EMPLOYMENT TRIBUNALS

Claimant: Mr T Jackson

Respondent: Kent County Council

Heard at: London South via CVP **On: 1, 2, 3, 4 & 5 March 2021 and in chambers 25 & 26 March 2021 & 21 April 2021**

Before: Employment Judge Khalil sitting with members
Ms N Murphy
Mr W Dixon

Appearances

For the claimant: Ms E Sole, Counsel
For the respondent: Mr J Small, Counsel

RESERVED JUDGMENT

(1) The claim for reasonable adjustments (dragon software auxiliary aid and the 'high caseload PCP') contrary to S.20 Equality Act 2010 is well founded and succeeds.

(2) The other reasonable adjustments claims are not well founded and are dismissed.

(3) The claim for Discrimination Arising from Disability is well founded and succeeds.

(4) The claim for Harassment (in relation to the comments on 17 October and 25 October 2019 only) contrary to S.26 Equality Act 2010 is well founded and succeeds.

(5) A Remedy hearing will be listed in respect of those claims which have succeeded if the parties indicate this is required. The parties are encouraged to resolve remedy privately. Both parties are to write to the Tribunal 28 days after receiving this Judgment to confirm whether or not a remedy Hearing is required and a time estimate.

Reasons

Claims, appearances and documents

(6) This was a claim for Disability Discrimination – S. 15 (Discrimination Arising from Disability), S.20 (Reasonable Adjustments) and S.26 (Harassment) Equality Act 2010 ('EqA').

(7) The claimant was represented by Ms Sole, Counsel. The respondent was represented by Mr Small, Counsel.

(8) The Tribunal heard evidence from the claimant and his wife, Mrs Jackson. For the respondent, the Tribunal heard from Mr Nicholas Esson, Team Leader of Social Care, Ms Marie Gallagher, former Service Manager for Ashford and Canterbury Mental Health Service and Ms Lynn Bryan, Managing Director of Chully & Co (Employment Consultants). All witnesses had produced a witness statement.

(9) The Tribunal had an agreed E-Bundle of 804 pages and a small supplementary bundle of 7 pages.

(10) The agreed issues were set out in a Case Management Order sent to the parties on 15 June 2020.

(11) The Tribunal raised at the outset if the question of whether the claimant was disabled at the material time remained disputed. The respondent confirmed it was and the dispute was specifically in relation to the 'substantial' adverse effect element of the definition in S.6 of the EqA.

(12) Both parties confirmed, upon the Tribunal's enquiry, that the material date was from August 2018 onwards.

(13) The respondent also confirmed that in relation to jurisdiction (time), the only alleged act which it would argue was outside of the primary limitation period was an alleged comment made on 18 June 2018 in the investigation report relied upon as an alleged act of Harassment.

(14) The Tribunal enquired of the claimant and his counsel if any adjustments were needed for the claimant in the light of his underlying health. None were requested. The claimant had indicated towards the close of evidence on day 2 that he had needed to take medication to get him through the day. The Tribunal enquired on the morning of day 3 if he was able to continue to give evidence in the light of that remark. He confirmed he was.

(15) The cross examination of the respondent's witnesses was interrupted by connection issues of Mr Esson, Ms Gallagher and Ms Bryan (who was in France and had a medical appointment too). The Tribunal was prepared to allow as much latitude as possible to the claimant's counsel and understood that this was not ideal. However it was not practically avoidable and short of any suggestion to postpone the hearing part heard the Tribunal continued and evidence was unavoidably heard into the Tribunal's planned deliberation time.

The overriding objective was best served by ensuring the evidence and submissions were completed within the allotted time for the Hearing to avoid further attendance at the Tribunal by the parties.

Relevant findings of fact

(16) The claimant is a mental health social worker. At the time of the hearing of his claims, he remained employed by the respondent but had been on sickness absence since October 2020.

(17) The allegations giving rise to these proceedings however were up to and including October 2019 when his suspension from work from 17 January 2019, pending an investigation in to alleged gross incompetence, was lifted and he was informed following a capability hearing, that there would be no further action.

(18) The claimant was employed by the respondent in his current role from 8 June 2015. Overall, his continuous employment with the respondent commenced on 10 July 1995. The claimant's line manager from October 2017 was Mr Esson, Ashford team Leader of Social care.

(19) The claimant's contract and job description was at pages 115 to 123 of the bundle. The claimant's role, in summary, entailed him managing a mental health case load to safeguard and promote the welfare of the users of the service, to act as an approved mental health professional, to develop links with primary and secondary care Statutory Partnership Organisations and the Voluntary Sector and to produce verbal and written reports to inform multi agency decision making, to contribute to the job-holders supervision and team meetings and to ensure information systems and client records are effectively maintained and shared. (The respondent's client management system is called 'Rio').

(20) The claimant had some sickness absence in 3 separate periods in late 2017/early 2018.

(21) On 2 January 2018, a meeting took place between the claimant and Mr Esson in relation to a complaint received about the claimant. This was in relation to an alleged failure to respond to a client who was at risk. The complaint was raised via Solicitors. As a result of the complaint, the claimant's work was looked into and it was discovered that there was other work which had not been completed on Rio, or was out of date and in some cases no notes of intervention for over a year. This also included cases which needed to be transferred or closed. The claimant commented on his high caseload at this meeting but acknowledged it had come down from about 80 to 60 clients. He suggested 40 clients was what he should have. The claimant was given that week as a 'lockdown' to complete his outstanding documentation. A further review meeting was set for 9 January 2018 when all of his cases would be individually analysed to assist with the completion of outstanding issues and documentation. Mr Esson said this would continue for 3 weeks. The notes of this meeting were at pages 135-138.

(22) On 9 January 2018, the follow up meeting took place. The claimant self-assessed his well-being as 6/10. The Tribunal this understood to be an introductory invitation for the claimant to express in a very binary way how he felt he was, a lower score being more of a cause for concern than a higher score. The notes were at pages 2 to 5 of the supplementary bundle. Cases were identified which required completion of care plans/risk assessments. The claimant was told he could block out three days in the following week to address specific actions required with regard to a list of clients. The claimant also said that all outstanding CPAs (Care Programme Approach) had now been booked and/or recorded on Rio.

(23) A supervision meeting took place on 15 February 2018. The claimant self-assessed his well-being as 4/10. The notes were at pages 139 to 141. It was noted that only two risk assessment and care plans were outstanding from the previous tasks. The claimant was also advised to attend to the 'pink' sections in his performance figures in the next three weeks to focus on care plans and risk assessments. The claimant's responsibility to mentor students was also discussed (as a grade KR10) and that he would need time to complete his practice educator level 2 training. Mr Esson also explained that an occupational Health referral would also need to be made because of the claimant's three periods of sickness within the last six months. The decision/need to do this was not challenged by the claimant. The next meeting was scheduled for 13 March 2018.

(24) At the supervision meeting on 13 March 2018, the claimant self-assessed his well-being as 5/10. The claimant identified that his caseload exceeded the 'job plan' that was recommended by the respondent. It was noted that the claimant had been given a caseload management tool to help manage his performance but had felt under more pressure due to the caseload audit. The claimant identified 3-4 cases he could allocate to a student under his supervision. The claimant was given a further 3 weeks to complete the audit tasks. The claimant had identified three sessions for teaching and he would be expected to complete three pieces of written work. The notes of this meeting were at pages 143-145.

(25) There was a further supervision meeting on 11 April 2018 which was less remarkable in relation to matters discussed. However, he self-assessed his well-being as 3/10.

(26) However a capability meeting took place with the claimant on 3 May 2018. The notes were at pages 151-154 of the bundle. Mr Esson informed the claimant that as a KR10 grade, he was not performing as he should be, in particular his Rio diary did not reflect what he was doing. Mr Esson said he wanted the claimant to take 30 minutes each day to update his diary. Mr Esson said he had prepared a 'performance target table' which he would measure the claimant's performance against in 8 weeks. There was also discussion about caseload and Mr Esson suggested the caseload could be about 40 if the claimant closed down cases. The Tribunal noted that in oral testimony, the claimant accepted, that on average, 5 of his cases would no longer be live cases**.** Further, Mr Esson said the claimant would not be given any new cases to enable the

claimant to concentrate on his performance. He was also informed that he would be given 1 day per week over the next 3 weeks to enable the claimant to complete his paperwork. The main things were: to respond to emails and messages in a timely manner; to see clients he had not seen in a long time to ensure patient safety. The claimant stated that he would need twice the hours he worked to complete his job, further that if he had been offered paperwork time before, he may not have been in this situation. There was also discussion about coaching which Mr Esson encouraged and with the proposed transition from Kent and Medway Partnership Trust ('KMPT') to Kent County Council ('KCC'), there was an expectation the caseload would reduce further. The claimant acknowledged they had been coming down.

(27) There were various actions set out following this meeting. These were:

- to work through the performance plan
- to have two weekly one to ones with Mr Esson to discuss progress
- to inform Mr Esson if any requests could not be responded to
- Mr Esson was to contact Occupational Health ('OH') to arrange a new appointment
- an offer of 'Support Line' was made
- an offer of coaching was made

(28) The claimant was diagnosed with ADHD on 14 June 2018. The consultant who diagnosed this said "*it should be emphasised that his ADHD traits are relatively mild but nevertheless present and enough to interfere with his function"* (page 66). The claimant disclosed this to Mr Esson on 14 June 2018 (though he did not have the report then). There was no dispute about that as the Tribunal noted the exchange of emails on 14 June 2018 at page 155. The Tribunal found this was disclosed in person – the claimant said in paragraph 36 of his witness statement that it was the next time he saw Mr Esson and in paragraph 8 of Mr Esson's witness statement he said the claimant told him in a supervision meeting in June 2018. The notes of that meeting were not in the bundle but the 14 June 2018 email trail was. The claimant also provided a summary of examples of how ADHD might impact a person such as managing time, being organised, following directions and completing assignments. Mr Esson's email to the claimant referred to his OH appointment due in the following week, envisaging the claimant would inform OH of his diagnosis and that he would wait OH output before considering what adjustments might be needed.

(29) The claimant saw occupational health on 22 June 2018. The report was pages 67 -70 of the bundle. Although the referral was in relation to the claimant's short term absences, the claimant did disclose his ADHD diagnosis, although the claimant said the discussion about that was only brief (5 minutes). The diagnosis and discussion however did feature in and shape the recommendations. This was apparent from page 69 of the bundle where under the further advice section it was stated as follows:

"*In my opinion he is fit to undertake his new role however I understand that he has recently been formally diagnosed with ADHD and I would suggest the following adjustments:*

To sit in a quiet area within the open plan office where are the least distractions
To be provided with voice activated software – ideally dragon
To be allowed extra time for producing reports

Mr Jackson is going to contact Access to Work to apply for some noise reducing headphones"

(30) The OH report was not consistent with its findings/conclusions with regard to whether the claimant was a disabled person within the meaning of the EqA. The report stated the EqA did not apply to the underlying health problem. However, the report also stated that the claimant was likely to be covered by the EqA, but that ultimately it was a question to be determined by a Tribunal. In relation to whether the impairment adversely affected the claimant's ability to carry out his substantive duties the 'answer' was no; more importantly, in relation to whether there was a substantial 'or' long term adverse effect on the claimant's ability to carry out normal day to day activities, the 'answer' was no too. The claimant was assessed as fit for work 'with adjustments'. The Tribunal found the report to be ambiguous and unclear in relation to ADHD and the EqA and the inconsistencies would have been apparent on any reasonable reading of the report.

(31) There was a capability meeting on 17 July 2018. The minutes were at pages 167-168 of the bundle. Following a discussion about the OH report, Mr Esson informed the claimant that the formal (capability) process was being stopped. He said the plan was to implement Dragon software and although slightly difficult, he would accommodate extra time to write reports. Mr Esson recognised the claimant was working around 160 hours a month but his intention was to set up a new 'job plan' from September 2018 which should come in to play by December 2018. In addition, the claimant was able to go to a quiet area. The claimant said he believed a lot of the capability was related to his diagnosis of ADHD and thus it would be unfair if his 'TCP' (Total Contribution Pay) was affected as a result. Mr Esson confirmed that the claimant would be fairly assessed with adjustments in place. He remarked that "*it is now a clean slate taking [the] diagnosis into account.* The claimant also provided Mr Esson with a guidance document on helping and supporting employees with ADHD. Mr Esson confirmed in oral evidence that he had read what the claimant had given him which the Tribunal accepted (pages 342 to 343). The information in this guidance referred to key ideas such as providing written instructions and information, providing help with structuring tasks and setting deadlines for all tasks. There were other examples listed too. The claimant had also sent to Mr Esson a statement in relation to the impact of his ADHD dated 27 June 2018 (pages 353 & 354).

(32) There was also a supervision meeting on 24 July 2018 when some of the claimant's individual cases were discussed the notes of which were at pages 169-173. There was discussion about the need for the claimant to reduce his caseload by closing cases and transferring cases to health colleagues and discussion about the KMPT/KCC transformation on 1 October 2018 and the impact of his job plan. Further, the claimant had an 'AMHP' (Approved Mental

Health Professional) course scheduled for 25 July 2018. There was reference to the recent OH assessment and the agreement to secure Dragon software and that the other adjustments required assessment. It was not clear to the Tribunal what assessments were required or why. Mr Esson said he would chase up HR for a formal letter following the decision not to continue with the capability process.

(33) The follow up letter after the meeting of 17 July 2018 was dated 24 July 2018. This was at page 174-175 of the bundle. The letter stated that because of the claimant's ADHD diagnosis *and* as the clamant had made sufficient improvements, there was no need for further formal capability meetings at this time. The claimant was informed that OH recommendations would be implemented and a good level of performance would continue to be expected. In relation to the TCP, future ratings would be dependent on the claimant's performance against a modified job plan with adaptions to accommodate the impact of the claimant's disability.

(34) The claimant applied to Access to Work ('ATW') and there as an assessment on 30 August 2018 with the claimant only. The report dated 31 August 2018, was at pages 176 to 188. The report referred to the claimant's ADHD diagnosis and the effect of that on the claimant's ability to concentrate, prioritise and focus and that he struggled to work to deadlines. There was reference to his significant caseload requiring significant critical thinking, planning and prioritising. ATW quoted for up to date Dragon software (with some training on its use) which would help the claimant concentrate and input data more quickly and coherently. In addition, 5 x 2 hour coaching was recommended for stress and time management, concentration, prioritisation of work and communication skills. Further, earmuffs were recommended to reduce ambient noise while trying to focus and concentrate. Disability awareness support in the workplace was also recommended to allow mangers/peers to better understand the diagnosed condition. It was also stated that if an OH assessment which was fit for purpose had not been carried, that this takes place.

(35) Under a section headed 'Progression planning' there were some concluding remarks as follows:

"*Our customer's diagnosis is quite recent however he has been struggling with the effects of this condition for some considerable time. He is anxious that his performance may have been considered to be below par by his employer. It is very important for his employer and colleagues to understand the implications of his diagnosed condition as these symptoms are difficult for the individual concerned to overcome without help. The adjustments recommended in my report should be very helpful to him but an understanding of his difficulties by colleagues is equally important. I have quoted for some disability awareness training which may be considered helpful for his manager and colleagues*"

(36) The total cost of the recommendations was £2596.30. ATW would contribute £1565.04 leaving the balance to be met by the respondent. This was confirmed in a letter dated 5 September 2018 at pages 189-193.

(37) There were supervision meetings with the claimant on 13 September 2018, 21 November 2018 and 11 December 2018 (pages 378 to 396). In the supervision meeting on 13 September, the Dragon software was discussed and Mr Esson was to discuss with Ms Gallagher the 'training' referred to in the ATW report. The Tribunal understood this to mean the Disability awareness training. The claimant self-assessed his well-being as 6.5/10. In the November supervision meeting, the claimant assessed his well-being as 7.5/10. The claimant's caseload was 39. In the December supervision meeting, the claimant self-assessed his well-being as 7/10. His caseload was 37. There was also discussion about the outstanding Dragon software and discussion again about the outstanding Adult ADHD training. The Tribunal noted that the claimant's self-assessed well-being ratings, although a blunt and binary measure, were comparatively higher than those earlier in the year at his supervision meetings.

(38) The Dragon software was not installed on the claimant's laptop until November 2019. That was after the end of the claimant's suspension from work between January 2019 and October 2019 which will be addressed below and after the KCC/KMPT transformation had been completed. The Tribunal were taken to emails in the bundle between 17 September 2018 and 25 September 2018 at pages 194 to 198 which appeared to suggest that Dragon was to be ordered but, it appeared to the Tribunal, the cost for which was not ultimately approved and thus it was not ordered at that time. It was also raised and discussed in the supervision meetings on 13 September 2018 and 11 December 2018. The Tribunal noted the evidence of Mr Esson, that because of the proposed transformation and the change in IT systems, it was not an appropriate time to be introducing new software. Further, that the claimant was 'laid back' about this. The claimant's evidence (paragraph 59 of his witness statement) was that he agreed to wait until the new laptops from KCC were received (February 2019) as he had no alternative. The Tribunal accepted his evidence in this regard. This wasn't a voluntary decision to accept a delay in receiving Dragon software which had been approved in principle since July 2018. The Tribunal did however note that in paragraph 53 of his witness statement, the claimant said with hindsight it was a major error to allow implementation to be delayed. The viability or possibility of installing the software on his current KMPT laptop and transferring it to a KCC laptop was not explored. Whether or not arrangements could, or should, have been made then or on an interim basis will be analysed in the Tribunal's conclusions below.

(39) In relation to the headphones, the claimant was using his own until they broke down. The Tribunal found that the decision to use his own was the claimant's. The Tribunal found that the claimant did not convey that they had broken (or were not noise-cancelling) to the respondent. The claimant's evidence in paragraph 56 of his witness statement supported this finding. He did not say he had conveyed either point; on the contrary, he had 'expected' some to be ordered and did not press the point. He confirmed under cross examination too that he had not told the respondent that the headphones he was using had broken down.

(40) The Tribunal were not taken to any documentation and heard no evidence on the arrangement or occurrence of any coaching sessions for the claimant. The Tribunal found this was common ground. Mr Esson and Ms Gallagher both accepted under cross examination that this was overlooked and did not take place. Mr Esson said that this was because it was an extremely busy period for him and the respondent because of the transformation project. Mr Esson's evidence in paragraph 16 of his witness statement that efforts had been made to secure coaching sessions was not entirely consistent with his oral testimony under cross examination where he made no reference to any efforts made in this regard and confirmed there had been no coaching by December 2018.

(41) There was also no disability awareness training provided by the respondent for management or the claimant's peers. The Tribunal noted that the claimant had given Mr Esson documentation on the effects of ADHD and the Tribunal accepted that Mr Esson had read the documentation. The Tribunal also accepted Mr Esson's evidence that he had undertaken personal reading on ADHD. However, this fell short by some distance to be comparable to receiving workplace related training and adjustments that could be made whether the claimant was disabled under the EqA or not. Mr Esson's evidence in paragraph 16 of his witness statement, that efforts had been made to secure disability awareness training for the team was not supported by any contemporaneous evidence.

(42) In relation to sitting in a quiet area (recommended by OH), there was a quiet room the claimant had access to, but it was not an exclusive room for the claimant. It did not however need to be an exclusive room, the recommendation was to be provided a quiet area within the open plan office where there were the least distractions. Mr Esson confirmed in evidence that this room had hot desks and thus other people would use it too but he said this would be 1 or 2. The claimant's evidence in paragraph 80 of his witness statement was consistent with that, but Mr Esson's evidence on the number using the quiet room at the same time was not specifically challenged. There were no instructions given to the team that the claimant had, for example, priority use of an area within that room or to say to colleagues that the claimant needed to work with less disturbance. This was, however, interrelated with the recommendations to use headphones which would serve to reduce noise though when using Dragon or being on the phone, the headphones could not be in use (see ATW report, page 180).

(43) In the months following the OH report and the meeting in relation to that, save for an occasion in either July or August 2018 (see below) and an offer in the December 2018 supervision meeting (to take a paperwork day), there were no additional designated/pre-planned 'protected' paperwork days provided to the claimant. Mr Esson's evidence was that once he was outside of the formal capability procedure, Mr Esson no longer needed to 'micro-manage' the claimant. Neither, Mr Esson said, did the claimant ask for paperwork days. The claimant's evidence wavered on this aspect. He had said contemporaneously that he wished he had given more (paperwork) time sooner in the capability meeting on 3 May 2018. Under cross examination, he said being given more time was the opposite of helpful. This was also said in his witness statement

(paragraph 86). The Tribunal noted however that the claimant's remark on 3 May 2018 was pre-diagnosis of his ADHD.

(44) As part of the transition from KMPT to KCC, KCC had identified a need to transition some of the cases to KMPT. As a result, the claimant was asked to prepare a number of cases for handover. This would have entailed updating notes and doing risk assessments as required. On 27 December 2018, Mr Esson emailed the claimant asking him to make contact with client 'PM' to ascertain if the client continued to need the service or if the file could be closed. Either way, he said, "*we need an up to date contact on Rio*" observing that there were no contact notes since April 2018. This email was at page 405.

(45) On or around 4 January 2019, Mr Esson asked the claimant to give Ms Rosemary Coombes (KMPT) background information on clients he had not seen for a while. The claimant emailed Ms Coombes on 4 January 2019. He updated Ms Coombes in relation to 3 clients, including client PM. In relation to PM, the claimant said he/she had a fixed delusion about his/her life being pointless. He said he/she was taking a variety of medication but he/she could be discharged if his/her lithium levels could be checked. This email was at page 404. It was not in dispute that his email was sent to Ms Coombes without the claimant having any further contact with this client.

(46) On 15 January 2019, Mr Esson emailed the claimant again asking him to make contact with client PM. This email was at page 398 and again was only about client PM who had not been seen since April 2018. It was not in dispute that no further contact was made before the event reported to Mr Esson on 22 January 2019 that client PM had jumped off a motorway bridge and taken his/her own life.

(47) When the death of client PM was notified to Mr Esson, he informed the claimant on 23 January 2019, who was on a training course. Both Mr Esson and the claimant expressed shock and surprise. There was no doubt in the Tribunal's mind that this would have been very distressing for both and, in particular, the claimant as PM had been his client.

(48) Following this event, the case files for PM were reviewed. It was apparent that PM had not been seen since April 2018 and further, as referred to above, the claimant's risk assessment of PM in January 2019 was a paper review – it had been done without visiting PM, or speaking to him or his family members. In his witness statement, Mr Esson set out an additional timeline of dates (between 16 July 2018 and 13 September 2018) (pages 357 to 363) when the claimant had been asked to contact PM (and others). Specifically, on 16 July 2018 and 1 August 2018, the claimant's outstanding list was referred to as 'must dos'. There was also an email from Mr Esson relating to either 16 July 2018 or 1 August 2018 – this was unclear – offering the claimant a paperwork day to attend to the list. In oral testimony, the claimant said his email referred to 1 August 2018 though in his email to Ms Gallagher of 24 January 2018 (see below), it appeared to relate to the email of 16 July 2018. That recollection was preferred as being far more proximate to the date in question. The Tribunal found, based on the email dated 24 January 2019 (see below), that this timeline

was factored in to the decision to suspend the claimant. Further, Mr Esson also said there were another 6 cases where the clients had not been regularly visited by the claimant. It was however the Tribunal's understanding that this detail emerged *after* the decision to suspend.

(49) On 24 January 2019, Mr Esson set out a chronology/timeline in relation to PM to Ms Gallagher. This was at pages 367 to 368. This was a detailed summary of the key events and dates in relation to PM. It referred to PM wishing to be discharged from the service following the claimant's visit to PM in February 2018; contact with PM's brother in March 2018, when PM's brother was wanting PM to see a consultant psychiatrist for a medication review and because his hands were shaking. The claimant contacted PM's brother on 20 April 2018. It was not in dispute that PM had not been discharged, though it appeared to be in dispute what was needed to be done to be discharged. In the Tribunal's view, Mr Esson and Ms Gallagher were very forthright that a visit would be required first. It was not just a matter of form filling. The email also referred to the claimant's diagnosis of ADHD and its asserted impact on the claimant's performance and reasonable adjustments recommended by OH and ATW. Mr Esson said the claimant had a designated desk and would at times use ear phones and Dragon software was in the process of being ordered.

(50) On 25 January 2019, the claimant was suspended from work on full pay. This happened at a meeting attended by the claimant, Mr Esson and Ms Gallagher. In advance of the meeting Ms Gallagher had done a suspension risk assessment. This was at pages 201-203. All alternatives to suspension, for example doing duty work or safeguarding enquiries, were discounted because of the importance of regular contact and/or timely and comprehensive recording. There was no evidence contemporaneously, or in the witness evidence, that the claimant's ADHD was considered before the decision to suspend or that Ms Gallagher had read/considered the OH report or the ATW report first. In fact under cross examination she said she did not see the ATW report until the capability hearing in October 2018.

(51) The claimant's suspension was confirmed by a letter dated 25 January 2019, at pages 205-207. It was confirmed that the suspension was pending an investigation into possible gross incompetence and would be for up to 28 days. The specific allegation was "*Failure in duty to undertake role and mitigate risk to clients and KCC".* The claimant was informed that the suspension was not disciplinary action and did not imply any assumption of guilt; further that the suspension would be kept under review and would be no longer than necessary.

(52) Under the respondent's performance and capability procedure (pages 654-670), suspension was to be used exceptionally only. Further, in gross incompetence cases, an investigation was to be undertaken within 8 weeks. This was also stated as the maximum time limit in the respondent's 'guidance for investigation managers' document on page 650, including cases involving gross misconduct. This was considered an extension to the stated position that most investigations should be completed within 28 days. The claimant's email account was suspended as was his access to the computer network.

(53) Subsequently, the subset of allegations requiring investigation were clarified in a letter dated 30 January 2019. This was at pages 214 to 216:

- Failing to keep in contact with service user and the family leading to potential risk
- Failing to keep accurate records on Rio relating to plans for the service user and leading to potential risk
- The above are serious breaches of the HCPC standards of conduct, performance and ethics

(54) On 15 February 2019, the period of suspension was extended for a further 28 days. This letter was at page 224. No reasons were given in the letter.

(55) The Tribunal found that the initial delay was caused by the decision to appoint an external investigator. Ms Gallagher's evidence was accepted in this regard, but the Tribunal were surprised that there was no suitable investigator available amongst KCC's approved list of internal investigators. The claimant was informed of this decision, in principle, by a letter dated 22 February 2019 which was at page 226 of the bundle.

(56) Ms Lynne Bryan of Chully & Co was appointed as an investigator. The scoping form for the investigation was at pages 218-221. It was put to Ms Gallagher that the scoping meeting document, dated 11 February 2018 at page 222 of the bundle, related to the appointment of Ms Bryan (her name was on the scoping document at pages 218 to 221), but it was not until 11 March 2018 that the claimant was informed of her appointment. When questioned on this sequence under cross examination, Ms Gallagher did not have an explanation for this delay or that the sequence was in fact incorrect such that there was no delay.

(57) Ms Bryan wrote to the claimant on 19 March 2019 inviting him to an investigation meeting on 11 April 2019 (pages 241-242).

(58) Ms Bryan interviewed Mr Esson on 19 March 2019 and received a statement from Ms Henderson (previous Service manager of Ashford Community Mental Health Team 'ACMHT') (on 21 May 2019) as part of her investigation. The notes of the meeting with Mr Esson were at pages 316 to 333 of the bundle and the statement of Ms Henderson was at page 334.

(59) During the course of the interview with Mr Esson he was asked whether 'contact' with a service user meant by phone or a personal visit. Mr Esson said it depended on a person's presentation but there was a preference for face to face and that the visit 'should' be done in the user's home. The Tribunal were not taken to any prescriptive protocol in this regard and accepted the evidence as given by Mr Esson that fact to face contact was preferred but it was not always necessary or done. There was also discussion about reminder lists requiring information on clients to be updated which were sent to the claimant and others in readiness for the transformation but there was no information

given or discussed about how many clients had not been seen by other social workers and over what period for comparative context. In response to a question about why he thought the claimant had not seen client 'PM', Mr Esson said "*he probably forgot he was going to be discharged, his mind was on other things, focused on other things*". Mr Esson also explained that he felt the claimant had been doing really well, applying himself since his ADHD diagnosis, including acting as a mentor and also taking on a student for her placement. In oral testimony, Mr Esson also explained how the claimant had been assisting/deputising for Mr Esson at times too. Mr Esson also mentioned the claimant's ADHD diagnosis and his awareness of the need to make adjustments. He said Dragon was not implemented because of the transformation project and that the claimant understood and accepted the delay in this regard. He mentioned paperwork days had been given to the claimant, that he was aware the claimant had earphones and he had received information from the claimant about his ADHD and the impact of that on his lack of motivation and poor concentration. There was no discussion or reference to workplace coaching or ADHD training for his management and peers. Mr Esson also remarked at this meeting that *"it must be horrible for him [the claimant] being suspended*."

(60) In her statement, Ms Henderson said "all necessary reasonable adjustments were made when [the claimant] had his diagnosis of Adult ADHD and further, that he "had the necessary support to be able to effectively do his job and adequate adjustments were made in relation to his health." Specifically, Ms Henderson referred to the cessation of the capability procedure, equipment was 'agreed', workload was reduced and the claimant was removed from the Duty rota. There was no reference specifically to the OH report, or to the ATW report; or to workplace coaching sessions, ADHD training for management and the claimant's peers and the reference to equipment agreed (which the Tribunal found to mean Dragon), was not a reference to it being in place. In oral testimony, Ms Bryan confirmed twice, that she relied on what was said to her by Ms Henderson in this statement regarding whether/what adjustments were made and did not make her own/further enquiries around this.

(61) As a result of the interview with Mr Esson and reviewing documentation provided, Ms Bryan emailed Ms Lyndsey Mark (HR) to seek guidance/instruction about whether the scope of the investigation needed to be expanded to include other clients with whom it appeared the claimant had not had contact for over 6 months. There was a brief discussion (page 327) about this in Mr Esson's interview. Ms Bryan's email of 2 April 2019 was at page 258 of the bundle. She referred to 6 other clients who it appeared had not been contacted ranging between 6 to 10 months.

(62) Subsequently, Ms Cheryl Fenton (HR) wrote to the claimant on 5 April 2019, to expand the scope of the investigation to include the 6 other service users. They were referred to by initial. This letter was at page 259 of the bundle.

(63) Around this time, dialogue was also taking place between the claimant and HR about access to documentation/Rio which the claimant required in order to prepare for his investigation interview on 11 April 2019. Ms Mark had explained

to Ms Bryan that the claimant would be given access to view Rio by KMPT (as KCC no longer had the claimant's laptop). In addition, KCC were arranging for him to view his email account and 'H' drive via a virtual desk top. These arrangements were set out in an email from Ms Mark to Ms Bryan dated 2 April 2019 at page 257 of the bundle.

(64) The investigation meeting with the claimant went ahead as planned on 11 April 2019. The minutes were at pages 290 to 315 which is a transcription of the recording of the meeting. The claimant was accompanied at the meeting by a union representative. There was discussion at this meeting about his workload, the job plan, notes which may (or may not) be on Rio and emails the claimant said he had sent in relation to clients. The claimant also discussed his ADHD diagnosis and the effect of this on his work. Reference was also made to the 6 other clients (whom it was alleged the claimant had also not had recent contact with). The claimant remarked at this meeting " *to be honest I don't know what I've done and what I haven't done a lot of the time*". He also said he had been denied access to the respondent's system to check documentation (page 305 and 308) though he was expecting to get some access in the next week (page 306). Ms Bryan said she would make further enquiries in relation to documentation. At one point in the meeting, the claimant was asked what he thought the problem was in response to which he asserted his concerns about workload, and that no adjustments had been made as a result of his ADHD diagnosis, including no action plan, no implementation of the ATW recommendations and no workplace OH assessment as to how ADHD affects him in the workplace (pages 311-312).The Tribunal also found that when there had been an earlier discussion in the meeting about ADHD, rather than a further engagement with the claimant, the conversation moved on immediately to client 'PM' (page 302).

(65) In oral testimony, under cross examination, the Tribunal found that Ms Bryan repeatedly failed to understand the difference between not disputing the claimant's diagnosis of ADHD and the actual question which was being put to her about her appreciation of the effect of that diagnosis on the need for support in the workplace. The Tribunal were not impressed by Ms Bryan's evidence in this regard. She was an experienced HR professional who knew or ought to have known or appreciated the very different point which was being put to her. This was starkly illustrated when Ms Bryan was asked about whether she had investigated what had been recommended (reasonable adjustments), Ms Bryan said under cross examination that "*she never commented on the fact that [the claimant] did not have ADHD"* and separately *"my role was to see if there was a case to answer or not as to whether he had seen clients, not whether or not he had ADHD"*.

(66) On 26 April and 16 May 2019 the claimant's suspension was extended by 28 days (on each occasion).

(67) The claimant emailed HR (copying in Ms Bryan) on 22 May 2019 complaining about being denied access to documentation to enable him to take part in the investigation properly. A chronology of his requests and responses was provided. The email from Ms Mark of 9 April 2019 (page 349) did not seem to

appear in the chronology; in that email whilst accepting that access to documentation would be limited, access to the claimant's calendar, emails and the 'H' drive could be provided together with supervised access to Rio. The dispute appeared to be in respect of saved information on the 'C' drive which was not normally used. The Tribunal were not provided with evidence on whether the C drive of the claimant's laptop was ever retrieved or what further enquiries were made and if not, why not.

(68) In an email dated 10 July 2019 from Ms Mark to Joan Richardson, Ms Mark referred to Ms Richardson having met with the claimant expressing concerns about his health (page 407). In this letter, Ms Mark remarked, that her belief was that reasonable adjustments previously raised from August 2018, had been implemented. This belief may have been genuinely held but it was factually erroneous. There was no stated basis upon which she said that belief was held.

(69) The claimant's suspension was extended for a further 28 days on 10 July 2019 (page 409), having been extended on 11 June 2019 until 13 July 2019 (page 275).

(70) Following receipt of Ms Bryan's investigation report dated 18 June 2018, Ms Gallagher wrote to the claimant inviting him to a performance and capability hearing on a charge of gross incompetence. Ms Gallagher's letter was at page 410-411. The claimant was forewarned that a possible outcome of the hearing was dismissal.

(71) The investigation report was in the bundle starting at page 277 with appendices. Ms Bryan's conclusions took in to account the Health and Care and Professions Council ('HCPC') Code of Practice which provides at paragraph 6.3 "You must make changes to how you practise, or stop practising, if your physical or mental health may affect your programme or judgment, or put others at risk for any other reason". The report also cited paragraphs 10.1 and 10.2 about the need to keep records and to do so promptly. Ms Bryan concluded in relation to 6.3 above:

"*From the documentary evidence gathered it is evident that Tim Jackson has not taken into consideration what impact his health issues may have on his ability to perform his role, whilst meeting the requirements of his professional role and to adhere to and meet the standards required as indicated by the HCPC code of practice*".

(72) Ms Bryan's conclusion was that the claimant's actions could be deemed as incompetent. The conclusions did not make any specific reference to the 6 other service users in respect of whom the investigation had been expanded and neither was this referred to in Ms Bryan's witness statement. The report also referred the claimant's ADHD and stated that the suggested reasonable adjustments had been made, though there was enquiry of her own in this regard. The Tribunal found that Ms Bryan ought to have checked which of the adjustments recommended by OH or ATW had been made and when and the impact of those.

(73) The performance and capability hearing was scheduled for 16th September 2019, taking into consideration the claimant's holiday in August and the availability of his union representative. However, the hearing was rescheduled for 17 October 2019 because the claimant wished to have Ms Bryan in attendance, as he felt her evidence in person was necessary and she could not make 17th September 2019. The Tribunal found that whilst this provided some explanation for the period of the suspension, this was at the back end of the suspension period and only explained some weeks of the suspension period, by which time it ought to have been an absolute priority to schedule a hearing. Even by 5 August 2019, which the Tribunal understood to be the first scheduled date for the hearing, the claimant had been suspended for approximately seven months. The Tribunal also found, based on the claimant's email of 15th of July 2019 that the hearing on 5 August 2019 could have proceeded if the claimant had been sent a copy of the investigation report. The note at page 413 indicated that the full papers were to be issued to the claimant in due course. That note was dated 12 July 2019. An amended investigation report was still to be sent on 1 August 2019 based on the notes at page 419 of the bundle.

(74) In advance of the hearing, Ms Gallagher prepared a management case and the claimant prepared written statements. The management case did refer to the other service users beyond PM. Ms Gallagher also referred to the claimant's ADHD and reasonable adjustments, but again failed to identify, by reference to the OH report and the ATW report, which adjustments were made and when. Ms Gallagher also stated that the claimant was not given access to RIO during his suspension.

(75) The hearing was chaired by Ms Christine Beaney who, at the time, was the assistant director Adult Learning Disability Services. Ms Gallagher attended the hearing to present the case. The claimant attended with his union representative (Ms Richardson); Ms Bryan and Mr Esson were also called as witnesses. Ms Mark was present from HR.

(76) It was not in dispute (the meeting was recorded) that at this hearing during the claimant's questioning of Ms Bryan, she remarked " *I would have thought your time would have been better spent writing notes for your clients rather than your own job [plan]*" (page 493). The context of this remark will be analysed in the Tribunal's conclusions in relation to alleged harassment.

(77) At this hearing Mr Esson accepted that he Dragon software was not installed, the ADHD awareness training was not done and the coaching was not done either too. In relation to OH, there was no specific referral made for the claimant's ADHD (page 504/505/510) and there was no discussion with the claimant about a time line to get the ATW adjustments in place (page 510). Mr Esson accepted the recommendations 'got lost' and with the transformation project, it was like a perfect storm. Further, that at the time, the focus was on quantity rather than quality whereas now there was a very structured environment where they look at caseload weighting and there were job plans by which each person's work is assessed. It was also put to Mr Esson by the claimant that there were between 50 – 100 people on reports which used to be circulated detailing those clients who had not been seen for 180 days, but Mr

Esson was not able to answer that as he said he did not know. The Tribunal found this was likely to have been relevant. The claimant, reading from one of his statements, said the reason he did not contact PM after 15 January 2019 is because he had prioritised statutory work, safeguarding, MCA (Mental Capacity Act) Mental Health Act, prioritising people acutely unwell, being abused or who were ill or caring for children (page 539). He also considered the remark cited above (regarding the allegation that the claimant had not taken into consideration what impact his health issues may have had on his ability to perform his role as a strange allegation and one which was inappropriate.

(78) Ms Beaney's conclusion following the performance and capability hearing, was that there was insufficient evidence to support the management case that the claimant had been grossly incompetent. Ms Beaney explained that whilst she accepted that the risk assessment in relation to PM was on Rio in draft, this was not clear. However she was extremely concerned that the ATW report recommendations had not been implemented over a 5 to 6 month period. She concluded that the suspension should be lifted with immediate effect, that the ATW report and recommendations are implemented immediately and the OH referral *specific to* the claimant's ADHD and the ATW report is done, there is a phased return to support the claimant back to work and that there is a gradual build-up of the claimant's workload within that time.

(79) The conclusion and outcome was confirmed in a letter dated 18 October 2019 (pages 556 to 562).

(80) Following the claimant's return to work it was agreed that he would report in to Ms Dawn Ayres. The claimant had also asked to meet with Mr Esson informally. This duly happened. The meeting took place in a pub. During this meeting, Mr Esson said to the claimant he "*couldn't protect him anymore*". The comment was not disputed as said. In Mr Esson's witness statement, he explained that this was said after the claimant had told him about his disability and told him it might take him longer to do things. Further, he said whilst he understood that, the above comment was said in response. There was some tension between the parties as to what this meant. Mr Esson's evidence was that this meant there comes a point where the claimant had to be accountable for his own actions. The claimant believed that this was a comment in relation to no longer being able to support the claimant from management who wished to take capability action against the claimant. The claimant also disputed the assertions made in the grounds of resistance that this was in relation to not being able to protect the claimant from complaints from service users and colleagues. The Tribunal will analyse below, in its conclusions and analysis, the context, purpose or effect of this comment.

Applicable Law

(81) S.15 EqA provides:

Discrimination arising from disability

A person (A) discriminates against a disabled person (B) if

A treats B unfavourably because of something arising in consequence of B's disability, and

A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

S.20 provides:

Duty to make adjustments

Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice ('PCP') of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to:

(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to:

(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,
(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part 3 of Schedule 8, S.20 EqA provides:

Part 3
Limitations on the duty
Lack of knowledge of disability, etc.

20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know:

in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

<u>Harassment</u>

(1) A person (A) harasses another (B) if

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(82) Pursuant to S. 212 EqA,'substantial' means more than minor or trivial.

(83) The general burden of proof is set out in S.136 EqA. This provides:

"If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

(84) S 136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

(85) The guidance in ***Igen Ltd v Wong 2005 ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

(86) In ***Laing v Manchester City Council 2006 ICR 1519 EAT***, the EAT stated that its interpretation of Igen was that a Tribunal can, at stage one, have regard to facts adduced by the employer.

(87) In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated:

(88) "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient*

material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination"

(89) More specifically, in relation to reasonable adjustments, a claimant must establish he is disabled and that there is a provision, criterion or practice which has caused the claimant his substantial disadvantage (in comparison to a non-disabled person) and that there is apparently a reasonable adjustment which could be made. The burden then shifts to the respondent to prove that it did not fail in its duty to make reasonable adjustments ***Project Management Institute v Latif 2007 IRLR 579***. The respondent may advance a defence based on a lack of actual or constructive knowledge of the disability and of the likely substantial disadvantage and the nature and extent of that because of a PCP - S.20, Part 3, Schedule 8 EqA & ***Newham Sixth Form College v Sanders 2014 EWCA Civ 734***.

(90) In relation to discrimination arising from disability, once a claimant has established he is a disabled person, he must show that 'something' arose in consequence of his disability and that there are facts from which the Tribunal could conclude that this something was the reason for the unfavourable treatment. The burden then shifts to the employer to show it did not discriminate. Under S.15 (2) EqA, lack of knowledge of the disability is a defence but it does not matter whether the employer knew the 'something' arose in consequence of the disability. Further an employer may show that the reason for the unfavourable treatment was not the 'something' alleged by the claimant. Finally, an employer may show the treatment was a proportionate means of achieving a legitimate aim.

(91) In ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN*** the EAT stated:

"26. *The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" - and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.*

27. In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability."

In ***Pnaiser v NHS England & Anor UKEAT/0137/15/LA*** the EAT stated, in reviewing the authorities:

"*31 (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

31 (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it".

(92) In ***Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16/JOJ*** the EAT stated:

"*15. In those circumstances, I do not consider that there is any conflict between the approach identified in Hall and that identified by Langstaff J in Weerasinghe. As Langstaff J said in Weerasinghe the ingredients of a claim of discrimination arising from disability are defined by statute. It is therefore to the statute that regard must be had. The statute requires the unfavourable treatment to be "because of something"; nothing less will do. Provided the "something" is an effective cause (though it need not be the sole or the main cause of the unfavourable treatment) the causal test is established.*

16. In this case, the Tribunal recognised that the requirement in section 15 does not involve any comparison between the Claimant's treatment and that of others. It expressly accepted that in considering a section 15 claim it is not necessary for the Claimant's disability to be the cause of the Respondent's action, and that a cause need not be the only or main cause provided it is an effective cause (see paragraph 29.2). Notwithstanding the arguments of Mr McNerney, I can detect no error of law in that self-direction.

17. At paragraph 29.3 the Tribunal applied the facts to that statutory test, adopting the two-stage approach identified in Weerasinghe. In light of my conclusions above, I do not consider that there was any error of law by the Tribunal in taking that approach. The Tribunal was entitled to ask whether the Claimant's absence, which it accepted arose in consequence of his disability, was an effective cause of the decision to dismiss him. To put that question another way, as this Tribunal did, was the Claimant's sick leave one of the effective causes of his dismissal?"

(93) By S.123 (1) EqA, a claim may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.

(94) Pursuant to s.123 (3) (a) EqA, conduct extending over a period is treated as done at the end of the period.

Conclusions and analysis – Disability & knowledge

(95) The Tribunal had regard in particular to the claimant's disability impact statement dated 13 July 2020, the consultant psychiatrist (Mr Maltezos) report, dated 14 June 2018, the OH report dated 22 June 2018, the ATW report dated 31 August 2018, the claimant's GP records and the respondent's actions and evidence since the ATW report in particular. The Tribunal also referred to the Statutory guidance on matters to be taken into consideration in determining the question of disability.

(96) The Tribunal had the observations below from this documentation.

(97) The claimant's disability impact statement was dated 13 July 2020. It was written in the present tense without any conscious or deliberate attempt to look back in time or to draw a distinction between a 'before' and 'now' impact. In his impact statement, the claimant explained workplace impact such as being easily distracted from an assignment/task, having a poor memory, mislaying papers, struggling to remember to do routine/mundane tasks, being distracted in an open plan environment, procrastination, taking criticism badly. He said his working life had for years been spent thinking about what he had not done, what he likely to be criticised for. At home, the claimant said the foregoing impact was mirrored but better tolerated by family. He said he would start DIY matters at home but leave them half complete, he was unable to sit with his family if he is not engaged or interested, he struggled to be relaxed when sitting at the table to eat or watch television with his legs constantly moving, generally being less involved in conversations because he doesn't find the topic interesting or finds it difficult, frequently forgetting things he is cooking thus often burning food, being unable to take in too much information at once or being focused on more than one matter, struggling to sleep because of a pre-occupation with matters which do interest him, forgetting to do things completely and losing papers/items endlessly.

(98) Dr Maltezos recorded the claimant's concerns during his assessment, in particular: sustaining concentration and getting easily distracted, difficulties with the writing aspect of his work, drifting off, leaving boring tasks to the last minute, taking longer than expected to prepare reports, getting easily side tracked, jumping from one task to another, struggling to organise himself or manage his time, being forgetful, losing and misplacing items and attention difficulties.

(99) The OH report was not consistent and gave an uncertain view on whether the claimant was disabled. The report did say however that the claimant did have an underlying health problem, that he did have a physical or mental impairment, that he was fit for work *with adjustments* and that he was likely to be covered by the EqA 2010. A series of adjustments were recommended together with 'accommodations' to the capability process too.

(100) The ATW report was not diagnostic, but informative, based on a presentation of a recent diagnosis of ADHD. There were a series of adjustments recommended following a workplace assessment. Under the Occupational health section, it was stated that if a *suitable* OH assessment had not been completed, then further action was required following which in conjunction with HR, an action plan should be formulated. Whilst an OH report was available, it was not organised or arranged to assess or deal with the ADHD diagnosis. That was only discussed very briefly, albeit adjustments were still able to be recommended.

(101) The claimant's GP records/notes were unremarkable in relation to any history regarding symptoms, events or clues in relation to possible ADHD. That was save for an entry in November 2017 where the claimant did discuss the need to explore the possibility of ADHD. In the years preceding the claimant's diagnosis, there were some references to anxiety, the need for counselling, bereavement, workplace concerns (which the Tribunal concluded related to concerns about previous line management of the claimant). There was one reference to restless leg syndrome, which the Tribunal considered might have been a symptom of ADHD but could not conclude this without medical evidence/assertion. There were no references or concerns expressed *for example* in relation to concentration, memory, forgetfulness, attention, distraction or organisation.

(102) The Tribunal noted that the respondent had not challenged or queried the diagnosis of ADHD at the time neither the need or nature of the reasonable adjustments recommended in the OH report or ATW report, both of which had multiple references to his needs being linked to disability. Ms Gallagher, the commissioning manager for Ms Bryan's investigation, had referred in her scoping investigations pro-forma that the claimant "had a disability that falls under the Equality Act" (page 219) and in the supervision meeting of 11 December 2018, it was stated that the claimant had a disability which affected his concentration (page 395).

(103) In the Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability, under the Appendix, there is an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. The Tribunal noted this includes:

- Persistent general low motivation or loss of interest in everyday activities
- Difficulty understanding or following simple verbal instructions
- Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder

- Persistent distractibility or difficulty concentrating

(104) The Tribunal reminded itself that 'substantial' means more than minor or trivial.

(105) Having regard to the foregoing observations, the majority view of the Tribunal was that the claimant was, at the material time, a disabled person within the meaning of S.6 EqA. The claimant's disability impact statement in particular was accepted and with regard to the impact described on the claimant's normal day to day activities as manifested at home and in the workplace, it was reasonable to regard it as having a more than minor or trivial impact on matters (a) to (d) (from the Appendix referred to above) individually and collectively. In addition, Dr Maltezos's report provided corroboration, in particular in relation to the claimant's distractibility and difficulty concentrating. Whilst the OH and ATW reports were not diagnostic, they provided a series of recommendations and adjustments on the basis that they were needed – because of the claimant's disability. There was no evidence before the Tribunal to counter that and contemporaneously, the respondent had accepted that to be the position. These were not protective or 'just in case' adjustments. The majority view was also that there was unlikely to be a need for the claimant to seek medical attention from his GP in relation to symptoms of ADHD when he was not self-aware that there might be an underlying cause.

(106) The minority view was that that the claimant was not a disabled person within the meaning of S.6 EqA at the material time because the credibility of the impact on the claimant's home and work life was undermined by the absence of any previous work or home life evidence before the claimant's diagnosis. Whilst the claimant's evidence was he himself was not self-aware of his underlying issue (later diagnosed), his symptoms were apparent from a childhood and he said he struggled to concentrate on revision (when studying) for more than 5 minutes. He could never complete coursework or home work on time and "*all of my work throughout my life has been completed just in time, often with working through the night…".* Further, he said if he had been aware he had ADHD earlier in his life his academic and professional life could have been much different. However, there was no information or evidence about the claimant's home and work impact in, for example, 2017, 2016, 2015 and earlier years. In the minority view, there would have been significant workplace impact in earlier years. The Tribunal had evidence of previous alleged bullying but that had no link to alleged ADHD symptoms and the impact of that on the claimant. As noted above, there was reference to anxiety, depression, counselling and bereavement in the claimant's GP medical history in recent years but no work related *impact* of ADHD *symptoms*, albeit without specific awareness.

(107) In relation to knowledge and specifically whether the respondent knew or could reasonably have been expected to know the claimant had the disability, the majority view was that the respondent ought reasonably to have been expected to know the claimant had the disability. The conclusions of the majority view above are repeated, in their generality. In particular, the respondent had Dr Maltezos's report, the OH report and the ATW report. Both of the latter reports also had reasonable adjustments recommendations. The observations of the OH report referred to above 96 whilst ambiguous, when read with the other

evidence, ought to have provided sufficient evidence to put the respondent on reasonable notice that the claimant was disabled. There was no enquiry of OH of the ambiguity and it was not open, to the respondent to rely on that lack of enquiry in circumstances where there was evidence enough pointing to the claimant's underlying impairment. The respondent had also expressly or impliedly accepted its need to make adjustments in the period following, starting with halting the capability process. The question of knowledge was not raised by the respondent at the outset of the Hearing; it was the Tribunal who had announced that it considered it was a relevant issue to be determined.

(108) The minority view on whether the respondent knew or could reasonably have been expected to know the claimant was disabled, was that the respondent did not know and could not reasonably have been expected to know the claimant had the disability. The conclusions of the minority view above are repeated, in their generality. In particular, the respondent proceeded on the basis of the recommendations without any considered express acceptance that they knew the claimant to have the disability. Whilst the respondent had knowledge that the claimant had been diagnosed with ADHD, this was not the same as actual or constructive knowledge of the claimant being a disabled person as a result in the light of the significant absence of evidence relating to the impact on the claimant before 2018 given the evidence provided in his consultant psychiatrist's report (Dr Maltezos) and that set out in the claimant's disability impact statement. There appeared to be a tacit acceptance of what was a mild diagnosis of ADHD. Mr Esson's evidence under cross examination was that he had learnt more about the impairment during the course of the Tribunal proceedings.

Conclusions and analysis on the substantive issues

(109) 6 (a) & 7: Dragon software - based on the *majority* conclusions on the claimant being a disabled person at the material time and the respondent could reasonably be expected to know that the claimant had the disability, the unanimous view of the Tribunal was that the claimant would be put to a substantial disadvantage in relation to his ability to undertake his work in comparison with persons who did not have his disability without the provision of Dragon dictation software and the respondent knew or could reasonably be expected to know that. The ATW report was clear in its view that the software would help the claimant concentrate and input more coherently. In Dr Maltezos's report, it was noted that the claimant took longer than expected to produce reports, had a tendency to avoid mundane tasks exacerbated by his difficulties with planning and efficient time management resulting in leaving tasks to the last minute. It was also noted it would take him much longer than expected to deliver tasks. There was no compelling case for the delay in the provision of this software. The claimant's acquiescence was not a reason; the Tribunal concluded that this was not a consent to the delay. Neither was the transformation project a sound reason for the delay, especially as the contemporaneous evidence was that it could and should have been implemented**.** There was also no enquiry of the portability of the software. With the size of the respondent's undertaking, this could and should have been provided shortly after 25 September 2018. There was no assertion by the

respondent the cost of the adjustment had any relevance on the non-provision. The burden of proof had shifted to the respondent and was not discharged.

(110) 6 (b) & 7: Noise cancelling headphones - based on the *majority* conclusions on the claimant being a disabled person at the material time and the respondent could reasonably be expected to know that the claimant had the disability, the unanimous view of the Tribunal was that the claimant would not be put to a substantial disadvantage in relation to his ability to undertake his work in comparison with persons who did not have his disability without the provision of noise cancelling headphones. In relation to the claimant's susceptibility to ambient noise, the ATW report stated these headphones *should* help. It was not put any higher than that. Further they would need to be removed when the claimant was on the phone and when he was using Dragon. If the claimant was provided with Dragon, this would limit the occasions the headphones would be of use. They would of course not be of any aid when doing client/service user visits either. (Whilst working from home was offered this would not have aided the claimant because of other distractions because of his ADHD). Whilst the adjustment was for the respondent to make, the claimant had voluntarily used his own headphones. The Tribunal concluded that this was his election to do so. In addition, he did not inform the respondent that his headphones were subsequently broken. He accepted under cross examination that he did not inform the respondent. He said this at the performance and capability hearing too (page 551). He also accepted that he did not inform the respondent, as asserted by the claimant, that his headphones were not in fact noise reducing. This evidence was relevant to whether there was any disadvantage to the claimant without the headphones. If there had been the Tribunal concluded the claimant would have informed the respondent they were broken, also, that the headphones he was using were not noise cancelling as alleged by him. If the Tribunal was wrong in reaching this conclusion, the Tribunal concluded the respondent did not know and could not reasonably be expected to know that the non-provision of noise cancelling headphones *by the respondent*, in these circumstances, would put the claimant to a substantial disadvantage. The burden of proof did not shift to the respondent.

(111) 8 (a) PCP – 'Minimal supervision/training' – there was a lot of evidence of supervision meetings before the Tribunal. The Tribunal did not have the evidence of all supervision meetings undertaken particularly before 2018. However, before the capability meeting on 3 May 2018, as found above, there had been supervision meetings with the claimant on 9 January, 15 February, 13 March and 11 April 2018. The Tribunal had not been offered evidence or an explanation of what was considered to be minimal. There was however a supervision policy in the bundle. There was no questioning of the respondent's witnesses about this the policy, in particular Mr Esson and specifically whether or how the policy had not been adhered to. The Policy provided a framework/guidance for supervision. The recommendation for the frequency was 4 – 6 weeks. That accorded with the claimant's meetings referred to above in broad terms and with the timeline of the meetings between September and December 2018 (see earlier findings). No evidence was offered regarding how or why training was minimal or what that entailed. The Tribunal thus concluded that there was no PCP applied as asserted. If the Tribunal had gone on to

consider substantial disadvantage (if it had concluded this PCP was applied), the Tribunal would have had regard to the claimant's investigation meeting with Ms Bryan on 11 April 2018, when the claimant said a person with ADHD probably does not need help with supervision, but help with structure. The burden of proof did not shift to the respondent.

(112) 8 (b) 'No ADHD training PCP' – as found above, the ATW report recommended the provision of Disability in the workplace training. A quote was provided. A minimum number of 6 delegates was suggested. It was also noted that such training had not recently been provided by the respondent. The training was not provided, this was not disputed though Mr Esson said he had been provided with and read information on ADHD and had undertaken some research too but that was not the provision of organised training to impart knowledge on the implications of the condition which the report stated were difficult for others to understand. However, in assessing whether the respondent had applied a PCP of not providing the training, the Tribunal considered whether or not this was a one off act pursuant to ***Ishola v Transport for London 2020 EWCA Civ 112.***

(113) In ***Ishola***, the Court of Appeal, in paragraphs 32 and 37 – 39 in particular, said as follows:

"*32. Mr Jones challenges as wrong the approach of the EAT to the nature of an alleged practice in this context in* **Nottingham City Transport Ltd v Harvey UKEAT/0032/12**. *In that case, in the context of a flawed disciplinary process, the EAT (Langstaff J) held that although these words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, to be a "practice" falling within the definition of a PCP:*

"18. … there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustments, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."

37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground,

it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.

39. In that sense, the one-off decision treated as a PCP in Starmer is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of the element of repetition about it. In the Nottingham case in contrast to Starmer, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way. "

(114) With the above guidance in mind, the Tribunal concluded that was no evidence before the Tribunal that the alleged 'PCP' of the provision of disability awareness training had been 'applied' in the past or, that it would be applied in the future. The Tribunal concluded this was a one off act The decision, or more accurately described as the failure to provide the training, did not have any suggestion of past or likely future application. It was an oversight or something which got lost in the transformation project. It did not in the Tribunal's view relate to matters of more general application, rather to the claimant as an individual which simply was not followed through. The element of repetition as referred to in ***Nottingham City Transport***, endorsed in ***Ishola*** was missing. Whether the facts could have founded a claim of direct discrimination or harassment did not assist and was not relevant to the Tribunal's conclusion on whether a PCP was applied for the purposes of a reasonable adjustments claim. Thus, the Tribunal concluded, there was no PCP in this regard. The Burden of proof did not shift to the respondent.

(115) 8 (c) 'High caseload PCP' – there was a wide margin between the parties in respect of the number of additional hours (beyond the contracted hours) which were required to perform the claimant's role. There was an exchange of emails

between the claimant and Mr Esson on 1 April 2019 when the claimant was seeking documents during his suspension. The email exchange was in relation to the job plan from the previous year. Mr Esson recalled the claimant would need to do an extra 33 hours per month (beyond the 162 hours). The claimant recalled the deficit as about 170 hours every 4 weeks. He said he recalled him needing to do 80 hours a week in total; he remembered it because it was over double his working hours. These emails were at page 248. The claimant's evidence in his witness statement (paragraph 48) referred to a statement submitted by the claimant on 27 June 2018, which corroborated his statement that 80 hours were needed in total. This was also stated in the meeting on 3 May 2018 (page 152).

(116) In respect of case numbers, the claimant was carrying up to 80 or 90 at its peak (paragraph 27 of Mr Esson's witness statement). Under cross examination, the claimant thought it was 60-70 but when reminded he had referred to 80 in the hearing with Ms Beaney, he accepted this and confirmed it was very high. Whilst the direction of travel was to reducing case numbers - it was down to 50-60 in February/March 2018 and then capped at 44 after the capability process, Mr Esson's evidence under cross examination was that a case load in the '40s' was too high. He said the average 'now' was about 30. (The Tribunal understood that would be the figure if adjustments had not been made for the claimant reducing his caseload to 15).

(117) In pursuance of the foregoing analysis, the Tribunal concluded that the respondent did, without doubt, apply a high caseload PCP whether analysed in terms of hours or numbers of cases. The Tribunal concluded that the claimant's evidence on the job plan numbers was to be preferred. His references to the extra hours were consistent and contemporaneous. Mr Esson's handwritten notes were not before the Tribunal. Even on Mr Esson's own estimate (of the extra hours) this was considerable – about a weeks' extra hours needed a month. On the caseload numbers, he accepted 30 was the current average and a caseload even in the 40s was too high. That was before factoring in that the claimant's cases as a grade KR10 would be more complex. The PCP did put the claimant at a substantial disadvantage because of his ADHD because of the impact of his ADHD on his concentration, focus, attention, planning, structure and memory. He had other responsibilities too – mentoring students, 'acting-up' for Mr Esson and taking on the more complex cases. This impact on him was more than trivial/minor. Based on the majority view on disability and knowledge, the respondent knew or could reasonably be expected to know, that the claimant was likely to be placed at that disadvantage. Once aware of his diagnosis, the respondent had capped his numbers and stopped the capability process. Mr Esson accepted a number even in the 40s was too high.

(118) The respondent could have removed the disadvantage (a lot sooner) by reducing his caseload numbers and taking away some of his other responsibilities. After his suspension these came down to 15. The burden of proof had shifted to the respondent and was not discharged.

(119) <u>12 Discrimination arising from disability</u> – the Tribunal first analysed if there was unfavourable treatment and concluded that the act of suspension was

unfavourable. In addition, the decision to investigate the claimant for alleged gross incompetence was unfavourable. The claimant was told that he was no longer able to do his job pending an investigation. This is a different question to whether suspension was a neutral act. In addition, the period of suspension, which was approximately 9 months, was unfavourable. This was excessive on any analysis. The management guidelines for an investigation in relation to alleged gross incompetence was 8 weeks (page 655). The investigation which only resulted in 2 interviews and 1 statement did not conclude until 10 July 2019, which was about 5 months from Ms Bryan's appointment and 4 months from her interview with Mr Esson. The investigation did not give any or proper consideration to the claimant's ADHD or the non-provision of reasonable adjustments.

(120) Based on the majority view on disability and knowledge, the Tribunal concluded that the claimant's ADHD did cause the claimant difficulties in managing his caseload including prioritising and undertaking work (case reviews and risk assessments) because of the impact of his ADHD on his concentration, focus, attention, planning, structure and memory. The claimant had not been provided with Dragon; his caseload numbers were excessive; there had been no workplace coaching. The character of the emails sent to the claimant on 27 December 2018 (page 405) and on 15 January 2019 (page 398) was not one of specific urgency or exceptionality. They were not marked urgent or high priority and no specific risk was identified. The emails were also sent within the context of case load re-alignment. The email subject was clear in this regard.

(121) The Tribunal assessed if the claimant's difficulties in managing his caseload, including prioritising and undertaking work (case reviews and risk assessments), were an effective cause of the claimant's suspension and the ensuing investigation and concluded that they were. Essentially, the claimant was suspended in consequence of a service user, PM, taking his own life, in circumstances where the respondent was asserting that the claimant had not prioritised a need to see him (despite reminders) and, as expressly stated in the suspension letter, had not kept records up to date on Rio in relation to plans for the service user. This was the operating reason on the respondent's mind.

(122) The Tribunal considered if the length of the suspension and/or the time it took for the investigation to be completed were separable from the act of suspension and the fact of ensuing investigation into alleged gross incompetence. The Tribunal concluded, however, that the act of suspension and the ensuing investigation into alleged gross incompetence were the primary unfavourable treatment because of the claimant's difficulties in managing his caseload including prioritising and undertaking work, triggered by the death of PM. The length of the suspension and investigation was still consequent on the decision to invoke/undertake those actions and were intertwined. Part of the delay was the addition of 6 other cases where it was alleged there had not been contact with the service users.

(123) In respect of whether the respondent had a legitimate aim, the Tribunal concluded the respondent did have a legitimate aim to ensure a high standard

of service to its service users and to investigate if it was safe for the claimant to be practising in circumstances where a service user with whom he had not made contact, despite reminders, had taken his own life. The act of suspension had the aim of preventing interference with the investigation which was to determine the claimant's competence.

(124) In relation to proportionality, there was no specificity regarding the need, urgency or priority to contact PM. The context was about case realignment and preparing cases for transfer and it was a routine reminder within that context. There were no 'red flags' being raised. There was no evidence from the respondent of the numbers or volume of other service users who had not been contacted in over 6 months. The claimant's evidence that there were between 50-100 names on the circulated lists was accepted, alternatively that there between 8 to 10 per member of staff (page 541). The Tribunal were left with an overwhelming impression that the respondent's reaction and response was affected by and its judgment clouded by, the circumstances of what had happened with the service user (PM). There was no regard for the claimant's ADHD or the non-provision of a number of reasonable adjustments recommended by OH & ATW in the decision-making process to suspend or to investigate for gross incompetence. In the scoping investigations pro-forma (page 219) the reference to the claimant's disability under the section 'are there any other issues the employee is likely to raise' was a fleeting, inaccurate and wholly inadequate appreciation. The Tribunal noted the claimant had said on 28 June 2018 he had seen every client on his caseload. That may not have been accurate in the light of subsequent knowledge and Rio was not confirmed to be up to date. However, the focus, after June 2018, was on a refined need for support in the light of a positive diagnosis of ADHD and the recommendations of OH and ATW.

(125) The claim for discrimination arising from disability thus succeeds. The burden of proof had shifted to the respondent and was not discharged.

Harassment

(126) 15 (a) – 15 June 2018 (comment in the investigation report of Ms Bryan regarding the claimant's failure to manage his own health) – the Tribunal concluded that this comment did relate to the claimant's disability. It was about the claimant's responsibility having regard to his ADHD. However the Tribunal concluded it did not have the purpose or effect of harassing the claimant under section S.26 (1) (b). the Tribunal concluded the comment was not intended to harass the claimant and with regard to whether it was intended to have that effect the Tribunal took into consideration S.26 (4) EqA and concluded in all the circumstances of the case, it was not reasonable for the conduct to have that effect. The comment was a reasonable observation in relation to the HCPC code of practice. It was a fair cross-reference and it had reasonably formed part of the investigation report. Regarding consideration of the claimant's perception in particular, the Tribunal noted paragraph 53 of the claimant's witness statement and the claimant's acknowledgment that in hindsight it had been a major error (not to pursue the implementation of adjustments) which the

Tribunal concluded was a self -criticism, that he did not think he had done enough himself.

(127) 15 (b) – 17 October 2019 (comment by Ms Bryan in the performance and capability hearing regarding the claimant's time would have been better spent writing notes for his clients than his job plan) – the Tribunal concluded that this comment did relate to the claimant's disability. It was said in relation to the claimant's struggles, because of ADHD, to be able to keep up to date , prioritise and focus. Further, the comment did have the effect of harassing the claimant under S.26 (1) (b). The Tribunal deliberated at some length whether the comment was made with the purpose of harassing the claimant. It was an unreasonable comment and one which the Tribunal concluded was flippant and unprofessional in the circumstances of the case. Ms Bryan was an experienced HR Consultant. The Tribunal had regard to its findings on the investigation report and Ms Bryan's oral testimony particularly that there had been little or no regard for the claimant's ADHD. Ultimately the Tribunal stopped short of concluding it was purposely said to harass the claimant but having regard to the foregoing analysis, it was reasonable for the conduct to have that effect. It struck a chord with the claimant given that keeping up to date and prioritising were key issues for the claimant which persisted far beyond time spent on the job plan.

(128) 15 (c) – 25 October 2019 (comment by Mr Esson in the informal meeting with the claimant following his return to work that he would not be able to protect him anymore) – the Tribunal concluded that this comment did relate to the claimant's disability. It was said directly in the context of a discussion about the impact of the claimant's disability on his return to work from suspension. The Tribunal concluded that it was not said to purposely harass the claimant. However the comment did have the effect of harassing the claimant. In all the circumstances and having regard to the claimant's perception, this comment was said after the claimant's return from a very long suspension as a result of which he had been exonerated. He had asked to see Mr Esson informally. With the context of the meeting and conversation in mind, this was an ill-judged and ill-timed comment. It manifested a continuing ignorance and dis-connect between the claimant's ADHD and the claimant's performance. The context of the comment in paragraph 31 of Mr Esson's witness statement was clear. The subsequent explanation regarding the claimant needing to be accountable rather than erode any unreasonableness of the comment, compounded it. There was no suggestion for example, that this was said because Mr Esson was no longer going to be supervising the claimant anymore. Having regard to the foregoing analysis, it was reasonable for the conduct to have that effect.

Jurisdiction

(129) The Tribunal concluded that the discrimination (harassment) on 17 October and 25 October 2019 was in time having regard to the ACAS Early conciliation period (6 December 2019 to 6 January 2020) and the presentation of the ET1 on 13 February 2020.

(130) The discrimination arising from disability on 25 January 2019 when the decision to suspend and to investigate the claimant for alleged gross incompetence was made, was as a one off act (albeit with continuing consequences). out of time.

(131) In relation to discrimination because of a failure to make reasonable adjustments, the Tribunal had regard to S.123 (4) EqA and assessed that in relation to the failure to provide Dragon software (sooner than it was), the respondent might reasonably have been expected to do that within 3 months of the ATW report dated 31 August 2018 i.e. by 30 November 2018. In respect of the failure to reduce the claimant's caseload to an acceptable level having regard to his ADHD, the Tribunal assessed the respondent might reasonably have been expected to do this within 3 months of the cessation of the capability process on 17 July 2018 i.e. by 16 October 2018.

(132) The Tribunal also considered if there was a continuing course of conduct in relation to the discrimination complaints upheld such that limitation commenced at the end of the period thus putting all the claims in time pursuant to S.123 (3) EqA. The Tribunal noted that the failure to provide the Dragon software sooner and to reduce the caseload was the collective responsibility of Mr Esson and Ms Gallagher. The decision to suspend the claimant and for him to be investigated for alleged gross incompetence did not involve Mr Esson, but did involve Ms Gallagher. Subsequently, Mr Esson was a witness at the performance and capability hearing as was the investigating officer, Ms Bryan when the remarks upheld to be harassment were made. There was, in the Tribunal's conclusion, viewed holistically, a persistent underlying lack of understanding, appreciation or proper consideration of the claimant's ADHD such that there was a discriminatory state of affairs in this regard sufficiently connected. On this basis the claims upheld were all in time.

(133) If the Tribunal was wrong in its conclusion in this regard, the Tribunal considered if it was just and equitable to allow the purported out of time claims to proceed. The Tribunal had regard all the circumstances, including some of the guidance/factors in ***British Coal Corporation v Keeble 1997 IRLR 336***. The Tribunal concluded that whilst the claims were out of time between approximately 9 to 12 months, the cogency of the evidence was not affected by the delay and neither was this asserted. The reasons for the delay, the Tribunal understood (though it was not clearly asserted), was that the claimant was expecting the adjustments recommended to be made and had acquiesced in the delay with regard to Dragon and thereafter, the claimant's decision to pursue a claim was delayed until after the long period of suspension and the ensuing performance and capability hearing was concluded. This was not a case of a claimant being laid back or casual about his options, it was, in the Tribunal's view a waiting period to allow the internal processes to be concluded first. This was a relevant factor in the Tribunal's view. With regard to the comparative balance of prejudice, the respondent did not assert any prejudice. The only submission made was in relation to the comment on 15 June 2018 (in the investigation report) being out of time. There was no other positive case on prejudice, for example evidential difficulties caused by the delay or an inability to call a witness. The Tribunal found the respondent's case was comprehensively prepared. The Tribunal also had regard to the lengthy period

of the suspension and the denial of access to all documentation. It was likely that the claim would have been presented a lot sooner even if potentially outside of the primary limitation period. Thus the Tribunal concluded, it was just and equitable to extend time.

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Employment Judge Khalil

2 May 2021