Case Number: 3400885/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Main	**v**	**The Home Office**

Heard at: Cambridge

On: 16, 19, 20, 21, 22, 23, 26, 27, 28 and 29 June 2017
31 August 2017
23 and 24 October 2017 (no parties in attendance)

Before: Employment Judge Ord

Members: Mr T Chinnery and Mrs M Russell

Appearances

For the Claimant: In person
For the Respondent: Mr C Milsum, Counsel.

JUDGMENT

1. The claimant's complaint that he suffered detriment as a result of trade union activities are not well founded and are dismissed.

2. The claimant's complaint of a failure to make reasonable adjustments in 2012 is dismissed. It is out of time and it is not just and equitable to extend time.

3. The complaint of a failure to make reasonable adjustments in 2016 is upheld. The adjustments not provided until February 2017 should have been provided by, at the latest, the end of May 2016.

4. The remedy to which the claimant is entitled will be determined at a remedy hearing, on a date to be fixed.

REASONS

Background

1. The claimant remains in the employment of the respondent, where he has been continuously employed since 25 January 2010.

2. By a single claim form presented on 30 August 2016 the claimant brings complaints of detriment relating to trade union activities contrary to s.146 TULR(C)A 1992, and a failure to make reasonable adjustments contrary to s.20 and s.21 of the Equality Act 2010.

3. The claimant is dyslexic and it is admitted that he is (and has at all material times) been a disabled person for the purposes of the Equality Act 2010.

The claims and issues

4. The claims in this case were determined at, and agreed between the parties prior to, a case management hearing which took place on 27 January 2017. The claimant referred to the following as amounting to detriments which he said he had suffered as a result of his trade union activities:-

    4.1 Being issued with a security breach letter on 5 April 2015.

    4.2 Being downgraded after that security breach was identified.

    4.3 The grading awarded to him for the year 2014/2015 (finalised June 2015).

    4.4 Being subject to disciplinary proceedings and receiving a first disciplinary warning on 6 August 2015.

    4.5 Not being awarded an injury benefit (determined 13 January 2016).

    4.6 Being issued with an attendance warning on 10 March 2016.

    4.7 The decision to uphold that warning on 11 April 2016.

    4.8 His grading for the year 2015/2016 (finalised 25 April 2016).

    4.9 The decision not to proceed with the investigation and report into the claimant's grievance following the investigation report of Mr Clements.

    4.10 The terms of reference into the claimant's grievances.

    4.11 The terms of the grievance investigation report of 17 June 2016.

5. The issues to be determined in relation to those alleged detriments were:-

   5.1 Are the allegations set out above well founded on the facts?

   5.2 Do they amount to detriments?

   5.3 If the alleged incidents occurred and amount to detriments did those responsible for the acts or omissions have knowledge of the relevant trade union activities?

   5.4 Insofar as the acts occurred and amount to detriments did the conduct or events complained of which took place have the sole or main motivation or purpose of punishing the claimant for taking part in the activities of a trade union or deterring him from so doing?

6. The claimant relied upon a failure to provide equipment/an auxiliary aid in relation to his dyslexia, in the provision of voice recognition software "VRS").

7. In relation to that claim the issues for the tribunal to determine were as follows:-

   7.1 Did the claimant suffer a significant disadvantage by the non-provision of that auxiliary aid?

   7.2 Did the respondent take such steps as were reasonable to provide the auxiliary aid?

8. In relation to a significant number of the claimant's complaints the respondent raised the issue of jurisdiction as many of the events about which the claimant complains occurred more than three months before the provision by the claimant to ACAS of early conciliation information prior to the presentation of his claim (early conciliation information given on 13 July 2016, certificate dated 13 August 2016).

<u>The hearing</u>

9. All witnesses gave evidence by reference to prepared witness statements. The claimant gave evidence and on behalf of the respondent evidence was heard from Mr Guriderpal Jagpal (former line manager); Mr Daniel Smith (at the relevant time, Head of Detained Fast Track); Jamie Knapper (Senior Case Worker and team leader) ; Alan Yates (Decision Maker and Presenting Officer); Hannah Honeyman currently the Grade 6 Manager responsible for Assylum Intake, Quality and training), Sanderjit Growan (a grade 7 manager within the Respondent) and Stephen Murray (Senior Executive Officer)

10. Reference was made to an extensive bundle of documents and additional documents were produced during the course of the hearing as matters were raised by the parties. The tribunal gave both sides considerable leeway in this regard and allowed time for documents to be considered as necessary.

11. Closing submissions were made in writing and added to orally.

12. This judgment was reserved to allow the tribunal time for appropriate deliberations.

The Facts

13. Based on the evidence presented to the tribunal we have made the following findings of fact.

14. The claimant has been continuously employed by the respondent since 25 January 2015. After being initially employed as an Asylum Decision Maker and Presenting Officer, in June 2011 he was promoted to Executive Officer and then in February 2012 to Higher Executive Officer. He was interviewed under the Guaranteed Interview Scheme (GIS) which the respondent operates for persons with disabilities at each stage of that career progression.

15. Since 2013 the claimant has acted as a representative of the PCS Trade Union. He was known to undertake such work by members of the senior management team and confirmed in his own evidence that he would have constructive discussions about trade union activities with Mr Smith.

16. The claimant had produced to the respondent at the time of his application for employment a copy of the dyslexic report produced to in December 2004 for the University of Glamorgan where the claimant was a student.

17. Mr Jagpal became the claimant's line manager when he was promoted to higher executive officer in February 2012. The claimant was, Mr Jagpal knew, interviewed under the GIS and Mr Jagpal said that he had no reason to disbelieve the claimant when he said he had produced a copy of the dyslexia report to Mr Jagpal. Mr Jagpal did not say what measures he took to understand the claimant's disability and any workplace needs that arose from it. He referred to the claimant "vaguely asserting" that he had had adjustments at university.

18. Mr Jagpal's evidence was that it was left to the claimant to arrange a Work Station Assessment (WSA) for himself as he knew an appropriate person. Mr Jagpal was sure there was a WSA report but did not produce a copy. He accepted that it included reference to Voice recognition software ("VRS"). Mr Jagpal further said that whilst he accepted that the claimant had made a request for VRS he (Mr Jagpal) had been told by the respondent's IT service that such a system was not available internally, and only available externally at cost. No copy of any information about this from the respondent's IT service was produced and no details of such costs were provided.

19. The claimant said in evidence that he was told by Mr Jagpal that the reason VRS could not be provided was because of the open-plan office environment and that it was only when he saw Mr Jagpal's interview in

relation to the claimant's grievance (interview 26 May 2016) that he understood cost to be an issue. This however is slightly at odds with his witness statement (to which he had been sworn) wherein he said that he was not told why it had been refused.

20. The tribunal found Mr Jagpal's evidence in relation to these events however, to be conveniently vague. He referred to advice from IT which he could not produce and had not, apparently, sought to recover (although he did have access to other contemporaneous emails). He referred in his interview on 26 May to reviewing the position in informal discussions he did not follow the relevant policy (the Workplace (Reasonable) Adjustments Procedure) which required regular, minuted meetings to review adjustments because (he told us), in his view, no adjustments were required.

21. Mr Jagpal's position was that he had not refused to provide VRS but that the claimant was to "see how he got on" and raise the issue again. There was no evidence of any informal meetings as Mr Jagpal claimed had taken place, and which the claimant said had not.

22. Both Mr Jagpal and the claimant gave contradictory evidence in relation to this matter, and the confusion in evidence was increased by the fact the Mr Jagpal, having on his evidence determined that the provision of VRS should be reviewed against the claimant's performance gave evidence that although the claimant felt he was performing well, Mr Jagpal considered he was performing at below 75%. Why in those circumstances, Mr Jagpal did not re-visit the provision of computer software he could not say.

23. On the basis of the evidence we have heard, we have made the following findings of fact:-

    23.1 Mr Jagpal was aware that the claimant had dyslexia, had a copy of the dyslexia report and knew the claimant was interviewed under GIS which is limited to individuals with a disability.

    23.2 Mr Jagpal was aware that VRS was recommended within the report following a work station assessment (which the claimant was required to arrange for himself) along with other "coping mechanisms".

    23.3 On enquiry of the IT team, Mr Jagpal was told that VRS was not available internally, only by external provision and at cost.

    23.4 Mr Jagpal told the claimant it was not available and that they would have to "see how it went" using mechanisms such as extra time to read documents.

    23.5 Thereafter the claimant did not raise the issue again because he believed VRS was not available. Mr Jagpal did not review the position at any stage. No regard was taken of the adjustments policy.

24. Mr Jagpal gave some (late disclosed) evidence regarding the claimant's performance and raising criticisms of him during the time Mr Jagpal was his manager. None of those matters had been raised with the claimant previously. They did not assist us in dealing with the matters before us at all. Indeed, insofar as they were criticisms of the claimant's performance at work, they merely served to reinforce the concerns expressed at paragraph 22 above.

25. In April 2012 the claimant became a representative for the PCU.

26. In December 2014 the claimant's line manager changed from Mr Jagpal to Ms D'Rozario.

27. In January 2015 the claimant, as PCU representative, assisted two colleagues who were subject to disciplinary investigations ("C" and "J"). The claimant does not rely on his general trade union activities as being the motivation for what he says were detriments, but rather on the assistance given to these two individuals. The claimant said that he had represented over 30 PCU members in internal processes and meetings/hearings but he does not say he was subjected to any detrimental treatment as a result. Rather he attributes the matters about which he raises complaint to the assistance given to C and J.

28. Both C and J were under investigation for allegedly failing to comply with a "zero tolerance" approach to insensitive questioning towards asylum seekers who were relying upon their sexual orientation as a reason for remaining in the UK.

29. The commissioning manager for each investigation was Mr Smith. In relation to J he received a short report with a note of a disciplinary investigation interview attached. In relation to C he received an investigation report only. In both cases these were produced to Mr Smith on 2/3 March and in each case the report stated that no disciplinary action should follow but that additional training should be given in this area.

30. Mr Smith's unchallenged evidence was that he had already felt that training in this area was not adequate.

31. The claimant's involvement in these matters was not substantial. In relation to J he had attended with her for her investigation interview. During that interview he raised no words of challenge and indeed spoke only 12 recorded words which were simply to clarify a matter. In relation to C he is not mentioned in the report at all.

32. Meanwhile, and before these reports were provided to Mr Smith, the claimant committed what the respondent says was a security breach. The circumstances were as follows:-

    32.1 On 21 January 2015 the claimant was preparing for the hearing of an application for asylum which was being brought by an individual

who had previously applied for a visa. At the time the applicant had made his visa application his sponsors were the parents of his former girlfriend, but he now made an asylum application on the basis of his sexual orientation.

32.2 The respondent operates a number of "golden rules" which include that an officer must never release sensitive information by telephone, email or otherwise unless the officer is satisfied first that they are clear who is receiving that information and second that they are entitled to receive it. Any uncertainties are to be referred to a line manager.

32.3 The claimant contacted one of the former sponsors (the ex-girlfriend's mother) asking her to give evidence in relation to the asylum application. The applicant had previously stolen from her daughter.

32.4 The claimant's evidence was that he did this as, in his opinion, an explanation from the sponsor as to why the sponsorship was being with drawn would make the application easier to resist.

32.5 The result of this, however, was that the sponsor became aware of the applicant's asylum application, contacted her daughter who then contacted local police in Tanzania and there was a subsequent extradition request in relation to the applicant, through Interpol, in relation to the alleged theft.

32.6 Ms D'Rozario became aware of the issue and wrote to Mr Smith (her line manager) identifying the issue in detail. The concerns were that the safety of the applicant had been compromised such that if he returned to Tanzania he would be of interest to the authorities there and that because circumstances had changed the case amounted to a fresh asylum application. She had spoken to the claimant who she described as being distraught. At his request she had explained to him the worst case scenario (ie possible disciplinary action and possible dismissal) but had confirmed that she did not consider that the position was such that he ought to be suspended during any investigation.

33. Mr Smith received this email on 5 February 2015. He was concerned about what he considered to be a serious breach, agreed that the claimant need not be suspended, but that he was "on the fence" as to whether the claimant should continue in a decision manager role. On the same day Anthony Simm (Head of Asylum) advised that the claimant should be removed from decision manager duties "until we know how we will proceed".

34. The claimant was therefore removed from duties which included the handling of sensitive information such as interviewing and court duties. These are but part of his role and he was given additional duties which

were within his contract of employment and role description during this period.

35. In error Ms D'Rozario issued a disciplinary investigation notification form to the claimant. What she should have done was refer the matter to Corporate Security (CSR), which she later did on about 11 February.

36. CSR confirmed their view that this was a security breach (although at no stage was the claimant spoken to by them). There was no "entitlement" for the recipient of the information to be in receipt of it. Mr Smith expressed concern at this time that the claimant faced a "double punishment" through both a disciplinary process and action by CSR.

37. The claimant was absent from work through sickness from 10 February to 13 March 2015.

38. On 17 February CRS concluded that the claimant should be issued with a security breach letter. No disciplinary action was taken against the claimant.

39. The claimant had a return to work interview on 19 March 2015. Ms D'Rozario sought to discount the claimant's absence as the claimant had reached a trigger point for the absence management process. She wrote to Mr Smith for manager's discretion saying it would be inappropriate for the matter to be discussed at a senior management team meeting due to the claimant's "high profile in the office as a TU Rep", referred to the absence being "for stress and arguably work related" and accepted that the security breach matter "could in hindsight have been better managed" with reference made to a delay in referring the matter to CSR and the incorrect issue of a disciplinary investigation letter. She also suggested that the claimant would have been able to cope better with the situation had he not been removed from some of his normal duties.

40. Mr Smith replied within 10 minutes agreeing that discretion should be given in the "unusual circumstances".

41. The claimant was not issued with the security breach letter until 22 April, but he had undertaking e-learning in the interim. He sought to appeal the decision to issue a security breach letter directly to CSR which approach was rejected, CSR stating that there had been an unauthorised disclosure of information.

42. On 20 April the claimant had met Ms D'Rozario to discuss his performance review. All staff must submit a 400 word analysis of their work for the year under review. The claimant's view was that he should be assessed as a "top performer" and Ms D'Rozario felt that his summary did not reflect this so asked the claimant to provide additional material for her to reconsider the position. The claimant later sent her 30 emails by way of additional evidence on 24 April.

43. On 28 April an altercation took place between the claimant and Ms D'Rozario. The claimant said to Ms D'Rozario that he was "sick of being bullied" meaning by her. He did this in a raised voice in an open plan area. Ms D'Rozario brought this to the attention of Mr Smith.

44. As a result Mr Smith advised the claimant that he had asked Ms Lambert to consider whether a disciplinary investigation should be commissioned. The claimant replied setting out his version of the events and Mr Smith replied, advising him of his right to raise a grievance against Ms D'Rozario. He drew the email to Ms Lambert's attention.

45. The claimant did not raise a grievance.

46. Ms D'Rozario concluded that it would be in everyone's better interests if she ceased having direct line management responsibility for the claimant. Accordingly Jamie Knapper became the claimant's immediate line manager from 28 April. The claimant's PDR required completion and Ms D'Rozario provided information about this to Mr Knapper.

47. The claimant was absent from work from 29 April to 1 May 2015 and again from 6 May to 3 June with depression.

48. Mr Knapper took steps to complete the PDR for the claimant and drafted a form of words to replace the words the claimant had drafted for Ms D'Rozario. The claimant was sent these for review and effectively accepted them by raising no objection to or comment on them against a very tight deadline.

49. The claimant objected to Ms Lambert's involvement in the disciplinary process due to what he considered her "association" with Ms D'Rozario. Although she refuted any suggestion that it was inappropriate for her to be involved in the process she was not involved further, the matter being handled thereafter by Mr Brady (who was then superceded by Mr Crook due to illness). The investigation was conducted by Mr Phillips.

50. No criticism can be made nor was it made of the thorough nature of the investigation into the alleged misconduct. The claimant said he could not see that he had done anything wrong. Mr Phillips concluded that there was a case to answer.

51. A disciplinary hearing took place after which Mr Crook submitted a lengthy (7 page) letter dated 6 August 2015 setting out his findings. He concluded that the claimant was guilty of serious misconduct but having regard to all the circumstances of the case issued the claimant with a first written warning which was to remain on his file for 12 months.

52. The claimant appealed this decision. An appeal was conducted by Mr Matthew Smith. The appeal was rejected on 15 September 2015.

53. At no time during that process did the claimant allege that any action which was being taken against him was attributable in any way to his position as a trade union representative, whether generally or specifically by reference to the cases of C and/or J.

54. The claimant remained absent through sickness during the period for his PDR submission, but was able to engage in email correspondence throughout the period. Mr Knapper sought to deal with the problem in the following way:-

    54.1 He sent an email to the claimant on 7 May asking the claimant to consider redrafting the 400 word submission. He reminded the claimant that the PDR panel was meeting on Monday (11 May).

    54.2 Mr Knapper said that in default he would do his best to refine the submission the following day, but his scope for doing so would be limited due to his other work commitments.

    54.3 Although the claimant was able to engage with other matters on 7 May (he submitted a lengthy email by way of appeal against the issue of the security breach letter) he did not respond to Mr Knapper who then prepared a summary for submission to the panel on the claimant's behalf. This was sent to the claimant. It includes a positive reference to the claimant undertaking union duties.

55. Against that background the PDR panel met on 11 May. Mr Smith was the chair and there were nine other panel members. The panel placed the claimant in the bottom 10%.

56. Mr Knapper contacted the claimant to give feedback on a face to face basis but the claimant asked for this to be put in writing. On 27 June Mr Knapper set out the panel's findings and the reasons for the rating in an email to the claimant. The claimant challenged that appraisal, Mr Knapper confirmed that the comments he had set out in writing were those of the panel as a whole and that the claimant could add his own comments to the PDR and stated his hope that once the claimant was back at work they could look at ways to improve the perceptions which the panel had formed of the claimant.

57. A report was commissioned from Health Management Ltd, the respondent's occupational health providers given the claimant's continued ill health absence. That report dated 5 June 2015 and marked as being amended on 25 June (although the extent of or reason for amendment was not made clear) had been approved by the claimant to be sent to the respondent.

58. The report confirmed that the claimant had complained of difficulties in the workplace relating to investigations into his conduct, which he felt were unfair and comment by his manager which he found degrading. It was

said that his symptoms would persist for 2 to 3 months, or longer if those issues were not resolved; absent those issues he would provide reliable service and make a full recovery. He was deemed fit (subject to adjustments as set out in the report) to attend a disciplinary hearing (that was the hearing which took place on 27 July, before Mr Crook).

59. A follow up occupational health report was obtained on 23 August 2015. This confirmed that the claimant was receiving appropriate treatment and that he was likely to remain absent for a further 2 to 3 months.

60. On 28 August Mr Knapper submitted an injury benefit claim on the claimant's behalf.

61. The claimant returned to work on 30 September 2015. It had been agreed, at his request, that the claimant could relocate from Harmondsworth to Yarlswood, with no alteration to his work. He has since that date been under the line management of Mr Yates. There have been no issues regarding that arrangement so far as we have been made aware and the Respondent agreed to allow the claimant to retain his London weighting/allowance notwithstanding that Yarlswood is located outside the relevant geographical boundary.

62. There remained, however, the following matters which have been before us, all of which stem from the period before the claimant's transfer to Yarlswood:-

    62.1 The injury benefit application.

    62.2 The grievance raised by the claimant (including a further reference to a failure to make reasonable adjustments).

    62.3 The claimant's warning under the attendance policy.

    62.4 The claimant's PDR for 2015/2016.

    We address those in turn.

63. The claimant's application for injury benefit was sent to Capita by Mr Knapper. The Civil Service pay scheme gives an award of pay where an employee loses pay due to an accident which occurs "in the course of official duty" but not if the accident "…happens while you are at work but not carrying out your duties…[or]..if your injury…is a result of your own negligence or misconduct".

64. We were told in unchallenged evidence that this process is infrequently used and that Mr Knapper could not find anyone within the HR team who could assist from experience of the process.

65. On 30 December 2015 a medical report was produced for the purpose of the application. The examining physician, Mr Evans, confirmed the claimant's view that his illness was as a result of treatment he had

received at work. Mr Evans stated that the claimant's impaired mental health was the sole cause of his absence, but that the respondent had to consider whether that illness arose mainly as a result of the claimant's own misconduct. This was said not to be a matter for Mr Evans but for the respondent alone.

66. Thus it was left to Mr Smith to determine the application as the relevant manager. He refused the application and met the claimant to advise him of this on 14 January 2016. He advised that in his view the absence was caused by the claimant's reaction to facing appropriate management action in the light of a security breach and an act of serious misconduct in respect of which the claimant did not accept personal responsibility.

67. The claimant presented a grievance on 4 November 2015. It did not identify any then recent events, the most contemporaneous being in July 2015. It stressed in particular the security breach incident and the events leading to the taking of disciplinary action against him and that action itself. The claimant said that he was bullied on the ground, inter alia, of disability. Under the respondent's grievance policy a grievance should be presented within 3 months of the incident(s) complained of so prima facie the grievance was out of time but the respondent dealt with it notwithstanding that.

68. The claimant sent his grievance to Mr Knapper, who passed it to Mr Smith as he perceived it to be, in part, against him. Mr Smith then invited Mr Clements to "take this forward/on/investigate". Mr Smith accepted this was ambiguous and open-ended.

69. Confusion in this area was compounded by the respondent's grievance procedure (the same comments are true of the disciplinary procedure). Under the policy there are two roles, that of decision manager and investigation manager. The former instructs the latter to investigate the grievance. The terms of reference are to be agreed between them. The investigating manager is to report to the decision manager and the decision manager then determines the grievance based on the report.

70. A third role, that of commissioning manager, has featured in practice. No such role is envisaged in the policy. In practice what has happened (in all cases, we were told, not just in matters relating to the claimant) is that it is the commissioning manager who instructs the investigating manager and agrees the terms of reference with the investigating manager, before taking no further part in the process. In this instance Mr Smith was acting, we find, as commissioning manager. The terms of reference were not agreed with Mr Clements by him.

71. Mr Clements assumed (understandably) therefore that his role was to be that of investigating officer and that he was required to draw up terms of reference himself on the basis of the grievance.

72. Mr Clements produced his report on 12 February 2016. He rejected the allegations of bullying and harassment finding "no basis" for those allegations. He also rejected any criticism of the disciplinary process.

73. Mr Clements was, however, critical of Ms D'Rozario's handling of the security breach issue. He had not interviewed her as part of the process but had obtained written answers from her to a series of questions. Under the grievance policy it is said that the investigating manager "…will need to interview both the employee raising the grievance and the subject of the grievance…".

74. A copy of Mr Clement's report was sent to Mr Smith on 12 February. Although he said in evidence that he did not review the content of the report until 22 February he had looked at it sufficiently closely to correct the spelling of Ms D'Rozario's name on 15 February. Both the claimant and Ms D'Rozario were sent copies of the report in accordance with the procedure. Mr Knapper then invited the claimant to a meeting to discuss the outcome but that was overtaken by events.

75. At this stage, Ms D'Rozario raised complaint about the outcome of the grievance and the criticisms of her. Her line manager was Ms Growan and the matter was passed up to Mr Smith who wrote to Mr Clements. Mr Smith complained that Mr Clements had not interviewed Ms D'Rozario, had not differentiated (in his view) between the security breach and disciplinary issues and described Ms D'Rozario as feeling "aggrieved, frustrated and quite vulnerable".

76. Mr Clements was asked to interview Ms D'Rozario but declined as he considered it unnecessary.

77. On 25 February Mr Knapper wrote to the claimant to cancel the feedback meeting arranged for that day. He set out the reasons for this as being that the grievance had been against the SMT generally, and that he was part of that team and that the report is silent on some of the matters the claimant had raised. He did not mention any part of the issue raised by Ms D'Rozario, nor those addressed to Mr Clements by Mr Smith. He referred to a new decision manager being appointed.

78. The claimant said that he agreed that the Clements report did not cover every aspect of his grievance and agreed with what Mr Knapper proposed, asking to meet Mr Knapper to discuss what the terms of reference should be.

79. Ms D'Rozario then lodged a grievance of her own on 15 March 2016 and began a period of sick leave. She also objected to the indication that the claimant's grievance was to be investigated from scratch again, complaining of unfavourable treatment towards her and the "pressure of uncertainty" she had been under since the grievance was raised.

80. Ms Growan then undertook the role of commissioning manager. She drafted terms of reference to which the claimant agreed. In his evidence before us the claimant said that his agreement was sarcastic, but there is nothing in the contemporaneous documents to support this and Ms Growan did not receive his agreement as sarcastic. She was entitled to treat the agreement as genuine and the claimant did not at any stage seek to resile from it.

81. Accordingly Mr Murray was instructed to investigate the claimant's grievance under new, agreed, terms of reference. He undertook a thorough investigation, interviewing the claimant (twice), and Messrs, Knapper, Smith and Jagpal. He also gathered information from Mr Forrest and asked him supplementary questions thereafter. Somewhat ironically, given at least one of the bases upon which Mr Clements' report was criticised by Ms Growan and Mr Smith, Ms D'Rozario refused to be interviewed by Mr Murray.

82. Mr Murray's investigation report ran to 12 pages. It was submitted to Mr Hillier who was the decision manager. Mr Hillier held a grievance hearing after which he produced a grievance outcome report which followed Mr Murray's findings but also set out his additional conclusions.

83. The findings can be summarised thus:-

    83.1 A number of decisions made by management could have been improved upon, but there was no evidence of bullying and no malice.

    83.2 Ms D'Rozario made errors, but also had taken supportive action towards the claimant in particular at the time of the security breach.

    83.3 The claimant had not fully engaged with the PDR process.

    83.4 The PDR outcome was not inappropriate given the claimant's work, the panel's knowledge of it and the half year outcome which was before the panel.

84. The claimant appealed these findings. The appeal was conducted by Ms Honeyman and the appeal was rejected. The claimant does not complain about or criticize Ms Honeyman's approach or the process followed by her. The basis of his complaint, as set out in his witness statement, is in relation to the conduct of Mr Smith and Ms Growan in rejecting the Mr Clements' report setting new terms of reference was designed to "fix" the outcome that in particular Mr Smith and Ms Growan wanted which was motivated by the claimant's trade union activities and which was controlled by Mr Smith and Ms Growan agreeing with or being encouraged to follow his lead.

85. Mr Clements' report, did however, include one significant finding which was, in the general dispute around his terms of reference and methodology, overlooked by the Respondent.

86. Mr Clements stated (item 4 of his findings, set to Mr Smith and others on 22 February 2016) that there was "need for an urgent referral to a dyslexia specialist in regards to [the claimant's] protected characteristic.

87. This was not undertaken as a matter of urgency, however. Mr Smith said he understood this would be dealt with by Mr Knapper. Neither of them ensured the referral took place. Both had seen the Clements report.

88. In March 2016 the Claimant sent an email to Mr Knapper and Mr Yates pursuing the referral but no action was taken.

89. In May 2016 when discussion took place regarding the structure of the claimant's work, a referral was made but an ineffective one to occupational health (clearly not a "dyslexia specialist" as referred to by Mr Clements).

90. When occupational health advised they could not assist a referral was made to Access to work, again in no way a "dyslexia specialist" and according to the claimant's unchallenged evidence, not an organisation which works with the relevant unit of the respondent. A proper referral was not made until December 2016 when a referral was made to Dyslexia action. They made recommendations for specific equipment to be provided for the claimant and this was put in place in February 2017.

91. In relation to the first warning for attendance on 10 March 2016 this followed a meeting held on 25 February 2016 to consider the claimant's absence between 7 May and 30 September 2015. The claimant had triggered the attendance management policy because he had been absent for more than 6 days.

92. The claimant said that he should not have an attendance warning for this absence because under the policy he was absent for an exempted reason, namely a qualifying injury at work. This was rejected by Mr Knapper because, although the Capita report used for the purpose of the injury benefit application attributed the claimant's illness to an injury at work no benefit was payable and under the absence management policy "if injury benefit is awarded, the initial and up to six months' absence will be exempted as a qualified injury at work".

93. Mr Knapper concluded that this meant that if no injury benefit was payable the exemption would not apply.

94. For essentially the same reason Mr Knapper did not consider it appropriate to exercise his discretion to effectively waive the breach of the absence policy.

95. Turning to the claimant's PDR for 2015/16, this was completed by Mr Yates and the claimant, after his move to Yarlswood. It resulted in a "moderate" rating. Mr Smith counter-signed the PDR with a positive endorsement of the claimant being back at work.

96. It is against that factual background that the claimant brings his claims.

The law

97. Under s.146 of the Trade Union Labour Relations (Consolidation) Act 1992:-

> 1 A worker has the right not to be subjected to any detriment as an individual by any act or any deliberate failure to act by his employer if the act or failure takes place for the sole or main purpose of:-
>
> (a) preventing or deterring him from being or seeking to become a member of an independent trade union or penalising him for doing so
>
> (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time or penalising him for doing so

98. In Department of Transport v Gallagher [1994] ICR 967 it was emphasised that the important feature was the purpose of any act or failure to act and not the effect of the action or inaction.

99. Under s.148(1) of the same back business for the employer to show what was the sole or main purpose for which he acted or failed to act.

100. In Yewdall v Secretary of State for Work and Pensions EAT 0071/05 the effect of that statutory clause was clarified by the employment appeal tribunal which set out for questions for the employment tribunal to consider in relation to a complaint under s.146 as follows:-

> (1) Has there been actual deliberate failures to act on the part of the employer?
>
> (2) Have those acts or omissions caused a detriment to the claimant?
>
> (3) Is the complaint in relation to those acts or omissions in time?
>
> (4) Has the claimant established a prima facie case that the acts or omissions occurred for a purpose proscribed by s146?
>
> (5) If so, has the employer shown that the sole or main purpose for which he acted or failed to act was not for that purpose?

101. The requirement on the claimant to establish a prima facie case was said to provide the same mechanism as in discrimination legislation where the onus of proof only passes to the employer after the establishment of a prima facie case. That logic has been impacted upon by the decision of the employment appeal tribunal in Efobi v Royal Mail Group Ltd EAT 23/16 where it was held that there is no burden on a claimant to prove facts from which the tribunal could decide that the respondent had discriminated (the relevant test under s.136(2) of the Equality Act 2010), but rather that the section requires the tribunal to consider all the evidence, from all sources, at the end of the hearing so as to decide whether or not there are such facts. The EAT said that it was misleading to refer to a shifting burden of proof is that implied, contrary to the language of the section, the claimant was required to prove something.

102. Insofar as it is necessary to do so, we adopt that approach in this case. The establishment of a prima facie case in the fourth of the five considerations in Yewdall is to be drawn from the consideration of all facts, from all sources, presented to the tribunal. If on consideration of those facts a prima facie case has been established it is for the respondent to show that the sole or main purpose for the action or inaction was not a proscribed reason under s.146.

103. Further clarification of the test to be applied was given by the Court of Appeal in Serco Ltd v Dahou [2017] IRLR 81 where it was emphasised that it did not necessarily follow that a respondent's failure to show his reasons for action or inaction meant that the employees case was right. This confirmed the decision of the employment appeal tribunal in Ibekwe v Sussex Partenership NHS Foundation Trust EAT 72 that even where a tribunal can make no positive finding as to the reason why a certain respondent subjected a claimant to a detriment it does not follow that the claim succeeds by default.

104. In Dahou the Court of Appeal further confirmed the need to identify an individual decision maker. The decision-maker is not the corporate entity which employed the claimant. Thus the person who chose to act or not act so as to give rise to a complaint must themselves be motivated by the prohibited characteristic (in this case the trade union activity).

105. A prima facie case is not established by the mere presence of union activity alongside detrimental treatment, per Madarassy v Nomura plc [2007] IRLR 246 and Igen v Wong [2005] IRLR 258.

106. Under s.147 of the Act an employment tribunal shall not consider a complaint under s.146 unless it is presented before the end of the period of three months beginning with the date of the act or failure to which the complaint relates, aware that act or failure is part of a series of similar acts or failures (or both) the last of them, unless the tribunal is satisfied that it was not reasonably practicable for the complaints to be presented before the end of that period and it is presented within such further period as it considers reasonable.

107. Under s.4 of the Equality Act 2010 disability is a protected characteristic.

108. S.20 of the Act imposes a duty to make reasonable adjustments in circumstances where (per subsection (5)) a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. It requires an employer to take such steps as it is reasonable to have to take to provide the auxiliary aid.

109. Under s.21 a failure to comply with a requirement of s.20 is a failure to comply with a duty to make reasonable adjustments and a person discriminates against a disabled person if they fail to comply with that duty in relation to that person.

110. S.123 of that act states that a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates within such other period as the tribunal thinks just and equitable.

111. In Kingston Upon Hull City Council v Matuszowicz [2009] ICR 170 the Court of Appeal established that in relation to a failure to act (including therefore a failure to make reasonable adjustments) there was no concept of a continuing omission. If there is a refusal to provide a reasonable adjustment then time runs from the refusal. If there is no specific refusal but a continuing failure to act then time runs from the date when it would have been reasonable for the employer to act.

112. Under s.136 of the same act proceedings relating to a contravention of the act if there are facts which a court or tribunal could decide in the absence of any other explanation that a person has contravened the provision concerned then it must be held at the contravention has occurred unless (in this case the respondent) shows that it did not contravene the provision. That "burden of proof" section must be read in the light of the decision in Efobi referred to above.

Conclusions

113. Applying the acts found to the relevant law we have reached the following conclusions, unanimously.

114. The essential complaints of detriment for trade union activities stem from the issue of the security breach warning letter on 5 April 2016.

115. The claimant’s case is that this arose because he had represented two individuals (C and J) who were under investigation for the nature of questions they had posed to asylum seekers concerning their sexuality (their applications being founded on their orientation).

116. In each case the claimant was the appropriate trade union representative, but neither case progressed. In the case of C a report (which does not mention the claimant at all) was produced recommending no further action, and for J a similar report was accompanied by a record of an investigation interview in which the claimant was mentioned as a representative in attendance but where his recorded participation is minimal and non-challenging.

117. In both cases the investigations determined that disciplinary sanctions would be inappropriate and that training was required.

118. Both C and J – like the claimant – worked in a team headed by Mr Smith. It was he who saw the reports.

119. The claimant says that it was because of this specific trade union activity that he was subjected to detriment at the hands of Mr Smith (and others doing his bidding). The claimant's case was that these two outcomes were embarrassing for Mr Smith and he, in effect, sought revenge against the claimant.

120. The security breach letter was issued, however, in circumstances which we find were wholly unconnected with that trade union activity.

121. The circumstances of the security breach, when the claimant communicated with a former sponsor (who in turn communicated with her daughter) regarding an asylum seeker, in circumstances which led to his being of interest to the authorities in Tanzania including their making an extradition request, were not in dispute. The question was whether, in accordance with the relevant rules and policies, the former sponsor was "entitled" to receive that information.

122. Both the claimant's line management team, including Mr Smith and the respondent's corporate security team considered that it was a breach, in particular that the former sponsor had no "entitlement" to the information.

123. The claimant was, we are sure, acting in what he perceived as the best interests of the respondent when he made his disclosure. The applicant was now seeking asylum on the basis (inter alia) of his sexual orientation, but his previously application had been sponsored by the mother of his then girlfriend. He had also stolen from the former girlfriend. The claimant was sure that information from the former sponsor would assist the respondent in their resistance of the application at a forthcoming hearing where the claimant would be the presenting officer.

124. The question for us, however, is whether the claimant was issued with the security breach letter because of the trade union activities referred to. We have unanimously concluded that he was not. We say that because first the reason for the warning was clear; in the view of the corporate security team there had been a breach. Secondly, however, the breach took place on 21 January 2015. Mr Smith became aware of the issue on 5 February

following communication from the claimant's immediate manager Ms D'Rozario. Mr Smith's initial view was that the claimant should not be suspended (one of the issues Ms D'Rozario raised, she too being in favour of non-suspension) but was uncertain as to whether or not the claimant should be removed from decision making/presenting duties during an investigation. It was the Head of Asylum Mr Simm who then said that the claimant should be removed from those duties until the position became clearer.

125. The claimant was, therefore given other tasks, consistent with his post, until the matter was concluded.

126. Ms D'Rozario – in error – issued a form to the claimant notifying him of a disciplinary investigation. In fact the appropriate step was to refer the matter to corporate security which she later did. Mr Smith expressed concern that the claimant was facing "double punishment". The claimant was absent from work from 10 February to 13 March; a decision was taken by corporate security to issue a security breach letter on 17 February and no disciplinary action was taken against the claimant.

127. The reports into C and J were presented to Mr Smith on 2 and 3 March.

128. Accordingly the issue of the security breach letter was at the hands of corporate security and was issued because, and only because, the claimant disclosed information to the former sponsor of an asylum applicant. The process had been completed (save for the actual issue of the letter) before Mr Smith was aware of the outcome of the investigations into C and J and even the most scrupulous reading of those reports could not identify and significant action taken by the claimant which could be deemed to be causative of the decisions not to take disciplinary action against C and/or J.

129. Indeed, Mr Smith's actions in raising concern about "double punishment" are indicative of support for the claimant and not any desire to act detrimentally towards him.

130. Equally, the clamant was not "downgraded" at that time. His terms and conditions of employment remained fully in force, the additional tasks he was given were consistent with his grade and seniority and he was merely taken off decision manager duties pending the outcome of the investigation at the instruction of Mr Simm.

131. The PDR process for 2014/5 was, it would be appropriate to say, fraught with problems. The claimant submitted his 400 words to his manager (Ms D'Rozario) stating his view that he was a "top performer". She disagreed and asked for evidence in support which duly arrived in the form of 30+ emails. Following an altercation four days later between the claimant and Ms D'Rozario in an open plan office Ms D'Rozario stated to Mr Smith that it would be better if she did not directly manage the claimant so that role was passed to Mr Knapper.

132. The sequence of events is then as follows:-

132.1 The claimant was told that the altercation would be investigated as a possible disciplinary matter and he could raise a grievance against Ms D'Rozario if he felt, as he had said, that he had been bullied by her.

132.2 The claimant was absent from work with depression.

132.3 Mr Knapper became the claimant's line manger.

132.4 Mr Knapper took steps to complete the claimant's PDR. Ultimately, he had to submit words which he had drafted himself as the claimant had not been able or willing to agree appropriate wording with him.

132.5 The PDR panel met and placed the claimant in the bottom 10%.

132.6 Mr Knapper sought a face to face meeting to discuss this with the claimant who required written feedback instead. He challenged the feedback, which Mr Knapper confirmed was the opinion of the PDR panel (not any individual) and suggested that once the claimant was back at work they should work together to overcome the impressions which had been formed in the minds of the PDR panel.

133. We note that throughout this process the claimant did not at any stage raise the suggestion that he was being subjected to any form of mis-treatment because of the trade union activities on which he now seeks to rely.

134. We are satisfied that he PDR process was as complete as it could be in the difficult circumstances which Mr Knapper was facing. He was new to line management of the claimant; the claimant, whilst engaging in lengthy emails regarding other matters during his absence, did not comment when invited to on the draft submission prepared by Mr Knapper and Mr Knapper was therefore entitled to take it as agreed.

135. We are also satisfied that the outcome was not motivated or tainted by any trade union activities the claimant had carried out. The claimant raised no such allegation contemporaneously and we have found no evidence whatsoever to link Mr Knapper's action, nor those of the PDR panel to the specific activities relied up on by the claimant.

136. The claimant faced disciplinary action because of the altercation between himself and Ms D'Rozario on28 April 2018. He had, he accepted, stated he was "sick of being bullied" in terms which could be overheard by others, to Ms D'Rozario. The terms of his comment were such that he would be understood to be complaining of bullying at her hand.

137. It was because Ms D'Rozario brought a complaint about that conduct of the claimant that a disciplinary process was set in motion, and we cannot find any evidence which could link the decision to launch a disciplinary investigation into the matter with the claimant's trade union activities. We find that that decision was a natural consequence of, and only prompted or motivated by, the events of 28 April 2018 and were wholly unconnected with the claimant's trade union activities.

138. The claimant was found to have a case to answer after an investigation by Mr Phillips (after the initial investigating officer was removed from the matter at the request of the claimant). The matter proceeded to a disciplinary hearing. The claimant denied he had done anything wrong (although the facts were not materially in dispute). The claimant was found guilty of serious misconduct after the hearing chaired by Mr Crook. The findings were set out in a lengthy letter the claimant was given a first written warning which was to last for 12 months. His appeal was rejected by Mr Smith.

139. We can find no evidence at all linking any of those matters to the claimant's trade union activity. The entire matter was brought about by the altercation on 28 April 2015 and the process and outcome thereafter was not tainted by conduct which was attributable to the claimant's legitimate trade union activities. Indeed throughout the process the claimant made no indication that he considered any part of the action taken against him was as a result of any trade union activity he had engaged in, let alone the specific assistance offered to C and J on which he now relies. We note that although he raised objection to Ms Lambert conducting the investigation he did not object to Mr Smith conducting the appeal.

140. The claimant's complaint that his injury benefit application was rejected as a consequence of his trade union activities is without any evidential basis.

141. The application was made via Mr Knapper under a scheme whereby lost pay is awarded if an employee loses time due to an accident in the course of official duty, but not if the injury is a result of the employee's own negligence or misconduct. It was not disputed that the claimant's absence fell within the ambit of the scheme; he was suffering from depression/anxiety/stress as a result of matters occurring at work. The medical advice received attributed the claimant's mental health condition entirely to work related issue, but the question of whether or not this was as a result of the claimant's own misconduct was a matter left for the respondent.

142. Mr Smith determined that benefit was not payable, as in his findings the claimant's absence was due to his reaction to "appropriate management action" in the light of the security breach incident and the disciplinary issue we have already discussed above. Accordingly, he considered that the claimant's absence was primarily as a result of his own misconduct so that benefit was not payable.

143. We find that this was a conclusion which, on the face of the facts, Mr Smith was entitled to come to. We find no evidence that connects that decision with any trade union activities undertaken by the claimant and no such allegation was seriously put to Mr Smith.

144. The claimant was issued with a warning for attendance on 10 March 2016, upheld on appeal on 11 April 2016. The claimant does not contest that his absence was such that "trigger points" had been reached which would lead to a warning under the respondent's attendance management policy. He had been absent from 7 May to 30 September 2015.

145. The claimant said he should be excused any absence sanction because he had been absent due to a qualifying injury at work. That was rejected by Mr Knapper because the injury benefit application had been rejected. That was the reason he gave for rejecting the application and we accept that that was his true and only reason for reaching the decision he did. Accordingly, the decision was not related to any trade union activities which the claimant had undertaken.

146. The investigation into the claimant's grievance and the subsequent rejection of Mr Clements' report, which the claimant also says was attributable to his trade union activities, was mishandled by the respondent, but we do not find that any of the respondent's actions were motivated by the claimant's trade union activities.

147. The initial problem was caused by a combination of the creation of a third managerial function into the grievance process, that of "commissioning manager" and a failure by Mr Smith on the one hand and Mr Clements on the other to set, discuss or work within clear terms of reference.

148. Mr Smith was in receipt of the claimant's grievance from Mr Knapper, Mr Knapper determining that in part the grievance was against him. Mr Smith merely passed it to Mr Clements to "take this forward/on/investigate" which led Mr Clements to, understandably, believe that he was the investigating manager and, presumably, that Mr Smith was the decision manger (the only two roles under the policy). However Mr Smith considered himself the commissioning manager. Who was to be the decision manager was not clear to anyone. Under the policy as it operated (as opposed to how it is written) the commissioning manager should have agreed terms of reference with Mr Clements but Mr Smith did not.

149. When there was subsequent criticism over how Mr Clements had progressed his investigation (in particular by reference to his failure to interview Ms D'Rozario) there was also complaint 9which the claimant also shared) over the terms of reference under which Mr Clements had worked, whether they were too wide and/or whether they addressed all matters in the grievance. Indeed the claimant asked to meet Mr Knapper to discuss what the terms of reference should be when Mr Knapper said a new

decision manager had to be appointed (although we remain unclear as to who the original one was).

150. Whilst we are critical of the decision then taken have Ms Growan rewrite terms of reference (without any consultation with another person) and to effectively start again (something neither the claimant as the aggrieved and Ms D'Rozario who was criticised in Mr Clements' report agreed with) we do not see anything whatsoever which connects that decision, nor the terms of reference as drawn by Ms Growan with the claimant's trade union activities.

151. The claimant's complaint, as it emerged during the hearing, was that this was "fixed" by Mr Smith and Ms Growan to avoid a finding in the claimant's favour, as directed by Mr Smith who controlled or encouraged Ms Growan in her actions. We find absolutely no evidence whatsoever that this was in fact the case. The claimant in fact agreed that the Clements' report as not sufficient to deal with all his points of grievance and we do not see any connection whatsoever between this episode and the claimant's representation of C and J.

152. The outcome of the grievance was critical of some management decisions but found no bullying as the claimant alleged and that Ms D'Rozario had been supportive of the claimant at the time of the security breach. It found that the claimant had not fully engaged in the PDR process and that the outcome was not inappropriate. The claimant's appeal against those findings was not upheld.

153. The claimant's complaint about his PDR rating for 2015/16 is unclear. It was carried out under his new manager (Mr Yates) at a time when he had moved at his own request to Yarlswood. The outcome was "moderate" and was endorsed positively by Mr Yates who welcomed the claimant back to work. We have not been able to understand how any of that could be said to be a detriment, nor how it is said to connect to the trade union activities relied upon.

154. Turning now to the claims for failure to make reasonable adjustments, on the claimant's own case as it emerged in evidence was that he was told in 2012 that he could not have the software he asked for. On that basis, whatever the stated reason for the refusal was (cost or the use of such software in an open plan office) matters not, because the claimant had been told he could not have the equipment.

155. Promised reviews did not take place, but the claimant did not raise the issue again. Accordingly, if the claimant felt the other mechanisms in place were not sufficient he should have concluded by no later than mid 2013 (12 months after Mr Jagpal's refusal and promise of review) that the adjustment was not being provided. Time would, therefore, run from that time.

156. Clearly the claim as presented is therefore considerably out of time. The claimant said that he was not told the "real" reason for the non-provision of the software and only discovered it in May 2016. His sworn witness evidence, however, was that he had not been given a reason at the time. There was no application to extend time.

157. This part of the claim is out of time. Had the claimant made an application to extend time it would have been rejected. The claimant's own evidence was contradictory (whether he had been told a reason for refusal or not) and the matter had been left dormant for 4 years.

158. The final element of the claimant's case, however, was the failure to make reasonable adjustments following the receipt of the Clements report.

159. Although the report was rejected as it did not answer the claimant's grievances and/or did not follow appropriate terms of reference it did contain a clear piece of advice that the claimant should have an urgent referral to a dyslexia specialist. This was sent to Mr Knapper and Mr Smith on 22 February 2016, both said in evidence that they assumed the other would deal with it, but neither of them checked.

160. The claimant sent an email to Mr Knapper and Mr Yates chasing action on this in March 2016, then in May 2016 when a discussion about the structure of the claimant's work took place he raised it again. That led to a wholly inappropriate referral to occupational health and then to 'Access to Work'. Neither of those organisations were "dyslexia specialist[s]". It was not until December 2016 that a referral was made to Dyslexia Action who recommended specific equipment should be provided. It was provided in February 2017.

161. The respondent is a large organisation. It has over 25,000 employees. An appropriate reference to a dyslexia specialist could and should have been actioned promptly after receipt of the Clements report in late February 2016 and had that been done promptly the necessary adjustment could have been in place 2-3 months later, certainly by the end of May 2016. Instead the claimant had to remind his employers more than once about this, had the provision of the appropriate adjustments delayed for 9 months and was sent to not one but two unnecessary and inappropriate assessment meetings. To that extent and for the period May 2016 to February 2017 the respondent failed to make the adjustments in question.

162. We are satisfied on the evidence provided that the claimant suffered a substantial disadvantage by the failure to provide the equipment which was recommended by Dyslexia Action and provided in February 2017.

163. We say that for two reasons. First, the Respondent, throughout the evidence given in this case, made it clear that irrespective of the performance ratings the claimant had, he was under-performing. Mr. Jagpal referred to him as performing at 75% (although he did not thus re-

visit the claimant's need for adjustments) and secondly because the claimant himself gave unchallenged evidence that the absence of appropriate software had led to his taking longer to read and prepare documents which would have been alleviated (and was now alleviated) by the provision of adjustments.

Summary

1. The claimant's complaint of a failure to make reasonable adjustments in 2012 is dismissed, it is out of time and it is not just and equitable to extend time.

2. The complaint of a failure to make reasonable adjustments in 2016 is upheld. The adjustments not provided until February 2017 should have been provided by the end of May 2016 at the latest.

3. The claimant's complaints that he suffered detriment as a result of trade union activities are not well founded and are dismissed.

_____
Employment Judge Ord

Date: …27/11/2017……..

Sent to the parties on: .....

.....
For the Tribunal Office