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EMPLOYMENT TRIBUNALS

Claimant: Mr C Atkinson

Respondent: Financial Conduct Authority

Heard at: East London Hearing Centre

On: 8 – 12 & 15 – 18 January 2018
(17 and 18 January Tribunal only)

Before: Employment Judge Prichard (sitting alone)

Representation

Claimant: In Person

Respondent: Mr O Holloway (counsel)
Ms C Roughton (solicitor, Eversheds Sutherland Solicitors, London EC2)

RESERVED JUDGMENT

It is the judgment of the Employment Tribunal that the claimant was fairly dismissed. His claim of unfair dismissal under section 94 of the Employment Rights Act 1996 is dismissed.

REASONS

1. Mr Colin Atkinson, the claimant, is 57 years old. He worked for the Financial Services Authority (“FSA”) in London, which later became the Financial Conduct Authority (“FCA”), for 5 complete years from April 2011 to 19 August 2016. He was dismissed with 3 months’ pay in lieu of notice under contract, for reasons, as the tribunal finds, of his underperformance.

2. These were reasons under section 98(2)(a) of the Employment Rights Act 1996 -

reasons relating to the “capability...of the employee for performing work of the kind which he was employed by the [respondent] to do”. Capability is defined as meaning an employee’s “capability assessed by reference to skill, aptitude, health or any other physical or mental quality”.

3. This claim was referred to ACAS for early conciliation on 27 September and was presented to the tribunal on 4 December. Originally it was for unfair dismissal, automatically unfair dismissal for assertion of a statutory right, and disability discrimination relating to the claimant’s dyslexia. Subsequently the automatically unfair dismissal was withdrawn and not pursued.

4. The disability discrimination claim was effectively dismissed when, by a judgment of Judge Russell on 26 June 2017, she found that the claimant was not a disabled person for the purposes of section 6 of the Equality Act 2010.

5. Notwithstanding the dismissal of the disability discrimination case, the tribunal has had to consider a considerable amount of evidence relating to dyslexia - dyslexia specialist reports and workplace adjustments made - to make a full and informed assessment of the fairness of the ultimate dismissal under section 98(4) of the Employment Rights Act 1996.

6. Prior to joining the respondent, the claimant had worked for various banks and fund managers in Switzerland, London, and Edinburgh in roles related to credit analysis and credit risk control. He lives in Edinburgh and used to weekly commute to the FSA / FCA. Latterly, under an informal arrangement, he worked for 1 day per week in the Edinburgh office of the FCA, being allowed to leave London early on a Thursday on the understanding that he would undertake written work on the 4½ hour train journey.

7. When working in the FSA, he continued in the credit risk specialism within the prudential policy division until the FSA disbanded around February 2013 and split into the prudential side and the FCA, as it is now called. That started on 1 April 2013. That date was known as the LCO, (or legal cut-over - “LCO”), from the one larger dual organisation to the specialist conduct authority (FCA), which split from the Prudential Regulation Authority (“PRA”). The PRA is in fact part of the Bank of England, whereas the FCA is a separate public regulatory body.

8. It might seem intuitively surprising that the claimant should then opt to change his specialism from the prudential side to go to the supervisory conduct work of the FCA. The claimant’s main rationale for this was that in the FCA he was ultimately more likely to find a permanent job in Edinburgh where he lived and wished to continue living. The PRA has no presence in Scotland.

9. When the claimant transferred to the FCA, there was a slight adjustment in grade in order to transfer at an equivalent level. He had been working as an associate C level. This translated to the grade which would be one above that in the FCA - associate C1 level. His salary and terms remained unchanged, and he had continuity of employment.

10. The claimant states, (and there is no reason to doubt this), that early on he himself realised he was not a good fit in the FCA. However, there has been no dispute

that the claimant made a free and informed choice to make this move.

11. The claimant referred the tribunal to emails from a German colleague in the Bundesbank (German equivalent of Bank of England) with whom he had worked when he had been with the Bank of England with the FSA. This colleague expressed appreciation for the quality of his work there saying how much he would be missed. The claimant in this tribunal relied on this as evidence of his skills. In a capability case that is understandable. However it related to a specialism which is different from that involved in these tribunal proceedings for this dismissal.

12. Joining the FCA the claimant joined the wholesale banking division. Choosing between the sector team and the thematic team, he chose to be allocated to the thematic team. Within the sector team, conduct supervisors are allocated to particular firms or groups of firms (larger groups of the smaller firms). The thematic team deals with certain types of financial instrument. The nature of the work is to collect data, analyse the data, and to provide a report from a supervisory/regulatory point of view. The first such financial instrument type he was assigned to was the structured notes/structured products.

13. The claimant's manager was Duncan Sloan, someone who had been at the FSA/FCA for over 14 years from when he was a graduate. He was the manager responsible for implementing effective supervision project for the banking sector. A manager is at grade D. For some time before LCO, Mr Sloan had been in the conduct supervision side of the FSA, i.e. the side which became the FCA, unlike the claimant.

14. Mr Sloan's manager in turn was David Blunt, who was the acting head of the wholesale banks and investment firms department. He in turn reported to Will Amos, who was the director of the wholesale banking and investment management division from 2014.

15. As early as July 2013, Mr Sloan emailed a memo to himself about some major issues that arose with the claimant. The claimant had applied for a technical specialist role, which is at grade D1. Technical specialist is two grades above where the claimant was working at grade C1. He was hoping to get promotion. Apparently he had also applied for a manager's role, the same grade as Mr Sloan's - grade D. That surprised Mr Sloan, given that the claimant was new to this kind of work and had only recently joined the FCA. However, Mr Sloan did not show his surprise and continued to be highly supportive to the claimant (as I find). The claimant wanted to position himself well in London so he would be more easily transferable to Edinburgh.

16. Mr Sloan was also concerned that working from home was going to become more of an issue in the future. The FCA's policy was tightening up, and it appeared to him that the claimant enjoyed relatively generous concessions because of his Edinburgh residence.

17. The background to this is that the claimant's financial situation was difficult. He is divorced and has to make maintenance payments which he describes as extortionate. His weekly train commute between Edinburgh and London during the week was complex and expensive. He bought his tickets 12 weeks in advance (these are discounted advance tickets), again, for financial reasons. This meant that there was no

flexibility in the system. However Mr Sloan continued to allow it.

18. Mr Sloan now required the claimant not to be working in Edinburgh on the Friday but to book his tickets so he would travel up to London on Monday and go back on Friday afternoon earlier. He would not have to catch the 5pm KGX train which might get him back home at approximately 10pm. This was all in July 2013 after only 4 months into the claimant's engagement in his new FCA department.

19. Mr Sloan stated that, provisionally, based on limited time to assess the claimant, he would grade him as a 2 on the appraisal grading system, i.e. that he met the FCA expectations but no more than that. He was also recommending that the claimant "stay in grade" (i.e. not ready for promotion). Even though Mr Sloan had marked the claimant as to stay in role, it only had informal status and it did not stop him from supporting and encouraging the claimant in his efforts to interview for other roles 1 and even 2 grades above that at which he was currently working.

20. Although this was at the 4 month point, from 1 April the claimant had not coincided in the office with Mr Sloan much by reason of absences of both individuals, on leave, etc. This was all in a memo of Mr Sloan in the form of an email sent to himself on 31 July 2013, following a meeting with the claimant. He states at the start of it: "There are 3 things I believe would merit recording with more formality than usual – other more work related things were discussed as well". Mr David Blunt also was concerned by the claimant's own concerns and apparent restlessness, as is evident from his emails around that time.

21. Already by September 2013 both managers were having misgivings about the claimant's written work and his inability to be succinct, in talking and in writing. Slowly, the managers started to introduce support for the claimant to address his perceived difficulties with written work. By November 2013 they had assigned Alexis Lamberton as additional help on the structured notes report for the Divisional Supervision Risk Committee ("DSRC").

22. By the end of November the claimant sent around a guide called "Approach to Supervision – Reference Guide". Both the managers were worried that he had taken it upon himself to email this to the whole division without consulting either of them and whilst it was not wrong or misleading, it was unnecessary. As the work of the department was in the process of development, it would have seemed premature to be sending some codifying guide on their activities in this way.

23. The respondent operates an appraisal system whereby there is a full appraisal once a year. A round of appraisals is 2 months and starts in January of the year and ends in March. All grades are moderated to achieve some sort of benchmarking of standards. As a result of appraisals pay awards and promotions can be awarded.

24. There is also an interim review in September of each year which is less formal. In the claimant's case this took place on 25 September. At that meeting the claimant mentioned for the first time that he had dyslexia.

25. Coincidentally, Duncan Sloan was diagnosed with dyslexia as a child and had several adjustments made for him during his schooling and onwards from which he

benefited. The claimant was identified as having dyslexia later in life. It has been a factor in this case which certainly influenced the tribunal that Mr Sloan, whose own spelling is erratic, was not about to mark the claimant down for prose style or spelling.

26. When dyslexia was mentioned at that meeting Mr Sloan said that they could pair the claimant up with one of the graduates to help to cast a second pair of eyes over his written reports. This was how Alexis Lamberton came to help the claimant.

27. Shortly afterwards, Mr Sloan had to emphasise to the claimant that, in this department, there was a major focus on written work. Will Amos, the director, was particularly keen on quality reporting, which is hardly surprising as the respondent is a public authority. These reports get wide readership in the banking sector.

28. At the review, the claimant was also keen to talk about his hopes to move to Scotland but Mr Sloan firmly said that this was a London-based team. In the back of his mind, Mr Sloan was also aware that if the claimant was based in Scotland but travelled down to London to work, his travel costs would become an expense for the business which would be against policy, if the reality was that the claimant was doing a London-based job. Contractually, the claimant had always been London-based with the FSA and the FCA.

29. On 10 December David Blunt clearly had a detailed conversation with the claimant, upon which he reported to Duncan Sloan the following day by email. He says that the claimant had raised 3 areas of concern - Edinburgh, the technical specialist application, and money. He had also described himself as feeling "under stress". Mr Blunt had told the claimant he did not see that a job in Edinburgh was viable and repeated that it looked as if he was doing a London role. Most of the visits to firms were to firms in or near London, many of whom were within walking distance of the FCA in Canary Wharf.

30. The claimant described himself to Mr Blunt as "under stress", oddly, particularly because of the technical specialist role he had applied for. He referred to a 3-way meeting between Mr Sloan and Will Amos, which had confirmed to the claimant that he was performing poorly and that Mr Sloan had had to step in to help. The claimant had said to Mr Blunt that he did not know who was going to be progressed to the next round of the technical specialist recruitment. Mr Blunt had informed the claimant that even if he did succeed in getting the technical specialist role he might not get a pay rise. His £70,000 per annum sat above the normal pay range for a technical specialist D1.

31. Mr Blunt did not miss the "stress" point and emphasised that perhaps occupational health should become involved. Mr Sloan followed up. Mr Sloan confirmed that he had tried to keep the claimant's hours down. They had been using Alexis Lamberton but they were stretching the budget. The claimant had also been offered the help of Sarah Foster, who was a secondee from JP Morgan. He was also relieved of some non-essential training days to help him to work sensible hours.

32. Mr Sloan updated the claimant on the technical specialist progress. The claimant had told Mr Sloan he had been applying for Scottish roles for no less than 2 years. Mr Sloan reiterated to him it always was going to be that way because the PRA was part

of the Bank of England it had no presence in Edinburgh.

33. Subsequently, Mr Sloan had a two-way meeting with the claimant for about 30 minutes on 17 December, specifically talking about the claimant's stress and how his workload could be made more manageable. Mr Sloan offered him the services of the employee assistance programme ("EAP") and occupational health referrals.

34. It was at this meeting that Mr Sloan told the claimant that he would not be put forward for the next round of the technical specialist recruitment on his team. That was because of his performance, having been moderated with other candidates. He gave him feedback from his assessment centre session and told him about a course that he himself had gone on for dyslexia. He suggested the claimant could go on such a course himself. Throughout the technical specialist recruitment round Mr Sloan had already consistently warned the claimant that the competition was going to be tough.

35. In early January 2014, Mr Sloan managed to book the claimant onto a specialist dyslexia assessment via occupational health. The specialist service is Lexxic.

36. Around the beginning of the year too the claimant was given his objectives for the year ahead, 2013/2014. His principal duties were to be the thematic projects. One of the ways of achieving his goals was teamworking with other supervisors and other thematic teams and the sector team and other parts of the FCA. This became an issue in the months that followed. The most important part of it in terms of duties, was: "Manipulate, analyse and present the data and information in a logical manner, drawing out the key risks and trends and present these in a clear and logical manner". Part of the technique for this is the drafting of coloured "heat maps/risk maps". They are a coloured diagrammatic risk presentation. The claimant's turned out to be inaccurate.

37. Around the beginning of January Mr Sloan started to receive quite strongly adverse comments about the claimant. These were going to be fed into the appraisal. In particular, he asked Thomas Leyhane for his comments on how he found the claimant to work with. Comments were initially quite favourable, describing his project management of the structured notes project as good. They said he had handled himself well on visits to firms including one particularly challenging firm. But Mr Leyhane mixed this with criticism of the claimant's technique and how his questioning of firms had too much duplication and therefore took too long. He said:

"...he also tended to get bogged down, in my view unnecessarily, on the compliance section when the key issues arise in the strategy and business. For example, he would hone in on the minutiae of the new product approval process when...probably 90-95% of the volume of notes traded are existing pre-approved structures, using up time whilst not really hitting the main issues.

I also personally think that some of the recommendation being made to DSRC are too watered down and miss the point, but that may be a team decision and not solely Colin's. ..."

38. Later, Mr Leyhane added a comment about the claimant's personal liaison with him as follows:

"A long period went by (the period from the data request up until the start of the on-sites) without any interaction whatsoever, including the shaping of the second and third DSRC papers. In that respect, it was a little surprising not to be involved in scoping phase 2 or the recommendations

being made.

I still think the paper being presented to DSRC misses the fundamental points.”

39. It was on the same day that the claimant had an appraisal meeting with Mr Sloan. Mr Sloan made a general point to the tribunal which the tribunal agrees with, that the claimant seemed to be soliciting testimony of support from colleagues he had worked with. Some of these provided testimonials directly to the claimant.

40. In the nature of it, that feedback was not necessarily going to be fully independent and frank. People are often reluctant to be overcritical, person to person. However, it must be added there was some highly favourable feedback from Saleem Wadee and Rachele James.

41. The claimant was assessed by Lexxic. Overall he was assessed as having dyslexia which was “mild in severity”. There are several different aspects to dyslexia and his verbal and non-verbal reasoning were in the high-average range, his processing of routine visual material without errors was in the very superior range compared to his peers but he showed mild difficulty with phonological processing - the decoding of sounds in words that were unfamiliar and complex. It stated:

“It is important to recognise that, in comparison to his peers, Colin has high average cognitive processing capabilities in verbal comprehension and perceptual reasoning. Colin also has very superior cognitive processing capabilities in processing speed (visual short-term memory) in comparison to his peers.”

42. Nonetheless Lexxic made a variety of recommendations on computer settings and the use of coloured backgrounds, sans serif font (Arial or Tahoma), and line spacing of 1.5, and 12pt font. They also recommended giving the claimant 25% extra time when completing exams and timed training. The report was signed by a qualified specialist occupational psychologist.

43. This was followed up by a workplace adjustment agreement completed by Rebecca Lambourne from AbilityNet for which authority was duly given. It was a long list in the end. Many computer software packages were installed: Myscribe, Livescribe and MindView. There were Crossbow reading rulers in two colours (celery and aqua), coloured overlays (aqua and celery). There was a training session for the software in addition to provision of internal resource for proofreading and writing reports for the claimant.

44. In the tribunal’s view this was an impressively thorough and prompt reaction to the request for workplace adjustments. Had this been a disability discrimination tribunal claim, I would have said the same thing about reasonable adjustments. Mr Sloan got very directly involved in all this personally and did not delegate it. That is clear from the email threads.

45. The Lexxic report diagnosing the claimant with as well as his high averages in other areas was one of the principal reasons why Judge Russell found that the claimant’s dyslexia, whilst it may have been long term, did not have a sufficiently “substantial” effect on his ability to carry out normal day-to-day activities.

46. There was other critical feedback about the claimant's work. Will Amos by email of 30 December to Mr Sloan and the claimant and other members of the team including David Blunt, commented on the claimant's DSRC summary, that "My main point is that we need to be clearer on the actions we are proposing and the findings. I struggled in places to follow exactly what we had found and what we wanted to do, and why". Significant changes were then made by others including, particularly, Mr Sloan.

47. The annual appraisal process was now in course. Mr Sloan struck the tribunal as careful and discerning with the feedback he obtained from others. He also bore in mind that the claimant was a lead associate at grade C1 and much of the positive feedback was no less than you would expect for someone working averagely in that grade.

48. It appears that Rachele James' direct feedback to the claimant, for instance, was probably drafted twice and the claimant may well have had some input into it, which is not what feedback should be. When Mr Sloan requested feedback he asked for it to be sent direct to himself as the appraiser.

49. On 18 March 2014 Mr Sloan emailed the appraisal comments which were then work-in-progress. He was quick to acknowledge and commend positive feedback. However, taking into account the claimant's seniority, and particularly the Thomas Leyhane feedback, he awarded the claimant a low 2 grade. The claimant was given no bonus and no pay rise as a result of this. The grade had been fully moderated with the rest of the claimant's cohort. Mr Sloan considered he needed to give the claimant some benefit of the doubt and not give a 1. That was because the reasonable adjustments were in hand but had not been fully implemented. So the claimant was judged to be "meets standards" rather than "does not meet standards", or "exceeds standards".

50. At the end of May 2014, there was an important email sent to everyone in wholesale and investment banking about aspirations and expectations for the year ahead. It emphasised team work, general excellence and under a heading of "Helping you to develop your career" was in fact what reads like an increased emphasis on performance management. That is relevant to the themes I have been hearing about at this hearing.

"So, we are committing today to focus on talent, management and performance. We will:

- Increase the frequency of feedback based on performance – through quarterly talent management reviews followed by provision of feedback to every staff member of the Division within 10 working days
- Give open, honest and transparent views on where each of you are rated against expectations
- Be more transparent about why promotions and other opportunities are given to certain individuals
- Actively pursue with you at an individual level all career development opportunities
- Increase the rigour and robustness of ensuring improvements where our performance has dropped."

51. Mr Sloan's anxiety about the claimant's performance did not improve. Six

months later he had a discussion with the claimant on 14 November. The meeting was obviously difficult and that weekend, on a Sunday evening, he emailed his then manager, Julia Hoggett, Director of Market Oversight. He stated:

“At Colin’s request, we had a discussion on Friday afternoon about some of the development points I have given him – these are around clarity of thinking, the importance of making judgements based on evidence, presentation skills and the importance of pitching our written work appropriately for the audience.

Colin is clear on these points but disagrees with them and does not believe these are areas which he needs to develop in.

During our discussion Colin mentioned that:

- Stress levels are near breaking point
- His confidence is at rock bottom
- He is lacking in motivation which is why he is happy to let me take over on visits
- He feels I am too negative on his performance
- His health is quite bad at the moment and getting worse
- He believes I am overseeing him too closely and micro-managing him

I asked if there was anything I could do to assist him manage the stress and Colin said he did not believe there was.

I have been focusing closely on his performance over the past few months in particular and giving a lot of feedback; I have also been trying to give a high amount of oversight to his work and the project. I have also tried to engage him on the Scotland issue but he won’t discuss an alternative arrangement – he believes this would cause him too much stress.

The health/stress concerns Colin raised are new and he has not raised them with me before. My plan is to make an occupational health referral given the stress/health comments. As we discussed before you went to the US, I will also fix up a discussion for you and me with HR.”

52. On a Sunday evening, Ms Hoggett replied within minutes, “Let’s discuss, perhaps we could meet for breakfast before the off-site to think about it and then meet Karen Bickerstaff to discuss [HR]”. Ms Hoggett realised the seriousness and the urgency of Mr Sloan’s situation with the claimant.

53. On 12 December Mr Sloan sent the claimant a draft of his referral to occupational health with which the claimant said he was happy.

54. Over this time, and as a direct result of the claimant complaining of being micromanaged, a plan developed for the line management of the claimant to be transferred to another manager, Mr Ted MacDonald, who would now be his natural report. Mr MacDonald is a Canadian technical specialist with a laid-back person-management style. The claimant has used the word “chemistry” at this hearing in criticising his relationship with Mr Sloan and there is no doubt that the “chemistry” improved when Mr MacDonald took over.

55. There was a gradual transition from December 2014 until Mr McDonald fully took over officially on 1 May 2015, but between those times the appraisal had to be done and Mr Sloan was still in charge of that.

56. On 14 January 2015 the claimant was seen by occupational health. A more

graphic description emerged about the claimant's perception of Mr Sloan's management of him from the referral.

"[Colin] ... feels 'bombarded' with negative comments during 1-2-1's and he feels he is not heard and often gets spoken over in meetings. ...

Colin also informs me that he commutes from Edinburgh to London on a weekly basis and he is finding this stressful and a financial burden. This is a decision making process for Colin rather than the FCA, but as Colin refers to it as one of his main stressors I feel I should include it in the report as it is relevant to Colin's condition.

Currently Colin is not receiving any medical treatment. I would suggest that Colin's above symptoms will not improve until Colin's perception of the current issues/situation changes."

57. The occupational health advisor recommended:

- In my opinion Colin is medically fit to work.
- I would suggest that until Colin's personal circumstance change and his work concerns are resolved the current stress levels will not reduce. ...
- Please undertake a stress risk assessment detailing the various aspects of Colin's role and any perceived issues with regards to Colin delivering his normal duties of his role. "

And further:

"1) Is the ill health work related?

...The personal issues are that Colin commutes from Edinburgh to London on a weekly basis and he is finding this stressful and a financial burden, there is a decision here that only Colin can make. The work issues in Colin's perception [sic] are that he feels bombarded with negative comments during 1-2-1's and he feels he is not heard and often gets spoken over in meetings. There are also issues around Colin's dyslexia during the interview process."

58. Having had a longer time to assess the claimant's continuing performance and, in view of the fact that all reasonable adjustments had been put into place, Mr Sloan was concerned and considered that the claimant did not look as though he was carrying out the role of a C1 lead associate.

59. In December 2014 Mr Sloan considered it was likely that the claimant would receive a 1 in his next appraisal in March and therefore he was the first to consider a performance improvement plan under the FCA performance management procedure.

60. In outline, the steps under the policy procedure are that there is a performance improvement plan ("PIP"), the first of which is "informal". If that resolves the performance issues, it stops there. If it does not, consideration will be given to a first written warning. If performance improves after that, the matter would end there, but if not, following the imposition of a warning, a further performance improvement plan would be initiated. If performance does not improve on PIP 2, a written warning would be issued and a further PIP3 would follow. If performance does not improve, that could lead to dismissal for underperformance, after PIP 3. There are rights of appeal against the first, and final written warnings and against dismissal under this procedure.

61. In the end, the claimant was to go through every step of that procedure. It was also unfortunate that, at the same time, Mr Sloan felt the need to tackle the travel arrangement to and from Edinburgh because the claimant was spending a large amount of his working week travelling during core work time. Working from home is one thing because one is contactable online and by telephone and one is in a confidential setting. That is unlike a train.

62. The claimant raised that there was another individual in a department who commuted from Paris, but Mr Sloan considered that that was a distinguishable situation as that individual was not constrained by the same advance ticket restrictions the claimant's arrangement came with. He was able to change his plans at short notice at his own expense to go back on a different Eurostar. He also had a formal statutory "flexible working arrangement" with the respondent (unlike the claimant). In the end, Mr Sloan did agree to 1 day's working in the Edinburgh office for the claimant but that he would have to attend London for 4 full days per week.

63. Despite being invited, the claimant never made a formal statutory flexible working request.

64. As the appraisal continued, Mr Sloan sought feedback on the continuing structured notes project from those the claimant had worked with. There was some claimant-solicited feedback from Carlos Molinas, who co-managed a new project, the benchmark project, which the claimant was transitioning to. Mr Molinas was, as you would expect, complimentary. The only criticism he made openly to the claimant was:

"In terms of things to improve I would like to focus on your questions. They are usually driven by an organised sequence of questions but sometimes the answers from the firm raise interesting points that are off the planned track but begging to be developed with subsequent questions. I would suggest you to listen to those answers and do not hesitate to change your tack and get "off piste" as they say around here. [Mr Molinas was away skiing at the time he sent this on 3 January 2015.]"

65. Towards the end of 2014 the claimant had been given additional support from an individual known at this hearing as "Buddy 1". He was seconded to the team and helped the claimant with writing reports. As it turned out, the relationship between him and the claimant did not work out at all well.

66. With the next year coming, Mr Sloan consulted with Julia Hoggett about possibly starting the claimant on a performance improvement plan. Once again he identified the 3 points that he had previously identified, being:

- 66.1. "Colin needs to express himself much more clearly in his communications and structure clear, logical arguments to support the points he is making".
- 66.2. "Backing up views/statements with clear evidence. At times Colin can make broad statements which, when probed, are not backed up by any detail of evidence – he needs to have a sound basis to support judgements he is making (this is very much linked to the point above)."
- 66.3. "Delivery/Drive: Colin needs to demonstrate much more drive and ownership of his work and deliver an end product. At present he needs much too much oversight of the quality of his work and chasing to get things done."

67. Ms Hoggett broadly agreed with his points and in the same exchange also discussed the vexed Edinburgh/London problem which never really went away. It remained a constant source of tension between the claimant and management. (She was not unsympathetic as she lived in Dublin).

68. Ted MacDonald, the claimant's future line manager, provided some feedback. Therefore this would have been input into the appraisal, for instance:

"Team Skills

Good working relationship with immediate team members.
Impatience clearly shows on occasion so need to manage this.
Can be too readily dismissive of difficult peers."

Under "Career Points and Professionalism":

"I understand your career aspirations are somewhat thwarted. Nevertheless, I would make sure that you deliver 100% while in your current role and not let your disaffection show so obviously."

69. This was direct feedback to the claimant himself, not direct to Duncan Sloan.

70. David Mazzone, also from the benchmark project, was quite critical:

"Regarding the development points, I noticed that sometimes during our internal meetings you dismissed some observations from other team members which could have been relevant to the discussion. I am sure that you did it because of the restricted amount of time we have but it may be a point you may want to consider."

That was feedback solicited by the claimant.

71. The unsolicited feedback was considerably less favourable. It came from the structured notes project from Mr Paul Hearn, who was an advisor to the FCA and helped coordinate the structured notes project. It was sent directly to Mr Sloan:

"On the plus side, there now is a vaguely workable draft. Much needs doing but he has produced a very important base document which others can now shoot at. While, as I say, it is far from perfect, someone always has to do the hard bit of getting the first draft done.

On the negative side, I doubt this would have happened without significant input from Ted and on occasions some cajoling and assistance from me. Colin seems to find it difficult to see the wood for the trees and can get bogged down in detail. He finds it hard to set a framework (Ted played a key role here) and also to get down to actual doing. He also has a slight tendency to say how difficult everything is and that he is very busy on other things. In this case, that is the Benchmark project which may well be true but he seems to mention more than necessary.

In short, I think he is rather disorganised and lacks clear thought. That said, this has been a pretty thankless task taking the lead on a project meant to be led by another group... I do however worry about his ability to get this over the line in reasonable time."

72. On 3 February, after the appraisal meeting on 28 January between Mr Sloan and the claimant, the claimant had reported to Paul Hearn that the claimant had said that he received good feedback from Paul Hearn. Mr Sloan considered was at odds with discussions with Julia Hoggett. Mr Hearn said to her:

“Any positive comments I may have given to Colin were mostly in the context of encouragement. This has not been an easy project for him because of the number of groups and writers involved. In the end, the progress over these past two months was in part due to him being given ownership at a key moment and finally managing to produce an improved draft with some inputs from others. That said, I think he struggled to see the wood for the trees and get to the key points. He was also quite slow. All in all, he does not write in a particularly clear fashion even if there is sometimes some good knowledge behind what he does.

The project has moved forward relatively quickly in the past fortnight but that has really been because Evie has essentially become the key contributor, helped by Ted. It is not obvious we would have moved as fast had Colin remained the point person.”

[Evie Christodoulidou was a technical specialist from the sector team].

73. For the purpose of the appraisal, Buddy 1 gave Mr Sloan some strongly critical feedback on the claimant and his ability to work with him. Having looked at some of the emails, notably a thread at the beginning of February between him and Mr Sloan, the relationship was clearly breaking down (2 – 5 February). Because of that Mr Sloan laid on even more support in the form of Risha Kerai, who was a high performing individual who regularly got appraisal grades of 4, (which is “exceptional”). Buddy 1 nonetheless carried on working there.

74. To describe the working relationship with Buddy 1. The claimant seemed to find difficulty in sharing his plans with others. Buddy 1 was writing to Mr Sloan in March 2014:

“An example to state – when we (me and Risha) have asked Colin about what the plan is...the response has been ‘it’s all in my head, you will be told on a need to know basis’.

I definitely understand there is a control issue here, which I feel is the underlying reasoning for such a response, but I am hoping there may be a softer/much better way to address this to ensure that we get the positive more constructive outcome we are hoping to get.

I have tried to address this throughout the project in a diplomatic way by asking for suggestions where necessary or giving hints so that his project can be better led. ...Suggestions are taken quite defensively. ...If you mention it, it may hit home and you may be able to build into your discussion with Colin.

This is only my suggestion...”

75. The criticism was echoed by others.

76. Mr Sloan had a regular “bilats”, as he referred to them - bilateral meetings or 1-2-1’s with the claimant. He recorded them in the form of a single thread of self-addressed emails, also sent to the claimant, after the meetings. In particular, the appraisal meeting seems to have been held on 12 March 2015, of which he records the following:

“Appraisal:

We held our appraisal meeting. A full note will follow with the pay letter but we discussed the deep dives, the SN project [structured notes], benchmarks, what you felt had gone well, what had gone less well, working with Buddy 1, the onsite work and your career and development. Some of the key points of feedback I gave were around ensuring you are clear in your

communications, ensuring the points you make are appropriately backed up with evidence and ensuring you deliver and own your own work and drive it forward. These are material areas that need to be addressed.”

77. In more detail, he specifically considered feedback letters sent to various firms on specific projects and the report. He was specifically concerned about the evidence-based report. He states:

“We discussed some facts that were in the final report. I challenged the facts and asked where they had come from and it transpired that they were not supported by evidence. I did not get the opportunity at the time to feed this back but we must make sure that facts in our public reports are supported by strong evidence as without this the organisation is open to criticism.”

78. Mr Sloan was acutely aware that the claimant perceived him as micromanaging him. He had actually stated in December:

“We discussed that I did not want to micro-manage you or oversee you too closely and by the development areas being addressed that should help allow me to give you the freedom you and I wish you to have. I also discussed that I did not want to cause you to lose confidence but that I had been giving a lot of feedback recently which I hoped would help you improve your performance so you would be in a position where you can get roles outside of the team which you desire.”

79. He was finding it difficult. He stated:

“We have discussed the benchmark visits, my view is that I am having to provide too much oversight to the project and my concern is that, were I not on the visits, things like capturing the key points on the day for the summaries etc, they would not be done. You assured me that if I was not on the visit capturing the key points then you would be doing so but I wanted you to demonstrate that on the visits I am on. I have also fed back that I wanted you to take greater ownership of the benchmark work given you are leading it...”

80. Where praise was due Mr Sloan gave it, but I have focused in my summary, for these reasons, on the criticism, because that was the respondent’s final reason for terminating the claimant’s employment.

81. In the bilats Mr Sloan spent a lot of time discussing the claimant’s domestic situation and his desire to be in Scotland. It is obvious too from the bilats that Mr Sloan spent considerable time helping the claimant with his career aspirations and with his development and training. At one stage there was an FCA diploma but it felt like too much of a commitment for the claimant. There was also a chance for the claimant to pass the ACA and become a member, but this would have involved a commitment of 20 hours per week. References to learning and development abound, as do references to the claimant’s goal of being based in Edinburgh, more on the retail side.

82. The claimant’s appraisal year ended formally on 31 March 2015. His summary on 1 April 2015 was as follows:

“In summary whilst Colin has some good feedback from firm supervisors, approaches his work in a collaborative way and generally works well with others. He has struggled to act on the feedback given at the interim appraisal and throughout the year and his performance is, in my view, below that expected of a lead associate. Colin has generally not delivered high quality work, to time, over the year. He needs extensive oversight of his work to ensure it is to standard and this causes delays in the project work.”

He continued:

“Therefore Colin does not meet the high expectations of a lead associate and gets a grade 1; he will also go on a performance improvement plan which will be drafted.

The key areas for Colin to focus on are [and they are connected]:

- Analysing and acting on evidence...
- Communication skills...
- Delivery of work & ownership...
- Prioritisation [/organisation]...”

83. These were described in more depth, but the themes remained consistent in these criticisms. The performance improvement plan was in the making but that was going to be overseen by Ted MacDonald, who was taking over managing the claimant, on 1 May officially, although he had already been involved.

84. At that time Duncan Sloan was moving to another department to cover maternity leave for Elizabeth Wilson, wholesale banking investment manager. He was to return to the same team though after the maternity cover finished. Ted MacDonald was to remain the claimant’s line manager for the rest of his employment, even after Duncan Sloan returned because of the acknowledged issues the claimant had with being managed by Duncan Sloan, which seemed to persist long after Mr Sloan had ceased to manage him.

85. Mr MacDonald was a technical specialist on the cross-firm team and was quite laid back as a manager. Compared to Mr Sloan, he put far less in writing on a regular basis, although he compiled the main detailed official reports. There was nothing like the long thread of bilats, which Mr Sloan created between himself and the claimant.

86. The original performance improvement plan was sent to the claimant by Ted MacDonald on 1 May. It was the informal process under the procedure. The plan was to run from 4 May for 8 weeks. There was to be a review at the midpoint. Feedback would be given every 2 weeks. The subject matter of PIP2 was benchmarks. The PIP plan reflected the contents of the appraisals.

87. The claimant met with Mr MacDonald on 30 April to discuss the forthcoming plan and was sent the plan itself the following day. In the event, PIP2 lasted longer than the full 8 weeks due to the claimant’s absence. It became a matter of complaint from the claimant, that there was what appeared to him to be an indeterminate endpoint. There were feedback sessions in the midst of the PIP. Ultimately, the final feedback from Mr MacDonald came on 4 August by email. It was CC’d to HR who have oversight of the performance management process and stated:

“At the mid-way point we discussed again that you needed to reflect fulsome ownership and co-ordination of the project in addition to focusing on your individual deliverables.”

88. He made some positive statements, but not many. He stated:

“Your commitment and determination to the task have been good and you have the required technical knowledge for the project and applied this well.”

89. Areas for improvement came under 3 headings:

89.1. “Project management and planning.

- There was a lack of project ownership from you...an example being your comments that work undertaken by others was ‘nothing to do with you’. ...
- There was a major project planning error at the end of the delivery stage, in which advance production work had not been undertaken by the Design team. You noted that there had been e-mail messaging but not face-to-face contact with the team during this period. This failure created delays and negative feedback from Tracey McDermott and others...
- There was a further planning and communication issue when others wasted time editing the press release which had already been signed off by Tracey earlier in the week. This served to undermine the reputation of the Thematic Team as a whole not just those immediately involved in the project.”;

89.2. “Writing skills”.

- “• We have discussed at various points that the writing quality of the report was below standard, and you acknowledged that this is a continuing problem.
- The original drafts of the report were not acceptable for publication and had to be changed substantially to achieve a publishable version ultimately requiring an emergency redraft exercise by myself and another. Good report organisation and English drafting skills are fundamental to the C1 role.”

89.3. “Team collaboration and management”.

- “• I would expect as project lead that you would ensure that the more junior associates were working to clear objectives and feeling part of a team. Your approach to managing your team member was often too directive, autocratic and at times dismissive. We have discussed that this was inappropriate and did not create a good team working environment.
- Recently a drafting matter was escalated to me. It was a simple and clear decision and should not have needed my intervention.
- We also discussed, that during the team review sessions for the letters, your behaviour, clearly evident in your body language was not always appropriate or conducive to good team work or collaboration. ...I will be in touch shortly regarding next steps and the formal performance review meeting.”

90. And then by letter dated 5 August 2015 the claimant was invited to a formal performance review meeting on 11 August. The subject matter for PIP 2, the first of 2 formal PIP’s, was to be securitisation / risk. The 3 headings were repeated again. They were:

90.1. “Project management and planning”;

90.2. “Writing skills”; and

90.3. “Team collaboration and management”.

91. It is worth mentioning, because it is germane to the respondent’s case, that the whole question of writing skills was not something that the claimant was bound to fail at

by reason of his dyslexia. Because he was a coordinator and project leader coordinating a team who were to produce a report, his own personal writing skills would not be fatal to success on the project.

92. The performance review meeting took place on 13 August 2015. Mr MacDonald was there, and Nathalie Gregory from HR. The claimant was supported by a representative, Carol Mahoney. The outcome of the meeting was that the claimant was given a first written warning by Mr MacDonald. That was on 9 September 2015. The more detailed written feedback was 10 September.

93. The more detailed written outcome mentioned the claimant's stress levels, of which management was acutely aware. Nonetheless management were still of the view that the claimant needed a PIP. They could not simply avoid the situation because the claimant found it stressful. Anybody finds a PIP stressful. Mr MacDonald made it clear that the writing skill required of him was of a standard level as might be expected from a typical university undergraduate in any discipline. The claimant was not being subjected to higher enhanced standards.

94. The feedback also mentioned a stress risk assessment which had been formally undertaken. It was in the form of a questionnaire which had previously been filled out by Duncan Sloan in detail. The respondent took and stuck to the view that the stress assessment questionnaire is like an unrevisable exam, i.e. no special preparation is needed to go through such a questionnaire. The tribunal is inclined to agree. I have seen the questionnaire.

95. The claimant appealed against the performance warning, to Julia Hoggett. It was 5 closely typed pages long. His appeal could not be heard by Julia Hoggett or by Alison Barker, as both of them had been too closely involved with the benchmark project itself. It was therefore thought better to ask Mr Robert Taylor, the head of global asset management regulatory strategy, to conduct the appeal. There was an appeal hearing that followed, on 4 November.

96. Mr Taylor interviewed Ted MacDonald together with Katie Meredith from HR. Following that Mr Taylor had a diagnosis of cancer, so the further interview with Duncan Sloan was carried out by Katie Meredith on her own. It is clear that Mr Sloan was spoken to.

97. It is all referred to in a detailed outcome letter signed by Mr Taylor dated 15 December. He upheld the first written warning. As far as writing skills and reasonable adjustment for dyslexia went, he itemised the many adjustments which had been made by way of equipment provided to the claimant and the detailed history of Buddy 1 and then Risha Kerai to give him support. Even if the relationship prevented good use of Buddy 1 that did not apply to Risha Kerai, and the claimant's apparent explanation that she did not know what her role was, did not seem to hang together.

98. Of a point of criticism about Ted MacDonald's feedback that the claimant did not receive a written communication about how he was likely to do in the PIP, Mr Taylor said:

"In hindsight, I think it would have been helpful for Ted to be explicit with you about whether it

was likely the informal PIP would progress to the formal stage as soon as he was clear on this point. I will feed back this point to Ted, however I don't think it follows that this was the reason for your underperformance, or a reason why it should not have moved to the next stage in the process."

99. He talked also about the claimant's financial pressures, the travel to Edinburgh and the old bilats with Duncan Sloan, and the detailed notes. He commented:

"Your overarching complaint was that the shortfall in your performance is primarily related to your disability, for which appropriate adjustments have not been made by your line management...On the basis of my investigations above, I do not find that the sole shortfall in your performance is around your written abilities. I have found that adjustments have been put in place to support you with your written abilities and both Ted and Duncan refer to the fact that this support has at times led you to feeling undermined and that you haven't always welcomed this support. It is clear from the investigation meetings with Ted and Duncan and from reviewing your PIPs that there is also a behavioural element to your PIP objectives. I have understood that you need to improve the way you work effectively with the team, take ownership of tasks and improve the way you gather and share information. ...there is a need for you to focus on your interpersonal skills and how you interact with your team. If you are not clear on this...I would encourage you to discuss this with Ted so that this can be incorporated into your current PIP."

100. It was a workmanlike and discerning appeal outcome which took account of the claimant's written notice of appeal.

101. The appeal against the first PIP did not prevent the second PIP from starting. As a matter of procedure that seems to be right. Appeals inevitably take some time to hear and the process is a long one end-to-end. This entire performance management process took 15 months to complete. It was a lot of management time for the respondent. The second PIP was sent to the claimant on 28 October. There was a meeting the following day (29 October) which changed some elements of the PIP plan, in view of the claimant's observations. It was to start on 2 November 2015 and was to last for 3 months. The thematic subject matter was securitisation / risk.

102. The claimant was signed off sick from 16 November to 28 December 2015. The MED3 diagnoses on this absence were "work related stress" and "chronic fatigue syndrome".

103. The claimant explained CFS can be a live issue where stress is involved, even when individuals are not suffering a full-blown episode of ME/CFS.

104. The claimant returned to work on Tuesday 29 December, immediately after the Christmas break and a referral was made to occupational health. The resulting report on 26 January confirmed that, "In my opinion Colin is medically fit to work, I have suggested some temporary adjustments below". The adjustments consisted of a phased return on reduced hours over a 7-week period, still working 5 days per week.

105. Significantly, the occupational health advisor advised "Please note that any management issues such as poor performance, an individuals report line are ultimately a business/operational decision and not something for me to comment on, please manage in line with your local HR policies and procedures". In the tribunal's view that was a helpful observation to have made. Too often managers are put in a difficult situation of having to design some therapeutic regime for the employees they manage, whereas a PIP is entirely counter-therapeutic, particularly with this (CFS) diagnosis.

106. In a series of meetings in January on 19 and 26 March, the first of which was the official annual appraisal meeting, he helpfully stated:

“...we did cover the point that your writing skills should not feature so prominently in your mind as a performance impediment. We discussed your performance in the round including teamwork and inter-personal skills with work colleagues as being more important for you to focus on. I will include these comments in the Appraisal form.”

107. On 19 February the claimant was sent the securitisation risk project. It centred around one particular firm but was almost bound to raise issues that would apply to many such firms. Subsequently, on 21 April Mr MacDonald waited some 8 weeks and then gave the claimant feedback. Some of the main points are here. It mentioned:

1. The initial plan you proposed was good in that it was reasonably complete. ...
2. Feedback at mid-way stressed the need for you to complete all aspects of your plan. I emphasised this but it was still not done. ...
4. You did not hand in a completed pack with a wrapper as requested. I did not have a coherent package that I could review, return for further work or approve and deliver to the WB1 [wholesale banks 1] Team Head.”

108. Other comments:

5. Much of the content in your output reflects opinion which was not accompanied by underlying facts such that the reader could weigh and/or challenge.” [This had been a consistent theme in criticism of the claimant’s performance.]
7. Beyond use of a bit of industry terminology, you have found it difficult to convey any sense of understanding of the ABS [asset backed securities] market as supporting information for a plan.”

109. He concluded:

“I mentioned that the failure is not down to specific details here or there but to overall approach to the task, management of it and delivery of end product. In the circumstances of a PIP where you are making your very best efforts, the results are well below C1 grade.”

110. Following that, the claimant was invited to a second formal performance review meeting - PIP. By letter of 28 April he was told that he did not perform well during this period, “We may decide to issue you with a final written warning”. The meeting took place on that day. The claimant exercised his right to be accompanied and was accompanied by Mr Felix Bungay. On this occasion, Mr MacDonald decided to give the claimant a final written warning.

111. This was confirmed by letter of 18 May 2016. The letter confirmed that the PIP had been extended by about 6 weeks to account for the claimant’s sickness and holiday absences and to ensure he had adequate time to complete the tasks. The letter ran through many of the points the claimant had made during the course of the performance management meeting.

112. In particular, there was a secondment application the claimant had made, but unfortunately it appears to be a practice, if not a policy, that people in the FCA who are on a PIP, even an informal PIP, will not generally be accepted for secondment or transfer or any other role. Superficially, that might seem tough because if somebody is

struggling in one role, it may be that transfer to another role could be the solution. Mr MacDonald also assured the claimant that he was very aware of the recommendations made in the Lexxic dyslexia report and that all the adjustments had been implemented. Nathalie Gregory had been through it with him.

113. Mr MacDonald also addressed the matter of the claimant's stress and how stress had always been discussed in their 1:1's. Indeed, the extension of the PIP itself was intended as an aid to stress, although the claimant suggested it was to his disadvantage because he was being examined on a period with an indeterminate end. Mr MacDonald also confirmed that a managed move for the claimant had been investigated but had not proved possible at this stage. Mr MacDonald proceeded to outline the plans for the next PIP, stating:

“...failure to make satisfactory progress in meeting the objectives set out in your subsequent PIP, during the review period may lead to further action being taken in line with the Performance Management Procedure, including your possible dismissal from the FCA.”

114. The claimant appealed against that written warning on 31 May. In the view of Katie Meredith, the person best placed to hear the appeal was Julia Hoggett. An appeal hearing was convened before Julia Hoggett, on 23 June 2016, the day of the EU referendum. Ms Hoggett was accompanied by Katie Meredith of HR and the claimant by Mr Bungay, again.

115. The referendum outcome had a massive impact over the financial sector generally. The FCA was no exception. Ms Hoggett went to work at 2am the following morning. Notwithstanding that, she managed to complete the appeal outcome letter and sent it to the claimant on 1 July. She was working at home in Dublin.

116. It was a conscientious and sympathetic appeal outcome. She had spoken with Ted MacDonald, Duncan Sloan and Mr Paul Ulah, to whom the claimant had referred in the course of the appeal hearing. (He was in central team supervision framework). Ms Hoggett was not conflicted in this appeal despite the fact that Ted MacDonald reported to her regarding management of the claimant. She had not been directly involved in the securitisation risk project. She stuck close to the terms of the claimant's appeal letter of 31 May. She addressed the claimant's contention that there was a lack of clarity on the PIP period and concluded:

“I have...found that the timing of the PIP period was entirely appropriate to accommodate the flexibility that your condition required and also to provide you with the maximum opportunity to perform under the PIP and therefore I find no grounds to state that the final written warning is not upheld on this basis.”

117. The ghostwriter was a continuing theme of the claimant's appeal, but then she reminded the claimant that he himself had acknowledged that for the purposes of PIP 2 this was not a consideration. If he felt he needed one for PIP 3 then he should have asked Ted MacDonald.

118. She comes to review the several overarching themes in the appeal. There was:

118.1. “Insufficient support to meet your needs with respect to you disability”;

118.2. "The manner of your treatment by the Management team"; and

118.3. "Disagreement with the factual basis of the final written warning".

119. And she stated:

119.1. "I would reiterate that the Management team has extraordinary measures in place (that do not exist elsewhere in the Department) to ensure that you do not report directly to Duncan Sloan or indeed have any greater engagement with him than two people that work in the same Department might and therefore I do not find grounds to say that appropriate steps were not taken. With regard to (iii)...I believe that you had the resources, access and guidance consistent with both a C1 grade and indeed a C in order to complete the work, that the finding that the work was not up to standard was reasonable and that the nature of the feedback regarding the 'unhelpful' statement whilst not as artfully phrased as it could have been, nevertheless was an accurate reflection of the feedback received."

120. Ms Hoggett went into great detail over reasonable adjustments, both regarding stress and dyslexia management support. She found that the claimant had not raised sufficient mitigation for her to reconsider or overturn the final written warning from PIP 2. She reminded him that her decision was final.

121. PIP 3, as before, had commenced before the outcome of the appeal of PIP 2 was finished. The claimant received PIP 3 on 13 May. The project subject matter related to conduct risk and the 5 questions strategy. It was undertaken by the cross-firm team and for the delivery to the head of the department for wholesale banking. Once more, the claimant was to be line managed by Ted MacDonald and once more, Mr MacDonald was to outline the PIP plan for him.

122. The claimant had various queries including, oddly, that he needed an explanation of what was meant by "synthesis". Here at the tribunal he explained that he could not find a mental picture for the word synthesis, which I must admit I found quite hard to follow. The claimant is not incapable of abstract thought.

123. As before, Mr MacDonald had progress meetings where he emphasised reminders of the project objectives rather than adverse criticism or an indication of whether or not the claimant was likely to fail. He gave feedback on 11 August. Mr MacDonald expressed appreciation for his hard work, noting that he had done consistently full days at the FCA. Nonetheless, he said, "The outcome of PIP 3 would be performance below C1 level". In a feedback report to Nathalie Gregory and Julia Hoggett he said:

"The outcome of PIP 3 would be performance below C1 level. He understands that this will trigger a meeting with HR as before. His expectation was that I would be there. ...

Points I mentioned included:

1. Drift away from the objective of the project introducing new topics he thought important,
2. A high number of points that were not new or directly arising from his research,
3. There was insufficient analytical content resulting in low value-add,
4. Errors as between the report, the heatmap document and the database, and
5. My willingness to rely on the report was significantly undermined by point 4."

124. The tribunal was shown a colour enhanced copy of the heatmap and Mr

MacDonald's many criticisms of how objectively, factually, it did not tally with the database. One pauses to reflect that this was not a dyslexia issue. So far as one can see, data analysis (or number-crunching) is what the claimant prides himself on. On a more personal basis, Mr MacDonald had said:

"We also had a more personal discussion wherein I noted that he had made significant personal progress in pulling himself together over the past year and looked better for it. He agreed and was appreciative of the comments while mentioning that he still had some way to go."

125. Following that, on 12 August Mr MacDonald invited the claimant to the third performance review meeting. It was to be on 18 August. On 17 August the claimant submitted a grievance to the director of the FCA highlighting discrimination concerns, his poor health and naming Julia Hoggett, Duncan Sloan and Ted Mac Donald for discrimination, harassment, bullying, and endangering his health.

126. This time the PIP meeting was not taken by Mr MacDonald, but by Alison Barker, who was not conflicted. She was Acting Director of market intelligence, data and analysis. She was not in the claimant's line of management at all.

127. Again, Mr Felix Bungay the FCC representative accompanied the claimant. Surprisingly perhaps, during the performance review meeting, which was recorded and transcribed like all the performance review meetings, the claimant stated the following Alison Barker:

"...I'll turn that question around to you, Colin, and say what do you want or from the outcomes of this process, what are the outcomes that you are looking for?"

He answered:

"...My focus is on getting my health back...My health has been stable, which means it hasn't deteriorated until recently...at the moment my self-confidence and motivation has completely evaporated unfortunately. It's almost like I've lost the will to live but not quite. So I've got very low mood and the moment and I'm thinking, 'I need to, I need to, this cannot go on because it's untenable going forward'. So my focus is on my health and I'm thinking, 'How can this be resolved?' That's my key focus point. ...

I've tried over the last three years to move out of the department 'cause I saw issues fairly early on. And for one reason or another it hasn't happened even through applying for roles, managed moves etc. And there's issues with Duncan, which are formally noted. He's now the team head and that's causing anxiety and that was mentioned at the previous appeal meeting and that still hasn't been resolved. So while that's ongoing, my health is not going to get any better and the stress levels are not going, you know, decrease.

So my concern is what options are open to me without having to resign – I don't want to resign...there's only two options. One is I get a managed moved out to, or maybe another PIP somewhere else to [go], you know, confirm the issues, or we come to some form of agreement where the FCA lets me go. I'm not sure what the options are."

128. As I myself said to the claimant at the tribunal hearing, he was leaving Ms Barker with few options, unless she were to find that the claimant's performance was not as stated by Ted MacDonald.

129. The following day there was a performance decision meeting, which was again recorded and transcribed. She confirmed, "In terms of my decision, my decision is to dismiss,

so Nathalie will explain what that means in a minute...". She then gives a brief synopsis of her reasons which she later incorporated in the detailed dismissal letter which she wrote dated 25 August. Clearly, the dismissal *pro forma* paragraphs had to be completed by HR. Ms Barker set out the claimant's representations as they had been put to her at the hearing. In the oral feedback she had made 2 main points:

"...you were set a brief on the PIP, and you didn't actually deliver a report to that brief. You actually wrote something that was wider and broader than that brief. So I think, you know, one of the key things is that you need to be able to follow instructions and deliver a brief that you were asked to do..."

The second point is around quality of the analysis. I think that, whilst you've completed the catalogue part of the task, so you were asked to pull together all the information and catalogue it, and you did that, and I've confirmed with Ted that, at the midpoint, that he was happy that you had completed a reasonable assembly of all the information that you needed, so you were in a good place to do the analysis for the report writing. ...I think what happened then is the analysis of that information and the report writing analysis ...wasn't really to the depth that you needed. The example I used yesterday was, on the flexible firms, you started drawing conclusions in your report, which were based on really quite thin evidence in terms of only having two firms. So that's an example of where the analysis, to my mind, wasn't to the standard..."

130. Those were her two overriding concerns that she expressed at the time – going off brief, and lack of analytical rigour. Later in the dismissal letter these 2 concerns were confirmed. Indeed, she confirmed that it appeared from a draft report which was produced to the project manager that the claimant had changed the brief. However he continued to produce the report that the draft reflected. Ms Barker stated in the letter, as she stated to the tribunal:

"In my view, it would be expected of any grade that a brief would be followed or if an individual felt in their judgment it needed to be changed, changes would be discussed and agreed with the manager. You made a judgment to change the focus and content of the report without agreeing with your manager. Therefore I conclude the brief was not met."

131. She then mentioned the second point about quality of analysis. Ms Barker deals with the claimant's stated problem, to deal with the word "synthesise", and she states:

"In my view, it would be expected that an associate of any grade [sic] could perform analysis and write conclusions. The topic was narrowly defined and required analysis of information already available from a defined group of firms. [That is 8 fixed and 2 flexible smaller firms.] ...it is reasonable to expect a senior associate to be able to work through variable information and [analysis]."

132. Of the claimant's complaint about insufficient time to complete the PIP Ms Barker suggests, "...if you had stuck to the narrow brief, time may not have been an issue". In response to the claimant's ghost-writer point, she suggested:

"It was not deemed that this report was of a level of complexity to require a 'ghost writer'. In any event the two main points are, in my view, that the brief wasn't followed and quality of the analysis was insufficient. A ghost writer would not improve the quality of underlying analysis or change the fact that the report doesn't answer the brief. Additional time was allowed for this task because of Brexit and the focus of other staff on that."

133. Ms Barker found that, at the midpoint during the PIP, the prospect of getting the project finished was good because the initial collation of information had been good. It was at the analysis stage that it failed. Overall there were regular meetings and a

reasonable level of feedback had been provided, although the claimant was not informed squarely that he was heading towards failing in the task.

134. It is important to note Ms Barker's observation that the failings he demonstrated on this PIP would have been failings in any grade. He was at C1, which is a senior associate grade, but it would have been a failing in associates A, B and C. So it is not as if a move to a lower grade would have been the answer for the claimant.

135. The claimant appealed against his dismissal by email of 1 September. He had been paid 3 months' basic salary with a flex account in lieu of notice and had been given his outstanding holiday entitlement of 13.5 days.

136. The claimant at this stage had a grievance outstanding from 17 August. It was proposed that the 2 would be run together and, because of this, it was decided that there would be joint decision makers on the composite grievance/dismissal appeal. The grievance was a first instance determination, whereas the appeal against dismissal was a second and final appeal.

137. The process was undertaken by Phillip Salter, the Director of Retail Lending, and Graeme McLean, the Head of Department for Banking, Lending and Distribution. The appeal was heard on 4 and 12 October. As part of their preparation for the decision the two met with Duncan Sloan, Ted MacDonald and Julia Hoggett and interviewed them.

138. Graeme McLean was particularly well suited for the task, as he was the Equal Opportunities officer. The claimant made some very marginal criticism that he was going to be rather stuck to appeal against the outcome of his grievance if the Equal Opportunities officer had already been used for the first instance decision. In the event, the claimant did not appeal, for whatever reason. I am not at all convinced that was why he did not appeal. There would have been little to gain from it and I need not consider it, because this hearing at this tribunal has been purely an unfair dismissal hearing, as discussed above.

139. It was interesting to note that Julia Hoggett has every reason to be particularly knowledgeable on mental health. She told Mr McLean that her ex-wife is a PhD psychologist who is qualified in cognitive behavioural therapy for people with challenging mental health problems. The ex-wife herself undergoes therapy (as all therapists have to). In turn, Ms Hoggett (as partners do) became her ex-wife's support mechanism. She was also acutely aware that going through a PIP process is an emotionally challenging and difficult thing to do. She had conducted several.

140. She added:

"I knew by that point that it was going to be Ted who would be managing and when I would speak to Ted about it he would describe himself as having "Ted talks" in a sense with Colin and doing more than just a Line Manager job to check in with him and see how he was and see if he could at least support his mood and the impact that it was having on his mood and therefore his confidence".

"You also need someone from whom Colin could take a degree of comfort and confidence and I think that probably needed to be someone with more grey hair and I think it probably needed to

be someone who had a general demeanour that Colin trusted”.

This was a perceptive comment about the choice of Ted MacDonald to replace Duncan Sloan. It is true that Duncan Sloan was a much younger man than the claimant and Mr MacDonald. That could have contributed to the claimant’s lack of comfort with Mr Sloan. (He came to the FCA as a graduate and had been there for 14 years and had obviously done well there, despite his dyslexia).

141. On 30 November they completed the appeal outcome letter dealing with the appeal/grievance arguments, and the overlap:

- (i) The claimant believed that the PIP 3 objectives were general and not specific;
- (ii) He did not agree with the assessment of his performance in the dismissal decision;
- (iii) reasonable adjustments had not been put in place, and
- (iv) his mental health issues were not taken properly into consideration.

142. It is notable that, when this was a discrimination case, the claimant only sought to rely upon dyslexia as a disability despite the fact that he is a continuing user of Citalopram antidepressant medication.

143. It is not necessary for the purpose of this already long judgment to recite the findings on the grievance but suffice it to say it was thorough. They extracted the main headings from the grievance and dealt with each formally. On the first they disagreed with the claimant that the objectives he was set were too general and not specific. They had all been written down. They reiterated that there had been ample opportunity to clarify the PIP objectives in the course of 1:1 talks with Ted MacDonald, or just in discussions. This grievance was not upheld.

144. They also disagreed with the claimant over assessment of his performance. The conclusions had been simple that the claimant had changed the brief and did not revert to the brief even when asked to do so by the Project Manager. They also cited the long history of PIP’s and warnings and the earlier informal stage, and the growing concerns over performance before the process started.

145. Under the procedure they emphasised that the claimant was diagnosed as having “mild dyslexia”. As the work on the deliverables under PIP 2 and PIP 3 smaller sized pieces of work for internal audience only, unlike PIP 1 benchmarks, did not require a ghost-writer. Further if the claimant really had needed a ghost-writer he should have asked Ted for one, but he had not. They emphasised that the work of analysis would never have been the job of a ghost-writer. That was obviously the claimant’s responsibility as the lead on the project.

146. They commented too on the mental health issues and how these had been taken into account. There had been a phased return to work, and occupational health assessments were removed from Duncan Sloan’s line management. There was nothing to suggest mismanagement of this process. So far as the claimant’s dyslexia was concerned they were also satisfied that as much had been done as possible to help him, through implementing reasonable adjustments.

147. They regretted that a transfer had not been possible particularly after the claimant had received a warning. The claimant had been given extra coaching and support for interviews for internal secondments. Insofar as possible management had tried to move him to Edinburgh, which he was so determined to do, but, for perfectly proper reasons this had not been possible.

Unfair Dismissal

148. The tribunal had to review all this evidence with a view to seeing whether, taken end to end, this had been a fair dismissal first. There is no doubt in my mind that this was a dismissal because of capability. In the respondent's reasonable view the claimant was clearly working as hard as he could. His dedication and effort were consistently praised throughout the hearing. Some of his failings were of his own making, particularly departing from the brief on PIP 3. The claimant was consistently failing.

149. It is not suggested, as part of his unfair dismissal complaint, that the claimant was dismissed for anything other than a performance related reason or capability. I have already quoted the passage from Section 98(2)(a). It makes it clear that capability relates to capability for performing "work of the kind which he was employed by the employer to do". The same "work of a particular kind" definition appears in section 139 in the statutory definition of redundancy. It is important.

150. The evidence seems overwhelming that that was the reason. Was dismissal reasonable under Section 98(4)? I take note of the fact that this is a large employer. I am particularly impressed by the fact that two percent of the entire workforce of the FCA consists of HR. HR's input seems to have been of a consistently high standard in the extensive evidence I have been asked to review.

151. Stepping back and asking oneself why did the claimant's career founder so soon after the splitting off of the FCA from the FSA. The headline theory is that he is simply volunteered for a section for which he had less aptitude. If he had stayed with the Bank of England none of this might have happened. However, his strategy was to manoeuvre himself into a position where he might get a full-time role in Scotland. That was his priority. He freely put himself forward for a role which did not play to his strengths. It was quite clear that the respondent believed that the claimant out of his depth in the FCA from the start. The respondent was nervous and did not trust him with any projects aimed at an external readership. This is where the s98(2)(a) definition is so important. This had become the "work of the kind which he was employed by the employer to do".

152. The consistency of the criticisms of the claimant's performance throughout the whole period outlined his failings. The claimant will have to forgive me for stating that this impression was reinforced in the tribunal by the way he presented his own case, particularly towards the end when he had to summarise. For all that, he is a charming individual.

153. This has ultimately not been a marginal decision. Despite the fact that it is only an unfair dismissal case the disability discrimination aspect of it has been amply

considered both in the work place and here at this tribunal as an aspect of reasonableness under section 98(4). In addition this tribunal and the claimant's management in the FCA considered the claimant's mental health which was under real strain during the entire process. He seems better since.

154. I was pleased to note that he now has work in London on similar pay for Lloyds Bank. This seems to play to his strengths, by his own account. So perhaps he just was not made for supervisory work.

155. The amount of time spent by management on this process was impressive. It was also clear to me that management had a will for the claimant to succeed in the organisation despite the claimant's continuing under-performance. I have concluded it was a well managed process. The parties will have to forgive me for not referring to every single piece of evidence I have been referred to. I have tried to be selective keeping my mind focused on the unfair dismissal question.

156. I have concluded that this dismissal was well within the range of reasonable responses under the proper procedural process. It seems that management had little alternative but to dismiss.

157. Unless one assumes the process was inherently malign, or that management individually were malign, I could not find this an unfair process. Hypothetically if this had been a discrimination case I would not have come near to find that there was harassment or bullying.

158. One of the claimant's arguments was that he should have never entered the PIP process in the first place and that Duncan Sloan was the architect of that. This is a flawed argument. I am dealing here with proximate causation. I have to look at the reason for the dismissal. Causation becomes too remote at a certain stage. The fact was that Mr Sloan was out of the picture at the time the claimant was taken into the performance management process even the informal part of it. The formal part in the first warning was conducted by Ted MacDonald. The third PIP was overseen by Ted MacDonald but the decision maker was Alison Barker.

159. The reason why Duncan Sloan was interviewed in connection with later parts of the process was that the claimant never ceased to complain about Mr Sloan's management of him. It appears the claimant could not let it go, long after Mr Sloan had ceased management of him. I can see that the chemistry might not have been good. Duncan Sloan put much more in writing than Ted MacDonald did and was quite openly critical. His intention was to help the claimant by letting him know where he stood

160. By contrast Ted MacDonald was more oblique, to the extent that the claimant accused him of not giving him "half time scores" in his PIP's and not being negative enough, when he knew that the claimant was headed towards failure on the PIP. It is not as if the claimant could have made a greater effort if he had been told that he would otherwise fail. I have found, as did the respondent that he was trying his utmost. This was a theoretical argument, in principle, but it did not sit at all with the facts.

161. Overall, the claimant has not put before me any evidence which suggests that this could be an unfair dismissal.

162. So far as the subject matter of the performance management is concerned it is perhaps worth stating that this tribunal has considerable experience of finance sector cases as we are the local tribunal for the financial sector in London Docklands. We are familiar with the terms. I also take heart from a case which counsel appropriately mentioned in his closing submission - *Cook v Thomas Linnell & Sons Limited* [1977] IRLR 132 that the evidence of an employer's managers that he lacked competence can itself provide evidence to the tribunal. The tribunal does not in every case have to do a reassessment of the assessment, or become expert in every field.

163. I am quite satisfied that management was sympathetic and did not set the claimant up to fail. I will not cite further authority. Some of the authorities provided by the claimant were clearly beside the point. For instance authorities concerning a situation where the demands of the job had increased. I find the demands of this particular work clearly had not. There is no factual basis that might make such an authority relevant. The fact that the claimant might have been out of his depth in this particular type of work was as a result of a conscious and freely made election on the claimant's part

164. For all these reasons I find the claimant was fairly dismissed. The process and the outcome were both well within the range of reasonable responses under s 98(4), and the reason related to the claimant's capability under section 98(2)(a) of the Employment Rights Act 1996

Employment Judge Prichard

30 April 2018