



# EMPLOYMENT TRIBUNALS

## Claimant

Mr J Jarvis

## Respondent

The Department for Work and  
Pensions

v

## Heard at:

Norwich (in person)

## On:

22 – 26 January 2024

## In Chambers:

29 and 31 January, 8 March 2024

## Before:

Employment Judge M Warren

## Members:

Mrs A Bray and Mr G Page

## Appearances

### For the Claimant:

Ms L Redman, Counsel

### For the Respondent:

Mr T Kirk, Counsel

## RESERVED JUDGMENT

1. The complaints of unfavourable treatment because of something arising from disability contrary to section 15 and failure to make reasonable adjustments contrary to section 20 of the Equality Act 2021 succeed.
2. The remedy to which the Claimant is entitled will be determined at a remedy hearing at the Norwich Employment Tribunal on **12 July 2024** to start at 10:00 a.m..

## REASONS

### Background

1. Mr Jarvis was employed by the Respondent as an Executive Officer (Work Coach) between 11 January 2021 and 23 March 2022. After Early Conciliation between 30 March and 10 May 2022, he issued these proceedings on 18 July 2022 claiming disability discrimination.
2. Mr Jarvis is an Autistic person.

3. The case has been managed by Employment Judge Laidler, at Preliminary Hearings on 20 January 2023 and 11 January 2024.
4. Adjustments have been put in place to try and ameliorate disadvantages to Mr Jarvis because he is an Autistic person:-
  - 4.1. A timetable was provided for the Trial;
  - 4.2. He was provided with a list of the people attending each day;
  - 4.3. A private room in the Court building was made available to him and his advisors;
  - 4.4. In the week before this hearing, Mr Jarvis attended the Tribunal building and Tribunal room and was given a tour by the Tribunal Clerk;
  - 4.5. Some of lights in the hearing room were switched off to avoid glare and overly bright lighting;
  - 4.6. We broke approximately every hour for ten minutes, (as much for my benefit as for the benefit of Mr Jarvis) and he knew that he could request a break at any time;
  - 4.7. His solicitor, Ms Davenport, was permitted to sit close to him while he was giving evidence in order to assist if needed and to closely observe in case there were signs of imminent shutdown. Fortunately, he did not experience a shutdown during the hearing;
  - 4.8. He knew that he could absent himself from the hearing whilst the Respondents were giving evidence if he needed to do so. He in fact remained throughout;
  - 4.9. He was provided with a list of topics for cross examination in the order in which the topics were covered, which was chronological order; and
  - 4.10. Mr Kirk and the Tribunal did their best to ask clear, direct, simple and to the point questions as recommended in the Equal Treatment Bench Book.

### **The Issues**

5. The parties had agreed on a List of Issues as set out below, by way of cutting and pasting.
6. On day two of the hearing, the Respondent conceded that Mr Jarvis had been disabled throughout the relevant time and that from 10 March 2022, it had knowledge. Subsequently on day three, the Respondent conceded that it had knowledge of Mr Jarvis' disability from 16 April 2021.

**A. DISABILITY & KNOWLEDGE OF DISABILITY**

1. The Respondent admits that the Claimant is disabled within the meaning of the Equality Act 2010 (“the Act”) by reason of Autism Spectrum Disorder (ASD), but only from 17 December 2021, the date of his formal diagnosis.
2. Was the Claimant a disabled person by reason of ASD prior to 17 December 2021 and, if so, when?

*The Claimant’s position is that he made the Respondent aware in the early weeks of his employment that he may have ASD and on 16 April 2021 Autism Service Norfolk advised the Respondent that there was a strong possibility that he could have ASD. The Claimant’s case is that he was experiencing impairments that had a substantial adverse effect on his day-to-day activities during this period, informed his employer of such and should have been treated as disabled within the meaning of the Act.*

3. The Tribunal will decide, in relation to the period between 16 April 2021 - 17 December 2021 (the relevant period), when the Claimant became disabled having regard to:
  - i. Whether C had the impairment of ASD during the relevant period.
  - ii. If so, whether at that time, the ASD had a substantial adverse effect on his ability to carry out day-to-day activities?
  - iii. Were the effects of the impairment long-term during the relevant period? The Tribunal will decide:
    1. did they last at least 12 months, or were they likely to last at least 12 months?
    2. if not, were they likely to recur?
4. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the above disability and, if so, from what date?

*The Respondent denies that it had knowledge. The Claimant avers that the Respondent had knowledge of his disability from 16 April 2021 onwards.*

**B. JURISDICTION**

5. Are any of the Claimant’s claims out of time? Given the dates of ACAS conciliation and the filing of the Claimant’s ET1, any claim of discriminatory acts/omissions occurring prior to 30 December 2021 is prima facie out of time.
6. Did any of the discriminatory acts or omissions relied on by the Claimant and occurring prior to 30 December 2021 constitute part of a continuing act extending over a period? If so, did such period extend to or beyond 30 December 2021?
7. If the claim is wholly or partly out of time, is it just and equitable in all the circumstances for the ET to extend time?

**C. DISCRIMINATION ARISING FROM A DISABILITY**

8. Was the Claimant treated unfavourably because of something arising in consequence of his disability contrary to section 15 of the Equality Act 2010 having regard in particular to the following questions:

a) Did any or all of the things listed in paragraph 36 of the Claimant's Particulars of Claim and set out below arise in consequence of the Claimant's disability

- He was unable to interact fully with the IT System;
- He was unable to complete his training for the role of work coach, pass his probation and perform the role;
- He was unable to process everything that was discussed with him in online meetings, engage fully in them and reflect on the discussions afterwards;
- He was unable to make decisions about possible alternative roles without detailed information on them;
- His mental health worsened and he had to take disability-related sick leave due to the lack of support.

b) Did any or all of the things listed in paragraph 37 of the Claimant's Particulars of Claim and set out below amount to unfavourable treatment?

- The Respondent's insistence that he use all aspects of the IT system;
- The Respondent's ongoing failure to explore adjustments that might have supported him in his original role or in a different role;
- The Respondent's rigid application of its policies, including its probation policy and absence policy;
- The fact that for many months the Respondent denied him support in online meetings from someone who understood his disability;
- The Respondent's failure to provide meeting notes/transcripts or record meetings when requested to do so;
- The Respondent's failure to respond to his request for more information on generic job descriptions that were sent to him;
- The fact that he was only made aware of the Respondent's permanency campaign shortly before it ended and was not in a position to apply for a permanent role due to the lack of time;

- The Respondent's ongoing failure to explore reasonable adjustments and find a suitable role for him;
  - The Respondent's failure to make him aware of the existence of its policy on job carving and its failure to act in accordance with it;
  - The attitude of his line manager towards him in their final meeting, leaving him with no option but to resign and treat himself as constructively dismissed (disability-related dismissal).
- c) Was any of the above treatment because of the something arising in consequence of the Claimant's disability, as set out at para 36 of the Particulars of Claim and at para 8(a) above?
9. If the Claimant was treated unfavourably because of something arising in consequence of his disability, has the Respondent shown that its treatment of him was a proportionate means of achieving a legitimate aim pursuant to section 15(1)(b) of the Equality Act 2010?

The Respondent relies on the following aims, as outlined at paragraph 45 of their Grounds of Resistance.

- i. Managing the Claimant to ensure that it can properly provide the services and work it is required to do as a public sector organisation;*
  - ii. Ensuring public money is managed appropriately and this includes efficient and cost-effective running of a public service;*
  - iii. Maintaining expected standards of performance and ensuring correct process are followed;*
10. The Tribunal will decide in particular:
- i. was the treatment an appropriate and reasonably necessary way to achieve those aims;
  - ii. could something less discriminatory have been done instead; and
  - iii. how should the needs of the Claimant and the Respondent be balanced?

#### **D. FAILURE TO MAKE REASONABLE ADJUSTMENTS**

11. Do any or all of the things listed in paragraph 39 of the Claimant's Particulars of Claim and set out below amount to PCPs and did the Respondent apply them to the Claimant?
- Requiring employees to complete a "one-size-fits-all" training in order to pass their probation and continue in their job role;
  - Requiring employees to use all aspects of the IT System;

- Only considering the question of reasonable adjustments in the context of a substantive position;
  - Only allowing work colleagues or union representatives to accompany employees to meetings;
  - Refusing to record meetings and/or provide a transcript of them;
  - Communicating with employees via work emails even when off sick.
12. If so, was the Claimant put at a substantial disadvantage due to his disability in comparison with a non-disabled colleague by any relevant PCPs contrary to section 20(3) of the Equality Act 2010?
13. If so, what steps could have been taken to avoid the disadvantage.

*The Claimant relies on the following as outlined at paragraph 41 of the Claimant's Particulars of Claim. The Respondent's position on each proposed adjustment is at paragraph 41(c) of its Amended Grounds of Resistance.*

- Allowing the Claimant to be accompanied at meetings by someone other than a colleague or union representative. The Respondent states that a third-party advocate accompanied the Claimant to meetings;
- Recording meetings and/or producing transcripts of them. The Respondent states that the Claimant was provided with a note of the various meetings that he attended;
- Obtaining specialist input on adjustments that could be made to the work coach role in light of the Claimant's ASD. The Respondent states that the Claimant was regularly referred to Occupational Health (OH) and rejected the Respondent's final attempt at a further referral to OH;
- Obtaining specialist input on other roles that might be appropriate for the Claimant in light of his ASD and the adjustments that might need to be put in place for him in those roles. The Respondent states that the Respondent implemented several adjustments for the Claimant and offered him the opportunity to apply for alternative roles;
- Exploring what adjustments could be made to the way that the Claimant interacted with the IT System. The Respondent states that adjustments were explored and implemented with the Claimant;
- Acting in accordance with its policy on job carving. The Respondent denies failing to act in accordance with this policy and avers that the policy is readily available on the Respondent's intranet; ;
- Ensuring that important information such as the extension of his fixed-term contract and the possibility of applying for his contract to be made permanent was communicated to the Claimant in a timely and accessible manner (for example by

letter). The Respondent states that the Claimant was regularly informed with regards to applying for alternative roles.

14. Was it reasonable for the Respondent to have to take those steps? If so, when?

15. Did the Respondent fail to take those steps?

**D. REMEDY**

16. What financial losses has the Claimant suffered as a result of his dismissal?

17. Can the Respondent show that the Claimant has failed to mitigate his losses?

18. What compensation would it be just and equitable to award to the Claimant for financial losses?

19. What compensation should the Claimant be awarded for injury to feelings?

Should the compensation awarded to the Claimant be reduced by 25% by reason of the Claimant's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures? The Respondent will aver that the Claimant was offered the chance to raise a grievance, in an attempt to resolve matters, but the Claimant failed to do so (see paras 35-36 and 47 of the Grounds of Resistance).

20. Should the Claimant be entitled to a declaration that he has been discriminated against and, if so, in what terms?

**Evidence**

7. We had before us a witness statement from Mr Jarvis and for the Respondents, witness statements from:

7.1. Mr Andrew Pipe;

7.2. Mr David Lancaster;

7.3. Mr Karl Steward;

7.4. Mr Shaun Sadler; and

7.5. Ms Alexandra Ward.

8. We had a properly paginated and indexed Bundle of documents running to page 686.

9. Day one was a reading day, (after a short hearing with the Representatives by CVP in the morning). We read the witness statements and we read or looked at the documents referred to in the witness statements. I emphasised to the parties that we have not read the entire Bundle, just those documents referred to. I explained that they must make

sure they take us to what they consider to be the important passages in the relevant documents.

### **The Law**

10. Disability is a protected characteristic pursuant to s.4 of the Equality Act 2010.
11. Section 39(2)(c) and (d) proscribes discrimination by an employer by either dismissing an employee or subjecting him to any other detriment.
12. "Dismissal" includes constructive dismissal, (s39(7)(b)).
13. Section 39(5) imposes a duty on an employer to make reasonable adjustments.

### ***Reasonable Adjustments***

14. Section 20 defines the duty to make reasonable adjustments, which comprises three possible requirements, the first of which might apply in this case set out at subsection (3) as follows:-

“(3) The first requirement is a requirement, where a provision criterion or practice 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

...

15. Section 21 provides that a failure to comply with such requirements is a failure to make a reasonable adjustment, which amounts to discrimination.
16. There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:
  - 16.1. The relevant provision criterion or practice applied by or on behalf of the employer;
  - 16.2. The identity of non-disabled comparators, (where appropriate);
  - 16.3. The nature and extent of the substantial disadvantage suffered by the disabled employee;
  - 16.4. The steps the employer is said to have failed to take, and
  - 16.5. Whether it was reasonable to take that step.



17. The employer will only be liable if it knew or ought to have known that the Claimant was likely to be affected in the manner alleged, see Schedule 8 paragraph 20 and Wilcox v Birmingham CAB Services Ltd EAT 0293/10 where Mr Justice Underhill said of the equivalent provision in the Disability Discrimination Act 1995, that an employer will not be liable for a failure to make reasonable adjustments unless it has actual or constructive knowledge both that the employee was disabled and that he or she was disadvantaged by the disability.
18. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at paragraph 4.5 suggests that PCP should be construed widely so as to include for example, formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. It may also be a decision to do something in the future or a one off decision.
19. The decision of Mrs Justice Simler DBE, (then President) in Lamb v the Business Academy Bexley UKEAT/0226/JOJ assists with identifying what is and what is not, a PCP. The phrase is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer from disability. It may in certain circumstances include one-off decisions, (paragraph 26). She approved though, the comments of the former President, Langstaff J in Nottingham City Transport Ltd v Harvey UKEAT/0032/12 where he referred to, "practice" as having an element of repetition. In the former case, a teacher was dismissed after a long period of absence during which a grievance was investigated and an outcome provided. The PCP was the requirement to return to work without a proper and fair investigation. There were repeated failures to properly investigate and repeated delays; that was a practice. In the latter case, a claimant suffering from depression, returning to work and confused by a new swipe card system, altered his time sheet. The EAT held that the one-off application of a flawed disciplinary procedure did not amount to a, "practice". More recently in Ishola v Transport for London 2020 EWCA Civ 112, CA, Lady Justice Simler, (as she now is) affirmed that approach, the Court of Appeal holding that the words provision criterion or practice carry the connotation of a state of affairs indicating how similar cases will be treated in the future; a one off act can amount to a practice if there is some indication that it would be repeated if similar circumstances were to arise in the future. She said at paragraph 35 that the words:

*"...are not terms of art but ordinary English words ... they are broad and overlapping... not to be narrowly construed or unjustifiably limited in their application".*

She also said at paragraph 37, that not every unfair act amounts to a PCP. If such an act is found not to be direct discrimination, it would be wrong by a process of abstraction, to seek to convert it into the application of a PCP.

20. As for comparators, the appropriate comparators in a reasonable adjustment claim are not the population at large, but a class or group of

non-disabled comparators. We do not have to identify or construct in our minds comparators who are in the same circumstances as the Claimant but not disabled, as one would in a claim of direct discrimination. Comparison with the treatment of someone else in the same circumstances as the Claimant but who is not disabled is misplaced. We simply ask, does the PCP put the Claimant with their disability at a disadvantage compared to a non-disabled person, see Fareham College Corporation v Waters 2009 IRLR 991, EAT approved by the Court of Appeal in Griffiths v Secretary of State for Work and Pensions 2017 ICR 160.

21. Claimants are not required to prove that they were disadvantaged, it is not a test of causation, it is a comparative exercise to test whether the PCP has the effect of disadvantaging the disabled Claimant more than trivially in comparison with others who are not disabled, see Sheikholeslami v University of Edinburgh 2018 IRLR 1090.
22. The duty is to make “reasonable” adjustments, to take such steps as it is reasonable for the employer to take to avoid the disadvantage. The test is objective. Our focus should be not on the process followed by the employer to reach its decision but on practical outcomes and whether there is an adjustment that should be considered reasonable. It is for the tribunal to determine, objectively, what is reasonable. It is not a matter of what the employer reasonably believed. Unusually, the tribunal may substitute its view for that of the employer and it is permissible for the tribunal to conclude that different adjustments would have been reasonable from those contended for by the Claimant: see Smith v Churchills Stairlifts Plc [2006] ICR 524 CA; Royal Bank of Scotland v Ashton [2011] ICR 632 EAT; Garrett v LIDL Ltd UKEAT 0541/08; Southampton City College v Randal IRLR 2006 18; Project Management Institute v Latiff [2007] IRLR 579.
23. The employer’s reasoning or other processes that lead to the failure to make reasonable adjustments are irrelevant, the duty to make reasonable adjustments is about outcome, not process, see Owen v Amec Foster Wheeler Energy Ltd 2019 ICR 1593, CA 80.
24. The tribunal should adopt a holistic approach, where a number of adjustments taken together might ameliorate the substantial disadvantage, see Burke v The College of Law [2012] EWCA Civ 37 and Home Office (UK Visas and Immigration) v Kuranchie EAT 0202/16.
25. The EHRC Code at paragraph 6.28 sets out examples of matters we might take into account in evaluating whether proposed steps are reasonable as follows:
  - 25.1. The effectiveness in preventing the substantial disadvantage;
  - 25.2. Its practicability;

- 25.3. The financial and other costs and the extent of any disruptions that may be caused;
  - 25.4. The employer's financial or other resources;
  - 25.5. The availability of financial or other assistance, (eg through Access to Work), and
  - 25.6. The type and size of the employer.
26. The step of redeployment an employee to another post without competitive interview is capable of being a reasonable adjustment; it depends upon the circumstances of the case: Archibald v Fife Council [2004] UKHL 32; [2004] ICR 954 at [67]-[70].
  27. The effectiveness of a proposed adjustment is one of the factors to be evaluated by the tribunal; it is sufficient for the Claimant to raise the issue for there to be a chance that the step would avoid the disadvantage: South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley (UKEAT/0341/15/DM) at [17]-[18].
  28. In Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 Elias LJ said:

*“So far as efficacy is concerned, it may be that it is not clear whether the step proposal will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.”*
  29. In Cordell v Foreign and Commonwealth Office 2012 ICR 280 EAT the EAT gave useful guidance on the significance of the cost of a proposed adjustment. That might include the size of any budget allocated to reasonable adjustments, how much has been spent in similar situations, what other employers are prepared to spend in similar situations, and any policies set out in collective agreements. The tribunal makes a judgment on what it considers right, as an industrial jury. The significance of cost might also depend on what the Respondent might otherwise have to spend, for example in retraining or recruiting others.
  30. The resources, financial and otherwise, available to the employer are relevant as is its size. For example redeployment is more likely to be reasonable for a large employer.
  31. On the question of comparators, the Code states at 6.16 that the purpose of comparison with people who are not disabled is to establish whether it is a PCP, physical feature or lack of auxiliary aid that places the disabled person at a disadvantage and therefore there is no need to identify a comparator whose circumstances are the same as the Claimants, (in contrast to such a requirement in claims of direct and indirect discrimination). Simler P observed in Sheikholeslami v University of Edinburgh

[2018] IRLR 1090 at [48]-[49] that it is a question of whether the PCP bites harder on the Claimant, she said:

*“Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability.”*

### **Disability Related Discrimination**

32. Disability Related discrimination is defined at s.15 as follows:

*(1) A person (A) discriminates against a disabled person (B) if—*

*(a) A treats B unfavourably because of something arising in consequence of B's disability, and*

*(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

*(2) 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.*

33. Determining whether treatment is unfavourable does not require any element of comparison, as is required in deciding whether treatment is less favourable for the purposes of direct discrimination. There is a relatively low threshold of disadvantage for treatment to be regarded as unfavourable. It entails perhaps placing a hurdle in front of someone, creating a particular difficulty or disadvantaging for a person, see Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] UKSC.

34. The difference between Direct Discrimination on the grounds of disability and Disability Related Discrimination is often neatly explained in these terms: direct discrimination is by reason of the fact of the disability, whereas disability related discrimination is because of the effect of the disability.

35. As for the difference between making a reasonable adjustment and disability related discrimination, in General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that reasonable adjustments are about preventing disadvantage, disability related discrimination is about making allowances for that persons disability.

36. There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN)

37. There is no requirement that the employer was aware that the disability caused the particular something, City of York Council v Grosset [2018] EWCA Civ 1105 although, as the Court of Appeal observed in that case, if the employer knows of the disability, it would be, “wise to look into the matter more carefully before taking the unfavourable treatment”.
38. Simler P, (as she then was) reviewed the authorities and gave helpful guidance on the correct approach to s15 in Pnaiser v NHS England [2016] IRLR 170 which may be summarised as follows:
  - 38.1. The tribunal should first identify whether the claimant was treated unfavourably and if so, by whom.
  - 38.2. Secondly, the tribunal should determine what caused the treatment, focussing on the reason, (not motive) in the mind of the alleged discriminator, possibly requiring consideration of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive is irrelevant. There may be more than one cause of the treatment, the “something” need not be the main or sole reason, but it must have a significant, (more than trivial) influence and amount to an effective cause of the unfavourable treatment.
  - 38.3. Thirdly, the tribunal must then determine whether the reason for the unfavourable treatment arose because of the claimant’s disability. There could be a range of, more than one, causal links. However, the more links there are, the harder it may be to establish the required connection. The question of causation is an objective test and does not entail consideration of the thought processes of the alleged discriminator. There is no requirement that the respondent know of the causal link between the disability and the, “something arising”.
39. If there has been such treatment, we should then go on to ask, as set out at s.15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:
  - 39.1. Whether there was a legitimate aim, unrelated to discrimination;
  - 39.2. Whether the treatment was capable of achieving that aim, and
  - 39.3. Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.
40. The test of whether there is a proportionate means of achieving a legitimate aim, (often referred to as the justification test) mirrors similar provisions in other strands of discrimination, such as in respect of indirect discrimination under s19 of the Equality Act, the origins of which lie in European Law. There is however, a difference, in that in the context of disability related discrimination, one is looking at the effect on the

individual, whereas with indirect discrimination, one is looking at the effect on a group of people.

41. There is guidance in the Equality and Human Rights Commission's Code of Practice on Employment, which reflects case law on objective justification in other strands of discrimination and which can be relied on in the context of disability related discrimination.
42. Thus, in Hensam v Ministry of Defence UKEAT/10067/14/DM the EAT applied the justification test as described in Hardys & Hansons Plc v Lax [2005] EWCA Civ 846. In Gray v University of Portsmouth UKEAT/0242/20 Mrs Justice Eady said that employment tribunals should carry out a critical evaluation, adopting the same approach as in indirect discrimination cases, following Hardys & Hansons. The test is objective. In assessing proportionality, the tribunal uses its own judgment, which must be based on a fair and detailed analysis of the working practices and business considerations involved, particularly the business needs of the employer. It is not a question of whether the view taken by the employer was one a reasonable employer would have taken. The obligation is on the employer to show that the treatment complained of is a proportionate means of achieving a legitimate aim. The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary.
43. The tribunal has to objectively balance the discriminatory effect of the treatment and the reasonable needs of the employer.
44. "Legitimate aim" and "proportionate means" are 2 separate issues and should not be conflated.
45. The tribunal must weigh out a quantitative and qualitative assessment of the discriminatory effect of the treatment, (University of Manchester v Jones [1993] ICR 474).
46. The tribunal should scrutinise the justification put forward by the Respondent, (per Sedley LJ in Allonby v Accrington & Rosedale College [2001] ICR 189).
47. In respect of the burden of proof, s.136 reads as follows:
  - (2) *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;*
  - (3) *But subsection (2) does not apply if A shows that A did not contravene the provision."*

48. In the context of section 15, this means that the claimant will have to show:
- 48.1. That she was disabled at the relevant time;
  - 48.2. That she had been subjected to unfavourable treatment;
  - 48.3. A link between the unfavourable treatment and the, “something”, and
  - 48.4. Evidence from which the tribunal could properly conclude that the, “something” was an effective cause of the unfavourable treatment.
49. If the claimant proves facts from which the tribunal could conclude that there was section 15 discrimination in this way, the burden of proof shifts to the respondent to prove a non-discriminatory explanation, or justification.

### ***Time***

50. Section 123 of the Equality Act requires that claims of discrimination must normally be made within 3 months of the act complained of, or such further period as the Tribunal considers just and equitable. Where an act continues over a period of time, time runs from the end of that period, from the last act.
51. A failure to make a reasonable adjustment is not an act, or a continuing act, but a failure to act, an omission. In the case of Kingston Upon Hull City Council v Matuszowicz [2009] ICR 1170 it was explained that in the context of reasonable adjustments, time runs from either when the omission was decided upon, or if there is no evidence of a deliberate decision, when the decision to make the adjustment might reasonably have been expected to have been made. This can lead to a situation where time expires long before a Claimant may have realised, in which case a Tribunal is likely to be willing to find that it is just and equitable to extend time.
52. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal further explained that whilst the duty to make reasonable adjustments arose as soon as the employer was able to take steps to avoid the disadvantage, the assessment of when the employer might reasonably be expected to comply, ought to be assessed from the claimant’s point of view, having regard to the facts known or that ought reasonably to have been known by the claimant.
53. The Court of Appeal in Morgan also clarified on the question of when it is just and equitable to extend time, that there was no requirement to apply any check list under the wide discretion afforded tribunals by s123(1). The only requirement is not to leave a significant factor out of account, (paragraph 18). Further, there is no requirement that the tribunal must be satisfied that there was a good reason for any delay; the absence of a

reason or the nature of the reason are factors to take into account, (paragraph 25).

### **Findings of Fact**

54. The Respondent has a policy called, "How to Manage Moves as a Reasonable Adjustment under the Equality Act" setting out, as the title suggests, how to manage the move of an employee from one role to another necessitated by the need to make reasonable adjustments for a person who is disabled. This policy is in the Bundle at page 100. It states that line managers and employees have a joint responsibility for ensuring the progression of moves to make a reasonable adjustment. It requires line managers to be supported by senior managers in undertaking a job search for an alternative role, which to begin with, should be within the individual's own directorate, before further exploring what is referred to as, "DWP Networks". The employee should register with, "Civil Service Jobs" and set up what is described as a job alert to identify suitable vacancies within the DWP and other Government Departments. The focus is on keeping disabled people in employment.

55. The Respondent also has a policy called, "Job Carving as a Reasonable Adjustment Under the Equality Act", (page 10). It states as a key principle:

"In DWP, workplace adjustments should be considered as a matter of course for everyone who experiences a barrier and/or difficulty at work and feels they need a workplace adjustment to support them in their role. This is to enable colleagues to develop and reach their potential without barriers. "

56. This explains the concept of Job Carving as follows:

"Job Carving is a type of workplace adjustment which involves either re-designing an existing job around the needs of a specific disability, or creating a new role (for example, when an employee returns to work following a serious illness).

Our first option is always to retain an employee in their current role. Managers have a duty to ensure that workplace adjustments to an employee's current role, equipment and / or workplace are considered before seeking to re-deploy them outside their current team.

To help identify the workplace capability of an employee (to find out what they **can** do as opposed to what they cannot) and to establish appropriate workplace adjustments, line managers should initiate a two way discussion with the employee. ..."

57. Mr Jarvis was aged about 50 during the period in question. He has a Degree in Fine Art. He was a Primary School Teacher for six years between 2010 and 2016 and worked as a Support Worker in Adult Education, working with adults with learning disabilities between 2016 and 2020. He was offered a fixed term appointment as a Work Coach, on the



grade of Executive Officer, by letter dated 7 December 2020. The appointment was to commence on 11 January 2021 and end on 10 January 2022. He was subject to a probationary period of six months, which could possibly be extended by a further three months. The terms and conditions of employment stated that he would be confirmed in his position of Executive Officer on demonstrating that his attendance and conduct were satisfactory. The terms and conditions state that if he did not reach the required standard, the appointment would be terminated, but in exceptional circumstances his period of probation may be extended.

58. Mr Jarvis commenced his employment with the Respondent on 11 January 2021.
59. The job description issued with the advertisement for the role included as a requirement, that the successful applicant would be required to navigate a range of computer systems to action tasks, as well as to coach customers and should be confident in using digital work search tools.
60. Mr Jarvis' line manager was Ms Ward. Induction included a training course for new entrants to the Work Coach role. It included training on the IT System called 'Build'. This entailed four weeks of tutor led training. The course ran alongside another course on coaching skills. The trainers on both courses raised from the very beginning, concerns with regard to Mr Jarvis' digital capabilities. His attendance on both courses was postponed and local training and mentoring was delivered to him instead, with a view to enabling him to reach a required standard such that he could rejoin the two courses. He was also put on a Digital Awareness course over two days on 14 – 16 January 2021. Mr Jarvis resumed Universal Credit Work Coach Training on 1 February 2021. The trainers reported back to Ms Ward that he was continually interrupting the training, that he would disappear for long periods and he did not attend to shadow Work Coaches on their appointments. Mr Jarvis reported what he described as, "*shutdowns*".
61. This led to Ms Ward making an Occupational Health Referral on 8 February 2021.
62. On 17 February 2021, Mr Jarvis attended a meeting with another Work Coach, Mr Jowsey, who was to act as an Informal Trainer and Support Person. Notes of this meeting are at page 175. They record Mr Jarvis expressing surprise and that he was impressed with, the help and support he was receiving from his line manager and his team. He explained how he found himself mentally shutting down by the end of the first week due to the amount of information on the course. He is recorded as having said that he found the consolidation week, particularly the job shadowing, constructive and effective. He is recorded as explaining that the challenges that he faced included, "*how much information can my brain process before it will switch off*", that he needed time to process written information, that he needed clear, concise and simply laid out information. He is said to have reported that he had been in touch with his GP because of the

shutdowns and his GP had referred him to Autism Service Norfolk. He provides a link for 'Dos and Don'ts' for those on the Autistic Spectrum.

63. In an email of 18 February 2021, Mr Jowsey wrote to Ms Ward to attach the above mentioned notes and commented that he saw as a priority, getting Mr Jarvis assessed for Autism and expressing a view there was a need to get the right support via Occupational Health.
64. On 3 March 2021, an Occupational Health Report (resulting from the referral on 8 February 2021) was received, (page 179). This referred to Mr Jarvis explaining he had suffered what the author described as 'mental meltdown', (his word is 'shutdown') and explains that his GP expressed a view that this was an Autistic behavioural trait. The advice is that he will need adjustments to be considered at work until he has a formal assessment and a detailed individual report to clarify what adjustments would be necessary. The author explains, Autism is a life long developmental disability, that he appeared to thrive on analytical work, completing one task at a time and having stillness and quiet to concentrate. The advice is that Mr Jarvis be allowed additional time between appointments, that he be allowed to work in a quiet area, wearing his headphones and that for training purposes, the Respondent should consider different learning styles with discretion and flexibility to avoid overload. It is suggested a Stress Risk Assessment should be completed and that Mr Jarvis would benefit from a Specialist Workplace Needs Assessment.
65. Ms Ward sent Mr Jarvis a self-assessment Stress Risk Assessment to complete on 8 March 2021.
66. Mr Jarvis received a letter from Autism Service Norfolk dated 10 March 2021 which warned him that there was a long waiting list, at approximately three and a half years, for assessments.
67. Mr Jarvis attended a Probationary Review Meeting with Ms Ward on 11 March 2021. This is recorded at pages 183 and 184 of the Bundle. It refers to concerns having been raised and there being agreement that they should wait for specialist reports. It records Mr Jarvis as acknowledging that he is not meeting expectations and that he was happy with the support he was receiving. There is a paragraph which reads as follows:

"Joseph acknowledges that he does not think that he can meet expectations of the Work Coach role due to the continuous meetings and the need to process information quickly, however, he is very dedicated and open to looking at where his competencies should be best used in our diverse and inclusive organisation".
68. In a later iteration of the Probation Review document, the wording used in this paragraph for the meeting on 11 March 2021 was changed to read as follows:

“Joseph has not completed the training or completed any consolidational contact with customers. I would expect at this stage a new entrant to have completed the learning and contact with some customers (with a colleague present as a minimum)”.

69. Evidently, the wording is harsher and much less empathetic. The quoted wording from the original version of the Review on 11 March 2021 seems to have been cut and pasted to the later review under the heading of a discussion on 14 June 2021, (see pages 255 and 257 of the Bundle). This is odd.
70. During March 2021, a Work Coach colleague Ms Ransome provided help and support. She wrote to Ms Ward on 16 March 2021 and explained that she had put in place an Excel document breaking down for Mr Jarvis his daily activities, giving the time of each event during the course of the day. She gave him a listening and learning task to complete before shadowing a Work Coach the next day. She wrote that there was a lot of work to do to get Mr Jarvis up to the standard of a Work Coach, that she was going to work very hard to achieve that and so was he.
71. Ms Ward made a referral for a Workplace Needs Assessment on 15 March 2021. In this referral she referred to Mr Jarvis struggling with the training due to information overload and a possible diagnosis of Autism. She wrote that he was struggling to keep up the pace and was falling behind. She referred to his having been asked to leave the training due to what he was missing and that he had suffered meltdowns during the training. When asked the question what difficulties she had noticed the employee was having, she referred to his feeling overwhelmed with information overload, finding it difficult to participate in meetings with multiple people and often removing himself from meetings.
72. A Workstation Assessment Report was provided dated 26 March 2021. This referred to Mr Jarvis stating that he believed that he had Autism and that he was awaiting diagnosis. It records him telling the assessor that he experienced, “*meltdowns*”, that he found the pace of the training challenging, he felt that the training was a once size fits all and that what he found had worked well for him in the past was support from his team, setting clear objectives and minimal talking. He was working from home, which assisted with that. The assessor recommended what is described at one part of the form as Dyslexia Coping Strategy Coaching and in another part as Autism Coping Strategy Coaching. The recommendation explains:
- “The coaching is delivered by qualified professional coaches who are experienced in workplace autism strengths and weaknesses. As part of this service they are also able to help managers and colleagues understand the effects of the disability and its impact in the working environment.”
73. From a document which is not disputed, (in the Bundle at pages 218 – 220), one can see that a good deal of individual time had been spent with

Mr Jarvis providing him with one to one coaching and support, (including by Ms Ransome as noted above), Mr Jowsey and a Ms Cordy.

74. In a written record undisputed, (at page 226 of the Bundle) we see that Ms Ransome spent seven hours with Mr Jarvis on 6 and 7 April 2021, mentoring him on something called 'Kickstart Application Nudges' which, it is recorded, ended in, "a meltdown". The note says:

*"Would not telephone customer even when I got the information up on the UC Build."*

75. Mr Jarvis was away from work sick due to a virus on 8 April 2021. On 12 April 2021 at a Return to Work meeting, Ms Ward suggested to Mr Jarvis he try a dry run, calling Gemma Cordy as if she were a Claimant. Mr Jarvis is recorded as responding positively to that suggestion, (page 208 of the Bundle).

76. The note at page 226 goes on to record that Ms Ransome on 16 and 19 April 2021 tried to work with Mr Jarvis to carry out the nudges, that he created a 35 step document outlining the process, but he was unable to follow it to make a call to a customer. It records Mr Jarvis requesting on 20 April 2021 that he be set work that did not involve working on a computer and it records that on 22 April 2021, it was agreed that going forward he would review customers' CVs, with no customer contact. Ms Ward notified the team that all customers' CVs for review should be sent to Mr Jarvis. The review of a customer's CV amounts to about five per cent of the total workload of a Work Coach.

77. In the meantime, notes of a meeting between Mr Jarvis and Ms Ward on 15 April 2021 record the following points being made:-

77.1. Mr Jarvis would like to get talking to customers;

77.2. Mr Jarvis felt that going back into training would result in the same outcomes;

77.3. That if he suffered a shutdown he needed to reset;

77.4. That training online was hard to keep up with;

77.5. Working on a computer had side effects making him feel sick, but might be mitigated by scrolling left to right rather than up or down;

77.6. At this point the coaching sessions are a good idea and are helping, although labelled as Dyslexia sessions and he does not have Dyslexia, he found the coping mechanisms and strategies useful;

77.7. It was against the Respondent's guidance to reallocate a Fixed Term employee to another role without going through a formal interview process; and

- 77.8. HR had advised the Equality Act 2010 might change that and Ms Ward was to make another Occupational Health Referral.
78. Mr Jarvis was provided with a, “to whom it may concern” letter dated 16 April 2021 from Autism Service Norfolk, (page 215) confirming that there was a strong possibility that he may have Autistic Spectrum Disorder, but there may be a long wait for a formal assessment. Ms Ward acknowledged in cross examination that she received a copy of this letter and we see from the Bundle, (page 230) that it was emailed to her on 29 April 2021.
79. On 28 April 2021, Ms Ward wrote to Ms Ransome:
- “I think one of the main issues that we have, is that we have put a lot of time in on training Joseph to do a specific task – however, it never gets any further and what I think could be the issue, is contacting the customers... Joseph seems happy to complete tasks at his own speed and without customer contact. So what I would like addressing if possible, is the nervousness or anxiety associated with customer contact and making phone calls”.*
80. Ms Ward misunderstands the issue. It is the process which caused Mr Jarvis the anxiety, not speaking to customers.
81. The minutes of a meeting between Mr Jarvis, Ms Ward and Ms Ransome on 29 April 2021 record the following, (page 229):-
- 81.1. Mr Jarvis has created a timetable, a best practice guide and a spreadsheet to track the CVs he reviews;
- 81.2. An HR Report is being sought with a view to a possible move of role, “under the DWP umbrella under the Equality Act”;
- 81.3. Mr Jarvis acknowledged there being a business need and he felt that he was doing worthwhile work on the CVs which he saw as focused, enjoyable, productive and valuable;
- 81.4. Mr Jarvis commended the information he provided from Autism Norfolk, (page 215 of the Bundle) which Ms Ward was to analyse and seek guidance from HR.
82. Ms Ward was provided with HR advice on 4 May 2021, (page 234). We can see that the information she provided the HR Advisor was that Mr Jarvis did not yet have a diagnosis for Autism but that he was on the waiting list, he was suffering meltdowns and information overload, contacting customers seemed to be an issue, his recommended coaching sessions were scheduled to start on 30 April 2021, he was currently reviewing CVs and she poses the question whether under the Equality Act, they can move him to a different role. The advice received was that whilst those on Fixed Term Contracts should not normally be moved to alternate roles, there can be exceptional business circumstances making that necessary. The line manager should seek an HR Business Partner

approval for such a move. It is suggested that an Occupational Health Report be obtained to find out whether or not Mr Jarvis is likely to meet the definition of a disabled person and if he is, that Ms Ward should then discuss the matter further with an HR Business Partner.

83. Ms Ward and Ms Ransome have a further meeting with Mr Jarvis, described as a "Probation Check Up Meeting" on 19 May 2021. The notes of this meeting at page 242 of the Bundle record:-

83.1. The coaching sessions were going well;

83.2. Mr Jarvis does not feel that training would have a different outcome;

83.3. Mr Jarvis does not feel that the role of Work Coach is possible;

83.4. Mr Jarvis said that he was grateful for the open, honest and fair discussions. He was also grateful to Ms Ward for her following every avenue and for her honesty and fairness in pushing for solutions;

83.5. Ms Ward had offered resuming the Universal Credit Training, completion of which was a requirement for passing Probation; and

83.6. That there were other potential roles, but that she was uncertain whether they were possible given that he was on a Fixed Term Appointment, "Fixed Term Appointment moves are very unusual and only for extreme business needs. The lack of formal diagnosis makes things harder with a reference of being moved under the Equality Act 2010".

84. A further Occupational Health Report was received on 29 May 2021. This recites Mr Jarvis describing the training as a Work Coach as overwhelming and stating that he could not foresee meeting the requirements of the role. He feels confident in performing the CV Review role. The advisor's opinion is that he would benefit from work adjustments pending the formal assessment, that he would thrive on analytical work refraining from multi-tasking and working in a quiet environment. The advice is that he is fit for work with adjustments, that they should explore alternative roles within the business and that they should complete a Personal Stress Risk Assessment.

85. A second Probationary Review meeting took place on 14 June 2021. The note of this appears at page 257 of the Bundle. As previously noted, an earlier comment from March 2021 has been cut and pasted in as if made in June 2021. Ms Ward has noted:

*"Unfortunately, there has not been an adequate demonstration of all the criteria that is required for the Universal Credit Work Coach role that Joseph was employed to fulfil under a Fixed Term 12 month contract.*

*Unable to make telephone calls to customers.*

*Unable to use a Universal Credit Build.*

*As these two were a barrier, there was no further assessment that could be made to ascertain his capabilities. These are mandatory for a Work Coach on the full service.*

*When offered the Universal Credit Training again, Joseph refused this, clearly understanding that he needed to complete it to become a Work Coach.”*

86. At the end of the report at page 263:

*“End of probation report submitted to Karl [Mr Sadler, see below] recommendation that probation has not been passed”.*

87. The foregoing appears to be contrary to the Occupational Health advice that Ms Ward received on 26 May 2021, see above.

88. Mr Steward, Ms Ward's line manager, sought advice from HR, which appears at pages 264 and 265. In seeking the advice, Mr Steward referred to the apparent link to undiagnosed Autism and Mr Steward is recorded as seeking advice on whether the potential Autism should give rise to consideration of a suitable job within the Department if he does not meet the level of performance required for a Work Coach. Mr Steward is recorded as stating that he felt the correct decision would be to terminate employment at the end of the Probation Period.

89. The advice received was:

*“I advise that reaching a decision to dismiss without formal action (warning) is not within probationary policy intent. Therefore if you are comfortable to make a decision on documented discussions in relation to performance, then this is a business decision and is a risk as the probation procedures have not been applied appropriately.*

*The fact that the MOS has not been diagnosed with Autism means that decision can only be made on the information at present. There is not a requirement to move roles on the basis that the MOS may be diagnosed with Autism in the future. From a business perspective it is matters affecting and relating to conduct, performance and attendance during the probation period are the factors to consider.”*

90. There are two very surprising aspects arising out of these two paragraphs. Firstly that Mr Steward's decision to dismiss, (see below) flies in the face of the advice given in the first paragraph. Secondly, the suggestion from an HR person that reasonable adjustments need only be considered if there is a diagnosis of Autism, (thereby placing a determinative emphasis on diagnosis rather than impairment) is plainly, simply and obviously, wrong.

91. As trailed in the preceding paragraph, by letter dated 25 June 2021, Mr Steward wrote to Mr Jarvis to tell him that he had failed to meet the expected standards during probation and that he was therefore to attend a meeting by Teams on 5 July 2021, which may result in his dismissal.

92. In response, Mr Jarvis emailed Mr Steward to request that a particular named person from Asperger East Anglia attend the meeting with him. Mr Steward's surprising response was that person could not attend, that Mr Jarvis may only be accompanied by a Trade Union Representative or work colleague. Mr Jarvis replied to express his disappointment. He said that he was taking professional advice and,

*"I therefore request a new date for the meeting, so that I may receive the necessary advocacy".*

93. Mr Steward responded that he had cancelled the meeting and that he would be in touch.
94. Mr Steward sought further HR advice, which is at page 270 of the Bundle. The advisor records having been told by Mr Steward that the issue was that the member of staff had asked for the meeting to be postponed as they were seeking professional advice. Mr Steward does not seem to have explained to the HR Advisor the real problem was that as an Autistic person, (diagnosis pending) Mr Jarvis needed a suitable companion. The advice received was that he should arrange a rescheduled meeting, giving five days' notice, expressing that the individual may be accompanied by a work colleague or Trade Union Representative, but not somebody from outside the organisation. If it is the case this particular HR Advisor knew Mr Jarvis was probably an Autistic person, the latter piece of advice is surprising. It is also surprising that Mr Steward was advised to rearrange the meeting, but rather than doing that, he decides simply to dismiss Mr Jarvis.
95. Thus, by letter dated 14 July 2021, Mr Jarvis was told that as he had not attended the originally scheduled meeting on 5 July 2021, Mr Steward has proceeded in his absence and that his employment is terminated.
96. Mr Jarvis appealed his dismissal by letter dated 19 July 2021, page 279 of the Bundle. The appeal came before Mr Lancaster, who clearly recognised the deficiencies in the process and decision making. He invited Mr Jarvis to attend an Appeal Meeting by Teams. In the meantime on reviewing the papers, he decided to uphold the appeal anyway. This was communicated to Mr Jarvis in a telephone call followed by an email, on 10 August 2021. Mr Lancaster wrote formal confirmation that the appeal was upheld in a letter dated 13 August 2021 which is at page 296 of the Bundle. It noted the following, (page 297):

*"Whilst you have not been formally diagnosed with an Autism Spectrum Disorder, as employer, the Department has to consider whether you are likely to be classed as disabled... You do not need to have a formal diagnosis... In this case, you have given us notice as your employer that you consider yourself disabled due to the possibility of having an Autistic Spectrum Disorder... Whilst I note reasonable adjustments have been put in place to support you, alternative roles should have been explored by considering a managed move under the Equality Act 2010, this did not occur.*



*In addition... I have identified that our probation procedures have not been applied appropriately. A decision to dismiss was made without any formal action taking place throughout the probationary period, despite well documented performance discussions. This is not within the probation policy intent."*

97. On 16 August 2021, the Respondent wrote to Mr Jarvis to inform him that his probationary period had been extended to 11 October 2021.
98. During Ms Ward's absence from work on leave, a Work Coach Team Leader colleague, Mr Pipe, held a meeting on 18 August 2021 with Mr Jarvis, minuted at pages 300 – 317 in the Bundle. In summary, whilst at this meeting passing reference was made to alternative roles, (commenting that there were none available) the main thrust of the meeting appears to be to discuss adjustments to the training programme for the Work Coach role, so as to enable Mr Jarvis to pass his probation. That was surprising, given that it was already clear that was not going to work.
99. At some point, is not clear exactly when, Mr Jarvis prepared a spreadsheet recording the CV's that had been referred to him for review, it is at pages 593 to 97. In summary, it shows 25 were referred in May 2021, mostly but not exclusively, by Mr Jowsey, in June Mr Jarvis only two were made, by Mr Jowsey, on the 30<sup>th</sup>, (although Mr Jarvis was on leave for much of that time and in July 7 referrals were made, all from Mr Jowsey.
100. On 23 August 2021, Mr Pipe wrote to Mr Jarvis to invite him to attend a meeting with himself and Ms Ward,

*"... to support your return to the office and to set out criteria we need you to work towards in order that passing Probation can be considered".*
101. Mr Jarvis replied to request that the meeting be by Teams. The meeting was by Teams. We note that at this time, Mr Pipe provided Mr Jarvis with a transcript of the recorded meeting on 18 August 2021.
102. Mr Jarvis met with Mr Pipe and Ms Ward on 25 August 2021, notes of that meeting are at pages 321 – 322 in the Bundle. From these we note:-
  - 102.1. The aim of the meeting was to put arrangements in place so that Mr Jarvis could pass his probation on 11 October 2021;
  - 102.2. It was suggested Mr Jarvis should come into work two days a week to shadow existing Coaches;
  - 102.3. The emphasis was on Mr Jarvis completing training for a Work Coach so that he could pass his probation;
  - 102.4. The following recorded remarks: *"Alex advised that when we are looking at reasonable adjustments, we have to be looking at those two words with the first being reasonable – it is not a reasonable adjustment to be a Work Coach but not use the UC Build. Alex also discussed DWP*

*expectations and does Joseph understand that we also as an organisation and an employer have expectations of all our staff... We also have expectations that Joseph is able to complete the tasks of the Work Coach role that Joseph was employed as" , (indicative of an attitude, also reflected in a significant later meeting on 11 March 2022);*

- 102.5. Mr Jarvis was told that if he did not pass his probation, dismissal was likely; although a managed move was not ruled out, there was not the availability for a managed move at that time;
- 102.6. That he was working on CV reviews was not enough; and
- 102.7. Mr Jarvis requested that Mr Jowsey attend as a support for him at the next meeting, as he understands Autism.
103. Mr Jarvis was signed off work unwell with work related stress on 26 August 2021 and remained so until the end of his employment.
104. Between 10 and 17 September 2021, Ms Ward sent a number of emails using Mr Jarvis' work email address, attempting to keep in touch with him. He requested that communication be by letter.
105. On 11 October 2021, Mr Jarvis received, without explanation, a letter dated 11 October 2021 informing him that he had completed his probation.
106. On 13 October 2021, Ms Ward sent Mr Jarvis job descriptions for three vacancies, namely that of: Kick Start Employment Advisor, Decision Maker and Data Protection Officer. The email attaching those job descriptions was blank. Ms Ward had telephoned Mr Jarvis to explain that she was sending them through.
107. On 15 October 2021, Mr Jarvis wrote to Ms Ward asking for further information, including whether the three roles would require him to interact with the IT System Build and, given that he was on a Fixed Term Contract due to expire in January 2022, what were the start and finish dates of those roles? He received no reply.
108. Ms Ward referred Mr Jarvis again to Occupational Health and the report received in response is dated 16 November 2021, to be found at page 371 of the Bundle. The advisor wrote that it appeared there had been a diagnosis of Autistic Spectrum Disorder. He explained that work related stress issues can be very problematic for Autistic people, that they had completed a psychological assessment with Mr Jarvis and that he has moderate psychological symptoms associated with stress. As Autistic Spectrum Disorder symptoms vary from one person to another, it is recommended there should be specialist advice sought. In terms of management advice, they advised that currently Mr Jarvis was unfit to work in any capacity and that a return to work would be feasible following a successful resolution of his work related stress issues. They recommend completing a Stress Reduction Plan, that management discuss work related stress issues with him seeking to resolve them. They

also recommend a Wellness Recovery Action Plan, (WRAP). He should have a Specialist Ergonomic Review of his work environment and duties at work, a specialist should be appointed with sound knowledge of ASD and that can be arranged by contacting the Occupational Health provider.

109. By letter dated 18 November 2021, Ms Ward invited Mr Jarvis to a meeting on 23 November 2021. She says that she would like to discuss the three job roles with him.
110. Mr Jarvis replied on 22 November 2021, (page 374 of the Bundle) saying he will not be able to attend as his long anticipated assessment for ASD is listed for that day. He therefore asks for sufficient notice of the rearranged meeting so that he can arrange to be accompanied with appropriate support. In a later email of 25 November 2021, he asked for at least 10 days' notice. Ms Ward replied on 27 November 2021, (page 377) to say that he can only be accompanied by a work colleague or Trade Union Representative. In a reply, Mr Jarvis queried why that would be so, providing a list of websites that would explain why an Autistic person, a disabled person, might need specialist assistance at meetings and he refers to taking advice. Ms Ward forwarded that email to her line manager Mr Sadler on 1 December 2021, saying that she is at the end of knowing what to do and that she does not feel equipped to continue to manage this situation.
111. On 2 December 2021, Ms Ward wrote to Mr Jarvis, (by work email) reiterating he can only have five days' notice and he can only be accompanied by a work colleague or Trade Union Representative.
112. Mr Jarvis wrote by email to Ms Ward on 7 December 2021 explaining that an advocate would assist him in expressing himself in meetings, in processing information and avoiding shutdowns, knowing that he would be able to discuss what was said with his advocate at post meeting briefings. He wrote that transcripts of meetings would help, but protests that he had yet to receive a transcript of his meeting with Ms Ward and Mr Pipe on 25 August 2021. He proposed the meeting be rescheduled for January 2022. He raised three questions with regard to the three proposed alternative roles. He wrote again on 15 December 2021; he noted that Occupational Health had made a recommendation for a specialist OT assessment and he would appreciate that being arranged at Ms Ward's earliest convenience. He also reiterated the importance of being accompanied by an appropriate advocate.
113. Ms Ward wrote on 16 December 2021, explaining that unfortunately she had been off due to family bereavement and that she would now look to arrange the specialist OT assessment.
114. On 16 December 2021, Ms Ward sent a WRAP to Mr Jarvis to complete.
115. Mr Jarvis received written confirmation of his formal diagnosis of Autistic Spectrum Disorder by letter dated 17 December 2021 from Autism Service Norfolk. The letter had attached, a document with reasonable adjustment

recommendations and a full Report. The letter and recommended adjustments were forwarded to the Respondent on 7 March 2022, (page 492). The attached detailed report was not included. We note there seems to have been implicit criticism of Mr Jarvis for not attaching this detailed report. It contains a personal history which is analysed as part of the diagnostic process. There seems to us to be no particular reason why the detailed report should have been shared with the Respondent.

116. The recommended adjustments are disappointingly generic. They include: reference to sensitivities to light, noise and smell; the need for more time to process new information; the observation that certain changes or new situations can increase anxiety; that everyone is different, and that adjustments should meet the needs of the individual rather than provide a generic response.
117. On 20 January 2022, Ms Ward wrote once again to Mr Jarvis to invite him to attend a further meeting on 25 January 2021, to discuss the roles, his return to work and whether he has completed his WRAP. That he may only be accompanied by a member of staff or Trade Union Representative is repeated once again. Reference is made to the DWP having a number of Disability Employment Advisors who would have appropriate knowledge in order to accompany him.
118. Human Resources provide further advice on 2 February 2022, (page 423). At this point, the HR Advisor understands the situation to be that a diagnosis is pending. He recognises that this should be taken into account and reasonable adjustments considered. He advises that Occupational Health advice should be sought as to what the individual can do. It was said to be risky to consider dismissal and that further efforts should be made to engage with the individual about reasonable adjustments. It is suggested in light of Mr Jarvis' repeated requests, that exceptionally and with a view to re-establishing contact, he may be accompanied by someone other than a Trade Union Representative or work colleague. Once Mr Jarvis is re-engaged, a further up to date Occupational Report should be obtained on the job roles he is likely to be able to do. Thus, Ms Ward wrote to Mr Jarvis on 21 February 2022 to inform him that in light of advice that she had received he would, exceptionally, be allowed to be accompanied by an advocate. She proposed a meeting date of 28 February 2022.
119. Mr Jarvis' Solicitor, Ms Davenport, wrote to Ms Ward an email dated 21 February 2022, (page 441). From this we note:-
  - 119.1. It is assumed that Mr Jarvis' contract must have been extended;
  - 119.2. She asks whether the three roles are still available, whether any new roles have become available and whether any of those roles entail Mr Jarvis having to use 'Build'?
  - 119.3. She informed the Respondent that Mr Jarvis had been formally diagnosed with Autism on 17 December 2021;

- 119.4. She noted that Mr Jarvis has completed his Wellness Recovery Action Plan;
- 119.5. She wrote that Mr Jarvis had repeatedly requested that he be accompanied by an advocate from Equal Lives;
- 119.6. She requests that transcripts of meetings be provided within five days, Mr Jarvis yet to receive transcripts of the meeting from 25 August; and
- 119.7. She notes that a Stress Reduction Plan is to be prepared and a Specialist Ergonomic Review carried out.
120. Ms Ward sought support from Mr Sadler, (pages 445 and 446 of the Bundle).
121. Mr Jarvis had been in receipt of a number of emails into his work email account that were generic emails informing people on Fixed Term Contracts that they could apply for permanent employment, the expression used being, "Permanency Application". Mr Jarvis did not understand this correspondence.
122. On 24 February 2022, he emailed Ms Ward about an email he had received on that topic of 19 February 2022, expressing his lack of understanding, noting that it appeared to be a potential job opportunity. In relation to the proposed meeting, he requested that it should be by Teams and explained that he was waiting for his chosen advocate to get back to him as to her availability.
123. On 25 February 2022, Mr Sadler wrote to Mr Jarvis seeking to explain the, "permanency exercise" and giving him extra time to complete his application.
124. On 27 February 2022, Mr Jarvis wrote to Mr Sadler explaining his lack of understanding. With the conclusion of his email, he wrote that he had been advised by his solicitor that it was unacceptable that the Respondents should have been communicating with him via his email account whilst he was off sick and that the important information should have been communicated to him directly. Mr Sadler replied on 28 February 2022, (page 463 of the Bundle) apologising for using Mr Jarvis' work email address and asking for a personal email address. He asked him once again if he wished to apply for permanency, the extended deadline expiring at 11:55 that night.
125. Also on 28 February 2022, Ms Ward wrote to propose the next planned meeting should be on 10 March 2022.
126. On 3 March 2022, Ms Ward replied to Ms Davenport confirming that only two of the roles are now available as that of the Kick Start Advisor had come to an end on 1 March 2022. She referred in unfortunate terms to Mr Jarvis failing to attend the previously arranged meeting on 23 November 2021; as we have seen above, the reason he was unable to attend was

that he was attending his long awaited autism assessment. She confirmed that the roles proposed would entail Mr Jarvis having to use the Build IT system. She confirmed that Mr Jarvis would be able to attend the proposed meeting on 10 March 2022 with his advocate of choice. She stated that notes would be taken, but the meeting would not be recorded. The explanation for that given to the Tribunal was that it was not possible to record the meeting because there would be a third party present, an explanation the Tribunal finds puzzling.

127. On 7 March 2022, Mr Jarvis in anticipation of the meeting sent three documents to Ms Ward: a document called his Personal Overview which contained some questions which he wished to ask, the letter from Autism Norfolk setting out his diagnosis dated 17 December 2021, and his Wellness Recovery Action Plan. Unfortunately, Ms Ward did not see these documents before the meeting on 10 March 2022.

128. Mr Sadler gave Ms Ward some advice in advance of the meeting, the focus of which we can see, (page 491) was:

128.1. She is to remember that she is leading the interview and the emphasis is on getting him back to work;

128.2. The presence of an external advocate is not usual policy;

128.3. It is important Mr Jarvis gives his agreement for a new Occupational Health Report, (he has never not given his agreement);

128.4. She should establish whether he has an intention to return to work;

128.5. Ask whether he has applied for permanency and if not why not?  
And

128.6. She should not feel pressurised to give answers on any specific points if she does not feel confident enough to do so.

129. The meeting took place on 11 March 2022. Mr Jarvis, (JJ) was accompanied by a Keri-Ann Ellis, (KE). In addition to Ms Ward, (AW) a minute taker attended. Her name was Mandy Rush, (MR). She was another Work Coach Team Leader. We had before us two sets of notes, one prepared by Mandy Rush and the other prepared by Keri-Ann Ellis after the meeting.

130. We quote from the Respondent's notes of this meeting, (page 482) as follows:

"AW: *Okay Joseph I will be leading this meeting today, we need to establish how we can get you back to work, will you be coming back?*

JJ asked three questions.

AW replied: *It is for me to structure the interview to see how we can get you back to work"*

Immediately we see an apparently aggressive approach and Mr Jarvis being shut down.

MR: *"Can you tell me for the notes what type of Autism you have and any medication you take for it?"*

JJ: *I won't answer that."*

We make the observation that this is an offensive and ignorant question. It is posed by the so called minute taker. We note Ms Ward does not step in to intervene.

"AW: *... will you be returning in June? I haven't had that answer yet.*

JJ: *What are my choices?*

AW: *Why are you unclear as to what your choices are?*

JJ: *Because all the roles mean I need to use the Build.*

AW: *I don't know what issues you might have, unless I am told what you need and what barriers you have I can't answer the question. What systems did you think you would be using when you applied?"*

Even on the basis of the Respondent's own notes, this is clearly an aggressive approach being adopted by Ms Ward, which is surprising in the face of the advice that has been given thus far.

"JJ: *I think it would be futile to continue with this meeting. I have produced questions that you haven't answered and unless those questions are addressed in my period of absence. I think we should take some time out. Can we take a break."*

It is not surprising at this stage that Mr Jarvis is anxious and upset and wants a break.

"AW: *What you are saying is in order to work with the DWP you would need to have a role that doesn't involve the UC Build, if you're unable to use the UC Build would you be looking for another job role that doesn't use the Build?*

JJ: *Yes I would like to explain to you what happens to me is it has difficulty processing information, it is usually in layers, the requirements are different, if my brain is distracted by messages popping up and more than one person talking I struggle to see what the priorities are, it is difficult to navigate through that, my brain goes into survival mode, and this is very recent for me...*

AW: *Please send me the questions so I can send them to HR...*

AW: *You applied for a job in DWP which you did on your own volition, as far as I can tell it is your own free choice to apply for a role and then if you feel that the role you applied for isn't suitable, only you can make the decision if an employer is suitable for your needs.*

*So if you put those questions to me on paper then HR can take a look, there are only a certain reasonable adjustment, we have employed you at DWP are you able to perform those duties which you applied for... I can't answer whether you can go to a different role in the DWP where the Build is used and I don't think that is a reasonable adjustment, we have to acknowledge that those positions use UC Build but the system cannot be changed."*

**Again, Ms Ward's approach seems to be aggressive.**

"AW: *I'll draw this meeting to a close, we are looking at all of this from a business perspective, there comes a point where we have to ask is it reasonable for the business. Is a job role that is reasonable, I will consult HR regarding this..."*

**131. From the notes of Ms Keri-Ann Ellis we note the following:**

"JJ said that he had a pre-prepared statement that he would like to read out and would send the link to AW / MR.

JJ began to read his statement, AW looked very disengaged. E.g. looking around the room, repetitive drinking, no active listening.

AW interrupted 2/3 of the way through and JJ advised her that he had almost finished.

JJ asked his first question to AW and she said that she wouldn't answer as it was an open question.

JJ asked his second question to AW and she said that she wouldn't answer...

AW advised that the Specialist OH Assessment was offered as a reasonable adjustment, but that it could not be offered until JJ knew which alternative role he would like to undertake.

MR then bluntly asked JJ if he could tell her "*what form of Autism he has*" and "*what medication he takes*".

KAE interjected and said I could see the expression on JJ's face and that he looked visibly offended by that comment and how it was inappropriate to speak to a disabled person in that manner...



AW repeated her question to JJ as to whether he would be willing to return back to work with the DWP before the cessation of his current contract.

JJ asked, *“what are my choices?”*

AW said, *“why are you asking?”*

JJ said that he was unclear and asked if AW knew the effect of the Full Build on him.

AW said that she did not know and couldn't answer as she was not a clinician.

MR said that she did not expect her manager to have understanding or empathy when she had suffered from mental health difficulties and that JJ can't ask that of AW.

AW asked JJ what he thought about using the DWP's IT systems before he commenced his employment and what his thought process was at the time...

AW said that there are only so many reasonable adjustments that can be made on behalf of the business.

AW said that we are *“looking at this from a business point of view”*, *“are you able to do this?”* and that she *“can't confirm if there is a job”* (for him). ...

MR interjected and said that she was not a minute taker and could not possibly keep up with writing everything that JJ was saying verbatim...

JJ began to explain about an incident he had experienced...

MR then interjected and said that she was 10 minutes late for her next meeting and for JJ to send his emails to AW to attach to the meeting notes..."

132. By email dated 23 March 2022, Mr Jarvis resigned his employment with the Respondent. His resignation is at page 522 of the Bundle. He wrote that he had lost all trust and confidence in the willingness of DWP to support him in his return. He wrote the following about the meeting on 10 March 2022:

*“I had hoped that our recent meeting would be a positive one, but in fact the opposite was the case. I felt that I was not being listened to, that I was a nuisance and that you had no interest in exploring what could be done to enable me, as a disabled person, get back to work. I asked if I could read a statement and ask some questions and was told that you would be leading the meeting and setting the agenda. My statement was interrupted before I had finished it and you refused to answer any of my questions. I was shocked to be asked by Mandy Rush, who I understood to be there solely as a note taker, what type of Autism I have and what medication I take for it.*

*Your main focus was on whether I would be returning to work in June when my current fit note expires. My Advocate Keri-Ann Ellis and I both said that we needed more information on the job roles that you had identified and requested a referral to a specialist who could advise on adjustments. You said that no further information was available. You made it clear that the Full Build system would have to be used in the two roles that you told me about back in October and that it would not be a reasonable adjustment to look at ways around the problems I have with the system due to my Autism. When I asked you if you would like me to explain the specific difficulties I had with the system, you said no. You did not suggest any alternative roles within the DWP. You indicated that you were looking at things from a business perspective and that "there comes a point where we have to ask is it reasonable for the business". I formed the distinct impression that in your view that point had already been reached and your conclusion was that it was not.*

*... I have heard nothing from you about the Specialist OT Referral or any other support for me."*

133. 23 March 2022 was the last day of Mr Jarvis' employment.
134. On 24 March 2022, Mr Pipe wrote to Mr Jarvis asking whether there was anything the business could do to enable him to reconsider his resignation. He suggests that an updated Occupational Health Referral, with Mr Jarvis' input, would be welcome.
135. On 28 March 2022, Ms Ward wrote by email to Mr Jarvis to invite him to attend a meeting to discuss his Fixed Term Contract due to end on 30 June 2022. The letter informs him of his right to be accompanied by a Trade Union Representative or work colleague.
136. Mr Jarvis replied to Mr Pipe on 28 March 2022 (page 530) saying that his decision to resign had not been taken lightly, it followed months of feeling unsupported and that he had lost all confidence in the willingness of the DWP to support him.

### **Conclusions**

137. We approach our conclusions by reference to the List of Issues.

#### ***Disability***

138. The Respondent accepts that Mr Jarvis was disabled at all material times by reason of Autism and that it knew or ought reasonably to have known that he was disabled, from 16 April 2021.

#### ***Time***

139. It is appropriate to consider the question of time limits once we have reached our conclusions on the specific allegations, so that any question of a continuing act can then be considered, if appropriate.

***Discrimination Arising from a Disability***

140. We consider first each of the alleged matters said to have arisen from Mr Jarvis' disability.

*He was unable to interact fully with the IT System.*

141. The Respondent does not accept that this is so. It disputes Mr Jarvis' assertion that he was proficient in the usual use of IT and asserts that Mr Jarvis' inability to interact with the Respondent's IT System was his general poor IT skills. They also say that his problem with 'Build' was the way it was viewed during online training, with speedy scrolling by the trainers.

142. We reviewed the evidence. We considered first Mr Jarvis' witness statement. We found Mr Jarvis an honest witness. At paragraph 11, he said he found the pace of the training too fast and that he was slower than other people. At paragraph 13, he agreed that he struggled with the IT System. At paragraph 21, cross referring to the notes of the meeting on 15 April 2021, (at page 213 of the Bundle) he explained that using the computer had made him feel sick, which he said might be mitigated by scrolling left to right as opposed to up and down. At paragraph 29, he wrote:

*"The barrier for me was that before making a phone call, I would need to go through multiple screening procedures on the IT System, then make the call through the System, while simultaneously accessing reference materials on the System during the call. It was this multi-tasking that was the issue for me."*

143. At paragraph 38, he said that the main barrier was the IT System. In his oral evidence, he spoke of struggling to follow when he was shadowing a Work Coach, because of multiple taskings, not necessarily because of the speed of scrolling.

144. We find that Mr Jarvis was unable to interact with the IT System.

145. There was a surprising lack of evidence to assist us as to whether this was caused by his autism. We draw on the report from Autism Service Norfolk at page 411, where the author wrote:

*"In more recent history, since being under significant stress in his job role at the Department for Work and Pensions (DWP), this has deteriorated into "shutdowns" comprising "a near death feeling – a feeling of impending doom", the fall-out from which in terms of recovering his sense of equilibrium can last several days. Joseph added that as well as difficulty keeping up with group conversations, he experiences visual sensitivity which also seems to be a trigger for the "shutdowns"; this can be scrolling down a computer screen, busy environments with lots of visual stimulation and "busyness"."*

146. At page 415 of the Bundle, the author wrote:

“There is also current evidence of difficulties in imagination alongside, rigidity and flexibility in thought processes. This is reflected in Joseph’s very strong need for process, sameness, routine and precision.”

147. We also draw upon Mr Jarvis’ own description of what happened to him, his reference to, “*shutdown*”. A characteristic for some with autism. A, “*shutdown*” is not a neurotypical response. From Mr Jarvis’ evidence, it is caused by multiple tasking, his having to dart about rather than be able to follow a straight forward step by step process.

148. On the balance of probabilities, we find that Mr Jarvis’ inability to interact fully with the Respondent’s IT System was caused by his autism and not a consequence of his mere ineptitude in working with IT generally.

*He was unable to complete his training for the role of Work Coach, pass his probation and perform the role.*

149. It follows from our findings set out immediately above, that Mr Jarvis could not complete his training for the role of Work Coach, he could not pass his probation, (as the Respondent required him to complete his training before he could pass his probation) and could not perform the role of Work Coach, which was because of his difficulties with the Respondent’s IT system, which was because of his autism.

*He was unable to process everything that was discussed with him in online meetings, engage fully in them and reflect on the discussions afterwards.*

150. Mr Jarvis was able to engage in meetings with him which were about him. We refer to the various one to one meetings with him about his issues with one to one training. In those meetings, he was able to process what was discussed. He was less able to reflect afterwards on what was discussed, until such time as he had the minute or the transcript of the recording, of the meeting in question. As the letter from Autism Service Norfolk said at page 397 of the Bundle, Item 7, in recommending helpful strategies,

“Provide the person with a written breakdown of topics or actions discussed, as they may not be able to recall the information later.”

151. Mr Jarvis explained in his email to Ms Ward of 7 December 2021, (page 384) his difficulties in processing information after a meeting in the context of his reliance upon an advocate to assist him. He explained the point again in a further email of 15 December 2021 at page 386, where he talks of the need for a debrief and consolidation after a meeting, to fully understand the process and procedures that have or will happen.

152. In respect of meetings involving multiple attendees, such as the so called ‘Buzz’ meetings or Group Training, Mr Jarvis was not able to process everything in an online meeting. He was unable to engage. As Autism Service Norfolk explained, again at page 397 of the Bundle, Item 4,

“Meetings can be particularly difficult for Autistic people, as they combine unpredictable discussion and complex social communication and interaction.”

153. The difficulty in this regard was caused by his autism.

*He was unable to make decisions about possible alternative roles without detailed information on them.*

154. That is so. It is also true of a neurotypical person. There is no evidence before us, medical or otherwise, that his difficulties in this regard were any different from those of a neurotypical person.

*His mental health worsened and he has to take disability-related sick leave due to the lack of support.*

155. Again, there is a disappointing lack of medical evidence from Mr Jarvis. His mental health certainly worsened and he did have to take sick leave. Whether that was due to lack of support and due to his autism, is the issue.

156. The Occupational Health Report of 16 November 2021 discusses the connection between autism and work related stress:

“His pro-active approach in seeking clarity for himself does appear to have led to a diagnosis of Autistic Spectrum Disorder, however I note this does need to be clarified. Work related stress issues can be very problematic for sufferers. I have completed psychological assessment with them today using a well validated tool and results of this show he has moderate psychological symptoms associated stress. It is hoped that he will receive clarity in relation to his highly likely diagnosis of autism and if so, it is hoped this will go some way in providing him with clarity in relation to his difficulty with information processing. Stress is not an illness nor is it a diagnosis, it is a collection of symptoms individuals may show in response to excessive pressures placed upon them. However, if the stressors become too excessive and prolonged, mental, and physical illness may develop. Autistic Spectrum Disorder symptoms do vary person to person and often specialist advice needs to be sought.”

157. It is clear to us that Mr Jarvis’ stress had been caused by his inability to be trained into and perform the role of a Work Coach and that inability was caused by his autism. In that sense, autism has caused the stress and the absence.

158. Next we consider, did any of the matters set out below amount to unfavourable treatment? If so, was it because of one of the matters above that was caused by Autism?

159. To recap, four of the five matters were, we found, “something arising” caused by autism, they are:

- 159.1. That Mr Jarvis was unable to interact with the Respondent's IT System;
- 159.2. That Mr Jarvis was unable to complete the Respondent's training, unable to perform the role of Work Coach and unable to pass the probationary period;
- 159.3. That Mr Jarvis was unable to reflect upon discussions without notes provided afterwards and was unable to engage in multi-party meetings; and
- 159.4. That he suffered poor mental health and disability related absence.
160. We note that the question posed is whether any of the matters below, (if they amount to unfavourable treatment) were caused by any of the matters arising from disability noted above.
161. We consider each in turn.
- The Respondent's insistence that he use all aspects of the IT System.*
162. The reason the Respondent insists that Mr Jarvis use all aspects of its IT Systems is that he needed to do so in order to perform the work of a Work Coach, that is not unfavourable treatment. Further, the reason was not any of those matters arising from disability as set out above.
- The Respondent's ongoing failure to explore adjustments that might have supported him in his original role, or in a different role.*
163. There was not a blanket failure to explore adjustments, as the wording of the issue suggests. Adjustments were explored and implemented, for example in the approach to training, in allowing Mr Jarvis to work on CVs for a while and in allowing him to work from home. The question is not about reasonable adjustments, that is for another head of claim.
164. In any event, the motive on the part of Ms Ward and others was not any of the matters above arising from disability, but either because they saw it as procedurally not possible, or that Mr Jarvis needed to decide what alternative role he could take, before the Respondent could look at what adjustments could be made, (rightly or wrongly).
- The Respondent's rigid application of its policies, including its Probation Policy and Absence Policy.*
165. There was a rigid application of the Probation Policy, in that up until 11 October 2021 when they told him that he had passed his probationary period, they had insisted that he had to pass it in the ordinary sense of the expression, by demonstrating his abilities to carry out the role of a Work Coach. There was a rigid application of the Absence Policy by keeping in touch, insisting on five days' notice of meetings rather than ten and until

they changed their mind, insisting that a companion at meetings had to be a work colleague or Trade Union Representative.

166. Keeping in touch was not unfavourable treatment. Insisting on passing probation, only giving five days' notice rather than ten, and insisting a work colleague or Trade Union Representative as a companion, were.
167. The Respondent's Application of this policy in this regard, can accurately be described as, "rigid".
168. However, once again, the claim breaks down because Ms Ward's decisions were because she was following policy, or following HR advice, who in turn were following policy. They were not because of any of the matters arising caused by disability.

*The fact that for many months the Respondent denied him support in online meetings from someone who understood his disability.*

169. Mr Jarvis was not denied support in online meetings from someone who understood his disability. It is apparent from the documentation that Ms Ransome and Mr Jowsey understood his autism and Mr Jarvis recognised as such, certainly in the case of Mr Jowsey.
170. In any event, any decision about who would or would not be allowed to accompany and support Mr Jarvis in an online meeting was not because of any of the matters set out above that were caused by his disability.

*The Respondent's failure to provide meeting notes / transcripts or record meetings when requested to do.*

171. There was no failure to provide meeting notes or transcripts at all. There was an issue with late provision of meeting notes, as Mr Jarvis' solicitor noted in her email of 21 February 2022, (page 442). She recites having requested of Mr Steward that on 6 September 2021, the notes of his meeting with Mr Jarvis on 25 August 2021, and as at 21 February 2022, they had not been provided. They were provided eventually.
172. It is true that Mr Jarvis and his solicitor requested that the meeting of 11 August 2022 should be recorded and a transcript provided. For reasons that are not understood, that request was refused. Ms Ward said in evidence it was because a third party was present at the meeting, but the Tribunal does not understand what difference that would have made. However as it happens, that matters not: two sets of minutes were produced at the meeting of 11 March 2022. From those minutes, it is clear what happened and what was said.
173. In any event, any failure to produce the notes of Ms Ward and anybody else who may have been involved in the production of minutes, was not because of any of the matters referred to above as arising from Mr Jarvis' disability.

*The Respondent's failure to respond to his request for more information on generic job descriptions that were sent to him.*

174. The job descriptions sent, (page 362) were very sparse. The Respondent did for a time, fail to answer Mr Jarvis' question about whether any of those roles entailed use of Build. On 15 October 2021 by email, (page 365) Mr Jarvis asked whether the three roles required the use of Build and what effect the fact that he was on a fixed term contract would have on the proposal.
175. In an email of 7 December 2021, (page 384) Mr Jarvis asked three questions, but they all amounted to the same thing, which was to query the use of Build in the three roles proposed.
176. We note that no questions were asked seeking more detail on what the jobs entailed.
177. Not answering the question about the use of Build in those three roles was unfavourable treatment. However, Ms Ward did not fail to answer those questions because of any of the matters arising caused by Mr Jarvis' disability. The question was answered on 3 March 2022, (page 472.1 of the Bundle) and Ms Ward's delay up until then was a combination of her being discombobulated by her family bereavements and latterly, her desire for an actual face to face discussion with Mr Jarvis.

*The fact that he was only made aware of the Respondent's permanency campaign shortly before it ended and was not in a position to apply for a permanent role due to the lack of time.*

178. We would make the observation that it is generally rightly acknowledged that it is inappropriate to seek to communicate with an employee who is absent from work due to work related stress via their work email address. Looking at one's inbox to see what has arrived in one's absence is only likely to enhance one's stress.
179. There were a series of generic emails that inform those on fixed term contracts, including Mr Jarvis, that they could apply for a permanent contract. Mr Jarvis did not understand them. In fairness to the Respondents, when Mr Jarvis wrote on 24 February 2022 to Ms Ward that he did not understand this correspondence, Mr Sadler promptly wrote to him the next day to explain. Mr Jarvis' evidence was that he was not well enough to understand. However, he wrote on 27 February 2022 acknowledging Mr Sadler's email and stating that he had spoken to his solicitor about it. By then, he therefore understood what was being offered. We note that Mr Sadler, in his reply on 28 February 2022, reiterated the question whether he wished to apply for permanency, pointing out that the deadline was that evening (11:55pm) but also making clear that if he required more time he should let Mr Sadler know and he would liaise with the Recruitment Team. Mr Sadler provided Mr Jarvis with his mobile telephone number for that purpose.



180. Mr Jarvis chose not to apply for a permanent contract.
181. In this regard, Mr Jarvis received favourable, not unfavourable treatment and in any event, the motives of Ms Ward and Mr Sadler were not any of the matters noted above arising from Mr Jarvis' disability.

*The Respondent's ongoing failure to explore reasonable adjustments and find a suitable role for him.*

182. This is a complaint about failure to make reasonable adjustments. For the avoidance of doubt, the Respondent's motives and decisions made relating to investigations about reasonable adjustments and suitable alternative roles were not any of the matters noted above as arising from Mr Jarvis' disability.

*The Respondent's failure to make him aware of the existence of its policy on Job Carving and its failure to act in accordance with it.*

183. It is correct to say that the Respondent did not tell Mr Jarvis about the Job Carving Policy and did not consider applying it. It is no answer to suggest that Mr Jarvis ought to have been aware of it because it is on the Intranet. One cannot expect an employee to go looking for a policy which they do not know exists.

184. To not refer an employee to a relevant policy that might assist and to not apply that policy, is unfavourable treatment.

185. However, once again the issue is that the Respondent's decision makers and their failure to tell him about the policy or consider applying it, were not motivated by any of the matters referred to above as arising from Mr Jarvis' disability.

186. Mr Jarvis' complaints in this regard are more properly to be considered under the heading of his claim for failure to make reasonable adjustments.

*The attitude of his line manager towards him in their final meeting, leaving him with no option but to resign and treat himself as constructively dismissed (disability related dismissal).*

187. The attitude of Ms Ward at the meeting on 11 March 2022 was aggressive, belligerent, lacking in empathy and understanding.

188. We agree that given the history of this matter to that point and what Mr Jarvis encountered in that meeting, we can understand why he resigned. We have noted the comment Mr Jarvis is recorded to have said to Ms Keri-Ann Ellis on 7 February 2022, that he had decided he no longer wished to work with the DWP and wanted to look at an exit plan. However, he did not resign at that time. He continued to enter into correspondence with the Respondent via his solicitor, seeking more information about the possible job roles and agreed to attend a meeting, (via Teams) to discuss those roles. His reaction to that meeting, leading to

his resignation, as set out in his email of 23 March 2022, (page 522) is an understandable reaction to the manner in which the meeting had been conducted, as evidenced by the two sets of minutes.

189. The manner in which the meeting of 11 March 2022 was conducted was in breach of the term implied in every contract of employment, for the employer to conduct itself in a manner that will maintain mutual trust and confidence. It was conduct that was bound to undermine trust and confidence.
190. The question arises, what was Ms Ward's motive? What was the reason in Ms Ward's mind for saying and behaving as she did in that meeting?
191. Ms Redman said in her closing submissions that it was because of the consequences of Mr Jarvis' disability, in his challenges with the IT System, his inability to complete the probation, his inability to process information and inability to make decisions about what alternative roles he wanted without details. She says that Ms Ward was frustrated and fed up. The difficulty is that this was not put to Ms Ward. There are other potential explanations:
- 191.1. Ms Ward's inexperience as a manager and feeling intimidated, knowing that Mr Jarvis was backed up by a solicitor, who had been corresponding with her direct and a sense that Mr Jarvis was looking to build an Employment Tribunal claim.
- 191.2. She was not intellectually capable and / or insufficiently experienced to answer the questions being put to her by Mr Jarvis.
- 191.3. She may have felt intimidated by the presence of Ms Keri-Ann Ellis.

One wonders whether this is a meeting Ms Ward ought to have been asked or expected to attend at all, certainly without the assistance of experienced HR support in person. Perhaps it is a meeting that would have been better conducted by a more Senior Manager.

192. In general, if a party wishes to submit that a witnesses evidence should not be accepted on a particular point, the witness should be challenged on the point in cross examination. The seminal authority is Browne v Dunn [1893] 6 R 67 HL. The rule is not hard and fast and has become refined over the years. It was recently considered in the EAT by Kerr J in The Commissioner of Police of the Metropolis v A Denby UKEAT/0314/16 who summarised the authorities and referred to the modern practice of a case being clearly set out in advance in pleadings, written witness statements and lists of issues. He quoted the more modern authority on the point from Lords Neuberger and Mance in Chen v Ng (British Virgin Island) [2017] UKPC 27 as follows:

[54] ... It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the

question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.

[55] At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds.

193. The pleadings do not deal with causation in the mind of Ms Ward. The Particulars of Claim at paragraph 32 refer to the meeting being hostile and confrontational. Paragraph 34 states that the attitude of Ms Ward was the final straw. They do not assert that her attitude was because of exasperation linked to the manifestations of Mr Jarvis' disability. Under the heading for "Discrimination arising from disability" they bullet point list those manifestations at paragraph 36 and refer to Ms Ward's attitude in this meeting as unfavourable treatment at paragraph 37, but they do not purport to make the link, that the manifestations of his disability caused the attitude of Ms Ward in this meeting to be hostile and confrontational.
194. The list of issues does pose the question at 8 c) whether any of the alleged unfavourable treatment was because of the manifestations of Mr Jarvis' disability listed at paragraph 36. It does not explicitly identify that Mr Jarvis's case is that Ms Ward acted as she did on 11 March 2022 because she was, "frustrated and fed up", (Claimant's submissions paragraph 90) with the listed consequences of his disability.
195. In his witness statement, Mr Jarvis does not refer to the motive of Ms Ward, rightly in that it is not something that would be within his knowledge. He does refer to having the overwhelming impression that he was a nuisance, (paragraph 67).
196. In her witness statement, Ms Ward does not accept that she behaved as described by Mr Jarvis and so does not address the question of why she behaved as we find that she did. She simply denies that she was discriminatory toward Mr Jarvis in this meeting, (paragraph 63). There are clues as to her exasperation in preceding paragraphs:
  - 196.1. At paragraph 47, "the Claimant replied by email on 22 November 2021 without answering my question";
  - 196.2. At paragraph 52, "..the Claimant was not attending my meetings and in many cases, ignoring my attempts at contact";
  - 196.3. Referring to Ms Davenport's suggestion that there had been no meaningful contact, at paragraph 54, "I was angry at this statement

given all the time, effort, and persistence I had displayed in trying to contact the Claimant to discuss his return to work and his opportunities. He was simply not engaging with me.”

- 196.4. At paragraph 56, “The Claimant failed to apply for permanence”, and
- 196.5. At paragraph 59, “Despite the Claimant being informed on many occasions, he chose not to apply for permanency with the Respondent”.
197. These statements are accurate, but are illustrative in the way that they are worded, of Ms Ward’s exasperation.
198. That brings us to the cross examination:
- 198.1. Ms Ward was cross examined about her attitude during the meeting;
- 198.2. She did appear in cross examination to be and to have been exasperated by Mr Jarvis and his autism;
- 198.3. She deflected questions about passages in the Respondent’s minutes that illustrated her exasperation, such as: “will you be returning in June? I haven’t had that answer yet”, “What system did you think you would be using when you applied”, “there are only a certain reasonable adjustment, we have employed you at DWP are you able to perform those duties for which you applied for” and, “we are looking at all of this from a business perspective, there comes a point where we have to ask is it reasonable for the business”
- 198.4. She complained, “at this point he would not even confirm he would return to work”.
199. We have broken this analysis down carefully because it is important. In our judgment, it was obvious that Ms Ward was exasperated by the effects of Mr Jarvis’s autism as listed at paragraph 8 a) of the list of issues and that this was why she behaved toward Mr Jarvis as she did, in the meeting on 11 March 2022. It was not put to her in such direct terms. Had it been, she would doubtless have denied it, but for us, it was clear that it was.
200. Can this be justified? Was Ms Ward’s conduct of the meeting on 11 March 2022 a proportionate means of achieving a legitimate aim? The aims relied on by the Respondent in respect of the section 15 claim are set out at paragraph 9 of the list of issues. None of those have any bearing on the way Ms Ward conducted that final meeting.
201. The complaint of unfavourable treatment because of something arising from disability contrary to section 15 of the Equality Act 2010 therefore succeeds.

***Reasonable adjustments***

202. It was unhelpful that the reasonable adjustments contended for were not linked to the PCPs relied upon. It is of course, open to us to come up with our own adjustments, although we would have had to have given the Respondent an opportunity to respond to any we might have proposed. We will consider each of the PCPs in turn and look for which adjustments might be relevant.

*Requiring employees to complete a “one-size-fits-all” training in order to pass their probation and continue in their job role*

203. “One size fits all” is an unhelpful expression. However, we agree that although the Respondent took Mr Jarvis out of the Work Coach training programme and gave him other background training, ultimately, he was expected to return to the Work Coach training programme on Build and complete it, before he could complete his probation and begin in the role of Work Coach. There was such a PCP; everyone was expected to complete the training.
204. Did that put Mr Jarvis at a disadvantage? We find that it did, in terms of his having to undertake the training with others, he was expected to go at the unadjusted pace of the trainer and he had to use the Build system.
205. On examining the list of issues, no reasonable adjustment in this respect is in fact proposed. The nearest to it is, “exploring what adjustments could be made” which is about process, see below, it is not an adjustment in itself. Mr Jarvis himself expressly said in the probationary review meetings of 11 March and 19 May 2021, that he did not feel the role of Work Coach was going to be possible. The Tribunal was unable to conceive of any possible adjustments itself.
206. The failure to make reasonable adjustments claim in relation to this PCP does not succeed.

*Requiring employees to use all aspects of the IT System*

207. All Work Coaches were required to use the IT Build system. There was such a PCP.
208. Mr Jarvis was at a disadvantage, he could not use the Build system and that was because of his Autism.
209. No reasonable adjustments are proposed in the list of issues. “Exploring what adjustments could be made” is not in itself an adjustment, it is, as Mr Kirk says, a process. The outcome of that process, were an adjustment proposed, is what would have been relevant.

210. We have been unable to conceive of a reasonable adjustment to the Build system, or the need for Work Coaches to use it, ourselves. This aspect of the failure to make reasonable adjustments claim fails.

*Only considering the question of reasonable adjustments in the context of a substantive position*

211. The Respondent accepted, (submissions paragraph 24) that there was a PCP of only considering the question of reasonable adjustments in the context of a substantive position, in that it accepted that there was a practice of not considering alternative roles until probation had been passed.
212. Does that place disabled employees and in particular, Mr Jarvis, at a disadvantage? A disabled person is more likely to be placed at a disadvantage, to need to be considered for an alternative role, as did Mr Jarvis.
213. Because of the PCP, the Respondent did not apply its Job Carving policy, which would have resulted, in our view, on the balance of probabilities, in the Respondent carving out a role for Mr Jarvis that consisted of reviewing CVs, (there had been a tail off in referring CVs to him, but the referral rate for May suggests the demand was there if Work Coaches other than Mr Jowsey bought into the idea). CVs could have been sent from a wider geographical area. If reviewing CVs was 5% of the Work Coaches job as the Respondent's witnesses said, then if 10 Work Coaches were to send him their CVs' for review, that would be half a full time role. The Respondent could also have utilised his skills and experience in working with people with learning difficulties as highlighted in his CV. We simply do not believe that by applying its own Job Carving policy, such a large organisation would not have been able to put together a role that would have kept this autistic person in employment as is contemplated in the Respondent's own policies.
214. The Respondent ought to have known of the disadvantage: it knew of the symptoms, it seems to have mistakenly focused on a need for diagnosis and to pass the probation threshold.
215. We find that the Respondent has failed to make reasonable adjustments by failing to apply its Job Carving policy to Mr Jarvis whilst he was subject to probation.

*Only allowing work colleagues or union representatives to accompany employees to meetings;*

216. There was a PCP of only allowing work colleagues or trade union representatives to accompany employees to meetings
217. A disabled person is clearly more likely to need some form of specialist support. We do not accept that having available work colleagues with some knowledge of autism removes the disadvantage; they may be

empathetic and have some understanding, but they do not have specialist training and understanding of the problems Autistic people have. Furthermore, it is important that the Autistic person knows and trust their companion.

218. There is a simple reasonable adjustment to alleviate this disadvantage; allow a specialist companion from outside the organisation. We find it hard to conceive, why wouldn't an employer agree to that? We cannot think of any good reason not to.
219. We find that there was a failure to make a reasonable adjustment by not allowing, (before 11 March 2022) Mr Jarvis to be accompanied by a person of his choice. The Respondent knew of that disadvantage, Mr Jarvis explained it to them.

*Refusing to record meetings and/or provide a transcript of them;*

220. There was not a PCP of refusing to record meetings or provide transcripts. Mr Jarvis complains about a set of minutes that were delayed, which is not the same as their not being produced at all.
221. There was a PCP of refusing to record meetings at which a third party was present. That was not just a, "one off" because Ms Ward told us, it was policy. There was no PCP of not recording meetings otherwise.
222. In relation to the PCP of not recording meetings if a third party was present, (which is not the PCP relied upon) Mr Jarvis was not in fact disadvantaged, because minutes of the 11 March meeting were produced by the Respondent and by his companion, they did not differ greatly and he was able to review and consider afterwards everything that had been said.

*Communicating with employees via work emails even when off sick.*

223. There was a practice of communicating with an employee by emails using the work email system when they are off work sick.
224. As an Autistic person, Mr Jarvis was more particularly vulnerable to anxiety and stress. He was absent from work ill with stress. Any person absent from work with stress, disabled or not, will find it unhelpful to have to have to access their work email account in order to look out for important communications from their employer. By having to look at their in-box, they confront work related issues, even without opening the emails. It reminds them of what awaits them and what is accumulating in their absence. Communicating with employees absent with stress related illness is poor employee relations practice. As an autistic person absent through stress and because of his particular characteristics, Mr Jarvis is more particularly disadvantaged because of his vulnerability to stress and to an overload of information that he could not then focus on.

225. However, Mr Jarvis chose to communicate with the Respondent using his work email address and he said himself in his witness statement, (paragraph 54) that whilst off sick, he would choose to access his work emails when he felt well enough. There was no indication to the Respondent that he was unhappy to receive communications this way until his solicitor objected and thereafter, the Respondent wrote to him by letter or using his personal email address.
226. Whilst there was disadvantage, the Respondent could not reasonably have known of that disadvantage until 27 February 2022, (page 463) and thereafter, a reasonable adjustment was made. The claim in this respect does not succeed.

*Adjustments which are not adjustments*

227. Three of the proposed adjustments fall away from consideration, because they are, as Mr Kirk submits, about process. They do not propose adjustments, they suggest a process by which adjustments might have been identified. These were:

- *Obtaining specialist input on adjustments that could be made to the work coach role in light of the Claimant's ASD. The Respondent states that the Claimant was regularly referred to Occupational Health (OH) and rejected the Respondent's final attempt at a further referral to OH;*
- *Obtaining specialist input on other roles that might be appropriate for the Claimant in light of his ASD and the adjustments that might need to be put in place for him in those roles. The Respondent states that the Respondent implemented several adjustments for the Claimant and offered him the opportunity to apply for alternative roles;*
- *Exploring what adjustments could be made to the way that the Claimant interacted with the IT System. The Respondent states that adjustments were explored and implemented with the Claimant;*

228. The final proposed adjustment, that important information be communicated in a timely and accessible manner, only fits with the 6<sup>th</sup> and final PCP, communicating with employees via work email when they are off sick. That must fall away because we found that the Respondent could not reasonably have known of the disadvantage earlier and when it did, it made the adjustment contented for.

***Time***

229. The section 15 claim has succeeded in respect of the conduct of the 11 March 2022 meeting only. ACAS early conciliation commenced on 30 March, lasted to 10 May and proceedings were issued on 18 July 2022,



within the 3 month limitation period, the clock having stopped during ACAS conciliation. The claim in that respect is in time.

230. The aspects of the reasonable adjustment claims that succeed are in relation to failing to consider reasonable adjustments, specifically alternative roles, until after probation had been passed and by not allowing a specialist companion.
231. The decision to make the adjustment of considering alternative roles might reasonably have been taken shortly after the Occupational Health report of 3 March 2021, say by 3 June 2021. The three month time limit expired on 2 September 2021. The claim is 10 months out of time. Is it just and equitable to extend time? Mr Jarvis has the impairment of Autism. He did not have the benefit of legal advice until about February 2022. Proceedings were issued not long after. His complaint in this regard is well founded. The prejudice to him of not extending time is that he will not receive justice for discrimination that he has suffered. The prejudice to the Respondent is that it will have to provide redress for discrimination it inflicted on Mr Jarvis that it might otherwise have avoided by reason of the limitation period. The balance of prejudice favours extending time and we find that it is just and equitable to extend time.
232. The last occasion on which Mr Jarvis was told he would not be permitted a specialist companion was when Ms Ward wrote to him on 20 January 2022, three months from which, (on which time would expire) was 19 April. Early conciliation having commenced 30 March, the complaint in relation to that instance is in time. Each occasion that the Respondent refused Mr Jarvis' request for an appropriate companion are part of a continuing course of conduct and are therefore brought in time by the refusal on 20 January 2022.

### **Case Management Orders**

233. We trust the parties representatives will cooperate, in accordance with their obligations under the overriding objective, to ensure that they prepare for the remedy hearing. However, we direct that at the very least:
  - 233.1. By no later than the date 28 days from the date this Judgment is sent to the parties, the Claimant is to serve on the Respondent an updated Schedule of loss, supported by copies of documents in his possession relevant to the issue of remedy and a witness statement setting out the evidence he wishes to give to the tribunal on that issue.
  - 233.2. By no later than the date 21 days from receiving the above, the Respondent shall serve on the Claimant a counter-schedule, copies of any documents in its possession relevant to the issue of remedy and witness statements from any witness it may intend to call on that issue.

233.3. By no later than **28 June 2024** the Claimant shall prepare and provide to the Respondent a bundle of the documents both sides may wish to refer to at the remedy hearing and bring 4 copies of the same to the hearing.

233.4. The parties should each bring 4 copies of their witness statements to the remedy hearing.

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Employment Judge M Warren

Date: 26 March 2024

Sent to the parties on: ...2 April 2024.....

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For the Tribunal Office.

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>