy. This meeting took place on 1 August 2022. The outcome of this meeting was recorded in a letter from the respondent dated 5 August 2022. The letter records the claimant as having informed the respondent that she would require leave for a myomectomy operation. It also states that the claimant had 34 days' full pay and 55 days' half pay remaining of her sickness absence entitlement. The Tribunal was taken to the claimant's Statement of Written Particulars and its provisions on sick pay. The Tribunal agrees with the claimant's assessment of these provisions, which were also agreed by Ms Havemann during examination; that is, that after 27 July 2022 the claimant was entitled to four months' full pay and four months' half pay during sickness absence. The Tribunal therefore finds that the statement of outstanding sickness leave in the letter of 5 August 2022 was incorrect.

Adjustments

25. On 19 October 2020 the claimant emailed Ingrid Theodore, a Recruitment Coordinator for the respondent, requesting "disability support for dyslexia". In this email the claimant said that she required Dragon software for a staff computer. Ms Theodore responded to this email on 9 November 2020; on the same day the claimant replied to her to state that she was "still trying to find out who I can contact about receiving assistance for disability support for dyslexia…". While accepting that the claimant did not raise the matter of support with Ms Havemann until spring 2021, the Tribunal therefore finds that the respondent knew of the substantial disadvantage caused by the claimant's dyslexia by 9 November 2020.

26. It is not in dispute that the respondent took steps to adjust its ways of working after November 2020 to provide support to the claimant with respect to her dyslexia. The key dates are the following:

a. On 7 January 2021 the claimant emailed Harriet Ray, to ask if she could provide support in respect of her dyslexia;

b. On 9 March 2021 there were exchanges between Emily Cooper and the claimant. Ms Cooper flagged the respondent's Occupational Health and Access to Work services to the claimant. Ms Cooper re-sent this email to the claimant on 27 April 2021;

c. Between 11 October 2021 and 14 October 2021 the claimant and Ms Cooper corresponded by email. On 11 October the claimant told Ms Cooper she was "being sent round in circles still trying to find out who I can contact about receiving assistance for disability support for dyslexia…". Three days later, she told Ms Cooper that equipment was "refused" by HR in February. The same day Ms Cooper said she was "confused" by the refusal and told the claimant that Ms Havemann would have to refer the claimant to the Occupational Health Service;

d. On 22 November 2021 Health Management emailed Ms Havemann to tell her that Lexxic recommended two assessments for the claimant, as she was diagnosed with dyslexia in 2002;

e. On 26 April 2022 a summary of the Lexxic report was provided to the respondent (this had been delayed since January 2022 due to the need for Lexxic to obtain authorisation from the claimant); and

f. On 28 April 2022 the Access to Work Holistic Workplace Assessment was provided to the respondent.

27. The Lexxic report had, as a high priority recommendation, the provision of "Read and Write Text-to-Speech Software". It also recommended the provision of "Dragon Naturally Speaking Software" and "Mind Mapping Software".

28. The 28 April 2022 Occupational Health report recommended that, amongst others, the respondent make the following adjustments:

a. The claimant to have regular breaks away from her workstation;

b. Weekly review meetings with the claimant; and

c. The claimant be provided with more time to undertake tasks.

29. On 20 May 2022 the claimant and Ms Havemann discussed a change in the claimant's working pattern from a four-day week to a five-day week. (The claimant was working a four-day week because she had previously requested this arrangement.) The claimant decided not to move to a five-day week and subsequently communicated this decision to the respondent.

30. On 15 July 2022 Ms Havemann provided costs authorisation to the respondent's IT department; this enabled the respondent to order the software recommended in the Lexxic report.

31. Although the respondent and claimant took the above steps in 2021 and 2022, the Dragon software – which the claimant had originally requested the respondent to provide in late 2020 - was not in fact provided by the respondent to the claimant before the claimant left the respondent's employment. In addition, the adjustments that were recommended in the Occupational Health Service assessments of November 2021 and February 2022 and the Access To Work assessment of April 2022 were not implemented before the claimant left the respondent's employment.

32. In particular, the Tribunal has found that:

a. The respondent did not – during the time that the claimant worked for the respondent – implement any of the auxiliary aids that the claimant or the expert reports identified;

b. The respondent did allow the claimant to take extra breaks. The respondent's evidence, provided by Ms Havemann, is that the claimant was able to work from home and work from abroad during her employment with the respondent. Ms Havemann put this arrangement in place to allow the claimant to flex her working hours. The Tribunal recognises that the work of the respondent's Regeneration department was busy, that the period during which the claimant worked for this department could be hectic and that the claimant often had to work long hours. However, there was no evidence before the Tribunal from which it could conclude that the respondent did not allow the claimant to take extra breaks as required;

c. The respondent did not hold weekly review meetings. Ms Havemann's own evidence is that she did not do so. We accept that there were regular structured and documented check-ins; we also accept that Ms Havemann had contact with the claimant outside of these check-ins. However, none of this contact was in the form of structured review meetings and they were not held on a consistent weekly basis. The recommended, structured weekly review meetings would have provided the claimant and the respondent with a delineated opportunity to address work, deadlines and any other required adjustments; and

d. The respondent did not permit the claimant additional time to undertake tasks. The evidence of Ms Havemann is that the claimant was removed from projects she worked on in order to ensure projects delivered to time. The evidence was also that there were pressing internal and external deadlines and many moving pieces. In contrast to the instances identified in evidence of the claimant being removed from projects, the respondent failed to point to any specific deadlines where time was extended in response to the claimant's disability.

Learning and development

33. When the claimant commenced employment with the respondent she was undertaking her RIBA Architectural Chartership Part III qualification. In February 2021 the claimant raised with her manager the option of the respondent providing funding to support this study. The Tribunal finds that Ms Havemann expressed interest in the course and responded positively by expressing that it may be of interest to herself, as well as the claimant.

34. The Tribunal finds that the claimant added details of this training to her Personal Learning Account. However, the Tribunal also accepts Ms Havemann's evidence that there was a process for applying for training support and that this was different from the Personal Learning Account process. The Tribunal also finds that the claimant would have been aware of this process because she was a line manager for the respondent. Therefore, the Tribunal finds that the claimant did not apply for funding for her Part III qualification via the mandated online system.

35. The respondent offered internal training, namely the Estate Regeneration Development Programme, which was also referred to as the Future London Leadership. The claimant accepted in evidence that she undertook this internal training.

End of contract

36. The claimant's contract ended in September 2022 and was not extended.

37. In June 2022 the respondent produced a report entitled "Justification for ending of Fixed Term Contract". Mr Trowell told the Tribunal in his oral evidence that this was the record of a meeting held between him, Ms Bagenal and Ms Havemann in June 2022; at this meeting they decided not to renew the claimant's contract. Ms Havemann said in her witness statement that, in late 2021/early 2022, there was less work to do across the Regeneration department. She told the Tribunal that the resourcing requirements for the department were discussed between herself, Mr Trowell and Ms Bagenal. She said that the June 2022 report was written by herself and Ms Bagenal, reflecting the conclusions they had reached and with Mr Trowell as the intended audience. She could not remember at what point in June they had produced this document. The Tribunal does not accept the evidence of Mr Trowell or Ms Havemann that this document was the record of a decision that had been made. Instead, it finds that this document was in fact a proposal for ending the claimant's employment with the respondent. The Tribunal has reached this decision because of the inconsistencies in evidence given by the respondents' witnesses on this point. The Tribunal's conclusion on this point is also consistent with the language that was used in the document (for example, the use of the term "proposal").

38. We find that the decision to end the contract was taken by Ms Havemann. This is consistent with her having the primary role in drafting this document (being the claimant's line manager) and attending the meetings at which there was discussion about ending the claimant's contract.

39. At the return to work meeting on 19 July 2022 Ms Havemann informed the claimant that her contract would not be extended beyond September 2022. This was confirmed by email from Ms Havemann to the claimant on the same date. A follow-up conversation took place on 25 July 2022. Ms Havemann sent an email to the claimant on the same day, confirming that the claimant's contract would terminate on 30 September 2022.

Grievance and Appeal

40. The claimant submitted a grievance in writing on 8 August 2022; this included complaints about disability discrimination and non-payment of her RIBA Part III fees.

41. On 13 August 2022 the claimant appealed against the decision not to renew her contract. Ultimately, this appeal – and the grievance that the claimant had also raised – were investigated by Ms Wynter. When the claimant first raised her grievance and appeal the respondent had decided that they would be investigated together by Chris Trowell. The claimant objected to this, due to the claimant's working relationship with Mr Trowell. As

a result the respondent replaced Mr Trowell as investigator with Ms Wynter.

42. On 7 October 2022 Ms Wynter held separate investigative meetings with Ms Dathan, Mr Trowell and Ms Havemann. In the meeting with Ms Havemann, Ms Havemann told Ms Wynter that the claimant's sickness absence was not a factor in reviewing the claimant's contract extension.

43. Ms Wynter arranged a meeting with the claimant for 27 October 2022 to discuss with her her grievance and appeal. This meeting was adjourned at the claimant's request. Instead, the claimant provided written answers to questions that Ms Wynter had sent to the claimant.

44. The postponed investigative meeting between Ms Wynter and the claimant was held on 18 November 2022 and continued on 23 November 2022.

45. Ms Wynter held an investigative meeting with a colleague of the claimant, Jake Armfield on 28 November 2022. Mr Armfield worked for the respondent as a design officer.

46. On 9 January 2022 Ms Wynter sent the claimant the outcome of the grievance and appeal process. The complaint and appeal were rejected in full.

Relevant policies

47. During the relevant period the respondent had in force a number of policies that were relevant to these claims. These included the Managing Fixed-Term Employees Policy (also referred to as a guide) and Management of Sickness Absence Policy.

Submissions

48. The claimant provided oral and written submissions. In summary, these were:

    a. The respondent failed to make reasonable adjustments for the claimant. The respondent was put on adequate notice of the claimant's dyslexia and the substantial disadvantages caused by her dyslexia by May 2021 at the latest. It is no defence for the respondent to rely on its own internal processes to justify the delays in implementing reasonable adjustments;

    b. The claimant's dismissal was unfair. The respondent's stated reason for the claimant's dismissal was redundancy. However, the respondent failed to construct a redundancy pool; establish criteria for selection; consider adequately alternatives to dismissal; and cure any breaches in its redundance process by way of a meaningful appeal process.

    c. The respondent's decision to dismiss the claimant bears all the hallmarks of predetermination and the respondent's witnesses effectively accepted this in cross-examination;
    d. The claimant has adduced facts from which it could be concluded, in the absence of any other explanation, that the reason for her dismissal was discrimination;

e. The respondent is unable to meet its burden of establishing that the reason for dismissal was not discrimination;

f. The respondent is unable to meet its justificatory burden as health-related reasons did not feature in its documentary evidence, and given the paucity of evidence on proportionality in this regard; and

g. Given the issues identified in the case, it can safely be inferred that the claimant was treated differently on the grounds of her temporary status.

49. The respondent also provided oral and written submissions. In summary, these were:

a. Adjustments within Ms Havemann's immediate control were put in place as soon as it became apparent that they would be helpful. The provision of auxiliary aids, software and training took longer because it required proper investigation;

b. It was reasonable for the respondent to seek expert advice in respect of auxiliary aids, software and training. The process of investigation took longer than it should and there were multiple reasons for this. However, the delay was not unreasonable in the circumstances;

c. The refusal to move from a four-day week to a five-day week was not a matter arising as a result of the claimant's disability;

d. None of the matters arising had any bearing on the respondent's decision not to renew the claimant's contract;

e. None of the comparators that the claimant raised with respect to direct discrimination are appropriate comparators. In any event, the difference in the nature of work done is the only reason for the respondent's decision to extend the comparators' secondment;

f. There is no basis on which the Tribunal could fairly conclude that a person such as the claimant would have had their contract extended;

g. The claimant was fairly dismissed for redundancy: this is a clear case of a diminution of work resulting in a need for fewer employees and the respondent followed a proper procedure;

h. The allegations relating to fixed-term employment are denied and, to the extent that the Tribunal finds them to be made out, there is nothing to link any of them to the claimant's fixed term contract; and

i. The claims relating to the claimant's Part III and internal training may have been brought out of time by the claimant.

Relevant Law

Disability

50. Section 6 of the Equality Act states:

> "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."

51. It is accepted that that the claimant was a disabled person as she is dyslexic. It is also accepted that the claimant was a disabled person because of fibroids.

Reasonable adjustments

52. Section 20 of the Equality Act states (where relevant):

> "(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.
>
> …
>
> (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…"

53. Section 21 of the Equality Act states (where relevant):

> "(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…"

54. Section 39(5) of the Equality Act provides that a duty to make reasonable adjustments applies to an employer.
55. Section 212 of the Equality Act defines "substantial" as meaning "more than minor or trivial".

56. In a case, such as this, where it is accepted that the claimant is a disabled person, the following are the key questions that the Tribunal must consider. These have been clearly identified in the issues for the Tribunal to answer (see paragraph 4).

    a. What is the provision, criterion or practice ("PCP"), physical feature of premises, or missing auxiliary aid or service relied upon?

    b. How does that PCP/physical feature/missing auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

    c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

    d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage or to have provided the auxiliary aid or service?

57. The Tribunal should not unduly limit the interpretation of a PCP – see the case of *Lamb v The Business Academy Bexley* EAT 0226/15. In addition, the Tribunal will not normally need to distinguish between provision, criterion and practice – see the case of *Harrod v Chief Constable of West Midlands Police* [2017] ICR 869. However, in *Ishola v Transport for London* [2020] ICR 1204 the Court of Appeal said that all three words ("provision", "criterion" and "practice"):

    "..carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."

58. The Equality Act does not identify the factors that it is reasonable to take into account. However, the Equality and Human Rights Commission's ("EHRC") Statutory Code of Practice on Employment cites "some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take". The Tribunal considered this Code of Practice to be relevant and has taken it into account in this case, in accordance with section 15(4) of the Equality Act 2006.

59. In a case such as this, where the respondent accepts knowledge of the claimant's disability, the claimant must prove facts from which it could reasonably be inferred, absent an explanation, that the duty has been breached (*Project Management Institute v Latif*, [2007] IRLR 579, EAT). This means the claimant must prove facts relating to the application of a PCP, the substantial disadvantage, and the adjustment which might have avoided that disadvantage. The burden will then shift to the respondent: it might discharge that burden in a variety of ways, such as by proving there was no knowledge

of the substantial disadvantage or by showing that the proposed adjustment was not in fact reasonable.

Direct discrimination on the grounds of disability

60. Section 13 of the Equality Act states:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treats others."

61. Disability is a protected characteristic (section 6 of the Equality Act).

62. Section 39 of the Act states:

> "…
>
> (2) An employer (A) must not discriminate against an employee of A's (B)-
>
> …
>
> (c) by dismissing B…"

63. What is less favourable treatment is determined objectively and is a matter of fact for the tribunal.

64. In bringing a claim a claimant may seek to show that they were treated less favourably than their colleague was actually treated. In this type of claim, the colleague is often referred to as being an 'actual comparator'. Section 23 of the Equality Act states that there must be no material difference between the claimant's circumstances and the actual comparator's circumstances. This means that "the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (per *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337, HL).

65. It is for the claimant to prove that they suffered the treatment complained of. In cases where the reason for the less favourable treatment is not immediately apparent, the Tribunal will have to consider the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind (see *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors* 2010 IRLR 136, SC). In determining this question, this Tribunal has reminded itself of the following:

    a. Motivation is not the same as motive and a well-meaning employer may still directly discriminate against a person (see, for example, *Amnesty International v Ahmed* 2009 ICR 1450, EAT);

    b. Discrimination may not be self-conscious (see *Nagarajan v London Regional Transport* [1999] IRLR 572);

    c. The claimant's disability need not be the only or main reason for the less favourable treatment as long as disability is a significant influence on the

decision (see *Gould v St John's Downshire Hill* 2021 ICR 1, EAT); see also paragraph 3.11 of the EHRC Employment Code

66. Section 136(2) of the Equality Act states:

> "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."

67. These provisions apply to all forms of prohibited conduct under the Act, including direct disability discrimination. They deal with the burden of proof; guidance on their application was provided by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142. There are two stages to the burden of proof:

    a. Stage 1 deals with the primary facts of the case. At this stage the Tribunal has to find that there are primary facts from which it could decide - in the absence of any other explanation - that discrimination took place. This means (per *Madarassy v Nomura International Plc [*2007] EWCA Civ 33) that the Stage 1 test will be met if 'a reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination. The same case also makes clear that it is not sufficient for the employee merely to prove a difference in protected characteristic and a difference in treatment. Also, as per the case of *Glasgow City Council v Zafar* (1998) IRLR 36, HL, unfair or unreasonable treatment on its own is not sufficient to satisfy Stage 1;

    b. If the claimant satisfies the burden of proof at Stage 1, the burden shifts to the respondent in Stage 2 to prove - on the balance of probabilities - that the treatment was not for the proscribed reason. At this stage (per *Igen*):

        i. the respondent must prove that the less favourable treatment was "in no sense whatsoever" because of the protected characteristic; and

        ii. the ET will expect "cogent evidence" for the employer's burden to be discharged.

<u>Unfair dismissal</u>

68. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. A person who complains that they have been unfairly dismissed may bring a complaint to the Tribunal under section 111 of the Act.

69. The employee must show that he or she was dismissed by the respondent under section 95 of the Act. In this case the respondent admits that it dismissed the claimant on 30 September 2022, at the expiry of her fixed-term contract. The respondent – correctly - does not dispute that the expiry of a fixed-term contract constitutes a dismissal.

70. Section 98 of the Act deals with the fairness of dismissals. There are two stages to deciding whether a dismissal was fair. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent

shows that it had a potentially fair reason for the dismissal, the Tribunal must consider whether the respondent acted fairly or unfairly in dismissing for that reason. There is no burden of proof on either party at the second stage.

71. Section 98 of the Employment Rights Act 1996 states:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> …
>
> (c) is that the employee was redundant,
>
> …
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality…"

72. The Tribunal notes at this stage that section 139 of the Equality Act defines redundancy as including where the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

73. Section 98(4) deals with fairness generally. It states:

> "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

Less favourable treatment under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations

74. Regulation 3 of the Fixed-term Regulations provides:

> (1) A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee-
>
> …
>
> (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.
>
> (2) Subject to paragraphs (3) and (4), the right conferred by paragraph (1) includes in particular the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to—
>
> …
>
> (b) the opportunity to receive training…
>
> (3) The right conferred by paragraph (1) applies only if—
>
> (a)the treatment is on the ground that the employee is a fixed-term employee, and
>
> (b)the treatment is not justified on objective grounds.

75. The non-renewal of a fixed-term contract does not on its own amount to less favourable treatment: see *Webley v Department for Work and Pensions* 2005 ICR 577, CA.

76. Regulation 2 of the Fixed-term Regulations states:

> (1) For the purposes of these Regulations, an employee is a comparable permanent employee in relation to a fixed-term employee if, at the time when the treatment that is alleged to be less favourable to the fixed-term employee takes place,
>
> (a) both employees are—
>
> (i) employed by the same employer, and
>
> (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and
>
> (b) the permanent employee works or is based at the same establishment as the fixed-term employee or, where there is no comparable permanent employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

77. Regulation 7 of the Fixed-term Regulations states:

> "(1) An employee may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 3, or (subject to regulation 6(5)), regulation 6(2).
>
> (2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—
>
> (a) in the case of an alleged infringement of a right conferred by regulation 3(1) or 6(2), with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them;
>
> …
>
> (6) Where an employee presents a complaint under this regulation in relation to a right conferred on him by regulation 3 or 6(2) it is for the employer to identify the ground for the less favourable treatment or detriment."

Conclusions

Reasonable Adjustments

78. It is accepted that the claimant was disabled because of dyslexia and fibroids.

79. The Tribunal finds that the respondent required the claimant to use its IT equipment and software from throughout the period of her employment with the respondent. The Tribunal also concludes that the respondent required its employees (including the claimant) to carry out work assigned to them. The application of these PCPs to the claimant was not disputed by the respondent during the hearing.

80. The Tribunal concludes that the respondent knew that the application of these PCPs to the claimant caused her substantial disadvantage; in particular:

    a. Caused by her dyslexia from November 2020, when the claimant returned to Ms Theodore to identify the need for support with her dyslexia;

    b. Caused by her fibroids from April 2022: by this point the respondent was in possession of the Occupational Health Service report that addressed this condition and identified that the claimant would require an operation to treat it.

81. In respect of the adjustments identified by the claimant in her claim, the Tribunal has reached the following conclusions:

    a. With respect to Dragon software, the Tribunal considered that it would have been reasonable for the respondent to rely upon the claimant's assessment of the utility of the software. This is because the claimant had previous experience of using this type of software and the support it provided to her in completing her work. The Tribunal therefore concludes that the respondent should have provided it

upon identification by the claimant and, in any event, by no later than February 2021;

b. The Tribunal decided that it was appropriate for the respondent to obtain an expert report – and refreshed information – on the adjustments required (other than the Dragon software). However, the Tribunal concludes that the time the respondent took to obtain this report was unreasonable. The respondent has referred to the claimant's absences from employment and has relied upon these as the reason for the time it took to obtain the report. However, the claimant was not absent for extended periods between November 2020 – when she first requested support for her dyslexia - and May 2021. As Ms Havemann accepted in her evidence: "It all took longer than it ought to have." The Tribunal has decided that these adjustments should have been in place by April 2021 at the latest;

c. The Tribunal concludes that weekly review meetings should have been implemented immediately upon their identification in the Occupational Health Service report in April 2022. In her oral evidence to the Tribunal Ms Havemann identified this requirement and said that the meetings did not take place due to the pressure of work. The Tribunal has acknowledged that the department in which Ms Havemann and the claimant worked was busy; however, the Tribunal also recognises that Ms Havemann was the claimant's line manager and that the provision of reasonable adjustments was an integral part of the line manager role. Therefore, weekly review meetings should have been taking place by April 2022;

d. The Tribunal concludes that it would not be a reasonable adjustment to give the claimant additional time to complete tasks. The Tribunal has already found that the work of the department in which the claimant worked was busy with tight internal and external deadlines. The Tribunal also found that there was uncertainty over funding for the department's work. Therefore, the Tribunal considered that the provision of additional time for work would be significantly disruptive for the respondent and therefore would not be a reasonable step to take.

Unfair dismissal

82. The respondent says that the claimant's dismissal was for reason of redundancy. The claimant says it was because she was disabled.

83. The Tribunal has decided that the reason for the claimant's dismissal was because the respondent concluded that the claimant was no longer capable of performing the role for which she was recruited, namely Project Manager. The Tribunal has reached this conclusion from the evidence of Ms Havemann, the claimant's line manager who – we have already found – was the decision maker in respect of the end of the claimant's employment. Ms Havemann told the Tribunal that termination of the claimant's employment was "the right way to move forward" because it would be "difficult for [the claimant] to go onto other projects with ill health and time off she would need to take".

84. The Tribunal considered carefully whether the respondent may have dismissed the claimant for redundancy. It concluded that this could not be the case, as the behaviour of the respondent was not consistent with this being the case. Specifically, the respondent had not, at the time of the hearing, removed the claimant's former role from

its complement of posts; and did not follow its own redundancy procedure for fixed-term staff. As the Tribunal did not decide that the claimant was dismissed for reason of redundancy, the Tribunal did not consider further the purported redundancy process.

85. As capability is a potentially fair reason for dismissal the Tribunal considered whether the dismissal was procedurally fair. It concluded that it was not procedurally fair because:

    a. The respondent did not prepare a management report that addressed the claimant's capability;

    b. The respondent's real reason for dismissal (i.e. capability) was not shared with the claimant;

    c. As the real reason for dismissal was not shared with the claimant, the respondent failed to provide the claimant with a reasonable opportunity to respond to the respondent's decision to dismiss her; and

    d. The respondent's decision was taken prior to:

        i. The respondent's implementation of most of the reasonable adjustments, which were recommended by external parties and accepted by respondent, and which would be likely to have had a positive impact on the claimant's capability; and

        ii. The sickness management meeting, which would have provided the respondent with an opportunity to explore with the claimant her capability to undertake the Project Manager role on an ongoing basis.

86. The Tribunal recognises that the claimant was afforded the opportunity to appeal against her decision and that Ms Wynter undertook an investigation into the matter. However, this appeal was unable to – and did not - remedy the procedural deficiencies that had already occurred. This is because neither Ms Wynter nor the claimant was aware of the real reason for the claimant's dismissal. As a result, the appeal procedure failed to investigate and address the deficiencies in the initial procedure.

87. As the procedure for dismissing the claimant was not fair, the Tribunal concludes that the claimant was unfairly dismissed.

<u>Direct Discrimination</u>

88. It was not an issue in dispute between the parties that the respondent dismissed the claimant when it failed to renew her fixed-term contract.

89. The Tribunal concludes that there are primary facts from which it could decide - in the absence of any other explanation - that disability discrimination took place.

90. We were directed to a significant number of comparators in this case. The comparators could be categorised into two broad classes. The first class of comparator was senior management; the second type was project managers or project officers who were on secondment – "acting up" from other departments or other roles.

91. The Tribunal concluded that the senior managers were not appropriate comparators. The Tribunal had heard evidence from the department's senior managers about the work they carried out, which included decisions as to work allocation and resourcing. These were not part of the Project Manager role. Therefore, the Tribunal concluded that there were material differences between the claimant and these comparators, in that they were not conducting the same type of role.

92. By contrast, the Tribunal concluded that project managers (but not the project officers) on secondment were appropriate comparators. This is because both the claimant and the other project managers were performing the project manager role and because the Tribunal did not find that there were any material differences between the claimant and the comparators. The respondent argued that there was a material difference, in that the claimant and the other project managers were carrying out materially different roles due to the nature of their projects. Specifically, the respondent submitted that the other project managers were working on projects which were at critical phases and that they had specialist knowledge of their projects. The Tribunal did not accept that this was a material difference: the document to which the Tribunal was referred and in which the comparators were identified did not identify either of these characteristics and the Tribunal heard no other evidence to support this submission. In addition, the Tribunal considered that the same characterisation could properly have been made of the claimant's skills: it was not disputed by the respondent that the claimant had detailed knowledge of her own projects.

93. The respondent also submitted that there was a material difference in that the respondent would have required the other project managers to return to their substantive role if they were no longer on secondment or acting up, which would in turn have required the dismissal of the permanent member of staff who was backfilling the secondee's role. The Tribunal did not accept this submission: first, both the claimant and the other project managers were acting temporarily in the role of project manager; second, both the dismissal of the claimant and the cessation of the other project manager's secondment would ultimately lead to the dismissal of a person working for the respondent.

94. The Tribunal decided that the claimant and the project manager comparators were acting in the same type of role, doing the same type of work and in the same department. Three project managers – other than the claimant - had their secondments or acting-up contracts extended. The Tribunal concluded that these were primary facts from which it could decide - in the absence of any other explanation - that discrimination took place.

95. The burden then shifted to the respondent to prove that the less favourable treatment was in no sense whatsoever because of the protected characteristic. This is a burden that the Tribunal considered that the respondent could not meet because of the evidence of Ms Havemann that was referred to above. The Tribunal decided that it was abundantly clear from that evidence that the claimant's disability was operative in Ms Havemenann's mind at the time the decision was made not to extend her contract.

Discrimination arising from disability

96. It is not in dispute that the claimant was dismissed and that this caused the claimant detriment.

97. The claimant states that her dismissal was because of four matters, each of which arises from her disability. These are:

    a. her need for adaptive software and reasonable adjustments for her dyslexia;

    b. her period of absence from work from February to April 2022;

    c. her period of post surgery absence planned from mid-August 2022;

    d. her refusal to move from a 4-day week to a 5-day week

98. The Tribunal has concluded that complaint (d) is a matter arising from the claimant's disability: while the respondent is correct in submitting that the claimant's four-day working arrangement was sought early in her employment, the claimant's refusal to move to a five-day week occurred later in the claimant's employment and she refused this change to her working arrangements specifically because of the negative impact that the claimant considered it would have upon her health. The refusal is therefore a matter arising from her disability.

99. The Tribunal concluded that complaints (a) and (d) did not have any bearing on the decision to dismiss the claimant. While recognising that the necessary adjustments to address the claimant's disabilities had not been taken within a reasonable time by the respondent, the Tribunal found that the respondent did take steps to implement the adaptive software and other reasonable adjustments. The Tribunal considered that taking these steps – including in particular the submission of the costs authorisation by Ms Havemann in July 2022 – would be inconsistent with a decision to dismiss the claimant because of her need for reasonable adjustments.

100. The Tribunal also found that the steps the respondent had taken during the relevant period included flexibility around the claimant's working arrangements. Therefore, the Tribunal concluded that this behaviour would be inconsistent with a decision by Ms Havemann to dismiss the claimant because of her preference to remain on a four-day working week (a working pattern that Ms Havemann had previously authorised).

101. Ms Havemann told the Tribunal that she had decided to dismiss the claimant because it would be "difficult for [the claimant] to go onto other projects with ill health and time off she would need to take". Therefore, the Tribunal concluded that her dismissal was because of her period of absence from work from February to April 2022 and her period of post-surgery absence planned from mid-August 2022 (i.e. matters (b) and (c) above).

102. No evidence was put before the Tribunal to the effect that dismissal of the claimant for these matters was a proportionate means of achieving a legitimate aim. Therefore, the Tribunal concluded that dismissal for these matters was not justified.

<u>Fixed-term discrimination</u>

103. The claimant raised the question of the respondent paying fees for her Part 3 Qualification in February 2021 but did not bring this claim until December 2022. The

Tribunal therefore decided that this claim was brought outside of the time limit in the Fixed-term Regulations.

104. The Tribunal considered whether it was just and equitable to consider this complaint out of time. However, it heard no reason why the claimant could not have brought the complaint in 2021, and therefore concluded that it would not be just and equitable to hear the claim now, over eighteen months later.

105. The Tribunal found that the claimant had accessed internal training, namely the Future London Leadership/Estate Regeneration Development Programme. The Tribunal therefore decided that the respondent had not informed the claimant that she could not access internal training.

106. The Tribunal found that the respondent failed to provide adaptive software and equipment and told the claimant that she would not be paid her full pay for her post-surgery sickness absence. However, the Tribunal concluded that it had heard no evidence to suggest that the respondent had done (or failed to do) these things because of the claimant's status as a fixed-term employee. In particular, in the case of the complaint relating to sickness pay, the Tribunal considered that this was a simple – albeit unfortunate – error in calculation of sickness periods.

107. The Tribunal duly concluded that the claimant was not treated unfavourably because she was a fixed-term employee.

Employment Judge J Mack
Dated: 26 May 2024