



EMPLOYMENT TRIBUNALS

Claimant: Glenn Parkes

Respondents: Secretary of State for Justice

RESERVED JUDGMENT

Heard at: Manchester and by CVP **On:** 12 – 15 April 2021;
16 June 2021;
21 June 2021(In Chambers)

Before: Employment Judge Holmes
Mrs S Humphreys
Dr B Tirohl

Representatives

For the claimant: Miss M Stanley, Counsel
For the respondent: Mr D Bunting, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The claimant was unfairly dismissed.
2. The respondent discriminated against the claimant because of something arising in consequence of his disability, by dismissing him, which the respondent has not justified.
3. The claimant is entitled to a remedy. The Tribunal proposes to make no reductions to any awards on the basis of Polkey or contributory fault.
4. The parties are to seek to agree remedy, and, in default, to narrow and define the issues that the Tribunal will be required to determine on remedy. In the event that a remedy hearing is required, they are to notify the Tribunal by **19 November 2021** that a remedy hearing is required, what the issues to be determined will be, to provide an estimated length of hearing, and dates to avoid. They are also to make suggested, and if possible agreed, case management orders for the remedy hearing.

REASONS

1. By a claim form presented on 22 February 2019 the claimant brings claims of unfair dismissal, and disability discrimination. The claims arise from the termination of the claimant's employment on 12 January 2019, on the grounds of capability. The disability discrimination claims take two forms, based on the alleged disability of dyslexia and dyspraxia.

2. At a preliminary hearing on 11 June 2019 the Tribunal identified the issues as follows:

1. Unfair Dismissal – Capability – Performance

(i) Can the Respondent show that the reason or principal reason for the dismissal was one of the five potentially fair reasons under section 98(1) of the Employment Rights Act 1996 (“ERA”), namely capability?

(ii) If the reason was capability, in all the circumstances, did the Respondent act reasonably in treating that reason as a sufficient reason for dismissal? In this regard, there is no burden of proof, but the Tribunal will consider:

(iii) Did the Respondent genuinely believe that the Claimant was incapable of performing his role?

(iv) Did the Respondent have reasonable grounds for sustaining that belief?

(v) Was the decision to dismiss the Claimant within a band of reasonable responses available to a reasonable employer in the circumstances?

(vi) Did the Respondent consider if there was any suitable alternative employment available within its organisation, such as a Probation Officer role or a Senior Probation Officer role?

(vii) If it is found that the Claimant was unfairly dismissed:

(viii) Would the Claimant have been dismissed in any event and, if so, what is the appropriate reduction to the amount awarded to the Claimant under **Polkey**?

(ix) Was there contributory fault on the part of the Claimant and if so, what is the appropriate reduction to the amount awarded to the Claimant to reflect his contributory conduct?

2. Discrimination arising in consequence of disability (s15)

(i) Did the Claimant have a qualifying disability the Claimant's dismissal was determined on/around 12 October 2018 and/or when the Claimant's appeal was determined on/around 7 December 2018?

(ii) Did the Respondent have actual or constructive knowledge of the constituent facts / elements of the Claimant's alleged disability at the material time(s), on/around 12 October 2018 and/or on/around 7 December 2018?

(iii) The Claimant contends he was treated unfavourably by the Respondent because of his dismissal, as communicated on/around 12 October 2018 and with effect on 12 January 2019. Was any unfavourable treatment because of something arising in consequence of his disability (i.e. did the Claimant's performance shortcomings arise in consequence of his disability)?

(iv) If so, was the Claimant's dismissal by the Respondent justified as a proportionate means of achieving a legitimate aim (that aim being the efficient running of its undertaking) based upon the knowledge the Respondent had at the material time(s)?

3. Whilst the issues relating to remedy were identified, the Tribunal has, with the agreement of the parties, only considered liability at this stage. The issues of any **Polkey** reduction, or contribution, however, have been considered as part of determination of the liability issues.

4. The hearing started on 12 April 2021. Evidence was heard over 4 days, and the hearing was then adjourned until 16 June 2021 for closing submissions. The Tribunal then deliberated in chambers on 21 June 2021. Judgment is now given, with the Tribunal's apologies for the delay, occasioned in part by restricted access to judicial premises and resources, and, in part, more recently, by software issues affecting the IT of the Employment Judge.

5. That said, the Employment Judge feels obliged to record his dissatisfaction with the final hearing bundle. Whilst some repetition has been avoided, there are still far too many copies of the same documents at various points in the bundle. Further, entire documents have been included, with no real purpose – a prime example of which is the wholly unnecessary inclusion of the whole of the User Guide for HRBPS, Line Managers and Senior Establishment/Divisional Managers at pages 1558 to 1609 of the bundle. The same can be said in relation to the Adoption Leave Policy, all 36 pages of which are included in the bundle. It is doubtful why any of this was necessary, and the inclusion of all of it certainly was not. It is perhaps a consequence of the age of the electronic bundle that those preparing bundles are less conscious of content and bulk, as there is no physical set of files to be printed, copied and put into ring binders. An overfull electronic bundle, however, is no more easy to navigate than a hard copy. Rather more discrimination, and thought as to what is really relevant to the issues to be determined, is required, and greatly to be encouraged. Not every disclosed document has to be in the bundle, and agreed facts and chronologies can short circuit the need for the Tribunal to try to discern what actually happened from a torturous trawl through an email paperchase over many pages of a sprawling bundle.

6. The claimant was represented by Ms Stanley, of counsel, and the respondent by Mr Bunting, counsel. The claimant gave evidence and called Mick Hooson, his trade union representative as his witness. The claimant had made two witness statements, one being his disability impact statement (pages 50 to 54 of the bundle), and the other dealing with the claims as a whole. The respondent called Lynda Marginson, Divisional Director for the North East, who heard the claimant's appeal as his only witness. The

Tribunal accordingly did not hear evidence from Mohammed Farooq, the claimant's line manager, who carried out the dismissal. He was not available for the hearing, and had made no witness statement, but no application for a postponement was made. Having heard the witnesses, read the documents and considered the submissions of both parties, the Tribunal unanimously finds the following relevant facts (the abbreviations and acronyms used in the documents in the bundle are explained in the Annexe to this judgment):

- 6.1 The claimant commenced employment as a Probation Officer on 10 January 2000. The claimant commenced employment as a Senior Probation Office in May 2005.
- 6.2 The claimant's employment transferred to the National Probation Service (a new business unit of HM Prisons & Probations Service) on 1 June 2014.
- 6.3 The claimant obtained a postgraduate Diploma in Law in 2014. He commenced full-time Partnership Manager role in February 2015. He remained under the line management of Nisha Bakshi Assistant Chief Officer – Head of BRO (Bury, Oldham and Rochdale) Cluster. Whilst the SPO and Partnership Manager roles are on the same pay band, they are different. The former managers staff in the Offender Management Unit, whilst the latter works more strategically with external agencies and senior managers.
- 6.4 The claimant was provided with some 2-hour training sessions on organising emails in August 2015. He was also given training in organising paper files.
- 6.5 Nisha Bakshi wrote to the claimant to commence a formal capability process (page 421 of the bundle) on 2 December 2015.
- 6.6 The claimant went off on sick leave due to stress (see page 398 of the bundle) on 9 December 2015.
- 6.7 The claimant submitted a grievance about Nisha Bakshi (page 423 of the bundle) on 17 March 2016. The claimant complained in this grievance that he was overworked, and was not given adequate resources to support him which led to his ill-health and absence from work. The grievance was upheld , and the claimant requested a transfer so that he would no longer be managed by Nisha Bakshi.
- 6.8 The claimant returned to work following a period of long-term sick leave (see page 265 of the bundle) on 2 June 2016.
- 6.9 On 8 June 2016 an informal performance improvement plan ("PIP") was put into place (page 292 of the bundle).
- 6.10 The claimant expressed concerns to Nisha Bakshi about black colleagues not thriving in the Cluster (page 270 of the bundle) on 15 June 2016.

- 6.11 On 3 August 2018 the claimant had his final supervision with Nisha Bakshi (page 342 of the bundle) . The claimant confirmed he was still fine to work with her, and for her to delegate work.
- 6.12 Fuschia Allen (Effective Practice Manager) was the appointed as the claimant's Line Manager on 3 August 2018 (page 398 of the bundle).
- 6.13 On 18 October 2016 the claimant had a Supervision with Fuschia Allen, which included a 'Final Review of the Informal PIP (page 337 of the bundle).
- 6.14 Fuschia Allen invited the claimant to a formal capability meeting on 27 October 2016 , which was subsequently postponed twice (page 185 of the bundle).
- 6.15 The claimant raised written concerns about Fuschia Allen on 7 November 2016 (pages 112-113 of the bundle).
- 6.16 The claimant asked that the capability process be conducted by another ACO, if possible, someone from outside the GMP area. On 7 November 2016 the claimant raised written concerns about Fuchsia Allen (page 112 of the bundle).
- 6.17 On 7 November 2016 an occupational health report was obtained on the claimant (see pages 73 to 75 of the bundle). In that report the medical issues were the claimant's low mood and mental health , which he attributed, in part at least , to pressures at work and stress.
- 6.18 The claimant attended a supervision meeting with Fuschia Allen on 21 November 2016, for which the claimant arrived late, and was cut short (pages 102 to 103 of the bundle).
- 6.19 The claimant accused Fuchsia Allen of making a 'racist innuendo' and confirms he will be asking Roz Hamilton, the Deputy Director for the North West, to appoint a new Line Manager for him.
- 6.20 Mohammed Farooq (Head of Cluster for Stakeholder Engagement) was then on 29 November 2016 appointed as the claimant's Line Manager (page 109 of the bundle).
- 6.21 The claimant raised grievances grieved, complaining of racism and sexism, and other matters on 9 December 2016 (pages 416 to 428 of the bundle).
- 6.22 The claimant had his first supervision meeting with Mohammed Farooq on 16 December 2016 , and his next on 22 December 2016 .
- 6.23 The claimant then had an informal capability meeting with Mohammed Farooq 20 February 2017 (page 527 of the bundle).
- 6.24 On 28 February 2017 the claimant provided Mohammed Farooq with a written summary of his evidence in relation to each of the areas of concern regarding his performance which had been discussed in that meeting (pages 544 and 555 of the bundle). A further meeting was then held on 1 March 2017.

- 6.25 Mohammed Farooq then on 8 March 2017 wrote to the claimant confirming that the outcome of the informal capability hearing was that formal capability proceedings would be commenced (pages 591- 592 of the bundle).
- 6.26 On 20 March 2017 the six week capability review period commenced, with objectives from the Action Plan to be achieved by staggered dates, to be agreed at supervisions (page 724 of the bundle).
- 6.27 A formal capability review meeting was held on 18 May 2017 (pages 856 to 864 of the bundle). The issues discussed in that meeting were how the process would be managed, going forward, and how the claimant had performed that far.
- 6.28 Mohammed Farooq concluded that the claimant had not made sufficient improvement in his performance , and consequently issued a first written warning on 25 May 2017 (pages 814 to 819 of the bundle).
- 6.29 Objectives were set by Mohammed Farooq for a further formal capability period from 30 May 2017 to 27 June 2017 , on 30 May 2017 (page 882 of the bundle).
- 6.30 On 1 June 2017 the claimant emailed Mohammed Farooq confirming that he no longer had any confidence in his line management (page 836 of the bundle).
- 6.31 The claimant appealed his first written warning , and on 13 June 2017 set out his grounds of appeal (page 871 of the bundle).
- 6.32 A further formal capability meeting was held on 30 June 2017 (page 944 of the bundle).
- 6.33 On 6 July 2017 the claimant's appeal against his first written warning was heard by Roz Hamilton, who dismissed the appeal on 21 July 2017 (page 1002 of the bundle).
- 6.34 Following the meeting on 30 June 2017 the claimant was issued with a final written warning (pages 919 to 920 of the bundle) on 12 July 2017. The period of the warning was 12 months effective from 12 July 2017. The claimant was informed that a new performance improvement plan would be discussed and implemented, supervisions would continue, and review periods would be set. A referral to occupational health was also to be discussed, and the claimant was warned that failure to improve to a satisfactory standard could result in his case being referred to the next stage in the relevant procedure, which could ultimately lead to his dismissal. The claimant was advised of his right to appeal against this warning, and did so on 14 July 2017 (page 958 of the bundle).
- 6.35 On 25 July 2017 Mohammed Farooq sent the claimant a draft of the proposed OH referral, which he had prepared with the assistance of HR (pages 1011 to 1014 of the bundle). The claimant replied on 28 July 2017, raising some objections, but indicating that he would raise these matters with the OH adviser in the consultation. The claimant continued to have supervisions with Mohammed Farooq during August 2017, but he was then suspended on unrelated conduct

grounds on 11 August 2017 (page 1034 of the bundle). This suspension was carried out by Mohammed Farooq.

- 6.36 Notwithstanding his suspension the claimant continued to have supervision meetings with Mohammed Farooq , having one on 20 September 2017 , with another scheduled for 18 October 2017 (although it is unclear if this took place). During this period the claimant continued to pursue his appeals, in respect of his first written warning, and the final written warning.
- 6.37 In relation to the disciplinary investigation in respect of which the claimant was suspended, this was conducted by Richard Moses, divisional complaints manager. He concluded that save in respect of one allegation, there should be no disciplinary action against the claimant. He had prepared his report, setting out his conclusions, and sent it to Ross Hamilton on 17 November 2017 (pages 1074 to 1082 of the bundle). It was not, it seems, at that stage, sent to the claimant.
- 6.38 In relation to the final written warning , that appeal was heard by Roz Hamilton on 1 December 2017. The claimant was accompanied in the appeal hearing by a trade union representative, Mike Gaskell. Whilst there are references in other documentation to notes of this appeal hearing, none appear to be included in the hearing bundle.
- 6.39 Roz Hamilton's decision was to reject the appeal. Draft versions of her outcome letter appear in the bundle, and were commented upon, but the ultimate version sent to the claimant is dated 2 January 2018 (pages 1472 to 1475 of the bundle). The claimant's suspension was lifted around 18 December 2017, but it is hard to identify any formal document in which he was advised of this.
- 6.40 The claimant technically returned to work following this suspension on 18 December 2017, but remained on annual leave until 4 January 2018, when he physically returned .
- 6.41 A new PIP was agreed and commenced on 29 January 2018 (pages 1478 to 1484 of the bundle) covering the period to 9 April 2018. In it, the claimant's objectives to be achieved in that period included :

"Section Two: Outline of Broader Objectives for the Period

2.1 Glenn to do the following piece of work over the next 3 months in relation to Adult Safeguarding.

2.2 Write and deliver a presentation/briefing for the 3 teams across the cluster on the Care Act and how this applies to the role of NPS Staff.

2.3 Complete a 7 minute briefing on the Care Act as a reference document (this could be used as the basis for the above.

2.4 Write and deliver a presentation/briefing on the MCA (Competency Framework below) which should include best practice for NPS staff in partnership working where the MCA is applicable.

2.5 Input to all 3 teams (Bury, Rochdale and Oldham) with regards to their borough's Safeguarding Adults Policies and Procedures and NPS staff roles and responsibilities related to this.

2.6 Act as Rate card SPOC for the cluster and also the Accommodation SPOC. Riverside is due to go live in January - Glenn to produce guidance for staff on referral pathways as well as ensuring staff understand the eligibility/suitability criteria and when/how they can access the accommodation provision via the rate card.

2.7 BRO has been able to obtain Accommodation and Employment information. Glenn to complete an analysis of the data report in narrative form (date to be agreed in supervision with MF), split by each office so that we can see what the picture is in each of the 3 boroughs with regards to our offenders' accommodation and employment status. This would then help inform where we need to concentrate our efforts, both in terms of accommodation and employment.

2.8 Implement EMS Audit Findings (Audit Paper attached). It would require reading all relevant guidance, setting objectives re deliverables required, monitoring systems and engagement with staff and managers via briefings.

*EM Risk Management
Audit Final Report 30*

Section Three: Mental Health and Learning Disability

3.1 Identify national and divisional priorities

3.2 Scope Mental Health/LO provision available across the 3 BRO boroughs, identify the referral pathways, devise a strategy for OMs to be able to access services for service users; this may include developing agreements with providers as to how the NPS will work with the providers as well as Information Sharing Agreements.

3.3 Attend the Suicide Prevention Group in Oldham. Identify the equivalents in Rochdale and Bury and identify mutual benefit for NPS engagement.

3.4 Identify which services are offered and by whom, for BRO offenders at MSMC and Oldham Magistrates at point of sentence

3.5 Identify and implement next steps regarding the Bury Learning Disability Strategy and identify equivalents in Rochdale and Oldham

Section Four: Accommodation

4.1 Scope accommodation provision across the 3 BRO boroughs through making links with the 3 Homelessness Units, Social Housing including Housing Associations and Private Registered Landlords/use of Bond Schemes

4.2 Identify whether Information Sharing Agreements/use of RMX are required and collaborate on developing clear referral pathways, include use of Accommodation lead PSOs (now established in each LOU) and develop their links to providers.

4.3 Check whether existing SLAs with housing providers are fit for purpose and update if required. This would involve identifying the areas that should be included/excluded in existing SLAs and would be in negotiation with the housing providers, management colleagues and HoC.

4.4 Develop a briefing sheet for OMs in relation to Bond Schemes

4.5 Develop a briefing sheet/presentation regarding what will be available via the Riverside provision due to be available via the Rate Card

4.6 Identify the opportunities that might be afforded to our service users via the accommodation agenda within GM Devolution

Section Four: Police Custody Triage

4.1 Establish what the interventions will be for offenders at point of arrest in relation to integrated assessment

4.2 Identify what collaboration is required with partner agencies (including the CRC) within this model across BRO so that NPS service users benefit appropriately, from the Custody & Healthcare Liaison and Diversion process

Section Five: NPS Cluster - Rochdale

5.1 What's the profile of partnerships in Rochdale? What we mean by this is - who are ETE and other partners, their capacity/resource issues and extent of their engagement (during the last 6 months) with public protection/reducing re-offending agenda?

5.2 Confirm communication with Cluster staff to raise their awareness of partnerships, what's available and how to access it.

Section Six: VOS

6.1 Develop a presentation to be delivered at both Bury/Rochdale and Oldham YOS Boards which highlights the key aspects of the Transitions protocol. This will require understanding the current picture/compliance with BRO manager colleagues who are the YOS links.

6.2 Identify any key issues which need to be overcome in order that the transition protocol is being adhered to both by YOS and NPS. Discussion to be held with HoC prior to the delivery of presentations to both Boards.

Section Seven: Oversee Implementation of:

1. Slip Rule - Practice Guidance

Briefing

Note Approach to Mc

2. OMiC - Next Steps (working closely with Resettlement Lead)

3. Partnership implications of revised HDC Guidance

Briefing Note_HDC

PI_Jan 18.doc

Section Eight: Learning and Development - Attend Training Events:

- The role and statutory duties of an Approved Mental Health Practitioner (AMHP)*
- The Care Act 2014*
- Transitions - the journey to adulthood*
- Mental Capacity Act 2005 - best interest decision making process and guiding principles*
- Introduction to Personal Budgets*
- Statutory duty to safeguard adults*
- First Line Manager Training*
- Attend L & D sessions with Steve Port, QDO*
- Attend Risk Assessment Workshops/SPO Countersigning Training*
- Complete all mandatory training (Safeguarding Children, Adult, Parole and Oral Hearings)*
- Others in line with developing need"*

6.42 Pursuant to the claimant's suggestion, Mohammed Farooq's approach this time was less 'hands on', so the claimant could aim to simply get objectives achieved by the end of the relevant period (rather than on a staggered basis as before).

- 6.43 The claimant and Mohammed Farooq continued to have supervision meetings throughout January, February and March 2018.
- 6.44 On 17 January 2018 OH Assist provided their report dated on that day, following the referral that had been made in August 2017. It is unclear when Mohammed Farooq first saw this document, and it appears that he only became aware of it on or around 6 April 2018.
- 6.45 On 9 March 2018 a disciplinary hearing was held in relation to the matters for which the claimant had been suspended in August 2018. Mohammed Farooq conducted that hearing, and the claimant was represented at it by Mick Hooson, his trade union representative.
- 6.46 Following the investigation report by Richard Moses, Mohammed Farooq agreed that one allegation of misconduct against the claimant had been established, but concluded that as the claimant was going through a performance management process in which the issues that had led to this instance of misconduct were being addressed, he did not feel it necessary to impose any additional separate sanction. The outcome of disciplinary hearing, therefore, was that no penalty imposed, as was confirmed in the outcome letter dated 22 March 2018 (pages 1514 to 1516 of the bundle).
- 6.47 The claimant's formal capability meeting was scheduled for 9 April 2018, but was adjourned, there being some confusion as to who was aware of the date. In any event Mohammed Farooq only saw the OH report from January 2018 on 6 April 2018.
- 6.48 The meeting took place on 19 April 2018, and the notes are at pages 1824 to 1836 of the bundle. The claimant was represented by Mick Hooson his union representative, and Mohammed Farooq was supported by Gill Hannay, HR caseworker, who had been advising and supporting Mohammed Farooq throughout this process.
- 6.49 After an initial discussion as to the precise procedure that was being followed in this process (said by Mohammed Farooq to be "legacy" procedure), Mick Hooson, who has some personal familiarity with the conditions, suggested that the claimant's difficulties may be attributable to undiagnosed dyslexia or dyspraxia, and proposed that he be assessed for these conditions. This was the first time that anyone had made such a suggestion. The claimant himself had not previously considered that he may suffer from either of these conditions. Mohammed Farooq agreed to take this into consideration, and to seek HR advice upon it.
- 6.50 The meeting then moved on to a discussion of each of the various areas of performance and objectives been set for the claimant, and the degree to which he had or had not achieved the required standard. The claimant's position was that he was performing satisfactorily, but there was simply too much work to do.
- 6.51 After some considerable discussion, the claimant, who had not attended with any written evidence, was to provide any further written evidence of the work

that he had been doing to Mohammed Farooq within the next day or so , and he intended to give a decision within seven days. Mohammed Farooq was also to look into and seek advice upon whether there should be any further occupational health assessment.

- 6.52 Following the meeting on 19 April 2018 Mohammed Farooq on 23 April 2018 sent the claimant an email (pages 1554 and 1555 of the bundle) asking him to complete a document attached to the email in table form , setting out his comments on the various aspects of his performance and objectives discussed in the meeting .
- 6.53 Further Mohammed Farooq sought advice from Gill Hannay as to a further potential referral to OH. By email of 26 April 2018 she provided some advice to him as to the possible wording for a referral to seek advice on issues relating to dyslexia and dyspraxia.
- 6.54 There was further meeting between the claimant and Mohammed Farooq on 30 April 2018 (see notes at pages 1612 and 1613 of the bundle) , at which the claimant updated Mohammed Farooq on where he was in relation to the action plan , and he in turn confirmed that there would be a further referral to OH.
- 6.55 Following approval for the obtaining of this further report from OH, Mohammed Farooq wrote again to the claimant on 21 May 2018 (page 1628A of the bundle), confirming what had been discussed in the meeting on 19 April 2018 , and that a further occupational health referral had been made. Whilst Mohammed Farooq said that he would suspend the making of his decision pending receipt of that further report, he would nonetheless be basing his decision upon the claimant's performance up until 9 April 2018, as this was the end of the review period agreed on 29 January 2018.
- 6.56 In that letter Mohammed Farooq also pointed out that he had asked the claimant on 23 April 2018, to complete a document attached to his email of that day, which the claimant had failed to do. He would therefore be basing his decision upon the claimant's performance up until 9 April 2018, together with any further documentation provided up until 30 April 2018.
- 6.57 The same day, Mohammed Farooq prepared a document entitled "Interim Outcome of Capability Dismissal Meeting (19 April 2018)", which is at pages 1961 to 1972 of the bundle. It is unclear when it was sent to the claimant , and his union representative. In this document Mohammed Farooq sets out his findings as to the claimant's performance over the January to April review period, against the objective set in January 2018.
- 6.58 In overall terms, his conclusion was that the claimant had not achieved most of them, and had not evidenced what he had done to achieve them. In particular, he wrote this in relation to the specific objectives set out in the Action Plan in January 2018.

5. Review of Evidence

5.1 The Plan sets out each of Mr Parkes objectives with clarity and coherence, so as to make it easier for them to be interpreted and delivered. The draft Plan was fully discussed with Mr Parkes in supervision (26th January 2018) prior to its implementation (29th January 2018). At that meeting, Mr Parkes had the opportunity to go through all the objectives and expectations and it was further clarified (by Mohammed Farooq) that he could come back with specific queries relating to any aspect of the Plan during the period of its operation. (Supervision had provided another forum for such discussions). The review of evidence is completed in relation to each of the eight sections in the Plan.

Section One

Most of this summarises some of the initial/very broad expectations of Mr Parkes as he returned to work following suspension. He attended the meetings set out in this section (even though feedback from them was not provided in line with the agreed timescales). One of the issues to note with respect to his feedback is that it often consists of an overview of discussions at meetings (as in the case of feedback from Housing Conference - 26th January 2018) without sufficient focus on what is relevant to the NPS at different levels of operational practice and how the provision/services in question could be appropriately accessed to support offender management. Mr Parkes concludes the feedback from the Conference: 'This is a piece of work which I intend to prioritise and give my immediate attention'. No evidence was presented at the hearing (19th April 2018) to suggest it had been progressed at all. It is equally pertinent to state that accommodation has been a recurring objective throughout his capability process without any tangible progress being made to bring it to closure to support offender managers in the Cluster.

1.4 - is important in that it confirmed there had been no change in the use of NSI for women's provision in the BRO Cluster as previously claimed by Mr Parkes (this was a specific objective in one of his previous Plans).

1.5 - Mr Parkes broadly complied with the requirement to countersign OASys at Bury, but some of this work was subject to reminders to ensure the Cluster did not miss the deadlines. He did not consistently attend the Bury Office on Tuesdays as originally agreed (there was not always a clear explanation given).

Section Two

There are a number of significant and complex areas of probation practice in this section which required Mr Parkes to lead on to offer specific guidance and leadership, at times working closely with other professionals to reflect a clear and holistic perspective on what needed doing. To achieve successful delivery of these objectives, Mr Parkes would need to demonstrate a combination of technical knowledge (e.g. Mental Capacity Act) and offer (in consultation with others) a practice framework to drive offender management.

He has presented just two documents as evidence: a Safeguarding Presentation and a handout relating to Riverside Accommodation. .

The Safeguarding Presentation is extremely rudimentary with a very broad overview of some of the issues in the form of headlines. A detailed analysis of it shows there is a degree of dissonance between the Outlined Objectives for the session and what is actually delivered. It does not fully reflect the needs of the audience in this case. It should have been designed for probation staff that has to deal with the complexities of interpreting difficult legislation and thresholds to provide their offenders access to the relevant safeguarding and mental health provision. The Slide on the MCA, for example, is inadequate in that it does not reflect on the 2 Step Test as well as the 5 Key Principles. There should have been further emphasis on mental capacity being time and decision specific. The presentation also needed to provide examples of when the MCA may be relevant, beyond the issue of sexual assault Case studies and specific information regarding the application of thresholds and professionals from other agencies who could help and support with this work would have gone a long way towards serving the overall purpose on this occasion. It is highly questionable whether the presentation would satisfy the Adult Safeguarding Boards .

.Jo Woods is the NW Divisional Lead for Suicide Prevention. There is no evidence to suggest she was consulted in the preparation of the presentation. It further appears the suicide statistics used in discussions related to the GM Suicide Audit (2015). Mr Parkes should have used more recent statistics, relating them to the BRO Cluster and discussions of what strategies offender managers could adopt to prevent suicide amongst their cohort of offenders.

The other document is equally basic, providing a broad overview of Riverside Accommodation. It is assessed as 'basic' in that it would not appear to provide a significant contribution to the complexities of accessing information/resources in the community to support the delivery of offender management.

Specific evaluation of key strands in Section Two:

2.2 - the presentations were delivered but as stated above. largely not fit for purpose 2.3 - no evidence provided

2.4 - inadequate evidence (see above)

2.5 - no evidence provided

2.6 - some evidence of progress made (as above)

2.7 - no evidence provided

2.8 - Mr Parkes submitted the powerpoint presentation (Electronic Monitoring Risk Management Plan Audit - West Midlands Case Review Findings 20/11/2017) that was attached to the Plan.

The objective was to 'Implement EMS Audit Findings (Audit Paper attached). It would require reading all relevant guidance, setting objectives re deliverables required, monitoring systems and engagement with staff and managers via briefings'.

No evidence was provided to support the delivery of the stated objective (2.8).

Section Three

This section contains another set of significant practice issues which would rely on Mr Parkes' combining technical knowledge of legislation with practical application to operational offender management practice. The evidence submitted by Mr Parkes consists of a handout entitled 'Partnership Provision in BRO Cluster including MH and LD Provision'. It provides a basic overview of some of the issues (including ETE) and some contact details.

Specific evaluation of key strands in Section Three:

3.1 - there is no evidence of national and divisional priorities (both of which could reasonably be expected to reflect the objectives in the NPS NW Business Plan 2017/18).

3.2 - the document presented as evidence provides a basic overview of what is available, but there is little in it that could be defined as a coherent strategy to work at service level. There is insufficient attention to detail in terms of the complex issues around Service Level Agreements/Information Sharing with equally little meaningful evidence of Mr Parkes' engagement with providers to influence the accommodation/ETE/MH/LD agendas. The document provides a narrative of things as they are at present, but not how a strategy could be developed/has been implemented to re-shape the provision to improve access and effectiveness for NPS offenders. It is not managing (even less leading) but simply reporting on what is there. A quote from the document presented by Mr Parkes would help to illustrate some of the issues: 'The SPOCs and I attended an Accommodation Briefing Salford Probation (28/03/18). This looked at the new Homelessness Reduction Act (HRA) which came into effect 03/04/18. They were tasked to share this with their colleagues and this has been confirmed'. A Partnership Manager could reasonably be expected to take the lead in interpreting the implications of the HRA for the Head of Cluster and his management colleagues, setting out a clear strategy to improve knowledge and understanding to drive proactive partnership engagement within BRO so that the Cluster could achieve demonstrable outcomes (e.g. reduced homelessness to improve public protection).

3.3 - some/limited activities mentioned during supervision, but no evidence presented in terms of specific work done across BRO to '... identify mutual benefit for NPS engagement'.

3.4 - no evidence provided

3.5 - no evidence provided in terms of specific focus of this strand: 'Identify and implement next steps regarding the Bury Learning, Disability Strategy and identify equivalents in Rochdale and Oldham'.

Section Four

This area of work has been part of Mr Parkes' role and capability process for sometime. He was expected to provide substantial evidence of progress in relation to it on this occasion to resolve a long-standing issue with critical implications for offender management and public protection.

4.1 - no evidence presented in relation to scoping •

... accommodation provision across the 3 BRO boroughs through making links with the 3 Homelessness Units, Social Housing including Housing Associations and Private Registered Landlords/use of Bond Schemes'. The handout relating to Riverside Support Services makes reference to Bond Schemes but there is no systematic scoping of accommodation provision across the different housing sectors.

4.2 - no evidence provided

4.3 - no evidence provided

4.4 - no evidence of a specific Briefing Sheet as required but reference to Bond Schemes in the handout (4.1). In reality failing to deliver on the stated purpose of this objective.

4.5 - Briefing sheet provided (see 4.1)

4.6- no evidence provided. This is a big area of developing work in Greater Manchester with significant implications for how offender management is delivered across GM, so therefore an essential part of any Partnership Manager's brief.

Section Five

No evidence of achievement of this objective in its entirety.

Section Six

There was some progress made in relation to the objectives in this section. Mr Parkes developed a presentation but this was not delivered due to organisational issues which required the Head of Cluster (Nisha Bakshi) to address with the YOS Senior Management. However, YOS has been a consistent theme in Mr Parkes capability process and the level of progress has been variable (e.g .. he has not successfully negotiated YOS's engagement with the Protocol, even though some evidence of progress in discussions has been provided along the way).

Section Seven

This section contained three objectives (The Slip Rule, OMiC and HDC) which were intended enable Mr Parkes to provide evidence of overseeing implementation, as opposed to leading on substantive areas of work. They were therefore subsidiary objectives. He had access to all the Practice Guidance to support him.

1. The Slip Rule - required implementation of a tracker to ensure the Cluster was able to comply with the Direction from Liverpool Crown Court. Mr Parkes largely

implemented it in terms of a process map setting what staff was required to do following sentence. However, his own Executive Summary of the Practice Briefing (prepared by Mohammed Farooq, January .2018) reflects a serious misunderstanding: Mr Parkes interpreted the direction as a 'Pilot' when there is no reference to it in the Practice Guidance in those terms. Whilst most of the implementation process is helpful, Mr Parkes' should have set out the requirement for NPS staff to complete the Memo (attached to Practice Guidance) when communicating with the Legal Services Team (LST).

2. OMiC - the overall operational responsibility for this rests with another of Mr Parkes' SPO colleague in the Cluster. His role was to oversee any partnership implications of OMiC such as briefing key stakeholders (e.g. accommodation, substance misuse providers and ETE) in the course of his work. He produced a note for staff (not clear if/when he circulated it) which sets out what OMiC is and some of the issues associated with it. There is no evidence that he has discussed OMiC and its potential implications at any of his partnership meetings. OMiC has significant implications for partnership work and stakeholder engagement.

3. Partnership Implications of HDC - Mr Parkes prepared a presentation from the Practice Guidance (produced by Mohammed Farooq for NW region and attached to the Plan). There is no evidence of its delivery to staff by the deadline (9th April 2018) nor has Mr Parkes provided any evidence that he has addressed the 'partnership implications ... ' of this area of work.

Section Eight

This relates to Mr Parkes' learning and development that was designed to support him with professional development. I understand he has attended most of the events but Mr Parkes' has not provided written evidence in terms of what he had completed and what remained outstanding at the point of deadline (9th April 2018)."

6.59 Additionally, Mohammed Farooq went on to say this (page 1969 of the bundle):

“Guiding Principle 2: Provide demonstrable evidence of ability to manage competing commitments, reflecting the full range of tasks in role specification

Assessment: Mr Parkes has consistently failed to manage 'competing commitments'. The evidence presented in this report offers limited progress against a small number of minor objectives, but inability to manage the range, volume and complexity of his role (even within the parameters of restricted responsibilities as part of the capability process)."

and:

“Guiding Principle 4.: Evidence of sustained management and leadership appropriate to role of Partnership Manager

Assessment: Mr Parkes' approach has been disjointed and characterised 'by a significant level of incoherence. There is little evidence that he has provided sustained management or leadership of his critical agenda at a time when partnership work is so vital to the overall success and effectiveness of the NPS's public protection work.'

- 6.60 There is more to this document, but those are the salient findings in relation to the claimant's performance against the objectives set in January 2018. A further supervision meeting was held by telephone on 31 May 2018 (pages 1629 and 1630 of the bundle), when the claimant was still awaiting his OH referral. Mohammed Farooq requested , and the claimant agreed to provide , details of all the work the claimant had done since 19 April 2018.
- 6.61 Whilst an appointment had been made for the claimant to attend for an OH assessment on 19 June 2018, some difficulties arose, and there ensued email correspondence between the claimant and HR in relation to reorganising appointments. In due course the appointments were rearranged for 4 and 10 July 2018.
- 6.62 There was, around this time, email discussion (see pages 1660 et seq.) between Mohammed Farooq and HR about the fact that the claimant was rapidly approaching the end of the review period, which was due to expire on 12 July 2018. There was a suggestion from Gill Hannay of HR that the reconvened meeting (potentially resulting in dismissal) be re-scheduled for 16 July 2018.
- 6.63 There then ensued issues with the processing of the new OH reports, with the respondent seeking to have them expedited, and agreeing to pay an additional fee for this option. The claimant was entitled to see and approve the reports before they were released to the respondent.
- 6.64 The assessments were carried out by Lexxic Ltd, and not directly by OH Assist. This led to further issues as to when the reports were provided to OH Assist, and when they would be provided to the respondent. On 2 August 2018 Lexxic Ltd confirmed (page 1705 of the bundle) to Gill Hannay and Mohammed Farooq that the claimant had provided his consent to the release of the reports, which had been sent to OH Assist.
- 6.65 The claimant then commenced sickness absence in early July 2018. This does not appear to be documented in the bundle – no fit notes have been included.
- 6.66 The first report that Mohammed Farooq appears to have seen , although when is unclear, is the Workplace Assessment Occupational Health report, dated 13 July 2018, at pages 1740 to 1760 of the bundle. That report does also refer to the Dyslexia and Dyspraxia Diagnostic Assessment report, dated, 17 July 2018, which is at pages 2155 to 2163 of the bundle.
- 6.67 The former report sets out details of the claimant's job role, and the difficulties that he had reported to the assessor he experienced in carrying out that role. His duties , as explained by the claimant , are set out (page 1743 of the bundle). On

the next two pages (pages 1744 and 1745 of the bundle) the claimant explains the difficulties he was having with his work, in these terms:

“SPECIFIC WORK DIFFICULTIES

Glenn reported that he is a slow reader and often struggles with absorbing large documents and attachments, particularly if the writing style is long and complex. He added that he is a slow reader who stutters when reading aloud in front of an audience and may use his finger as a guide when reading. Glenn also informed that his eyes get 'tired' and 'watery' and he needs to take a comfort break. Glenn informed that writing can take him a long time as he finds it difficult to process information. He explained that he can be unsure where to start, may write a few drafts and that he struggles with spelling. Glenn added that he has difficulty with proofreading as he will find something new to change each time he reads his work. He added that he tries to come back with fresh eyes or asks colleagues to proofread his work. Glenn additionally explained he has difficulty multitasking, such as listening and engaging in meetings and notetaking at the same time. He also informed difficulty extracting the relevant points, even when using his Dictaphone. He elaborated that he tends to transcribe rather than summarise and explained that this takes a long time. Glenn reported difficulty working in noisy environments as he said that he becomes distracted when faced with chattering, the photocopier and the telephone ringing. Glenn reported difficulty with keeping deadlines and feeling 'overwhelmed' with the work he is supposed to be doing. He said that he has some difficulty organising his workload and that writing things in diaries does not always work for him as he may still forget to complete tasks. Glenn also informed of challenges with keeping up with unread emails. He explained that he has to prioritise what he reads and colour codes emails from certain people as things could be easily missed. Glenn added that he has some difficulty with remembering verbal instructions and added that he needs instructions to be clear. He said that he thinks he understands, then later realises he does not, but is embarrassed to ask. Glenn explained that he is currently struggling with confidence and has sought support with the issues that he has been experiencing within his role. He further disclosed that he is keen to start afresh in a role that focuses more on the responsibilities of a main grade Senior Probation Officer, rather than partnership work.”

- 6.68 The ensuing 8 pages (pages 1746 to 1754 of the bundle) set out equipment and training recommendations, some 25 in total, graded as either high priority, or desirable, along with the reasons and rationale therefor. Amongst these are:

Workload: Leeway

In light of Glenn's difficulties, consider providing him with 25% extra leeway to help him achieve his targets, or consider changing his targets accordingly.

This is graded as high priority.

- 6.69 The final 6 pages (pages 1754 to 1759 of the bundle) make similar recommendations, also graded the same way, for action by the claimant himself.

6.70 The Diagnostic Assessment Report identifies the following effects on the Claimant's normal day-to-day activities:

- (i) Memory and attention: "Glenn's ability to sustain attention, concentrate, and exert mental control is in the low average range..." [2157]; "Glenn reported difficulties with short-term memory, for example, he stated that he needs to re-read text in order to take in the information" [2158]; "difficulties with short-term memory...struggles to remember names and instructions" [2161].
- (ii) Phonological processing: "Glenn shows difficulties with phonological processing and decoding of sounds in words that are unfamiliar and complex" [2158]; "...difficulties listening and taking in verbal information and concentrating with background noise. He struggles to listen and make notes at the same time..." [2160]; Listening and understanding are part of all sorts of normal day to day activities.
- (iii) Visual processing: "Glenn's ability in processing simple or routine visual material without making errors is in the borderline range..." [2157] "Glenn explains that he has difficulties taking in text and stated that he needs to reread text to take in the information. He commented that he struggles to read at a quick pace and stated that he struggles with lengthy documents... he struggles to focus on text and stated that the text appears to dance and blur on the page... occasionally experiences sore and watery eyes when reading..." [2161]
- (iv) Writing: "Glenn reported that he has difficulties in getting his ideas down in writing and making use of grammar, sentence structure and punctuation...struggles to spot mistakes in written work" [2161];
- (v) Numeracy: "Struggles to perform mental arithmetic... difficulties remembering numbers such as phone numbers" [2161]
- (vi) Organising, planning and priorities: "Glenn reported that he has difficulties with planning and prioritising...struggles with time management and underestimate how long it will take him to complete a task... he finds himself spending long periods of time searching for items" [2161].
- (vii) Difficulties with spatial awareness: "he struggles to read maps, distinguish between left and right and describes himself as clumsy" ; "it can take him multiple attempts to park his car accurately" [2158].
- (viii) The Claimant's dyslexia and dyspraxia are described as moderate in severity [2159].

6.71 The claimant returned from sick leave on 7 September 2018, or was due to. In fact this was delayed by other leave.

6.72 Mohammed Farooq had clearly received the first report by 19 September 2018, as on that date he sent an email to Gill Hannay, to which he attached a document

which was apparently the result of his discussing the Workplace Assessment document with Nisha Bakshi, the claimant's former line manager. His email is at page 1769 of the bundle, and the attachment is at pages 1770 to 1772.

- 6.73 Without hearing any evidence from Mohammed Farooq (or Nisha Bakshi, for that matter) the Tribunal has had to discern what the various comments made in this document probably mean. The comments vary. In some instances, Mohammed Farooq appears to accept that some recommendations could be accommodated. In others, he suggests that the claimant had already been provided with what was being recommended. In others, he doubts the feasibility or long term sustainability of the recommended adjustment. In others, he questions whether the claimant's really has the difficulties in carrying out his role that he has led the assessor to believe he has, and notes an absence of previous issues with some aspects of his work that he now says cause him problems. He makes the point about the first time these conditions were raised was in his dismissal hearing. He also describes the claimant's workload as "minimal", and responds to the contention (made by the claimant to the assessor) that he was carrying out a role that requires 1.5 persons by pointing out that this contention was rejected in the outcome of the claimant's grievance.
- 6.74 This document was not shared with the claimant , and he was therefore wholly unaware of this critique of, and in large part, rejection of, expert OH advice as to what was required to eliminate, or reduce, the effect that his conditions were having upon his ability to perform his job.
- 6.75 In September 2018 the claimant and his partner were approved to become adopters. He was therefore entitled to take Adoption Leave. He informed Mohammed Farooq of this by email on 7 September 2018 (page 1762 of the bundle). He informed Mohammed Farooq how a child was being placed with him from 1 October 2018. He therefore sought 26 weeks leave, from which he would return on 1 April 2019. He also sought other leave, and provided details of when he would be in work, prior to starting the Adoption Leave.
- 6.76 A further supervision meeting was held on 14 September 2018 , when the claimant had actually returned to work. The notes are at pages 1781 to 1784 of the bundle. there was discussion as to who was responsible for the delay in the OH reports being provided to Mohammed Farooq. He clearly believed that the claimant was, although the claimant disputed this. It was also suggested that the claimant had only (himself) provided the Workplace Assessment report, and not the Diagnostic Assessment, though he had subsequently done so. Mohammed Farooq explained that the recommendations could not be considered further, or put into place, until both reports could be considered. There was also discussion about the claimant's Adoption Leave. He was asked to provide the necessary paperwork confirmation, and duly provided this. Mohammed Farooq commented upon how he had no prior notice of the claimant going through this process, and considered that the claimant had left it very late to tell him about it. The claimant replied that he was under no obligation to inform Mohammed Farooq of such matters until the time to do so had come. There was discussion as to when the reconvened capability review meeting could be held, in the light of the claimant's impending Adoption Leave.

- 6.77 The reconvened formal capability review meeting was scheduled for 8 October 2018. On 25 September 2018 Mick Hooson wrote to Mohammed Farooq (page 1788 of the bundle) requesting that the meeting be postponed, and that the respondent now address the recommendations in the reports, and put into place the reasonable adjustments that had been recommended. He also made the point that it was inappropriate to assess how the claimant had performed in the period prior to the diagnosis, without the appropriate adjustments being in place. He considered that requiring the claimant to attend a meeting at which his dismissal was still an option was highly inappropriate. He invited Mohammed Farooq to confirm that the meeting on 8 October 2018 would be cancelled, the performance management process terminated, the threat of dismissal removed, and that a meeting would be convened at the end of the claimant's adoption leave in 6 months time to discuss implementation of the reasonable adjustments.
- 6.78 Mohammed Farooq replied to Mick Hooson on 28 September 2018 (page 1789 of the bundle). In this brief email he said that he (he used the plural "we", presumably meaning he and HR) had considered the OH report and recommendations in detail, and had decided to proceed with the meeting on 8 October 2018. He did not address any other points made by Mick Hooson in his email.
- 6.79 On 1 October 2018 Mohammed Farooq wrote to the claimant (page 1793 the bundle) by email, attaching an invitation letter for the meeting on 8 October 2018, a letter entitled "Interim Outcome of Capability Dismissal Meeting 19.04.18", and "Performance Improvement Action Pack 29.01 – 09.04.18" (pages 1796 to 1807 of the bundle).
- 6.80 The first document attached, the Interim Outcome, runs to some 12 pages, and is a comprehensive review of the claimant's performance against objectives for the period 29 January 2018 to 9 April 2018.
- 6.81 In conclusion, Mohammed Farooq says this (page 1807 of the bundle):

"7. Conclusion

7. 1 Phase One

The review of evidence against the objectives/Guiding Principles in the Plan provides a clear conclusion that Mr Parkes significantly failed to deliver on his expectations, reinforcing a consistent pattern of inability to deal with the requirements of his role (Partnership Manager). He was offered a well-defined Action Plan that was proportionate to the task in hand (the current capability process) and given the freedom and discretion (with appropriate 'line management support and guidance) to focus on providing evidence of competence. There was continuity (from previous Plans) in some of his objectives (such as accommodation and safeguarding) which would should have facilitate (sic) their more effective completion. However, instead there has been little meaningful progress to suggest that Mr Parkes can successfully deliver on the range, volume and complexity of his role (SPO, Partnership)."

- 6.82 Mohammed Farooq went on in that document to refer to Phase 2, which would be determined following the OH assessment of dyslexia/dyspraxia.
- 6.83 The dismissal meeting (as it was termed by the respondent) went ahead on 8 October 2018. The claimant was represented by Mick Hooson, but was not in attendance, as he was looking after the adopted child, as his wife had medical appointments. Mohammed Farooq chaired the meeting, and was supported by Gill Hannay, and a notetaker. The notes of the meeting are at pages 1889 to 1891 of the bundle.
- 6.84 In the meeting Mohammed Farooq rehearsed the recent history of the process, including the interim outcome prepared by him dated 21 May 2018, following the hearing on 19 April 2018. He made reference to the obtaining of the OH reports, and then went into some considerable detail about the claimant's alleged delay in giving authorisation for disclosure of those reports, and also the process followed by the claimant in relation to his Adoption Leave.
- 6.85 Mick Hooson, on behalf of the claimant, made the point that the claimant expected to be dismissed. He also said that he understood that detailed records of the claimant's work had been gone through, and his work was deemed unsatisfactory. This, however, may not have been the case if the claimant's conditions had been highlighted, and reasonable adjustments made. He reiterated that dismissal should not be on the agenda, and reasonable adjustments should be looked at. He also added that he had sought advice from solicitors, and that dismissal at this hearing would be inappropriate. The meeting was then concluded.
- 6.86 Mohammed Farooq prepared a draft outcome letter (pages 1839 to 1841 bundle) dated 12 October 2018. He submitted that draft to Gill Hannay for comment, and her comments are included on the draft in boxes at the side of the text. Different colour fonts on the original of this document suggest that she or Mohammed Farooq made amendments to it.
- 6.87 On the second page Mohammed Farooq's draft reads as follows:

"I believe you have been offered a substantial amount of support including allowing you to remain in the limited role of Partnership Manager, reasonable adjustments have been made (even prior to your diagnosis of dyslexia and dyspraxia) and that even if the extensive list of recommendations suggested by OH Assist were deemed reasonable, I do not believe their implementation would have resulted in you reaching the required standard of performance of a Senior Probation Officer within HMPPS."

- 6.88 Gill Hannay's comment was as follows:

"Commented [HG] : This is the likely assumption that will be challenged at ET and therefore you need to be fully satisfied that you can defend the point and may want to add additional justification into the letter."

6.89 The final version of the outcome letter dated 12 October 2018, and sent to the claimant that day, is at (amongst other places) pages 1886 and 1887 of the bundle. As this is a relatively short document, and is the only evidence of Mohammed Farooq's reasons for dismissal, the Tribunal will set out its contents in full, save for the unnecessary formal parts.

“ Outcome of formal poor performance meeting - 8 October 2018

I write to confirm the outcome of your formal poor performance meeting on Monday 8 October 2018. You chose not to attend the hearing and Mick Hooson your Trade Union representative presented your case on your behalf. As you are aware the formal poor performance meeting was a reconvened hearing following the original hearing on 19 April 2018. The hearing on 19 April 2018 was adjourned, and my decision on your future employment with HMPPS was suspended, due to my decision to make a further occupational health referral. The basis for the referral was your/your Trade Union representative's assertion at the hearing that your poor performance may be attributable to possible dyslexia and / or dyspraxia, neither of which conditions you had disclosed previously.

At the formal meeting on 19 April 2018 we discussed the action plan (dated 29 January - 9 April 2018) and went through each individual objective to ensure you had full opportunity to explain to me how you had met each of them. In advance of this meeting, I asked you on several occasions to come to the meeting fully prepared with your evidence but you failed to do so. Despite this, and to ensure you had a further opportunity, I provided you with a template document that you could complete outside of the meeting and return to me to evidence which of the objectives you had met, which you were still working towards and the work that had been undertaken. You failed to provide this information nor offered an explanation as to why you had not completed it.

I wrote to you on 21 May 2018 to provide an interim outcome of the hearing on 19 April 2018 and based on our discussions provided a comprehensive analysis of your progress against the action plan. During the 10-week action plan, we met on a weekly basis (where possible) to discuss your progress, forthcoming work priorities in relation to the action plan and any additional support required. You were not only fully involved in the development of the action plan, but further given complete discretion to organise the delivery of the objectives, so that you could offer evidence of their delivery at the end of the 10-week period. Despite this level of support we established through our discussions on 19 April 2018 that you had met only a very small number of the objectives set over the 10 week action plan. Please see my letter dated 21 May 2018 for a full breakdown of our discussions, which objectives had been met and which had not. Within that letter I also confirmed my decision that the final outcome of the capability process would be suspended until I received the Occupational Health report, but you would receive an interim report that would offer an assessment of your compliance with the performance objectives in the action plan.

The referral to occupational health was made on 3rd May 2018 and, according to Occupational Health records, you subsequently attended two appointments with them on 19th May 2018 and then 13th July 2018 respectively. NPS paid an

additional fee for the report to be expedited however but did not receive the report until 7th September 2018 when, following a request from me, you provided a hard copy to me. I made every effort to obtain the report prior to this however OH Assist informed me you refused to give consent to release the report. Had I received the report at an earlier date the hearing would have been re-convened sooner and prior to the commencement of your period of adoption leave. As we have discussed I was totally unaware of any possible adoption leave until you informed me on 7th September 2018 that you would be commencing adoption leave on 1st October 2018, but pre-placement leave commencing on 24th September 2018. In essence, you formally finished work on 21st September 2018 and only provided formal evidence to support your request for Adoption Leave on 18 September 2018.

I have fully considered the content of the OH report dated 13 July 2018 along with your performance against the action plan date 29 January - 9 April 2018 and have concluded you will be dismissed from HMPPS on the grounds of poor performance, subject to 12 weeks' notice. Unfortunately, your level of poor performance cannot be sustained indefinitely. The formal poor performance process has now been ongoing for over 17 months and you were issued with a first written warning on 25 May 2017 and a final written warning on 12 July 2017.

I believe you have been offered a substantial amount of support including allowing you to remain in the limited role of Partnership Manager for more than 2 years and reasonable adjustments have been made, even prior to your diagnosis of dyslexia and dyspraxia. Even if the extensive list of recommendations suggested by OH Assist were deemed reasonable and practicable, which I do not consider them all to be due to the nature of our work and the environment in which we operate, I do not believe their implementation would have resulted in you reaching the required standard of performance of a Senior Probation Officer within HMPPS.

Before making the decision to dismiss you I gave full consideration to whether a re-grade would be appropriate. Having done so, I concluded based on your level of performance during the poor performance proceedings despite the support provided and adjustments made, it would not be. Both the Probation Officer role and Probation Service Officer role involves management of high risk complex case work. I am not confident you would be able to carry out the range, volume and complexity of this workload based on the consistent lack of your progress in terms of dealing with the objectives in the action plans during the period of capability, in your tightly defined Partnership Manager's role, you had a set of responsibilities which were extremely structured, designed to be delivered in line with the pace and intensity that reflected you were in capability process. However, as the outcome of the capability process has shown, you have been unable to deliver those objectives in that context. Therefore, it is difficult to envisage how you could successfully make the transition into either a Probation Officer or Probation Service Officer or alternative role within the Department. The type of work undertaken by the NPS is by its nature high risk and failures in performance can have very serious implications for the health and safety of staff and the public."

- 6.90 The claimant was then dismissed with 12 weeks notice, his employment ending on 12 January 2019. He was not required to work his notice, and was given the option of pay in lieu. He was also advised of his right of appeal, and how that should be exercised.
- 6.91 The claimant did , with the assistance of Mick Hooson, appeal by the submission of a Poor Performance Appeal Notification form (MPP1a) at pages 1872 to 1875 of the bundle. His grounds for appeal were , in summary:

The decision was unreasonable; reference was made to the hearing held on 19th April 2018 when Mr Farooq was informed by the union representative Mick Hooson, that he suspected the claimant may be dyslexic and or dyspraxic. The process was adjourned for a specialist assessment to ascertain whether this was the case. Mr Farooq agreed to the adjournment, and the claimant was assessed July 2018. He quoted from the findings of that assessment, which stated :

"We can conclude that, due to the nature of Glenn's performance within attainment tasks in comparison with Glenn's overall cognitive abilities, Glenn has a specific learning difficulty - dyslexia. We would describe this as moderate in severity. We can also conclude that Glenn has the specific learning difficulty - dyspraxia. We would describe this as moderate in severity. Regardless of the diagnostic categories into which Glenn's difficulties fall, it is important that all the problems he is experiencing are recognised, along with an understanding of his strengths."

In addition a comprehensive work place assessment was provided by OH Assist, which outlined a series of adjustments, which could have alleviated the claimant's difficulties and allowed him to perform to the required standard . Mr Farooq was provided with a copy of this report. Reference was also made to Mick Hooson's email to Mohammed Farooq on 25th September 2018, but he insisted that the meeting go ahead on the 8th October 2018, and chose to ignore both the assessment , and the suggested reasonable adjustments. This raised the question why he adjourned for the assessments if he had no intention of responding to any of the information and advice they provided for the service.

Reference was also made to the dismissal letter in which Mohammed Farooq stated that he did not believe that the implementation of the adjustments would have resulted in the claimant reaching the required standard of performance of a Senior Probation Officer within HMPPS.

It was pointed out that Mohammed Farooq did not offer any explanation as to why he reached this conclusion, offer any alternative reasonable adjustments, or explain how he was qualified to overrule the advice provided by specialists in the field of dyslexia and dyspraxia.

It was asserted that Mohammed Farooq's actions in ignoring the assessments and recommendations provided by OH are examples of both a failure to follow the correct process and discrimination on the grounds of disability and race.

In addition, it was said that the process had been undermined through Mohammed Farooq's decision to defer imposing a penalty following Mr Parke's disciplinary hearing in relation to his involvement in a high profile serious further offence. Reference was made to how that process had not resulted in any sanction, but had referred to the claimant going through the managing performance process. Concern was expressed that the claimant had been dismissed for these reasons , as he could not be dismissed through the disciplinary process due to the failure to find a case of gross misconduct against him.

It was also said that the disciplinary measure was unduly harsh. The claimant had been an SPO for over 13 years and a probation officer for 8 years prior to that. Both roles were held without any recourse to performance improvement procedures. Despite the changes to these roles in the ensuing period, the claimant could reasonably have been expected to be able to change roles back to OMU management as a reasonable adjustment. No evidence was provided to prove that he would not be able to work competently in such a role. Mohammed Farooq was of the view that the claimant could not change roles as an SPO , or even be regraded to either a PO or PSO. The fact that he was not prepared to move the claimant to a role as team leader within an OMU was a further example of the unduly harsh nature of the disciplinary penalty.

6.92 The appeal was allocated to Lynda Marginson , Probation Divisional Director for the North East. She was supported by Usha Mistry , HR caseworker. On 31 October 2018 Lynda Marginson sent the claimant an invitation to an appeal hearing to be held on 30 November 2018 (page 1861 of the bundle).

6.93 On 2 November 2018 Lynda Marginson's PA , Joanne Williams, sent to Usha Mistry an appeal pack (page 1880 of the bundle) . It seems that Joanne Williams put this together from documentation on a particular database.

6.94 The covering index for this pack is at pages 1883 to 1885 of the bundle. It contained:

- i. Final Outcome dated 12.10.18
- ii. Minutes of Dismissal Hearing 08.10.18
- iii. Letter to Glenn Parkes re Dismissal Hearing 01.10.18
- iv. Interim Outcome of Capability Dismissal Hearing 19.04.18
- v. Glenn Parkes Performance Improvement Action Plan 29.01.18 – 09.04.18
- vi. Notes of Capability meeting held on 19.04.18
- vii. Letter to GP Re Interim outcome of Capability Dismissal 21.05.18
- viii. Outcome of Disciplinary Hearing 09.03.18
- ix. Outcome of second Formal Hearing 30.06.17
- x. Objective for formal Capability Period 30.05.17 – 27.06.17
- xi. Outcome of review of incident at BRO operation manager's meeting 26.05.17
- xii. Letter to Glenn Parkes 05.05.17
- xiii. Outstanding responses to emails work as of 26.01.17 (Update 04.05.17)
- xiv. Letter to Glenn Parkes dated 08.05.17 – outcome of informal capability hearing

- xv. Performance Improvement Action Plan Formal Capability 6 week period commenced 20.03.17
- xvi. Notes of Capability procedure (informal hearing) 01.03.17
- xvii. Outstanding responses to emails work as at 26.01.17 Additional Info:
Notes re Occupational Health Report
Letter to M Farooq from Adoption Agency dated 17.09.2018
Supervision Notes Glenn Parkes 12.16 – 31.05.18
Risk Assessment Form dated 07.04.16 (Updated 03.08.16)

6.95 The appeal pack did not include the OH Diagnostic and Workplace Assessments.

6.96 Lynda Marginson and was also provided with a document dated 22 November 2018 by Usha Mistry , entitled “Case Analysis Submission” (pages 2123 to 2126 of the bundle). On page 2126 of the bundle she says this :

“Mr Parkes has asked why Mr Farooq felt the recommended adjustments would not enable him to meet the required standard. The appeal authority will benefit in reading the document produced by Mr Farooq giving a response to each of the recommendations.”

6.97 This is a reference to the document that Mohammed Farooq had compiled with Nisha Bakshi , and had sent to Gill Hannay on 19 September 2018 (see paragraphs 6.72 and 6.73 above) , which is to be found (for the second time) in the bundle at pages 2116 to 2118. It is unclear if this document was attached to this Case Analysis Submission, but it was at some point provided to Lynda Marginson, as she refers in paragraph 11 of her witness statement to having a “critique” of the adjustments , and in para. 31 to Mohammed Farooq “carefully reflecting upon the recommended adjustments”. As previously observed, Mohammed Farooq’s document had not been provided to the claimant or his representative prior to the dismissal hearing on 8 October 2018, and it was not provided to them prior to the appeal hearing on 30 November 2018.

6.98 In her Case Analysis Submission document , Usha Mistry also says this , under the heading “HR Advice & Options” (page 2126 of the bundle)

“Uphold Appeal

This would be appropriate should the appeal authority view that recommendations given in the OH report should have been explored and evidence that the adjustments are considered reasonable and likely to enable Mr Parkes to achieve the required standard. Should this be decided, consideration will need to be given to commence future formal process (if deemed necessary) following implementation and commence at first written warning consideration stage.

The benefit of this could result in Mr Parkes being an effective SPO or alternative grade. The impact of this is that the issues have been long-standing and a lot of time management/supervision has been in place throughout. During this time, Mr Parkes only carried out partnership work (small part of SPO). It is likely significant management support will continue for a significant period of time going forward

and may cause difficult precedence (sic) in managing future similar cases, in particular, sustaining employee not being able to carry out full duties for over 2 years. The impact on the rest of the team should also be considered

Uphold Original Decision

This would be appropriate should the appeal authority view that Mr Farooq was reasonable in his approach in reaching a dismissal decision. The benefit of this would enable the Department to recruit a permanent SPO and remove the high level of support that has been in place for over 2 years. This would support the corporate planning and reduce the impact of Mr Parke's not being able to meet the required standard on the rest of the team."

- 6.99 The appeal pack provided to Lynda Marginson was not copied to the claimant or his representative. They were accordingly unaware of precisely what had been provided to the appeals officer in advance of the appeal hearing on 13 November 2018.
- 6.100 The Appeal meeting was held on 30 November 2018, and the notes are at pages 2127 to 2128 of the bundle. The claimant did attend the appeal, and was again represented by Mick Hooson. Lynda Marginson was supported by Usha Mistry, and Joanne Williams took the notes.
- 6.101 In the course of the appeal it emerged that Linda Marginson was not in possession of all the relevant OH reports. In particular she did not have one of the recent OH reports, in which the claimant's diagnosis was confirmed, and it seems probable that she did not have the other either, in which the workplace assessment was carried out. The claimant remedied this by sending them to Joanne Williams, but this was after the appeal hearing is concluded.
- 6.102 There was discussion of the previous disciplinary procedure carried out with the claimant which resulted in no sanction. Mick Hooson expressed his suspicion about this process.
- 6.103 Mick Hooson went on to confirm that he was not disputing the many failings that had been identified in relation to the claimant's performance, but there was a real probability that the claimant had either dyslexia or dyspraxia and as a result he had pressed the respondent to get the claimant professionally assessed. When the reports were available, there was a very detailed list of recommended reasonable adjustments. He had expected that these would be discussed in the capability meeting with Mohammed Farooq. He did not consider that Mohammed Farooq was qualified to make a judgement about whether the claimant's performance would be improved with or without the recommended reasonable adjustments in place. The claimant had been able in his previous role as an SPO to mask his condition.
- 6.104 There was then discussion as to whether the claimant had suggested that he be returned to an SPO role, which he had not, but Mohammed Farooq would not consider an SPO role or any other role for the claimant as he did not believe he would be capable of performing them to the required standard.

- 6.105 Mick Hooson suggested that the claimant should be allowed an opportunity to improve his performance, by having the reasonable adjustments put into place. Lynda Marginson then wanted to explore more as to why the claimant's relationships with his previous managers had broken down. The claimant explained how we considered that two of them had been working in collusion against him , and that he was never really given the chance to make a fresh start. He had been happy when Nisha Bakshi was out of the picture and he was being managed by Mohammed Farooq .
- 6.106 In conclusion the claimant reiterated the point that he now had a diagnosis for dyslexia and dyspraxia, and would benefit greatly from reasonable adjustments being put in place. He believed his performance would improve because of this, and he would like to be given an opportunity to prove this. He went on to say that he believed he was being managed out of his job all along, and was being set up to fail, because Mohammed Farooq had not acted on the recommendations of the OH report. Lynda Marginson questioned this, and pointed out that the claimant had been a good PO, and was promoted to SPO. After discussion about compensation (under a particular civil service scheme which need not concern the Tribunal) the appeal hearing was concluded.
- 6.107 Lynda Marginson adjourned to make her decision. She did not interview Mohammed Farooq , or anyone else. She did, however, discuss the notes of the appeal, and the OH reports with Usha Mistry, and spent a significant amount of time with her in doing so.
- 6.108 On 3 December 2018 claimant sent to Joanne Williams, in support of his appeal, a further document entitled "Notes to Workplace Assessment Report – the WAR" (pages 2164 to 2170 of the bundle). Lynda Marginson deals with this in one paragraph (para. 25) of her witness statement, in which she says that the claimant "considered that none of the support has been provided to him as suggested in the report". This is not what quite the claimant said in this document. He acknowledged that some equipment recommended in the WAR had been provided to him, but that the rest of the recommendations that were made had not been implemented previously.
- 6.109 Lynda Marginson carried out no further investigations, no further meetings, and conducted no further enquiries before issuing her decision.
- 6.110 When the decision had been taken, it was Usha Mistry who drafted the outcome letter, as can be seen from the email exchange on 5 December 2018 (page 2172 of the bundle) and 7 December 2018 (page 2173 of the bundle).
- 6.111 The appeal outcome letter, which confirmed the appeal was unsuccessful is dated 7 December 2018, and is at pages 2177 to 2179 of the bundle.
- 6.112 In it, Lynda Marginson gives this account of her reasons:

"Having taken everything into consideration, I have not upheld your appeal. The reason for my decision is as follows:

At our meeting, Mr Hooson highlighted that you were not disputing the performance concerns as identified by Mr Farooq and accepted that there were real failures, however, given the recent diagnosis of dyslexia/dyspraxia following the OH assessment, you requested that the recommended adjustments should be explored and implemented and any actions should be considered once the adjustments were in place. This was the crux of your appeal grounds.

You gave a breakdown of your service working in various roles including as a Probation Officer and your current grade as a Senior Probation Officer (SPO). In your representation, you stated there were no issues with your performance including report writing and you still remain of this view now, despite the latest diagnosis. These representations then changed to stating the failings were down to not receiving the support/adjustments as set out in the OH report.

You gave me a comprehensive background of failed management actions that you felt led to your dismissal. I am aware that you had gone through the grievance and appeals procedures accordingly and at each stage your applications were not upheld. I am therefore, satisfied that reaching the stage to consider dismissal was appropriate and reasonable. This is further confirmed by your acknowledgement in our meeting that there were 'real failings'.

Having said that, it was still appropriate to consider whether Mr Farooq was correct in reaching a dismissal decision. You are correct, it would be appropriate to allow adjustments (when deemed reasonable) to be put in place and consider any further action thereafter. However, in this case formal proceedings commenced in February 2017 and OH advice was received during the process, which at the time, each clearly stated there were no underlying medical conditions that would impact on your performance. It wasn't until the meeting on 19 April 2018, that there were any indications of dyslexia/dyspraxia and this was only identified as a possibility by Mr Hooson. Receiving the report was delayed due to your refusal to give consent, however, once received and reading the recommendations, I was satisfied that it was appropriate for Mr Farooq to proceed with the meeting scheduled for 8 October 2018 to discuss the outcome of the OH report.

You did not attend the final meeting with Mr Farooq and therefore, he gave his decision in writing. Before making his decision, Mr Farooq had reflected on each of the recommended adjustments in the OH report. However, I could see that this was not elaborated to you in his outcome, therefore, I will use this opportunity to provide this.

I explored with you at the meeting how you felt the OH recommendations would assist you, given that there were no issues with spelling/grammar and as you stated no issues with report writing. You advised me that you took much longer than it should and the adjustments would reduce this time. You also said it would enable you to manage your time better and structure your work.

Reading the paperwork available to me, I could see that these issues were already being addressed with you. It was clearly evident that you have received

a substantial amount of support by Mr Farooq which had continued since 2016 following your return from sick absence. Since then you have only carried out the partnership related duties, which is only a small element of your full duties as a SPO. During this time assistance provided to you included: a Dictaphone, administration support, assistance on managing emails, tools and guidance to breakdown tasks. These adjustments were included in the OH report.

It was evident that the issues in question also entailed not actually carrying out tasks, being late for meetings or merely where you did not turn up. The reasons given at the time were not because you were struggling. In addition to this, you had either not utilised the support made available to you or you criticised it e.g. felt micro-managed. You were given every opportunity to comment and feed into the performance plan but you did not respond despite the reminders sent to you.

You had caused a considerable amount of delays within the process, in particular at the end when you refused to give consent to release the OH report.

I agree with Mr Farooq that the adjustments recommended in the OH report were unlikely to result in you being able to carry out not only the partnership element of the role but also that of an SPO.

In terms of considering alternative role/re-!~rade. Mr Farooq provided an explanation in his outcome why he felt this was not appropriate, I also concur his explanation.

I was satisfied that reaching a dismissal decision was appropriate.”

6.113 The claimant's dismissal was accordingly upheld, and his employment ended on 12 January 2019.

6.114 The claimant has set out the effects of his conditions upon his day-to-day activities in an impact statement made by him on 7 April 2021 (pages 50 to 53 bundle). In this statement he describes how :

His dyslexia causes difficulties with phonological processing, rapid naming, working memory, processing skills and developing skills. In particular he has difficulties in taking in and listening to verbal information, and struggles to concentrate when there is background noise. He struggles to listen when he has to take notes at the same time. He has difficulty pronouncing longer words. He struggles to read and is a slow reader, having sometimes to reread text to take in information. He can sometimes get watery eyes and soreness when reading. When reading aloud in front of an audience , he stutters. In written work he has difficulties with punctuation, and such work takes him a long time. He has difficulties with numbers, in terms of doing mental arithmetic, and finds it hard to remember numbers such as telephone numbers. He struggles with time management, and often underestimates how long it will take to do something. He has difficulties in organising, and struggles to meet deadlines. He has problems with his short-term memory, and struggles to remember names and verbal instructions. He has difficulty distinguishing between left and right, struggles to understand points of the compass and cannot read maps. He has difficulty with

balance, and often bumped into things. His handwriting is untidy, and he finds handwriting tiring after a short time.

7. Those then are the relevant material facts found by the Tribunal. The credibility of the witnesses was not an issue, and the Tribunal is quite satisfied that all three witnesses from whom it heard gave honest and reliable evidence. The Tribunal, of course, did not hear from Mohammed Farooq , so was unable to formally view as to his honesty or reliability. The Employment Judge appreciates that there are large extracts from documents rehearsed in this judgment. That is largely because , in the case of Mohammed Farooq , this is the only evidence of what he did, and why he did it.

The Submissions.

8. Both parties' representatives had prepared substantial closing submissions which they spoke to. It is not intended to rehearse them here, as they are available for examination on the Tribunal file. The respective submissions will be considered in context when the specific issues are examined below.

The Law.

9. The relevant statutory provisions are set out in the parties' written submissions, and are not contentious. There are only two, on liability, s.98 of the Employment Rights Act 1996, and s.15 of the Equality Act 2010. The applicable caselaw has been cited largely in the submissions of both parties, and will be further referred to, where necessary, in the course of this judgment, along with any other relevant authorities which the Tribunal considers germane.

Discussion and Findings.

10. We consider it most logical to address the issues in the order set out in the issues set out in para. 2 above.

Unfair dismissal.

11. We turn first , therefore, to the unfair dismissal claim. The first issue, of course, is whether the respondent has shown a potentially fair reason for dismissal. If so, the claimant would succeed at that stage. The reason relied upon is capability, in the sense of ability to give satisfactory performance.

Discussion and finding on fairness.

12. The Tribunal accepts that the test that must be applied is that of the range of reasonable responses (see **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**). It notes the particular warning from the EAT in capability dismissal cases, in **DB Schenker Rail (UK) Ltd v Doolan UKEATS/0053/09** as to how easy it can be for Tribunals to fall into the substitution mind set in cases of ill-health. Tribunals must guard against being carried along by sympathy for an employee whose employers have concluded that he is not fit to return to his job and resist the temptation to test matters according to what they would have decided if they had been in the employer's shoes . For the purposes of this test, it is irrelevant whether or not the Tribunal would have dismissed the claimant.

The Tribunal must ask whether a reasonable employer might have reached the same conclusion as the respondent.

13. The respondent, of course, has been severely hampered by the lack of any evidence from Mohammed Farooq, who took the decision to dismiss. The Tribunal has been left only with the documents, and the evidence of Lynda Marginson, who heard the appeal.

14. In some cases, that may give the respondent the initial problem of establishing a potentially fair reason for the dismissal. The reason advanced is capability, in the form of performance, and the Tribunal is satisfied, from the documents, and the evidence of Lynda Marginson, that the respondent's belief, genuinely held, in the claimant's lack of capability was indeed the reason for his dismissal, or at least the principal reason for it. Another reason, the Tribunal is quite satisfied, is that Mohammed Farooq had come to the conclusion by April 2019 that the claimant had taken up too much of his, and others', management time, and was seeking to make excuses for his poor performance. Thereafter, Mohammed Farooq also became frustrated and irritated that the claimant had, in his view, delayed authorisation for release of the OH reports, and then has dropped upon Mohammed Farooq at the last minute the fact that he was about to take Adoption Leave. Whilst these matters, as will be seen, played their part in the decision taken by Mohammed Farooq, the Tribunal is satisfied that the principal reason, and certainly the reason that Lynda Marginson upheld the dismissal, was the respondent's belief that the claimant was not performing to a satisfactory standard.

15. The next question, therefore, and the crucial one, is whether it was fair in all the circumstances. The Tribunal accepts, as was submitted by Mr Bunting, that it is not entitled to look behind written warnings, and does not seek to do so. Further, the Tribunal also accepts that the respondent carried out, up until April 2019 a reasonable procedure in terms of assessing the claimant's performance against criteria that were reasonably set by his manager.

16. It is from April 2019 however, that Tribunal considers, in a number of aspects the respondent's decision to dismiss, both procedurally and substantively, was unfair. The Tribunal has not, of course, had the benefit of hearing from Mohammed Farooq who took the decision to dismiss the claimant. There are therefore a number of matters which could have been explored with him, which the Tribunal has not had the opportunity to do.

17. There are a number of features apparent from the documentation which have particularly struck the Tribunal in its deliberations. Firstly, it is clear that Mohammed Farooq expended a considerable amount of time and effort in performance managing the claimant. It is equally clear, and understandable, that by early 2019 he was becoming somewhat exasperated by the claimant's failure to improve his performance to the required standard. The Tribunal can therefore well understand why it was that, as at April 2019, Mohammed Farooq considered that the claimant had not made sufficient improvement, despite the numerous opportunities that he had been given to do so, and the assistance that had been provided to him. Mohammed Farooq by April 2019 was on the brink of dismissing him. His "Interim Outcome" letter of 21 May 2019 (pages 1796 to 1807 of the bundle) is a comprehensive review of the claimant's performance, and set out in detail Mohammed Farooq's conclusion that he had not

made sufficient improvement to warrant his retention in employment with the respondent. That conclusion, whilst disputed at that stage by the claimant, on the grounds that the role he was being asked to carry out was in fact one that should have been done by 1.5 persons, is one to which the Tribunal would have found the respondent was probably entitled to come, and was within the band of reasonable responses.

18. Thus, if the claimant had been dismissed at that point, and the Tribunal had to assess the fairness of the dismissal then, it may well have concluded that the dismissal would have been fair. All this, however, is subject to the OH reports that were then obtained, which revealed, for the first time, the diagnosis of the claimant's conditions of dyslexia and dyspraxia, conditions of which the claimant was, until then, himself unaware.

19. Notwithstanding those reports, Mohammed Farooq proceeded to conclude the process on 8 October 2019, and dismissed the claimant. It is difficult not to form the impression that Mohammed Farooq (and perhaps HR) regarded these highly significant OH reports as something of an inconvenience, that could potentially prevent the execution of what by then had become, the Tribunal is satisfied, Mohammed Farooq's settled intention to dismiss the claimant.

20. There are a number of unanswered questions which lead the Tribunal to conclude that Mohammed Farooq's decision to proceed with the dismissal hearing on 8 October 2019, and then to dismiss the claimant, was unreasonable. Whilst it is clear from the document that he and Nisha Bakshi compiled setting out their views upon reports (pages 1770 to 1772 of the bundle) that he disagreed with some elements of these reports, or considered that they were not relevant to the issues relating to the claimant's performance, neither he, nor HR sought to present these views to the claimant, or to revert to the providers of the OH reports for their comments. Instead he preferred to dismiss the contents of these reports, as not adequately explaining any issues the claimant may have been experiencing with his performance, and not indicating that any improvement in his performance was likely. He proceeded to dismiss him.

21. He did so despite an eminently reasonable and sensible request from the claimant's trade union representative, Mick Hooson, on 25 September 2019 that the meeting on 8 October 2019 be cancelled, and steps put in place to implement the recommended reasonable adjustments upon the claimant's return from Adoption Leave (page 1788 of the bundle). His reply to that email was somewhat brief, and he did not explain why the proposal made by Mick Hooson was not acceptable.

22. In the absence of any evidence from Mohammed Farooq, the Tribunal will never know why this was such an urgent and pressing matter. The claimant was about to start six months Adoption Leave. His performance during this period consequently was irrelevant, as he would not be carrying out any of his duties. Quite why in those circumstances Mohammed Farooq felt it necessary to press ahead with the conclusion of the capability process will never be known. The most likely explanation, the Tribunal considers, is that Mohammed Farooq had indeed decided in April 2019, if not earlier, that the claimant was to be dismissed. That would explain why he insisted on proceeding with the meeting on 8 October 2019, and why he did not consider that the findings of

the OH reports required any further investigation or consideration, or should delay this process.

23. The claimant's Adoption Leave perhaps has a further significance, in that it is apparent from the documentation that Mohammed Farooq was irritated that the claimant had not shared with him his intention to be approved as an adopter, and his potential application for Adoption Leave. The claimant's position is that he was perfectly within his rights not to inform the respondent of this until such time as he had become approved, which did not occur until 7 September 2019. Whether this is right or wrong is irrelevant, what it reveals is another reason why by October 2019 Mohammed Farooq, in short, had had enough of the claimant and wanted rid of him. That this totally irrelevant issue should have been raised in the meeting on 8 October 2018, when Mick Hooson again confirmed that the claimant was under no obligation to inform the respondent, rather reinforces that this had become another issue for Mohammed Farooq, and influenced him in his decision, or rather probably confirmed his decision, already made, that the claimant was to be dismissed. It is also to be noted that in that meeting Mick Hooson again reiterated his request that the meeting be adjourned, and any further action deferred pending the claimant's return to work after Adoption Leave. He even warned Mohammed Farooq that any dismissal in these circumstances would be unfair, but he pressed on regardless.

24. Even if no such motivation was present in the mind of Mohammed Farooq, no reasonable employer, in the Tribunal's view, would have proceeded to dismiss the claimant in October 2018 in the light of the OH reports with a diagnosis of dyslexia and dyspraxia that had just been obtained. These reports were, frankly, a potential game changer. For the first time in his employment, and at the age of 54, a comprehensive assessment of the claimant's learning abilities had been carried out, and had led to the diagnoses set out in these reports. Whilst it may have been the case, upon further examination discussion and investigation, that the claimant's dyslexia and dyspraxia were not responsible for all of the deficiencies in his performance, that is not a view to which the respondent was entitled to come in the meeting on 8 October 2019, without further investigation and enquiry. At the very least one would have expected a reasonable employer to put to the claimant, and indeed the OH assessors, further questions and observations, of the nature set out in Mohammed Farooq's private and undisclosed notes upon the contents of the OH reports.

25. Further, to the extent that various recommendations were made specifically with the intention of improving the claimant's workplace performance, no reasonable employer would have dismissed without either being satisfied that all such recommendations were already in place, or that they would clearly be unlikely to make any difference to the claimant's chances of achieving satisfactory performance. Mohammed Farooq, and on appeal Lynda Marginson, took both that latter view, and each formed such a view unreasonably. Neither carried out any further enquiry with the claimant, or the assessors, or, on appeal with Mohammed Farooq, as to whether either of these assertions was correct. No consideration was given at all to the fact that the very fact that the claimant had received these diagnoses for the first time in his life, and was therefore likely to be able better to improve his own performance in the light of this information. Instead there was a hasty, ill-informed and untested assumption either that these adjustments had already been tried, or would not work if they were to be. Either way, the respondent took an unreasonable and dismissive view of weighty and

comprehensive reports which afforded a valuable insight into why the claimant may have struggled to achieve satisfactory performance in his most recent role. There is , the Tribunal detects , in the approach of Mohammed Farooq, and in the advice from HR, an underlying view that the claimant had already had an undue amount of management time and effort expended upon him, and it was now too late to start exploring dyslexia and dyspraxia issues, which he had only just raised.

26. In summary, we find that no reasonable employer would have dismissed the claimant at this juncture , without at least giving him a further opportunity in the light of the diagnoses , to improve his performance to a satisfactory standard, as adjusted in the light of the recommendations of those reports (one of which was that he be given a 25% leeway). It was , of course, unfortunate timing that the claimant would be on Adoption Leave for the ensuing six months, and so his performance in the light of the OH reports , and any recommendations being implemented, could not be assessed until his return to work. That does not , in the Tribunal's view , make his dismissal at that time reasonable, quite the opposite.

27. No reasonable employer either would have overlooked the possibility that , regardless of any recommendations being implemented, the claimant was likely to benefit himself from the diagnoses in the reports, and be able better to understand how he could improve his own performance.

28. The Tribunal also finds it significant that , despite a prompt from Gill Hannay in her comments upon the draft dismissal letter submitted to her for her advice (pages 1839 to 1841 of the bundle) , Mohammed Farooq did not, as he was advised to, add anything further to the draft dismissal letter to defend , and fully justify, the statement that he made in it that, even if the extensive list of recommendations were deemed reasonable and practicable, he did not believe that their implementation would have resulted in him reaching the required standard of performance. As Gill Hannay rightly anticipated in her comment on the draft , this assumption was likely to be challenged before a Tribunal, but Mohammed Farooq did not set out in his final version of the dismissal letter any further basis for , or justification for, this view. Not having heard any evidence from him, the Tribunal to this day does not know upon what basis he came to that conclusion. The closest that he comes is in the preceding sentences of the paragraph referred to, in which he makes reference to the substantial amount of support that had been provided to the claimant for more than two years, and the reasonable adjustments that have been made even prior to his diagnosis.

29. That in the Tribunal's view is not a reasonable view. All the preceding support, and so-called adjustments, were provided in ignorance of the diagnosis. Mohammed Farooq took what the Tribunal considers to be a somewhat cavalier and dismissive approach to the very comprehensive and detailed diagnosis and recommendations in the OH reports. As it was, as is clear from the claimant's document of 3 December 2018 submitted for the appeal, the claimant did not accept that the majority of the recommended adjustments had previously been provided to him , in any event.

30. The respondent, in the person of Mohammed Farooq was clearly not prepared to expend any more management time and effort upon the claimant, even if this would not actually be required for a further six months.

31. That such a view was taken not only by Mohammed Farooq but also by HR is perhaps demonstrated by the advice that was given to Lynda Marginson by Usha Mistry for the appeal (pages 2123 to 2126 of the bundle) as to the options on appeal. Whilst the two options (page 2126 of the bundle) purport to set out evenhandedly the choices open to the appeal authority, it is hard not to note the further references to the amount of management time that had already been expended upon the claimant, and which may well be needed in future upon his return from Adoption Leave. The references to “precedent”, and the impact upon the rest of the team, of upholding the appeal also highlight how this option was viewed as a negative outcome. By contrast, the advantages of upholding dismissal would be the ability to recruit a new SPO, who would not need such a high level of support, and would reduce the impact upon the team. The advice clearly is that there are more benefits to upholding the dismissal, than there are to allowing the appeal.

32. Whether a decision to dismiss is more beneficial to an employer, of course, is, or should be, an irrelevant consideration. An appeal officer’s task is to decide whether a dismissal was fair, whether a fair procedure was followed, and whether all relevant matters, and only relevant matters, were taken into consideration. The “benefit” to an employer in dismissing an employee is not a reasonable consideration. Were it otherwise, it would always, for example, be beneficial financially for an employer to dismiss an older, more expensive employee, who could be replaced by a cheaper younger one. Dismissing under – performing employees rather than managing them, and helping them achieve an acceptable level of performance is almost always going to be more “beneficial” to an employer, in terms of management time and effort.

33. A moment’s reflection however, by a reasonable employer, would have led to an appreciation that all prior performance management carried out with the claimant was probably now irrelevant, given that it was carried out in ignorance, on both sides, of the claimant’s conditions of dyslexia and dyspraxia. It was therefore, in the Tribunal’s view, unreasonable for the claimant’s previous performance management history to be taken into account in arriving at the decision to dismiss, when all this had occurred before the OH reports revealed his underlying conditions. Regardless of any disability issues, no reasonable employer, faced with these comprehensive OH reports which provide potential explanations for previous poor performance, and recommendations for future improvements, would have proceeded to dismiss without further enquiries, investigation, and a further opportunity to show improvement, against adjusted targets.

The Appeal.

34. There was, of course, then the appeal. It is clear that an unfair dismissal can be cured at the appeal stage, usually if that the appeal takes the form of a complete rehearing, which remedies any unfairness in the original dismissal process (see **Taylor v OCS Group Ltd [2006] IRLR 613**). Whether the appeal is a review or a rehearing, however, should not be the sole focus of the Tribunal’s attention, as was said in the judgment in **Taylor v OCS Group Ltd**, where the previous caselaw was discussed:

*“It seems to us that there is no real difference between what the EAT said in **Whitbread** and what it said in **Adivihalli**. Both were consistent with **Sartor**. In both cases, the EAT recognised that the ET must focus on the statutory test and that, in considering whether the dismissal was fair, they must look at the substance of what had happened*

*throughout the disciplinary process. To that extent, in our view, the EAT in the present case was right. However, in **Whitbread**, the EAT used the words 'review' and 'rehearing' to illustrate the kind of hearing that would be thorough enough to cure earlier defects and one which would not. Unfortunately, this illustration has been understood by some to propound a rule of law that only a rehearing is capable of curing earlier defects and a mere review never is. There is no such rule of law."*

35. That said, Lynda Marginson agreed that she was conducting a review, and not a rehearing. Examining the overall fairness of the appeal, there are a number of factors about it which perpetuated the original unfairness of the procedure, and the decision taken by Mohammed Farooq.

36. Firstly, Lynda Marginson was, amazingly, not provided as part of the preparation for the appeal with the OH reports which confirmed the claimant's dyslexia and dyspraxia, and made comprehensive recommendations for adjustments that could be made to improve his performance. That put her at her disadvantage from the very outset. Secondly, and conversely she had however been provided with the "critique", as she calls it, of those reports (or one of them, the WAR) prepared by Mohammed Farooq, and which had not been shared with the claimant or his representative. She nonetheless proceeded to take this into account, and determined that Mohammed Farooq was right to ignore the recommendations in those reports, and to proceed with the dismissal. Thirdly, Lynda Marginson did not interview Mohammed Farooq to put any of the claimant's appeal points to him, and in particular to seek any explanation, which he had failed to provide in his dismissal letter, despite being prompted by Gill Hannay to do so, as to why he considered that the recommended adjustments, even if feasible, would be unlikely to result in an improvement in the claimant's performance. Linked to this is the failure to investigate what emerged as an obvious factual dispute between the claimant and Mohammed Farooq. The claimant in his document of 3 December 2018, set out his views as to what equipment and other assistance of the type recommended in the reports had actually been provided to him. This was at odds with what Mohammed Farooq was saying in his (still secret) critique document. Lynda Marginson, however, faced with these conflicting views of the level of support and assistance the claimant had already been provided with did not see the need to investigate these issues any further, but merely accepted Mohammed Farooq's critique document which the claimant had never even seen.

37. Fourthly, Lynda Marginson was not independent. She openly states in her witness statement (para. 15) that she had known Mohammed Farooq for many years and had also known the claimant's two previous managers about whom the claimant had raised grievances. She says that in her experience all three were people with integrity, and all highly regarded senior managers within the respondent. She therefore was of the view that it was unlikely that any of these people could have been colluding against the claimant. Collusion was not, of course, a central point the claimant's appeal, but the judgement of Mohammed Farooq certainly was. Lynda Marginson did not declare at the commencement of the appeal her previous knowledge and experience of Mohammed Farooq. Whether she was, or was not, influenced by that knowledge, she deprived the claimant and his representative of the opportunity to seek her recusal if they so required. Sixthly, whilst Lynda Marginson did not interview, or in any other way seek to test the reasons that Mohammed Farooq relied upon for dismissing the claimant when he did, she did rely, the Tribunal considers, very heavily on HR advice,

particularly from Usha Mistry. The Tribunal notes how she discussed the notes and the OH report with Usha Mistry, and how she regarded her as being very helpful in assisting her to think through whether she should uphold the appeal or not.

38. The Tribunal notes the way in which , in her document of 22 November 2018 Usha Mistry presented the two options for upholding or dismissing the appeal in a manner which the Tribunal considers leant considerably towards the latter, sharing and rather emphasising the frustrations and irritations that Mohammed Farooq was doubtless feeling and expressing about the amount of management time that the claimant had already taken up, was likely to take up in future, and its impact upon his team. Further elements in Mohammed Farooq's decision-making process also recur in the appeal decision letter. Lynda Marginson too makes reference to the commencement of the claimant's performance issues, and the absence at that time of any suggestion that he was suffering from dyslexia and dyspraxia. The relevance of this point is lost on the Tribunal. The claimant did not know that he suffered from those conditions, so could not raise them in response to criticisms of his performance. Both Mohammed Farooq and Lynda Marginson seem to hold this against him , as somehow undermining the validity of his subsequent contention these conditions had some bearing upon his performance. Similarly , both make reference to the claimant's alleged delaying of receipt of the OH reports from July 2018. The claimant does not accept that he was responsible for that delay, but again, other than it being a further source of irritation for Mohammed Farooq, the Tribunal cannot see this has any relevance to the issue of whether or not the claimant's performance may have been affected by the conditions that were clearly diagnosed in these reports. Again, it seems that the claimant was not being dismissed simply because of his performance issues, but also because he was perceived to have delayed receipt of reports (paid for by the respondent) which delayed the process that Mohammed Farooq had commenced some time previously. That delay, on any view, was irrelevant to the merits of what those reports then disclosed.

39. A further point made on behalf of the claimant which the Tribunal accepts, is that Lynda Marginson did not have first-hand experience of precisely what the claimant's role was, and appeared to consider that, if anything, the claimant was only performing 50% of an SPO role. This view was also supported by the HR advice from Usha Mistry. Again, she did not investigate these matters with Mohammed Farooq , or anyone else, she simply rejected the claimant's contentions that the role was, or could have been, too much for one person.

40. The influence of Usha Mistry can again be detected in the fact that it was she who drafted the outcome letter. The Tribunal appreciates that it is not unusual for HR to give assistance to managers conducting disciplinary hearings and appeals , in perfecting the appropriate outcome letter that informs the employee of the result of those processes. The actual decision, however, is meant to be that of the manager, not of HR. One would therefore normally expect the manager to attempt the first draft, with HR only being involved in an advisory role, correcting any errors, or pointing out any omissions. It appears, however in this instance, that Usha Mistry drafted the outcome letter from the outset, for approval by Linda Marginson, and not the other way round. Whilst noting that Lynda Marginson maintained that the decision was hers, and accepting that up to a point, the Tribunal considers that it was one which was highly

influenced by HR, whose views were clearly in favour of maintaining the dismissal, as the more “beneficial” option for the respondent.

41. In short, whilst not doubting Lynda Marginson's bona fides, or her desire and intention to hold a fair appeal, the Tribunal considers that she was not provided with the adequate preparation that was necessary for this task, particularly in not being provided with the OH reports, and was not advised or encouraged to carry out any further or deeper investigations into the serious and complex issues that the appeal raised. It is therefore perhaps not surprising, or indeed entirely her responsibility, that this appeal did not, in all the circumstances, remedy the unfairness of the dismissal carried out by Mohammed Farooq. Consequently, the Tribunal's finding is that the dismissal was, and remained, unfair.

The Disability discrimination claims.

(i) Disability.

42. The first issue is whether the claimant was at the material time a person with a disability. The respondent does not dispute that he has and had had for some time, some degree of mental impairment, in the form of his dyslexia and dyspraxia, and that these conditions are long-term, but has submitted that the effects upon his day to day activities are insufficient to meet the (admittedly low) test of being substantial, in the sense, as long established, of being more than trivial. Emphasis is rightly placed upon the fact that work is not in itself a day to day activity, and the Tribunal should not confuse activities that a person has to carry out at work with what are normal day to day activities for all persons. That is, of course, correct, but much of a person's work does involve day to activities which are not specific to the type of work being carried out. Mobility, memory, concentration and the processing of information are all day to day activities which are part of any person's working life.

43. The respondent's submissions have focussed on the minimal degree to which the claimant has been impacted by his conditions in his work and his day to day life. The respondent has sought to argue that, taken in the round, the effects are pretty minimal, and do not satisfy the test of being substantial. The claimant's submissions point out how many of the activities referred to in the OH report that the claimant has difficulty with work, such as reading, writing, memory, numeracy, organising and planning, and spatial awareness, are indeed all day to day activities, notwithstanding that they are activities that persons engage in whilst working.

44. The Tribunal does not agree with the respondent. Careful reading of the very comprehensive reports produced on the claimant's conditions make it clear that the effects are more than trivial. There are a number of examples, but to select a few, the claimant's difficulties with short-term memory, to take in information when reading, and to concentrate when there is background noise, are all matters that the Tribunal considers are more than trivial. His difficulties in distinguishing between left and right, to read a map, and be aware of the points of the compass are again matters which the Tribunal considers are more than merely trivial. His difficulties with mental arithmetic and remembering telephone numbers are similarly more than trivial. Whilst none of these matters in themselves may appear to be particularly significant, the Tribunal looks upon the overall effect that they must have cumulatively upon the claimant's abilities to

carry out day-to-day activities. Taken in the round therefore, on the basis of reports on the claimant's own evidence, the Tribunal is therefore quite satisfied that the claimant's impairments amounted to a disability within the meaning of the Equality Act 2010.

Knowledge.

45. The respondent in the alternative, however, argues that if disability is established, the respondent can avoid liability on the basis that it did not know, and could not reasonably be expected to have known, that the claimant had any disability. This is a specific defence to claims under s.15. The respondent rightly submits that for these purposes knowledge of disability means knowledge of all the constituent elements of disability. Thus, it is not sufficient if the respondent knew of the conditions from which the claimant suffered, it was also have known, or ought recently to have known, that their effects upon his day-to-day activities amounted to disability.

46. The respondent relies upon the claimant's ability to function in a demanding role for almost 20 years without any difficulty, and the complete absence until April 2018 of any mention of the conditions of dyslexia and dyspraxia. The claimant, it is submitted, had up until then largely disputed that he had any performance issues.

47. The claimant submits that the respondent from, at the latest, the date of the receipt of the OH reports on 7 September 2018 had the requisite actual or constructive knowledge that the claimant's conditions amounted to a disability. This was therefore so at the date of his dismissal on 8 October 2018, and the date of his appeal being dismissed on 7 December 2018.

48. The Tribunal considers that the claimant's submissions are correct. Whilst Mohammed Farooq may have chosen to disregard the OH reports, and not to act upon them, he cannot choose to ignore their contents insofar as they provide information as to the claimant's conditions, and their effects upon his day to day activities. The Tribunal considers that those reports more than adequately provided the respondent with the information from which it could reasonably have known that the claimant's conditions either singly, or more likely, cumulatively amounted to a disability. If there were any doubt about this, the burden of establishing this want of knowledge lies upon the respondent (see s.15(2) Equality Act 2010). Crucially, Mohammed Farooq did not give evidence, so the respondent cannot rely upon his lack of knowledge as it has no evidence that he lacked either actual or constructive knowledge of the claimant's disability. Similarly, nowhere in Lynda Marginson's witness statement does she state that, despite having had access to the relevant OH reports, she did not know, and could not reasonably be expected to have known that the claimant's conditions amounted to a disability. Thus, on any view, the respondent has failed to discharge the burden of proof upon it to establish this defence in any event.

The s.15 claims – "arising in consequence of the disability.."

49. The respondent's next line of defence, once disability, and knowledge are established, is that the claimant has not shown that his poor performance was because of something arising in consequence of his disability. It is submitted that he has not shown this causal link because he cannot establish that his conditions were an effective

cause of his poor performance, and/or an effective cause of his progression through the respondent's capability process, and/or an effective cause of his dismissal.

50. Reference is made in the respondent's submissions to **Pnaiser v NHS England [2016] IRLR 170**. The respondent argues that whatever the position in April 2018, the claimant cannot show that his prior poor performance which led to him being taken through the capability process in the first place was attributable to any disability. The point is made that the claimant did not prior to April 2018 accept that his performance was deficient in any event. If the initiation of the capability process cannot be shown to have been by reason of anything arising in consequence of his disability, then even if at its conclusion some element of his performance may have been attributable to his disabilities, that, it is submitted, is insufficient to satisfy the test of causation under s.15.

51. The claimant's submissions also refer to **Pnaiser**. Ms Stanley submits that the disability - linked performance concerns need not be the main or sole reason for the dismissal, they must merely have had a significant, i.e. more than trivial, influence upon the decision to dismiss.

52. As both parties have referred to **Paisner** the Tribunal will refer to the judgment of Simler, J. This was a case in which an employee had a significant amount of disability-related sickness absence. She was offered a job with NHS England subject to satisfactory references; after a telephone conversation between her previous line manager and prospective employer, in which her attendance record was discussed, the job offer was withdrawn. In light of the relevant authorities, the following guidance as to the correct approach to a claim under s. 15 was given, at para. 31:

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

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

*(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see **Nagarajan v London Regional Transport [1999] IRLR 572**. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).*

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression

'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, "discriminatory motivation" and the alleged discriminator must know that the "something" that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

53. On that analysis, the Tribunal considers that the claimant has established a sufficient link between his dismissal, and "something arising in consequence of his

disability". The immediate cause of his dismissal was his performance between 29 January 2018 and 9 April 2019, the period over which his performance was being assessed against set goals. As Ms Stanley points out, it was therefore his final action plan or PIP (pages 1477 to 1484 of the bundle) that is relevant. As she submits, this meant that :

(i) the claimant was required to write presentations and guidance (eg. on the Care Act). The claimant would find this more difficult because of his difficulties processing material, marshalling information and getting his ideas down in writing;

(ii) the claimant was required to analyse data reports (completing an analysis of the data on Education and Training). The claimant would find this more difficult because of the issues with his numeracy skills; and

(iii) the claimant was required to develop strategies and work with partner agencies (scoping mental health provision, identify a strategy to obtain access for service users, developing agreements with providers as to how they will work with the National Probation Service). This sort of work was inevitably going to involve coordination and organisation, inevitable when working with another body. The claimant would be affected by the issues with his organisational skills. Again this work would require the processing and marshalling of information.

54. When, therefore, Mohammed Farooq, on reviewing the claimant's performance against this plan, as set out in his Interim Outcome document of 21 May 2018 (pages 1960 to 1972 of the bundle) found that the claimant had not met these objectives, many of these failures were likely to be related to the difficulties that arose from his disabilities.

55. The Tribunal agrees with Ms Stanley. There are several references to in these findings to the claimant producing only "basic" or "rudimentary" materials, to the need to keep reminding him to keep to deadlines, to him misunderstanding what he was meant to do, to his failing to prioritise tasks, and failing to evidence (i.e produce written evidence) his activities. Reference is also made to his disjointed and incoherent approach. All these facets of his performance, the Tribunal, considers are likely to arise from his disabilities. His time management, difficulties in prioritisation, verbal comprehension, reading and writing, are all likely to have a connection with his conditions of dyslexia and dyspraxia.

56. That the claimant was started on the capability management process before his diagnosis is, of course, irrelevant. That not all, or perhaps none, of his earlier performance issues did arise as a consequence of his disabilities (which seems unlikely, but is possible) similarly does not matter. If, as the Tribunal has found, any performance issues in the January to April 2018 period did arise in consequence of the disabilities, then, provided those issues had a more than trivial influence upon the unfavourable treatment of dismissal, on the tests approved in *Pnaiser* that is sufficient to engage s.15.

57. With respect, the respondent seems to be seeking to have his cake and eat it. On the one hand he relies upon the claimant's many failings, and his poor performance in his role, as justifying his dismissal, but on the other he invites the

Tribunal to ignore his disabilities, and suggests that these are coincidental, and not in any way linked to the performance issues that ultimately led to the dismissal. He has stopped short of admitting that the role was impossible for anyone to do, disabled or not, but his case must really amount to saying that the Tribunal can wholly dissociate the disabilities from the claimant's performance issues. That is, the Tribunal considers, wholly unrealistic. Several aspects of the claimant's performance issues are, the Tribunal considers likely, on a balance of probabilities, to be causally linked to the effects of his impairments, and the s.15 claim is made out, subject only now to the defence of justification.

Justification.

58. The respondent, in the alternative, finally pleads justification. Again, the burden is on the respondent to establish this defence. To do so, it must show that the treatment, in this case dismissal, was a proportionate means of achieving a legitimate end. This is dealt with very briefly in Mr Bunting's Skeleton Argument. The legitimate aim is identified as "to run its undertaking efficiently". That aim, the Tribunal would accept, is capable of amounting to a legitimate one, especially given the respondent's responsibility for protection of the public, and the rehabilitation of offenders.

59. Was dismissal of the claimant a proportionate means of achieving that aim? It clearly was not, for a number of reasons. The first and most obvious one is that, once the claimant was a person with a disability, the respondent came under a duty to make reasonable adjustments for his disabilities. Those were identified in the Workplace Report. Even if there was, or could be, some debate as to whether all of them would have been found to be reasonable adjustments, the simple fact is that the respondent did not attempt any of them, it just dismissed the claimant without any further consideration of them.

60. Rather like justification in indirect discrimination cases, the Tribunal's understanding of the law is that discriminatory treatment cannot be justified as a proportionate means of achieving a legitimate aim if there remains any "taint" of discrimination in the justification that is advanced.

61. Under the pre-Equality Act 2010 law, the Disability Discrimination Act 1995, at s.3A(6) provided that there could be no justification of less favourable treatment imposed for a disability-related reason unless, had the duty to make reasonable adjustments been complied with, the basis for justification would have still existed. There is no specific re-enactment of that section in the Equality Act 2010. However, whether a Tribunal should consider treatment to amount to a proportionate means of achieving a legitimate aim if there was an unfulfilled duty to make a reasonable adjustment must be the subject of serious doubt. Indeed, the Court of Appeal in **City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746** noted that the Employment Code of Practice issued by the Equality and Human Rights Commission (at para 5.21) makes it clear that a link between failure to put in place reasonable adjustments and the unfavourable treatment in issue under s 15(1)(a) may be an important factor to be taken into account when determining justification. That an ongoing (as opposed to an earlier, but lapsed) duty to make reasonable adjustments was a relevant factor for a Tribunal to take into account in assessing whether treatment

was justified was implicitly accepted by HHJ Eady QC, as she then was, in **Monmouthshire County Council v Harris UKEAT/0010/15**

62. This Tribunal finds that the respondent cannot rely upon the justification advanced in this case when it was, at the time, in breach of its duty to make reasonable adjustments.

63. Additionally, and quite separately, dismissal was not proportionate for other reasons. The first is that there was no pressing need for the claimant to be dismissed at the time that he was. He was about to start Adoption Leave, so his performance was not going to be an issue for some 6 months. The respondent's efficient running of its organisation could and would be achieved without the claimant's dismissal. The second is that the Tribunal is far from satisfied (and not hearing from Mohammed Farooq does not assist in this regard) that some other lesser sanction would not have been more proportionate. As the respondent has argued in other contexts, the claimant had been able to perform perfectly well as a PO and as a SPO, until he got the Partnership Manager role, but Mohammed Farooq had concluded that he could not be retained in any role. That is seriously open to doubt, and the respondent has failed to do enough to persuade the Tribunal, for all these reasons, that this treatment was justified. The claimant's s.15 claim accordingly succeeds.

Remedy.

i) Polkey

64. The parties agreed that the Tribunal should only determine liability. The respondent, has, however, pleaded, and made submissions on **Polkey**, in relation to whether there should be any reduction in the compensatory award to reflect the chance that, had a fair procedure been followed, the claimant would have been dismissed in any event. It was agreed this should be determined at this stage. Mr Bunting submitted that the claimant would have been dismissed in any event, albeit after his return from Adoption Leave, and there should be a 100% reduction thereafter. Ms Stanley submitted there should be no reduction. There was no evidence upon which the Tribunal could safely conclude that the claimant would have been fairly dismissed in any event.

65. The law on this topic is well summarised by Elias J in **Software 2000 Ltd v Andrews [2007] IRLR 568** from Elias, then the President, where he said this:

"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) *However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.*

(4) *Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.*

(5) *An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.*

(6) *[Now irrelevant following repeal of s 98A(2) ERA]It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.*

(7) *Having considered the evidence, the Tribunal may determine*

(a) *That if fair procedures had been complied with, the employer has satisfied it—the onus being firmly on the employer—that on the balance of probabilities the dismissal would have occurred when it did in any event.*

(b) *[N/a]*

(c) *That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the **O'Donoghue** case.*

(d) *Employment would have continued indefinitely.*

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

66. Thus it is clear that the range of options open to a Tribunal is considerable. It may make a 100% reduction in an appropriate case, a lesser reduction if it thinks the chances of the claimant being fairly dismissed are less than 100%, or may make none.

67. The Tribunal's view is that no reduction for **Polkey** should be made. The first reason for that is that the Tribunal considers it impossible to say what the outcome would have been had the respondent waited for the claimant to complete his Adoption Leave,

return to work, and then discuss with him, and seek to implement the adjustments recommended in the OH reports. The second is that , as the claimant had previously managed roles as a PO, and an SPO, it is impossible to say that he would not then have been able to return to such a role, with adjustments. Thirdly, the Tribunal considers that whilst for the potentially fair reason of capability, the claimant's dismissal was very much a consequence of Mohammed Farooq becoming fed up with him, and unfairly dismissing him out of those feelings of exasperation. A more objective , and less involved , reasonable manager, capable of standing back in mid - 2018 from what had gone on previously, in the light of the diagnosis received , would have been unlikely to have dismissed him, and would also have shared, as Mohammed Farooq and the respondent as a whole did not, his comments upon the OH reports that were so influential in the appeal. No reduction is made on the basis of Polkey.

2. Contribution.

68. Finally, Mr Bunting argued for a reduction for contribution under s.123(6) of the Employment Rights Act 1996. He cited BBC v Nelson in this regard. The Employment Judge queried the extent to which contributory fault had a role to play in capability dismissals, but Mr Bunting contended that it was not precluded by the wording of s.123(6), which is correct.

69. It was unclear what the conduct relied upon is. If it was the delay in authorising the release of the OH reports, the Tribunal would not so find, as the claimant disputed that he had done this. If it is the Adoption Leave, again, the claimant was not, on the respondent's case, dismissed for that, so that cannot justify any reduction. If it was his performance, then that would fall well short of the type of willful, reckless or foolhardy behaviour which the authorities say has to characterise the type of conduct which merits any reduction on this basis.

70. There is therefore simply no basis for the Tribunal to make any reduction from any awards it proposes to make.

Preparation for remedy.

71. The Tribunal invites the parties to consider the judgment , and, if possible, to seek to agree remedy, or to narrow and formulate the issues that the Tribunal will have to determine in any remedy hearing. In the event of the parties notifying the Tribunal of the need for a remedy hearing, and identifying the issues to be determined, the Tribunal will make further case management orders for the determination of remedy. The parties are encouraged to assist the Tribunal by suggesting what orders they consider will be required for the remedy hearing, with a suggested timetable for compliance.

Employment Judge Holmes

DATE: 8 October 2021

RESERVED JUDGMENT SENT TO THE
PARTIES ON 11 OCTOBER 2021

RESERVED JUDGMENT

**Case Number: 2402025/2019
Code V**

FOR THE TRIBUNAL OFFICE

ANNEXE – KEY TO ABBREVIATIONS USED IN DOCUMENTS

OASYS	Offender Assessment System. The assessment tool probation officers use to assess service users. This is a form in the region of 35 pages. In the case of a higher risk offender this is completed by a probation officer and then quality checked by a Senior Probation Officer and (if it is of sufficient quality) then counter-signed by this Senior Probation Officer. Countersigning are done within a specific timeframe as this an operational measure.
OMiC	Offender Management in Custody. The probation service operating in a prison context. Offenders' cases are held by probation officers (or prison officers) based in prisons.
ETE	Education, training and employment. The acronym is used to refer to the work the probation service does helping service users with education, training and employment.
NSI	Non-statutory intervention. This is a code used to refer to interventions which have not been ordered by a court or parole board eg. an accredited programme which it is voluntary to complete.
YOS	Youth Offender Service. Probation officers are part of this service (with other professionals) working with young offenders
HDC	Home detention curfew. This is when offenders are released from prison but subject to a curfew (monitored by electronic tag).
DRR	Drug Rehabilitation Requirement. A requirement imposed on offenders (by eg, a court) related to drugs eg. a requirement to attend drug counselling and to be drug tested
RAMA	Review of Administrative Management Arrangements [meetings] A meeting concerning the progress of a particular offender. This is the longstanding system in Greater Manchester for Management

	<p>Oversight of High/Very High Risk cases, Lifers/IPP (imprisonment for public protection) and cases where there are child protection issues.</p> <p>A RAMA meeting is a meeting involving a senior probation Officer and probation officer only. In this meeting the probation officer will feedback information from external agencies. The offender’s risk and compliance are reviewed and determinations are made as to whether to make further referrals for accessing resources. Determinations are made as to whether to escalate to offender’s case to MAPP Panel (a Multi-Agency Public Protection Arrangements meeting), monitor the offender or lower the risk rating.</p>
<p>Slip Rule [This definition comes from the Respondent. The Claimant is not in a position to confirm or deny the meaning of this term].</p>	<p>This allows the [Criminal] Courts, within 56 days (not working days) from the sentence/order date (inclusive) to alter the original sentence/order if there has been a factual or legal error or where further evidence/information has come to light that is relevant to the sentence or order made.</p>