EMPLOYMENT TRIBUNALS

Claimant: Ms M Reilly

Respondent: Maximus UK Services Ltd

Heard at: **Bristol** **On:** **18, 19, 20 and 21 November 2024**

Before: **Employment Judge Livesey**
Mrs S Maidment
Mrs S Ramsaran

Representation:
Claimant: In person
Respondent: Ms Polimac, counsel

REASONS

JUDGMENT having been sent to the parties on 28 November 2024 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

1. Claim

1.1 By a Claim Form dated 6 September 2023, the Claimant brought complaints of unfair dismissal and discrimination on the grounds of disability.

2. Evidence

2.1 The Claimant gave evidence in support of her case and the Tribunal heard from the following witnesses on behalf of the Respondent;

- Ms Williams, former Assessment Centre Manager;
- Miss Homan, former Assessment Centre Manager;
- Mr Fuller, former Performance Manager.

2.2 The following documents were produced;

- R1; a hearing bundle;
- R2; a cast list;
- R3; a chronology.

3. Issues

3.1 The issues in the case had been discussed, agreed and recorded by Employment Judge Gray at a Case Management Preliminary Hearing which he conducted on 29 February 2024. They were revisited with the parties at

the start of the hearing and were confirmed, by way of a summary, as follows;

3.1.1 Unfair dismissal;

The reason for dismissal that was relied upon by the Respondent was that of capability. In terms of issues of fairness, the focus was upon whether the Claimant had been given a reasonable chance to improve and/or whether her dismissal had been a fair sanction (paragraph 1.3 of the Case Summary). In particular, we had to examine whether she ought to have been dismissed when she was and she asserted that it had been before adjustments had been able to take effect (paragraph 1.5);

3.1.2 Discrimination;

The issue of disability (dyslexia) had been determined in the Claimant's favour by Employment Judge Goraj at a Preliminary Hearing which she had conducted on 3 September 2024.

Her complaints were of discrimination arising from disability relating to her dismissal. She alleged that her inability to maintain the speed and quality of her written work had arisen from her disability (paragraph 3.2 of the Case Summary). The Respondent was not relying upon any lack of knowledge as a defence but was seeking to rely upon the argument of justification (see paragraphs 56-8 of its Amended Response).

The Claimant was also alleging that the Respondent had failed to make reasonable adjustments to the provision, criterion and/or practice ('PCP') set out in paragraph 4.2 of the Case Summary relating to the timeframes and quality of her work. The second limb of the knowledge defence *was* being run by the Respondent in that respect.

3.2 There was a change to the issues on 3 September in that the Employment Judge enabled a slight broadening of the claims to include consideration as to whether the Claimant ought to have been allocated 'non-WCA' duties as an alternative to dismissal in respect of the complaint under the 1996 Act and/or as a further reasonable adjustment under section 20 (see the email of 10 October and the Order of 29 October 2024, at paragraph 40).

4. Facts

4.1 The following factual findings were made on the balance of probabilities. Any page references within these Reasons are to pages within the hearing bundle, R1, which have been cited in square brackets.

Introduction

4.2 The Respondent is in business as an independent health assessment service which provided services to the Department of Work and Pensions ('DWP') in relation to benefit claimants and their eligibility for certain benefits. Assessments were undertaken by Healthcare Professionals ('HCPs') who prepared reports which went to the DWP which were used as

tools for assessing eligibility. They were known as Work Capability Assessments ('WCAs').

4.3 The Claimant was employed as a Functional Assessor - HCP from 13 September 1999. She transferred under TUPE to the Respondent in March 2015 when it took over the DWP contract. That work was subsequently transferred again to Serco in September 2024.

4.4 The Claimant worked at the Respondent's premises in Swindon. The Assessment Centre Manager, and the Claimant's line manager from about 2019, was Ms Williams. The Claimant's contract created a work pattern of 29 weeks on and the remaining time off. It was an annualised contract, a bit like that of the teacher, based around the school term times.

The nature of the work

4.5 There was an expectation for an HCP to conduct at least six WCAs per day. There were targets for completion times (the Average Case Determination time, or 'ACD'). The HCPs' work was supported by Clinical Support Leads ('CSLs').

4.6 A quality target of 95% was also set. That meant that less than 5% of their reports ought to have achieved a C grade and 95% ought to have been A or B graded, with at least 72% graded as an A. An A graded report was one which contained the right outcome and which had been properly set out and expressed. A B graded report was one which contained the right outcome, but which had been poorly expressed and/or contained spelling errors. A report graded C would not have contained the right outcome and would not have been fit for purpose, sometimes requiring the customer to have been reassessed. Whilst it was correct that some C graded reports could have contained the right outcome for the client, they would have contained inconsistencies between the conclusions and the findings.

4.7 WCA's were completed on the DWP's specific LiMA computer program. Other, non-WCA work was limited but it included assessments relating to industrial injuries, war pensions and Pensions Overseas Department work.

4.8 WCA work had been undertaken on a face-to-face basis prior to the Covid-19 pandemic, but it transferred onto the telephone during that time and never reverted thereafter.

4.9 An assessment involved the reading of an application form prior to an interview and then the conducting of that interview which the HCP noted, partly as free text, which could have been faired later when the interviewee had left, and partly as selections from options in drop down boxes on the LiMA programme. After the interviewee had left, the HCP then had to complete two main areas of the report; a tick box section which required selections to have been made from various functional descriptors by applying the information gained through the interview and, secondly, a free text Personalised Summary Statement ('PSS'), which was the HCP's personalised summary of the applicant's position, which may have been up to one side of A4.

4.10 Non-WCA work (for example industrial injury claimants) involved the inputting of more free text but the history, once taken from an interviewee,

was read back to them and faired with them still present. There was then a clinical examination and the rest of the report was largely written up as free text.

Disability

4.11 The Claimant was diagnosed with dyslexia in 2018. An April assessment had revealed 'mild dyslexia' [150 & 123-149]. All of her other functional abilities were assessed in the 'very superior' to 'average' range [124, 132-4] but she had difficulty with short-term memory [125] and reading speed and comprehension [125-6].

4.12 Occupational Health ('OH') recommended a reduced workload as a reasonable adjustment; a reduction of 20%. For the Claimant, that therefore meant a reduction from 6 to 4.8 WCAs per day [151]. A further possibility, speech to text software, was considered, but it was not then compatible with the Respondent's systems. A further recommendation, the provision of computer overlays, was put into place.

4.13 We considered the Claimant's disability impact witness statement [63-4] and the Judgment of 26 September 2024 [89-106]. We noted that the Judge had found that the undertaking of WCAs was part of the Claimant's normal day-to-day activities. As to the effect of her disability upon those activities, the Judge found as follows (paragraph 53 and 65 [103 & 105]);

> "*..the Tribunal is satisfied that the claimant has established that her dyslexia had an adverse effect on her ability to carry out the work - related activities identified at paragraph 52 above. The Tribunal is further satisfied that, in light of the claimant's high level of achievement recorded in the Lexxic Report in respect of the activities not effected by her dyslexia, she would, on the balance of probabilities, have been able to carry out the telephone computer-based WCA assessments and associated reports to the required speed/standards if she had not had dyslexia...*
>
> *The Tribunal is satisfied that the claimant's dyslexia had a substantial, that is more than minor or trivial, effect on the claimant's ability to carry out her normal day-to-day work related activities relating to WCAs/reports.*"

Performance pre-2020

4.14 The Respondent's case was that the Claimant had struggled with aspects of her role before the 2020 Covid lockdown. She had been on a Performance Plan since November 2017. Whilst she then appeared able to produce good quality WCAs, she had been unable to do it consistently [113 & 116-7]. But the focus then was on productivity and the numbers that she was producing, not the quality of them. It was at that point that she was referred for an assessment regarding her dyslexia (see above).

4.15 A Performance Improvement Action Plan ('PIAP') had been considered again by Ms Williams in or around September 2020, not because of the quality of her work, but on productivity grounds.

4.16 During Covid, WCA targets were reduced further, from 6 to 5 nationally. For the Claimant, that meant that her target came down to 4, 80% of 5.

Post Covid

4.17 In 2021, the DWP put in place new measurement tools which caused the Respondent to monitor its staff's output more closely. That was explained to the Claimant in January when her shortcomings were identified [161-2].

4.18 In February, a PIAP was implemented because of productivity concerns, for two weeks initially [413]. Her target had then been 4, but the figures for September 2022 February 2021 had ranged between 2.37 and 3.57 per day [421]. During reviews at that time, the Claimant was not asking for any more support or adjustments (for example, [418]).

4.19 In March 2021, the formal PIAP was extended because targets were not being hit [437-9]. By June, however, she had improved (to 4 per day) and the plan was therefore concluded [467-472]. It was noteworthy that, during the process, she did not explain her difficulties on the basis of her dyslexia (for example, [423, 442 and 457-8]).

4.20 On 18 June 2021, all HCPs' targets rose from 5 to 6 per day which, for the Claimant, ought to have meant a return to 4.8 per day [473-494].

4.21 By 29 June, a different concern had arisen in relation to the Claimant's reports, that of poor quality. An audit of seven reports had shown 4 to have been at B grade and 3 at C (57% and 43% respectively). That was described by Ms Williams as a "*serious concern*", especially since another audit of 26 reports in May and June produced a further 7 Cs and no As at all [487-90].

4.22 Support was arranged; a sit in with a CSL who was present at the interview and the report writing stage, followed by a feedback session on 14 September 2021 [491]. That support was provided despite the Claimant's initial rejection of it [222]. Two further C grade reports had been recorded and customers had had to be recalled.

4.23 A further PIAP was introduced in November 2021. The records showed the support that was then followed [519-27 & 573-9];

- CSL sit ins; these were undertaken with her sitting in on a CSL and vice versa. A whole day was undertaken on one assessment [520]. Others were undertaken which did show some improvement [525];
- Audited feedback; some audits were still producing C grades in 2021 [525], but they did improve in 2022 [526];
- Red pen marking exercises.

4.24 The Claimant suggested that the original basis of the 2018 OH dyslexia assessment had been wrong and a further assessment with Ability First was therefore suggested [533-4], but she declined the referral.

4.25 The PIAP ran, initially, on an informal basis from November 2021 to January 2022 [573-9], but it then continued from to March [595-608] because of the lack of process that had been made initially. The PIAP continued to involve weekly meetings and support.

4.26 A further Ability First referral was offered in February 2022. It was declined again [583];

From Ms Williams; "*At the end of the last meeting you where* [sic] *going to consider a referral to Ability First? The recommendations made by Lexxic and OH where* [sic] *made some time ago, and I believe there could be more options available/IT software that may be suitable to support you. This would mean a referral to Ability First, but I would need your consent for this to be explored."*

From the Claimant; "*I have given consideration to your suggestion of possible referral to Ability First, but I do not feel that this is necessary at present.*"

The Claimant explained her decision on the basis that she did not know what could then have been offered (paragraph 45 of her witness statement).

4.27 Nevertheless, things were improving and, in March 2022, her statistics showed no Cs and 10 As out of 21 reports [588-9]. She was congratulated and the support continued. She was asked to say if there was anything else that she wanted to assist her.

4.28 In the final week of the PIAP, however, there was another significant downturn; 4 of the 9 reports were Cs [593-4] and another customer had to be recalled. Overall, about 17% of her reports over the year had produced C grades.

4.29 On 31 March 2022, the Claimant was invited to a formal performance review under the Capability Policy [616-7]. The meeting was chaired by Ms Williams on 27 April and, although two of the Claimant's C grade reports had been regraded to Bs, her performance was still a long way from where it needed to had needed to have been. A first written warning was issued, as confirmed in the subsequent letter [638-9]. It was important to note that the Claimant did not, again, identify her dyslexia as a barrier to producing reports of good quality [638].

4.30 On 6 May, the Claimant appealed the decision [642]. Her dyslexia was not mentioned and the recurring theme then was "*session management issues*". The appeal hearing took place on 19 May and was conducted by Mr Lloyd, a Remote Performance Manager. It was dismissed [667-9].

4.31 The formal PIAP had restarted in May and, in the Ms Williams's absence on annual leave, Ms Salisbury met the Claimant to discuss the support and management of the plan going forward [641]. At that point, all of her reports were being audited and some Cs was still being produced [647-9 & 653-6].

4.32 On 5 July, the Claimant was invited to a second formal performance review [672]. At the meeting with Ms Williams on 12 July, the Claimant had produced a further 14 C graded reports and 32 B grades [688-695]. A final written warning was issued, as confirmed in the subsequent letter [699-700].

4.33 The Claimant appealed against that warning too and the hearing that time was conducted by Ms Homan, another Assessment Centre Manager, on 7 September [702-5]. The Claimant's appeal focused upon the timescale over which an improvement had been expected but, again, it was dismissed later that month [709-10].

4.34 A further PIAP ran from September and the terms were set at a meeting on the 13th of that month [705-6]. The Plan restarted after the appeal had been determined and so it actually ran from 29 September [711] and continued to include sit ins, red pen marking, 100% auditing and one-to-one meetings with CSLs. Interim reviews took place on 13 and 20 October [717-9]. At the first, the quality of her reports was not in issue, but her volumes were still low. At the second, the quality had dipped again, with two more reports graded at C level, one of which had been on a day when just three WCAs had been completed.

4.35 On 17 November 2022, the Claimant was invited to attend a final formal performance review meeting as Ms Williams determined that the Plan's aims had not been met; only 43.75% of her reports had been As and 15.63% had been Cs [748]. Her average case duration was supposed to have been approximately 93 minutes, but her figures were between 104 and 201 minutes [752].

4.36 The meeting took place on 23 November [759-765]. Ms Williams asked if the Respondent might have done anything more to assist the Claimant. She blamed staff departures but was complimentary about the support that she had had from CSLs. Ms Williams said that she had not understood why the Claimant had declined an Ability First referral but she then requested an adjournment for one to take place and to explore whether there were in fact any further adjustments which ought to have been considered. Ms Williams agreed and the meeting was adjourned. Ms Williams returned to HR [328-9] and her own line manager [333] for guidance.

4.37 It was determined that the PIAP should have continued, pending the Ability First referral. There were further review meetings on 4 and 9 January, when the Claimant was still producing C graded reports [772-3], on 16 January, when excessive time with the customer was noted [776-7], on 24 January, when some improvement was noted [778-9] and on 30 January when she had produced another C [783-4].

4.38 On 31 January 2023, the Claimant was seen by Ability First. The report recommended the provision of Dragon dictation software and training on it with a review 3 to 6 months later [785-792];

> "*Maggie speculates that the impact of her dyslexia on her typing ability and thought to manual output processing speed may be the reason for her inability to achieve her targets. As Maggie reports that her thought to speech processes faster than her thought to typing output, and to reduce the time taken editing substandard content, speech to text software Dragon Naturally Speaking, is recommended to allow Maggie to dictate her written work and improve the efficiency of her written work. It is noted that Dragon will not fully support Maggie during her live assessment but may significantly reduce the time taken to produce the written work afterwards.*"

There was a further recommendation (a disability passport) which was not relevant to issues in the case.

4.39 On 6 February, at the first PIAP review meeting after the report, Dragon was discussed. Although Ms Salisbury readily appreciated how the software may have assisted with the Claimant's speed, she was less clear and/or confident about how it would have raised the quality of the Claimant's reports [799-800].

4.40 Further reviews in February were patchy (the 13th [802], 21st [810-1], 28th [819-20]). At that stage the Claimant was only undertaking 2 WCAs per day and Cs were still appearing (see Ms Williams's summary in her letter of 8 March [832-4]);

> "*Dragon Software will aid in completion of the latter portion of the report, however this will not aid in improving decision-making/quality of the report to meet expectation. You have reported fatigue because of focusing on one report for a lengthy amount of time, and you hope Dragon Software will help with this. The expectation of 4 assessments/day would be reasonable as an adjustment whilst we wait for this to be made available.*"

4.41 The Dragon software had been installed on the Claimant's computer on 6 March. A further review on 13 March revealed 2 C grades and 2 A grades out of 6 reports [844-6]. She was not then at work between 20 March and 17 April because of the cycle of her contract but, on 18 April, she had her first training session on the software [860-2]. She said that it included other non-Dragon related elements regarding working strategies, which she found particularly helpful.

4.42 On the review conducted on 24 April, 4 out of 5 of her reports were As, the other a B [876-7]. That was clearly an improvement. At a further review on 2 May [906-14], the Claimant said that Dragon was improving the more that she used it. The quality of her WCAs had improved;

> "*I agree that the quality has improved. I feel that I have cracked that really. I am looking to the software to help with productivity. And that still in the trail/setting up stage really. I feel that it will help with timings that the issues with it need to be ironed out. When it does work & it fluent* [sic]*, I find it helpful.*"

4.43 She was asked about specific days of work, 24 to 26 April. The problems which she identified then were not attributed to dyslexia and were obviously ones which might not have been overcome by Dragon to any extent, if at all. She described the 'stumbling block' to further progress being her lack of access to the training server. That was corrected that day. Ms Williams was still concerned at the volumes, with some of her assessments having been "*excessively long*" and, whilst the quality was improving, she still had 10% Cs, not under 5%, and the volume of As was in the 40% range [912].

4.44 The Claimant was invited to a further formal performance review meeting on 3 May [915-6], which was subsequently rearranged [934-6]. Because dismissal was then a possibility, Ms Williams needed HR approval, which she obtained [361].

4.45 The Claimant received her second Dragon training session on 18 May, which was recorded as having been re-iterative of the first [860-2]. Again, the most beneficial aspect to her, she said, was the element which concerned organisational strategies.

4.46 The performance review meeting took place on 23 May with Ms Williams in the chair again and the Claimant supported by Ms Davies, a CSL [955-961]. Her performance was discussed, both with regard to volumes and quality [957]; in respect of the former, she was producing 2 WCAs per day against a target of 4. In respect of quality, 41% of her reports had been graded A, 9% at C and the rest were Bs.

4.47 It was the quality of the work which was Ms Williams's main concern because of the Claimant's experience and her apparent inability to exercise good judgment using her clinical skills. The Claimant said that she wanted more time with Dragon and had wanted to use it for other things. She also sought to challenge the adjusted targets. Ms Williams asked her how she thought that Dragon was ever going to help with the quality of the work that she was producing. The Claimant's response to that question was not easy to understand [958] and no greater clarity was provided when it was addressed with her during her evidence.

4.48 Ms Williams's position was captured in paragraphs 65 and 66 of her witness statement;

> "*I took on board the comments raised by Maggie in relation to Dragon. However, my concern with this was that Dragon would not assist Maggie with her quality. Maggie was making the incorrect clinical decisions when preparing reports. Dragon was not going to be able to assist her with this aspect which had been explained to her on various occasions by different people. A very lengthy performance process had been followed, with weekly review meetings being held and a large amount of support being provided to Maggie.*
> *The focus of the PAP was to improve quality and whilst there were some improvements towards the end of the PAP, there were some C grades awarded following the final PAP review and before the final performance review meeting. The impact of C grades reports is significant and can lead to incorrect outcomes being provided to customers which can have a serious effect on them.*"

4.49 Ms Williams decided to dismiss the Claimant. There were no realistic alternatives to the work that she was doing. Although she did some non-WCA work, there was not enough for her to have been given that type of work alone. The decision was confirmed in writing [962-4].

4.50 The Claimant appealed on 2 June [970-1]. The focus of the appeal was on the timeframe of the performance improvement process and her training on Dragon.

4.51 The appeal hearing took place on 4 July before Mr Fuller, a Performance Manager. The Claimant was again supported by Ms Davies [993-1018]. Mr Fuller was keen to understand how the Claimant considered that Dragon would have improved the quality of her reports. She explained her position as follows, highlighting the benefit that she had from the strategic coaching element of the training [1007];

> "*Main thing is strategic coaching with Dragon with speed I gain time if I save on time if I have coaching in place that would lead to better*

quality reports in a timely manner leave me more energy help to element [sic, but assumed, 'eliminate'] *some errors…*
It follows better I feel better I am less tired mentally it is clear I am in better position at end of report rather than feeling fatigued at end."

4.52 Mr Fuller took the Claimant's comments away for further consideration. He spoke to Ms Williams and explored the issues of support, quality and the alternatives to dismissal with her [979-989]. He then reconvened the hearing on 18 July and allowed the Claimant to comment further about aspects of what Ms Williams had told him, including why she had not given consent for an earlier Ability First referral [1035-1041].

4.53 Having considered the matter further, he convened an outcome meeting on 27 July and dismissed the appeal [1052-7]. In his following confirmation letter, he wrote as follows [1048-51];

"*Your average case duration over the period of the plan remained over 200 minutes and would not enable the opportunity to meet the expected volume of customers in a normal working day…*
.. productivity was not the reason for the dismissal - the reason for dismissal following the failure of the Performance Improvement action plan was the quality of the reports…
.. I can see that the Ability First request was first made in November 2022 - this was at the meeting being held to review the final formal review of the capability policy and was at the time of a decision to issue a final written warning. The offer of ability first had been made as a matter of routine through the regular reviews in the plan either specifically or as a general request for any support needed. You advised when we met that you were not aware of what support could be provided and felt that following an unsuccessful recommendation from 2018 for a Lexxic assessment and OH report competed [sic., assumed 'completed'] *at the time.*"

4.54 As to the availability of other work the Claimant complained that very little of the documentation before the Tribunal reflected the non-WCA work which she did, but she accepted that that was because the problems had concentrated upon her WCA work performance. She had undertaken her non-WCA without too much difficulty. She also accepted that she had never expressly asked for more non-WCA work, nor was it raised at her dismissal and/or appeal as a potential alternative. In fact, she said that she positively liked the WCA work.

4.55 Ms Williams told us that there simply was not enough non-WCA work for the Claimant to complete alone. She said that she had possibly done one such report per month. That evidence was not challenged and it echoed Mr Fuller's about the availability of such work.

4.56 Ms Williams told us that she also considered the Claimant for other 'file work', but that work required an analysis of whether applicants could not, or ought not, have been required to attend for assessment interviews (for example, because of severe disability or terminal illness). That required finely attuned skills and there was an expectation that 80 such cases would have been reviewed each day. In light of the Claimant's assessed quality of judgment and/or speed of work, it was not considered suitable for her.

5. Conclusions

Unfair dismissal

Relevant legal principles

5.1 There was no dispute that the Claimant was dismissed for a fair reason, that of capability, under s. 98 (2)(a) of the Act. In such cases, an employer did not have to prove that the employee was, in fact, incapable of performing his or her job in order to satisfy a tribunal that the dismissal was fair. The test was whether the employer had an honest belief in the employee's incapability which was based upon reasonable grounds (*Alidair Ltd-v-Taylor* [1978] 445, CA).

5.2 In performance cases of this sort, an employee needed to have been provided with an adequate and clear explanation as to why he or she was considered to have been failing in the role. Adequate warning, with targets and opportunities for improvement, needed to have been given. Sometimes further training could have been appropriate. A tribunal had to take into account all of the surrounding circumstances including, but not limited to, whether the targets were realistic, the reasons for the employee not attaining them and how other staff fared at that level of seniority and/or experience. The alleged incapability must have related to the work of the kind which the employee was employed to do (s. 98 (2)(a)). In cases where an employee failed to achieve the desired standard in his or her role, there was no obligation upon an employer to offer a different or subsidiary position. Its duty to consider redeployment would have depended upon all of the circumstances the case.

5.3 Whilst the Claimant did not challenge the process adopted by the Respondent which led to her dismissal, she clearly had challenged the sanction that was imposed. In dealing with that issue, we were not permitted to impose our own view of the appropriate sanction. Rather, we had to ask whether it fell somewhere within the band of responses available to a reasonable employer in the circumstances (*Foley-v-Post Office, HSBC-v-Madden* [2000] ICR 1283 and *Graham-v-Secretary of State for Work and Pensions* [2012] EWCA Civ 903). A tribunal had to consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the it's own subjective views, whether the employer had acted within a band or range of reasonable responses to the particular performance issues found of the particular employee.

5.4 An employer ought to have considered any mitigating features which might have justified a lesser sanction and the ACAS Guidance was useful in that respect; factors such as the employer's disciplinary rules, the penalty imposed in similar previous cases, the employee's disciplinary record, experience and length of service were all relevant. An employer was entitled to take into account both the actual impact and/or the potential impact of the poor capability alleged upon its business.

5.5 Section 98 (4)(b) of the Act required us to approach the question in relation to sanction "*in accordance with equity and the substantial merits of the case*". A Tribunal was entitled to find that a sanction *was* outside the band of reasonable responses without being accused of having taken the decision again; the "*band is not infinitely wide*" (*Newbound-v-Thames Water* [2015] EWCA Civ 677). The test was not the same thing as saying that a

decision of an employer to dismiss would only have been regarded as unreasonable if it was shown to have been perverse.

5.6 As to the previous warnings which the Claimant had received, it was not usually appropriate for a tribunal to reopen the circumstances which led to any earlier warning. An employer was entitled to rely upon a final warning provided that it was issued in good faith, that there were at least prima facie grounds for issuing it and that it had not been manifestly inappropriate to do so (*Davies-v-Sandwell MBC* [2013] EWCA Civ 135). There generally needed to have been exceptional circumstances before a tribunal should have been prepared to go behind an earlier disciplinary process, but it nevertheless had to consider the issues identified in *Davies* before that decision could have been made.

Discussion and conclusions

5.7 The key issue was the Claimant's contention that she ought to have been given more time to improve (see paragraphs 1.3.1 and 1.5.1 of the Case Summary [55-6]). She was not given at least three months to improve her performance after Dragon had been provided as Ability First had recommended. She expressed confidence that she could have "*comfortably*" hit the targets had she been given more time (paragraph 73 of her witness statement).

5.8 The Respondent had been trying to get the Claimant to Ability First since late 2021. A referral had been declined until later on in 2022. The January 2023 report made recommendations about the provision of Dragon, some training and a suitable review period. It was installed at the start of March. The Claimant then did two weeks work with it before she was then away from work. She returned for approximately five weeks before her dismissal. Accordingly, she had worked for nearly two months with Dragon with the benefit of a substantial training session.

5.9 The Respondent's case was that the Ability First report had recommended Dragon to assist with the *speed* of the Claimant's work [787] but it was the *quality* of her work which remained the significant issue [957]. The volumes also remained low, despite the use of the software [912 & 957]; she was supposed to have been doing 4 reports per day, but was only achieving 50% of that number. The call times too, which were never going to have been assisted by Dragon, were still excessively long [802]. These had been longstanding, endemic issues and, despite extensive periods of performance management, they continued.

5.10 Was the Respondent right to dismiss the Claimant before the end point of the recommended review period? Was it a decision which a reasonable employer could have taken in all the circumstances?

5.11 We thought that it was for the following reasons. First, approximately two thirds of the Claimant's expected review time with Dragon had elapsed but she still had a very significant distance to go to achieve the Respondent's targets (less than 5% Cs and more than 72% As). She was also still only doing 2 WCAs per day, yet was still producing some C grade reports and with excessive call times. Dragon was only going to have helped to a relatively limited extent because the free text part of the form on LiMA was a small element (the PPS). Most of the material which had to be completed

was whilst the Claimant was on a call, when Dragon could not have been used, and she was taking ages to complete that part. Whilst the fairing of that element and the PPS could have been assisted by Dragon, it was the selection of the right descriptors from the drop-down boxes which was causing the Claimant to make judgmental errors which was resulting in so many low grade reports.

5.12 Secondly, it was important to note that the real benefit that the Claimant said that she took from the Dragon training had been the planning and organisational strategies that had been delivered, which were not actually part of the training on the software itself and had never been part of the First Assist recommendation.

5.13 Thirdly, The Claimant had shown, well before the use of Dragon, that she was capable of greater output and the production of a better quality of reports on occasions. In June 2021 she had been producing 4 WCAs per day and the quality of her reports in March 2022 had been good. But she said that there was a trade-off between her speed and the quality of her reports because of her dyslexia. Unfortunately, the evidence simply did not sustain the type of correlation contended for ([802], for example).

5.14 Accordingly, the Respondent was acting within the band of reasonable responses available to it by dismissing her when it did. It did not consider that Dragon ought to have been regarded as a silver bullet. It considered that the further improvement confidently expected by the Claimant could not reasonably have been predicted and that view was one that a reasonable employer could have formed on the material available to it. As Ms Williams put it during her oral evidence;

> "*The quality was driving the decision not to wait three months. The quality had not been reached or maintained. The DWP required reports to have been of a specific standard. It was not being met.*"

5.15 As to sanction, the question was not just that which was set out in paragraph 1.4 of the Case Summary [56], but also whether non-WCA work should have been allocated to her in order to her avoided her dismissal (see the Tribunal's email of 12 October 2024).

5.16 Given the significant history of underperformance, the previous warnings (including a final written warning), the impact of underperformance upon the Respondent's contract with the DWP and benefit claimants if re-calls were required and all that we have already said about the perceived likely benefit of Dragon, we considered that dismissal was not a sanction that fell outside the band of responses available to a reasonable employer.

5.17 As to non-WCA work, there was no evidence to suggest that there was sufficient work of that nature to have sustained the Claimant's continued employment.

Discrimination arising from disability

Relevant legal principles

5.18 When considering a complaint under s. 15 of the Act, we had to consider whether the employee was "*treated unfavourably because of something arising in consequence of her disability*". There needed to have been, first, '*something'* which arose in consequence of the disability, which was an

objective question and, secondly, unfavourable treatment which was suffered because of that '*something*' (*Basildon and Thurrock NHS-v-Weerasinghe* UKEAT/0397/14). That second question was subjective, in the sense that it required us to examine the employer's mind in order to establish whether the treatment had been by reason of its attitude or reaction to the '*something*' (*Dunn-v-Secretary of State for Justice* [2019] IRLR 298, CA). Although an employer must have had knowledge (actual or imputed) of the disability, there was no requirement for it to have been aware that the relevant '*something*' had arisen from the disability (*City of York-v-Grosset* 2018] IRLR 746, CA).

5.19 Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might have been several links in the causative chain (*Hall-v-Chief Constable of West Yorkshire Police* UKEAT/0057/15 and *iForce Ltd-v-Wood* UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause, in the sense of 'more than trivial' (*Pnaiser-v-NHS England* [2016] IRLR 170 and *Bodis-v-Lindfield Christian Care Home Ltd* [2024] EAT 65), but the statutory wording ('in consequence') imported a looser test than 'caused by' (*Sheikholeslami-v-University of Edinburgh* UKEATS/0014/17 and *Scott-v-Kenton Schools Academy Trust* UKEAT/0031/19/DA).

5.20 In *IPC Media-v-Millar* [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

5.21 No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (*Williams-v-Trustees of Swansea University Pension and Assurance Scheme* [2019] ICR 230, SC).

5.22 We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3). In order to trigger the reversal of the burden, it needed to have been shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. A claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might have sufficed. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic, although unexplained, unreasonable conduct could be sufficient to shift the burden in some cases (as in *Law Society-v-Bahl* [2003] IRLR 640]).

5.23 If a claimant was able to demonstrate the essential elements of the test within s. 15 (1)(a), a Respondent had a defence if it could show that the treatment was "*a proportionate means of achieving a legitimate aim*". (s. 15 (1)(b)). In considering such a defence, we had to identify the Respondent's

aim, analyse whether it was 'legitimate', consider whether the Respondent had demonstrated that the step that it took was a means of achieving it and consider whether the step was proportionate (see *Minis Childcare-v-Hilton-Webb* [2024] EAT 108).

5.24 Proportionality in that context meant 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3). Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT). The test was not as loose, however, as the range of reasonable responses test (*Scott-v-Kenton Academy Schools* UKEAT/0031/19/DA, paragraph 58). If a respondent relied upon the rationale for a policy or practice, it had to justify the manner in which it was applied to a claimant in order to meet the defence in the section. In *Buchanan-v-Commissioner of Police of the Metropolis* UKEAT 0112/16 HHJ David Richardson drew a distinction between objective justification for the purposes of s. 15 (2) and justification of the general application of a policy (such as in the case of *Seldon*). HHJ Richardson explained that since the focus must have been on "the treatment" by the putative discriminator, it was necessary to start by identifying the act or omission, and asking whether that act or omission was a proportionate means of achieving a legitimate aim. Therefore, there will be some cases where, rather than the act or omission having been the application of a general rule or policy, what must be justified is the treatment at each stage in the policy (see paragraphs 42 to 49).

5.25 It was important to remember that justification had to be considered in the context of the impact of the Claimant's conduct or performance upon the business generally, not just the individual employee (*City of Oxford Bus Services Ltd-v-Harvey* UKEAT/0171/18/JOJ) and that the section required a Tribunal to make its own '*critical evaluation*' of the evidence against the statutory test. The following key principles were set out by Lady Hale in *Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 601 [22-24]:

(i) To be proportionate, a measure had to be both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so;

(ii) If the measure went further than was (reasonably) necessary to have achieved the aim, it will have been disproportionate;

(iii) Assessment of justification included a comparison of the impact of the act upon a claimant as against the importance of the aim to the employer.

5.26 The Supreme Court expressly applied the judgment of the CA in *Hardys & Hansons plc v Lax* [2005] IRLR 726. It was made clear in that case that the latitude given to an employer when considering the objective justification defence was not akin to the band of reasonable responses test applicable in an unfair dismissal claim. The main principles of the objective justification test were usefully summarised by HHJ Eady QC (as she then was) in *City*

of Oxford Bus Services Ltd t/a Oxford Bus Company v Harvey [2018] (UKEAT/0171/18) as follows [22]:

> *"(i) Once a finding of a PCP having a disparate and adverse impact on those sharing the relevant protected characteristic has been made, what is required is (at a minimum) a critical evaluation of whether the employer's reasons demonstrated a real need to take the action in question (Allonby).*
> *(ii) If there was such a need, there must be consideration of the seriousness of a disparate impact of the PCP on those sharing the relevant protected characteristic, including the complainant and an evaluation of whether the former was sufficient to outweigh the latter (Allonby, Homer).*
> *(iii) In thus performing the required balancing exercise, the ET must assess not only the needs of the employer but also the discriminatory effect on those who share the relevant protected characteristic. Specifically, proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment. To be proportionate, a measure must be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (Homer).*
> *(iv) The caveat imported by the word "reasonably" allows that an employer is not required to prove there was no other way of achieving its objectives (Hardys). On the other hand, the test is something more than the range of reasonable responses (again see Hardys).*"

Discussions and conclusion

5.27 The significant problem for the Claimant in respect of this element of the claim was the issue of causation; whether her competence, particularly in relation to the quality of her reports, arose from the effects of her disability.

5.28 The Respondent had readily accepted that the speed of the Claimant's work "*may have been hindered*" by her dyslexia, but not the quality of what she was producing (paragraphs 51 and 52 of the Amended Response [72]). The Claimant's ability to produce good reports sometimes (for example, in March 2022) undermined her case that her disability impeded her ability to do so. It was the poor selection of the descriptors in the reports which was really harmful to her and the evidence that her dyslexia somehow conflicted with her ability to use her clinical skills to properly judge the information that she had received for an applicant's interview was very limited indeed. Paragraphs 28 and 29 of the Judgment of 26 September 2024 concentrated upon the *speed* of her work. What primarily caused her dismissal related to *quality*, even when she was only undertaking 2 WCAs per day. Her continuing problems with judgment was not one identified as having been a feature of her dyslexia, either in the 2018 Lexxic report or Employment Judge Goraj's judgment.

5.29 Even if we had been wrong and a causal link ought to have been established, the Respondent's defence of justification was compelling (see paragraphs 56-8 its Amended Response [73]). The aims identified were essentially twofold; its requirements to meet the DWP's strict service levels and the need to ensure that benefit claimants, who were often vulnerable,

were dealt with correctly so that they received their correct, statutory entitlements. Those aims were both legitimate in our judgment.

5.30 The decision to dismiss was contended to have been proportionate in the context of the achievement of those aims and we also agreed. Having spent so much of the previous years of her employment in one performance improvement process or another, having received a written and then a final written warning, having failed to make a substantial and sustained improvement to all aspects of her work over the majority of the suggested review period with Dragon and there being no suitable alternative work then for her, dismissal was then justified.

Failure to make reasonable adjustments

Relevant legal principles

5.31 In dealing with the claim under ss. 20 and 21 of the Act, we have bore in mind the guidance in the case of *Environment Agency-v-Rowan* [2008] IRLR 20 in relation to the correct manner that we should approach the sections; first, we had to identify whether and to what extent the Respondent had applied a provision, criterion and/or a practice (the 'PCP'). In relation to the second limb of the test, it had to be remembered that a claimant needed to demonstrate that he or she was caused a substantial disadvantage when compared with those not disabled. It was not sufficient that the disadvantage was merely some disadvantage when viewed generally. It needed to have been one which was substantial when viewed in comparison with persons who were not disabled and that test was an objective one (*Copal Castings-v-Hinton* [2005] UKEAT 0903/04 and *Sheikholeslami-v-University of Edinburgh* [2018] 1090, EAT).

5.32 Further, in terms of the adjustments themselves, it was necessary for them to have been both reasonable and to have operated so as to have avoided the disadvantage. There did not have to have been a certainty that the disadvantage would have been removed or alleviated by the adjustment. A real prospect that it would have had that effect would have been sufficient (*Romec-v-Rudham* UKEAT/0067/07 and *Leeds Teaching Hospital NHS Trust-v-Foster* [2011] EqLR 1075).

5.33 It can have been reasonable for an employer to have made an adjustment even if the claimant had not suggested it. That underlined the importance of the employer consulting with a claimant and making appropriate enquiries/assessments. However, at the stage when a claim was brought, it was incumbent on a claimant to identify the adjustments which he or she says should reasonably have been made (see *Project Management Institute-v-Latif* at paragraphs 54 and 55).

5.34 It was not generally considered reasonable to have required an employer to have made an adjustment which might have caused there to have been a drop in standards of competence (*Hart-v-Chief Constable of Derbyshire* UKEAT/0403/07/ZT).

5.35 In our consideration of this part of the claim, we referred to the statutory Code of Practice and, specifically, paragraph 6 relating to the duty under ss. 20 and 21.

Discussion and conclusions

5.36 We had little difficulty in accepting that, although the PCP framed within paragraph 4.2.1 of the Case Summary, was vague, there were expectations in terms of volumes and quality which amounted to PCPs in this case which had been imposed upon the Claimant in an adjusted form (a 20% reduction in targets).

5.37 The difficulty for here, however, was twofold; first, she was unable to demonstrate a substantial disadvantage caused by her disability for the same reasons set out above in relation to the complaint under s.15 and, secondly, the adjustment contended for was not in fact an adjustment to the PCP relied upon. The adjustment specified within paragraph 4.5.1 of the Case Summary [58] was not to the standards relied upon within paragraph 4.2.1. Rather, it was to a one off recommendation which was unlikely, by and of itself, to have amounted to a PCP. Even if it had been, considering the contractual obligations that the Respondent had to the DWP, we would not have been satisfied that a lowering of those standards in relation to quality would not have been reasonable in any event.

5.38 For the reasons already explained, the additional adjustment contended for in relation to the provision of other non-WCA work, did not succeed because there was insufficient evidence that such work existed in sufficient quantity so as to have sustained her continued employment.

Employment Judge Livesey
Date: 30 January 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON
03 February 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE