

THE INDUSTRIAL TRIBUNALS

CASE REF: 22359/19

CLAIMANT: Richard Craig

RESPONDENT: The Management Committee of Assistance Dogs Northern Ireland

JUDGMENT

The unanimous decision of the tribunal is that:-

1. The claimant's dismissal was automatically unfair for failure to follow the statutory minimum dismissal procedures and respondent failed in its duty to make reasonable adjustments pursuant to the Disability Discrimination Act 1995, as amended. The respondent shall pay the claimant compensation of **£11,449.98** in respect thereof.
2. The respondent failed to pay the claimant 9 days holiday pay accrued due to him on termination of his employment. The respondent shall pay the claimant **£800.42** (gross) in respect thereof.
3. The claimant's complaints of Failure to Consult (Trade Union) on Redundancy or Relevant Transfer and Breach of Contract were not made out and are dismissed.

Constitution of Tribunal:

Employment Judge: Employment Judge Bell

Members: Mr A Barron
Ms M J McReynolds

Appearances:

The claimant was represented by Mr T Sharkey, Barrister-at-Law, instructed by Law Centre NI.

The respondent was represented by Mr N Phillips, Barrister-at-Law, instructed by Worthingtons Solicitors.

1. The claimant in his originating claim raised complaints of Disability Discrimination, Unfair Dismissal, Breach of Contract, Failure to Consult (Trade Union) on Redundancy or Relevant Transfer, Failure to Pay Redundancy Payment and Part-time Working discrimination.
2. The respondent in its response resisted the claimant's claims.

3. The claimant's claims of Failure to Pay Redundancy Payment and Part-time Working discrimination were withdrawn and dismissed prior to substantive hearing.
4. In support of an application made for the claimant under Rule 26 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (NI) 2020 for reasonable adjustments set out in an email of 18 June 2020 a medical report dated 11 June 2020 confirming a diagnosis of Dyslexia was presented supporting significant difficulties associated with working memory and processing speed. At a preliminary hearing on 25 September 2020 all adjustments sought to be made for the claimant within the tribunal proceedings, save for the provision of cross-examination questions in advance, were indicated to be considered appropriate and were observed at the substantive hearing.
5. Contrary to prior case management orders and without prior consent, hearing bundles presented significantly exceeded the 400 page limit set (running to some 800 pages). Given the history of delay already encountered in this case and current quarantine requirements for documentation arising from the pandemic the provided bundles were permitted without return for revision prior to commencement of the substantive hearing so as not to cause further delay. Extensive bundles of largely unnecessary documentation however slow efficient progress through evidence at hearing and should be restricted to only those documents necessary for the tribunal to hear and determine the claim. Scrupulous compliance with case management orders is not optional and parties and their representatives should be mindful of potential delay and cost implications where not observed.
6. By agreement at substantive hearing the title of the Respondent was amended to **The Management Committee of Assistance Dogs Northern Ireland** and it was confirmed that the management committee of Assistance Dogs Northern Ireland [ADNI] during 2019 consisted of Helen McKenna, Melanie Fitzpatrick, Jean Bishop-Greentree, Patricia Whyte, Annie Barfoot, and Dr Claire McDowell; that Dr McDowell resigned as of 7 September 2020; and since then and as at the date of the substantive hearing, the respondent's Board was made up of Helen McKenna, Melanie Fitzpatrick, Jean Bishop-Greentree, Patricia Whyte and Annie Barfoot.

THE ISSUES

7. The agreed statement of legal and factual issues presented by parties identified the issues as follows:-

Factual

- (1) Did the claimant work as a Senior Dog Trainer?
- (2) Did an altercation take place in January 2019?
- (3) Did the claimant try to resign on 15 January 2019?
- (4) Was the claimant convinced not to resign in January 2019 and asked to work part time instead?
- (5) Did the claimant write the letter dated 16 January 2019 in relation to a

reduction in hours?

- (6) Did the claimant receive a letter dated 23 January 2019 from the respondent?
- (7) Did the claimant and Simon Davies job share?
- (8) Was the claimant sent a letter dated 13 March 2019 from the respondent?
- (9) Was the claimant advised that if his reduction of hours detrimentally impacted the respondent's service, consideration would be given to terminating the part time contract?
- (10) Was the respondent unaware the claimant had learning difficulties?

Legal

- (1) Has the claimant been unfairly dismissed contrary to the Employment Rights (NI) Order 1996?
- (2) Has the claimant been unfairly dismissed for a reason specified in Article 130 of the Employment Rights (NI) Order 1996, namely by reason of redundancy as defined by Article 174 of the 1996 Order?
- (3) Has the respondent acted reasonably within the meaning of Article 130 (4) of the Employment Rights (NI) Order 1996 in the procedures that it followed and in treating redundancy as a sufficient reason for dismissing the claimant?
- (4) Is the claimant's dismissal automatically unfair by virtue of a failure to apply the statutory dismissal procedures in accordance with the Employment Rights (NI) Order 1996 and the Employment (NI) Order 2003?
- (5) Has the respondent complied with the Labour Relations Agency Code of Practice in regard to the dismissal of the claimant?
- (6) Has the claimant been unfairly dismissed in all the circumstances?
- (7) Has there been an unauthorised deduction from wages by the respondent in relation to holiday pay contrary to the Working Time Regulations (NI) 2016 and the Employment Rights (NI) Order 1996?
- (8) Is the claimant a disabled person within the meaning of the Disability Discrimination Act 1995 [**DDA**]?
- (9) Has the claimant failed to make reasonable adjustments as required by the DDA?
- (10) If the claimant is held to have been unfairly dismissed or to have been discriminated against, what compensation should he receive?
- (11) If the respondent has failed to follow the statutory dismissal procedure, what level of uplift to damages should be awarded?

8. Mr Sharkey at the outset of the substantive hearing confirmed complaints now remaining for determination by the tribunal were Disability Discrimination by way of failure to make reasonable adjustment, Unfair Dismissal and Unpaid holiday pay.
9. Mr Phillips confirmed at hearing the respondent accepted learning difficulties, including dyslexia, can constitute a disability for the purposes of the DDA 1995 but that it was not accepted the claimant was disabled at the relevant time for the purposes of the DDA 1995 or that the respondent had knowledge of a disability.
10. The parties agreed in the course of the substantive hearing that 9 days holiday pay was accrued due and remaining owing to the claimant in the amount of £759.38 net (which is approximately £800.42 gross).
11. Key issues remaining for determination by the tribunal were accordingly:

A. Did the claimant suffer disability discrimination by way of a failure to make reasonable adjustment?

That is:-

Was the claimant disabled within the definition of the DDA at the relevant time?

- Did the claimant have a physical or mental impairment? If so,
- Did it affect the claimant's ability to carry out normal day to day activities/ did it affect his *memory or ability to concentrate, learn or understand*?
- Was the effect on such activities 'substantial';
- Were the effects 'long-term'.

If so,

Was the duty to make reasonable adjustments triggered?

- Did the respondent know or ought the respondent reasonably to have known that the claimant was disabled? If so,
- Did the respondent know that the disability was likely to put him at a substantial disadvantage?

If so,

Was the duty breached?

- Would any proposed adjustment have ameliorated the substantial disadvantage and if so been reasonable to make?

- Has the claimant established facts from which it could reasonably be inferred, absent an explanation, that the duty to make reasonable adjustment has been breached and that the respondent has failed to prove that it complied with the duty?

B. Was the claimant unfairly dismissed?

Was the claimant's dismissal automatically unfair for failure to follow the Statutory Disciplinary and Dismissal Procedures [SDDP]?

Otherwise,

Was the claimant's dismissal ordinarily unfair?

- Has the respondent shown a potentially fair reason? / was redundancy the real reason for dismissal?
- Was the dismissal procedurally fair?
- Was the decision to dismiss for the reason shown reasonable?

C. If yes to A or B, what remedy is appropriate?

- What is the likelihood that the claimant would have still lost his job had fair procedures been followed?
- What is the claimant's loss arising from dismissal?
- Has the claimant unreasonably failed to mitigate his loss?
- What uplift is appropriate for failure to complete the SDDP?
- What is the claimant's injury to feeling (if discrimination)?

SOURCES OF EVIDENCE

12. The tribunal considered the claim; response; three agreed bundles of documentation; written statement of Ms Patricia Watson (deceased, former volunteer) and written witness statements and oral testimony from the claimant, Simon Davies (former volunteer and trainee dog trainer), James Stothers (foster volunteer), Natasha Henderson (assistance dog recipient) and Georgina Craig (claimant's wife) on behalf of the claimant; and written witness statements and oral testimony of Geraldine McCaughey (respondent's CEO & Project Co-ordinator), Patricia Shirley Whyte (respondent's chairperson & voluntary senior dog trainer), Jean Bishop-Greentree (foster volunteer & respondent Board member), Pearl Montgomery (sister of Ms Whyte & respondent's full time administrator, Melanie Fitzpatrick (volunteer Board member) and Joan Campbell (volunteer), on behalf of the respondent.

FINDINGS OF FACT AND CONCLUSIONS

13. As put by Mr Phillips, the number of factual disputes for one case was astonishing and tribunal left the task of having to sift through the evidence to find where the credible evidence lay. There were considerable issues with the consistency and reliability of evidence presented for both parties, in particular that from the claimant, Mr Davies, Ms McGaughey and Ms Whyte. Having considered in detail the evidence before it the tribunal find proven on a balance of probabilities relevant facts as set out below:
14. In 2007 when the claimant was studying for GCSE English and Mathematics at College he was referred for assessment by an Educational Psychologist who concluded that the claimant had 'mild general learning difficulties' and made recommendations for how the claimant's needs might best be met in that context with the resources available to the College.
15. The claimant holds multiple certificates and qualifications in relation to dog handling, psychology, behaviour and training.
16. The respondent organisation was established in 2011 to fulfil the need for assistance dogs for children with Autism and wheelchair users within Northern Ireland. It is a registered charity and was fully funded by the 'Big Lottery Fund' for 3 full time positions by way of a Project Co-ordinator, full time Administrator and Project Worker until December 2020, since then it has operated under its own resources and is seeking to source alternative funding.
17. The claimant qualified as a pro dog trainer in 2018.
18. After first volunteering with the respondent in February 2018 the claimant became aware from Ms Whyte of a paid Dog Trainer vacancy and in March 2018 requested an application pack from the respondent for the vacancy advertised by them at Job Centre Online NI. The claimant was sent a job description and specification for the role and asked to forward his CV along with a supporting statement indicating how he met the specification if he wished to apply.
19. The tribunal accept the claimant discussed the job vacancy with Ms Whyte indicating that whilst he would have no problems with training the dogs and teaching fosterers, that he '*wasn't an office person*' but was reassured by Ms Whyte that this would not be a problem and that she would help him out. We are not however persuaded that Ms Whyte understood from the claimant's comment that he had Dyslexia or that she agreed with the claimant were he to be appointed that she would do all the dog reports for dog training delivered by him.
20. Ms Whyte thereafter read over the claimant's CV and cover letter and suggested improvements to him.
21. On 23 March 2018 a text exchange took place between the claimant (C) and Ms Whyte (SW):

C: Hi Shirley, I have redone the statement, do you just want me emal [sic] it to Pearl?

SW: Email to at psa@adni.org.uk me to read over then if ok I will tell you to email to Pearl.

C: Ok many thanks

SW: Hi Richard I have emailed back CV etc. can you now email to pearl at info@adni.org.uk Shirley

C: Cheers many thanks

The claimant was invited to an interview to take place on 4 April 2018 for which he was required to submit a written lesson plan for a puppy and an adult class.

22. The claimant prior to his interview received a copy of the interview questions, supported by him having a copy in his possession on later instructing solicitors in relation to these proceeding albeit not included by Ms Montgomery in response to his later Subject Access Request. The claimant contended in his evidence Ms Whyte had handed the questions to him personally in his belief because it '*was not above board*' and not '*to leave any digital trail*', whereas Mr Sharkey later contended on behalf of the claimant that Ms Whyte had done so because she was clearly aware at that stage the claimant had dyslexia. The tribunal is not persuaded that the claimant clearly expressed to Ms Whyte or Ms Whyte to have understood by this point the claimant to have had Dyslexia.
23. The claimant following interview on 4 April 2018 was offered and accepted the role of full time *Dog Trainer* (the job title in his job description) at a salary of £22,894.00. The respondent set out in its letter of offer to the claimant '*This is a fixed term full-time post (37.5 hours per week) for which funding has been allocated until 31st December 2020*'.
24. 'Specific Duties' in the claimant's job description included:-

'Administration

A high standard of administration is required to maintain all records. You will be required to:

- Compile written weekly and monthly training reports-these will be used to communicate with all stakeholders e.g. breeders, board members, the big lottery etc.
- Day-to-day administration including teaching documentation and record keeping on current state of dogs, compiling transitional handover timetables for new dog recipients and ensuring completion and maintenance of all paperwork and records in relation to the dogs training and welfare.'

25. The respondent in its *Staff Handbook and Terms and Conditions of Employment* at:
 - 25.1 Section 2D, 4 *Flexible Working*, acknowledges difficulties in fulfilling work duties at various stages in employees working lives arising from domestic/family commitments and responsibilities and offers flexible working arrangements such as part-time and job share to prevent the loss of skilled experienced workers and help

reduce staff anxiety. Provision is made therein for a change to working hours to be requested at any time and revised working arrangements to be subject to a minimum six month trial period before a final decision being made whether in the interests of the employer and employee.

- 25.2 Section 2D, 5, *Part Time Working* at 5.3, reserves 'the right not to agree to such a reduction where it is experiencing recruitment difficulties in the area of work in which the employee is employed, or where it can clearly be demonstrated that the part-time job can only be carried out effectively by a full-time worker. ADNI will consider all possible options, including job-sharing...'
- 25.3 Section 2D, 6 *Job-sharing* at 6.6, requires a request for a full-time job share by two employees to have the approval of the employee's line manager in consultation with the human resources manager.
- 25.4 Section 3E, *Disciplinary & Dismissal Rules & Procedures for Misconduct* at 1.3, gives examples of Minor Misconduct to include:-
- Careless work and poor effort at work
 - Failure to complete work sheets/paperwork as instructed
- 25.5 Section 3H, *Redundancy Policy* at 2.2, sets out: The dismissal of an employee on grounds of unsuitability or inefficiency does not constitute redundancy, and would follow such procedures as are prescribed in the existing disciplinary and dismissal procedure – Misconduct (outlined in Section 3E).
- 25.6 Section 4, *Measures to Avoid or Minimise Redundancy*, provides the respondent will seek to avoid or minimise redundancies wherever practicable including by investigating the use of alternative working arrangements such as part-time working, job sharing, reduced hours, etc.
- 25.7 Section 5, *Selection for Redundancy* at 5.3, provides that staff on temporary or fixed term contracts will be selected for dismissal 'as their contracts end, in advance of any other selection'.
26. During the claimant's first month of employment Ms Whyte supervised him, helped him with classes and went over the respondent's training methods with him.
27. From April 2018 the Claimant introduced and undertook a new program of pre-puppy training before placement of puppies with foster families which involved him looking after puppies for a period of time at his own home. No additional remuneration or time off in lieu was agreed for the claimant with the respondent for this additional undertaking prior to introduction of the new programme. As time went on the claimant however became unhappy with the significant time commitment involved and impact the pre-puppy training arrangement had upon his and his wife's home life.
28. The claimant often in the course of his employment took dogs from fosterers to look after in his own home so as to address behavioural issues with them. Whilst not the respondent's practice to provide holiday cover to fosterers, the claimant often arranged directly with them to do so. The claimant also frequently helped the

respondent with tasks outside specified duties under his job description.

29. The claimant completed training reports for 'H Dogs' pre puppy training in April 2018.
30. On 9 May 2018 the respondent provided in house 'ASD training' to the claimant.
31. In July 2018 Ms Whyte discussed with the claimant the progress of dogs currently in training, the claimant reported no problems, made a suggestion for an improvement relating to training with which Ms Whyte agreed, and went over dog reports and ADNI policies. Ms Whyte kept a note of their discussion, no copy was provided to the claimant. Ms Whyte's notes were produced and referred to at the substantive hearing as minutes of *quarterly meetings* albeit these discussion and subsequent similar meetings were not formally introduced or described by the respondent to the claimant at the time as being a *quarterly meeting*.
32. In October 2018 Ms Whyte again discussed with the claimant the progress of dogs in training, no problems were reported by the claimant. Ms Whyte queried a change in training methods that had been reported to her and put to the claimant that whilst they were open to and encouraged new ideas she asked that he not make any changes without prior permission. Ms Whyte kept a note of their discussion, no copy was provided to the claimant.
33. The claimant considered that he was generally coping well with his job but as time went on he found his workload began to negatively impact upon his family life; his early start time meant he could not take his children to school; he considered that having extra dogs at his home was putting a strain upon him, increased his wife's workload and decreased the time he could spend with his children. By November 2018 the claimant began to feel burnt out.
34. On 7 December 2018 the claimant was provided by the respondent online training from Absolute Dogs Training Academy.
35. Following discussion with the claimant in January 2019 Ms Whyte recorded in her notes:

'I asked Richard to update the boards and to provide reports that were not in files he says they were on his USB but he had forgotten it I asked him to make sure they were in files as this is how I can check the progress of the dogs.

We also discussed the recruitment of foster carers and how he was working on this.

I asked Richard to start going over dog files with me over the next few weeks as we were working towards o[u]r accreditation with ADUE [sic].
[Assistance Dogs Europe]
36. It was a significant issue in dispute whether an altercation took place on 11 January 2019 between the claimant and Ms Whyte and which the claimant contended led to her led to withdrawing from a prior agreement that she would complete dog reports for the training he carried out. The claimant conceded in cross examination that dog

reports are meant to be completed by the trainer who had delivered the training to the dog. Whilst Ms Whyte was present at some training sessions this was not always the case. As per our findings at Paragraph 19 we are not persuaded that Ms Whyte had in fact made a prior agreement with the claimant that she would do all the reports for dog training delivered by him. We consider that Ms Whyte in anticipation of pending accreditation inspection on reviewing dog files at the beginning of January 2019 became aware of the full extent of missing completed paperwork going back into 2018 which still needed to be completed by the claimant as the relevant trainer for accreditation purposes. We accept on balance that on Friday 11 January 2019 whilst helping out in the respondent's storage room for its charity shop the claimant considered Ms Whyte to be speaking to Ms Campbell, the respondent's charity shop volunteer, in an inappropriate way and told her so, in response to which Ms Whyte rebuked the claimant for how he had just spoken to her and exclaimed 'do the f..... dog reports that I pay you to do.'

37. When the claimant later spoke with Ms Whyte following this altercation she gave him a paper copy example training report to use. The claimant as per his evidence later modified it to a format that he considered better suited to accreditation purposes.

38. On 13 January 2019 text messages were exchanged between Ms Watson (PW), one of the respondent's volunteers at that time, and the claimant, as follows:

PW: How's you today

C: I'm okay but enough is enough, no one could work for her
I couldn't work in a social enterprise with her no amount of money would change my mind

PW: I'm hoping that they do sort something out for you but I do understand

C: It's time to break free, she is always going to be there and doing what she always does, people should put complaints in how she speaks to them. I've told Jean to bring it up on the board meeting on Wednesday night as no one is putting her in her place.

39. On Monday 14 January 2019 the claimant notified the respondent he would not be attending work due to sickness.

40. On 14 January 2019 text messages were exchanged between the claimant and Ms including:

P: Enjoy your sicky today...

...

C: Will have to do my resignation letter to give them a month notice.

...

C: And it's not my wife's job to look after pups when they still want me to do training

...

C: Things are not going to change

...

C: I'm not suited for office work with me being dyslexic I get to [sic] stressed with paper work.

It all about them

...

C: ...I'm making the best decisions for my mental health as I do have lots of injuries...

...

C: Got a text from her...

P: From Geraldine or Shirley

C: Shirley

P: she prob [sic] has voodoo doll out

...

P: ...Let them know notice handed in from today

...

C: I won't go to there [sic] standards will hand it in by hand tomorrow

P: ... Are you handing notice in b4 you come in or while we are there

C: I told Shirley on the phone they want to talk about me doing part time but I'm done...

41. The claimant with his wife's assistance prepared a resignation letter dated 15 January 2019, it concluded 'I have enjoyed being a part of the team and am thankful for the opportunities you have given me during my time here however due to health reasons, it is necessary for me to resign my position...'
42. On Tuesday, 15 January 2019 the claimant whilst in the company of Mr Davies phoned Ms McGaughey and told her he wanted to discuss a personal family matter, she objected to doing so over the phone with Mr Davies present in the background and said she would speak to the claimant later that day. Thereafter the claimant received a text message from the respondent's mobile phone, 'We will have a chat but not when Simon is there it's confidential'. The claimant replied 'ok'.
43. Later that day a discussion regarding difficulties the claimant was experiencing took place outside the claimant's home between the claimant, Ms McGaughey and Ms Whyte. It was in dispute whether the claimant sought a reduction in his working hours due to his family commitments or whether instead the respondent talked the claimant out of resigning and asked him to work part time. Against the background of reports required by the respondent to be completed by the claimant for accreditation purposes and the claimant's text message to Ms Watson the previous day the tribunal consider that after expressing difficulties regarding the impact of his work commitments upon his family life and an intention to leave, that a reduction in working hours was suggested to the claimant by the respondent together with as per the claimant's evidence, 'less dogs at my home', and for him to remain at home when puppies were placed with him for puppy training but accept also the respondent put to the claimant difficulties had been experienced with part time working for the charity in the past and should it not work his position might have to be made redundant. We are not persuaded on balance the claimant, 'even still', then handed the respondent a copy of his intended resignation letter citing *health reasons* rather than family commitments as his reason for resignation.

44. On 16 January 2019 Ms McGaughey informed the claimant she would need a letter to put to the Board to agree his change to part time. A letter was then dictated to, typed and printed out by Ms Montgomery, one copy of which was signed by the claimant, it set out:

‘Unfortunately, due to family commitments, I would like to ask ADNI to consider changing my employment contract with a view to reducing my hours to a part- time basis.

I would continue to cover all of the dog training aspects and associated paperwork required of the position.

I would also continue to give 100% to the charity, but due to family circumstances, I feel I can no longer commit to full time hours.

I will fully understand that if ADNI cannot accommodate this change of contract, I will continue my current contract to such times as a full-time replacement can be found.’

45. The claimant did not receive a copy of this letter for his records.
46. It was in dispute whether the letter was dictated by the claimant or by Ms Whyte. The tribunal on balance found overall more credible the evidence of Ms Montgomery that the claimant came into her office and asked if she would type up a short letter as she would be faster than him and he was in a hurry. The tribunal furthermore consider in any event that the respondent’s understanding of the actual reason behind the claimant’s wish at that stage not to continue to work full time arose from his *family commitments*.
47. Minutes of a Board meeting held by the respondent on 16 January 2019 recorded:

Richard has requested to change his contract to become part-time because of family commitments. The charity has agreed to facilitate this request, reducing his hours to 18.75 hours/week on a temporary basis, as part-time employees have been problematic in the past. He will continue to carry out training on Tuesday and Thursday in Belfast and Limavady on a Wednesday. He also reassured the charity that the necessary reports and all other contractual duties will still be completed.

In relation to ‘Trainee Dog Trainer’ the minutes recorded:

Volunteer, Simon Davies, who has been shadowing Richard for several months, will now be employed on a part-time basis as a trainee dog trainee [sic], to cover the rest of the hours.

48. On 17 January 2019 the claimant exchanged text messages with Ms Watson:

C: Yes had a good talk with them and just told them how I feel and she was a big part of the problem and have the dogs here all the time and it’s not my wife’s job to look after them

PW: Did she reply???

C: Well she said she was going to cut back in the office and work at home

PW: ...is she going to allow you to train your own way and not interfere [sic]

49. On 21 January 2019 the claimant exchanged texts with Ms Watson:

PW: Brilliant ... but you still have a couple of weeks ... What about there [sic] dogs ...

C: they have to go and interview people for the dogs. I have a year off [sic] dog reports to do as she said she was doing them...

50. By letter dated 23 January 2019 recorded as sent by normal post in the respondent's postal record, Ms Whyte set out:

'Change of employment

Thank you for your letter dated 16th January regarding your request to change from full time to part time employment.

The board have met and are in agreement with the CEO/ Project Coordinator that ADNI will reduce your hours to part time on a temporary basis only, but due to the fact that a part time dog trainer has been problematic in the past and ADNI will need to find another part time dog trainer or trainee to assist you.

This offer will only be on the condition that a new contract of employment is signed with ADNI. The revised contract of employment replaces your original contract. This also means that a new probationary period will commence for the revised hours...Your new working hours will be 18.75 hours per week, with a salary of £11561.50 per annum, and your revised hours will be a Tuesday, Wednesday and Thursday. Your places of work will be Tuesday and Thursday 9am to 5pm, of which you will be in Belfast 1030am to 1230pm, then office based in Limavady. Wednesday will be 9 am to 1 pm in Limavady, which includes training 1030 to 1130am.

...

You will be off on Mondays and Fridays and because of your reduced hours time management will be of the utmost importance. When office based you will be required to attend to all other aspects of your new contract and any other duties as required.

ADNI understand that your circumstances have changed, and you now have family commitments and ADNI are willing to accommodate you as much as possible, but unfortunately if we find that your position can only be carried out effectively by a full-time worker and we feel that you are unable to complete all aspects of your contractual duties we will have no other alternative than to end your contract giving one weeks' notice.

If you are in agreement to all of the above a new contract of employment will

be drawn up ready for your consideration and signature of agreement.

Following our conversation on receipt of your hand delivered letter I informed you that this would be passed to the CEO/ Project Coordinator to be presented to the board of ADNI.'

51. The claimant did not receive the respondent's letter of 23 January 2019.
52. A new statement of main terms and conditions of employment dated 1 February 2019 was signed by the claimant and respondent, provision therein included:

Date of commencement of employment

Friday 1st February 2019 – 31st December 2020

Job title

Senior Dog Trainer

Details of your duties are outlined in your Job Description.

...

The position will be reviewed in light of the availability of further funding, post 31 December 2020

Hours of Work

Your employment is of a part-time nature (18.75 hours per week, exclusive of meal break)... Your employment is for a fixed term and expires on 31st December 2020

53. Duties specified for the claimant's new part-time hours remained the same as those provided for his former full-time position. A separate contract of employment was signed by Mr Davies for the role of Trainee Dog Trainer for which different duties were specified, these included: Work under the supervision of the Senior Dog Trainer: To deliver training as instructed on arranged training days by the Senior Dog Trainer: Compiling written training reports on the training days that you deliver. Beyond that, no agreement as to the precise way in which the duties of the dog trainer role going forward were to be divided between the claimant and Mr Davies was made or action taken by Ms McGaughey as project coordinator to agree a designation of duties or work systems to be used.
54. A further document dated 1 February 2019 was signed by both the claimant and Mr Davies setting out their agreed understanding with the respondent as to working hours from that date for which the rate of pay would be the same, but hours different, as follows:

Richard Craig Senior Dog Trainer	Simon Davies Trainee Dog Trainer
Mon OFF	Mon 9 am to 5 pm
Tue 9 am to 5 pm	Tue OFF
Wed 9 am to 1 pm	Wed 9 am to 1 pm

Thur 9 am to 5 pm	Thur 9 am to 5 pm
Fri OFF	Fri 9 am to 430 pm
TOTAL: 19 hours/ week	Total: 26 hours/ week

The copy of this document provided in discovery by the respondent to the claimant in preparation for substantive hearing had information thereon relating to Mr Davies redacted.

55. It was in dispute whether the claimant had worked for the respondent as a ‘Senior Dog Trainer’. The tribunal find the claimant on his initial engagement worked as ‘Dog Trainer’ for the respondent but on his reduction in working hours to part time in February 2019 he thereafter worked as, ‘Senior Dog Trainer’, still with the overall responsibility for fulfilling the same duties as for his previous full time role, but now with the assistance of Mr Davies as, ‘Trainee Dog Trainer’, who was to work under the claimant’s supervision for which Mr Davies received the same rate of pay as the claimant and had more limited duties specified.
56. The claimant and Mr Davies understood their positions to be a job share of the claimant’s previous full time dog trainer role. It was however in dispute whether the claimant’s new part time role was in fact a ‘job share’ rather than his and Mr Davies’ jobs being two stand-alone part time roles. Mr Sharkey contended the redaction of information in discovery relating to Mr Davies in the jointly signed document had been a ‘ham fisted’ attempt to conceal the true nature of the *job share* rather than for reason of confidentiality. Mr Phillips put that in any event Mr Sharkey had not explained how the term *job share* feeds into the legal determination to ultimately be made by the tribunal. The tribunal note that whilst Mr Davies was not qualified to carry out all the duties required of the claimant and was assigned more limited duties, the claimant it appears however continued to have overall responsibility for the delivery of the same duties of his former full time post, to be achieved by him with the assistance of Mr Davies, but otherwise without modification so as to have been independently achievable by him within his reduced working hours. We find that if distinction is to be drawn that the claimant’s new part time role was not an independent part time role but on balance more probable a ‘job share’ of his former full time role.
57. From January 2019 onward the claimant felt that his work intensified with the receipt of many high priority emails from Ms McGaughey and Ms Whyte asking him to write and return dog reports by the next day, as per his evidence, ‘New strict schedule rules were introduced.... Shirley started to call me incompetent’.
58. Following the claimant’s change to part time hours Ms Whyte and Ms McGaughey found themselves sending the claimant emails where they would previously have just spoken with him directly when he was present at work full time.
59. On or about 6 February 2019 Ms Watson texted the claimant:
- These reports how far do you need me to go back
- I can’t remember what I did plus Gemma went to new home for a few weeks ... does it matter dates might not tally ...
60. The claimant with the help of his wife thereafter completed at home many pieces of

work required for accreditation which the tribunal accept, supported by text messages between the claimant and Ms Watson, included both backdated and current dog training reports, feeling unable to do so in the office, as put by him, because the atmosphere was causing him anxiety, 'Not that I was completely incapable of writing'.

61. At training in February 2019 after hearing requests made to the claimant for a new coat and collar for a dog, Ms Whyte suggested he might use a Dictaphone to help him remember and deal with administrative matters, the claimant replied that he already had his own Dictaphone.

62. The respondent held a Board meeting on 20 February 2019 the minutes of which recorded:

'Richard has now commenced on a part-time contract as from 1 February 2019. Richard works on Tuesdays and Thursdays, and half day on a Wednesday.

He is still covering all the training days; however, the training reports are coming back very late and things are missed. The board discussed and agreed that the reports should be in dog files on the day after the training takes place to keep the training records up to date. Time management may need to be looked at also.

It was suggested that he used a dictaphone whilst training to record the details and make it simpler, so that things are not forgotten. There is also a lot of work still to be done with the dog files in preparation for accreditation, and other contractual duties are not being met.'

63. On 8 March 2019 Ms McGaughey sent the claimant a text message requesting details of the daily routine of one of the dogs in which she asked, 'Could your wife type it up quickly and email it asap'.

64. In a letter dated 13 March 2019 recorded in the respondent's post book as sent to the claimant by normal post, which is accepted as genuine, Ms Whyte set out:

'Re: Working Hours

As you are aware your position was reduced from full-time to part-time hours from 01st February 2019. It was agreed on the basis that if [sic] did not work we would have to make your position redundant.

Following my conversation with you were [sic] we discussed your hours and work not being completed on time. I feel I may have to take this to the board of ADNI to look at this again. I must make you aware if they find that part-time is not working, unfortunately your position may be made redundant. I will try my best not to have this happen.'

65. The claimant did not receive the respondent's letter of 13 March 2019.

66. Ms Whyte after meeting with the claimant in April 2019, recorded in her notes:

'Since last quarterly Richard had requested his hours be reduced to part time due to family circumstances and the board agreed but would review this if not working.

I discussed with asked [sic] Richard how over the past few months on numerous occasions I asked him to provide me with reports as these are not being done or are handed to me late and other administrative work is not being done.

His answer was that he didn't have time.

I spoke to Richard about time management that he had been returning from training in Limavady after nearly 2 and half hours when the training should only be an hour max and that he had late [sic] returning from training Belfast [sic] and that when I did the training I was back in the office by 3 pm at the latest.

I explained that on a Wednesday he had 1 hour before training 9-10 to do admin as training started at 10.30 that gave him time to go training 5 mins away and set up was 10 mins and as training was 10.30 to 11.30 he would be expected to be in the office no later than 12 giving him two hours for admin.

Also he had time when he returned from Belfast training.

Richard said that he would make better use of his time and make sure reports were done on time.

I informed Richard that I would be having a monthly meeting with him to make sure that work was being done Richard agreed.'

67. On 7 April 2019 in a text message exchange with Ms Watson the claimant sent her a text, 'I'm sick of doing reports do you remember what date did you get Gus and what date he left? Will be doing G reports from last year, many thanks for Gemma's they have really helped to do the others...'

68. The respondent held a Board meeting on 17 April 2019, the minutes recorded:

'Chairperson and CEO are concerned that the dog trainer position being made part-time is not working, as Richard is not fulfilling his contractual duties. Files and training reports are not being completed and new fosters are not being sourced.

This seems to be a lot of time slippage and time management is very poor, leaving things left undone.

Richard reports all is okay with the dogs and the foster carers. This may be the case, but other work is falling behind.'

69. On 15 May 2019 Gillian Cassidy one of the respondent's volunteer fosters emailed Ms McCaughey seeking to share with the respondent's Board some concerns from the fosterer's private peer support group with the expressed intention of aiding the

charity's sustainability, items mentioned included a request for home visits at times not currently available. Ms McCaughey replied acknowledging items raised would be discussed at a Board meeting and dog trainers liaised with and sought from Ms Cassidy details of the issues being experienced with the dog within the home. Ms Cassidy replied relating a problem about the dog barking at the doorbell ringing and when a requested home visit was not available that her next port of call had been the peer support group where she found lots of people there were experiencing the same issue and had no advice.

70. The respondent held a Board meeting held on 15 May 2019. The minutes recorded:

'Richard reports all training is going well and that there are no problems with the dogs or the foster carers and families. This is concerning as we have received an e-mail from GC and one part of the e-mail states "re lack of communication between staff and fosterers".

Richard is aware that he is the first point of contact with the foster families, but he has not been relaying any concerns from them, stating every month that they [sic] are no problems.

It was suggested that there is a meeting held with the foster families to address any concerns they may have.

Richard is not meeting his competencies and a performance review is also required.'

71. On 1 June 2019 Ms McCaughey emailed the respondent with high importance advising him that dog reports were needed for:

K dogs: the 2 week stay with you in April 2019
January 2019 monthly report for Hanson; Hero; Heidi; Healy; Hope
May 2019 monthly report for Hero

May 2019 monthly report for
Jesse; JoJo; Jade; Jazz; Jax

Joy's monthly reports from
2018
April, May, June, July, August, September, October, November, December
2019
Jan, Joy [sic]

Eddy's monthly reports from
2018
May, June, July, Aug, Sept, Oct, Nov, Dec,
2019
Jan, April, May

Echo's Monthly Reports from
2018
Sept, Oct, Nov, Dec
2019

Jan

72. On 8 June 2019 Ms White emailed the claimant and Mr Davies about training courses she thought would help with their continuing professional development and be of benefit and interest to them and asked to discuss these after training on 13 June 2019. On subsequent discussion Ms White found the claimant to be uninterested in further training.
73. On 12 June 2019 Ms McGaughey emailed the claimant and Mr Davies to remind them to check the noticeboard when entering the office for information relating to their dogs and asked, 'As previously requested can you update the dog's notice board regarding weights and treatments due dates ATC.' In another email also sent on 12 June 2019, Ms McGaughey sought further to a conversation the day before, reports for a dog since collected due to a foot injury and on another dog as to his behavioural issue before going to the claimant.
74. The respondent held a Board Meeting on 19 June 2019, the minutes recorded:
- 'Chairperson and the CEO are still very unhappy about the dog trainer position being part-time as it is still not working. Richard is still not meeting his competencies and a performance review is required.
- Richard is still not relaying information back from fosterers and families and this has had an impact on them.
- Many parts of his work have to be done by the CEO as they have not been completed. He has been asked on numerous occasions to update the dogs board but has not completed this task and there is a full tray of filing in his tray that has not been completed either.
- The board agreed that Richard's reduction in hours to a part-time position is clearly not working and we require a full-time dog trainer.
- Melanie will meet with both Simon and Richard on Thursday 4th July 2019 at 3pm.'
75. As confirmed by Ms Whyte in her evidence, contemplation was given to the implementation of a performance improvement procedure but this not done as the respondent did not have, *'the bodies to implement it'*.
76. In an email of 26 June 2019 to the claimant, Ms McGaughey expressed her surprise at dogs at training not wearing their dog training jackets upon the claimant's instruction that they did not need to be worn while in the hall. Ms McGaughey confirmed the respondent would be going back to the respondent's method which had worked in the past and queried what the claimant's thinking was behind his decision to give this instruction to their foster carers.
77. On 26 June 2019 Ms McGaughey emailed Ms Whyte to bring to her attention that the claimant had, 'yet again', been out of the office for three hours with one of the dogs and on returning had switched off the computer to leave without checking for emails. Mr White replied confirming that no explanation was given by the claimant where he was for three hours in the absence of anyone there for training that day,

setting out, 'this is totally unacceptable', and that; the training session was only one hour; the venue five minutes away; training around the shops only two minutes; and, 'I thoroughly understand the position this is putting you in but I can assure you the board are dealing with this. As advised please keep a record of Richard and Simon's timekeeping and what work is not being done'.

78. By email on 27 June 2019 Ms Fitzpatrick set out to Ms McGaughey:

'As you know from the last board meeting, the members of the board voiced concerns regarding the continued time slippage of performance against targets, relating to the training of dogs and the associated administration task required by the trainer. The slippages are impacting on our ability to meet our sustainability targets (and left unchecked could impact on our ability to meet big lottery training output targets – which in turn will effect [sic] any future applications for funding) and therefore I have been asked to make some recommendations to the board, on how to address this problem.

I have one objective: to better understand why tasks are not been completed in a timely manner, so as I can make recommendations to the board as to the way forward for ADNI – therefore protecting the future of the organisation.

Before I make any recommendations, I would like Richard and Simon to have an opportunity to have some input. Their input will be important as they are currently job sharing the role. By way of preparing, if the [sic] Richard and Simon could all think of ways in which we can address the problem, it will greatly help me when making my recommendations."

Ms Fitzpatrick asked if Ms McCarthy could also be available for Ms Fitzpatrick to draw upon her strategic insight as the Co-ordinator and requested the claimant and Mr Davies be let know that she would meet with them on 4 July 2019. Finally Ms Fitzpatrick confirmed she would make recommendations to the Board on 5 July 2019 at a specially scheduled Board meeting at which a way forward would be agreed.

79. By email to the claimant and Mr Davies on 1 July 2019 Ms McGaughey set out:

'Can you please make yourselves available for a meeting with myself and a board member Melanie Fitzpatrick on Thursday fourth July at 3PM.

This will be to discuss time slippage home visits and our ability to meet our sustainability targets.

I would like you both to have an opportunity to have some input and think of ways in which we can address the problem.'

80. Ms McGaughey (as per her evidence) did not advise the claimant that the meeting was a *redundancy meeting*.

81. The claimant by email to Ms McGaughey on 2 July 2019 set out that training jackets as with all training stages needed to be introduced at the right moment and since she was project control coordinator and not a dog trainer it was understandable that she had no knowledge of the different training methods and had allowed, 'such

forceful and intimidating training methods in past with the consequent disastrous results...’.

82. On 4 July 2019 Ms Fitzpatrick met individually with the claimant Mr Davies and Ms McGaughey. Ms Fitzpatrick did not consider this to be the start of a redundancy process but rather that all options were on the table and she, *‘didn’t dismiss the possibility more bodies were needed’*. Ms Fitzpatrick had in her possession the job descriptions for the claimant and Mr Davies but did not consult these. At their meeting Ms Fitzpatrick explained to the claimant that the members of the Board had voiced concerns regarding continued time slippage of performance against targets, relating to the training of dogs and the associated administration tasks required by him and Mr Davies, putting to him that the slippage was impacting on their ability to meet their sustainability targets – and if left unchecked could impact on their ability to meet Big Lottery training output targets, which would in turn effect any future applications for funding. Ms Fitzpatrick set out her one objective that day was to better understand why tasks were not being completed in a timely manner, so that she could make recommendations to the Board regarding the way forward for the respondent – therefore protecting the future of the organisation. Ms Fitzpatrick put to the claimant there were a number of options including: expanding the team to include an additional member (e.g. dog trainer or administrator); and, making one or more position redundant.

83. The following four questions were put by Ms Fitzpatrick to the claimant and to Mr Davies in their respective meetings:

Q 1. Now that you job share, what are your working hours? And what tasks do you complete on each typical day?

Q 2. So, without giving recommendations just yet, what things do you feel put the most pressure on your time?

Q 3. What do you think would help to solve the problems we are facing, concerning time slippage in the dog training?

Q 4. What do you think would help to solve the problems we are facing, concerning time slippage in the administrative duties?

84. Ms Fitzpatrick recorded the claimant’s answer to Q.3 as:

(1) 2 full-time positions would help

(2) 1 full-time + a helper

And, to Q.4 as:

Share admin re: receipts with Pearl

Centralised server or folder so we can easily print off or copy forms needed of training log

85. Ms Fitzpatrick recorded Mr Davies answer to Q.3 as:

Do more training => ∴ extra trainer
⇒ Two full-time trainers + 2 assistants
Home visits for more needy people....
Training the people before they get the dogs...
Shirley + me home visits

And, to Q.4 as:

Full-time hours

86. Ms Fitzpatrick recorded Ms McGaughey's response to her first question - 'What do you think would help to solve the problems we are facing, concerning time slippage in the dog training?' - to include:

Full- Time position: *over running on training times
 * May not be able to turn them around

At mo: - only p/t qualified
 - only p/t not qualified

(Tues/Thurs) together

Things have been changed i.e. not follow ADNI methods = e.g. no jackets.

87. Ms Fitzpatrick recorded Ms McGaughey's response to her second question- 'What do you think would help to solve the problems we are facing, concerning time slippage in the administrative duties?' - to include:

1. *Richard says he is dyslexia. (Not at interview)*

- *we offered a Dictaphone - + give to Pearl to type – would not do it.*

2. *Don't take direction:.. not be re-trained.*

88. Ms Fitzpatrick at substantive hearing could not recollect Ms McGaughey having informed her that the claimant had said he had Dyslexia but fully accepted the meeting note recording this was in her handwriting. No record appeared in subsequent Board minutes of this information disclosed by Ms McGaughey having been discussed.

89. At a Special meeting of the respondent's Board on 5 July 2019 Ms Fitzpatrick presented her report with the stated objective '... To better understand why tasks are not being completed in a timely manner, so as recommendations to the board regarding the way forward the [sic] ADNI – therefore protecting the future of the organisation...' to prevent any issues that could impact on the organisation's future sustainability following on from CEO reports during the past two Board meetings which had highlighted that:

- (a) ADNI dogs were not being trained to the standard required, or in the time required, to meet project targets (threatening the project's future funding and impacting on applications to ongoing funding opportunities); and

- (b) Administrative requirements were not being fulfilled in a timely manner (resulting in volunteers not attending training weekly, and potentially impacting ability to be awarded different contracts).

90. The respondent's Board minutes record:

'It is clear from the interviews in the report attached, because there are two trainers, there is confusion as to job roles (e.g. emails being sent out by both on a number of days, rather than a co-ordinated effort, the division of work at training sessions who is doing what etc.), the number of dogs currently under the care of ADNI (i.e. both trainers providing vastly different numbers of dogs in training), and that the hours worked are not totalling a working week (i.e. the trainers overlap on days, therefore the full week is not being covered) dog training reports are being done by Richard's wife at home and that part-time is not working.

It is also clear from the interviews, there is consensus on the fact that there needs to be a minimum of one full-time trainer.

Therefore the board recommend the following:

3. The current part-time roles are made redundant – they are clearly not fit for purpose.
4. A full-time position is created again.
5. There is merit in seeking additional funding in the coming months, for an assistant to support a full-time dog trainer during dog training sessions.

It was discussed that Richard had requested on the 16 January 2019 to change from full-time to part-time due to family commitments and that ADNI had informed Richard in writing on 23 January 2019 that they would reduce his hours to part-time on a temporary basis as part-time has been problematic in the past and he was made aware that if part-time was not working and could only be carried out effectively by a full-time worker than[sic] unfortunately ADNI would have no other alternative than to end his contract.

It was suggested that Richard be offered the full-time position but due to his request on 16 January it was highly unlikely that he would accept. It was agreed that if Richard did not take up the offer of full-time dog trainer that the position be advertised ASAP.

Patricia Whyte Chair agreed that she would cover the training until a full-time trainer was found and she would support the new trainer and training under lone worker policy.

There was also discussion about Simon trainee dog trainer as to his position as he is not qualified or experienced enough to do the dog trainer job this would not be offered to him ...

It was suggested if we secure funding in the future for another trainee we would invite Simon to apply.'

91. No consideration was given (as per Ms Fitzpatrick's evidence) to addressing the problem identified with co-ordination of the role.
92. On 8 July 2019 Ms Whyte, Ms Bishop-Greentree and Ms McGaughey met with and informed the claimant and Mr Davies that the Board had held a special meeting on 5 July 2019 to discuss the 4 July 2019 meetings and outcome (as per the respondent's minutes) was that the two part-time dog training positions were not working and decision to make both positions redundant as of 8 July 2019 and to make one full time dog trainer post. The claimant was invited to apply for the full time position. The claimant said that he did not want to work full-time because of *injuries and mental health*. Mr Davies was informed the respondent could not find him another position, they only had funding for one full time dog trainer but were they to secure funding in the future, he could apply. The claimant and Mr Davies were not required to work their notice and both were advised of their right of appeal.
93. By letter dated 8 July 2019 Ms Fitzpatrick confirmed to the claimant the respondent Board's decision to make him redundant, its offer in recognition of his contribution to make a payment equivalent to three weeks salary and that he would be entitled to payment for untaken holidays accrued due. Ms Fitzpatrick set out:

The full-time position will be advertised in the very near future, and you are welcome to apply for the position, if your family circumstances have changed since your change of contract date of 1 February 2019. Application does in no way guarantee this position.
94. No payment for untaken holidays accrued due was made to the claimant prior to the substantive hearing.
95. A full time/ Permanent Dog Trainer post for 37 hours per week at a salary of £23,123 was advertised by the respondent on 10 July 2019 with essentially the same duties and specification as previously required of the claimant. Ms McGaughey accepted on cross examination the same job was re-advertised following the claimant's dismissal.
96. By letter dated 17 July 2019 the claimant made a subject access request of the respondent to supply data held relating to him.
97. By letter dated 24 July 2019 the claimant put to the respondent his belief that the treatment he had received may amount to unlawful disability discrimination and seemed a contradiction that a charity that supported disabled people had just put two very productive disabled people out of work with no warning or support. The respondent treated the claimant's letter of 24 July 2019 as an appeal and by letter dated 5 August 2019 invited him to attend an appeal meeting on 13 August 2019 and advised he could be accompanied by a trade union official.
98. On 8 August 2019 the claimant confirmed to Ms Fitzpatrick due to the short notice given, a trade union official would not be available to attend with him on 13 August 2019 and reminded her that he still awaited documentation requested on 17 July

2019. Ms Fitzpatrick replied on 12 August 2019 that requested documents would be forwarded in due course to the claimant and the respondent available to meet on 21 or 27 August 2019.

99. On 12 August 2019 the respondent responded to the claimant's request for records and documents under Data Protection Law. Documents provided to the claimant at that stage did not include minutes of discussions with Ms Whyte later referred to as *quarterly meeting minutes*.
100. On 15 August 2019 the claimant confirmed to Ms Fitzpatrick his availability to meet on 27 August 2019. On 19 August 2019 Ms Fitzpatrick advised the claimant that Ms Whyte would hear his appeal and sought the name of his companion and any evidence to substantiate his appeal.
101. On 23 August 2019 the claimant advised Ms Fitzpatrick that Mr Stothers (a volunteer for the respondent) would accompany him, she replied he could bring a work colleague, trade union representative, or immediate family member, but not Mr Stothers. On 24 August 2019 the claimant responded that he was not a member of any trade union and as such had no access to any such person, that his wife was Mexican, spoke very little English and would have difficulty following proceedings and that his employed work colleagues were limited to Ms McGaughey and Ms Montgomery, the rest being volunteers and considered his selection of Mr Stothers, who had been a volunteer involved with dog training from before the claimant had joined, and able to bring an impartial view to the proceedings, was justified. On 26 August 2019 Ms Fitzpatrick again rejected Mr Stothers as the claimant's proposed companion and confirmed postponement of the appeal meeting which had been requested in the alternative by the claimant so as to allow him to seek further advice and to arrange for a companion. Ms Fitzpatrick confirmed the respondent was willing to accept a member of the claimant's family or someone from Citizen's Advice. By email on 30 August 2019 the claimant put to Ms Fitzpatrick that the decision to make his position redundant was unfair and unreasonable and he sought to review in the appeal meeting comments made at Board meetings from February and enclosed a working schedule of all his activities during and above contractual hours for ongoing training, puppy training and care in his own home. The claimant confirmed he would attend the appeal meeting with his wife because of what he considered as the respondent's unreasonable decision to disallow Mr Stothers.
102. The claimant accompanied by his wife attended the appeal meeting on 31 August 2019, chaired by Ms Whyte, also in attendance was Ms Fitzpatrick and Ms Montgomery as note taker. Ms Whyte advised the claimant that recording the meeting was not permitted and a paper note of minutes would be provided, in response to which the claimant remarked, 'Well this is going to be slower, as you know I have learning difficulties and my wife's language'. Ms Whyte replied that she did not know the claimant had any learning difficulties and first respondent had heard about any disabilities was when the claimant was made redundant on 8 July 2019 and had turned down the offer to go back to full-time saying, 'I can't go full-time due to my injuries and my mental health', and that no mention of learning difficulties or any disabilities or mental health was made before then. The claimant stated, 'yes you do know, that's what Dyslexia is, it's a learning difficulty. You were told that from the very start'. Ms Whyte disagreed saying, 'this is not true Richard'.

Replying to the claimant's question, *why his post was made redundant?* Ms Fitzpatrick began to read out her statement which she explained she believed would answer his question and stated in response to the claimant's written query about minutes that; in April's meeting there were no issues; in May there were communication problems with the foster carers and a report from a foster carer in relation to the training and a report regarding the use of scatter feeding; and June's meeting had highlighted issues with the administration for example reports not being done on time. The claimant questioned this. Ms Fitzpatrick responded the reports should have been done that evening, before leaving work at 5 PM or the next day and concern was that there were not enough hours to do the work that needed to be done, or the reports should be done by the next day following the training and so she had followed a 5 step review process by way of an urgent review into the two dog trainer positions because the respondent was concerned about the sustainability of the charity.

Ms Fitzpatrick proceeded to outline steps taken by her including, at step 1, informing the claimant and Mr Davies the reasons for review, these included *problems with time management and administrative duties* and at step 2 on meeting with the claimant and Mr Davies Ms Fitzpatrick put four questions to them, the first being, 'Now that you job share, what are your working hours?'

Mrs Craig questioned whether Ms Fitzpatrick had offered solutions. Ms Fitzpatrick said she had not as she was not operational so could not make recommendations and that it was up to the workers to find a solution. Ms Fitzpatrick pointed out that the claimant and Mr Davies were doing more hours than they should have been because of the crossover of the trainers, Mr Davies was not qualified and there seemed to be some confusion in the job roles, they were doing long hours and not getting the paperwork done. Ms Fitzpatrick confirmed at step 3 she concluded her report and presented it to the Board the next day and reason the meeting took place so quickly because they were a micro organisation; the fact of having a dog trainer that could not cover a full week would be detrimental to the charity; and it was agreed that a minimum of one full-time qualified dog trainer was needed and claimant had also suggested they would need two full time qualified dog trainers, so it was not the person being made redundant but the two part time positions. At step 4, Ms Fitzpatrick continued, Mr Davies had been informed his position was being made redundant because he was not trained and the claimant offered the full time position but had said no so was given his redundancy letter and invited to reapply should he change his mind following which they immediately advertised the full time position. The claimant pointed out he had meant, '*us two part-time and one other full-time*'. Ms Fitzpatrick explained that at step 5 an appeal was offered. The minutes thereafter set out:

RC Why did you not simply ask me for a meeting to review the areas of concern and any perceived problems? Why could everyone not get together and come up with a solution and an action plan? There were no monthly or quarterly staff meetings or procedures to review on-going issues or to review dog reports. So that was the first time I knew there were any problems on that meeting on the 04th. Richard hands Melanie a list of working hours.

MF We are not saying that you weren't working Richard, it's not you it is the position that was being redundant. There were not enough hours in the position to fulfil the needs of the job. For example, in response to your

question, you went part-time and therefore a long list from the job description was not being completed.

RC I didn't go part-time I actually resigned and they asked me to go part-time.

GC Yes, he resigned, and they asked him to go part-time.

SW You didn't resign Richard, you asked to go part-time because of family commitments. He even gave me that in writing and you have a copy.

The claimant disputed what Ms Whyte had said and asserted that she, 'got Pearl to dictate that letter for you on her computer and then I signed it. There were no concerns and no perceived problems; nothing was ever said to me.' Ms Whyte disagreed with the claimant stating, 'you got the Admin & Finance manager to type the letter you dictated to her and presented it to me. You did not resign.'

Ms Fitzpatrick interrupted and asked could she respond to the first question. The minutes then record:

RC We had no meetings and no perceived problems were ever brought to me. So, you went from February, March, April, May and June so you went all those months and all those areas of concern were perceived problems, because I did not know.

SW Yes we did have meetings.

MF I didn't know there were major problems before our meeting.

The claimant put to Ms Fitzpatrick she would have known as a Board member as it was in the Board meeting minutes. Ms Fitzpatrick pointed out again she was not operational, and why she did the review meeting was to come in and look at matters from a different viewpoint and she could not give solutions. The claimant responded, 'Well going back to that I was still not told about any perceived problems'. Ms Whyte disagreed with the claimant.

Ms Fitzpatrick continued setting out that regarding time management, things were no longer being done because the overlap of the hours e.g. marketing, and work towards accreditation, therefore there were things that were not being done because of the claimant's reduction in hours. The claimant stated these were perceived problems again because they were not brought to his attention. Ms Whyte disagreed. The claimant and Ms Whyte again disagreed over whether the claimant had resigned or had requested to go part-time due to family commitments. The claimant stated, 'It's not my letter, I just signed it. You got Pearl to type it out and I signed it. It doesn't matter about that anyway, back to the subject....' Ms Whyte put that the claimant knew if they found the part-time position was not working the post would be made redundant. Ms Fitzpatrick referred to the letter presented to the Board and put even though two part-time positions had previously not worked they had decided to try it again provisionally. Minutes then record:

RC It was a shared job for the full-time role.

SW This was not shared. You both were doing different hours, one qualified and one trainee.

MF Yes, I totally agree Richard but what I am saying is the shared job roles were not working. It was a full-time role, but the full-time role wasn't being done.

Ms Fitzpatrick referred to the review she had carried out and put that even though the claimant had been doing long hours the job description was not being completed, stating, 'That was the concern. This was a shared role and the job description was not being completed. Both of you were made redundant, not just your job, because the full role was not being completed.' The claimant again put that this went back to the area of concern and perceived problems. Ms Fitzpatrick referred to the claimant having suggested the role be replaced by two full time people. The claimant responded, 'you said ... me and Simon were actually doing a job-sharing role so that was one full time position already filled. I was talking about another full-time job.' The claimant questioned, 'why was there not a meeting, staff and quarterly meetings?' Ms Fitzpatrick replied, 'That was the meeting'. Ms Whyte pointed out that there were monthly meetings that the claimant had met with her and the CEO that asked how the dogs were doing and also asked for the reports and encouraged him to find foster carers and marketing and there were no problems brought to her attention; also that the claimant had been asked on numerous occasions via email to update noticeboards, that his excuse was that he didn't have time to do it and that she would not elaborate on what was said when it was suggested he would have to work to 5 PM. The claimant disputed this. Minutes thereafter record:

RC Well then did you have any problems with me when I was working full-time in 2018?

SW Yes reports were not being done. You assured me that when you went part-time that you would start doing this and Simon would help and all fostering recruitment and marketing would be covered.

RC But answer me yes or no.

SW I did answer you. I had problems with the administration work not being done and the marketing and you reassured me that would all be done.

RC So again we went a full year before you picked up that the reports had not been done.

SW That is incorrect. There were numerous emails sent from the CEO asking you why the reports hadn't been done. You were also asked verbally.

RC That wasn't in 2018...

Ms Fitzpatrick thereafter put, 'we did offer you an option to have a dictaphone, you said you were getting support from your wife at home with the reports.'

The claimant set out, 'my final statement is that you had no procedures to

follow up on perceived issues raised at the board meetings, nor did you give an opportunity to solve any issues by rescheduling our work day or agreeing new priorities for the business. We should at the very least have been given a window of opportunity like a month or three months to address any perceived issues.'

Ms Whyte pointed out that it was the positions that were made redundant because contractual duties within the job description were not being fulfilled due to the fact the claimant did not have time to do the tasks because he was a part-time worker; they were not saying that the claimant was not capable of doing his job it was just that the hours in the day did not permit him to fulfil his job role. Lastly, Ms Whyte put that the claimant had not provided any evidence to substantiate his reason for appeal on the grounds that he was discriminated against because of disabilities and confirmed accordingly their decision stood that the positions were made redundant.

103. On termination of his employment the claimant's gross weekly pay was £222.34 being £210.89 net and he had 9 days untaken holidays accrued due (as agreed by parties) for which payment of £800.42 gross (approximately) was due and outstanding at the date of the substantive hearing.
104. The management committee of ADNI during 2019 consisted of Helen McKenna, Melanie Fitzpatrick, Jean Bishop-Greentree, Patricia Whyte, Annie Barfoot, and Dr Claire McDowell. Dr McDowell resigned as of 7 September 2020. Since then and as at the date of the substantive hearing, the Board was made up of Helen McKenna, Melanie Fitzpatrick, Jean Bishop-Greentree, Patricia Whyte and Annie Barfoot.
105. The claimant presented his claim to the Office of the Tribunals on 18 September 2019.
106. A psychological assessment of the claimant was carried out in June 2020 by Dr Damien Rooney a specialist practitioner psychologist and that report presented and relied upon by the claimant in support of an application for reasonable adjustments at the substantive hearing. No objection was raised by the respondent to Dr Rooney's report in the context of 'Gallo' adjustments sought but at substantive hearing the respondent did not agree Dr Rooney's report as evidence for the purpose of the substantive hearing and Dr Rooney was not called as a witness to give testimony.
107. Mr Phillips in any event referred to Dr Rooney's report having recorded the claimant as noting that he was generally coping well in his role until he went part-time. Dr Rooney's report in summary (at Page 3) set out that amongst matters discussed by the claimant, the claimant noted that he was generally coping well in his role but experience changed after he witnessed a member of staff getting abuse from Ms Whyte, that he had intervened and, *'since then he struggled to work there due to a change in his work. He noted that extra demands were placed on him in relation to paperwork, despite having previously made the company aware of his needs. He reported that he **then** went part-time in February 2019. Mr Craig described that the atmosphere had changed since this time...'* (Emphasis in bold added).
108. Dr Rooney in his report of June 2020 stated his opinion that cognitive assessment

highlighted the claimant:

'does not have a diagnosable learning disability in keeping with the DSM or ICD-10 (a learning difficulty is indicated by a cognitive score of >69 as well as considering the functional impairments in a person's day to day life). It is important to consider terminology used between health and education for diagnostic purposes. Richard's needs, at the time of his previous assessment may have fallen under a "mild learning difficulty" in terms of education provision. A "mild learning difficulty" is not a formal diagnosis in education, but typically indicates that a person **will have greater difficulty than their age matched counterparts and may hinder their use of educational, vocational or employment facilities.**'

'he does have greater difficulties in learning arising from the interaction of his cognitive abilities, therefore "mild learning difficulties" remains an appropriate, if general, definition when understanding his needs.'

'literacy scores highlight that he has **specific literacy difficulties**, particularly in relation to his word reading, word decoding, his overall reading fluency, as well as in his written expression. This pattern is in keeping with a specific learning disorder with an impairment in reading and writing as per the diagnostic criteria set out in the DSM-5. **A diagnosis of Dyslexia is therefore appropriate** at this time. In my view, given that his literacy skills are so significantly impacted by Dyslexia, it is a testament to Richard and his own personal efforts that he has done so well for himself to date with a fairly limited amount of support.

And,

'Overall Summary

Richard presents as an individual of low average overall intelligence, with a relative strength in his non-verbal skills. He also has significant difficulties associated with working memory and processing speed, resulting in difficulties in acquiring and applying his learning in a traditional format. He experiences more success with applied, hands-on tasks. In addition, he presents with a specific literacy difficulty (Dyslexia). In my view, the nature of his difficulties and the interaction between them are likely to cause him substantial difficulty in the workplace without relevant accommodations in place for him.'

109. No contradictory medical evidence was presented.
110. The respondent accepted that learning difficulties, including Dyslexia can constitute a disability for the purposes of the DDA but did not accept the claimant was disabled at the relevant time for the purposes of the DDA or that the respondent had knowledge of a disability.

THE LAW

Disability Discrimination

111. The Disability Discrimination Act 1995 (as amended) [DDA] prohibits disability discrimination. A person has a disability for the purposes of the DDA if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities (Section 1 (1)). The effect of an impairment is a long-term effect if it has lasted at least 12 months; the period for which it lasts is likely to be at least 12 months; or it is likely to last for the rest of the life of the person affected (Schedule 1, 2(1)). An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects certain specified categories, these include, memory or ability to concentrate, learn or understand (Schedule 1, 4(1)).
112. The burden of proving disability within the definition of the DDA rests with the claimant to be established on the balance of probabilities.
113. Disability discrimination occurs if a person fails to comply with the duty to make reasonable adjustments imposed on him in relation to the disabled person (S.3 A (2) DDA). Section 4A DDA imposes a duty to make reasonable adjustments:-
- “(1) Where –
- (a) a provision, criterion or practice applied by or on behalf of an employer;
- ... places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled,
- it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to take in order to prevent the provision, criterion or practice, or feature, having that effect.”*
114. The duty to make reasonable adjustments is triggered only if the employer knows that the relevant person is disabled and that the disability is likely to put him at a substantial disadvantage in comparison with non-disabled persons in the way set out in Section 4A (Section 4A (3) DDA). Knowledge is not limited to actual knowledge but extends to constructive knowledge – namely, what the employer ought reasonably to have known. A formal diagnosis is not necessary for an employer to have knowledge of disability. Knowledge is a question of fact for the tribunal.
115. The Equality Commission Disability Code of Practice – Employment and Occupation (as amended) provides that:-
- A substantial adverse effect is something which is more than a minor or trivial effect.
 - The duty to make reasonable adjustments applies at all stages of employment, including dismissal.

- In order to avoid discrimination, it would be prudent for employers not to attempt to make a fine judgement whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the requirements of each employee and job applicant. Only substantial disadvantages give rise to the duty. Substantial disadvantages are those which are not minor or trivial.
- Whether a particular disadvantage exists in a particular case is a question of fact. What matters is not that a provision, criterion or practice or a physical feature is capable of causing a substantial disadvantage to the disabled person in question, but that it actually has this effect on him.
- The employer only has a duty to make an adjustment if it knows, or could reasonably be expected to know, that the employee has a disability and is likely to be placed at a substantial disadvantage. The employer must, however, do all it can reasonably be expected to do to find out whether this is the case. If an employer's agent or employee...knows, in that capacity, of an employee's disability, the employer will not usually be able to claim that it does not know of the disability, and that it therefore has no obligation to make a reasonable adjustment... Employers therefore need to ensure that where information about disabled person may come through different channels, there is a means – suitably confidential – for bringing the information together, to make it easier for the employer to fulfil its duties under the Act.
- The Act gives a number of examples of adjustments (/ 'steps') which employers may have to take, if it reasonable for them to have to do so (including, allocating some of the disabled person's duties to another person; altering the disabled person's hours of working or training; providing supervision or other support). Steps other than those listed or a combination of steps will sometimes have to be taken. These steps could include conducting a proper assessment of what reasonable adjustments may be required. Advice and assistance (which may include financial assistance) in relation to making work adjustments may be available from the Access to Work scheme.
- Whether it is reasonable for an employer to make any particular adjustment will depend on a number of things, such as its cost and effectiveness. However if an adjustment is one which is reasonable to make, then the employer must do so.

116. In ***Environment Agency v Rowan [2008] IRLR 20*** the EAT set out that a tribunal considering a claim that an employer has failed to make a reasonable adjustments must identify:-

“(a) the provision, criterion or practice applied by or on behalf of an employer; or

- (b) *the physical feature of premises occupied by the employer; or*
- (c) *the identity of non-disabled comparators (where appropriate); and*
- (d) *the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of the employer and the physical feature of premises', so it would be necessary to look at the overall picture."*

117. If the duty arises then the tribunal goes on to consider if any proposed adjustment is reasonable to prevent the PCP placing the disabled person at the substantial disadvantage.
118. The factors to be taken into account in determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make a reasonable adjustment and a non-exhaustive list of examples of reasonable adjustments are set out at Section 18B of the DDA. It is for the tribunal to decide whether something is a reasonable adjustment, objectively, on the facts of the particular case.

Burden of Proof

119. Under Section 17A of the DDA:-

'1(C) Where, in the hearing of a complaint under sub-section (1), the complainant proves facts on which the Tribunal could, apart from this sub-section, conclude in the absence of an adequate explanation that the respondent is acting in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the respondent proves that he did not so act.'

120. The burden of proof in relation to the duty to make reasonable adjustments, was specifically considered in **Project Management Institute v Latif [2007] IRLR 579**. Mr Justice Elias concluded that:-

'The paragraph in the DRC's Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably have been inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing substantial disadvantage engages the duty but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. It would, however, be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could be reasonably be achieved or not.'

'[We] very much doubt whether the burden shifts at all in respect of

establishing the provision, criterion or practice or demonstrating the substantial disadvantage. These are simply questions of fact for the Tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant.'

121. In summary, the burden will only pass to a respondent to prove that it complied with the duty once the claimant has shown that they have been disadvantaged by a PCP and a suggested adjustment has been put forward (by the claimant or tribunal) as potentially reasonable. There is no requirement for claimants to suggest any specific reasonable adjustments at the time of the alleged failure to comply with the duty but can propose reasonable adjustments on which they wished to rely at any time up to and including the hearing itself.
122. Possible remedies a tribunal may grant on finding a complaint under the DDA well founded, where it considers it just and equitable, are set out at Article 17A (2), these include compensation, which were ordered shall be calculated applying the principles applicable to the calculation of damages in claims in tort (Article 17 (3)), that is, to put the employee insofar as is possible in the position he would have been in had the unlawful act not occurred. Compensation may include an award for injury to feeling (Article 17 (4)). Awards should be just to both parties (***HM Prison Service v Johnson [1997] IRLR 162 EAT***). In ***Vento v The Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871*** the Court of Appeal identified three broad bands of compensation for injury to feelings. Presidential Guidance issued for England and Wales and Scotland uprated the ***Vento*** bands in respect of claims presented on or after 6 April 2019 to £900 to £8,800; £8,800 to £26,300; and, £26,300 to £44,000.
123. Under the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996 where a tribunal makes an award under the DDA it is obliged to consider the inclusion of interest thereon.

Unfair Dismissal

124. An employee has the right not to be unfairly dismissed by his employer under Article 126 of the Employment Rights (Northern Ireland) Order 1996 [**ERO**].
125. Statutory Dismissal and Disciplinary Procedures [**SDDP**] to be followed where applicable as a bare minimum by an employer contemplating dismissal or taking disciplinary action against an employee are set out under Schedule 1 of the ERO. The standard procedure in summary consists of three steps requiring an employer to provide an employee at Step 1 with a written statement of grounds for action and an invitation to a meeting, at Step 2 a meeting and at Step 3 an appeal.
126. Under Article 130A (1) ERO, an employee who is dismissed shall be regarded as unfairly dismissed if one of the statutory dismissal and disciplinary procedures applies in relation to the dismissal procedure, it has not been completed, and, the non-completion of the procedure is wholly or mainly attributable to a failure by an employer to comply with its requirement.
127. Article 154(1A) ERO where an employee is regarded as unfairly dismissed by virtue of Article 130A (1) the industrial tribunal shall increase the basic award where the amount is less than four weeks' pay to the amount of four weeks' pay (save as

provided therein at 1(B)).

128. Otherwise, Article 130 ERO sets out how the question of whether a dismissal is ('ordinarily') fair or unfair is to be determined, as follows:-

“(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show:-

(a) the reasons (or if more than one the principal reasons) for the dismissal, and

(b) that it is either a reason falling within paragraph 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this paragraph if it –

*...
(c) is that the employee was redundant, ..”*

129. Circumstances in which an employee is taken to have been dismissed by reason of redundancy include where the dismissal is wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of a particular kind, have ceased or diminished or are expected to cease or diminish (Article 174 ERO).
130. Where a potentially fair reason is shown under Article 130(1) ERO, then determination of the question of whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case (under Article 130 (4)).
131. In assessing reasonableness, a failure by the employer to follow a procedure in relation to the dismissal of an employee (*other than the statutory dismissal procedure*) shall not be regarded as by itself making the employer's action unreasonable if he shows (on the balance of probabilities) that he would have decided to dismiss the employee if he had followed the procedure (Article 130A(2)ERO).
132. Where an Industrial Tribunal finds the grounds of complaint of unfair dismissal are well-founded the Orders it may make are set out at Articles 146 ERO and include reinstatement, re-engagement and otherwise compensation. How compensation is to be calculated is set out in Articles 152 to 161 ERO.
133. The overriding duty imposed on a tribunal on a finding of unfair dismissal is to award compensation which is just and equitable in the circumstances.
134. The case of ***Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1988] ICR 142, HL*** makes it clear that if a dismissal is procedurally defective, then that dismissal is unfair but the tribunal has a discretion to reduce any compensatory award by any

percentage up to 100% if following the procedures correctly would have made no difference to the outcome. It requires consideration of what the particular employer (not a hypothetical reasonable employer) would have done in the circumstances and assessment of: - if a fair process had occurred whether it would have affected when the claimant would have been dismissed; and the percentage chance a fair process would still have resulted in the claimant's dismissal. The Article 130 (2) ERO and *Polkey* exercises run in parallel and will often involve consideration of the same evidence, but must not be conflated. There can be no *Polkey* deductions of the basic award.

135. Principles were set out in ***Wilding v BT PLC [2002] IRLR 524*** for a tribunal to apply where the claimant had refused an offer of re-employment and apply equally to assessment of whether a claimant has mitigated his loss by actively seeking alternative employment:-
- (i) It is the duty of the employee to act in mitigation of his loss as a reasonable person unaffected by the hope of compensation from his former employer;
 - (ii) the onus is on the former employer as the wrongdoer to show that the employee has failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment;
 - (iii) the test of unreasonableness is an objective one based on the totality of the evidence;
 - (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of the former employer, the way in which the employee had been treated and all the surrounding circumstances including the employee's state of mind of should be taken into account;
 - (v) the court or tribunal deciding the issue must not be too stringent in its expectations of the injured party.
136. *Harvey on Industrial Relations and Employment Law/Division D1 Unfair Dismissal 15*, discusses compensation as a remedy and has been taken into consideration by the tribunal.
137. Article 17 of the Employment (Northern Ireland) Order 2003 requires an uplift to be applied to awards (in specified jurisdictions, including unfair dismissal) where an applicable statutory procedures was not completed before the proceedings were begun, and it wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure, in which case it shall (save where there are circumstances which would make an award or increase of that percentage unjust or inequitable) increase any award which it makes to the employee by 10% and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount, but not so as to make a total increase of more than 50%.
138. Where a dismissal is both unfair and an act of unlawful discrimination, the tribunal would ordinarily award compensation on the basis of discrimination. Recoupment and the statutory cap do not apply and 'restoring the claimant's position' could produce a higher figure than the just and equitable test (***D'Souza v London Borough of Lambeth [1997] IRLR 677***).

AUTHORITIES

139. The following authorities were referred to by the respondent and have been taken into consideration by the tribunal:

Murray v Foyle Meats Ltd [2000] 1 AC 51, [1999] IRLR 562, [1999] ICR 827

E R Sutton v Revlon Overseas Corporation Ltd [1973] IRLR 173

Johnson v Nottinghamshire Combined Police Authority [1974] IRLR 20

Ellis v Brighton Co-operative Society [1976] IRLR 419

Hollister v National Farmers' Union [1979] IRLR 238

Bowater Containers Ltd v McCormack [1980] IRLR 50

Genower v Ealing Hammersmith and Hounslow Area Health Authority [1980] IRLR 297

Catamaran Cruisers Ltd v Williams [1994] IRLR 386

Garside & Laycock Ltd v Booth [2011] IRLR 735, EAT

Kerry Foods Ltd v Lynch [2005] IRLR 680, EAT

Banerjee v City and East London Area Health Authority [1979] IRLR 147

Ladbroke Courage Holidays Ltd v Asten [1981] IRLR 59, EAT

Copsey v WWB Devon Clays Ltd [2005] EWCA Civ 932, [2005] IRLR 811

SUBMISSIONS

The claimant's contentions in summary:

140. The claimant's dismissal was substantively and procedurally unfair and claimant had suffered unlawful disability discrimination in that there was not a genuine redundancy situation- the claimant and Mr Davies were employed in a job share to cover the full time dog trainer role, both signed the same fixed term contract and the work the claimant carried out did not change cease or reduce. The issue the respondent had with the claimant was performance related but no performance review took place. The LRA code, statutory disciplinary procedure and respondent's own redundancy policy were not followed. The claimant was disabled under the DDA suffering long term from learning difficulties and Dyslexia. The respondent was aware from the outset of the claimant's employment that he had Dyslexia. No consideration was given to the claimant's disability or any adjustments when considering redundancy and respondent failed to make reasonable adjustments by way of extra time for the claimant to prepare reports, or by putting in place measures to assist the claimant with the typing up of reports or by seeking occupational health advice at the appeal stage.

The respondent's contentions in summary:

141. The claimant's dismissal was substantively fair, the respondent had a prima facie fair reason for dismissal by way of *redundancy*, based on diminution in the need for particular (part time) employees to carry out particular work - rather than diminution in the need for the particular work and in the alternative, if circumstances were not found within the definition of redundancy, that the dismissal had been for *some other substantial reason*, the respondent having no other option, it being a small charity, the role of part-time dog trainer not working, there being concern held over funding, its future viability at risk and the claimant not wanting to work full time. Whilst accepting that clearly things should have been done differently and that the respondent had failed to adhere to Step 1 of the Statutory Disciplinary and Dismissal Procedure in dismissing the claimant, the respondent contended the outcome would have been no different had it done so because the part time role was not working, as repeatedly noted by the Board at meetings and there were no funds to employ any additional dog trainer and likelihood the claimant would have been dismissed in any case at some point. Furthermore Mr Phillips put that the respondent was unaware of the claimant's alleged Dyslexia or that the claimant required the assistance of his wife and additional time to complete administrative tasks such as completion of reports. It was submitted that the claimant did not inform the respondent he had a disability at a relevant time and in any event had been offered and had declined a Dictaphone in February 2019 and was aware that the administrative support of Ms Montgomery was available to him, but had rarely sought to use same.

APPLYING THE LAW TO FACTS FOUND

A. Did the claimant suffer Disability Discrimination by way of a failure to make reasonable adjustment?

Was the claimant disabled within the definition of the DDA at the relevant time?

142. Whilst sworn testimony from Dr Rooney was not called, in the absence of contradictory medical evidence the tribunal accept the opinion of Dr Rooney as set out in the report obtained by the claimant in 2020 for the purpose of these proceedings, as genuine and credible. Based upon the claimant's own evidence and supported by the educational assessment carried out upon him for educational purposes in 2007 and the opinion of Dr Rooney set out in his report in 2020, together with Mrs Craig's evidence, the tribunal is satisfied on balance that at the relevant time of his dismissal, the claimant suffered from significant difficulties with his working memory and processing speed along with a specific literacy difficulty which impaired his reading and writing. The tribunal is satisfied the claimant at the relevant time was suffering from a long term mental impairment (having already lasted more than 12 months and likely to continue indefinitely) which affected his *memory or ability to concentrate, learn or understand* and which significantly impacted upon his ability to carry out normal day to day activities particularly his ability to carry out office administrative tasks. The tribunal find that the claimant at the relevant time was disabled within the definition of the DDA (the relevant condition being Dyslexia).

Was the duty to make reasonable adjustments triggered?

143. The tribunal is not persuaded that Ms Whyte was clearly informed by the claimant prior to his engagement in Spring 2018 that he had Dyslexia; accepts the submission that the claimant's actions of not taking up available typing assistance or a Dictaphone are more consistent with a person not wishing to disclose his Dyslexia; and consider that Mr Davies' evidence was in places inaccurate and overall unreliable regarding open discussion of the claimant's Dyslexia having taken place in a work van with Ms Whyte present. However, it is clear that Ms Whyte as per her quarterly meeting notes knew in January 2019, before the claimant reduced to part time working, that many dog reports required to be completed by the claimant for accreditation purposes were missing from files. Furthermore Ms Whyte confirmed to the claimant in his appeal meeting that she had had issues with administrative tasks / dog reports not being completed by him since 2018 and had suggested to him in February 2019 that use of a Dictaphone might help him keep up with administrative matters. Ms Whyte as such clearly knew by the appeal stage of an issue regarding the claimant's completion of administrative tasks from 2018. Furthermore the tribunal accept Ms McGaughey, supported by text message of 8 March 2019 asking the claimant, 'could your wife type it up quickly and email it asap', was aware of the claimant's wife helping him with typing; and is indisputable Ms McGaughey knew the claimant had said he had Dyslexia, had informed Ms Fitzpatrick of this on 4 July 2019 and that they had offered the claimant a Dictaphone, as recorded by Ms Fitzpatrick in her meeting notes. Additionally, at the appeal meeting, Ms Fitzpatrick put to the claimant the respondent had offered him a Dictaphone and that he had said he was getting support from his wife at home. Lastly Ms Fitzpatrick acknowledged in her evidence that the knowledge of the claimant's Dyslexia was highly relevant to the perceived issue of time slippage in relation to administrative duties but could not explain why this was not included in her report to the Board.
144. The tribunal is persuaded that prior to the claimant's dismissal the respondent had constructive knowledge of the claimant's disability and that it was likely to put him at a substantial disadvantage given the issues they were clearly aware of regarding his completion of administrative tasks including dog reports within required time frames and that his wife was helping him at home to attend to these.
145. The tribunal consider that:-
- The provision, criterion or practice applied by or on behalf of the respondent was a requirement to complete dog reports on the day of training within work hours.
 - The relevant comparator is a person, without the claimant's Dyslexia, subject to the same requirement to complete dog reports on the day of training, within work hours.
 - The nature and extent of the disadvantage suffered by the claimant was the increased likelihood of sanction including dismissal because the claimant's Dyslexia made it more likely that he would not be able to complete administrative tasks required of him, including dog reports on the day of training, within work hours.

146. Based on the above, the tribunal find the claimant has proven that the duty to make reasonable adjustments was triggered.

Was the duty breached?

147. Suggested reasonable adjustments pleaded and submitted for the claimant were:-

- (1) To have divided reports with another employee.

Whilst a reduction in the overall number of reports to be completed by the claimant may have prevented the substantial disadvantage caused to the claimant by the PCP, dog training reports for accreditation purposes had to be completed by the trainer who delivered the training and the tribunal is not persuaded where training was delivered by the claimant to have divided the reports equally between the claimant and another employee was accordingly a reasonable adjustment for the respondent to have made.

- (2) To have put measures in place to assist the claimant with the typing up of reports

Clearly the provision of typing assistance to the claimant could have helped the claimant to complete reports in time and prevented the substantial disadvantage caused to him by the PCP. It is accepted however that the respondent had administrative assistance available to the claimant by way of Ms Montgomery and also that Ms Whyte had proposed the use of a Dictaphone to the claimant in February 2019 but that the claimant did not seek to avail of either. The tribunal is not persuaded this was a reasonable adjustment that the respondent failed to make.

- (3) To have sought occupational health advice at the appeal stage

Mr Phillips contended that to have sought occupational advice at this stage would have been akin to taking a sledgehammer to crack a nutshell and furthermore that the claimant had not said anything in the appeal meeting which would have required him to have had some further adjustment made. We disagree with the respondent's contentions. The claimant made mention of having learning difficulties by way of Dyslexia at the outset of the appeal meeting but discussion of this thereafter was limited to debate over whether the respondent had been previously made aware of any disability. At the end of the meeting the respondent proceeded to uphold its decision to dismiss, it would seem somewhat disingenuously asserting, contrary to concessions at substantive hearing that a performance improvement plan had been considered, that they were not saying the claimant, 'wasn't capable of doing his job, it's just the hours in the day did not permit him to fulfil his job role', because he was part time working and stating the claimant had failed to provide any evidence to substantiate disability discrimination, without engaging in any consideration over whether Dyslexia was a relevant factor in the duties of the dog trainer role not being satisfactorily fulfilled within working hours and reasonable adjustments required. We consider that whilst seeking occupational health advice in itself may not have prevented the substantial disadvantage caused by the PCP it was likely have led to appropriate assessment of the claimant for disability and consequently of his workplace

needs to identify appropriate steps to minimise the challenges experienced by him resulting from his disability (potentially beyond typing assistance and a Dictaphone) and consider the step of seeking occupational health advice was a reasonable one with potential ultimately to ameliorate the substantial disadvantage caused to the claimant by the PCP. This step was not taken by the respondent.

(4) To have given the claimant extra time to prepare dog training reports.

The tribunal accept that the provision of extra time to the claimant to prepare dog training reports was a reasonable step which clearly had the potential to prevent the substantial disadvantage caused to the claimant by the PCP. This step was not taken by the respondent.

148. The tribunal find that the duty to make reasonable adjustments was breached and burden of proof has shifted to the respondent to prove that it complied with the duty but that the respondent has failed to prove that it took such steps as were reasonable in all the circumstances of the case for it to have taken in order to prevent the PCP from placing the claimant at a substantial disadvantage in comparison to those that are not disabled.

B. Was the claimant Unfairly Dismissed?

149. The respondent conceded that it failed to complete Step 1 of the SDDP in dismissing the claimant and automatically unfair. The tribunal find the standard procedure was applicable to the claimant's dismissal and its non-completion wholly attributable to the respondent's failure to comply with its requirements and claimant's dismissal accordingly automatically unfair under Article 130A (1) ERO.
150. The respondent submitted that absent procedural shortcomings the claimant's employment would in any event have been fairly terminated relying upon redundancy as its prima facie fair reason based on diminution in the need for particular (i.e. part time) employees to carry out particular work - rather than diminution in the need for the particular work and alternatively *some other substantial reason* the respondent having no other option, it being a small charity, the role of part-time dog trainer not working, there being concern held over funding, its future viability at risk, the claimant not wanting to work full time and the respondent having no funds to employ any additional dog trainer.
151. The tribunal accept in the majority submissions made for the claimant and are persuaded on balance that the respondent's real reason for the claimant's dismissal was due to concerns about inefficiency/ perceived performance related issues (from predating his reduction in working hours), rather than a genuine redundancy situation or circumstances amounting to some other substantial reason, taking account in particular of the following:
- a. The respondent's Board minutes from early February 2019 record reference to performance issues with the claimant.
 - b. The problems identified with the claimant and Board's concern of tasks not being completed in a timely manner, as accepted by Ms Whyte and Ms Fitzpatrick in their evidence, was an inefficiency problem which under the

respondent's handbook was not grounds for redundancy.

- c. Contemplation was given by the respondent to implementation of a performance improvement procedure but this was not done because it did not have *the bodies to implement it*.
- d. At the appeal meeting Ms Whyte confirmed to the claimant that she had problems with him when he was working full time in 2018, with reports/administration work and marketing not being done.
- e. Ms Fitzpatrick at the outset of her review was open to considering expanding the team.
- f. Ms Fitzpatrick identified confusion as to job roles and lack of coordination as reasons for the perceived problems with the claimant.
- g. No designation of duties or work systems to be used upon the claimant's reduction in working hours was agreed by Ms McGaughey as project coordinator under the respondent's flexible working provisions in its staff handbook.
- h. The same job as the claimant had held was re-advertised following the claimant's dismissal, as accepted by Ms McGaughey.
- i. The work for which the claimant had been employed did not change diminish or cease.
- j. The respondent's contention that the claimant had been aware from as far back as January 2019, of the risk of his part-time role being made redundant conflicts with Ms Fitzpatrick's evidence that by the 4 July 2019 meeting the redundancy process had not begun as all options were on the table and she *'didn't dismiss the possibility more bodies were needed.'*
- k. The invitation to the meeting held on 4 July 2019 sought discussion only of, 'time slippage, home visits and our ability to meet our sustainability targets', and the claimant was not afforded any opportunity to be accompanied to it. The claimant clearly did not understand the 4 July 2019 meeting to be part of any redundancy process and tribunal accept advance notification of any intended redundancy process was certainly not apparent from the invitation letter sent.
- l. Following meetings on 4 July Ms Fitzpatrick identified a problem with co-ordination of the role; at the meeting on 5 July 2019 the Board agreed with the suggestion made by the claimant of a full time role with helper to address inefficiency; the respondent's Board however then proceeded on 5 July 2019 to make the claimant redundant without notice and with no time taken to address perceived problems. Ms Fitzpatrick agreed in her evidence that the claimant's suggestion at appeal of a one month period to address perceived problems was not unreasonable.
- m. At whatever stage the respondent identified redundancy as a potential reason for dismissal of the claimant, it did not notify the claimant clearly in

advance of the commencement of a redundancy consultation process, or enter into genuine meaningful consultation with him to try to avoid or mitigate against the effect of same, or give genuine consideration to alternative employment having only put to the claimant on 8 July 2019 that he could seek to *apply* for the new job with no guarantee of success, as was acknowledged in evidence by Ms Fitzpatrick.

- n. The new full time position was advertised on 10 July 2019 before completion of the appeal process.
- o. No evidence was provided by the respondent in support of assertions of tasks not being met/ risk to respondent/ targets being missed / risk of coming to a standstill.
- p. The respondent's Board minutes from 19 June 2019 support that the respondent had already decided prior to the review process carried out by Ms Fitzpatrick that the claimant's part time position was not working and the redundancy process following it 'a sham'.
- q. No form of formal performance review was instituted by the respondent in relation to perceived concerns regarding the claimant's performance, notes of quarterly discussions recorded by Ms Whyte were not shared and agreed with the claimant and as conceded by Ms Whyte in her evidence the respondent did not have the people available to implement a performance improvement plan.
- r. It is accepted that the performance issues identified under the respondent's handbook were at most matters of minor misconduct and not a basis for dismissal had the SDDP been completed.

152. The tribunal is not persuaded the respondent has shown a genuine prima facie fair reason by way of redundancy or some other substantial reason such that absent procedural shortcomings in failing to complete the SDDP the claimant's dismissal may potentially otherwise have been ordinarily fair.

C. What remedy is appropriate?

Finding of fact and conclusions relevant only to remedy

- 153. The claimant sought compensation only by way of remedy.
- 154. At the effective date of termination (EDT) on 8 July 2019 the claimant was 51 years of age and had 2 complete years of continuous employment, weekly pay was approximately £222.34 gross being £210.89 net and pension benefits approximately £36.12 net per week.
- 155. The claimant had one week's notice entitlement on termination of his employment. The respondent thereafter made a payment to the claimant approximately two and a half weeks pay. The claimant's income following his dismissal consisted of his medical pension, war pension and child tax credit, he was ineligible for unemployment benefits. The claimant received an increase of child tax credit of £180 per month for the 22 months since EDT (being £41.54 approximately per

week).

156. The claimant considers dog training to be his area of expertise and it difficult to find suitable employment because of his Dyslexia and (unspecified) injuries. No evidence as to the claimant's injuries was presented. The claimant did not apply for any job following his dismissal until 26 November 2019 when he applied for a volunteer position with Dogs Aid for which he was subsequently accepted but unable to start following the onset of the Covid 19 pandemic in 2020. The claimant has not applied for any other employment since his dismissal.
157. The claimant was certified as not fit for work (for social security or SSP) on 8 August 2019 for 56 days (to 3 October 2019) because of depression. Statutory Sick Pay only was payable to eligible employees absent due to sickness under the claimant's contract of employment. No medical evidence was presented as to the cause of the claimant's depression; in support of the claimant's injury to feelings; or in relation to matters impacting upon his ability to seek alternative work.
158. The claimant's evidence is accepted that he suffered depression and low self-esteem following his dismissal. The claimant considered these to have been triggered by his dismissal. We accept on balance that the claimant's dismissal most likely contributed to the depression he suffered for which the claimant was certified as unfit to work for 56 days.
159. The respondent continues to employ a full time dog trainer.
160. Mr Sharkey at the close of the hearing requested re-imbusement for the claimant of £400 for Dr Rooney's report. This appears to be an expense incurred whilst the claimant was legally represented and properly a matter for a costs order which may only be made where the paying party has had a reasonable opportunity to make representations in response. If the claimant wishes to pursue a costs application the application should be confirmed within 28 days (per Rule 74 of the Rules of Procedure 2020) so the paying party's written representations may be provided and costs hearing fixed if necessary.
161. The tribunal consider it appropriate to award compensation on the basis of discrimination and it just and equitable to award compensation by way of remedy. In assessing the claimant's actual loss attributable to the dismissal the tribunal has to consider what sums the claimant would have received had the unlawful act not occurred, this is not an exact exercise and tribunal has adopted a broad brush approach.
162. The respondent contended absent procedural shortcomings the likelihood was that the claimant would still have been dismissed at some point because the part time role was not working, as repeatedly noted by the Board at meetings, and there were no funds to employ any additional dog trainer and accordingly a Polkey reduction of any compensatory award appropriate to reflect this.
163. The tribunal based upon the same matters as referred to in paragraph 151 is not persuaded on the evidence presented that if a fair procedure had been followed that the claimant's employment would likely in any event have ended but consider the evidence presented in support of this so scant that it can effectively be ignored. The tribunal consider a fair procedure would have allowed the claimant opportunity to

seek to address matters of perceived inefficiency, led to appropriate assessment of the claimant for disability and of his workplace needs to identify appropriate steps to minimise challenges experienced resulting from his disability and opportunity for potential funding routes to be explored. We consider the claimant's employment absent unfairness would have otherwise continued indefinitely, beyond the fixed term end date provided, given that the dog trainer role continues to exist and are not persuaded that it is just and equitable to make a Polkey reduction in the circumstances.

164. The claimant sought lost income for the 22 months to substantive hearing and 12 months future loss thereafter. Mr Phillips contended the claimant had unreasonably failed to mitigate his loss by choosing not to seek any paid employment. The tribunal accept on balance the claimant was unfit for work for a 56 day period due to an episode of depression triggered by his dismissal so would not be appropriate to make any reduction or to treat his loss as only SSP relating to this period. The claimant thereafter was only prepared to consider a role in dog training/ position close to home. The claimant in the 22 months following his dismissal up to substantive hearing did not make any paid job application, in particular in the period following 3 October 2019, after which time he applied for only one voluntary post with Dog Aid on 26 November 2019. No evidence as to injuries potentially restricting the type of work the claimant could seek was before the tribunal. Whilst an employee should not be expected to lower their sights immediately the tribunal consider that the claimant in choosing not to seek any paid work whatsoever following his dismissal ultimately severed the causal link with continuing loss arising from his original dismissal. We consider that on making reasonable efforts in mitigation to secure alternative paid work albeit perhaps within a different sector/ further from home, the claimant should have been able to secure other work at a similar rate of pay as a mid-point of probabilities within a further 5 months (that is within a total eight months from his dismissal and prior to the onset of the Covid 19 pandemic), that the claimant unreasonably failed to mitigate his loss, is not just and equitable to continue to hold the respondent responsible for continuing income loss and appropriate that the causal link for continuing loss from the claimant's dismissal be treated as severed from this point.
165. Applying a broad brush approach the tribunal overall assess the claimant's loss at 34 week's net wages and pension credit less increase in Working Tax Credit (£210.89 + £36.12 - £41.54= £205.47 per week) **Less** ex gratia payment/ notice pay received of approximately 2 ½ weeks wages.
166. Mr Sharkey invited the tribunal to consider a 50% uplift for the respondent's failure to comply with the statutory dismissal procedure and LRA Code of Practice. The tribunal is not persuaded of facts and circumstances upon which it is appropriate to exercise its discretion to increase the statutory uplift from 10% to the maximum of 50%, but consider an increase to 20% appropriate in the circumstances of the respondent's complete absence of endeavour to complete Step 1 of the standard SDDP under the 2003 Order.
168. No medical evidence was presented in support of injury to feelings suffered by the claimant beyond the statement of fitness for work dated certifying him as unfit for work for 56 days due to depression and which on balance the tribunal accept was connected with the respondent's handling of his disability and his dismissal and claimant's evidence is accepted that his dismissal triggered this depression and

feelings of low self-esteem. It is noted the claimant was able to apply for a voluntary post in November 2019 which he secured but was unable to start due to the pandemic. Based on the limited evidence before us we consider that the claimant's injury to feelings falls at the lower end of the lower band of **Vento** and an appropriate amount of compensation is £1,200.00.

169. The tribunal is obliged to consider making an award of interest. There is no evidence before the tribunal amounting to exceptional circumstances such that serious injustice would be caused if an award of interest were made. Accordingly the tribunal accedes to the claimant's request that interest be awarded.

170. Accordingly the tribunal awards as follows:-

(A) Compensatory award

(1) Loss of statutory rights	£ 500.00
(2) Financial Loss, say 34 weeks @ (£210.89 (pay) + £36.12(pension) – £41.54 (WTC))	
Less Ex-gratia payment/ notice pay of approx. 2.5 week's pay	
I.e. approximately 31.5 weeks @ £205.47=	<u>£6,472.30</u>
	£6,972.31
 (3) Statutory uplift for failure to comply with SDDP 20% of £ 6,972.31	 <u>£1,394.46</u>
	£8,366.77

(B) Interest on compensation (other than injury to feelings) from mid-point date to calculation date:

Say 60 weeks @ 8% p.a.: £ 772.31

(C) Injury to feelings compensation: £1,200.00

(D) Interest on injury to feelings award from date of discrimination to date of calculation:

Say 120 weeks @ 8% p.a.: £ 221.54

Total discrimination compensation £10,560.62

(E) Unfair Dismissal Basic award:

4 week's gross pay (@£222.34) under Article 154 1A ERO

4 x £222.34= £889.36

Total Compensation awarded: £11,449.98

CONCLUSION

171. The unanimous decision of the tribunal is that the claimant was automatically unfairly dismissed for failure to comply with statutory dismissal procedures and respondent failed in its duty to make reasonable adjustments pursuant to the DDA. The respondent shall pay the claimant compensation of **£11,449.98** in respect thereof. The respondent failed in breach of contract to pay the claimant 9 days holiday pay accrued due to him on termination of his employment and shall pay the claimant **£800.42** gross in respect thereof. The claimant's complaints of Failure to Consult (Trade Union) on Redundancy or Relevant Transfer and Breach of Contract were not made out and are dismissed.
172. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Dates and place of hearing: 7-11 June 2021, Belfast.

Date decision recorded in register and issued to parties: