EMPLOYMENT TRIBUNALS

Claimant: A W Anderson

Respondent: Curzon & Co Ltd

Heard at: Bristol (video hearing)

On: 01 – 05 July 2024

Before: Employment Judge Paul Housego

Representation

Claimant: In person

Respondent: Andrew Rhodes, of Counsel

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.
2. The basic and compensatory awards are reduced by 50%.
3. The breach of contract claim for notice pay succeeds.
4. The claims of disability discrimination are dismissed.
5. The claim for holiday pay succeeds.
6. The Respondent made unlawful deductions from the wages of the Claimant.
7. A remedy hearing will be listed as soon as possible.

REASONS

Summary

1. Mr Anderson was a senior consultant with the Respondent, a consulting firm. A disciplinary process was started in respect of an alleged failure to complete

and submit any appraisal documentation in time. In response he supplied a document which he said rebutted this. By reason of this document the Respondent added a charge of falsifying documents. It summarily dismissed Mr Anderson for not complying with the requirements relating to the appraisal in May 2022 which it described as *"tantamount to gross insubordination"* and that he had *"knowingly falsified"* the document he had sent in. His appeal was dismissed.

2. Mr Anderson is dyslexic and told the Respondent so when applying for his job with them. He says they failed over an extended period to make reasonable adjustments and then the process leading to his dismissal also failed to make reasonable adjustments. He says that the Respondent failed to follow the Acas procedure and that his dismissal was procedurally and substantively unfair and was direct discrimination. He says that the circumstances gave rise to the other disability discrimination claims set out here.

3. The Respondent accepts that Mr Anderson has dyslexia, which he disclosed at interview and so that it has always had corporate knowledge of it, but that some of the individuals involved did not and could not have been expected to know of it.

4. Deductions were made from his last pay, and he says this was an unlawful deduction, and that he was not paid outstanding holiday pay. The Respondent says that the deductions were because he failed to work the last days of his employment and had taken more holiday than he had accrued so was not entitled to holiday pay.

5. I decided that the deductions were unlawful. If he was not working that might be a disciplinary matter but it did not "nullify" his right to pay, and nor was he asked what he was doing. The decision was unilateral. His sick pay should have been paid. I accepted Ms Fleming's evidence that no holiday pay was due as Mr Anderson had taken more than the holiday accrued to the date of dismissal, 31 August 2022.

6. I decided that the dismissal was unfair and that a reduction based on what would have happened if a fair procedure had been followed was not appropriate. I decided that Mr Anderson caused or contributed to his dismissal to the extent of 50%.

7. I decided that the claims for disability discrimination did not succeed.

Claims made and relevant law

8. The claims are of unfair dismissal[1], of disability discrimination (direct[2], discrimination arising from disability[3] indirect discrimination[4], failure to make reasonable adjustments[5] and of victimisation[6]), of unlawful deduction from wages[7], for accrued holiday pay[8], and for notice pay (for this was a dismissal without notice). The claim of victimisation requires a protected act. Mr

[1] S 98 of the Employment Rights Act 1996
[2] S13 Equality Act 2010
[33] S15 Equality Act 2010
[4] S19 Equality Act 2010
[5] S20 & 21 Equality Act 2010
[6] S27 Equality Act 2010
[7] S13 Employment Rights Act 1996
[8] Regulation 14 of the Working Time Regulations

Anderson says that he raised a grievance about a lack of reasonable adjustments in respect of the disciplinary procedure, that this was a protected act and that his dismissal was victimisation for raising it.

9. In respect of a claim for unfair dismissal, the Respondent has to show that the dismissal was for a potentially fair reason[9]. The Respondent says this was conduct which is one of the categories that can be fair[10]. The Claimant disputes that was the real reason and says that his dismissal was unfair substantively and procedurally and was direct discrimination.

10. The Respondent has to show that the dismissal was fair[11]. It must prove the reason on the balance of probabilities. If it does so there is no burden or standard of proof for the decision as to whether the dismissal was fair[12]. The employer must follow a fair procedure throughout[13], and dismissal must fall within the range of responses of a reasonable employer[14]. It is not for the Tribunal to substitute its own view of what should have happened, for it is judging whether the actions of the employer were fair, and not deciding what it would have done. A gross misconduct dismissal requires the employer to show not only that dismissal was warranted but that the conduct was sufficiently bad to justify dismissal without notice. If the dismissal was procedurally unfair the Tribunal has to assess what would have happened if a fair procedure had been followed[15].

11. The Respondent says also that if the claim of unfair dismissal succeeds there should be no, or a substantial reduction in, compensation for contributory conduct[16].

12. For the discrimination claims, it is for Mr Anderson to show reason why there might be discrimination[17], and if he does so then it is for the Respondent to show there was not. The indirect discrimination claim under S13 requires a provision criterion or practice and a comparator. Mr Anderson says that was to impose standards on him for work output that were the same as those for everyone, and that was detrimental to him because of his dyslexia compared to those colleagues without dyslexia, as a result of which, he says, he was disciplined. He says that others who were late were not, and they are his comparators. This is also part of his claim that he was not afforded reasonable adjustments, which also extends to a claim that before this arose he was not given reasonable adjustments in terms of hardware and software, and nor were reasonable adjustments made in the way his disciplinary hearing was handled. He says he complained about the way his hearing was being conducted and that that complaint was a grievance which was a protected act which, he says, led to him being victimised in that hearing.

[9] S98(2) of the Employment Rights Act 1996
[10] Also S98(2) of the Employment Rights Act 1996
[11] S98(4) of the Employment Rights Act 1996
[12] Section 98(4) of the Employment Rights Act 1996
[13] Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA
[14] Iceland Frozen Foods Ltd v Jones [1982] UKEAT 62_82_2907
[15] Polkey v AE Dayton Services Ltd [1987] UKHL 8
[16] S122(2) and S 123(6) of the Employment Rights Act 1996
[17] Igen v Wong [2005] ICR 931, Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913, all summarised in Royal Mail Group Ltd v Efobi [2021] UKSC 33

Issues

13. In a previous Case Management Hearing on 17 August 2023 after extensive discussion I prepared a list of issues. It is set out below with my conclusions for each heading. Some of them required elucidation by the parties subsequent to that hearing. In the conclusions I set out those further and better particulars. Neither party sought to depart from that list of issues.

Evidence

14. The preparation of a document bundle had been problematic. There was discussion about documents. Eventually I had before me the following:

    14.1. a bundle of documents of 512 pages (incorporating the 111 pages provided for the previous Case Management Hearing;

    14.2. an addition bundle of documents of documents from Mr Anderson of 38 pages;

    14.3. the amended Particulars of Claim and amended Grounds of Resistance;

    14.4. the Claimant's witness statement;

    14.5. a witness statement from his former mentor at the Respondent, Edem Eno-Amooquaye (who did not attend to give evidence, and so I gave the statement little weight: but as it related to the period up to November 2021 on which there was no real dispute it was not directly germane to the issues in this case);

    14.6. witness statements from the Respondent's witnesses, Douglas Badham, who dismissed Mr Anderson, Mr Bailey who took the appeal and Catherine Fleming of the Respondent's human resources department;

    14.7. documents from both parties about Mr Anderson's dyslexia, its impact on him, and the Respondent's acceptance that he had dyslexia and had disclosed this before he was interviewed for his job with the Respondent (the principal feature being an allowance of 25% for tasks and the observation that Mr Anderson can find oral information easier to assimilate than written, and was prone to spelling errors);

    14.8. further and better particulars from Mr Anderson of the reasonable adjustments he said should have been made;

    14.9. further and better particulars from Mr Anderson as required by §33 of my CMO (25 pages);

    14.10. further and better particulars from the Respondent about why the spreadsheet was said to have been dishonest, as also required by my CMO (9 pages);

    14.11. the Respondent's email dated 30 January 2024 accepting that Mr Anderson was disabled (by reason of dyslexia) at all material times (in the

hearing Mr Rhodes accepted that the Respondent had corporate knowledge of it at all material times as Mr Anderson had told them prior to interview and been allowed 25% more time for assessments);

14.12. a CMO from a hearing on 12 June 2024 held by REJ Pirani following EJ Livesey's CMH on 13 December 2023 at which directions were given, the parties having failed to comply with directions about documents and witness statements given by me on 17 August 2023 and by EJ Livesey on 13 December 2023.

The hearing

15. The parties had agreed to this hearing being a video hearing conducted by a judge sitting alone. No members were available, and the alternative was to postpone the hearing.

16. On 28 June 2024 Mr Anderson had emailed the Tribunal to complain about the Respondent's approach to documents. He said they had refused to engage with him and had omitted the impact statement from the bundle of documents.

17. The CMOs of EJ Livesey and of REJ Pirani limited the size of the bundle of documents (and of the witness statements). I had some sympathy for the Respondent for this reason. Mr Anderson had produced a small extra bundle of documents (38 pages). The Respondent said some were irrelevant but did not object to any of them other than for this reason. I resolved by admitting the 38-page bundle of documents. There was no point arguing about relevance, for if irrelevant there was no prejudice to the Respondent. I also admitted the bundle of documents about Mr Anderson's dyslexia and the impact statement. While this was now conceded it contained useful information about the effect on him of his dyslexia and the expert report referred to reasonable adjustments as well as the effect on him of dyslexia. I saw no issue with it being some years old, as dyslexia is a constant.

18. Mr Anderson sought to introduce a transcript of his disciplinary hearing. The recording had been sent by Mr Anderson to the Respondent's solicitor on 14 March 2024. The Respondent said this had been made covertly but did not object in principle. It was accepted that Mr Badham had been told of Mr Anderson's dyslexia some days before the hearing. It was also accepted that Mr Anderson had asked Mr Badham if he could use the assistive technology in his laptop, and this had been agreed. He said that the recording was a function of that software as it enabled him to compare the notes he had typed with what had actually been said. Mr Anderson said that the notes of that hearing, prepared by Ms Fleming, were materially inaccurate, to the extent that they were misleading, possibly deliberately so.

19. On 12 June 2024 Mr Anderson raised this before REJ Pirani who directed Mr Anderson to produce a written transcript and disclose it to the Respondent. This Order did not give a date for compliance.

20. Late on 30 June 2024, the day before the hearing, Mr Anderson had sent to the Respondent's solicitor a 19-page document said to be a transcript of the recording. It did not identify any text which differed from the notes prepared by Ms Fleming. Mr Rhodes objected to it on the basis that it needed to be

checked against the recording, and then a compare and contrast approach taken with Ms Fleming's notes. That was the more complex as the notes were not a transcript.

21. Mr Anderson was to give evidence first. I directed that I would revisit this before the Respondent's witnesses gave evidence. As Mr Anderson said that the notes of the meeting were inaccurate, he must know where this was in Ms Fleming's notes. I directed that he should, before the start of day 2, Tuesday 02 July 2024, mark on the transcript the points he said were inaccurate in Ms Fleming's notes, with the time elapsed in the recording at which they occurred. Then Mr Rhodes and the Respondent and its solicitor would be able to see what Mr Anderson was alleging and either accept that the notes were incorrect, or deal with the issue as they thought best. Mr Rhodes submitted that this was all too late in the day. I agreed that it would not be allowed in the County Court, but that a judge in an Employment Tribunal discrimination case had an obligation to facilitate the expression of a claim, provided it was not unfair to the Respondent. It had long been known that Mr Anderson challenged these notes, and I did not think this unfair to the Respondent, or to Mr Rhodes.

22. At the start of day 2 Mr Anderson had not done this. He had provided 85 bullet points over 4½ pages which was not cross referenced either to the recording or to Ms Fleming's notes. I did not consider it fair to the Respondent to require them to try to work out the points of difference from this document. Because the Claimant said this was central to his attack on the credibility of the Respondent's witnesses, I afforded Mr Anderson the opportunity to set out 5 substantial points in the transcript he said were inaccurate. I adjourned between 11:00 am and noon for Mr Anderson to do so. He then provided the Respondent with a document with 7 headings with 51 points.

23. I decided that this was the point at which I was required to refuse Mr Anderson's application to admit the transcript and recording and did so.

24. I made enquiries of Mr Anderson as to any adjustments needed to the running of the hearing by reason of his dyslexia. His dyslexia report stated that he prefers documents to be in Arial 12 font, in which this decision is written. I said that we would take breaks every hour of 10 minutes or so, which we did throughout the hearing. I made it clear to Mr Anderson that if he needed a break at any time he must say, and I would accommodate him. This he did not need to do. Mr Anderson used his laptop which he told me has assistive technology packages in it such as Grammarly and ClearRead, and that he has the professional (subscription) versions of these software programs. Mr Anderson preferred to use a paper copy of the bundle of documents to which he was able to attach post it notes. The numbers on the paper copies were different to those on the pdf. At the end of day 1 Mr Anderson was able to insert the pdf numbers on the paper copies so that when referring to documents both numbers were available to him.

25. As the Respondent's witnesses pointed out, Mr Anderson's role for the last few years had been to assimilate and analyse large amounts of complex information and prepare transformation plans for the Respondent's clients. I am entirely satisfied that Mr Anderson's dyslexia did not have any material effect on his ability to deal with this hearing.

26. As the hearing progressed, I assisted Mr Anderson in the presentation of his claim as much as is possible for a judge to do without descending into the arena. I asked each of the Respondent's witnesses a large number of questions. I did so by asking open questions to elicit information necessary properly to evaluate the claims and defences. After I had concluded my question to each witness Mr Rhodes said that he was content that all my questions had been appropriate and asked any follow up questions he wished.

27. Mr Rhodes had an admirable grasp of the documents and assisted Mr Anderson (and me) with the number of documents Mr Anderson wished to refer to in his evidence or in cross examination of the Respondent's witnesses.

28. Andrew Morgan was in attendance as an observer for much of the hearing, and so would have been able to give instructions to the Respondent's solicitor (an observer throughout) and Counsel.

The Claimant's case

29. He had always made clear that he had dyslexia. The Respondent had given him 25% more time in the assessments undertaken as part of the recruitment exercise and he provided his expert report about it. He did not regard himself as disabled – he had no physical or mental health issue, but his dyslexia qualified as a disability under the Equality Act 2010. He did not want to be known as the guy with dyslexia, so he only told people who needed to know. Since he had provided the expert report to human resources, he thought that those who made decisions about him would know and make adjustments as necessary without him having to spell out the obvious. He had asked for a larger monitor and a printer for this reason but been refused. Others had asked for, and been allowed, such equipment.

30. The appraisal process involved him giving material to his mentor, which was discussed with his manager before being finalised and submitted to human resources. It then went to a review meeting where all the partners discussed bonuses and career progression. The half year paperwork, in November 2021 had been late, but that was because his then mentor, who had now left the Respondent, Edem Eno-Amooquaye, had Covid and was not able to send it in on time. He had an email to prove that (it did). For this reason, it was very unfair of them to say in the disciplinary hearing that he had an *"informal warning"* about the November submission. That was what Mr Badham was told, that information coming from Andrew Morgan, who, in effect, owned the Respondent and made all the decisions. Mr Morgan had wanted him out of the business, and this was just a way of helping that to occur. Mr Morgan had told him earlier that year that he should not return to work from his holiday, but leave.

31. The appraisal submission was due by mid-May 2022. He had no end of difficulty getting his manager, Chetan Trevedi, to engage with him about the documents, called EPRs (a performance review for each project) and a DPR (an overview of his development with the firm based on the EPRs). This had been going on for months, and an EPR from November 2021 was still not signed off by Mr Trevedi. The email he had sent saying that he, Mr Anderson, had overlooked it was just a final attempt, using a different approach, to get Mr Trevedi to sign it off. The project he was engaged with for Anglian Water was due to end 06 May 2022 with

his presentation to them. He had given his manager for that project, Nigel Brannan, the material to assess, but Mr Brannan decided not to deal with it until after the presentation. This was to have been 06 May 2022, but the client deferred it to 13 May 2022. Mr Brannan then gave feedback, on 16 May 2022, but then not as an EPR but as a Word document. While that contained feedback, it was not in the form that could be submitted to human resources. He had escalated the lack of input from Mr Trevedi to his mentor, Rachna Trehan. She had been no more successful than he had been and so she had escalated it to human resources, to whom the DPR with the EPRs on which it was based had to be submitted. This all got overtaken by events.

32. There were 7 people who had to submit DPRs, but only 1 did so in accordance with the timetable. No one else was disciplined, let alone dismissed, and as gross misconduct, for not getting it in on time. They had all been given dispensation to be late. Mr Brannan knew what was happening and should have taken similar action. It was Mr Brannan who had decided to delay feedback until after the deadline, and even then he supplied it in a form that was not usable by him.

33. The initial letter about disciplinary action alleged that he had submitted nothing. He had then sent in a document that was a draft DPR, in the form of a workbook with EPRs as part of it. It had to be a draft because one project manager would engage with the EPR for one project, and the other project manager had provided only a Word document, and that deliberately delayed past the deadline. By providing the draft he conclusively disproved the allegation put to him.

34. Then he heard nothing for 6 weeks. There were some without prejudice discussions which delayed matters a little, but not for long. Then, out of the blue he got a request to attend a disciplinary hearing with different charges, which were very vague and unspecific. This was not fair. Nor was it fair for it to be sent by email at 5:15 pm on a day when he was, to their knowledge leaving work to go on holiday for a few days. He had opened the email only on the Sunday evening before the meeting on the Tuesday. It had been sent that way, he thought, so as to surprise him. The short notice made it hard for him to prepare, with his dyslexia, and made it impossible for him to get a companion.

35. The letter setting out what was alleged had no particularity at all, and it was not possible to know what was being alleged in any detail, so that it was not possible for him to defend himself.

36. Although 6 weeks had gone by since he sent in the document, no attempt had been made to get feedback from his mentor, Rachna Trehan. She had left only recently and there was no reason why that could not have been done before she left. That was because the whole process was a sham.

37. The hearing at which he was dismissed was only an hour which was inadequate, the more so for someone with dyslexia. Mr Badham had been told about his dyslexia well in advance of the hearing. He was given the letter of dismissal at the hearing, and it looked like it was prepared in advance of the hearing, as the meeting started with Mr Badham setting out what was put in the letter as its conclusions. He had not adhered to the process set out in the Acas Code and Guidelines (and in cross examination he took Mr Badham through each and every point in the Acas documentation).

38. He had appealed. Mr Bailey plainly appreciated that the decision was flawed because he made further enquiries. But he also did not follow the Acas guidance. He started off with a review, then decided he needed to do more, but said he was having a hybrid review/rehearing appeal. The Acas guidance was binary. He had pointed out to Mr Bailey what the Acas guidance said and so had not attended the adjourned second hearing date. Mr Bailey was now conflicted, because not only was he not following guidance, but he was investigator and decision maker. He had not made any effort to get information from Edem Eno-Amooquaye as he, the Claimant, had requested but had got more evidence which he then relied on to support the allegations.

39. Mr Morgan was directing Ms Fleming and the process behind the scenes, hence the *"informal warning"* statement and the letters written by Ms Fleming which say *"we"* have decided. Doubtless he was pulling the strings for the dismissal as well. Ms Fleming had written to another ex-employee threatening costs and to drag his name though the mud if he did not abandon his claim[18]. It was unlikely a human resources professional would write such a letter unless instructed to do so by another, doubtless Mr Morgan. That exemplified Mr Morgan's approach, employed in his, Mr Anderson's, case.

40. That also applied to the *"informal warning"* in November 2021. There had been no such warning. That information had been given by Mr Morgan to Ms Fleming who had conveyed it to Mr Badham who had (perhaps understandably) accepted it without question.

41. He had not falsified anything. He had prepared a draft. It could only ever be a draft until his mentor, Rachna Trehan, and his manager for the project, Chetan Trevedi, had approved it. He could not possibly be thought to have been seeking advantage as bonus and salary discussions were in a partner meeting, and his mentor would have to make a suggestion and his manager would be able to comment upon it. In any event bonus payments were non contractual and entirely discretionary.

42. The errors in the form were attributable to his dyslexia and should not have been regarded as falsifying anything. In any case the document had to be signed off by his manager and by his mentor.

43. He could not submit 360 reviews as he was working on these projects by himself.

44. He was entitled to holiday pay – he was allowed by the contract to carry forward 5 days into the year in which he was dismissed, and human resources had authorised him to depart from the contractual arrangements by carrying over another 7 days carried forward: proved by an email from Louise Wilford of human resources dated 04 July 2022[19]. That made 12 days.

45. The Respondent had deducted money from his final salary payment. The reason they gave was that he had *"gone awol"* and as he was not working, he was not entitled to be paid. He had been working, apart from days when he was self-certified as unfit to do so through stress, and when he was on pre-booked

[18] 16 September 2022, 18/38
"If you continue to pursue what we regard as a vexatious claim we will:
Pursue you for costs up to thousands of pounds
Publicise the case as part of a public relations opportunity.
This will be our full and final offer to settle before we attend the tribunal."

[19] Page 30/38: C's extra documents

holiday. One of the days they did not pay was 31 August 2022 when he was in the office in London at the meeting at which he was dismissed. That had to be a working day. He had not taken more than the 10 days a year paid sick leave which was allowed.

46. He was summarily dismissed on 31 August 2022, and his pay for August had deductions. Plainly this had to be processed well before the end of August. Ms Fleming said that the pay was *"nullified"* but that she had nothing to do with payroll. Someone else must have instructed payroll to make the deduction, and whether it was Andrew Morgan or someone else, it was an indicator of prejudgment (not least as not paying for the holiday could only be because he was not going to be an employee accruing holiday entitlement to balance the holiday entitlement with the holiday accrual).

The Respondent's case

47. The process followed leading to Mr Anderson's dismissal could have been clearer on occasion, to the outside reader, but Mr Anderson knew exactly what the issues were. Both the things alleged were gross misconduct. He had shown a cavalier disregard to the appraisal system which was a fundamental part of the Respondent's annual process, and that process was very important. The evidence was that it was about a dozen people who put in DPRs with supporting EPRs. Although many were late – about half – it was still possible at the partner group meeting to discuss everyone's performance except that of Mr Anderson. That failure was over an extended period of time and despite reminders from his mentor Rachna Trehan.

48. He had not completed the EPR for the project which finished in November 2021. He blamed Chetan Trevedi, but the only evidence about EPRs involving him was the email of 11 May 2022 from him to Mr Trevedi[20] in which he stated *"My bad[21]. I totally forgot about this EPR from last year. I have had a quick check and it looks ok. Please let me know your thoughts."* This was inconsistent with his account that it was Mr Trevedi at fault, supported by the fact that the document sent was one from November 2021 prepared before the project ended and not updated when it finished. There was no other evidence that Mr Anderson had been chasing Mr Trevedi, or involved his mentor or human resources.

49. The witnesses were clear that there were no EPRs in a workbook behind the draft DPR. Mr Anderson cannot have thought the figures right for the Anglia project, as he had the Word document from Mr Bannan which gave other figures.

50. Dyslexia did not account for putting the wrong figures in the wrong boxes.

51. The document was plainly put forward to be used in the partner group review meeting at which salary and bonuses were decided upon. It was irrelevant that it did not in fact lead to a bonus payment or to a salary rise. It was a document that was not as it appeared on its face, and that was intentional, and the purpose was either or both to avoid criticism for not submitting paperwork or to gain financial advantage.

[20] 188

[21] Modern parlance for mea culpa

52. Mr Anderson had taken an inappropriate approach to the disciplinary process, telling Mr Badham and Mr Bailey how to run the process with a rigid adherence to Acas documents, which were a guide but not a rigid set of tramlines which made any procedure departing from them in any way unfair. He had failed to attend the adjourned appeal. He had not responded to Mr Bailey's invitation to supply questions to be put to Edem Eno-Amooquaye, so he could not complain that his former mentor had not been contacted by Mr Bailey.

53. Ms Trehan had been ill for some time and had left. She had been approached but not followed through on promises to engage with this process.

54. The contract was clear about the extent of holiday entitlement – 1.2 days a calendar month accrued and carry forward was 5 days a year.

55. Mr Anderson had not been working as he had submitted no timesheets. Work was either *"utilised time"* when consultants worked for clients on projects, or they were *"on the bench"* doing work such as preparing proposals for prospective clients. Whichever it was, timesheets were required, as without them it was not shown that he was working. A few emails back and forth was not work. He was entitled to pay only if he worked. It had to be conceded that 31 August 2022 was a working day as he was in the office.

56. It was accepted that Mr Anderson had not exceeded the limit for full pay when off sick, or that sickness could be self-certified.

Submissions

57. The Respondent provided written submissions, which can be read by a higher Court if required. They were supplied to Mr Anderson by Mr Rhodes well in advance so that he had adequate time to assimilate them. Mr Anderson addressed the Tribunal orally. My record of proceedings contains a full note of those submissions, and the description of his case, above, includes them. That statement also summarises Mr Anderson's pleaded case and his evidence, as does the description of the Respondent's case.

Facts found

58. The statements of the parties' cases set out in the summary at the start of this judgment and in the description of the parties' cases are largely not in dispute. The interpretation of them is very much in dispute.

59. The biggest difference is about the DPR document, which is central to the allegation which was added in August 2022.

    59.1. The Claimant says it was a workbook with the DPR populated from EPRs also contained within it, and that it was always a draft.

    59.2. The Respondent says this was not the case, and nor could it be as there were no EPRs on which it could be based. They say that scores were added improperly and could never have been right after Mr. Brannan's feedback.

60. On the balance of probabilities, I find that there was no supporting documentation behind the DPR, with numbers feeding through to the DPR from underlying

spreadsheets in a single workbook. The emails have been provided, but not any such spreadsheet. Mr Anderson knew exactly what he had supplied and had it existed he would have been able to show it, making an application for specific disclosure if necessary. It was something he had supplied to Mr Trevedi, as he said. No one appears to have found out from Mr Trevedi what he did with it after receiving it. It appears nothing, as he was told (by Mr Morgan) that it was now too late for Mr Anderson to submit anything for the annual review.

61. On the balance of probabilities, the other facts are:

61.1. Mr Anderson worked for the Respondent from 2019. The Respondent is a firm of management consultants. Work is carried out at the client's premises on a project-by-project basis. The amount of time spent on projects is called the utilisation rate and is expressed as a percentage of full-time work. Time not spent on projects is spent on putting together tenders and other work that is not income generative. Timesheets are prepared on a weekly basis. Mr Anderson was a senior level consultant.

61.2. The Respondent has an appraisal system. There are half year reviews in November and full year reviews in May, the documentation for which has to be submitted to human resources by mid-April.

61.3. Consultants have a manager for each consultancy project, and all the managers are part of a partnership group. Consultants each have a mentor (for all their projects) who is another member of the partnership group.

61.4. The consultant has to prepare an EPR (an evaluative document for each project). This is discussed with the manager. The mentor is involved in its preparation. This is to develop skills in the preparation of the EPR documents, and to act as advocate with the manager if the consultant and the manager do not agree on the scoring. Consultants do not attend the partner group appraisal review meeting. The mentor puts their case to the meeting.

61.5. There is a non-contractual bonus scheme. The Respondent decides on a bonus pot, and the appraisal review meeting apportions it between the consultants. That meeting also deals with salary reviews.

61.6. The decision on individual's bonus payments is an art not a science. Projects have a *"stretch"* and a *"performance"* score. My analogy of diving seemed to explain it: *"stretch"* is a measure of how difficult the project was for someone of that level of seniority, *"performance"* how well it was executed. The combination of the two is the measure of success. It is something akin to the degree of difficulty applied to how well a dive is executed. The consultant is told the amount of the bonus, but not how it is calculated. It is probably more accurate to say it is assessed, as there is no arithmetic or formula in arriving at the figure.

61.7. There was no issue with Mr Anderson's appraisals before the November 2021 half year appraisal.

61.8. The November 2021 EPR for the Jazz/Pharma project on which he was then engaged was not concluded in time for the half year review in November 2022. Mr. Trevedi was his manager for this project.

61.9. His mentor, Edem Eno-Amooquaye, left the Respondent. His new mentor, Rachna Trehan, had a discussion with him about this, stressing the importance of the process.

61.10. It was not in any sense *a "warning"*. This is because it was not his fault – his previous mentor had emailed to say that it was late because he, the mentor, had been ill. Mr Morgan knew this.

61.11. Nevertheless, when this project ended the EPR was not updated, and was not submitted to his manager, Mr Trevedi for approval until the email in May 2023.

61.12. As it was late, Mr Trevedi did not look at it at all. This is remarkable as the EPR is not only used to measure the performance of the consultant but is a tool for assessing client satisfaction.

61.13. Mr Trevedi was not active in his management of Mr Anderson, and nor was Mr Brannan, but the onus for the appraisal process is with the appraisee, in this case Mr Anderson. Given that the role of the appraisees is high end consultancy this is not unreasonable.

61.14. The Anglian Water consultancy ran towards, then exceeded, the deadline for the submission of an EPR.

61.15. Mr Brannan received the presentation Mr Anderson was to give to Anglian Water after the deadline for the DPR to be sent to human resources.

61.16. However, most of those who had to submit DPRs were also late. The evidence varied – it might be 1 of 5 in time, or 5 of 12 in time. Whichever, the deadline was routinely not met. No-one else faced disciplinary proceedings. The others had all obtained dispensations. Mr Anderson could have asked Mr Brannan for a dispensation but did not do so. Had he asked he would have been given one (this was conceded). Mr Brannan was responsible for agreeing an EPR on the Anglia project. No reason is apparent to me as to why he did not raise the point with Mr Anderson and were it as important as is claimed he, Mr Brannan, would have done so.

61.17. Mr Badham said that Mr Anderson should have submitted an interim EPR so that it was within the deadline. Mr Brannan did not ask for this, as might be expected as he knew the timeframes for the project and was part of the partner group dealing with everyone's appraisals.

61.18. There was no reason why the EPR from November 2022 for Jazz/Pharma could not have been submitted by Mr. Anderson (or be ready for submission) by the end of December 2022, but it was not done until 13 May 2022.

61.19. Mr Anderson's email saying he had forgotten about the November 2022 EPR for Jazz/Pharma set out the fact of the matter. He had not done it. The explanation that this was a last attempt to get this addressed by Mr Trevedi is not credible – why would it start *"My bad [fault]"* if so, and say that he had forgotten it if so? The document submitted was the one prepared for November, not amended after that project ended. There is nothing to support Mr Anderson's oral evidence that he had involved his mentor and human resources in seeking to get EPRs and a DPR progressed. There is only the one email of 13 May 2023 and that says it was his fault and that he had overlooked it.

61.20. It follows that I find that Mr Anderson knew the appraisal process was important, but until the last minute neglected to do anything to anything to progress the end of year appraisal. Even the half year documentation was not available (the end of year appraisal includes the half-year appraisal).

61.21. The lateness of the other people's documents did not prevent their performance being discussed at the partner group appraisal review meeting. Mr Anderson did not submit anything which could be considered at that meeting.

61.22. Mr Badham was part of the partner group, but by chance was not at the appraisal review meeting. Nor had he any management or mentor involvement with Mr Anderson.

61.23. Mr Morgan attends the partner group meetings. He was at the appraisal review meeting. He calls the shots in the Respondent, as he the ownership structure means he controls it. He has a direct and uncompromising approach to management. In part this is understandable. The contract of employment of consultants has an *"up or out"* policy. This is an industry with high rewards, and high expectations.

61.24. The email sent by Ms Fleming to a colleague threatening him with bad publicity was not a proper way to conduct matters, as Ms Fleming accepted in her oral evidence in response to a direct question from me. Mr Morgan was copied into that email. A human resources professional does not usually act unilaterally but offers advice to management and then acts on instruction. I have no doubt but that Mr Morgan told her to write this. She ought to have declined to do so, but in context it is understandable that she did not.

61.25. Mr Morgan told Mr Anderson that he would be leaving the Respondent. He did this before the Respondent started disciplinary proceedings against him. I accept Mr Anderson's evidence in this regard, taking fully into account that I have not accepted other parts of Mr Anderson's evidence. I do so because of several different and unconnected factors:

61.25.1. Mr Trevedi did nothing about the yearly appraisal. Although it was past the deadline for submission, the content was important for the business. Mr Anderson had missed the review meeting for the assessment of bonus and salary review, but the need to assess his work remained.

61.25.2. Mr *Anderson's pay for August 2022 was subject to deduction because he "had gone awol"*. The instruction to payroll must have been sent days before 31 August 2022, the date he was dismissed. Ms Fleming said she did not give that instruction as she does not have a payroll function. It had to be someone in authority. Mr Anderson's mentor, Ms Trehan, had left by this time. Mr Trevedi was not his manager. It might have been Mr Brannan, but it is far more likely that it was Mr Morgan, who is the person in charge of the Respondent. Ms Fleming's oral evidence was that it was Mr Morgan who gave that instruction, on the basis that his right to pay was *"nullified"* by the absence of evidence that he was working. This is not a term a human resources professional would be likely to use. It was what Mr Morgan told Ms Fleming.

61.25.3. Mr Morgan also told Ms Fleming (such was her evidence) that the self-certified sick notes were not accepted as they also were *"nullified"* by the absence of timesheets. Timesheets would not be expected from someone off sick. Mr Anderson was entitled to full pay for up to 10 days a year away sick and had not exceeded that limit.

61.25.4. However, I accept Ms Fleming's evidence that by 31 August 2022 Mr Anderson had taken more holiday than was his entitlement. This was not easy to decide because neither side produced documentation about it. I found Ms Fleming a truthful witness and accepted her evidence that she had checked that was the case. I noted that she accepted that the sick pay deduction could not be justified as SSP only as Mr Anderson had not taken much sick leave. There was no documentation about that either, and it was a point in favour of Mr Anderson.

61.25.5. Ms Trehan was not contacted at the time. She was Mr Anderson's mentor, and her account would have been important. It was over 6 weeks after the document was sent by Mr Anderson to human resources that disciplinary action commenced. There was nothing to account for that delay (other than a pause for negotiation). There was no reason why her account could not have been sought immediately. It was not, and the reason was that Mr Morgan had decided that Mr Anderson was to leave the company. That was before the matter was given to Mr Badham.

61.25.6. There was no evidence as to who decided that there would be a disciplinary meeting, or who decided to amend the charges to include falsifying unspecified documents. It could not have been the whole partnership group, as Mr Badham was part of that group, and I accept his evidence that he was not part of that decision. This is not a decision that Ms Fleming would make. It was not Mr Bannan or Mr Trevedi, nor either mentor, both of whom having left by then. It will have been Mr Morgan, possibly after telling some of the partnership group.

61.25.7. The disciplinary meeting was called with little notice, and the detail sent to Mr Anderson on an evening when he was known to be leaving work to go on holiday for a few days, and he was not allowed

an adjournment of the hearing of 31 August 2022. This was the probably decided at the same time as Mr Morgan's decision to deduct pay from Mr Anderson's pay for August.

61.25.8. Mr Morgan was behind the letter sent by Ms Fleming to one of Mr Anderson's colleagues at about the same time, threatening him with adverse publicity if he did not drop his case. Also, there was a degree of fear apparent in that colleague's email responses. This assist in making the account of Mr Anderson in this regard credible.

61.26. Mr Badham's disciplinary hearing was not adequate. Mr Bailey needed to make further enquiries as there were gaps in Mr Badham's process. An hour is not adequate to decide whether or not to dismiss someone, particularly from such a senior role. Given what Mr Anderson said about not seeing the information until shortly before the hearing an adjournment was plainly required. It was not given because Mr Morgan had decided that Mr Anderson would be leaving the company on 31 August 2022.

61.27. The letter of dismissal was handed to Mr Anderson at the hearing. There was a gap of over an hour as Mr Anderson needed to visit a pharmacy as he was not feeling well – he described himself as *"as sick as a dog and croaking".* Ms Fleming, who was there accepted that this was the case, saying that she wrote the letter during that time. This would have been apparent to Mr Badham. It is another reason why the hearing should have been adjourned.

61.28. Mr Badham brought the meeting to an end after an hour, although Mr Anderson said that he wanted to ask Louise Wilford questions about what happened to others who were late with their submissions. She was there as notetaker. Mr Badham refused to permit this. It is a relevant point. It is not an adequate answer to say, as Mr Badham did, that the hearing was only about Mr Anderson, for what happened to others is relevant to what should happen to Mr Anderson for something similar, if it was indeed similar. He was entitled to ask what happened to others who were not disciplined. However, while this would have shown that the majority of consultants failed to meet the deadline, they all did enough to be appraised. It does give context (and belie) the Respondent's assertion that timely compliance with the appraisal time line is of fundamental importance.

61.29. Mr Badham said that he had no work connection with Mr Anderson and so was independent. I accept that was the case. However, he allowed himself to be persuaded that this was gross misconduct. He was clear that this was *"tantamount to"* insubordination, correcting me when I omitted those two words. It follows that he shrank from the express statement that it was insubordination. However, on the facts he was correct that Mr Anderson had done next to nothing about the appraisal process. The document submitted contained several important inaccuracies. Having given this much thought, and bearing fully in mind the importance of appraising consultants' work both as quality control and as a guide to future career development (or exit), I cannot see this as *"falsification of a company document"*. It was never tendered as a final document. It was tendered to attempt to show that the allegation that he

had done nothing at all was incorrect. It was only ever a draft which would require input and approval from his mentor and manager before being finalised.

61.30. Mr Bailey took the appeal. He is connected to the Respondent in a semi-detached way. He is not wholly engaged with it and is consulted and contributes as required. He adopted an independent approach and did not find Mr Badham's dismissal process and decision such that he could simply dismiss the appeal. Rightly, he thought more information was required.

61.31. Mr Bailey is correct in his observation that Mr Anderson's approach to both hearings was close to hectoring those taking the meetings. Something of that approach was apparent from Mr Anderson's cross examination of the Respondent's witnesses. Mr Bailey did not take kindly to Mr Anderson telling him how to run his hearing.

61.32. Mr Anderson was, however, correct in some of the things he was saying. It is not usual for the decision maker to conduct his own investigation. A part review / part rehearing is not easy to reconcile with the Acas guidance. Mr Bailey's outcome letter gives absolutely no indication as to why the appeal failed and the actions of Mr Anderson were gross misconduct either as insubordination or as falsifying a company document, or why one or other of these matters was gross misconduct. No thought was given as to whether it was misconduct less than gross misconduct.

61.33. Mr Anderson declined to attend Mr Bailey's resumed hearing, citing failure to comply with Acas guidelines as the reason. I do not think it could have made any difference if he had attended.

Conclusions

62. The role of the Tribunal is not to decide what it would have done in the circumstances, but to decide whether the procedure was fair, whether the Respondent had a genuine belief on reasonable grounds after proper investigation of misconduct, and if so whether dismissal was within the reasonable band of responses of the employer.

63. Mr Anderson laid far too much emphasis on the Acas Code and guidelines. They are of course very important, and an Employment Tribunal must have regard to them when deciding a claim that an employee has been unfairly dismissed. However, they are guidelines not tramlines. His approach lent support to Mr Bailey's observation that Mr Anderson was telling him how do deal with the appeal. The complexity to that argument is that while Mr Anderson was overly formulaic in his approach, he had a point, as set out above.

64. I do not consider it unfair to amend a charge or add a new one mid-way through a disciplinary process if new matters emerge. In principle there was no problem with altering the first charge from no material to little material for the appraisal.

65. The revised terms were opaque and unparticularised. That can be unfair and will be if an employee does not know what the allegations are. An external reader would have no idea what Mr Anderson was supposed to have done. Mr Anderson

understood exactly what was being alleged. He did not say otherwise in either hearing or outside the hearings.

66. There was a long delay between the first allegation, the swift submission of the document and the second allegation of about 6 weeks. I find this was because Mr Morgan decided to counter the submission of the document by using that document to add a further reason to have Mr Anderson dismissed.

67. I also consider that the sending of the hearing date was to disadvantage Mr Anderson, in which it was successful. Mr Anderson was always clear that he did not see it until he viewed the email with his mentor, Ms Trehan, on Sunday evening. I note that the Respondent's witnesses say that a consultant has his mobile phone with email notifications by him all the time, so that he was expected to see it immediately, whenever it was sent. This, of course, is diametrically opposed to the other position of the Respondent, that Mr Anderson had ceased to work and so was entitled to no pay. As they thought that was the case, they would have thought he was unlikely to be monitoring emails.

68. The conduct of the hearing by Mr Badham was not fair. Mr Anderson said he had little notice of the hearing, could not get a companion to come to London in so short a time, felt ill and was visibly not well, justifiably said that one hour was not long enough and refused to allow any questions of Ms Wilford about others in the same circumstances. Nor was the enquiry rigorous enough, for the reasons Mr Bailey needed to make more enquiries. Mr Anderson did not say that he needed more time because of his dyslexia, just (and correctly) that it was not long enough. Mr Badham was also influenced by the non-existent *"informal warning"* of November 2021.

69. A decision that is unfair can be revisited in an appeal and if proper process is followed that unfairness can be cured.

70. Mr Anderson was not well advised when he decided not to attend part 2 of that hearing, but it would have made no difference. Mr Bailey seems to have done his best, and as set out above, Mr Anderson's somewhat hectoring approach (apparent to some degree in his conduct of this hearing) did not assist him. He was making some good points, but the way he put them did not help his cause, and neither did the extent to which he took them. He was not correct that every recommendation in every Acas document must be followed to the letter, or it will be an unfair dismissal.

71. The taking of evidence by Mr Bailey could have been unfair, but if done properly and shared would not be. It was shared, but the extra investigation was somewhat cursory. Mr Bailey did not contact Edem Eno-Amooquaye, as Mr Anderson asked. He asked Mr Anderson to do so if he wished to get evidence from him. This would have been unfair, but for the fact that Mr Bailey asked Mr Anderson what it was he wanted asked of Edem Eno-Amooquaye, without reply (as Mr Anderson had decided not to participate further).

72. After considering all these factors, which lean this way and that, the issue with this case is that while a failure to put in documentation for an appraisal is certainly unacceptable, there was a paucity of evidence to show that it was so important that anyone who did not get the paperwork in, without getting a dispensation, was liable to disciplinary action up to and including dismissal. It was not said, for example, that anyone else had ever been disciplined for this.

That so many were not in time, even if excused, does not indicate that the deadline is itself critical.

73. Without such evidence I find that the assessment under S98(4) must be that it was not fair to dismiss Mr Anderson for lateness in, or failing to get, EPRs and a DPR for the appraisal period ending April 2022.

74. I also carefully considered the second reason put forward by the Respondent, of falsifying a company document which could have led to financial advantage.

75. I put a conundrum to the Respondent's witnesses and Counsel. If Mr Anderson had failed to provide documentation to the extent that it was gross misconduct and insubordination to refuse to engage with the process such that he would not be appraised (and he was not appraised) how could a draft document sent afterwards be an attempt to gain financial advantage? It was first, too late, and secondly a draft on the face of it that could have no currency until his manager and mentor had discussed amended and agreed it. The reply was that this demonstrated the paucity of his adherence to the process, so that while it was not that nothing had been done, it remained next to nothing and as the appraisal process was important and known to be so, this (in effect, for it was not put quite like this) supported the dismissal for the gross misconduct as it was tantamount to insubordination, made worse by Mr Anderson being a senior consultant of some years standing who should have known better. The document itself was not what it was purported to be, as there were no EPRs beneath and supporting the DPR, and there cannot be a DPR unless there are supporting EPRs on which to base it. Further, dyslexia did not account for putting entirely the wrong scores in the document subsequent to Mr Brannan's feedback which had lower scores. That was the case whatever box the numbers went in.

76. Ultimately, I decide that this cannot be accurately described as falsifying company documentation. It was part of his failure to deal with the appraisal properly, or even at all. The November 2021 EPR had not been progressed and the DPR was an attempt to put something in.

77. The scores cannot accurately be seen as an attempt to deceive the Respondent. Someone has to start the bidding on scores, as was accepted. Mr Brannan had given lower scores. These were not final, for Mr Anderson would disagree with them and then after intervention by the mentor a score both mentor and mentee would accept would be arrived at. They may have been ill-advised to the extent of being over-optimistic, but that is not deceit. In any event this was after Mr Anderson was told that it was too late for this appraisal round. It did not really matter what it said, for the point was not that it would be considered seriously, but to show that he had done something, so that the allegation that he had done nothing was not correct.

78. Nor, for the reasons given, was there any possibility of this document leading to financial advantage to Mr Anderson.

79. For these reasons the second reason was not a fair reason to dismiss Mr Anderson.

80. Nor, in my judgment, does the combination of the two matters warrant dismissal.

81. The appeal does not assist the Respondent. There was no pressure of time in the appeal as Mr Anderson had been dismissed and was not attending the resumed hearing. There was a complete absence of any reason why the appeal did not succeed. The letter reads as an assumption that once Mr Bailey found the circumstances were as Mr Badham found the conclusion was to be the same.

82. For these reasons I find this was an unfair dismissal.

83. It follows that I find it was not gross misconduct and so the notice pay claim succeeds.

84. A *Polkey* reduction is not appropriate in this case. There was little to no chance that Mr Anderson would not be dismissed whatever the procedure had been. There was clearly a mindset in the whole of the partner group which led to the dismissal, and Mr Bailey went along with it.

85. The background to this case is that Mr Morgan had decided that Mr Anderson would leave and organised the process to lead to this end. That also accounts for there being no contact with Ms Trehan before she left, and the extended allegation that was then put to Mr Anderson and rushed through. This is an organisation with high demands and rewards and Mr Anderson was at best slipshod in his approach to the important process of the annual appraisal, somewhat lessened as many others were non-compliant to some degree.

86. The conduct of Mr Anderson in failing to do anything significant to comply with the appraisal process from November 2021 to April 2022 was a substantial departure from what was expected of every consultant, and he was a senior consultant. His attempt to defeat the allegation that he had provided nothing but providing something was legalistic and did not address the fundamental problem that his performance could not be assessed, alone among about a dozen consultants. The document he did provide was partial and error strewn. He was confrontational in hearings – though this is a minor point as he was told he might be dismissed, so a fierce defence is not wrong.

87. Taking all these factors into account I decide that a reduction in basic and compensatory awards of 50% is appropriate.

88. I turn now to the disability discrimination claims. Nowhere in his contacts with the Respondent did he cite his dyslexia as a reason for something he was asking for. He made it clear at the beginning that he would tell people about his dyslexia only on a *"need to know"* basis. There is nothing wrong with that, but it is inconsistent with expecting everyone to have it in mind at all times. Mr Anderson asked for a large monitor and printer. He says that not agreeing was disability discrimination. It is not immediately apparent that he needed these things for any dyslexia related reason. When he asked for a new laptop and was asked why he said only that the battery was failing.

89. The backdrop to this is that Mr Anderson's work performance, as a senior consultant was not unsatisfactory. There was no reason for the Respondent to think dsyslexia was preventing him performing adequately. Mr Anderson paid for the professional level programs like Grammarly: he did not say that he had asked the Respondent to provide them or that they knew he had them. There was no reason for the Respondent to consider the effects of dyslexia unless Mr Anderson told them of the issue in any case, and he did not.

90. Mr Anderson is right (and it is conceded) that the Respondent had knowledge of his dyslexia, having the report and allowing him 25% extra for assessments at job application stage. It was unfortunate that it was not recorded by the Respondent. However, that did not impact on Mr Anderson. He should have, but did not, say *"I would like x and it will assist me to cope with my dyslexia by y".* It is to impose too high a standard on an employer to require its managers to work it out for themselves when the employee is keen that the dyslexia is very much in the background so as not to define him.

91. The same applies to the disciplinary hearing. Mr Anderson objected to aspects of that hearing, and as set out above, for good reason. He says now that it was disability discrimination as well, and Mr Badham knew of his dyslexia. But he never raised that as an issue in the disciplinary hearing. A good manager, knowing of the dyslexia would ask if any adjustment was needed, but failing to do so is not disability discrimination, in the case of a senior employee who was putting his case forcefully and did not mention it.

92. Mr Anderson complains that he was criticised for spelling and grammatical errors in some of his work, and that this is disability discrimination because it was caused by his dyslexia. This is not a good claim. One criticism was the use of American spelling. That is a function of having the Word template with US English and not UK English. If he had selected the correct language Word would have given him the correct spelling. Mr Anderson had the professional level of a grammar program, and a program (grammarly) which rewrites text more intelligibly. There is no disability discrimination in requiring him, with these aids, to provide documentation to the standards of those who do not have dyslexia. He does not complain that he was not allowed enough time to produce documentation.

93. Mr Anderson was not allowed to record the disciplinary hearing. He did not say that he needed to do so to help him with recall connected with dyslexia. Mr Badham had no reason to think this was a request for a reasonable adjustment. As he agreed to Mr Anderson using assistive technology in connection with dyslexia, he would have agreed had Mr Anderson said that was the reason for recording. He asked for reasons unconnected with dyslexia.

94. To avoid duplication some of the details of findings of fact are in the list of issues.

95. The same factors apply to all aspects of the disability discrimination claim, and for this reason I find that the disability discrimination claims fail.

96. The list of issues with decisions upon them is below:

The list of issues from CMO of 17 August 2023, with decisions on them, including further findings of fact and reasons in italics

The Issues

114. The Respondent is a management consultancy. The Claimant was employed from 08 August 2019 until 31 August 2022 as a senior consultant on £70,000 a year plus bonuses.

115. He contends that management knew about his dyslexia all the time, as he

provided a report saying so in his interview process, and was allowed 25% more time for assessments in the recruitment process because of it. He says that he was supported by managers, all of whom have now left, but when his mentor was changed from Edem Eno-amooquaye to Chetan Trevedi everything changed. He sets out the narrative in his Particulars of Claim. He says that he was targeted for his dyslexia (direct discrimination), that the Respondent imposed standards on him that caused him issues because of his dyslexia (indirect), that they subjected him to a disciplinary process and dismissal as a result (S15) and all the while failed to make reasonable adjustments (which the further and better particulars should make plain).

116. He says that irrespective of that his dismissal was procedurally and substantively unfair. He says that Catherine Fleming said to him that the Respondent did not follow the Acas procedure.

117. He says that the dismissal, by Douglas Badhams, was unfair and this is set out in paragraphs 69-80 of the Particulars of Claim.

118. He says that David Bailey predetermined the outcome of the appeal because the letter of dismissal was prepared in advance of the hearing. He says that he was no more non-compliant the review process than many others, none of whom were disciplined. The Claimant says that the appeal was not fair, and set out why in paragraph 85-91 of his Particulars of Claim.

119. The Respondent's case is that they did not know of the Claimant's dyslexia, if indeed he is disabled by it. While he said so at the start and adjustments were made, to human resources on starting he stated that he had no disability, and the work he did gave no cause for suspecting it any time. They say that the Claimant was on a performance review, as are all employees at the Claimant's grade. They say that he did not react promptly to the requirements of Chetan Trevedi and put detail in the spreadsheet he provided for his performance review that was not only incorrect but also that they reasonably concluded to be a dishonest attempt to deceive the Respondent, to the Claimant's financial advantage.

120. The Claimant says that with large size screen and with software he installed on his computer and with great attention to detail he was able to produce consistently high quality output prior to this. He says that there was never an issue prior to the involvement of Chetan Trevedi.

121. I discussed the issues in the case with the parties on the matters which will fall to be determined by the Tribunal at the final hearing were agreed and are now recorded as follows;

1. Time limits

    1.1 No time point is taken concerning the Claimant's claims against the Respondent.

2. Unfair dismissal

    2.1 The Claimant was dismissed.

    2.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for dismissal

under s. 98 (2) of the Employment Rights Act 1996.

That was the reason.

2.3 Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows;

2.3.1 The process was a sham.
2.3.2 The error in the spreadsheet was no more than that and it was not reasonable for the Respondent to think otherwise.
2.3.3 The conduct of Chetan Trevedi was in stark contrast to the approach of his previous managers.
2.3.4 Catherine Fleming was biased against him.
2.3.5 David Bailey was not independent. While he was not an employee of the Respondent he was a consultant used extensively by Chetan Trevedi and he was not impartial as he was too close to senior people in the Respondent to be so.

There was little dispute as to the facts. Mr Badham and Mr Bailey were not directed by Mr Morgan, but there was a tide running against Mr Anderson which made his dismissal inevitable. Mr Morgan organised it that way, particularly in the sudden addition of a falsification claim, and making the allegations very broad indeed.

2.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

No, absolutely not in the circumstances set out above. This is not to substitute my view for that of the employer. My judgment is that dismissal was outside the range of responses of the reasonable employer

2.5 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in ways that he is to set out in further and better particulars. It is set out in paragraph 84.1-7 of the Particulars of Claim.

No, for the reasons set out above.

2.6 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

For the reasons set out above, a fair procedure would not have led to dismissal.

2.7 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

For the reasons given above, yes, by 50%.

2.8 For the claim for disability discrimination the Tribunal will have to decide whether the dismissal was tainted by disability discrimination.

I see no credible evidence that this was the case, such that the burden of proof did not pass to the Respondent to prove that it was not disability discrimination.

3. Wrongful dismissal; notice pay

3.1 What was the Claimant's notice period?

There was no evidence about this, nor submissions. It will be a matter for the remedy hearing. The contract of employment at §16.1 provides for 1 calendar months' notice. Mr Anderson was employed between 08 August 2019 and 31 August 2022, which is 3 years, and so s86 of the Employment Rights Act 1996 would not extend that notice period.

3.2 Was the Claimant paid for that notice period?

No, he was not. In the claim form he gave his pay as £5,833 per calendar month. The Respondent's ET3 agreed (being more exact at £5,833.33) and so that amount would seem to be the amount of notice pay due.

3.3 If not, was the Claimant guilty of gross misconduct or did he do something so serious that the Respondent was entitled to dismiss without notice?

No, for the reasons given.

4. Disability

4.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Whether the Claimant had a physical or mental impairment. He asserts that he is dyslexic to the extent that he meets the definition of disability in the Equality Act 2010.
4.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?
4.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
4.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
4.1.5.2 if not, were they likely to recur?

Yes, at all material times he had dyslexia, which met the criteria of the Equality Act 2010 for disability. The Respondent conceded that they knew of it from before the start of Mr Anderson's employment with them.

5. Direct disability discrimination (Equality Act 2010 section 13)

5.1 Did the Respondent undertake a disciplinary process leading to his dismissal partially motivated by the Claimant's dyslexia?

No. It was motivated by a desire to end his employment, but that was not connected with his dyslexia. There is nothing to suggest that when Mr Morgan told Mr Anderson he should not return from his holiday that this was connected with his dyslexia.

5.2 Was that less favourable treatment than would be accorded to someone not dyslexic on the same facts? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who s/he says was treated better than he was and therefore relies upon a hypothetical comparator.

No reason is apparent why such a dim view was taken of Mr Anderson's failure to meet the requirements of the annual appraisal, but whatever it was it was not dyslexia. There had been no issue with his work since 2019 related to dyslexia. If Mr Anderson was not dyslexic, he would, in my judgment, have been treated in exactly the same way.

5.3 If so, was it because of disability?

If follows that the answer is no.

5.4 If the Claimant shows facts from which this could be inferred the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to disability?

No, he has not proved facts which might lead to such an inference.

5.5 Note: the law is set out fully in Royal Mail Group Ltd v Efobi [2021] UKSC 33.

6. Discrimination arising from disability (Equality Act 2010 section 15)

6.1 Did the Respondent treat the Claimant unfavourably by:

6.1.1 Subjecting him to a disciplinary or performance process and

6.1.2 Dismissing him?

Plainly this is unfavourable treatment.

6.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that dyslexia makes it harder for him to produce high quality output.

Yes, but not with the adjustments he had made in terms of software. He had worked to a satisfactory level for 3 years. While the marks given by Mr Bannan were lower than those Mr Anderson gave himself, and were not good marks, it was not suggested that the marks were so bad that they were cause for great concern.

6.3 Was the unfavourable treatment because of any of that thing? (Did the Respondent discipline and dismiss the Claimant because of that)?

No, he was dismissed for not following the annual appraisal scheme requirements and then seeking to excuse that by proffering a draft document that was inadequate and contained inaccuracies. This was the opportunity to dismiss him, an outcome desired by Mr Morgan.

6.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent should set out its legitimate aims and why any action it took was proportionate in its amended or supplemental Grounds of Resistance.

This is not applicable, as the dismissal was not connected with Mr Anderson's dyslexia and so does not require justification to defend the disability discrimination claim.

6.5 The Tribunal will decide in particular:

6.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;
6.5.2 Could something less discriminatory have been done instead;
6.5.3 How should the needs of the Claimant and the Respondent be balanced?
6.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

This is not relevant, but it was conceded that the Respondent knew that Mr Anderson had dyslexia (and that it qualified as a disability) all the time he was their employee.

7. Indirect discrimination (Equality Act 2010 s. 19)

7.1 A "PCP" is a provision, criterion or practice. Did the Respondent have or apply the following PCPs:

7.1.1 Requiring a high standard of output.
7.1.2 Use only of the Respondent's technology.
7.1.3 Not permitting recording of disciplinary meetings.

Mr Anderson asked if he could record the disciplinary hearing, He did not say that he needed to do so in order better to be able to recall what happened by reason of dyslexia. As a standalone request without that reason being given, it was not wrong of Mr Badham to refuse. This is reinforced by the fact that Mr Anderson asked if he could use adaptive technology to assist with his dyslexia, and Mr Badham agreed. This is what led to the recording, as this was part of what Mr Anderson said was assistive technology. It follows that had Mr Anderson

said he needed to record it to help him cope with his dyslexia Mr Badham would have agreed.

The Respondent expected a high standard of output, and Mr Anderson was perfectly capable of delivering it with the assistance of specialist software programs, which he chose to buy himself.

He was asked to use the Respondent's hardware, and while the security reasons do not seem strong (logging in to a company's systems remotely does not seem less secure whether it is done on a company or personal laptop as the security is in the program there is nothing to suggest that the person deciding this knew of Mr Anderson's dyslexia: part of the problem was that it was not recorded in the Respondent's records, and Mr Anderson did not tell the person he was dealing with that he wanted to use his own computer because of the software he had within it to assist with his dyslexia.

7.2 Did the Respondent apply the PCP to the Claimant?
Yes, but it does not support the claim for the reasons given.

7.3 Did the Respondent apply the PCP to persons with whom the Claimant did not share the same protected characteristic (disability), or would it have done so?

Yes, it applied to all.

7.4 Did the PCP put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom he did not share the characteristic?

No, because he had software that enabled him to deal with it. He said that he could not use the software on the Respondent's laptop, but accepted the proposition I put to him that he could prepare text on his laptop, using his software, and copy and paste the text into his laptop, which would take very little time.

7.5 Did the PCP put the Claimant at that disadvantage he found it harder to produce high quality documentation than someone without dyslexia?

No, for the reasons given.

7.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent will have to set out its legitimate aims and why any treatment was proportionate in its amended or supplemental Grounds of Resistance.

In the Respondent's business high quality documentation is absolutely essential.

7.7 The Tribunal will decide in particular:

7.7.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;
7.7.2 Could something less discriminatory have been done instead;
7.7.3 How should the needs of the Claimant and the Respondent be balanced?

This is not applicable.

8. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

8.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

Yes, from the time Mr Anderson first applied for his employment with them.

8.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the PCPs set out in paragraph 105 of the Particulars of Claim (set out above)?

See above.

8.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that they were required for him to do his job effectively?

As above, no.

8.4 Did the lack of an auxiliary aid, namely a large screen for his computer, large size printer and software such as grammarly installed on his work computer, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it was harder for him to meet professional standards?

No. It was not clear why a large monitor and printer would help, but assuming that they do Mr Anderson never said that he needed them to help with his dyslexia. He already had professional level programs, personally. He never asked the Respondent for them, and as his work (with the assistance of these programs) was adequate there was no reason for them to ask if he needed any auxiliary aid.

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

No, for the reasons given.

8.6 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests the adjustments he says were needed – large screen and printer and software, and in meetings time to prepare, being able to record meetings to avoid the need for notetaking and time to consider any document at a meeting.

No, dealt with above.

8.7 Was it reasonable for the Respondent to have to take those steps and when?

The decision tree does not reach this point by reason of previous findings.

8.8 Did the Respondent fail to take those steps?

Likewise.

9. Victimisation (Equality Act 2010 s. 27)

9.1 Did the Claimant do a protected act by raising a grievance about the way the Respondent was handling matters because adjustments should be made on account of his dyslexia?

No, he simply complained, but did not link it to dyslexia, and it is unrealistic to expect the Respondent to work out that the complaints might be connected with dyslexia.

9.2 Did the Respondent fail to deal with that grievance and instead proceed with a disciplinary process and dismiss him partly because he had raised this grievance?

No, but if it did that was unconnected with dyslexia, precisely because Mr Anderson did not connect the two things.

10. Holiday Pay (Working Time Regulations 1998)

10.1 Did the Respondent fail to pay the Claimant for annual leave the claimant had accrued but not taken when their employment ended?

Yes – he was allowed to carry forward 12 days into the holiday year in which he was dismissed. That the contractual right is less is not to the point. The Respondent did not take account for the additional days he was allowed to carry forward. The contract provides for carry forward of 3 days (§7.3), but by an email Ms Fleming permitted a total of 12 days to be carried forward into the last holiday year. There will be a shortfall, to be determined at the remedy hearing.

10.2 What was the Claimant's leave year?

§7.1 of the contract of employment states that it starts on 01 May each year.

10.3 How much of the leave year had passed when the Claimant's employment ended?

Exactly 4 months, or 1/3rd of a year.

10.4 How much leave had accrued for the year by that date?

The entitlement was 25 working days a year, so 8.33 days.

10.5 How much paid leave had the Claimant taken in the year?

I was not given evidence on this point.

10.6 Were any days carried over from previous holiday years?

Yes, 12.

10.7 How many days remain unpaid?

This is for the remedy hearing.

10.8 What is the relevant daily rate of pay?

This is for the remedy hearing.

11. Unauthorised deductions (Part II of the Employment Rights Act 1996)

11.1 Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted? This is set out in paragraph 113 of the Particulars of Claim.

Yes, his pay for August 2022 was reduced unilaterally, and wrongly. He was not paid from 12 August 2022 until 31 August 2022 (Ms Fleming's witness statement §88). She described this as 11 days, but it is 19 days. The monthly pay is agreed at £5,833, and the remedy hearing can decide the amount due.

12. Remedy, if successful

This is for the remedy hearing.

Unfair dismissal

12.1 The Claimant does not wish to be reinstated and/or re-engaged.

12.2 What basic award is payable to the Claimant, if any?

12.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

12.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

12.4.1 What financial losses has the dismissal caused the Claimant?
12.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
12.4.3 If not, for what period of loss should the Claimant be compensated?
12.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
12.4.5 If so, should the Claimant's compensation be reduced? By how much?
12.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it in a way specified by the Claimant in his further and better particulars? If so is it just and equitable to increase any award payable to the Claimant and, if so, by what proportion up to 25%?
12.4.7 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce his compensatory award? By what proportion?

12.4.8 Does the statutory cap of fifty-two weeks' pay of £93,878 apply?
Discrimination or victimisation.

Discrimination or victimisation

This is not applicable as I dismissed the discrimination claim.

12.5 What financial losses has the discrimination caused the Claimant?

12.6 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

12.7 If not, for what period of loss should the Claimant be compensated for?

12.8 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

12.9 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

12.10 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

12.11 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it in a way specified by the Claimant in his further and better particulars?

If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

12.12 Should interest be awarded? How much?

Employment Judge Housego

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Date 12 July 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

25 July 2024

Jade Lobb

FOR EMPLOYMENT TRIBUNALS