EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr S Lerenzo **v** Secretary of State for Justice

Heard at: Employment Tribunal **On**: 16, 17, 18, 19, 20 & 23 March 2020

Before: Employment Judge Johnson

Non Legal members: Mr P Davis
Ms S Campbell

Appearances
For the First Claimant: Mr Beyzade (counsel)
For the Respondent: Mr Beaver (counsel)

JUDGMENT

1. The complaint of direct disability discrimination contrary to section 13 of the Equality Act 2010 is dismissed as it is not well founded. This means that the respondent did not directly discriminate against the claimant on grounds of his disability.

2. The complaint of a failure by the respondent to comply with its duty to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 is well founded. This means that the respondent failed to comply with its duty to make reasonable adjustments.

3. The complaint of victimisation contrary to section 27 of the Equality Act 2010 is dismissed as it is not well founded. This means that the respondent did not subject the claimant to detriments for bringing protected acts.

4. Remedy will be determined at a remedy hearing on a date to be confirmed with a hearing length of 1 day in the Birmingham Employment Tribunal.

REASONS

Background

1. The claimant is employed by the respondent in its National Probation Service as a Probation Support Officer. He has worked in this role since 7 October 2003.

2. By a claim form presented on 25 October 2018 following a period of early conciliation from 12 September 2018 to 25 September 2018, the claimant presented claims of disability discrimination and breach of contract. The claim of breach of contract was dismissed upon withdrawal on 27 February 2019.

3. The claim relates to the treatment of the claimant by the respondent following periods of sickness absence and the development and/or discovery of conditions which caused him to suffer impairments. It is not in dispute that the claimant is disabled within section 6(1) of the Equality Act 2010 ('EqA').

4. The claimant presented an earlier claim under case number 1302657/2014 in 2014 which included claims of disability discrimination and unfair dismissal. Following his reinstatement by the respondent, a COT3 settlement agreement was reached later that year.

5. The respondent resists the claim and argues that it has not discriminated against the claimant because of his disabilities. It argues that its treatment relates to a failure by the claimant to undertake training and tasks relevant to the current job description of Probation Support Officer. It believes it has offered suitable adjustments in accordance with its duty under the EqA and the real issue is the claimant's unwillingness to work to the relevant job description.

6. The claimant argues that he remains subject to his original job description and that in any event, his impairments mean that he is restricted as to the duties he is expected to carry out. As a consequence, it would be reasonable to adjust his role to focus on the tasks that he can do. He believes that the respondent has been able to do this and can continue to do this.

The Evidence Used in the Hearing

7. For the claimant, the Tribunal heard from the claimant himself, Ralph Coldrick (a union representative from the union NAPO) and Christopher Hazeley-Jones (a probation officer and former colleague).

8. For the respondent, the Tribunal heard from Neil Appleby (a probation officer and Head of Service, Birmingham for the National Probation Service since 2014) and Alina Collinge-Lowe (a senior probation officer and line manager for the claimant from February 2018 to October 2019).

9. This was a hearing which used a bundle of documents numbering more than 1,000 pages and contained in two lever arch files. The bundles had been agreed in January 2020.

10. The hearing took place during the week when the government increased its restrictions concerning public gatherings and distancing between members of the public. By the third day of the hearing, Employment Judge Johnson had been asked by the Tribunal's Regional Employment Judge to explore the possibility of continuing the hearing with the parties 'calling in' using telephone conferencing or other technology. However, having consulted with Ms Campbell and Mr Davis, Employment Judge Johnson offered to sit with parties being present, for one further day (the fourth day). This would be to allow the remaining witness evidence and final submissions to be heard, (with the latter during the final two hours of the afternoon).

11. The Tribunal noted that the case management order of Employment Judge Chaudhry dated 26 February 2019 had carefully managed the listing of the final hearing. He had allotted three days for the hearing of evidence. This was entirely appropriate when the number of witnesses called to give evidence was considered. Taking into account the initial half day allotted for reading and housekeeping matters, by the end of the third day, two and half days of witness evidence had been heard. The claimant's witnesses had already given their evidence, roughly half of Mr Appleby's cross examination had been given and only Ms Collinge-Lowe's evidence remaining to be heard. As the parties were willing to continue with the hearing for a further attended day at Tribunal, counsel were advised that cross examination and re-examination should be reviewed in order that it could be concluded within the timescale provided by the Tribunal.

12. Employment Judge Johnson did remind parties from time to time of the need to make progress in their examination of witnesses. This was not assisted on days two, three and four of the hearing due to the hearing starting later than usual despite the Tribunal being available to start at 10am. However, on the fourth and final hearing day, additional time was provided for Mr Beyzade to conclude his cross examination of the respondent's witnesses and a truncated period was allowed for final submissions with counsel being permitted to provide further additional

submissions by email before the end of 19 March 2020 (fourth day). Further submissions were made by both parties in this way and were taken into account by the Tribunal. Additionally, a further application being made by Mr Beyzade concerning anonymisation under Rule 50 of the Employment Tribunal's Rules of Procedure and which is discussed below.

13. An issue arose on the third day of the hearing when a number of documents were produced by Mr Beyzade for the claimant. Most of these documents were not controversial and with the agreement of Mr Beaver for the respondent, the Tribunal permitted their addition to the bundle. However, there was one copy email which was more controversial and was subject to a formal application as the respondent strongly objected to its addition to the hearing bundle.

14. The claimant sought to rely upon an email which had seemingly been printed from Ms Collinge-Lowe's outlook email account and which he claimed had been left on his desk at work. It was not entirely clear how it had come to be left on his desk and whether somebody had removed it from a printer. This had taken place despite the email clearly being marked for Ms Collinge-Lowe, being received from the Government Legal Service and being marked as legal advice. It did however, relate to the claimant.

15. An application was made by Mr Beyzade at lunchtime on the fourth day of the hearing to have this email added to the bundle of documents. He argued that it was relevant to the proceedings, that it was either not a privileged document or that privilege had been waived by it being left on the claimant's desk. He added that it had been disclosed to the respondent's solicitors by the claimant's solicitor in December 2019. For the respondent, Mr Beaver argued that it had been obtained dishonestly, that it was privileged and in any event the application was being made after all but one of the parties' witnesses had given evidence. He also confirmed that the document could have been included in the bundle at an earlier date. He explained that the claimant's solicitor had agreed the hearing bundle in January 2020 and had not requested that the email be inserted in the bundle. Alternatively, had the respondent been unwilling to include this document, the claimant failed to make an application for its inclusion to the Tribunal before the hearing took place.

16. The Tribunal considered the parties' arguments and decided that the application should be dismissed. Its concern was that it involved a document which had been available for some time and which the claimant's solicitor could have requested be included within the bundle before agreeing its contents in January 2020. Privilege was undoubtedly an issue, given that the email was relating to legal advice between the Government Legal Service and Ms Collinge-Lowe and having been printed from her Outlook account. Taking into account the issue of privilege, this

was a matter where ordinarily a party would make an application for an order that it form part of the evidence in advance of the final hearing. This would enable the matter to be heard by an Employment Judge not involved with that final hearing. While, in principle a party can make an application at any stage during the hearing, we had no doubt that in this case, the application could have been made a number of months before the final hearing. The claimant despite having been represented for some time, did not even seek to make this application at the beginning of the hearing on day one before any evidence had been heard. To make this application at such a late stage was not reasonable, not in the interests of justice and contrary to the overriding objective under Rule 2 of the Employment Tribunal's Rules of Procedure. This would have been the case in normal circumstances, but was especially relevant in the current situation where the Tribunal was expected to conclude the attended part of the hearing on the third day and which had exceptionally agreed to sit for one further day to conclude evidence and final submissions. It was simply not proportionate to allow the application and would cause undue prejudice to the respondent and the Tribunal's ability to manage the hearing effectively as it would require witnesses being recalled, when sufficient time had already been allowed for cross examination. This could have resulted in the hearing being postponed part heard and the re-listing of this case could have been many months away. The prejudice to the claimant was minimal as the Tribunal had been able to consider the evidence relating to the issues to be considered in his claim from the significant number of documents already exchanged by the parties through disclosure and contained within the bundle which had been agreed by the claimant's legal representatives in January 2020.

17. For the avoidance of doubt, the email which was the subject of the application was not reviewed by the Tribunal in its consideration of the evidence in making this judgment.

The 'Anonymity Order' application made pursuant to Rule 50

18. This application was made by Mr Beyzade on behalf of the claimant by email on 20 March 2020 as there was insufficient time available at the end of the fourth hearing day for the Tribunal to consider it. It was an application seeking an anonymity order in accordance with Rule 50 of the Employment Tribunal's Rules of Procedure. The primary application was that the claimant's disabilities be anonymised. In the alternative, the claimant requested that the Tribunal either grant a temporary anonymity order in the terms sought or allow the claimant 28 days before the Tribunal promulgated the judgment so that an appeal could be made.

19. Mr Beaver had confirmed that he was instructed by the respondent to apply for written reasons even if sufficient time had been available for the Tribunal to give judgment orally with the 6 day listing provided. He also advised that the respondent would object to any application to anonymise the judgment, whether in relation to the claimant's name or the disabilities upon which he relied. He provided an email to the Tribunal on 20 March 2020 providing written arguments resisting the claimant's application.

20. The Tribunal considered the application before it completed the judgment. It considered the claimant's application dated 17 January 2020 which seeks an anonymity order in accordance with Rule 50(3)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which would have the effect that details of his disabilities would not be disclosed to the public, by use of anonymisation in any documents entered on the Register or otherwise forming part of the public record. It also took into account the emailed reply received from Mr Beaver on behalf of the respondent which objected to an anonymity order being made.

21. In considering this application, the Tribunal has taken account of the provisions of rule 50(2) which requires the Tribunal to give full weight to the principle of open justice and to the Convention right to freedom of expression under the Human Rights Act 1998.

22. The Tribunal fully appreciates and understands the concerns raised by the claimant's counsel in his application relating to the claimant's anxiety as to the contents of the judgment, its reference to personal information and who might read something that will be a matter of public record. The Tribunal also recognises the claimant's Convention right to privacy.

23. What must be considered however, is that the application relates to proceedings which he has brought of his own volition and which in ordinary circumstances, an employee would have a low expectation that their privacy would be protected through anonymity. This is a case which related to a claim of disability discrimination and which related to specific conditions and the impairments that they caused. While to some extent the consideration of issues relating to the claimant's disabilities are of a sensitive or personal nature, the judgment will only deal with these details insofar as they are relevant to the decision which it reaches in this case. Moreover, the claimant has already presented a claim to the Tribunal in 2014 and in which it is understood that no application for an anonymity order was made. The current proceedings have been subject to considerable case management and for a significant period of time the claimant has been represented. The application for anonymity was made at an extremely late stage of these proceedings. while it can be made at

any stage, it is surprising that it has not been made much earlier as potentially it could have been considered as a separate preliminary issue.

24. It should also be noted that the question of disability has not been in issue during this hearing and the respondent's acquiescence concerning this particular issue in respect of those disabilities which had not been formally agreed means that any consideration of the specifics of the claimant's disabilities has been kept to a minimum. This has assisted the Tribunal in reducing its need to make references to the claimant's disabilities within the judgment.

25. The Tribunal is not aware that this is a case where there has been any media interest and it seems unlikely that the claimant's claim will be subject to significant scrutiny beyond those wishing to consider the case for legal professional or academic purposes. It is reasonable when considering a judgment in disability discrimination, that the reader has some idea of the disabilities which are the subject of the Tribunal complaint. While every disability is personal to the individual to whom it afflicts, it is important for the public to be able to understand the diversity of conditions which exist amongst the workforce at large, how these individuals manage to remain in employment and the ways in which employers treat them; both good and bad. While the claimant has identified concerns that he has with regard to how his employer or potential recruiters might treat him in future, they will no doubt be aware of their legal obligations to behave appropriately and in a non-discriminatory way.

26. The Tribunal has taken into account the relevant case law in reaching its decision and is also obliged for those cases identified by Mr Beyzade in the claimant's application and in response by Mr Beaver. In many respects cases of this nature are fact sensitive, but often involve matters where the risk of serious harassment is in issue. The Tribunal has paid particular attention to the decision of Mrs Justice Simler in the Employment Appeal Tribunal case of; **British Broadcasting Corporation v Roden 2015 ICR 985, EAT**. In this case she emphasised that the principle of open justice was of paramount importance and that derogations from it could only be justified when determined as being strictly necessary in the interests of justice.

27. While the Tribunal acknowledges that the Employment Judge has a wide discretion in relation to matters of case management, it is not satisfied when balancing the competing rights in this case that the claimant's entitlement to privacy within the context of these proceedings justifies its interference with the paramountcy of the principle of open justice. Accordingly, the claimant's application is refused and the judgment will be provided to the parties and promulgated in the usual way.

The Issues

Time Limits

28. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred.

Disability

29. The respondent accepts that the claimant is a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s): ischaemic heart disease, depression and dyslexia. Although the original list of issues identified in the order of EJ Chaudhry dated 26 February 2019 did not make reference to the conditions of anxiety and a back condition, the Tribunal was content that these were also relevant conditions which the respondent accepted were disabilities within the meaning of section 6(1) EqA 2010. Mr Appleby when questioned by Mr Beyzade was clear in his evidence that he did not dispute that these conditions were disabilities during the relevant time considered by these proceedings.

EQA, section 13: direct discrimination because of disability

30. Has the respondent subjected the claimant to the following treatment:

    i. Failing or refusing to deal with the claimant's grievances submitted on 24 June 2015 and 14 December 2016 in which he sets out his complaints relating to breaches of the Equality Act 2010; and,

    ii. Subjecting the claimant to disciplinary proceedings in February 2017 for an alleged failure to follow reasonable managerial instruction to attend various training events.

31. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on a work colleague named Cynthia Clark as a comparator.

32. If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

Reasonable adjustments: EQA, sections 20 & 21

33. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

    i. Requiring the claimant to undertake the following duties: risk assessments, various reports requiring the claimant to use and interpret information from VISOR (specialist computer database in relation to high risk offenders), aural hearings, recalls, lifer reviews, MARAC meetings, Mapper screening and court work. These all being duties that the claimant did not, infact, undertake but which he was being requested to undertake by the respondent?

34. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: he was less able to complete the duties/tasks being asked of him? The claimant indicates that he is less able to complete the duties/tasks being asked of him as they are more complex and they impact upon his depression, stress and dyslexia. The claimant also asserts that this aggravates his anxiety and pre-existing back condition.

35. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

36. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

    i. The claimant indicates that the duties highlighted in paragraph 33 (i) above should have been removed; and/or
    ii. He should have been given other duties instead of duties highlighted in paragraph 33 (i), namely he should have been given more home visits, completion of home detention curfews and taken on more or all lower risk offenders and other types of offenders who do not require the full risk of harm assessments; or,
    iii. The claimant should have been provided with a support worker; or,
    iv. The claimant should have been provided with an agreed mentor.

37. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Equality Act, section 27: victimisation

38. Did the claimant do a protected act? The claimant relies upon the following:

    i. The issuing of legal proceedings in 2015, and;
    ii. The lodging of grievances citing breaches of the Equality Act 2010 on 24 June 2015 and 14 December 2016

39. Did the respondent subject the claimant to any detriments as follows:

    i. Refusing to hear his grievances of 24 June 2015 and 14 December 2016; and,
    ii. Refusing to make reasonable adjustments?

40. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Findings of fact

41. The respondent is the Secretary of State for Justice. The case concerns the National Offender Management Service which replaced HM Prison and Probation Service. It is an executive agency of the Ministry of Justice for which the Secretary of State is responsible.

42. The claimant is an employee of the Birmingham Local Delivery unit of National Offender Management Service. It employs 250 people comprising of Probation Officers ('POs') and Probation Service Officers ('PSO'). Neil Appleby was a Probation Officer by qualification and is now Head of Probation, Birmingham and has been in post since March 2014.

43. Prior to July 2017, it is understood that two deputy heads worked below Mr Appleby and were responsible for Senior Probation Officers ('SPOs') below them. However, he explained that one of the deputy roles had been deleted and only one remained, which was occupied by Steve Parry. It was understood that line management involved SPOs who then managed POs and PSOs.

44. The claimant was employed by the respondent as a PSO from 19 October 2003 and continues to remain in this role. Although not a qualified Probation Officer, PSOs carry out case management duties for offenders, but are restricted to low and medium risk offenders. As a case manager, it was understood that both POs and PSOs would produce a plan of

interventions to deliver the sentence imposed by the courts and which responded to risk factors and other needs relating to the personal characteristics of the offender. An important part of this process was the completion of ‘OASys’ which was an IT system which assessed risk and appropriate action concerning offender management. A significant issue between the parties in this case was the extent to which claimant as a PSO was expected to complete the report, in relation to the parts where risk was assessed.

45. Although the claimant was employed and subject to a 2002 job description (‘JD’), this was varied in 2006 and 2012. The unions representing POs and PSOs were involved in collective bargaining with the respondent. Mr Coldrick (from the NAPO trade union), explained that ultimately, the JDs were imposed by the respondent due to a failure of management and unions to reach an agreement. We were not aware of any challenges being brought by employees individually, concerning the imposition of the JDs, nor were we asked to consider the claimant’s contract of employment and whether the respondent could unilaterally impose new JDs. While the claimant in these proceedings did produce documentation which stated that he believed he continued to be subject to the original 2002 JD, it appears that the majority of POs and PSOs worked to each new JD as it was introduced and they acquiesced to these changes.

46. The claimant maintained that as he was subject to the 2002 JD and that he was not required to complete any sections of OASys relating to the risk management of offenders which could be found outside of sections R3 to R13 of the OASys form.

47. It is not in dispute that claimant was disabled within the meaning of the Equality Act 2010. In May 2010, he was assessed by the agency Access 2 Work which assisted with adjustments in his workplace which would support any issues arising from his heart problems and depression.

48. In October 2012, he had a triple heart bypass and suffered an absence from work. He then raised grievances concerning what he believed was a lack of support by the respondent in implementing Access 2 Work recommendations.

49. The claimant was diagnosed as having dyslexia in the Educational Psychologist’s Report of Suzanne Boyd dated 26 February 2014, which recommended that Access 2 Work advice be followed so that he could access adjustments to support him with this impairment. It was clear that stress and anxiety arising from his underlying health issues had a major impact upon the claimant’s day to day activities at this time.

<u>The 2014 Employment Tribunal Claim</u>

50. This case was not the first time that the claimant had presented a claim to the ET. The claimant produced copies in the bundle of his complaint

brought under case number 1302657/2014. He had been dismissed on 18 February 2014 by reason of medical incapability following a return to work after sickness absence. He complained that he had been unfairly dismissed and had been subject to disability discrimination. The respondent reinstated the claimant following an appeal in May 2014 and a settlement was reached between the parties on 18 November 2014 as a result of conciliation with Acas. The COT3 was included within the bundle and a section of the agreement, which is relevant to the current claim can be found in paragraph 7:

'The Respondent will take all steps reasonable to ensure that the following practical arrangements will be implemented:

a. *the Claimant will be provided with a headset to accompany his assistive IT equipment, which allows the effective implementation of the IT systems of Dragon, nDelius and OASys;*

b. *on completion of (a) above the Claimant will be provided with appropriate training and updates;*

c. *the Claimant will be provided with the assistance of an Assistive Technology support worker for up to 12 hours each week as appropriate based on an assessment of the requirements of his workload;*

d. *the Claimant to be permitted to conclude all arrangements relating to arranging and attending an optometrist appointment as recommended in the Educational Psychologists report of Suzanne M Boyd dated 26 February 2014;*

e. *the parties to agree the identity of a mentor, to be reasonably contactable and to provide advice and assistance to the Claimant from time to time as necessary.'*

These appeared to be adjustments that the respondent agreed would be provided to the claimant as part of the COT3 settlement, although they did not admit that the measures identified, amount to reasonable adjustments and simply said they would take *reasonable steps* to ensure that the measures were put in place.

51. It was understood that the arrangements within this section were adjustments which the parties agreed were reasonable and appropriate to support the claimant back into work.

52. Paragraph 8 of the COT3 stated that the claimant had returned to work by the time it was agreed and the claimant agreed;

'…that he will, within 6 months up to the date of this agreement, use his best endeavours to build up and then resume the full duties of his role as a full time Probating (sic) Service Officer, which is no more than 80 MIS points, or equivalent under any subsequent national workload measurement programme that may…be introduced from time to time'.

In this part of the COT3 agreement, the claimant simply confirmed that he would try to reach a position where he would work at full time capacity, although the reference to changing workload measurement programmes suggests that he recognises that the expectations of his role may well change over time.

53. It should be noted that Mr Appleby did not become involved with the claimant until the conclusion of these earlier proceedings. In evidence, he confirmed that he had no prior knowledge of the claimant before his return to work in mid-2014. He had only become Head of Service in Birmingham, in March 2014. However, while line managers would be expected to deal with the day to day impact of implementing adjustments for the claimant, Mr Appleby as Head of Service, would have ultimate responsibility for ensuring that the respondent complied with its duties to the claimant under the EqA 2010. Indeed, he confirmed that: *'I don't line manage him, but I had close involvement with these arrangements upon his return to work in 2014'.*

54. The claimant returned to work as a PSO on 23 June 2014 with a phased return over 8 weeks. A number of adjustments were confirmed in Mr Appleby's letter to the claimant on 20 June 2014 as being 'in progress' including the provision of Dragon Software, TextHELP Read and Write, Dyslexia Strategy Training and a 21.5" monitor, scanner and coloured overlays. The aim was described as being to enable him to be '*operating at full capacity for a PSO 16 weeks after reasonable adjustments are in place…'* with '…*issues that still need to be resolved'* being identified including desk location, working from home, compressed hours. It was noted by the Tribunal that none of these issues were a concern raised in the issues identified in this claim.

55. Training was provided by an external company called Astec Assistive Technology Solutions Limited on 14 July 2014 and 19 August 2014 and which appeared to focus upon Dragon dictate and TextHELP read. As the claimant did not have a headset at the relevant time further recommendations were made for further training once it had arrived so he could practice using Dragon. Additionally, concerns were raised about the claimant not having received training in the use of OASys and National Delius training which had taken place while he had been absent from work.

First Grievance

56. On 24 June 2015, the claimant sent an email to his line manager Alison Moss, Senior Probation Officer at Perry Barr raising '*a formal grievance concerning the management instruction to attend the fast delivery report (FDR) writing training*'. He said that '*I am not required to complete FDR's in my role as a PSO and FDR's have never been a requirement of my agreed terms and conditions of employment*'. He also mentioned '*I have been put under enormous pressure by the Deputy Head of Probation, Birmingham (Steve Perry) to attend the FDR training or he will instigate disciplinary action against me despite the fact that I have sought to clarify my terms and conditions of employment and dispute the instruction to attend FDR training as being unreasonable…*'

57. There had been pressure placed upon the claimant to attend this training by Mr Perry for a number of weeks prior to the grievance being raised and the view adopted by management was that FDR was an integral part of current PSO duties. This was a document which would be placed before a court, prepared by case managers and which formed part of PSO responsibilities under the 2012 JD. The claimant argued that it was not part of the PSO role and would amount to fundamental change to his contractual job and that his belief was that these changes had been neither agreed by unions collectively or by himself individually as an employee

58. Mr Appleby replied on 25 June 2015 explaining surprise at the grievance raised and asserted that the FDR had been an identified PSO role for a number of years. He also asked the claimant to submit his grievance using the formal GRV1 form by his line manager. In his subsequent email of 10 July 2015, he reiterated that that he was '*puzzled*' by the claimant's grievance and reminded the claimant to use GRV1 so that it could proceed.

59. Mr Appleby eventually decided to proceed with grievance request and notified the claimant by letter on 21 July 2015 that he was invited to a meeting at Birmingham city centre office to discuss matter with him. Claimant was allowed to attend with a union representative and confirmed that a decision would be given on form GRV1 within 10 working days. The meeting took place on 5 August 2015 following some confusion regarding the availability of those intending to attend.

60. Mr Appleby did not provide a reply by GRV1 or within the promised 10 working days. His decision was eventually given in his letter dated 9 November 2015. His conclusion was that FDR writing was part of the PSO JD for 2012 and that the relevant unions had confirmed it had been implemented. He did concede that he could not claim '*that this indicates unions were in total agreement*'. He acknowledged the claimant's anxieties concerning his achieving competence in this area and explained that he '*would not require staff to become self sufficient in FDR writing until I was satisfied they had demonstrated appropriate competence*'. He therefore required claimant to undergo '*key appropriate training including*

FDR writing'. But went on to say; '[*o]f course I am mindful of the ongoing need to ensure that reasonable adjustments are in place to support you at work'.* It is fair to conclude that in his letter, Mr Appleby acknowledged the claimant's disabilities and that his impairments may impact upon his ability to carry out this role.

61. The claimant appealed on 19 November 2015 stating the grievance decision of Mr Appleby was unreasonable. Mr Appleby replied by letter dated 24 November 2015 and sought to provide further clarification of his original decision in the grievance. He advised the claimant that:

'[w]hilst I agreed to meet with you and hear your concerns, I do not understand how you can argue that you should not be subject to the same expectations as the rest of your colleagues. I hope I have always made it clear that I will consider reasonable adjustments wherever appropriate but as far as I can ascertain, you are actually resisting accepting a training and development opportunity to develop your skill set. I understand that you are anxious about being stretched in this way, but it does appear unreasonable for you to refuse to participate.'

He went on to say:

'The grievance process is not a means of opting out of your valid role responsibilities.'

Mr Appleby concluded his letter by saying:

'…it appears that you are appealing against my statement that you are expected to fulfil the basics of your job description. If this is the case, it is not appropriate for me to direct your concern to Sarah Chand, Deputy Director.'

62. Mr Appleby emailed the claimant's union representative Joe Clarke of Unite separately on the same day expressing his confusion as to the nature of the claimant's appeal and explained:

'…that [the claimant] was bound by the same long established job description as everyone else at his grade and that what I had asked him to do was undertake training to assist him in fulfilling those responsibilities. I'm genuinely confused how this can possibly be contraversial (sic). I have reiterated that I will also consider reasonable adjustments but cannot have a colleague unilaterally opting out of a key worker role without even accepting the training. Please call me if you have a different insight into this. Clearly if you think the most appropriate thing you can do is send my mail to Sebastian, then that is fine. I take huge care, however, to model reasonableness and was hoping you could identify why my actions are perceived as so inherently unreasonable by your member.'

It appeared that Mr Appleby was genuinely confused as to the basis of the claimant's grievance and appeal. He clearly thought that the issue was that the claimant would not even undertake the training in order that the need for reasonable adjustments could be considered and appropriate support provided as result. However, taking into account the fact that a grievance had been raised and decided at 'stage one', it is strange that Mr Appleby simply didn't allow the appeal to go ahead so that a third party within the respondent service could consider the claimant's concerns in accordance with a usual grievance process.

63. Mr Clarke spoke with the claimant and on 10 December 2015 the claimant emailed Mr Appleby seeking a further meeting to discuss the issue. Mr Appleby replied the following day and confirmed he would be able to meet with the claimant but reasserted his position concerning the matter and sought from him details of the issues that he wished to discuss. A meeting took place in January 2016 and Mr Appleby confirmed what they had discussed in an email of 29 January 2016. Mr Appleby's understanding was that claimant had confirmed he was subject to the same JD as colleagues which we understood to be 2012 JD. He also noted that claimant had agreed to undergo training, but that the respondent's 'E3' organisational change process meant that the FDR report writing may well result in report writing being dealt with by the court team. Nonetheless, he was keen to ensure that claimant like all PSOs had sufficient skills to ensure that they were flexible to meet future changes

64. The Tribunal noted that by dealing with the appeal himself, Mr Appleby was effectively reconsidering his decision rather than considering an appeal. The Tribunal was not shown a copy of the respondent's in-house grievance procedure, but it is assumed that it will have taken into account the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedure, or even earlier guidance. Taking into account the size of the respondent, the Tribunal is surprised that Mr Appleby didn't simply refer the notice of appeal to a more senior officer or to Human Resources in order that an independent manager could have considered his decision.

<u>Second Grievance</u>

65. On 14 December 2016, the claimant raised a further grievance following a meeting which took place on 12 December 2016 concerning management expectations to attend training. Alison Moss, the claimant's line manager, explained in an email to Mr Perry dated 13 December 2016 and where she said:

'I have asked Sebastian [the claimant] to attend three training events,

1. *Kulwinder Sohal is laying on PSO training/mentoring. She is having one to ones with all PSOs tomorrow in preparation for weekly*

workshops and I have asked Sebastian to attend a slot with her at 3pm for an hour…I have now instructed him to attend. He has refused.

2. *I have asked Sebastian to attend Alina's workshop on risk of harm on Thursday at 2.30pm. he has refused.*

3. *I have asked Sebastian to pick a slot for FDR training, either in January or March. He has refused.*

I then verbally directed him to attend all three.

Sebastian is aware I am emailing you about this.

He asked me to include in the email that the above training is for tasks outside his remit, the new PSO job description under E3 has not been agreed formally. He also said that he feels he is being exploited as a PSO.'

Mr Appleby had written to him already on 12 December 2016 in light of these issues, explaining that he was subject *'…to the same job description and expectations as your other PSO colleagues.'* It did appear that at this point the claimant's managers felt the claimant's issues were with the job description changing and were not connected with his disabilities.

66. Indeed, the claimant's letter of 14 December 2016 which raised the grievance was initially in the first paragraph: *'…concerning management expectations to attend training and carry out duties that I believe are not within the scope my agreed job description'.* However, in the penultimate paragraph he goes on to say:

    'Additionally you will be aware that I have a number of disabilities, namely a heart condition, dyslexia, depression and back problems that are recognised under the Equality Act. Given my disabilities it would be extremely difficult for me to take on extra responsibilities due to the level of stress created and the significant impact they would have on my health. Therefore giving consideration to my disabilities and not forcing me into the new role would be a reasonable adjustment.'

    At this point, the respondent was clearly on notice that the claimant's second grievance makes reference to concerns that he had about the impact the developments to the PSO role might have on his disabilities and the need to consider whether a reasonable adjustment would be to adjust their expectations of what he should be doing in this role.

67. Mr Appleby replied on 15 December 2015 by email and acknowledged the grievance. He reminded the claimant that the grievance should be provided by completing a GRV1 form and attached a blank copy for him to complete. Again, he expressed confusion about the grievance and while acknowledging the claimant's '*health challenges*' and argued that management had '*made a series of reasonable adjustments over the last couple of years to keep you in the workplace. Unfortunately exempting*

you from the national change programme would not in my view, be reasonable'. He then went on to say:
'The main requirements placed on you at present have been to undertake training and development activities, which is reasonable preparation for your developing role. When I was informed, earlier in the week, that you were refusing to participate in the same training and development activities expected of all PSOs, I decided, with somewhat heavy heart, to commission a disciplinary investigation into your conduct and have appointed Paul Manning as investigating officer.'

In considering the claimant's second grievance, which while raising ongoing issues relating to his job description also mentions concerns about how this impacts upon his disabilities, Mr Appleby's main decision, was to commence a disciplinary investigation.

68. It seems surprising that taking into account the claimant's disabilities and his failure again to complete the GRV1, Mr Appleby did not think to ask a line manger to sit with the claimant and help him complete the GRV1 or simply accept the claimant's grievance in its informal state. It does appear that the claimant actually managed to complete the GRV1, although Mr Appleby said he didn't receive it due to it being misfiled. However, simply providing him with support would have resulted in the form being completed promptly or correctly. Additionally, while the issues raised in the claimant's grievance might have been puzzling or even frustrating, Mr Appleby knew that he was anxious and had dyslexia. His decision to escalate the claimant's unwillingness to participate in training to a disciplinary procedure without having first dealt with the grievance, even on an informal basis seems unhelpful in resolving this matter.

69. Mr Appleby wrote to claimant on 23 March 2017 and explained that while the claimant might be concerned about his outstanding grievance, he *'will not be allocating the grievance for investigation'*. While he explained that it related to previous discussions regarding his JD (presumably in relation to his first grievance). He felt that because the claimant had been provided with his JD and provided a further copy of the 2012 JD, his conclusion was that *'it is not a reasonable request to commission a grievance investigation into your concern that your long established grade description does not apply to you.'* He acknowledged the claimant's disabilities and health challenges but remained of view that he was being furnished with reasonable adjustments.

70. Accordingly, the grievance was not pursued and the Tribunal is surprised at his unwillingness to proceed. It does seem clear that the claimant had a real concern about his terms and conditions of employment and whether or not a particular JD applied to him. Had the grievance been properly dealt with in accordance with the respondent's grievance procedure or the Acas Code of Practice, it does seem likely that this matter could have been resolved whether by agreement or by involving further Human Resources processes.

Disciplinary investigation

71. This process was commenced by Mr Appleby in his email to the claimant of 15 December 2016 in response to his second grievance. He appointed Paul Manning SPO as an investigating officer. Mr Manning sent a letter to claimant on 15 December 2016 explaining that he had been asked to investigate an allegation. The claims he had been asked to investigate were:

    'You deliberately failed to obey a reasonable instruction, in that you indicated to your Senior Probation Officer, Alison Moss, that you were categorically refusing to participate in the following learning events on the basis that they were not commensurate with your role as a Probation Services Officer in the NPS:-

    i. *to participate in a locally arranged PSO mentoring session on 14th December 2016*
    ii. *to participate in a risk management session, co-ordinated by Alina Collinge-Lowe SPO, on 15th December 2016.*
    iii. *to declare your availability for Fast Delivery Report Writing training in January or March 2017.'*

    He said he would invite the claimant to a meeting, a union representative could be present and he was required by procedure to complete his investigation within 28 working days. He explained that once he had completed investigation, Mr Appleby would write to the claimant and would let him know what action would be appropriate. This could include; taking no further action, taking informal action such as training, formal performance management procedures or holding a formal disciplinary hearing. He enclosed a copy of the National Probation Service Conduct and Disciplinary Policy although the Tribunal notes it was not taken to a copy of this document within the hearing bundle.

72. A further letter was sent by Mr Manning on 17 January 2017 inviting him to meeting on 25 January 2017. The interview eventually took place on 2 February 2017. He then interviewed the claimant's managers Alison Moss, Alina Collinge-Lowe and Neil Appleby. He also spoke with Ralph Coldrick of NAPO. These interviews were concluded by the end of March 2017. However, the actual report was not completed until 25 August 2017. According to Mr Appleby, this was due to Mr Manning being subject to significant work pressures and other priorities. It was not clear what those priorities were or how his managers supported him during his investigation in allowing to him comply with timescales provided by procedure.

73. His recommendations were that: *'…this is not a matter that must proceed to formal disciplinary action. Instead I would propose that through an informal process the following actions are taken:-*

1. *To once and for all clalrify and receive written assent that the current PSO job description is the one that is in effect and that this job description requires staff willingly to participate in all necessary training for them to fulfil their role. It also requires them to complete all necessary tasks in respect of risk assessment and risk management appropriate to their grades. My conclusion is that this would include assessing that someone is deemed to be High Risk of Serious Harm at which point a manager must taken prompt and necessary (sic) to identify an Offender Manager at qualified Probation Officer grade.*
2. *Provide training that takes into account Sebastian Lorenzo's documented health and disability situation and, through an updated Reasonable Adjustments Action Plan, makes all necessary provisions to provide training and, if necessary, Quality Development Officer support that is designed to meet the identified needs.'*

Effectively, Mr Manning reached conclusions that were not dissimilar to conclusions which could have been reached in a grievance process, had the claimant been allowed to pursue the second grievance.

74. In the meantime, Mr Appleby wrote to the claimant by email on 14 August 2017 and copied in Mr Clarke of Unite. It concerned the investigation and also the PSO JD and possible adjustments that could be made. He confirmed that he had:

    '…discontinued the disciplinary investigation I had commissioned many months ago regarding an alleged refusal on your part to take up training and development opportunities. The investigation went on far too long, beyond any reasonable sense of timescale, to the point that discontinuation is the only possible option. I apologise that you were left with a considerable degree of uncertainty for such a lengthy period'

    He then went on to remind the claimant that he had: *'…impressed on you that the standard PSO job description, that now applies to all PSOs nationally, is the one I require you to work to'.* He provided the claimant with a copy of the job description, but also mentioned consideration of reasonable adjustments and exemption from tasks, saying: *'…[y]ou said that Joe and yourself would consider which tasks you might not be able to achieve, and get back to me'.* This letter also appears to show that Mr Appleby had reached a conclusion, which is similar to the conclusion which could have been reached in the second grievance process, had it been allowed to proceed.

75. There was no evidence to suggest that Mr Appleby asked Mr Manning not to provide his report. Taking into account that his decision to discontinue the disciplinary investigation took place 11 days before the report was completed, Mr Manning would not have known of this decision and in evidence we accept that Mr Appleby was not aware of the conclusions that had been reached in the report.

Reasonable Adjustments

76. As has already been described, training was provided to the claimant in 2014 following Mr Appleby's letter dated 20 June 2014 in advance of the claimant's return to work.

77. However, there were a number of activities which the claimant asserted were requirements of the role and which he was required to carry out as a PSO. While these have been referred to in the medical reports prepared by Occupational Health, they do not appear to have been considered in detail and it was necessary to hear evidence from the witnesses as to the what each activity involved and the extent to which it was integral to the PSO role and the extent to which the claimant was expected to carry out these activities

78. A major issue for the claimant was the requirement by the respondent that he participate in the completion of the risk assessment elements of the OASys forms and also in relation to other processes. Mr Appleby was clear that as the claimant's role involved offender management, a PSO would be expected to complete risk assessments under 'Offender Management Model' which became widely used from 2003. Although POs would exclusively manage higher risk cases, PSOs managed their own low and medium risk offender cases. Originally, the tasks of 'full risk of harm assessment' would be passed onto a PO prior to 2012. From May 2012, PSOs were required to complete these sections for those cases which they managed. Training was provided to PSOs at the time, but it is our understanding that the claimant was absent through ill health when it took place.

79. Mr Appleby explained that the process of risk assessments was a 'dynamic' one and needed continuous review. Under these circumstances, he believed that it was vital for those involved with offender management to have responsibility for considering risk management plans in respect of their own cases. They had the most direct knowledge of the offender whom they were managing and would be able to give the most accurate assessment of their personal characteristics and the challenges that they currently faced. It was accepted by Mr Appleby that in relation to PSOs, they would be subject to countersigning and feedback from POs. The same principles would also apply to the later requirement placed upon PSOs to complete FDR reports.

80. While the Tribunal recognises the claimant's concerns about this expectation, especially taking into account his lengthy periods of sickness absence when training for risk management and FDR writing took place, it accepts that in an offender management environment, the person allocated the case file, must be responsible for considering the relevant risk involved. It would appear that the real issue in this matter was supporting the claimant with relevant training and where appropriate *then*

considering what adjustments might be employed to support him. It was clear that a fundamental factor in the claimant's two grievances, was a reluctance on his part to even consider proceeding with the training offered, in order that the impact of his impairments upon these activities could then be assessed.

81. The claimant also referred to 'VISOR' which Mr Appleby described as being a police-owned database, initially used for recording key risk-based information pertaining to sex offenders. It is understood that this was a key development in managing risk in relation to these particular offender groups and was not normally something which a PSO would be expected to access. The claimant was clear in his evidence that he had not been asked or required to access this database and Mr Appleby did not dispute this.

82. The claimant also raised the issue of being required to attend oral hearings in his role of PSO. He said that he had never attended any of these hearings during his career. Mr Appleby accepted that the need for PSOs to attend these hearing was '*relatively rare'*. This was because PSOs would usually deal with cases which had fixed-term short recalls of offenders to custody where they had breached their licences. These did not lead to an oral hearing. He did say that occasionally there were defaults by offenders which had been persistent or risk had escalated which might require a standard recall being recommended by the offender manager. This could result in a Parole Board hearing which could require an attendance. While this might be the case, the fact that the likelihood of an oral hearing being required was so rare, the Tribunal finds that it would not be unreasonable in these situations for the claimant to provide a report to a PO who could attend on his behalf.

83. Mr Appleby asserted that Lifer review reports were an integral part of probation practice, including PSOs. This involved the completion of a written report completed by the offender manager. Since 2019, the Tribunal understands that these reviews have become an annual meeting relating to each lifer involving the offender manager and the deputy head of the probation delivery unit. Mr Appleby gave evidence that it did not involve the preparation of a formal report as it simply required offender managers to discuss relevant cases with their managers. While the claimant demonstrated some unease about being required to undertake this task due to it being something that PSOs had not been involved with historically, it does appear to be a relevant part of the offender managers role. The Tribunal notes that the task actually provides the reassurance of close line management supervision and support.

84. Multi Agency Risk Assessment Meetings (known as 'MARAC') are victim centred meetings which involve planning to support victims of domestic violence. Mr Appleby was clear in his evidence that best practice was for a single probation officer to attend an entire meeting where multiple cases are discussed. He believed the claimant had produced very good written work and with ample support being provided, he saw no reason why the

claimant couldn't attend these meetings. The claimant felt it was not role appropriate taking into account his belief that it involved work which he described as being 'high profile' and attracting 'media attention. It is fair to say that risk of domestic violence would be a major consideration for an offender manager. While it may be possible for a single PO or PSO to attend on behalf of their colleagues when multiple cases are discussed, all offender managers would reasonably be expected to complete relevant report in advance of a MARAC meeting taking place. However, it is reasonable that the claimant should only attend these meetings where only his cases are being considered at a particular MARAC. For the purposes of continuity it is reasonable to expect the claimant as offender manager to take the lead on those cases which he manages.

85. MAPPA screenings are a function of case management where the probation service would determine what involvement from other agencies would be required in terms of risk and complexity. Mr Appleby stated that PSOs would only be required to manage those cases described as being 'MAPPA level 1'. These were cases where case management was with a single agency. As a consequence, any case which required multi-agency involvement would be reallocated to a probation officer. Under these circumstances, the Tribunal finds that it would not be reasonable to expect the claimant to carry out MAPPA screenings at anything other than level 1.

86. There are PSOs who work within the court environment on a day to day basis. Mr Appleby explained that their role involved the preparation of short format reports. While he said that there was an aspiration that all PSOs would rotate roles every 3 years, he acknowledged that the claimant would not necessarily be required to be rotated in this way. It is recognised however, that there may be occasions where a PSO might be called to attend court to give evidence concerning a case that he or she managed. On this basis, it is understandable that the claimant would be expected to attend court, albeit with appropriate support being provided.

87. A particular issue in this case was the claimant's expression of interest in the Foreign National/Home Interest ('FNO/HOI') Single Point of Contact ('SPOC') and additionally, another specialised role called the Accommodation SPOC. The FNO/HOI role was advertised by Alison Moss, an SPO in Perry Barr, Birmingham and who was the then line manager for the claimant on 16 November 2017. The email was sent to a number of Birmingham POs/SPOs, but Ms Moss sent a separate email to the claimant on the same day in relation to the FNO/HOI role. In her email, she said that '*[W]e could not offer it to you without putting an ad [sic] out, but we feel it is very, very unlikely anyone else will be interested, or have the expertise that you have'.* This was followed up by an email from Ms Colling-Lowe to the claimant on 21 November 2017 with the subject header '*Are you submitting an expression of interest for the Accommodation or FNO/HOI SPOC'.* The claimant applied for the FNO/HOI role and an email from Ms Collinge-Lowe and John Halsey dated 8 January 2018, confirmed to the respondent's North Birmingham

staff that the claimant had been appointed. His colleague Cynthia Clarke was appointed to the Accommodation SPOC at the same time.

88. It was not entirely clear to the Tribunal why the claimant was no longer working in this role. The claimant said that his understanding when applying for the role was that he would not be required to complete risk assessments. Ms Collinge-Lowe however, disputed that this was the case. She asserted that risk assessments were an essential part of the FNO/HOI role because it was a job that involved case management of specific offenders. The Tribunal understood that when an officer was appointed as a case manager, they had direct knowledge of the offender who was the subject of the file and would reasonably be expected to have responsibility for risk assessing them as they made decision on their case. Ms Collinge-Lowe confirmed that had she been able to do so, she would have withdrawn the claimant from this post due to his expressed unwillingness to carry out risk assessments. Having considered this evidence, the Tribunal finds that the FNO/HOI role was not one where the post holder could reasonably avoid having to carry out risk assessments. The respondent's line managers had identified a role which they believed would be suitable for the claimant and which took into account some, but not all, of his ongoing issues relating to the existing PSO role. The claimant however, believed in applying for this role that the role that it would accommodate all of his concerns including the removal of the requirement for him to carry out risk assessments.

89. Insofar as the Accommodation Officer role was concerned, the claimant was not prevented from applying for it. Having considered his evidence, it appears that he recognised that Cynthia Clarke was better qualified for the role and as he recognised that she too had a number of health issues. The claimant seems to have behaved in a way which effectively allowed Ms Clarke to obtain one of the two roles most suitable for her and for him to obtain the other, which he felt was more suitable for his skills and experience.

90. The Claimant was absent from work through sickness from 12 March 2018 and his Med3 'fit' notes described his absence as being due to work related stress. He did provide evidence that he had been trying to obtain specialist glasses from his optician in Tamworth and which would ameliorate the impact of his dyslexia. Although the respondent provided its employees with access to a national chain of opticians, the claimant wished to use his own specialist optician. Mr Appleby described that civil service procurement processes made it difficult for him to authorise payment for these specialist glasses and this resulted in a delay in a payment being obtained. He did eventually manage to arrange for a cheque to be prepared so that the claimant could purchase these glasses, but it was clear that systems did not appear to be flexible in supporting employees in this way and this will have added to the stress and anxiety that the claimant was experiencing at work. While the claimant was

absent from work Ms Collinge-Lowe and Mr Appleby managed the claimant's absence reviews.

91. While the claimant has continued to suffer from frequent periods of sickness absence, he is currently in work and has done so for a continuous period since 3 June 2019. This was following a period of absence of 15 months. A meeting had taken place on 22 May 2019 to discuss the claimant's return to work and in which Mr Appleby proposed revisions to the job content of the claimant's role. He returned to work on a phased basis of 8 weeks. He currently works as a PSO but in a role which involves a restricted range of duties. Mr Appleby provided him an adjusted role which comprises of home visits, completion of home detention curfews and which involves him taking lower risk offenders who do not require risk of harm assessments.

92. While Mr Appleby has described the claimant's duties as fulfilling only 25% of at typical PSO work range, the claimant gave evidence that his full time role was 100% occupied with these tasks. Mr Appleby accepted that this was currently the case, but his concern was that work of this nature was not sustainable for the foreseeable future. He explained that the reason for the rise in this particular work was due to national government decision making which resulted in there being a massive growth of unregulated housing in the North Birmingham area. As a consequence, offenders in need of housing were being directed to this location and which resulted in an increase in offender management requirements for lower risk offenders. The claimant primarily assesses the risk posed by incoming offenders in terms of their offence type and their personal circumstances.

93. Currently, it is clear that the revised role arranged by Mr Appleby, has provided sufficient adjustments to enable the claimant to return to work and to maintain good levels of attendance. It is acknowledged that this arrangement is a temporary one, created in response to a rise in offenders moving into the North Birmingham area to occupy unregulated housing. However, Mr Appleby is understandably concerned that this position may be subject to change as Birmingham City Council improves regulation of housing provision in this area. While this adapted role may currently have an impact upon the day to day work of other PSOs, the Tribunal did not hear convincing evidence that this made the current arrangements unworkable. As a consequence, while the role which the claimant currently works in may be subject to further change due to external factors, it appears to work well.

94. The claimant has continued to argue that he needs support of a Support Worker and Mentor. The Educational Psychologist's Report of Suzanne Boyd dated 26 February 2014, did recommend that to support the impairments caused by his dyslexia, some tuition and equipment would be of assistance. In the COT3 dated 18 November 2014, paragraph 7c of the

agreement stated that the claimant would receive the assistance of a technology support worker for up to 12 hours per week as appropriate. Paragraph 7e committed the respondent to identifying a mentor who was reasonably contactable and to provide advice and assistance.

95. Mr Appleby was keen to emphasise the support provided to the claimant by management since his return to work in 2014. However, it does appear that this has been uneven and has not involved designated individuals on a long-term basis. However, while this was identified as a measure to be implemented by the respondent in the 2014 COT3, we find that on balance of probabilities, it is not a significant and ongoing issue in terms of adjustments, when compared with the other matters above, such as glasses with specialist lenses being provided and adjustments to the tasks that he was expected to do as a PSO.

96. Valerie Scott was appointed to provide assistance and guidance to the claimant upon his return to work on 3 June 2019. The claimant believes that this arrangement has not worked well and it was understood that Ms Scott had worked away from the claimant's area of work for several years. While it is noted that the claimant is unhappy with Ms Scott, it does seem that since he returned to work in 2019, he has worked effectively and we find that the allocation of those duties which he is able to do combined with the exclusion of those which he cannot reasonably do because of his impairments are the main needs to be addressed by his managers. The claimant's refusal to undertake training in relation to PSO roles did appear to result in him depriving himself of access to support which could have determined his ability to do certain tasks and whether support or adjustments would assist. The most recent Occupational Health ('OH') reports which have been prepared in 2019 provide the most up to date assessment of the claimant's health. The OH report of 11 October 2019 considers the claimant to remain fit for work with the current adjustments on a permanent basis. In this respect, unless this prognosis changes in subsequent OH reports, any changes to the claimant's current job role will need to be considered with this in mind to ensure that he continues to work effectively.

The Law

97. The relevant sections of the EQA applicable to this claim are as follows:

98. Section 13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

99. Section 23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case.

100. <u>Section*20 Duty to make adjustments*</u>

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

(2) The duty comprises the following three requirements;

(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.

102. <u>Section 21 Failure to comply with duty</u>

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

99. <u>Section 27 Victimisation</u>

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

100. <u>Section 123 Time limits</u>

(1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

101. Section 136 Burden of proof

(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.

102. The relevant authorities which we have considered are as follows:

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246.

The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Nagarajan v London Regional Transport [1999] IRLR 572, HL,-The crucial question in every case was, '*why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?*'

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: '*Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*'

Bahl v Law Society [2003] IRLR 640 – "where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But

again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups."

103. The Tribunal was also taken to the following cases by the claimant:

The Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA – an employment tribunal should not take too literal an approach to the question of what amounts to *'continuing acts'.*

Lyfar v Brighton and Sussex University Hospitals NHS Trust 2006 EWCA Civ 1548, CA – the correct test in determining a continuing act of discrimination is that set out in *Hendricks* (above), and a tribunal should look at substance of the complaints in question (as opposed to a policy or regime), and determine whether they can be part of one continuing act.

Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/17 – an employment tribunal erred in treating an employer's decision to instigate disciplinary procedures against an employee as a one-off act of racial discrimination for which the limitation period had passed.

Geller v Yeshurun Hebrew Congregation [2016] ICR 1028 – an employment tribunal failed to properly consider the possibility of subconscious or unconscious discrimination, particularly as the tribunal made findings of fact from which inferences of discrimination could have been drawn.

104. The Tribunal was taken to the following cases by the respondent:

Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL – the issue of 'less favourable treatment' cannot always be resolved without at the same time, deciding the reason why as the two issues are intertwined. It is therefore appropriate in certain cases for the Tribunal to ask the single question; was the claimant because of a protected characteristic treated less favourably?

Discussion and Analysis

Time Limits

105. The claim was presented on 25 October 2018. The claimant notified Acas on 12 September 2018 (Date A) and a conciliation certificate was issued on 25 September 2018 (Date B). This means that the earliest date that an act could be in time would be 13 June 2018. The application of time limits will be considered within the Tribunal's discussion of each separate complaint.

Direct Discrimination

106. In his first grievance of 24 June 2015, the claimant did not clearly explain that the grievance related to his disability and that a significant motivation for bringing it, was because of failure by the respondent to take into account his impairments. However, the grievance did explain that he was feeling that he was being put under enormous pressure by Steve Perry to undertake FDR training. Mr Appleby was aware of the claimant's disabilities and was the author of the letter which was sent to the claimant prior to his return to work in 2014 which discussed the adjustments which would be put in place. It also identified further issues that needed to be resolved. His actual decision in the grievance letter dated was 9 November 2015 and it recognised the ongoing duty towards making reasonable adjustments. It therefore seems clear that Mr Appleby was aware that the concerns raised could well be connected with the claimant's disability.

107. While Mr Appleby allowed the first grievance to be subject to a form of appeal, he was reluctant to allow the appeal to proceed. When he eventually did agree to the appeal taking place, he inappropriately allocated himself as the appeal hearing officer and effectively reasserted his original decision before the 'hearing' took place. In this respect, while he cannot be said to have refused the grievance, he certainly failed to allow it to progress to its conclusion in accordance with ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedure.

108. The second grievance of 14 December 2016 was obstructed by Mr Appleby from day one. He was clear in expressing his surprise that it had been raised, was insistent upon a particular GRV1 form being used despite being aware of the claimant's dyslexia and in any event, refused to allow it to proceed. The fact that in the same email he instigated a disciplinary process, demonstrates that he had no intention of dealing with the grievance. The grievance clearly referred to the impact upon his disability the duties which he was expected by management to undertake would have.

109. The disciplinary action was therefore commenced at the same time as Mr Appleby rejected the claimant's grievance which identified concerns which might impact upon his disability. As a consequence, both

grievances and the disciplinary action were connected with the claimant's disabilities and could be forms of treatment identified in section 13(1) of the EqA.

110. In determining whether this treatment was less favourable, the Tribunal; needs to consider whether it treated the claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances.

111. The claimant relies upon Cynthia Clarke as a named comparator. However, the Tribunal did not hear any evidence to suggest that she had been the subject of treatment similar to that identified by the claimant. The Tribunal has therefore considered a hypothetical comparator who was not disabled like the claimant and who raised grievances concerning management expectations to carry out roles which they believed were consistent with the PSO JD in force at the time.

112. It was clear from the evidence of Mr Appleby that management believed that the claimant was simply refusing to carry out the required elements of his job role. Moreover, in relation to the first grievance, the claimant appeared to be refusing training in relation to FDR writing. Mr Appleby gave credible and reliable evidence that he wanted the claimant to undertake training and at this stage, any necessary adjustments could be considered. While the second grievance was not accepted, this appeared to be by reason of a belief on the part of Mr Appleby that the claimant was trying to argue issues relating to the JD which he believed had been resolved in the first grievance and in subsequent discussions.

113. The disciplinary procedure was in turn provoked by the claimant's refusal to carry out tasks which the respondent believes were integral to his JD then in force.

114. In all three instances, Mr Appleby felt that as a PSO, the claimant needed to work to the relevant JD and he was clear that he would make adjustments in relation to those tasks. As a consequence, we find that Mr Appleby did not treat the claimant less favourably than any other employee without his disabilities in a similar situation.

115. On this basis, we are unable to conclude that the claimant was treated in this way because of the protected characteristic of disability or more generally. We considered whether there was any subconscious discrimination on the part of Mr Appleby but his continued acknowledgement in correspondence of the need to consider adjustments as appropriate suggested that his focus was upon his belief that PSOs needed to work to their job description. Indeed, the way in which the claimant articulated his grievances encouraged him to believe

that the application of JDs was the effective reason for their being raised. Accordingly, the Tribunal finds that the complaint of direct discrimination cannot succeed.

116. The Tribunal did consider time limits in relation to this complaint and notes that the first grievance was determined by 9 November 2015, there was a final refusal for the second grievance to proceed on 23 March 2017 and the decision to withdraw the disciplinary action on 14 August 2017. This means that the final acts in relation to these processes, even if we treat them as part of a series of continuing acts, occurred long before the 13 June 2018 which was the last date for a relevant act to have taken place in order that the claim could have been presented in time.

117. The Tribunal did consider whether it would be just and equitable to extend time. However, taking into account the claimant's earlier Tribunal claim from 2014, subsequent COT3 and the continued support of his trade union, it is reasonable to have expected him to have been aware of time limits and to have presented his claim with the relevant timescales provided by section123 EqA. Even allowing for the ongoing issues which were taking place in relation to his adjustments and his sickness absence, we did not hear any evidence which suggested that he would have been unable to present a claim at an earlier date. His dyslexia may have been an issue, but he clearly had an understanding of how Tribunal procedure operated and it would be reasonable to have expected him to have sought support from his union representatives, external legal advisors or even family and friends. We are therefore satisfied that he would have been able to present this claim within the time limits set out in section 123 and there was nothing which suggested to the Tribunal that it would be just and equitable to extend time.

Victimisation

118. The claimant was responsible for making protected acts both in relation to the presentation of an ET claim in 2014 and with regards to lodging of the two grievances in 2015 and 2016. As we have already discussed above in relation to the complaint of direct discrimination, the grievances involved potential breaches of the Equality Act 2010.

119. The claimant was subjected to a detriment due Mr Appleby's decision to refuse the second grievance in 2016 as he refused to allow it to proceed at all. However, we do not accept that the first grievance was dealt with in the same way. On this occasion, Mr Appleby did not *refuse* to hear the grievance, but failed to deal with it in a way which was consistent with good practice. However, we are not satisfied that this was because of the claimant raising a protected act.

120. In relation to the allegation that the respondent subjected the claimant to a detriment by refusing reasonable adjustments, the Tribunal considers that in relation to the second grievance, the respondent did not refuse to make adjustments. While the claimant has demonstrated that he has an issue concerning reasonable adjustments in these proceedings, the Tribunal is not satisfied that the bringing of the protected acts was the *core reason* for any failure on the part of the respondent to make reasonable adjustments whether in time or sufficiently.

121. In relation to the first grievance, Mr Appleby was of a mind that the issue was about a refusal to undertake FDR training, which if undertaken by the claimant, would then be supported with reasonable adjustments concerning the extent to which the claimant could undertake the FDR role. As has already been mentioned above, the claimant gave the impression that the first grievance was primarily about whether or not the FDR writing was consistent with the JD which he believed applied to him.

122. While the claimant was subject to a detriment in relation to the second grievance, the Tribunal is not satisfied that this was because the claimant did a protected act. The respondent had settled the earlier 2014 claim following a decision to reinstate the claimant and had agreed to a number of adjustments. It believed that it was managing the claimant with those adjustments in mind, but it can be seen that the claimant became increasingly unhappy that he was expected to work in accordance with the 2012 JD. The first grievance was effectively treated as a dispute regarding the application of a JD and the second grievance was refused because Mr Appleby believed that the claimant was seeking reopen a matter which he thought had been resolved. He was not refusing to allow the grievance to proceed because of the protected act in question and Mr Appleby's correspondence with the claimant does recognise that there is an ongoing need for reasonable adjustments. His frustration with the claimant related to the ongoing issue of the job description and not his disability and the way the claimant raised his concerns in his grievances; he gave a clear impression that it was the application of the job description which was his primary concern.

123. The Tribunal did consider time limits in relation to this complaint and as in the complaint of direct discrimination considered above, the first grievance was determined by 9 November 2015. There was a final refusal for the second grievance to proceed on 23 March 2017. Potentially the failure to make reasonable adjustments was a continuing act and as a consequence, the relationship of this particular alleged detriment is in time for reasons similar given in the separate complaint of a failure to make reasonable adjustments contrary to sections 20/1 of the Equality Act 2010, below. This means that the final acts in relation to the detriment of refusing the second grievance occurred long before the 13

June 2018 which was the last date for a relevant act to have taken place in order that the claim could have been presented in time. The detriment of a refusal to make reasonable adjustments is however, in time.

124. The Tribunal did consider whether it would be just and equitable to extend time in relation to the refusal of the grievances. However, taking into account the reasons given concerning this matter in respect of the complaint of direct discrimination, the earlier Tribunal claim from 2014, the COT3 and the continued support of his trade union, it is reasonable to have expected him to have been aware of time limits and to have presented this complaint in time.

<u>Reasonable adjustments</u>

125. The potential PCPs was identified in the list of issues as repeated below:

'Requiring the claimant to undertake the following duties: risk assessments, various reports requiring the claimant to use and interpret information from VISOR (specialist computer database in relation to high risk offenders), aural hearings, recalls, lifer reviews, MARAC meetings, Mappa screening and court work. These all being duties that the claimant did not, in fact, undertake but which he was being requested to undertake by the respondent?

126. It is understood from the evidence of Mr Appleby that the aim of the respondent probation service was to develop a PSO workforce which was flexible and which could adapt and if necessary undertake the duties described by the claimant as being PCPs. This was the case even if PSOs in general, or in specific work areas might not routinely encounter these duties on a day to day basis.

127. In determining whether the requirement to carry out (or be available to carry out) these PCPs, it is probably that some of them would have placed the claimant at a substantial disadvantage. This did appear to primarily by reason of the claimant's dyslexia, stress and anxiety. While the other conditions which constituted his disabilities may well have been relevant, it is the specific learning disorder of dyslexia and the stress and anxiety concerning the impact of all of his conditions, which were the reason for the disadvantage. The question to consider was therefore the extent to which the respondent adapted or could have adapted the PSO role and when these adaptations took place, if at all.

128. There is no dispute that the respondent knew of and accepted the disabilities in question. It had been on notice of the relevant conditions as a result of the earlier sickness absences, the Educational Psychiatrist's report, the 2014 Tribunal proceedings and COT3 and the subsequent OH reports.

129. Having heard evidence from Mr Appleby, there is a recognition on the part of the respondent that some of the PCPs identified could have been removed in relation to the claimant's role. VISOR and attendance at oral hearings were largely things that the claimant would not need to be involved with. Matters such as MARAC, Mappa and Lifer reviews were matters where the claimant could have colleagues cover this work for him or provide suitable support, It is unfortunate that these matters could not be resolved until his absence from work from March 2018 until July 2019. By the time the claimant returned to work, he had presented these proceedings to the ET.

130. To assist the claimant in returning to work, a role has been created, albeit on a temporary basis which has sought to give him the duties highlighted in the list of issues. However, these had not been provided at the time the proceedings were issued. The respondent has been on notice of a need to make reasonable adjustments since 2014 when the COT3 was agreed. This leaves the Tribunal to conclude that there was a failure to make reasonable adjustments.

131. As discussed in the findings of fact above, the Tribunal finds that the reasonable adjustments which were necessary to support the claimant, related to the removal of specific tasks from his job role, even on a temporary basis, to allow him to return to work. While the question of mentors and support workers has been found to be uneven, the provision of these adjustments were not material in the substantial disadvantage provided. It is noted that when the claimant returned to work, a mentor was provided with Valerie Scott assisting him. She does not appear to have been helpful to the claimant, yet nonetheless, he has continued to work satisfactorily in his adjusted role. While there was a failure to provide an agreed mentor until the claimant returned to work in June 2019, it does not appear to have been an adjustment that was material in alleviating the disadvantage that he experienced in work.

132. In terms of support workers, there was evidence that the claimant was provided with appropriate IT from time to time following his return to work in 2014 and following the agreement of the COT3 in November 2014. It was clear that the claimant by refusing to undertake training which he was requested to do by line managers and which led to him raising his grievances, would have assisted in the identification by the trainers and management of the support that he needed. As a consequence, the claimant's fixation upon the changing job descriptions made it difficult for management to provide the necessary support.

133. It is encouraging to see that Mr Appleby and the claimant have worked together so that the claimant can return to work into an adapted PSO

role. It seems likely that this role may need to be revisited in the future as developments take place with regard to the unregulated HMOs in Birmingham. Hopefully, the parties can work together as these changes take place so that suitable forms of working can be arranged and to accommodate the reasonable adjustments necessary to support the claimant in work. However, while this may be the case, the Tribunal does find that there had been a failure by the respondent to make reasonable adjustments at the time the proceedings were presented in October 2018 while the claimant remained on long term sickness absence.

134. In terms of time limits, the respondent's duty to provide the reasonable adjustments was a continuing one which remained unfulfilled at the time of the presentation of claim. The claimant was on long term sickness absence and it was the implementation of the reasonable adjustments identified in June 2019 which allowed his return to work. As a consequence, until this implementation took place, there was a continuing act with regards to the failure to provide those adjustments which have been identified as reasonable. The claim form was presented before the date of implementation and the claim insofar as it relates to a failure to make reasonable adjustments was not presented outside the relevant time limits.

Conclusions

135. The Tribunal finds that the claim of direct discrimination by reason of the claimant's disabilities is dismissed because he did not suffer less favourable treatment by reason of his disability. In any event, this complaint was not presented in time and it was not just and equitable to extend time.

136. The Tribunal finds that the claim of victimisation is unsuccessful and dismissed in that although protected acts identified were made, the claimant did not suffer detriments by reason of these protected acts having taken place. Additionally, the detriment relating to the refusal to allow the grievances to proceed, was not presented in time and it was not just and equitable to extend time. The detriment that there was a refusal to make reasonable adjustments was in time.

137. The Tribunal finds that the claimant's claim succeeds in relation to the complaint of a failure by the respondent to make reasonable adjustments in relation to the removal of those duties from his PSO job role which placed him at a disadvantage before this claim was presented to the Tribunal.

138. The outstanding issue of remedy in relation to the successful claim of a failure to make reasonable adjustments will be determined at a remedy

hearing on a date to be advised with a hearing length of 1 day in the Birmingham Employment Tribunal.

Employment Judge Johnson

7 April 2020………………….