EMPLOYMENT TRIBUNALS

Claimant:	**Ms. Z N Clarkson-Palomares**
Respondent:	**The Secretary of State for Justice**
Heard at:	**Reading Employment Tribunal (via CVP)**
On:	**7th- 10th, 13th & 14th and 16th September 2021 (17th, 20th and 29th September 2021 and 17th November 2021 in Chambers)**
Before:	**Employment Judge Eeley** **Mrs. A Brown** **Mr. D Palmer**

Representation

Claimant:	In person
Respondent:	Mr. J Allsop, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The name of the respondent to claim number 1401665/2020 is amended, by consent, to the Secretary of State for Justice.

2. The claimant's complaints that the respondent breached its duty to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 in relation to:

(a) a failure to provide voice recognition software from September 2016 until 6th December 2018; and
(b) a failure to provide training in relation to proper use of the voice recognition software from September 2016 until May 2019;

are well founded and are upheld.

3. The Tribunal has exercised its discretion under section 123(1)(b) of the Equality Act 2010 on the 'just and equitable' basis to permit the claimant to pursue her out of time claims for failure to make reasonable adjustments in relation to provision of voice recognition software and training in the use of the said software (as at paragraph 2 above). The Tribunal has not extended the limitation period on the just and equitable basis in relation to the reasonable adjustments claim in respect of provision of a proofreader.

4. The remainder of the claimant's complaints that the respondent breached its duty to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 fail and are dismissed.

5. The claimant's complaint that the respondent indirectly discriminated against her contrary to section 19 of the Equality Act 2010 in relation to the requirement to provide Written Statements (in the SSCS) without the use of voice recognition software is well founded and upheld in relation to the period from September 2016 to 5th December 2018 only. This aspect of the claim was presented to the Tribunal within the relevant limitation period.

6. The remainder of the claimant's complaints of indirect discrimination contrary to section 19 of the Equality Act 2010 fail and are dismissed.

7. The claimant's complaints of section 15 discrimination "because of something arising in consequence of disability" and section 26 disability related harassment fail and are dismissed.

REASONS

Background

1. The claimant is a fee paid judge of the First Tier Tribunal. She issued three sets of proceedings pursuant to claim numbers 1400822/19 ("The 1st proceedings"),1401665/2020 ("The 2nd proceedings") and 1404491/2020 ("The 3rd proceedings"). The 3rd proceedings were dismissed upon withdrawal in advance of the final merits hearing. During the hearing the name of the respondent in the 2nd proceedings was amended by consent so that the respondent to both sets of proceedings is now properly recorded as the Secretary of State for Justice.

2. The claimant's claims consist of a variety of complaints of disability discrimination including allegations of breaches of the duty to make reasonable adjustments; allegations of harassment (section 26), discrimination because of something arising from disability (section 15) and indirect discrimination (section 19). At the outset of the final hearing both parties agreed that the issues to be determined by the Tribunal were accurately set out in the agreed list of issues at page 103A of the bundle of documents. This list is reproduced at "Annex 1" to these written reasons. In addition to the agreed list of issues, the respondent raised arguments of judicial proceedings immunity in relation to some aspects of the claimant's claims.

3. The claimant's case is about her time sitting as a fee paid judge in the First Tier Tribunal, firstly in the Social Security and Child Support Chamber (hereafter referred to as "SSCS") and, latterly, in the Immigration and Asylum Chamber (hereafter referred to as "IAC"). The claimant is dyslexic and this impacts upon various facets of her everyday working life. In essence, the claimant asserts that she required several reasonable adjustments in order to be able to carry out her judicial function effectively and in a timely manner. She complains that the adjustments were not made, either timeously or, in some cases, at all. She asserts that this had a number of knock-on effects which adversely impacted upon her ability to sit as a fee paid judge and comply with the requirements of that role. She claims that, as a consequence, her performance was unjustly criticised and she was unfairly threatened with the judicial equivalent of disciplinary sanctions. The respondent accepts that the claimant was disabled within the meaning of the Equality Act 2010 ("EA 2010") and that it knew she was so disabled at all material times. However, it denies all the claimant's claims of discrimination. It asserts that adequate steps were taken for her to be able to carry out her judicial functions appropriately and that it did not act in a discriminatory manner when it appraised her performance or responded to complaints by members of the public about the claimant's decisions. Further, the respondent asserts that certain aspects of the claimant's claims are governed by the principle of judicial proceedings immunity ("JPI") such that the Employment Tribunal does not have the power to find it liable for breaches of EA 2010 which fall within the scope of JPI.

4. The tribunal hearing dealt with issues of liability only, leaving any remedy issues to be determined at a further hearing, as required.

5. The Tribunal received written witness statements from the following witnesses:

   On behalf of the claimant:

   (a) The claimant, Nadine Clarkson, a fee paid judge of the First Tier Tribunal.
   (b) Antonina Murray Smith, a district judge.
   (c) Samantha Mace, a fee paid judge in the First Tier Tribunal (IAC).
   (d) District Tribunal Judge William Rolt of the First Tier Tribunal (SSCS).
   (e) Helena Suffield-Thompson a fee paid judge in the First Tier Tribunal (SSCS).

(f) Angharad Lloyd-Lawrie a fee paid judge in the First Tier Tribunal (IAC).

Of the above, only the claimant and District Tribunal Judge Rolt ("DTJ Rolt") gave oral evidence to the Tribunal. The Tribunal excluded the witness statement of District Judge Claire Gilham from consideration because the evidence it contained was not relevant to the issues of liability before us.

The respondent relied upon the written and oral witness evidence of the following witnesses:

(i) Ian Francis, HMCTS Regional Security and Safety Officer for the South West Region.
(ii) Matthew Chaplin, HMCTS Delivery Manager for Gloucester and Cheltenham Civil, Family and Tribunals (previously based at Bristol County Court).
(iii) Resident Judge Julian Phillips, Resident Judge in the First Tier Tribunal (IAC) responsible for the management of the Newport hearing centre.
(iv) Andrew Wright, HMCTS Digital and Technology Services Head of Judicial and Royal Court of Justice Group.
(v) Helen Andrews, HMCTS Operations Manager for the Bristol Civil Justice Centre.
(vi) Regional Tribunal Judge Peter Maddox, Regional Tribunal Judge for Wales and the South West in the First Tier Tribunal SSCS.
(vii) Robert Casey, Delivery Manager for HMCTS.
(viii) Sharon Boreham, HMCTS Cluster manager for Avon, Somerset and Gloucestershire.
(ix) Tribunal Judge Moira Macmillan, a salaried tribunal judge sitting in the First Tier Tribunal in the General Regulatory Chamber and previously in the SSCS.

6. The Tribunal was presented with an agreed hearing bundle totalling 1804 numbered pages together with additional documents labelled C1 and R1. The Tribunal read the pages of the bundle to which they were referred by the parties. The parties provided an agreed chronology and cast list for which the Tribunal was grateful. In addition, the Tribunal was assisted by both written and oral submissions on behalf of both parties. References in square brackets within these reasons are references to page numbers in the agreed hearing bundle, unless otherwise specified.

The Facts

The claimant's disability and career history

7. The claimant is disabled by reason of dyslexia. The respondent has conceded that she was disabled at all material times and that it knew of her disability. The Tribunal accepts that the claimant's dyslexia causes her difficulties in writing, reading, with short term memory and with the structuring of her work. The claimant undertakes a lengthy process in order

to produce written work. She makes 'visual points' which she then makes into a 'mind map' which she then reorganises into an order which she thinks makes sense. She then tries to review this after a 24-hour break to see if that is the order that she thinks other people would consider to be correct. She then dictates what she wants to write and then reads it over in order to spot errors in content. She then re-reads it for spelling errors and finally reads it again for grammar and structure errors. She then leaves it for a further 24 hours before proofreading it. When tired or under time pressures her writing ability noticeably deteriorates. If she is unable to use voice recognition software she cannot dictate her work and has to type everything for herself. Even after repeatedly proofreading a document the claimant may still fail to spot mistakes and may need to rely on a third party to check her work for her. The claimant can make typed notes at the same speed that people speak but these notes contain many spelling errors.

8. It is fair to say that the claimant has faced many barriers to educational progression as a result of her disability and has sometimes had to find different approaches to her work in order to achieve her full potential in her education and later career. Without the benefit of proper support she dropped out of education whilst studying for her A Levels. She later worked as a paralegal whilst taking and passing an access to education course. At the age of 21 she obtained a report from an Educational Psychologist, Dr Moody who scored her as having an IQ in the top 1% of the population and diagnosed the claimant as having dyslexia which caused her educational difficulties. She attended university and gained her law degree. She went on to Bar School but later became a solicitor with higher advocacy rights.

9. The claimant worked as a solicitor for eight years, mainly in the area of welfare and housing. In the firm where the claimant worked, she was provided with an online dictation service that returned an electronic transcript. Apparently, all her correspondence was proofread. Although this was helpful, the claimant felt that it resulted in her being under constant scrutiny that other staff were not subject to. The claimant's employers were very generous with her time recording targets but, even so, we have no reason to disbelieve the claimant when she says that she was finding that she needed to work at least 10 hours a day. We accept that, as a result of her dyslexia, she found it very had to keep track of all the many small matters arising from each of her cases and she additionally found structure and organisation very difficult. Her reduced short-term memory made the work challenging. The claimant says that she found it extremely demoralising having to work very hard to complete administrative tasks, despite enjoying the case work itself. During her time working as a solicitor she found ways of working which involved adaptations and support mechanisms which helped her to do her job effectively. She largely adapted to a way of working which suited her during her time in practice as a solicitor.

10. As a result of her adapted working practices the claimant felt that she was under additional scrutiny. She feels that, because of her dyslexia, her intellectual ability has always been doubted. She has always felt that she has had to work harder in order to prove herself to others. She feels that asking for help has always resulted in criticism from other people. To this day, she finds that explaining her disability (and the difficulties that she

faces) is a humiliating experience. She feels that people automatically treat her as intellectually incapable. As a tribunal we, of course, have no way of knowing if this was in fact the way that she was viewed by others during her working life as opposed to being the claimant's own, subjective, perception.

The claimant's judicial appointment and career aspirations

11. After some time working as a solicitor the claimant was finding the administrative side of her work to be unduly time consuming and demoralising. As a result, she sought work which she felt she was more suited to and which provided new challenges. She set about applying for appointment as a fee paid judge in the First Tier Tribunal, SSCS.

12. On 15th July 2011 the claimant was offered an appointment as a fee paid judge of the First Tier Tribunal, assigned to the SSCS. The appointment took effect in August 2011 and she was assigned to the South East Region. In her application for the post she had noted that she has dyslexia and needs to use a computer and is normally provided with extra time in examinations. The claimant transferred to the South West Region in April 2013. She was based at Bristol but also sat in Chippenham, Cheltenham, Swindon, Weston Super Mare and Newport, Wales.

13. The claimant underwent induction training when she was initially appointed. We heard evidence that, amongst other things, this training included training in writing statements of reasons (the written judgment and reasons sometimes produced in SSCS cases). We heard that newly appointed judges worked in small groups and went through the process of making a decision in a case study. They then worked through the process of writing up their decisions and reasons so that they understood what was required of them in this regard.

14. Over the years the claimant developed her career plans and aspirations in order to minimise those aspects of her work which she found particularly troublesome due to her dyslexia. She wished to minimise or reduce written work and administrative tasks. It was her belief that she could best do this by becoming a 'portfolio judge'. That is to say, she wished to obtain a number of fee paid appointments in a range of jurisdictions. In an ideal world she would then 'mix and match' her sitting days in order to earn the equivalent of a full-time salary across her different appointments. She perceived that, over time, she would be able to obtain appointments in those jurisdictions which involved the least written and administrative work (such as routine or regular preparation of written judgments and reasons). Whether she would be able to do this, of course, depended on whether her perception of the nature of the work undertaken by judges in the various different jurisdictions was, in fact, accurate.

15. As a fee paid judge sitting in several different jurisdictions, the claimant would have overall control over how many days she offered to sit and in which jurisdictions. The necessary corollary of this is that she would also have overall responsibility for managing her workload and ensuring that she had adequate time to complete all the duties which formed part of her sitting commitments. Such duties would not be limited to carrying out tribunal

hearings (with the parties present) but would also include the written and administrative work which came with such sittings. Further, the 'flip-side' to the flexibility of working as a fee paid judge is the absence of a guaranteed minimum level of remuneration. Fee paid judges, as the name suggests, are not paid a salary. Instead, they are paid fees for particular sitting commitments and, sometimes, for the written work and other tasks which accompany them. (Each of the jurisdictions may have differing fee structures and levels of remuneration). Demand for fee paid judges to sit in a particular jurisdiction will ebb and flow over time depending on the workload of that jurisdiction. Each jurisdiction will utilise its salaried judicial resource as a priority before calling upon the services of fee paid judges. Consequently, fee paid judges are not guaranteed any particular number of sitting days or any particular level of remuneration from year to year. That is part and parcel of the working model. To the extent that this model of working did not meet the claimant's financial expectations she would have to consider whether, in fact, a series of fee paid appointments was a feasible way of earning her required, or desired, income level. Depending on her circumstances it might be that her preferred income level could only realistically be met by a salaried position.

16. The claimant's evidence was that her ideal model of working would be to sit for five days per week in a mixture of jurisdictions which were weighted towards those with little written or administrative work. By the time she appeared to give evidence before this Employment Tribunal her primary aspiration was to sit as a deputy district judge in the County Court. It was her perception that there is little pre-reading involved (as she would only receive the court files on the day of the hearing) and she would make her decisions orally such that they would be recorded with no need for her to provide written judgments.

How the SSCS operates

17. In any event, the claimant's first judicial appointment was to the SSCS chamber of the First Tier Tribunal. We heard evidence about the way a judge sits in the SSCS chamber. We find that a full time equivalent SSCS judge would spend approximately 60% of their time sitting on case hearings with a party (or parties) in attendance. The remainder of the working week would be spent on preparation and pre-reading for upcoming hearings and the preparation of "Statements of Reasons" (hereafter "SORs"). SORs are the equivalent of full written judgments with written reasons. A salaried SSCS judge would, on average, expect to spend half a day per month on writing SORs. On average a salaried judge might expect one to two requests for SORs per month. It is also generally the case that a salaried judge will sit on the more complex or contentious cases. They might expect more requests for SORs than their fee paid colleagues, although this would not automatically be the case. In SSCS hearings decisions are given orally, at the hearing so SORs are not required in all cases. However, the parties have the right to request a written SOR to be provided after the hearing. A written SOR is a prerequisite for those wishing to appeal against a First Tier SSCS decision. Preparation of written SORs is therefore an important part of a First Tier SSCS Judge's duties, whether they be salaried or fee paid. Consequently, a President's Protocol has been issued by the Chamber

President in relation to SORs. The material parts of Protocol Number 4 (formerly number 8) state:

1. *"Rule 34(5) of the Tribunal Procedure (First-tier Tribunal) SEC) Rules 2008 as amended (The Rules) requires the Tribunal to send to a party who requests it, a written Statement of Reasons within one month of the request or as soon as reasonably practicable after the end of that period.*
2. *Every Tribunal Judge has responsibility for providing the Statement of Reasons to explain the decision of the Tribunal within the time limit set down by the Rules.*
3. *It is essential that this requirement is met. Parties are entitled to know within a reasonable period of time after the decision why they have won or lost their appeal. A Statement of Reasons is also a prerequisite to a further appeal.*
4. *It is expected that in the absence of special circumstances a Statement of Reasons will be produced within 22 days of it being requested from the judge. When a Tribunal Judge fails to meet this time limit he or she is not acting in the best interests of the parties nor in the best interests of the Tribunal as a whole. ….*

7. *If a Statement of Reasons is not returned within the one month period set down in the Rules the clerk will refer the matter to the appropriate Salaried Tribunal Judge. That Judge will request the return of the statement by a specified date and, if there is still no response to that request, will refer the matter to the Regional Tribunal Judge for the region in which the judge sits.*
8. *If there is a further unexplained or unreasonable delay the Regional Tribunal Judge will investigate the matter and may refer the matter to the President of the Social Entitlement Chamber who may conclude that the failure to provide a Statement of Reasons amounts to a disciplinary matter and direct that further action must be taken.*
9. *Fee paid Judges are entitled to claim a fee for the preparation of a Statement of Reasons and the procedure for such claims is contained in President's Protocol 3."*

18. We heard evidence, and accept, that on an average sitting day an SSCS judge will have a full list of cases with a relatively short hearing time for each individual case hearing. Each case will be expected to last approximately half an hour to an hour, depending on the nature and complexity of the issues in question. At the conclusion of the hearing a judgment and reasons are delivered orally. The jurisdiction is known to deploy an inquisitorial model as opposed to an adversarial model. This means that the SSCS judge plays a significant role in ensuring that all the relevant evidence is elicited from the parties and that the relevant legal arguments and principles are properly and actively considered by the tribunal. In order to do this effectively the judge will need to have read the paperwork thoroughly in advance. He or she will also need to have had the opportunity to have a pre-hearing discussion with their colleague(s) on the tribunal panel, often a medical member. Appellants are generally unrepresented at the First Tier in this jurisdiction. The respondent often does not attend the hearing.

19. Whilst late provision of the written material for any given case (possibly less than two weeks prior to the hearing) might be expected to cause difficulties in ensuring sufficient preparation time, the claimant gave evidence that she did not have any particular difficulties in this regard. On her own evidence the claimant did not suffer any disadvantage by the late provision of hearing materials. Her evidence was that she was able to 'whip through' the documents and adequately prepare for the hearings in the time that she was given with the papers. Preparation for hearings and sittings was not in reality the real concern or difficulty in this case. The claimant's concerns and difficulties primarily arose in the follow-up to the tribunal hearings when written work was required.

20. SSCS judges are "ticketed" to hear various categories of case. On appointment they are given an '03' and an '04' ticket which involves sitting with tribunal members on cases involving non-means-tested disability related benefits cases and Employment Support Allowance cases respectively. '03' ticket cases are listed for 50 minutes each with five cases to be heard in a day. The papers for such a case would be considerably longer than 6 pages but if they were more than 250 pages the case would be referred to be listed for a longer hearing. An '04' case would be listed for a 30 minute hearing with about eight such cases listed in a day. Fee paid judges were selected for '01' tickets after an expressions of interest exercise. The claimant successfully passed this selection process and was ticketed to sit on 01 cases. These are judge 'sit alone' cases which deal with legacy benefits and means tested benefits (about 50 different types of benefit in all). The claimant's previous work as a solicitor in this area meant that she had a pre-existing knowledge of this area of law. '02' ticketed cases concern Child Support and only go to the salaried judges. Tickets 05, 06 and 07 deal with industrial disablement benefits, vaccine damage cases and mesothelioma cases respectively.

21. As already indicated, it is up to the fee paid judge in question to offer their availability to sit in the jurisdiction. Given the expectation that a salaried judge will only sit in hearings for 60% of the time, the overall instruction to the SSCS booking team is that fee paid judges should not sit more than three days per week in order to allow for the time needed to complete the other aspects of the role. The booking system involves each fee paid judge offering their availability to sit on particular days, in advance. The booking team will then look at the case load and book each judge for some or all of their proffered availability. A booking letter goes out to the judge indicating which days have been booked in a particular period of time, say, a month. In addition to such advance bookings there is last minute, so-called "filler" work. Such work is offered out to the judges at short notice and the claimant could (and did) offer to sit on such last-minute work.

22. Due to the claimant's personal circumstances, she wanted to sit for as many days as possible in her SSCS role. Some weeks she would be available to sit for five days in the week and in other weeks she would be unable to offer any availability because of, for example, childcare commitments. Her intention was to average a sitting rate of three days per week over the course of each year. She would achieve this by sitting up to five days in

some weeks to balance out the weeks where she was unable to sit at all. The claimant sought an amendment to the booking team's practice so that she could be booked to sit for five days in a given week so long as she did not exceed the 60% average sitting rate overall. This change to the basic booking approach was approved and implemented for the claimant.

2013

23. On 30th May 2013 the claimant made a written request for recording equipment to Regional Tribunal Judge ("RTJ") Curran.

24. Fee paid judges, such as the claimant, were subject to an appraisal scheme [1464]. As a general rule, judges would be appraised on a 3 yearly cycle. The appraisal includes an observation of the judge in action during hearings. The scheme sets out the other sources of information which may be taken into account by the appraiser. The appraisal is based on the "Tribunal Competencies" and an outcome indicator grade is provided at the end of the appraisal report. The available grades are: "competent performance"; "some concern…"; and "serious concern". The scheme makes provision for personal development plans and sets out the procedure when the appraisee and appraiser cannot agree on the wording of the report.

25. The claimant's first appraisal took place on 4th June 2013 and was carried out by District Tribunal Judge ("DTJ") Street. The appraisal document [182] is detailed and sets out the observations undertaken and assesses the claimant in line with the competencies of Law and Procedure, Communication, Conduct of Hearing, Evidence and Decision Making. Feedback is provided and an outcome indicator given. In this case the DTJ stated in the outcome section:

> *"I have every confidence, very genuinely, that Judge Clarkson will make an excellent judge. I give a competent grading, albeit with some hesitation on the basis that today she did not have the full grasp of the law being applied in particular in relation to the support component and its importance to the outcome."*

The claimant did not make any complaint about this appraisal or the contents of the written appraisal document.

26. Also on 4th June 2013, Mr Chaplin (the Delivery Manager for Gloucester and Cheltenham) received the claimant's request for recording equipment. He emailed the claimant to outline the process for obtaining an occupational health assessment of her needs. The assessor would then decide what, if any, additional equipment was required. He noted that the process could take between 6-8 weeks once the paperwork was submitted.

27. We accept that the claimant provided a copy of her educational psychologist's report (Dr Moody [505]) to HMCTS soon after her transfer into the region in 2013. It appears from her document [at 187E] that this was at the end of May/beginning of June 2013. We accept that she left it at the tribunal premises for the attention of Mr Chaplin although it is unclear at what stage he actually had sight of the report and had the opportunity to

read it and consider its implications. Whatever the precise timeline, it is apparent that he did not act immediately to refer the claimant to occupational health ("OH") to assess the need for disability related adjustments in the workplace.

28. At some point in the summer of 2013 the claimant was asked to complete a form because ATOS (the occupational health providers) had to carry out an assessment. The form requested that the claimant give permission to disclose her medical records and have a fitness for work assessment. The claimant refused to provide disclosure of her medical records. She considered that this was not a 'medical' and she had already provided a report. She did not agree to this form of assessment. She considered that she was fit for work and was appointed on that basis. She amended the wording on the form to read *"necessary for reasonable adaptions under the DDA."*

29. We pause to note that the report of the educational psychologist is useful but not sufficient on its own for workplace purposes. Whilst it provides a diagnosis and a description of the claimant's dyslexia it does not go further and clarify the impact of the disability in the workplace and the measures suggested to mitigate this. Occupational health reports, by contrast, perform a different function. They take the diagnosis or description of a medical condition or disability and assess the interrelationship between it and the workplace in the context of the job performed by the individual employee or (in this case) judge. They assess the effects of the condition on the ability of the individual to perform their role. They may set out any limitations on the individual's ability to perform the full range of tasks inherent in the post. They may then make suggestions as to how any difficulties may be overcome by the provision of equipment or other adjustments. To that extent they often assess someone's 'fitness to work'. This does not imply (as the claimant believed) an assessment of the individual's intellectual capabilities or skill levels or suitability for the post overall. Rather, it constitutes an assessment of the individual's ability to perform the full role to the required standard given the context of their health or disability with an additional assessment/prescription of the tools, equipment or changes to working practices which may reasonably be needed for the individual to perform the role fully and without being put at an unfair disadvantage. As we set out below, the claimant interpreted an assessment of her fitness to work as an implied criticism of her intellectual abilities or suitability for her judicial post. We can understand how a lifetime of trying to work with dyslexia might give the claimant this subjective impression but we cannot accept that this would be an objectively reasonable conclusion for her to draw in the circumstances. Had she been able to take a step back from the detail of her own situation we think she could reasonably have been expected to realise the purpose of any occupational health referral despite the exact wording on the referral form. Her perception that the OH referral constituted a criticism of her abilities or a threat to her security in post was unwarranted and unreasonable in all the circumstances. Of course, it would have been helpful if the OH referral had been clearer and more explicit about the reasons for the referral and the questions that the OH clinician was expected to answer. Greater clarity and specificity would probably have gone some way to allay the claimant's concerns about the referral. We also cannot be

certain of the extent to which the claimant was provided with an oral explanation (by HMCTS) of the purpose of the referral and the proposed remit of any OH report. If someone had explained these matters to her clearly, she might have overcome her reluctance to sign the consent form to facilitate the referral. That said, we find it hard to accept that she did not realise that the OH referral was a gatekeeping process which needed to be complied with for her to be given the adjustments and support that she needed.

30. The claimant's initial form of authority for the occupational health report was rejected because she had amended the wording. It did not provide full and proper consent for the sort of assessment and report which the respondent had requested. So long as the claimant refused to sign a consent form with wording proposed on behalf of the respondent, the parties were at an impasse. The respondent wanted a report but the claimant would not authorise what the respondent was asking for.

31. On 9th August 2013 the claimant raised a formal complaint to RTJ Curran about recording equipment [187CA]. In that complaint she confirmed that she needed to take her notes of a hearing on the computer (she used her own iPad to do this) but needed recording equipment for the formal 'Record of Proceedings' ("ROP"). There was a blue recording machine available (otherwise referred to as a "Coomber machine") which she said was unreliable as it regularly did not 'fix' the CDs (i.e. burn the recording to a CD). She expressed concern that listing conflicts might mean that more than one person would need to use the recording machine at any given time. She detailed how she had been asked to complete a form to request a fitness to work assessment to be carried out by ATOS. She stated that the form requested full disclosure of her medical records. She said that she had completed the form but refused to disclose her medical records on the basis that her dyslexia was nothing to do with her GP. She asserted that the GP records were of no relevance and that the necessary information had already been provided. Upon being told that they would have to carry out an assessment in any event, the claimant said that she had completed the form but removed the words "fitness for work" and replaced them with 'assessment for adaptions under the DDA/Equality Act'. She asserted that she had subsequently been told that this application had been refused and she had not been provided with the equipment. The claimant went on to say that she did not agree to be assessed for her fitness to work. She asserted that she was fit for work and that should not be questioned due to her disability. She said that she found the email correspondence she had seen offensive and concluded that her request was being belittled. She said that her educational psychologist's report had been ignored. She confirmed that she had been sitting in Chippenham and there was no recording equipment there and therefore no Record of Proceedings. She said that the failure to provide equipment was impeding her and causing her to breach her responsibilities. She flagged up that, as a result, she was concerned that she would not be able to accept work in future leading to a loss of income.

32. On 6th September 2013 the claimant sent a letter of claim alleging a failure to make reasonable adjustments [187D].

33. According to the agreed chronology, in December 2013 the claimant was provided with a laptop with Dragon dictation software preloaded onto it. For reasons which are not altogether clear, this laptop and software did not work reliably for the claimant and did not resolve her difficulties as had been anticipated. She had difficulties in training the Dragon software and was unable to get the most out of its functionality. We accept that, for whatever reason, the laptop and Dragon software provided at this time did not resolve the difficulties she encountered in taking a record of hearings, taking notes of evidence, and typing up written SORs. She was still without a reliable laptop for typing and software for dictation. In addition, we accept that the claimant was not provided with the facility to download recordings taken on the Olympus Dictaphone at this stage. Indeed, the absence of Olympus software was a problem which appears never to have been resolved. Even today the claimant does not have the facility to download digital dictation files so that they can be sent to a typist for transcription.

Recordings and "Record of Proceedings."

34. We pause the chronology to observe that we are mindful of the age of some of the court and tribunal buildings still in regular use. Whilst audio recording systems are often installed in new-build court rooms as a matter of course, this was not always the case. We anticipate that there would be significant cost and probably some practical difficulty and disruption involved if HMCTS were to attempt to retrofit all existing hearing rooms with integrated recording equipment. In order to ensure that the claimant could reliably make an audio recording of proceedings (and in the absence of all hearing rooms having integrated recording equipment) she would have needed access to a reliable portable recording system which she could take with her from hearing room to hearing room, depending on her commitments. Alternatively, she could perhaps have been assigned to a particular hearing room at each location where there was in fact a reliable recording system. No evidence was led by either party as to the cost or practicability of these alternative solutions and so we cannot comment further. The overall tenor of the evidence was that the claimant was expected to persevere with the aged Coomber machines despite their unreliability. On the occasions when the available recording system failed the practice was for the hearing to be cancelled and rearranged for another day. The claimant could still claim a fee for any hearings which were cancelled on the day due to such technical difficulties.

35. There has to be an official "Record of Proceedings" for all hearings which take place. This is the record of what is said during the hearing in terms of oral evidence and submissions from any party or witness. Under the Senior President of Tribunal's Practice Statement dated 30th October 2008 dealing with records of proceedings ("ROP"), the presiding member must make an ROP "in such medium as the member may determine." This has been the case throughout the claimant's time as a fee paid judge. It is the responsibility of the judge hearing the case to ensure that such an ROP is taken. Before the advent of alternative technology this would probably have been a handwritten note of the evidence taken by the judge as they went

along. Nowadays, many judges will type the ROP as they go through the hearing. However, we find that there is no specific requirement that the ROP be in a written format. In suitable circumstances an audio recording of the hearing can also be treated as the formal ROP. We find that the respondent is not concerned by the format of the ROP so long as a reliable record is taken. It is a matter for the judge sitting to determine which format is used in any given case. That said, the respondent must be taken to have known what recording equipment was or was not in place in the relevant hearing venues. As a matter of practicality, they would know that, unless there is functioning and reliable recording equipment, the claimant will have to take the ROP in a written format, probably on her laptop, whatever her individual preferences might otherwise have been. We find that the respondent knew or ought to have known that the claimant would be under the impression, following induction training, that she was under an obligation to take a written note of the evidence herself in the absence of reliable audio recording systems.

2016

36. In line with the way the bookings system for fee paid judges was operated by the respondent (see above) on 13th January 2016 DTJ Rolt asked for the claimant's availability on her profile to be amended from 6 sessions per week to 10 sessions per week. This was actioned. A session, for these purposes, is half a day. This was in line with the claimant's request to be permitted to sit for five days per week on some occasions to make up for those weeks where she could not sit at all so that she averaged three days per week over the course of a year. Thereafter, over the relevant period, she had some of the highest levels of sittings amongst the SSCS fee paid judges [542, 1361, 1772, 1772A set out the details, which were not challenged in cross examination].

37. The claimant underwent her second appraisal as part of her SSCS role on 2nd June 2016 [209]. This time it was carried out by DTJ Walker. The same format was deployed as used by DTJ Street in the first appraisal. In the feedback section it was noted that the claimant had identified problems with dictation machines and the low level of sittings. It was recorded that appraiser and appraisee had discussed the issues of corrections and late statements (i.e. SORs.) The claimant is recorded as having explained that many of the corrections were because of incorrect dates and she now felt more aware of the rules. Two matters were raised in connection with late SORs. The claimant stated during the appraisal process that she had had considerable difficulties in her personal life which meant that she had not been able to keep on top of her work as she would have wished. She went on to confirm that these difficulties were now resolved and that they should no longer be a reason for delay in preparing SORs in the future. She also mentioned that she had difficulties in recording her hearings. It was noted that frequently a statement arrived with no recording attached. It could then take a considerable length of time before the recording was obtained and, in one case, it was on a cassette which she could not play. DTJ Walker noted that the claimant had agreed to supply precise details of difficulties which

she had experienced, and it was agreed that this was a problem of general application which would be taken up with the administration.

38. Despite saying that she would provide these further written details of the difficulties that she had encountered (with dates and specifics), the claimant did not subsequently do this. She did not follow up on it so that the respondent could do something about it. The respondent was therefore unable to take this complaint further or take steps to avoid a future recurrence of these problems.

39. The overall outcome of the second appraisal was that the claimant was marked as having given a 'competent' performance.

40. In July 2016 the claimant's appointment to the SSCS was renewed for a further five years. This indicates that the respondent and, by implication, the claimant's leadership judges, did not have any particular problems with her performance at this stage. This straightforward renewal of the appointment could be seen as a vote of confidence in her abilities.

41. On 6th September 2016 DTJ Rolt communicated to HMCTS a request from the claimant for an ergonomic keyboard and wrist rest.

42. On 16th September 2016 DTJ Rolt provided the claimant with an analogue Dictaphone and tapes [236]. This was a makeshift solution intended to tide the claimant over until a more permanent solution could be found. The Dictaphone was primarily intended as a tool for dictating SORs so that they could be typed up as requested. (It was necessary because the claimant did not have access to a digital Dictaphone with the necessary functionality to download recordings so that they could be typed). In addition, the claimant did, on occasion, attempt to use the Dictaphone to make a recording of the hearing for ROP purposes, if the usual recording systems were unavailable. However, depending on the layout of the hearing room, it was usually not possible to use a Dictaphone in this way as not all speakers would be sufficiently close to the device for their voices to be captured and recorded.

43. On 26th September 2016 RTJ Curran requested an occupational health assessment for the claimant from Mr Casey [248]. On 29th September 2016 Mr Casey emailed the claimant to ask her to complete a DSE pre-assessment form [254]. However, on 14th October 2016 Ms Houlden informed Mr Casey that the issue was actually outside the DSE Assessor's remit and that a bespoke occupational health referral was required [281]. The claimant confirmed that she was happy to proceed with the OH referral on 17th October 2016 [281]. She was subsequently asked to complete sections on the OH referral form on 24th January 2017 but declined to sign the referral consent form at this time [324] [441].

44. In September 2016 there was correspondence between the claimant and RTJ Curran about late SORs. In her response [at 244] the claimant pointed out a number of reasons for the delays: childcare issues/the au pair; her husband had been unwell; arthritis; dyslexia and the laptop.

45. By 4th October 2016 RTJ Curran chased another SOR which was overdue. She reminded the claimant that the appellant was being affected financially and asked her to prioritise it. She noted that at that stage the claimant had 16 outstanding SORs and she went on to say: *"I think that the time has come for a decision to be made about whether you should remove yourself from sittings so that you have sufficient time to devote to the SORs. I look forward to receiving your observations."* Clearly RTJ Curran was making a suggestion. She was not making the decision herself that the claimant should not sit further until the backlog of SORs was cleared.

46. On 20th October [289] RTJ Curran wrote about a late SOR which had been promised by 17th October and which was still outstanding. RTJ Curran noted that 14 SORs were then significantly overdue. She continued: *"I consider that the time has come to intervene because the delay in producing statements of reasons is likely to become a conduct issue and, if at all possible, I would like to avoid it getting to that stage. I should, however, advise you that the Judicial Conduct and Investigations Office takes the view that a delay of 6 months in producing a SORs is likely to amount to a finding of judicial misconduct. Accordingly, I propose to remove you from sittings until such time as all the outstanding statements have been completed. I am sorry that it has come to this point but I cannot see any other alternative at present given the continuing delay."* The claimant says that she felt that this was a reprimand given that she would not be able to earn sitting fees (albeit she could charge fees for writing up the SORs but they were lower than the fee paid for a day actually sitting in a tribunal hearing.)

47. The claimant's response to this letter was to point out that, as she was then signed off sick, there was no need to remove her from sitting. She focused on other causes for her sick leave, such as problems relating to her husband in order to make it look more like a short-term problem rather than a longer-term issue related to her disability or a lack of reasonable adjustments. She wanted to emphasise the transient nature of the problems because she did not want an indefinite loss of income.

48. In any event, the claimant offered a further tranche of sitting days and was booked for several sessions from 21st December 2016 up until 20th January 2017.She did not refer this over to RTJ Curran (in light of the RTJ having removed her from sittings) in order to see if RTJ Curran was content for the claimant to be booked to sit during this period.

<u>2017</u>

49. In May 2017 the purchase of two new portable recording devices was authorised [374-378]. It is not clear whether the spare recording device sourced from Cheltenham was provided in addition to these [347 and 353].

50. On 16th May 2017 the claimant emailed RTJ Curran about the progress of the OH referral and adjustments. RTJ Curran's response on 19th May was that she would contact the Judicial HR representative in this regard

[345]. For context, it is important to note that leadership judges are separate from the line management chain in HMCTS. The judiciary and HMCTS are separate bodies. They operate alongside each other but independently from each other. This means that, although leadership judges can intervene and raise issues with HMCTS on their judges' behalf, they have no authority or power themselves to make decisions or force the implementation of changes within HMCTS. HMCTS operates alongside but independently from the judicial hierarchy even though its work is closely connected with the work of the judiciary.

51. At around this time (the precise dates are unclear) the claimant was asking her father to provide proofreading services to assist her in preparing the SORs. She would send them out to him in Spain for this purpose. Subsequently he became unable to provide this support when he became unwell.

52. On 29th May 2017 the claimant emailed Mr Casey and reiterated her objection to her fitness to work being assessed. She agreed to meet him for lunch in order to discuss the referral [354].

53. On 30th May 2017 Mr Casey informed the claimant that a spare Coomber recording device had been sourced for her use at Vintry building. We think that this is a reference to the spare recording device mentioned above [347 and 353]. We do not think two spare Coomber devices were found for the claimant at this time, only one.

54. On 1st June 2017 the claimant signed the consent form for the occupational health referral [355-356]. She did not alter the wording on the form but ticked the "no" box next to the following statements:

    "I understand that my referral will be dealt with in medical confidence and that any advice given to my employer will be expressed in terms of my fitness for employment/ or my fitness to carry out the duties of my role both now and in the future."

    "I agree to my General Practitioner, and if necessary the Specialist I am attending, giving information about my medical condition, if requested by OHS."

55. On 2nd October 2017 a spare portable recording system was apparently found in the Vintry server room [410]. Mr Casey sent an email to DTJ Rolt stating: *"We found a portable recording system in the Vintry server room this week. I have not tried it to see if it works but it contains a laptop, four speakers, audio control device and a CD burner! I will come and show you the equipment this week and more importantly try it to see if it works!"* DTJ Rolt notes this in his response but this Tribunal was not told what became of this equipment. Nobody gave evidence in relation to its existence or functionality. It was just referred to within the agreed chronology with the accompanying page reference [at 410].

56. On 3rd November 2017 Mr Casey carried out a DSE assessment [443-447]. Three days later (on 6th November) he forwarded the OH referral to Ian Francis, the Regional Security and Safety Officer. The chronology indicates that there was a delay in sending the completed OH referral between the date when the claimant signed it (1st June) and 6th November. Correspondence between Mr Casey and Mr Francis in June 2017 [366] suggests that Mr Casey was attempting to find a 'local solution' to get the claimant the equipment she wanted and bypass the need for the referral. Mr Francis warned Mr Casey that this might not work and informed him that whilst he looked into other routes the official application would be closed down and filed by Mr Francis, only to be resurrected at a later date if a referral to OH turned out to be necessary. Mr Francis confirmed in evidence before the Tribunal that a standard timeframe between referral and OH assessment would be 8 to 10 weeks.

57. Mr Casey next contacted Mr Francis on 6th November 2017 asking to arrange the OH referral as a matter of urgency [436]. Mr Francis asked Mr Casey if he could resend the paperwork which was no longer on Mr Francis' system because he had closed the case [447A]. As set out below, the OH examination did not take place until April 2018. No explanation for this further 6 month delay was really given to the Tribunal. Overall, there was a 9 month period between the claimant signing the OH referral consent form and the OH examination taking place. We find that this did not happen quickly enough on any reasonable and objective assessment of the chronology. It would not be unreasonable to expect a period of 6 to 10 weeks between referral and examination rather than 9 months. The claimant's case fell outside any reasonable timeframe without any explanation or justification for the delay being provided.

58. By the end of the month (30th November 2017) Mr Casey had issued an IT request for Olympus software to enable transfer of the recordings on the digital Dictaphone to a CD. The difficulty with the digital Dictaphone appears to have been in actually downloading the recordings into a useable format. The claimant was able to record onto the device and play the recording back on the device but was not able to download the recordings for transcription by a typist. It appears that in December 2017 Mr Casey encountered difficulties with the operation of the Olympus recording software and could not download the recordings himself either.

2018

59. In March 2018 SSCS moved from Vintry House to Bristol Magistrates' Court and Tribunal Hearing Centre where there was recording equipment already available and integrated into the fabric of the hearing rooms.

60. The claimant's occupational health assessment took place on 5th April 2018 and a report was produced by Sarah Wingfield (the "Wingfield report") dated 10th April 2018 (erroneously dated as April 2017) [537].

61. The Wingfield report confirmed that the claimant's main dyslexia-related issues are in relation to the written word including challenges with spelling, grammar, organisational skills and working memory. It also referred to difficulties with finger pain after a day spent typing. In the summary and advice section Ms Wingfield recommended provision of:

    a. A lightweight laptop.
    b. A monitor for use at home.
    c. Fujitsu-Siemens ergonomic keyboard (related to finger symptoms and not the dyslexia).
    d. "Dragon" software.
    e. "Read and Write Gold" software (for proof reading purposes). (The idea with this software was to utilise the playback function to enable the claimant to hear the words on screen spoken aloud by the software so that the claimant could follow along visually. This was intended to improve her proof-reading capability. The screen masking function could also be used to tint the screen and manage screen brightness supporting her to read more comfortably from the computer screen.)

62. In addition, it was noted that, even with the recommended software, the claimant was likely to struggle with proofreading. Ms Wingfield recommended consideration of a dictation service for statements in order to prevent the claimant from using family members to proofread, something which might not be considered "business appropriate." It was said to be important that "grammar creation" was part of any such service. Otherwise, the claimant was likely to continue to take a long time to submit her statements.

63. In addition to physical aids, such as those listed above, it was recommended that the claimant should be given 25% increased turnaround time to produce statements (equivalent to a few more days) although it was noted that the time taken might improve in any event with the use of a professional dictation service. Ms Wingfield recommended that the claimant be allowed to mark the hearing bundle with highlighters as this assists her with recall and creation of statements. Using colour coding would also assist her with recall. The Tribunal notes, in passing, that the claimant never challenged the assessments made in the Wingfield report. She never challenged whether 25% extra time was sufficient to remove the disadvantage, for example. She implicitly accepted the recommendations made as being reasonable in the circumstances of her case.

64. On 18th May 2018 RTJ Curran notified the claimant that she could use the typists at Eastgate House for transcription of her statements and for proof reading [566]. This was for her work in SSCS. No similar provision was made in the IAC, although the Tribunal notes that this is likely to be because she has not yet started doing sittings in the IAC so as to actually require a proofreading system in practice. We do not know, as a matter of fact, what proofreading facilities the IAC intends to provide to the claimant.

65. Around 6th June 2018 DTJ Rolt re-confirmed with the claimant that she had already been provided with an analogue Dictaphone and associated cassettes to use as an interim measure [709] [753].

66. On 10th July 2018 the claimant was appointed as a Fee Paid Judge in the Immigration and Asylum Chamber ("IAC") in addition to her SSCS jurisdiction.

67. By 30th July 2018 the claimant had been provided with an ergonomic keyboard and by 17th August 2018 she had a monitor and gel wrist pads available to her [610].

68. By 23rd August 2018 a "DOM1" laptop was made available to the claimant [638] and on 24th August 2018 Mr Casey placed the order for Dragon and Read & Write Gold software for the claimant. On 29th August the claimant asked for Express Dictate Digital software to be added to the requisition, as this was what was being used in the IAC. We should make clear that the material features of a DOM1 laptop (for the purposes of this case) are that it is built in-house with different and (in some cases) greater access to parts of the network. However, software for a DOM1 device has to be installed before it is sent out to the judge. It cannot be downloaded or installed by the judge themselves. It may therefore have greater security features but is considerably less flexible in terms of the provision of software. It is also notable that DOM1 devices are not compatible with non-HMCTS purchased peripherals (in this case, printer cables which had been sourced from outside HMCTS by the claimant).

69. We note that, even three months after the Wingfield report, the respondent was still in the process of obtaining the recommended equipment for the claimant. This was apparently a slow process and the delay was not really explained. The Tribunal could discern no clear chain of command within the organisation which could be tasked with obtaining the necessary equipment for the claimant. The absence of one 'controlling mind' for the process meant that the claimant's case became mixed up in a bureaucratic entanglement which was extremely difficult for anyone involved to unpick. Put simply, no one person took ownership of the problem and solved it for the claimant.

70. The claimant made a written complaint on 28th September 2018 about the alleged non-provision of reasonable adjustments. This complaint was sent to Helen Andrews (Operations Manager) but then escalated to Sharon Boreham, the Cluster Manager [674]. The claimant noted that:

    a. She had received the laptop but had still not received the software.
    b. The Dragon, Read & Write Gold and Express Dictation software was still outstanding at time of writing.
    c. She had not been given a working monitor. The one provided did not have the correct cable.
    d. She did not have recording equipment for venues which did not have it pre-installed.
    e. She was unable to print documents.

71. Ms Boreham responded to the claimant's written complaint on 3rd October 2018. Amongst other things Ms Boreham's written response stated:

> *"It is clear to me that there is a lack of clarity around roles and responsibilities when it comes to acting on recommendations within a Judicial OH assessment and ordering Judicial IT. This is compounded when we have a situation such as yours where you sit across jurisdictions and regions. To address this I have gained agreement for the Heads of Civil, Family and Crime for the South West and Wales to establish a working party to understand current processes with a view to setting out clear instructions and agreed responsibilities….*
> *A request was made for a DOM1 Windows 10 touch screen laptop as we were told that this was the only machine we could order through our IT catalogue system…..Judge Rolt then suggested that an open build laptop should be purchased and there was no need for the computer to be DOM1 enabled. Despite a number of conversations taking place between Rob Casey and Helen Andrews with ATOS, RCJIT and HMCTS IT managers there were still delays in sourcing the correct computer and fulfilling the order as there was confusion around whether an open build or a DOM1 enabled system was required. Once the equipment was finally received there were then further issues in the system and configuration with e-judiciary. I believe that part of the delays may be attributed to staff ordering judicial IT through a staff IT portal…"*

In relation to the alleged unacceptable delay arranging the OH referral Ms Boreham said:

> *"My enquiries have found that there were a number of factors that contributed to the delay. The OH form was not signed, a misunderstanding on Rob's part about the process, the availability of a DSE assessor and the time taken for the supplier to provide a date for your assessment. Rob has taken steps to ensure that he is completely aware of the process albeit the national lack of clarity around responsibilities. I have issued a reminder that despite work pressures we cannot delay DSE assessments and should secure a trained assessor off site if required."*

72. Ms Boreham confirmed that the claimant now had a working monitor and ascribed the problems to a faulty lead, as the original monitor did work on testing and non-HMCTS cables are not compatible with HMCTS systems (which is why the lead the claimant sourced from Amazon did not work). She explained that software could only be ordered once HMCTS was in possession of the hardware because it is downloaded to the individual CA number of the machine. She noted that she, Mr Casey and Ms Andrews did not have sufficient authority to set deadlines for provision. Upon receipt of the claimant's hardware, the relevant software was ordered. She confirmed that action was not taken by Mr Casey regarding a dictation service for the provision of SORs as RTJ Curran was said to have had a solution. It was then assumed that this was taken up with the Cardiff team who are responsible for the provision of SORs. This would now be taken forward by the IAC Team. Regarding

printing, she confirmed that DOM1 laptops are not set up to facilitate printing to non HMCTS printers, but enquiries were to be made to see if an adaptation could be made to the laptop to make this possible. In relation to venues where there was no recording equipment, Dictaphones were available which were linked to Olympus software which was only compatible with open build laptops. The claimant had been offered a cassette tape Dictaphone in June (and also a 'Phillips solution') but these did not meet the claimant's needs. After discussion, Dragon had been agreed upon and was on order. Finally, in relation to staff involvement in the process she had this to say:

> "*I spoke with Rob and Helen yesterday and both are in agreement, that in this instance we have contributed to delays and could have taken a more proactive approach. For this I am sorry and provide you with an assurance that we will not only learn lessons as outlined above but I will ensure a session is held for all my managers around the importance of timely action in relation to Judicial Occupational Health Referrals and the consequences of not doing so.*"

73. On 3rd October 2018 the claimant was provided with a headset and on 11th October Mr Casey offered to put in place a local solution for printing for the claimant. We understand that this meant that any printing the claimant needed had to be undertaken whilst she was on HMCTS premises and was dependent on Mr Casey's availability.

74. In relation to the IAC the claimant had concerns that she would not be able to sit until adjustments were in place and so she did not book herself in for a second sitting. (She asked to try sitting again on 17th April 2019. She then sat with Judge Davidge on 25//05/19 and 09/09/19.)

75. On 8th November 2018 the claimant opened ACAS Early Conciliation with the respondent. The EC certificate was issued on 22nd December 2018.

76. On 6th December 2018 the claimant was given an open build laptop with Dragon software, Read & Write Gold software and a headset.

77. In late December 2018 and early January 2019, the claimant was again offered the option of using the services of the typists in Cardiff, in particular in relation to proofreading [1053]. It is also notable that RTJ Curran had also told the claimant that she may be entitled to make a claim for the additional time taken to listen to the recording when she submits a claim for a payment for an SOR.

<u>2019</u>

78. On 3rd January 2019 Ms Boreham sent an email to the judiciary to confirm that all of the claimant's requirements had been met [1056].

79. The 1st set of Employment Tribunal proceedings was issued on 12th March 2019.

80. The Tribunal heard evidence about the judicial appraisal scheme from DTJ Macmillan who was appointed to deal with the claimant's third appraisal. We find that DTJ Macmillan had attended training in relation to judicial appraisals in January or February 2019. This was a general requirement before conducting judicial appraisals. The general expectation was that fee paid judicial office holders were appraised on a three-year rolling cycle if there were no concerns (or potentially over a shorter period if they were newly appointed). We find that DTJ Macmillan would be informed a couple of months in advance that one of her sitting days was going to be as an appraiser and who the appraisee would be. In advance of the appraisal, the appraisee (in this case, the claimant) would be asked to fill out a self-assessment form. The appraiser would then be sent the appraisee's personal file, which would be reviewed prior to the appraisal. During this review DTJ Macmillan would look for relevant evidence in the file, such as the number of SOR requests made, the timeliness of these being dealt with, the number of appeals against decisions to the Upper Tribunal and the outcome of any appeals. (DTJ Macmillan was told that SORs and Upper Tribunal decisions were only retained on the personal file for two years rather than the three years of the appraisal cycle.) DTJ Macmillan would also look for information about the nature of any decisions that had been set aside and the reasons for this. For example, a judge's decision may be set aside by the Upper Tribunal because they are dealing with challenging legal issues which have not previously been considered. Although DTJ Macmillan would be aware of some or all of this information before reviewing the personal file, it was a good opportunity to see it all in one place. She would also look at previous appraisal reports, if available.

81. Prior to the observation it was DTJ Macmillan's practice to have a pre-observation discussion with the appraisee to talk in general terms about how they were doing and to see whether there was anything they wanted to discuss in advance. This was then followed by an observation session in which she would observe the appraisee and make notes on their performance. At that time judicial office holders were assessed against the judicial qualities and abilities, which were in turn based on the Judicial Competence Framework. This was how the appraisal report was framed. After the observed session, DTJ Macmillan would hold a post- observation discussion with the appraisee. She would give the appraisee a choice about whether they wanted to go straight into that discussion or whether they would take break. During the discussion, she would raise matters she had noted had gone well and would bring up any observed development issues. She would then also discuss career development and she generally encouraged colleagues to consider what else they might like to do and how they could be supported in this. After the meeting, she would write up her notes of the appraisal and send a draft appraisal report to the appraisee for comment. If the appraisee disagreed with the draft, she would enter a dialogue with them to try to ensure that the report reflected both their views. Once the draft report was finalised, it was sent back to Cardiff and a copy was kept on the appraisee's personal file.

82. DTJ Macmillan set out her view to this Tribunal that appraisals are a way of providing development support, including career development, as well as

professional support, feedback, and peer review. She gave evidence that it is an additional, dedicated opportunity for the individual to speak about anything that they have found difficult and to provide feedback on things that are working well or not so well, both for them individually or more widely. DTJ Macmillan also confirmed that she encouraged appraisees to think widely in terms of what they would like to do, for example, whether they would like to apply for additional tickets or additional judicial appointments, and to explore anything that could be done to support their development.

83. We accept the evidence given by DTJ Macmillan about the way she operated the appraisal scheme and the intended purpose of the scheme.

84. The judicial appraisal scheme for SSCS starts at page 1465 of the bundle. The objectives of the scheme are set out at paragraph 4. The following objectives are relevant in this case:
    a. to evaluate and improve individual judicial performance with a view to ensuring that high standards of tribunal work and decision-making are maintained;
    b. to apply and maintain uniformity of judicial practice, wherever desirable;
    c. … To provide an assessment of future training needs;
    d. to enable regional tribunal judges to decide what types of cases the judiciary should be asked to hear.

Third appraisal

85. On 29th April 2019 the claimant underwent her third appraisal, this time conducted by DTJ Macmillan [1136]. Prior to conducting her appraisal, DTJ Macmillan looked at the claimant's personal file. She was aware that the claimant had been given a laptop in December 2018 but that she still had a number of outstanding SOR requests. DTJ Macmillan knew this as she was copied into correspondence sent to the claimant about the issue which went out from Cardiff in DTJ Macmillan's name. She was also aware that the Regional Tribunal Judge had become directly involved in the issue of outstanding SORs, although she had not been part of the conversations herself and did not know the details of what had taken place. DTJ Macmillan noted that late SORs had been mentioned in a previous appraisal although in the last appraisal DTJ Walker had suggested that the claimant's SORs were also late due to the claimant's domestic circumstances. DTJ Macmillan noted that the claimant had sometimes been set aside following production of an SOR. This included being set aside both at DTJ level and the Upper Tribunal level for reasons to do with the quality of her SORs. DTJ Macmillan therefore identified that the quality and content of the claimant's SORs was an area in which she might need additional support.

86. After the observation, in the post-observation discussion, the claimant became very upset and tearful when speaking about how difficult she found some things. Judge Macmillan asked her how she was getting on with Dragon Dictate and the claimant explained that she was not getting on with it at all well. Judge Macmillan had not had it brought to her attention before the appraisal that the claimant's assistive technology was proving inadequate to

her needs during the period between December 2018 and the end of April 2019. Judge Macmillan was also not made aware at any point that the claimant had experienced difficulty in connection with reading the law and/ or the cases she was due to hear. During the appraisal the claimant told Judge Macmillan that she was still not using her laptop to write SORs. She had instead reverted to a process whereby she was sent a recording of the hearing to which she listened. She then recorded her SORs using a Dictaphone and sent them to be transcribed. The claimant asked someone else to check them before they were promulgated. It was clear to DTJ Macmillan that the adjustments to the claimant's ways of working that had been put in place were not having the hoped-for effect and that the claimant needed further support. The claimant had also mentioned the additional time it took her to write SORs. DTJ Macmillan's reply was that she would explore whether she could be offered additional payment to reflect this.

87. At the beginning of the appraisal report DTJ Macmillan noted that the claimant had been assessed as requiring reasonable adjustments at work as a consequence of dyslexia but noted that, unfortunately, it took HMCTS an unacceptably long time to provide the claimant with satisfactory equipment and to put the required arrangements in place. She noted that the claimant eventually received the assistive technology identified in her OH report on 13th December 2018 but that it had not proved as effective as hoped. She noted that even using the technology it still took the claimant far longer to write an SOR than she (the claimant) would have hoped. She noted that the claimant had reverted to dictating SORs onto tapes that were sent off for transcription but the delay in having these returned meant that she had to re-read the papers again when the draft SOR was returned. The claimant had apparently agreed that a further OH assessment using the assistive technology would be helpful.

88. In the course of the appraisal DTJ Macmillan noted the large number of letters sent to the claimant by her DTJ and RTJ between December 2016 and January 2019 concerning late submission of SORs. She stated that this had been a cause for concern and that late submission of SORs had been raised in the claimant's last appraisal. She noted that this continuing problem was partly due to the time taken by HMCTS to comply with the requirements of the OH report. She recorded that some of the SORs had been very significantly late and one had generated a complaint to the Chamber President's office. The claimant had made efforts to clear the backlog of SORs at various times since the last appraisal, for example, in January 2017 and January 2019. DTJ Macmillan noted that the difficulties in providing timely SORs were of equal concern to the claimant and it had been agreed between them that she might be helped by having a sophisticated SOR template to which she could refer when dictating.

89. The claimant apparently arrived for the observed hearing session slightly later than DTJ Macmillan would have expected. During her observation of one of the claimant's hearings, DTJ Macmillan noted that the claimant appeared unfamiliar with Upper Tribunal decisions on the approach taken in DLA transition cases where the respondent had failed to provide medical evidence from the previous award. Apparently, she should have directed the panel to consider whether this evidence was likely to be relevant to the claim of

PIP and whether the panel should adjourn the case for this to be obtained. It is apparent to this Tribunal that not all of the criticism of the claimant's work concerned the issue of delay or the absence of disability related adjustments. Some of the criticisms were of the substance of the claimant's work and her legal knowledge, not just (for example) the timing of her SORs. In her observations, DTJ Macmillan also remarked on the positive features of the way the claimant conducted the hearing and balanced this with other observations about whether the claimant had correctly directed the panel in relation to the legal test in respect of some aspects of the case. Positive observations were made about the claimant's communication skills.

90. DTJ Macmillan reviewed some of the claimant's SORs on file and noted that the standard of the SORs was variable. Seven out of nine decisions had been set aside by the Upper Tribunal, four on the basis of deficiencies identified in the SOR. The claimant had also been set aside by her DTJ twice, once for failing to explain a decision to award points under descriptor 9(d), and once because the claimant had treated the case identified for oral hearing as a paper case. In one of the cases where the Upper Tribunal refused permission to appeal, the appeal was made on the basis of the delay in receiving the decision notice and SOR. DTJ Macmillan noted that the claimant received more requests for SORs than some other judges and that this was unfortunate given that, at that time, they were more difficult for her to produce. She noted that the suboptimal writing process that the claimant had to adopt may also have been contributing to the problems identified by the Upper Tribunal.

91. In the feedback section of the appraisal report there was reference to a discussion about "*whether and why the claimant might receive more requests for written statements than other judges, and whether this might be addressed by providing a more detailed verbal explanation at the end of the hearing and/or* summary *reasons in her decision notices."* There was also a discussion of the Upper Tribunal's comments and decisions in the claimant's cases. DTJ Macmillan noted that the claimant would appreciate some support and input into the structure and content of her SORs.

92. The outcome of the appraisal was a grading at Level 2 "some concern" (i.e. the middle grade). DTJ Macmillan wrote:

> *"Ms Clarkson is clearly a very able lawyer who displayed considerable judge craft during the observation. The fact that she is well regarded in the region is evidenced by her 2018 selection for 01 training from a very competitive field of applications. However, her ongoing problems around statements of reasons have reached a point where a personal development plan would be helpful."*

DTJ Macmillan set out some recommendations in a personal development plan. These included:

a. An additional OH assessment to assess the usefulness of the technology provided and whether any other assistive technology might be helpful.
b. One-to-one training in how best to use the assistive technology provided.

c. The claimant would be able to claim an additional fee for the activity of listening to the recordings of hearings before she could prepare an SOR.
d. The claimant would spend some time looking through SORs written by other judges to identify a preferred template and any passages of text she could adopt as standard.
e. The claimant was encouraged to discuss any complex or unusual SORs with one of the Bristol DTJs in advance of drafting them.
f. It was recommended that the PDP be reviewed in 6 months' time and the claimant be offered the opportunity to have a further appraisal if she so wished.

93. Judge Macmillan was keen that the claimant should be able to draw a line under her backlog of SORs and that she should be given any intensive support needed in order to do so. She still had outstanding SORs, some of which were very late by this stage, and Judge Macmillan knew (either from the personal file or from the conversation with the RTJ or DTJ Rolt) that the Office of the Senior President of Tribunals had been contacted with a complaint about one of them. Judge Macmillan was also conscious that there seemed to be an issue with the content of the SORs, as well as the fact that they were late. DTJ Macmillan also had to consider the impact that delay in producing SORs and the claimant's decisions being set aside was having on the parties to the litigation. At this time appellants were waiting for up to a year for their cases to be dealt with by the tribunal. These would be benefits claimants who generally received no benefits until the appeal had been decided.

94. Judge Macmillan was conscious that this was not a good position for the claimant to find herself in and that it was clearly having an effect on her wellbeing, such that the situation ought not to be allowed to continue. It was for this reason that DTJ Macmillan suggested that the claimant consider undertaking a dyslexia assessment as she had not been assessed since she was a teenager. She also suggested another occupational health referral using the technology that had already been provided. Judge Macmillan raised the possibility of assistive technology in support of reading and suggested it was worth exploring similar support for the claimant.

95. We find, in line with Judge Macmillan's evidence, that it was not uncommon for judges to mention during appraisals that they found writing SORs to be a challenge. This is because it is not a sufficiently regular part of the SSCS role to become habitual. We accept that on DTJ Macmillan's appointment as a DTJ (and because she was new to writing SORs) she started to collect SORs written by both fee paid and salaried judges. (Apparently copies of these are always sent to the DTJ with responsibility for the geographic area.) Judge Macmillan initially referred to these from time to time when considering how to draft her own SORs. She continued to collect and retain SORs thereafter and regularly offered these as a resource to judges who raised SOR writing as an issue. Some judges took up this offer and indicated subsequently that they had found it useful

96. The claimant and Judge Macmillan also talked about using templates for SOR writing during the post observation conversation. Judge Macmillan

offered the claimant access to the SORs that she had collected, some of which she could use as best practice examples. She suggested that the claimant might be able to develop templates and could draw up a store of standard paragraphs that she could refer to if she continued to dictate her decisions or incorporate when using Dragon dictate. The claimant did take some example SORs away with her but she later returned them and said that she had not found it helpful and did not want to go down that route. In addition, Judge Macmillan offered the claimant support from DTJ Rolt or herself in relation to any complex SORs. As the claimant was upset, the discussion was cut slightly short. Judge Macmillan did not raise all the issues that she had identified during the observation and did not refer to them in the appraisal report (but this is apparently not unusual).

97. Following the appraisal Judge Macmillan spoke to RTJ Curran and explained her concerns and why she was considering that the appraisal outcome grade might need to be "some concerns". If this was to be the grade, it was very important, in Judge Macmillan's view, that the claimant was offered the support she required as a priority, as well as the option of undergoing a further appraisal sooner than the usual three-year cycle. This would enable the appraisal result to be updated, making clear that any discrete concerns had been addressed.

98. Judge Macmillan gave evidence, and we accept, that the appraisal mark would not be a reflection of how the claimant was seen in terms of her overall abilities as a judge, or indeed of her future potential, but was based on the evidence available at the date of the appraisal in relation to how she was performing when assessed against the judicial qualities and abilities framework. Indeed, as Judge Macmillan noted in the appraisal report, the claimant had comparatively recently been selected for "01" training from a competitive field of applications, which reflected how capable she was considered to be. During her discussion with RTJ Curran, Judge Macmillan discussed what was or wasn't possible to arrange in terms of additional support for the claimant. It was agreed that an occupational health assessment using the technology provided to date would be optimal. Judge Macmillan also secured agreement that the claimant would be paid additionally for her listening time when writing her SORs. However, RTJ Curran was clear that Judge Macmillan had to decide for herself how to grade the claimant's appraisal report and that a report was definitely required.

99. After her conversation with the claimant and with RTJ Curran, Judge Macmillan put together a personal development plan ("PDP") for the claimant based on suggestions that she had already discussed with her. We find that the claimant had not disagreed with any of these proposed steps during the post-observation meeting and seemed (at the time) to appreciate the support and suggestions. Nor did the claimant identify any aspect of her role as a judge as being difficult, apart from the timely production of statements. The claimant had been informed each time one of her decisions had been set aside (and why) and had not suggested that the quality of her SORs might be connected to her dyslexia.

100. We accept that Judge Macmillan's options at this stage were limited. She either had to assess the claimant at the level of a "competent performance"

(thereby ignoring all of the issues of concern), or she could assess her at the level of "some concerns" taking the issues of concern into account. Judge Macmillan concluded that it would have been inappropriate to grade her at "some concerns" level without also identifying a way of improving matters. This would have been both unsupportive and contrary to the terms and purposes of the appraisal scheme. We accept that "some concerns" is the middle grade. The issues that Judge Macmillan had identified did not meet the threshold for the grade "serious concerns" which would have triggered the involvement of the Regional Tribunal Judge. Judge Macmillan therefore decided to mark the claimant as "some concerns" while providing a personal development plan that would hopefully improve the situation. We accept that this was not an easy decision for DTJ Macmillan nor was it one that she took lightly.

101. The personal development plan was set out at the end of the appraisal report. At some point after the appraisal meeting DTJ Macmillan suggested to the claimant that the personal development plan could be reviewed in six months, with the option of having another appraisal. We accept that this was suggested because a person may not want to have an appraisal on their file for three years, reflecting a discrete issue that is sufficiently significant to be reflected in the outcome of the appraisal, but which could be improved through intervention and support. At the time, it seemed fair to Judge Macmillan to offer the claimant the option of another appraisal in six months' time. She thought that they could put in some intensive work and support to allow the issues that she had identified to become 'non-issues' going forward. Provided that were the case, the next appraiser would be able to reflect this in the report and outcome. We accept that this was the thinking behind the PDP and the terms in which it was drafted.

102. We accept that Judge Macmillan looked carefully at the evidence she had in front of her and at the judicial qualities and abilities framework. She noted the issue with late and inadequate SORs represented an important part of the communication competence. She further noted that the claimant's performance in the observation raised some concerns in relation to the knowledge and values competence, although not to a level whereby she should be marked as "some concern" on this alone. Judge Macmillan asked herself whether it was appropriate to sign someone off as fully competent when they had an area of significant concern. We accept that Judge Macmillan's conclusion was based on the appraisal process as a whole, including the observation session, the apparent issue with timeliness, the content and quality of the claimant's SORs, and the extent to which the claimant appeared to be keeping up to date with, and applying, relevant law. Judge Macmillan decided that she needed to reflect these concerns in the appraisal outcome while making it clear that they arose from a discrete issue capable of being remedied.

103. We accept and find that the grading of "some concern" had no disciplinary consequences. We also accept that an appraisal report plays a very limited role, if any, in applications for other appointments. The process for applying for a judicial appointment through the JAC involves asking another judge to be an "independent assessor". The independent assessor is expected to have far more knowledge of the applicant than merely considering their last

appraisal and ought to draw on a wide variety of evidence, of which the appraisal would be only one part.

104. Judge Macmillan sent the appraisal report to the claimant to ask for her comments. She understood that the claimant was not happy with the outcome. The claimant responded to DTJ Macmillan expressing concern about aspects of her appraisal. On 7th May DTJ Macmillan responded to the claimant's concerns and amended the appraisal in response to her comments [1142]. In response to the claimant's comments Judge Macmillan made some changes and returned the report to the claimant. Judge Macmillan was then asked by HMCTS colleagues in Cardiff to return the report and the claimant's file more quickly than usual, so she asked the claimant to contact her if she had any further comments within quite a tight deadline. The claimant did not contact her again within the deadline, so she finalised the report from her own perspective. She finalised the appraisal on 14th May 2019. It was open to the claimant to send Cardiff additional comments in relation to the report for inclusion on her file.

105. Having reviewed totality of the appraisal document this Tribunal finds that there was nothing objectionable about it. It was fair and balanced given the purpose of the document to recognise achievement and point out areas for development and improvement. The report takes account of all available relevant information and excludes anything irrelevant from consideration. We note that the criticisms of the claimant were not limited to the SORs. Some related to time management, others to gaps in legal knowledge. Even some of the delays in providing SORs were not apparently related to dyslexia. Our view is that the appraisal was fair and balanced based on the evidence available to Judge Macmillan. The bottom line is that the claimant did not agree with the grading. We note that the grade is actually in the middle of the available range and that it would not typically trigger any disciplinary proceedings or concerns.

106. In relation to the issue of templates for SORs we find that the claimant wanted someone to provide her with a ready-made template and tell her that this was the appropriate and acceptable way for her to write up her SORs. She was not satisfied with being given access to a bank of sample SORs which she could use to construct her own precedents. It is this Tribunal's view that it is entirely reasonable to expect a judicial office holder to collate precedents and construct their own templates to assist with judgment writing. Whilst the basic requirements of a written judgment can be specified (e.g. the matters which it needs to cover in order to be meaningful to the litigants), the form and content of judgments and reasons cannot be overly standardised. Otherwise, there is a risk that they will not be sufficiently tailored to the facts and circumstances of each individual case. Furthermore, imposing a particular detailed formula on a judge risks interfering with said judge's judicial independence. The decision must be that of the judge seized of the case and must set out his or her factual and legal reasons for the decision in a manner which is comprehensible to the litigants concerned.

107. On 20th May 2019 RTJ Curran sent an email to Mr Casey and Ms Andrews asking them when the claimant could have a specialist dyslexia assessment. On 22nd May 2019 Mr Casey contacted

Judicial IT to arrange specialist software training for Read & Write Gold and Dragon dictate, which was subsequently arranged directly with the claimant.

108. On 2nd July 2019 a specialist dyslexia referral was submitted for the claimant.

109. On 20th July 2019 the claimant raised concerns about her third appraisal to RTJ Maddox [1162] as she could not find a formal procedure for challenging appraisals. The claimant referred to having raised several concerns with Judge Macmillan at the time and the fact that she had amended her report in part. The claimant gave the context of her request for adjustments and equipment in relation to her disability. She stated that over a year after the report's recommendations she was still waiting for training in relation to the software that she was provided with. She asserted that she had not been given the extra time that was recommended for providing statements. She complained that she had not been given a backup system for recording hearings and that there was no system in place for assessing if what she had been given was adequate or reasonable. She stated that she had not been assessed by anyone with specific knowledge of dyslexia. With that as background the claimant stated: *"In light of the lack of any procedure or policy across all the courts I have decided to proceed with my claim against the MOJ. It has been very stressful over the years trying to obtain the basic adaptions I need and to keep up with my workload. I did not want to have further conflict at work so decided not to say anything further about my appraisal but given subsequent conversations with Moira in which she suggested I apply to a different jurisdiction if I did not feel I had adequate support in this one and in which she was very disparaging about my abilities, I wish to raise the following points…"* The claimant then went on to explain her complaint about the appraisal mark that she had been awarded. She noted that the appraisal looked at her work over the last three years but that for the majority of the time under consideration she had not been given the equipment she needed to provide the SORs. In those circumstances, she did not consider that it was fair that she was marked down due to the delay. She stated that Judge Macmillan appeared to consider that the claimant got a disproportionate amount of SOR requests and that they were of poor quality. The claimant went on to say that she had asked for the figures that these assumptions were based on and how they compared to others but that she had not been given them. She asserted that, in fact, the amount of SOR requests she had been receiving pro rata had fallen year on year. Furthermore, she said that this was something that may not be anything to do with her work and could be due to facts such as the type of list and the numbers of unrepresented appellants. She had calculated her set aside rate as 0.36%. She complained that it did not appear that there were any statistics available to Judge Macmillan for her to have based her assumptions on. She said that Moira [Macmillan] simply looked at her set aside decisions not taking into account the number of days that the claimant sits or the fact that she sits more than other people so is (in the claimant's view) statistically more likely to have a request for and SOR and more set asides. The claimant complained that there doesn't appear to have been any comparison of how she performed in relation to others nor any statistics to base the concerns on and yet she had been marked down. The claimant asked Judge Maddox to provide her with any statistics that had been produced in relation to her SOR requests,

sittings and set aside rates and how they compare proportionately to other members.

110. The claimant went on to profess her gratitude for the efforts made by members of the judiciary to try and help her obtain the adaptations she needs and stated that she fully recognised that it was an institutional failing of policy and procedure which was out of the control of her direct line judiciary. Despite this she said that the failings had resulted in disability discrimination and she felt that to recognise that there have been these failings over the assessment but to then give her a lower mark as a direct result amounted to further discrimination. She went on to say that she was grateful for the opportunity to rectify this by having a further appraisal in six months' time but did not feel that she should have to due to the above and due to the fact that all of her abilities to carry out every aspect of the job would be reconsidered and appraised as a result of failings resulting from her dyslexia and the lack of reasonable adaptions. She felt that this was disproportionate and discriminatory. She concluded: *"In summary I am grateful for the personal development plan and the steps that are being made to progress things and assist me and understand that due to the structure in place it is not something one person can fix simply but giving me a lower mark as a result of unsupported difficulties and a further re appraisal of my overall competence could be viewed as further discrimination. I therefore ask that my level be changed and that rather than having a new appraisal there is the possibility of a meeting to address any ongoing difficulties. Unfortunately given Moira's comments to me subsequently about my abilities I do not feel she could be a fair appraiser of my work and request that a different DJ carries out my next appraisal."*

111. In the course of that complaint the claimant asserted that DTJ Macmillan had been very disparaging about her abilities. This is apparently a reference to comments made as part of the appraisal rather than "disparaging comments" in any wider sense. (We have no evidence of "disparaging comments" being made to or about the claimant by Judge Macmillan at any stage). The claimant is apparently referring to the assessment made by Judge Macmillan in the appraisal and those elements of it with which she disagrees. For the reasons already stated, we do not accept that the appraisal included disparaging comments or was disparaging about the claimant (either orally or in writing). Rather, it was balanced and recorded both the strengths and weaknesses in the claimant's performance.

112. RTJ Maddox responded to the claimant's concerns on 23rd July 2019. He stated: "*You are correct to note that there is no process by which an appraisal report can be challenged. The appraiser and appraisee are encouraged to discuss any disagreements, and if they cannot be resolved, the unresolved matters are noted and kept on the file so that the appraisal can be seen in context. In the circumstances it is not open to me or anyone else to alter the appraisal report as drafted. Looking at Moira's report the PDP agreed included a review in six months and a further appraisal if you wished to have one. I do not understand the report to be saying that you must have a further appraisal after six months. I note your comments about Moira being involved in any further appraisal. Given that the PDP was agreed with her would you be content for her to be involved in reviewing the position in six months or are*

you asking for this to be done by another DTJ? I also note that you refer to subsequent comments you say that Moira has made about you. Are you raising a formal grievance about Moira in making this observation? I am not seeking to encourage you one way or the other, but I need to be clear because there is a formal procedure to be followed if a grievance is raised between judicial office holders. I have asked admin to put together some statistics to deal with the queries you raise and will let you have these once available. I have sought an update from Rob Andrews/Helen Casey about your OH needs and assessment. Rob Andrews appears to be on leave. If you are able to provide an update, I would be grateful."

113. We pause to comment that this way of resolving disagreements about the content of an appraisal appears to us to be a fairly standard approach. It would not be possible or reasonable to have some sort of appeal mechanism to force changes to an appraisal as this would undermine the integrity and independence of the appraisal process as a whole. Instead, noting points of disagreement on the face of the document so that the reader understands which portions are not agreed would appear to be an appropriate and fair way forward. We note that the claimant was offered the option of raising a grievance about the contents of the appraisal but chose not to do this. Again, it was reasonable that she was given this option. We also observe that a PDP in principle should reasonably be viewed as a supportive measure designed to assist the appraisee in rectifying any problems in their performance. It was not another method by which to criticise the claimant. We also find that, contrary to the claimant's assertions during the Tribunal hearing, the option to have a further, early appraisal was just that- an option. It was not mandatory. It was there to help her update her record if she had rectified any problems earlier than anticipated and in advance of the next scheduled appraisal.

114. We accept that Judge Macmillan had made every effort to be supportive to the claimant throughout. We accept that she has no recollection of making disparaging comments to the claimant and would not intentionally have done so.

115. Judge Macmillan responded to repeated comments by the claimant that she had not received any support from the judiciary. After the first time she made this comment Judge Macmillan discussed it with Judge Rolt, as she was aware that the claimant contacted him for help and support more frequently than she did Judge Macmillan, and seemingly more frequently than any of the other fee paid judges. This was a matter Judge Rolt and Judge Macmillan had discussed from time to time and he felt hurt by the claimant's comment. When she repeated it after the appraisal meeting Judge Macmillan pointed out the significant level of support that she had received from Judge Rolt and said that she (Judge Macmillan) thought that the claimant was being unfair. We do not accept that Judge Macmillan at any stage suggested that the claimant should leave her role in SSCS. We accept that the claimant told Judge Macmillan that she had had enough of all the problems she had experienced in SSCS and was thinking about leaving in order to work as a judge in another jurisdiction. Judge Macmillan's response to this was that it would be a shame to lose the claimant but that it was entirely a matter for her if that was how she felt. Judge Macmillan could understand why the claimant

might feel like this after the lengthy problems she had experienced, particularly in relation to being provided with an adequate laptop. We accept that Judge Macmillan's comments in this regard were intended to be sympathetic and supportive and not intended to suggest that the claimant ought to leave her post.

116. On 20th September 2019 the claimant raised concerns about sitting levels and members from other parts of the region sitting in Bristol.

117. The specialist occupational health report was produced on 16th October 2019. The overall opinion stated was that the claimant's main difficulties associated with her dyslexia are her difficulties with organisation, retaining information for long periods of time, processing large amounts of information and focusing for long periods of time. This was likely to impact on her accuracy when inputting information into her "write-ups." The claimant's signs of visual difficulties might also exacerbate this. It was noted that the claimant had developed a visual learning style to cope with her dyslexia traits. This means that she may need longer to complete tasks and training relevant to her role. It was concluded that it would be appropriate to adjust targets accordingly to allow for her difficulties. The Workplace Needs Assessment Report set out the following relevant recommendations:

a. 9 hours of coaching for the claimant in reading and proofreading; writing, spelling and punctuation; listening, note taking and concentrating; organising, planning and prioritising.
b. Provision of mind mapping software such as MindView to assist the claimant in organising and structuring her ideas when writing plus three hours training in the use of the software.
c. Provision of a LiveScribe pen.
d. Provision of noise cancelling headphones.
e. Provision of best practice examples and templates. A recommendation that the claimant saves key phrases that, once proofread, can be used to cut and paste into documents.
f. When providing the claimant with feedback she should be given explicit feedback with clear examples.
g. Consideration to be given to providing the claimant with 25% extra time on her tasks.
h. Recommendation that the claimant's line manager and colleagues consider attending dyslexia awareness training. This could take the form of a one hour 'lunch and learn' session.
i. Recommendation that the claimant uses the playback function in Read & Write for reading and proofreading her documents.
j. Recommendation that the claimant uses the screen masking function on Read & Write.
l. Recommendation that the claimant considers creating a record of common errors she makes when producing written work which she can then use a checklist to go through when reviewing her work.
l. Recommendation that the claimant creates her own spelling dictionary for unfamiliar words.
m. Recommendation that the claimant considers using a template to record the tasks that she needs to complete and the estimated time it will take to complete these.

n. Recommendation that the claimant has one organisational system.
o. Recommendation that the claimant tries listening to instrumental/concentration music/white noise

118. A meeting took place between the claimant and RTJ Maddox on 14th November 2019 during which they discussed adjustments generally. The claimant was reminded that she could claim an extra fee for the preparation of SORs. Fee paid judges are entitled to a standard fee each time they prepare a SOR in accordance with the President's Protocol. This has been calculated with reference to the fee for a sitting day and on the basis that it should take around 2 hours to complete the SORs, on average. The Lexxic report that RTJ Maddox discussed with the claimant on 14th November 2019 suggested that the claimant be provided with 25% more time to complete tasks. On this basis RTJ Maddox was satisfied that, if claimed by her, the claimant would be entitled to a 25% uplift on her standard fee to reflect this additional time (and he authorised this additional payment when requested). In addition, all judges can ask for an additional fee for preparing an SOR, for example, if it is particularly complex or lengthy. The claimant confirmed to RTJ Maddox during the course of the November meeting that his predecessor (RTJ Curran) had told her about the ability to claim an additional fee but that she had not claimed this prior to November 2019. She said that she had already made arrangements to look at examples of other judges' SORs. RTJ Maddox's note of that meeting stated: *"We agreed that there is really no "best practice" and that individual styles varied."* There was a dispute between the parties as to what was actually discussed at this meeting. We find that the claimant and RTJ Maddox did not discuss the claimant's appraisal at this meeting. It was not included in his note of the meeting and we cannot see why it would be omitted if it had formed part of the discussion. This is particularly so as RTJ Maddox had already responded to the claimant's complaints about the appraisal back in July. There was no reason for this issue to have been resurrected at this meeting.

119. Judge Maddox became Regional Tribunal Judge in November 2019 (having been acting RTJ since 1st June 2019). At that point in time the claimant had a number of outstanding requests for SORs. RTJ Maddox noted that Protocol No 4 states that a statement of reasons should be provided within 22 days of the date of the request for such reasons. Judge Maddox thought that this was to build in time to allow for HMCTS to process and send the SOR out to comply with the statutory time frame that reasons be provided within one month of the request or as soon as reasonably practicable. We think this is a reasonable assumption for him to make. It had been suggested that the claimant be provided with 25% more time to complete tasks, which would include the time needed for preparation of an SOR. Although no formal amendment was made in the application of protocol No 4 to the claimant, in practice Judge Maddox does not believe that she would have received reminders before the 22 days plus 25% time (total 27.5 days) had elapsed and no complaints about late SORs were upheld. We accept this evidence.

120. Delays can have a significant impact on an appellant who has lost, as they are unable to seek permission to appeal until they have the SOR. Permission to appeal can only be granted if an arguable error of law is identified, and this

requires the SOR to be available so that the tribunal's analysis of the evidence and reasoning can be scrutinised. Moreover, if it is the DWP that requests the SOR, appellants are not paid any award of benefit made by the tribunal at first instance until any appeal process has been exhausted. We accept the evidence presented to us that it is always open to a judge to voluntarily reduce their sitting commitments where they have lots of outstanding SORs that need to be finalised (e.g. in order to try it prioritise this work), bearing in mind that the judges are paid a fee for each SOR.

121. The procedure to ensure compliance with the relevant timeframes is that prompts are sent by HMCTS to judges. These prompts are copied to the relevant District Tribunal Judge who would have more knowledge of (and contact with) a particular judge. They might speak informally with the judge to explore the reasons for any delay. When Judge Macmillan was appointed the claimant already had outstanding SORs. During DTJ Macmillan's time as Tribunal Judge the process was managed centrally from Cardiff. We accept that this means that correspondence was sent out in her name by the staff based there without any direct involvement from Judge Macmillan. She had no control over when the letters were sent and what they said. In any event the letters made no specific reference to judicial misconduct or disciplinary action.

122. If enough time elapsed, Judge Maddox would also be sent the prompts or reminders. He would sometimes get copied into emails following up on late SORs and reminder letters were also sent out automatically in his name (e.g. [1273]). If the SORs became significantly delayed, he would often email the judge concerned to ask if there was a problem and whether there was something that he could do to help. He did so for the claimant [1229; 1320].

123. We accept that it is not uncommon for judges, both salaried and fee paid, to receive letters chasing up late SORs. The reminder letters from the DTJs say that the District Judge would *be "grateful if [the recipient] will let the clerk have the requested statement within five working days and that if this is not likely to be possible [the District Judge] shall be glad to receive [the recipient's] observations".* The reminder letters sent out in Judge Maddox's name reflected the wording of Protocol No 4 which says that if there is further unexplained or unreasonable delay, the Regional Tribunal Judge will investigate and may refer the matter to the Chamber President. We accept that Judge Maddox had never referred an issue of delay to the Chamber President of his own volition, either for the claimant or any other judge. We agree that these letters should be read as a whole in that they remind the recipient that the appellant is potentially affected by the delay and they invite the recipient to explain any issue which is preventing the SOR from being prepared. We recognise that by the time the letters are sent the SOR is many weeks overdue. We accept that the letters are not intended to cause any distress to the recipient.

124. We note the contents of the following paragraphs of the President's Protocol for the Social Entitlement Chamber [1511] which state:

> 2. "Every tribunal judge has responsibility for providing the statement of reasons to explain the decision of the tribunal within the time limit set down by the rules.

> 3. It is essential that this requirement is met. The parties are entitled to know within a reasonable period of time after the decision why they have won or lost their appeal. A statement of reasons is also a prerequisite to a further appeal.
> 4. It is expected that in the absence of special circumstances a statement of reasons will be produced within 22 days of it being requested from the judge. When a tribunal judge fails to meet this time limit he or she is not acting in the best interests of the parties nor in the best interests of the tribunal as a whole."

125. On 6th December 2019 extensions for USB ports and an external drive for CDs were procured for the claimant to use. Quotes were put in for training and coaching on LiveScribe, 'Lunch and Learn' awareness sessions and MindView software.

2020

126. On 12th January 2020 the noise reduction keyboard was ordered for the claimant and by 22nd January the MindView software had been installed on the claimant's laptop. In February the claimant received noise cancelling headphones.

127. In March 2020 MindView training took place and the claimant received her LiveScribe pen. On 6th March the claimant contacted Mr Casey and DTJ Rolt with concerns about her computer functionality. During her training sessions she had had problems with her computer such as the fact that documents and applications were opening without anyone touching the mouse/ keyboard or screen. There was no media player with which to playback audio files so that the claimant was unable to use the audio note making feature within the software. There were problems with the memory on the laptop such that it was incredibly slow, crashed/ froze on numerous occasions within a three hour session [1291]. The claimant was directed to contact ejudiciary support in relation to the IT problems.

128. We accept that between April and May 2020 the claimant and Judge Maddox agreed a timetable for the completion of the list of outstanding SORs. In addition, Judge Maddox spoke to staff in May 2020 about the importance of processing the claimant's SORs as soon as they came in so as to ensure that her list was accurate and that she did not receive any unnecessary chasing emails. He reminded the administrative staff that it was important that all SORs were processed as quickly as possible on receipt. That said, the impact of the COVID-19 pandemic did place additional staffing strains on the system. It is not clear to us whether the backlog which had accumulated was solely dyslexia related or was due to her higher sitting levels or other factors.

129. The claimant largely managed to meet the agreed timetable and only had three outstanding SORs by 15th June 2020. On 22nd June 2020 she sent RTJ Maddox an email to confirm that she had completed all of her SORs.

130. In the period between October 2019 and March 2020 there were a few complaints made about delays to the claimant's SORs. These were complaints by members of the public over which the respondent had no control. If the member of the public wished to complain they were within their rights to do so. The investigation of the complaints was the responsibility of the Chamber President but in practice this was delegated to regional judges under the Judicial Conduct (Tribunals) Rules 2014. We accept that, while delay without good reason might amount to judicial misconduct, it should be noted that the conduct has to be such as to render someone unsuitable to hold judicial office. This is a high threshold.

131. Pursuant to the 2014 rules RTJ Maddox was required to investigate the complaints against the claimant and invite comments from her about the reasons for the delays. A final decision dismissing a complaint about delay would have to include reasons for that decision and would have to include the claimant's explanation. This is entirely appropriate. If it were otherwise, it would render the complaints process nugatory. The member of the public is entitled to understand why their complaint is being upheld or dismissed in the same way that a litigant is entitled to understand why their claim has failed or succeeded. The claimant explained that she had struggled and that there had been a delay in providing equipment. Judge Maddox did not uphold any of the complaints and his statements in the letters to the members of the public reflect what he understood to be the claimant's explanation for the delay. One complaint was dismissed on the ground that the letter requesting an SOR was never sent to the claimant due to an administrative oversight.

132. It is open to an appellant who is dissatisfied with Judge Maddox's decision to make a further complaint to the Judicial Conduct and Appointments Ombudsman about the way he has handled the complaint. This is referenced in the final letter setting out the outcome of the investigation and the letter also includes the Ombudsman's contact details. None of Judge Maddox's decisions relating to complaints against the claimant were referred to the Ombudsman.

133. As Judge Maddox realised that the issue of reasonable adjustments was sensitive and personal for the claimant, he showed her in advance the explanation that he intended to provide in his final letter dismissing the first complaint in time that had been made about delay [1232]. We accept that this is the only time that he has ever asked a judicial office holder to effectively approve part of a letter dismissing a complaint against them. We accept that he hesitated before doing so given that he knew that his conduct in investigating the complaint might itself be scrutinised by the Ombudsman. The claimant responded the same day and confirmed that she was happy with how Judge Maddox had worded the response.

134. The claimant then complained about a subsequent letter that Judge Maddox issued on 25th of February 2020 [1268- 1269] dismissing another complaint. She alleges this was an act of harassment because it referred to her requirement for reasonable adjustments. We accept that Judge Maddox did not send this particular letter to the claimant in draft in advance of it being sent out to the complainant. This was because, in Judge Maddox's view, it

said no more about the claimant's personal circumstances than he had previously said with her agreement. It does explain that the claimant required a CD recording of a hearing to assist her in preparing an SOR, but we accept that this was necessary to explain how and why the administrative failings (rather than the claimant) had caused the delay in that case. We also note that the letter approved by the claimant and this subsequent letter were written to the same organisation, Bristol Law Centre.

135. On reviewing this we, as a tribunal, conclude that it was not unreasonable for RTJ Maddox to think that he could mention in the subsequent letter the same matters as had been previously agreed in the first letter. It was not unreasonable for him to use this information a second time once it was agreed. We accept that the claimant is sensitive about it and does not want her personal circumstances to be broadcast at large. We accept that she might be upset by Judge Maddox's letter but that letter was not unreasonable in the context of giving a proper response to a complaint by a member of the public. She could not have been surprised by the contents of the second letter given that she had agreed the first. Judge Maddox has to hold the balance so that the complaints system gives meaningful responses to complainants whilst reasonably protecting the interests of the judges concerned.

136. On 25th February 2020 RTJ Maddox dismissed a complaint from a member of the public against the claimant. On 28th February 2020 the claimant received a letter from RTJ Maddox about outstanding SORs. The wording of the letter was: *"I regret to note that the Statement of Reasons is still outstanding despite reminders from the tribunal clerks and your District Judge. There are two aspects to the delay: not only has there been a breach of the standards in the President's protocol No 8, but excessive delay in producing a Statement of Reasons is also capable of amounting to judicial misconduct. The principles of natural justice require that an appellant is entitled to know, within a reasonable period, whether or not grounds exist for an application to appeal to the Upper Tribunal. If there is a particular problem with these cases, please contact Jane Spickett, Lee Mason or your District Judge to explain the circumstances. Otherwise I should be grateful if you would complete the Statements by return."* We find that there was nothing unreasonable about this letter. It was part of the RTJ's job to make sure that the Protocol was complied with and that the principles of natural justice were upheld. It was not a threat or a step pursuant to a misconduct procedure. Rather, it was giving the claimant fair warning of the potential consequences if that state of affairs was allowed to persist without adequate justification.

137. From the end of March 2020 to September 2020 all IAC sittings were suspended due to Covid-19. From March 2020 most oral hearings in SSCS were conducted remotely due to Covid 19. BT Meetme and CVP recordings were treated as ROPs for all judges in the SSCS. From April 2020 RTJ Maddox decided that whatever work was available should be allocated between judicial office holders regardless of geography.

138. On 1st April 2020 the claimant issued her second set of proceedings in the Employment Tribunal.

139. In March/April 2020 Judge Maddox attended the 'Lunch and Learn' session about dyslexia awareness.

140. On 19th May 2020 the claimant completed her Lexxic training. On 15th June 2020 RTJ Maddox indicated he would support the claimant for any Expression Of Interest exercise in relation to Court of Protection work. On 22nd June the claimant emailed RTJ Maddox to confirm that she had completed all outstanding SORs.

The position in IAC

141. By November 2018 the claimant had had her first and second mentored session with Judge Davidge. On 21 December 2018 Regional Tribunal Judge Phillips received an email from Russell Palmer confirming that all of the adjustments were in place. He wrote to the claimant on 24th December 2018 to invite her to book a further panel sitting with Judge Davidge.

142. To date the claimant has not been signed off to sit in the IAC. All sittings were suspended from the end of March 2020 due to the Covid 19 pandemic. There were no sittings for fee paid judges from the end of March 2020 to September 2020. When sittings resumed, they were few and far between.

143. In April 2021 RTJ Phillips received a request from the claimant asking to do supervised sittings with a different mentor. He replied to provide her with dates and confirmed that a different judge was happy to take over as mentor. By the date of the Employment Tribunal hearing the first, second and third mentored sittings had gone ahead. At the second sitting there were no effective decisions to write due to adjournments, so a third sitting was arranged. RTJ Phillips understands from the mentor judge that the third sitting went well but only one case was heard as the other was adjourned. The draft decision is almost ready to be promulgated and whereas it is outside the normal 10 day period, the delay has been due to the mentor judge's holiday rather than any delay on the part of the claimant. The claimant will require a further panel sitting before being signed off, to include a protection appeal but the indication seems to be positive and RTJ Phillips expected her to be signed off to sit alone in the course of the next month.

144. From 2018 the IAC started work on a wholly digitised system and this process has been accelerated by the pandemic. It is not yet known whether any further adjustments are required for the claimant working in the IAC and whether these can reasonably be made but the recent mentored sittings seem to indicate that the claimant is able to produce effective decisions.

Chronology summary tables

145. Given the lengthy chronology in this case it is helpful to summarise the timeline in relation to certain elements of the case as is set out in the tables below.

First occupational health report "Wingfield report"

26/9/16	RTJ requests OH assessment for C from Casey
17/10/16	C confirmed happy to proceed with OH referral. [281]
24/1/17	C is asked to complete sections on OH referral form but declines to sign consent form [324, 441]
19/5/17	RTJ Curran indicates she will contact Judicial HR about OH referral.
29/5/17	C takes issue with wording of referral but agrees to meet Casey to discuss.
01/06/17	C signs consent form for OH referral
3/11/17	Casey carries out DSE assessment.
6/11/7	Casey forwards OH referral to Francis.
5/4/18	OH assessment took place
10/4/18	OH report produced- Wingfield report.

Interval between initial RTJ request and report: circa 1 year and 6 months.
Interval between C signing consent form and report:10 months.

Second occupational health report "Lexxic report"

20/5/19	RTJ inquires about second specialist dyslexia report
2/7/19	referral for 2nd report submitted.
16/9/19	second OH assessment takes place

16/10/19	second OH report sent to C

Interval from initial request to provision of report: nearly 5 months.

Laptop

December 2013	1st laptop provided
23/8/18	DOM1 laptop made available to C
6/12/18	Open build laptop given to C

Dictaphone

December 2013	Digital Dictaphone provided (NB subsequently discover not got software to download recordings)
16/9/16	DTJ Rolt gives C analogue Dictaphone and tapes
2/11/17	C has run out of tapes for Dictaphone.[425]
2/11/17	Digital Dictaphone located for C to use [427] although still software problems.
30/11/17	Casey requests Olympus software to enable transfer of records on device to CD
December 2017	Casey encounters difficulties with Olympus software
18/5/18	RTJ Curran says C can use typists at Eastgate House for transcription of SORs and proofreading
6/6/18	C provided with Dictaphone and cassettes
By August 2019 (possibly earlier, in January 2019)	C is sending proofreading to Karen Clements (typist) [1221] [1767]

Software

December 2013	C is provided with laptop with Dragon
24/8/18	Casey orders Dragon and Read & Write Gold for DOM1 laptop
29/8/18	C asks for Express Dictate to be added to software order

3/10/18	C is provided with headset
6/12/18	Open build laptop with Dragon, Read & Write Gold and headset provided to C
22/1/20	MindView software installed by this date

Training

22/5/19	Casey contacts Judicial IT to arrange specialist Software training for Read & Write Gold and Dragon
6/12/19	Quotes put in for training
March 2020	MindView training
March/April 2020	Lunch and Learn training session
19/5/2020	C completes Lexxic training

Recording of hearings/ROPs

From 2011	C sat in South East/London where there were recording facilities in the venues (except Sutton, which C avoided as there were problems with the recordings when she sat there).
30/5/13	C requests recording equipment from RTJ Curran
4/6/13	Chaplin receives request for recording equipment.
9/8/13	C raises formal complaint to RTJ Curran about recording equipment
May 2017	2 new items of portable recording equipment ordered for Vintry Buildings. Backup device sourced for C to use (spare Coomber device made available from 30/5/17).

June 2017	Catastrophic flood at Civil Justice Centre causing disruption between June and November 2017
31/8/17	C complains to Casey that the 2 recording machines not working [379]
21/9/17	Recording machines broken again. [391]
2/10/17	Spare portable recording system found in Vintry server room
March 2018	SSCS moves from Vintry House to Bristol Magistrates where there is recording equipment.
4/4/18	Lack of recording equipment in Newport [494-495]
15/5/18	C emails Helen Andrews asking for back up recording system as there were apparently problems with the system working [560]
Around 7/6/18	MC gives instruction to get CD recordings when C sat in Cheltenham and Gloucester
20/8/18	Difficulties with the recording quality in Worle [612]

The Law

Section 15: Discrimination arising from disability

146. Section 15 Equality Act 2010 states:

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

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

147. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

(i) There must be unfavourable treatment. No comparison is required.
(ii) There must be something that arises 'in consequence of the claimant's disability'. The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.
(iii) The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.
(iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

148. Treatment cannot be 'unfavourable' merely because it is thought that it could have been more advantageous or is insufficiently advantageous (The Trustees of Swansea University Pension & Assurances Scheme and anor v Williams [2015] IRLR 885; [2017] IRLR 882 and [2019] IRLR 306.)

149. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).

150. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:

> (a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.
> (b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. 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 irrelevant
> (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. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. 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. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
> (g) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).
> (i) 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."

151. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. It does not matter in which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

152. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving

the objective and be necessary to that end. (Bilka-Kaufhaus GmBH v Weber von Hartz [1986] IRLR 317.)

153. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

154. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

155. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.

156. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM). It is not the same test as the 'band of reasonable responses' test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer's justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

157. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of

achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)

Section 19: indirect discrimination

158. Section 19 states:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) It puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.
…

159. The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic (Baroness Hale Chief Constable of West Yorkshire Police and another V Homer 2012 ICR 704 SC).

160. All four conditions in section 19 (2) must be met before a successful claim for indirect discrimination can be established. That is to say, there must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic at a particular disadvantage when compared with those who do not share that characteristic; the claimant must experience that particular disadvantage; and the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

161. The key element in indirect discrimination is the causal link between the PCP and the particular disadvantage suffered by the group and the individual. *"Sometimes, perhaps usually, the reason [why the PCP results in the disadvantage] will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage… Indirect discrimination assumes equality of treatment- the PCP is applied indiscriminately to all- but aims to achieve a level playing field, where people sharing a particular*

*protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot." (*Essop and ors v Home Office (UK Border Agency) and another 2017 ICR 640, per Baroness Hale) Implying a 'reason why' question into section 19 would undermine the protection afforded by that provision and could result in the continuation of discrimination.

162. As explained in Essop the salient features of indirect discrimination are:

(1) There is no express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others.
(2) While direct discrimination expressly requires a causal link between the less favourable treatment and a protected characteristic, indirect discrimination does not. Instead, it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual.
(3) The reasons why one group may find it harder to comply with the PCP than others are many and various. The reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). Both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.
(4) There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage.
(5) It is commonplace for the disparate impact or particular disadvantage, to be established on the basis of statistical evidence.
(6) It is always open to a respondent to show that its PCP is justified.

Accordingly, there is no need to prove the reason why the PCP in question puts or would put the effective group at a particular disadvantage. What is required is correspondence between the disadvantage suffered by the group and the disadvantage suffered by the individual.

163. The first step in an indirect discrimination claim is the identification of the PCP. The EHRC Employment Code 2011 confirms that the term "provision, criterion or practice" is capable of covering a wide range of conduct, noting: "the phrase… Is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions" (paragraph 4.5). It also states that a provision criterion or practice may include decisions to do something in the future- such as a policy or criterion that has not yet been applied- as well as a 'one-off' or discretionary decision.

164. Case law has indicated that the concept of a "practice" suggests some degree of repetition. "*It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability… Indeed if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply….A one-off application of the respondent's disciplinary*

process cannot in these circumstances reasonably be regarded as a practice; there would have to be evidence of some more general repetition, in most cases at least." (per HHJ Langstaff (President) Nottingham City Transport Ltd V Harvey EAT 0032/12). Further *"…it is hard to see how an individual dismissal could, of itself, be a policy or a criterion (although it may certainly result from either). As for whether it could be a practice, I would approach this term in the same way as did the EAT in Harvey; that is, as suggesting some degree of repetition. An individual dismissal might certainly result from the application of a particular practice but it is hard to see how it could be a practice as such."* (per HHJ Eady QC in H Fox (father of G Fox, deceased) v British Airways plc EAT 0315/14).

165. Although case law indicates that a one-off decision to dismiss will not amount to a practice within the meaning of section 19, this should be distinguished from a situation where an employer establishes for the first time a practice that it would repeat in the future. In Pendleton v Derbyshire County Council 2016 IRLR 580 the tribunal found that the employer had applied a PCP namely, a policy of dismissing those who chose not to end a relationship with a person convicted of making indecent images of children and voyeurism. The employer argued that the claimant's situation was unique and would not be repeated so there was no ongoing practice. The EAT concluded that a policy was capable of including a practice and the existence of highly unusual circumstances does not prevent an employer's response from representing the operation of a practice or policy. The EAT held that there is a difference between an isolated failure to follow a policy and a decision that flows from the application, however rare, of a practice or policy. While an employer may not have had to apply the policy or practice previously the tribunal was entitled to conclude from the evidence that this is how it would respond should the circumstances arise again.

166. In order for a PCP to emerge from evidence of what happened on a single occasion there must either be direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred. (Gan Menachem Hendon Ltd v De Groen 2019 ICR 1023. Likewise in Ishola v Transport for London 2020 ICR 1204 the Court of Appeal rejected the argument that all one-off decisions constitute a practice. The Court of Appeal accepted that the words "provision, criterion or practice" will not be narrowly construed or unjustifiably limited in their application. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. However widely and purposefully purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words "provision, criterion or practice" all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Although a one-off decision or act can be a practice it is not necessarily one.

167. A PCP need not impose an absolute bar on the employee in order to be caught by section 19.

168. It is important that the claimant identifies the PCP with precision. Identifying the exact PCP that has been applied is important because of its implications for the other elements of the test for proving indirect discrimination. A PCP must not be exclusive to a group sharing a protected characteristic. There is no statutory requirement that a PCP actually apply to members of the comparative group because it allows for the creation of a hypothetical comparator.

169. It is a requirement that the PCP puts or would put people who share the claimant's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic. The Act also requires that it puts or would put the claimant herself at that disadvantage. Once it is clear that there is a provision, criterion or practice which puts or would put people sharing the claimant's characteristic at a particular disadvantage the next stage is to consider a comparison between workers with the protected characteristic and those without it. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances. In a case of disability discrimination the protected characteristic is the particular disability the claimant has (e.g. here, dyslexia), not disability as a whole. The correct comparison must be made.

170. The pool for comparison generally consists of the group which is (or would be) affected (either positively or negatively) by the PCP in question. It may sometimes be necessary to carry out a formal comparison between the groups using statistical evidence but this is not always needed. Statistical analysis is not the only method of establishing a particular disadvantage or a disparate impact. Claimants may rely on evidence from expert and other witnesses and tribunals may take "judicial notice" of certain matters that are well known such as the adverse impact caused to women by refusal to allow part-time working. If there is no relevant statistical evidence the experience of those who belong to group sharing protected characteristics is important material for a tribunal to consider. Such individuals may be able to provide compelling evidence of disadvantage even if there are no statistics. A tribunal should then evaluate such evidence in the usual way, reaching conclusions as to its reliability and making appropriate findings of fact.

171. Dobson v North Cumbria Integrated Care NHS Foundation Trust 2021 IRLR 729 dealt with issues of 'judicial notice' and identified a number of principles:

    a. There are two broad categories of matters of which judicial notice may be taken: facts that are so notorious or so well established to the knowledge of the court or the tribunal that they may be accepted without further enquiry; and other matters that may be noticed after inquiry, such as referring to works of reference or other reliable and acceptable sources.
    b. The court or tribunal must take judicial notice of matters directed by statute and of matters that have been so noticed by the well-established practice or precedents of the courts.
    c. The tribunal has a discretion and may or may not take judicial notice of a relevant matter and may require it to be proved in evidence.

d. The party seeking judicial notice of a fact has the burden of convincing a judge that the matter is one capable of being accepted without further inquiry.

172. The EHRC code states that "disadvantage" is to be construed as "something that a reasonable person would complain about so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently" paragraph 4.9.

173. It is not enough for a claimant to show that a PCP has placed those sharing his or her characteristic at a disadvantage: the disadvantage must be a "particular" disadvantage. Particular disadvantage does not refer to serious, obviously particularly significant cases of inequality but instead denotes that it is particularly persons of a given protected characteristic who are at a disadvantage because of the practice in issue.

174. Indirect discrimination is still unlawful even where the discriminatory effect of the PCP is unintentional unless the respondent establishes the objective justification defence.

175. The objective justification defence in indirect discrimination applies the same principles as set out above in relation to section 15 discrimination.

Section 20/21: reasonable adjustments.

176. Section 20 (so far as relevant) states:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

…

177. Section 21 states:

> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
> (3) …

178. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:

> (a) Identify the PCP applied by or on behalf of the employer,
> (b) Identify comparators (if necessary),
> (c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

179. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.

180. A 'substantial disadvantage' is one which is 'more than minor or trivial'.

181. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

182. Where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable her to be more efficient would indeed relate to the substantial disadvantage she would otherwise suffer (Rakova v London Northwest healthcare NHS trust [2020] IRLR 503. It cannot be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. The fundamental question is what steps it was reasonable for the respondent to have to take

in order to avoid the particular disadvantage not what ought 'reasonably have been offered.'

183. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The questions is what objectively the employer could reasonably have known following reasonable enquiry.

Section 26: harassment

184. Section 26 states:

(1) A person (A) harasses another (B) if-
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of-
(i) violating B' s dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B
….
(4) In deciding whether conduct has the effect referred to in subsection (1) (b), each of the following must be taken into account-
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

185. 'Unwanted' conduct is essentially the same as 'unwelcome' or 'uninvited' conduct.

186. Harassment will be unlawful pursuant to section 26 if the unwanted conduct related to a relevant protected characteristic had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

187. The harassment has to be "related to" a particular protected characteristic. The tribunal is required to identify the reason for the harassment with a particular focus on the context of the particular case. In Unite v Naillard [2017] ICR 121 the EAT indicated that section 26 requires the tribunal to focus upon the conduct of the individual(s) concerned and ask whether their conduct is associated with the protected characteristic. In that case it was not enough that an individual had failed to deal with sexual harassment by a third party unless there was something about the individual's own conduct which was related to sex. The focus will be on the person against whom the allegation of harassment is made and his conduct or inaction. So long as the tribunal focuses on the conduct of the alleged perpetrator himself it will be a matter of fact whether the conduct is related to the protected characteristic. As stated in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, "there must still … be some feature or features of the factual matrix identified by the tribunal, which properly leads

it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found have led to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be."

188. The test as to the effect of the unwanted conduct has both subjective and objective elements to it. The subjective element involves looking at the effect of the conduct on the particular complainant. The objective part requires the tribunal to ask itself whether it was reasonable for the complainant to claim that the conduct had that effect. Whilst the ultimate judgement as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered. So, whilst the victim must have felt or perceived her dignity to have been violated or an adverse environment to have been created, it is only if it was reasonable for the victim to hold this feeling or perception that the conduct will amount to harassment. Much depends on context. See the guidance Richmond Pharmacology v Dhaliwal [2009] ICR 724 revisited in Pemberton v Inwood [2018] IRLR where Underhill LJ stated:

> In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."
>
> The context of the conduct and whether it was intended to produce the proscribed consequences are material to the tribunal's decision as to whether it was reasonable for the conduct to have the effect relied upon. Chawla v Hewlett Packard Ltd [2015] IRLR 356.)

189. As stated in Dhaliwal:

> 'If, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.

Jurisdiction- time limits

190. Pursuant to section 123(1) Equality Act 2010 a discrimination or harassment claim may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (as extended by any prior period of ACAS Early Conciliation).

191. Section 123(3)(a) provides that conduct extending over a period is to be treated as done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it (s123(3)(b)). Where there is no evidence to the contrary s123(4) provides that a person is to be taken to 'decide on failure to do something' when he does an act inconsistent with doing it or, if he does no inconsistent act, on the expiry of the period in which the person might reasonably have been expected to do it.

192. The Court of Appeal in Kingston Upon Hull City Council v Matuszowicz [2009] IRLR 288 confirmed that a failure to make a reasonable adjustment is not a continuing act. S123(3)(a) is not applicable. Rather, a failure to make an adjustment is an omission and so s123(4) applies in order to determine when time begins to run for limitation purposes. This is so whether the omission to adjust was a deliberate failure, the result of a decision not to make the adjustment, or was an inadvertent omission. In the absence of evidence as to when the decision was made (either because no evidence was available or because the failure to adjust was inadvertent) then s123(4)(a) and (b) come into play.

193. The date on which the duty to make a reasonable adjustment arises and is triggered may not be the same as the date on which the limitation period starts to run. For limitation purposes time will begin to run at the point in time when it became clear or ought to have become clear to the claimant that her employer was not complying with its duty to make reasonable adjustments. This may be later than the date on which the employer's duty to make adjustments first arose. This avoids unfair prejudice to a claimant who reasonably believes that the employer is taking steps to address the relevant disadvantage when in fact the employer is doing nothing at all. Section 123(4) requires the examination of the period in which an employer might reasonably have been expected to comply with its duty to be assessed and identified from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time (see Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194).

194. Where it is asserted that conduct extends over a period and is to be treated as being done at the end of that period the burden of establishing this rests on the claimant. It can be established in several ways, such as by separate acts that are linked in some way as evidence of a discriminatory state of affairs. Where a series of acts are alleged to amount to discrimination a finding that one or more of them was not discriminatory will mean that it cannot be considered to be part of a continuing act. *"[R]eliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs. If such constituent acts or instances cannot be established, either because they are not established on the facts or are found not to be discriminatory, then they cannot be relied upon to evidence the continuing discriminatory state of affairs "* (South Western Ambulance NHS Foundation Trust v King [2020]IRLR 168.

195. If a claim is found to have been presented outside the statutory time limit a tribunal may exercise its discretion to extend time and allow it to be determined where it is just and equitable to do so (section 123(1)(b)). While tribunals have a wide discretion to allow an extension of time under the 'just and equitable' test there is no presumption that they should do so unless they can justify failure to exercise the discretion. The onus is on the claimant to convince the tribunal that it is just and equitable to extend the time limit (Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434). In deciding whether to extend time on a just and equitable basis it is important that the tribunal considers all relevant factors. The tribunal must weigh up the so-called balance of prejudice between the parties of extending time and allowing the claim to proceed as against refusing the extension of time and stopping the claim on limitation grounds. It may be helpful to consider the same factors as are referred to in section 33 of the Limitation Act 1980 (British Coal Corporation v Keeble 1997 IRLR 336). The factors listed at section 33 include the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. Whilst that list is a useful guide to tribunals it need not be adhered to slavishly. It is not a legal requirement (Southwark London Borough Council v Afolabi [2003] ICR 800). The section 33 'checklist' should not be taken as the starting point for tribunals' approach to 'just and equitable extensions'. Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. The best approach for a tribunal is to assess all the factors in the particular case that it considers relevant including the length of and reasons for the delay (Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] ICR D5.) It is generally important for the party seeking an extension of time to provide some sort of explanation for the delay. The strength of the claim may be a relevant factor in deciding whether to extend time (Lupetti v Wrens Old House Ltd 1984 ICR 348). However, the this is not necessarily a definitive factor. Even if the claimant has a strong case, time may not be extended for it to be heard (Ahmed v

Ministry of Justice EAT 0390/14). The fact that a complainant has awaited the outcome of an internal grievance procedure before bringing a claim is just one matter to be taken into account by the tribunal (Apelogun-Gabriels v Lambeth London Borough Council and anor 2002 ICR 713). There is no general principle that it will be just and equitable to extend the time limit where the claimant was seeking redress through the employer's grievance procedure before embarking on legal proceedings. The general principle is that a delay caused by a claimant awaiting completion of an internal procedure may justify the extension of the time limit but it is only one factor to be considered in any particular case. The exercise of the tribunal's discretion demands a multi-factorial approach and no single factor is determinative.

Burden of proof

196. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act including direct discrimination, harassment, indirect discrimination, discrimination arising from disability under section 15 and the failure to make reasonable adjustments under section 20. Although similar principles apply, what needs to be proved depends, to a certain extent, on the nature of the legal test set out in the respective statutory sections.

197. The wording of section 136 of the act should remain the touchstone.

198. The relevant principles to be considered have been established in four key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

199. The correct approach entails a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

200. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

    a. It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.

b. In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
c. The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
d. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
e. When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
f. Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

201. The shifting burden of proof rule is intended to assist claimants to establish discrimination and help employment tribunals to establish whether or not discrimination has actually taken place. The shifting burden of proof rule only applies to the discriminatory element of any claim. For example, it is not for the respondent to prove that the claimant has the particular protected characteristic. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

202. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring

discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation

203. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

204. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

205. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory.

206. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

207. In a case of harassment under section 26 of the Equality Act the shifting burden of proof in section 136 will still be of use in establishing that the unwanted conduct in question was "related to a relevant protected

characteristic" for the purposes of section 26(1)(a). Where the conduct complained of is clearly related to protected characteristic then the employment tribunal will not need to revert to the shifting burden of proof rules at all. Where the conduct complained of is ostensibly indiscriminate the shifting burden of proof may be applicable to establish whether or not the reason for the treatment was the protected characteristic. Before the burden can shift to the respondent the claimant will need to establish on the balance of probabilities that she was subjected to the unwanted conduct which had the relevant purpose or effect of violating dignity, creating an intimidating etc environment for her. The claimant may also need to adduce some evidence to suggest that the conduct could be related to the protected characteristic, although she clearly does not need to prove that the conduct *is* related to the protected characteristic as that would be no different to the normal burden of proof.

208. In a claim of indirect discrimination, following the case off Dziedziak v Future Electronics Ltd EAT 0271/11 the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice; secondly, that it disadvantaged [those who share the protected characteristic] generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual claimant. Only then would the employer be required to justify the provision, criterion or practice. It appears that the burden lies on the claimant to establish the 1st 2nd and 3rd elements of the statutory definition, only then does it fall to the employer to justify the PCP as a proportionate means of achieving a legit aim.

209. In the context of a section 15 claim in order to establish a prima facie case of discrimination the claimant must prove that he or she has the disability and has been treated unfavourably by the employer. It is also for the claimant to show that "something" arose as a consequence of his or her disability and that there are facts from which it could be inferred that this "something" was the reason for the unfavourable treatment. Where the prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on section 15(2) and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was not the "something" alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving legitimate aim.

210. Where it is alleged that an employer has failed to make reasonable adjustments, the burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments had arisen but also that there are facts from which it could reasonably be inferred (absent an explanation) that the duty been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it can be properly inferred that there is a breach of that duty. Rather, there must be evidence of some apparently reasonable adjustment that could have been made. Therefore, the burden is reversed only once a potentially reasonable amendment adjustment has been identified Project Management Institute v Latif [2007] IRLR 579.

Judicial Proceedings Immunity

211. Judicial Proceedings Immunity ("JPI") is a legal principle of the common law that there is absolute immunity from suit in respect of things said or done in the course of judicial proceedings. It is a legal principle with a public policy rationale behind it. The public policy is designed to protect the integrity of the judicial process so that the judge can hear the case and determine the outcome according to the evidence given, the findings of fact made, and the application of the appropriate legal principles. The judge needs to be able to do this without fear of repercussions flowing from his or her actions in the course of hearing the case. There must be no threat of civil liability for things said or done by the judge in the course of that litigation so that the judge is free to discharge the requirements of the judicial oath without fear or favour and focusing on the pertinent matters in the litigation. It would not be appropriate for the decision-making of the court or tribunal to be fettered or influenced by outside factors other than those properly before said court or tribunal. The appropriate route for challenging the actions or decisions of the judge is therefore to appeal any decision which the party considers is legally wrong. In this way someone with a legitimate interest and 'standing' in the case has a remedy in relation to adverse judicial decisions and actions.

212. The second limb of the policy protects the interests of the other parties involved in the litigation. The rationale is the need to protect those involved in litigation from the fear of civil liability for things said or done in the course of that litigation. Once again, this means that those protected by the immunity are able to play their part in litigation, whether as a witness or as a party to the dispute, without fear of repercussions after the event. It facilitates access to justice so that individuals can give evidence and participate fully and freely in judicial proceedings. It is in the interests of justice that participants in litigation should not feel inhibited by the risk of being sued for something that they say or do within that litigation.

213. There are exceptions to the absolute immunity rule. They include actions for malicious prosecution, prosecution for perjury or proceedings for contempt of court.

214. The paradigm case for the application of JPI is to anything said or done in a court or tribunal hearing. This is at the core of the litigation process. However, case law has extended the definition in terms both of the types of judicial (or quasi-judicial) processes and jurisdictions covered by JPI, and also in relation to the actions which are said to fall within the scope of litigation and the protection of immunity (e.g. things not actually said or done during a court hearing).

215. Dealing first with the types of *process* which can be protected by JPI, case law shows that the scope of protection is wider than might first be thought. It might be assumed that judicial proceedings only cover litigation in the civil or criminal courts. However, it extends beyond that to proceedings in tribunals and some quasi-judicial functions. For example, in the case of Engel v Joint Committee for Parking and Traffic Regulation O/outside London (Patrol)

[2013] IRLR 787 the act to be considered for the protection of JPI was the decision of the chief adjudicator of the traffic penalty tribunal to stop allocating certain types of cases to the claimant, who was a fee paid parking adjudicator authorised to hear appeals concerning the imposition of penalty charges for certain road traffic offences. Likewise, arguments in relation to JPI can be pursued in relation to disciplinary proceedings held by Police Disciplinary Boards in relation to a police force.

216. Trapp v Mackie [1979] 1 All ER 489 and Heath v Metropolitan Police Commissioner [2005] IRLR 270 set out the criteria for determining whether a particular body is 'judicial' for the purpose of attracting JPI. The privilege extends to evidence given before tribunals which, although not courts of justice, nevertheless act in a manner similar to that in which the courts of justice act. Four aspects for consideration have been identified: (1) whether the tribunal is "recognised by law"; (2) whether the issue is "akin to" that of a civil or criminal issue in the courts; (3) whether its procedures are akin to those in civil or criminal courts; and (4) whether the result of its procedures lead to a binding determination of the civil rights of a party or parties.

217. Secondly, looking at the *type of activity* protected, the immunity extends beyond what is said in court to the preparatory stages of litigation e.g. taking witness statements. The coverage of the immunity is wide:

> *"When a police officer comes to court to give evidence he has the benefit of an absolute immunity. This immunity, which is regarded as necessary in the interests of the administration of justice and is granted to him as a matter of public policy, is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceeding in a court of justice. The same immunity is given to the parties, their advocates, jurors and the judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable or proper cause. …The immunity extends also to claims made against witnesses for things said or done by them in the ordinary course of such proceedings on the ground of negligence."* Darker v Chief Constable of the West Midlands Police [2001] 1 AC 435.

218. In the employment sphere the EAT has said that matters that are an 'integral part' of the judicial proceedings would attract the immunity but that would not stretch to cover conduct at the periphery of proceedings e.g. abuse and intimidation in a tribunal corridor following a hearing (Nicholls v Corin Tech Ltd UKEAT/0290/07).

219. In Engel v Joint Committee for Parking and Traffic Regulation Outside London (Patrol). [2013] IRLR 787 the issue was whether the act forming the basis of a victimisation claim was performed in the exercise of a judicial function so as to attract JPI and thereby deprive the tribunal of jurisdiction to

hear the case. The act in question was the decision of the chief adjudicator of the traffic penalty tribunal to stop allocating certain types of cases to the claimant, who was a fee paid parking adjudicator authorised to hear appeals concerning the imposition of penalty charges for certain road traffic offences, because of concerns about his handling of two cases. Following the dismissal of a complaint by the claimant against the chief adjudicator, the chief adjudicator stopped allocating all types of appeals to him. The claimant then sought to challenge this decision in an employment tribunal by bringing a victimisation claim against the joint committee alleging that he had suffered a detriment because he had made a protected disclosure about the conduct of the chief adjudicator. The employment tribunal held that judicial immunity applied and struck out the claim, a decision upheld on appeal. As there was no dispute that the chief adjudicator was a judicial officeholder and thus entitled to judicial immunity in the discharge of her judicial functions, the question was whether decisions as to the allocation or non-allocation of cases to adjudicators could be classified as judicial functions. Both the tribunal and the EAT held that they could. In the EAT, Mitting J equated decisions concerning the allocation of cases to those relating to the listing of cases in the ordinary courts, which have always been considered to be the prerogative of judges (even though in practice they are frequently performed by listing officers) and have always been regarded as attracting judicial immunity. Both listing and allocations decisions can, he held, have a significant impact on the judicial determination of a dispute (see paragraph 15). The claimant's further argument was that the decision by the chief adjudicator not to allocate him cases was not a simple allocation decision but a decision to suspend him from work (i.e. a disciplinary decision which was not in the exercise of her judicial functions). Although Mitting J was clear that disciplinary proceedings as such do not fall within the scope of judicial functions (see paragraph 13), he held that if it were the case that the chief adjudicator had decided not to allocate any cases pending the bringing of disciplinary proceedings, such a decision would have been taken in the exercise of judicial functions and judicial immunity would have applied to it. Mitting J went on to say "*as a free-standing disciplinary measure and even if it was taken for the improper purpose alleged by the appellant of subjecting him to a detriment because of his protected disclosure, her decision would... still be covered by judicial immunity. The principle of immunity for the exercise of judicial functions is, ultimately, a policy decision, which must be upheld even in extreme circumstances."*

220. However, in P v Commissioner of Police for the Metropolis [2018] IRLR 66 the Supreme Court held that judicial immunity rule could not operate to bar disability discrimination claims brought in an employment tribunal by a woman police officer who had been found guilty of misconduct by the Metropolitan Police Misconduct Board. The claims were made on the basis that the way in which the Board carried out its judicial functions constituted discrimination by it. The claims were struck out on the ground that the Board was a judicial body and as such had immunity from suit. Reliance was placed on the Heath case which was held to be binding. At the Court of Appeal it was held that EU law allows for the qualification or restriction of directives where Member States, within the margin of their appreciation, consider it necessary, and the Equal Treatment Directive could not be said to be an exception to this principle. However, on appeal at the Supreme Court this

reasoning was overruled. Lord Reed held that where directly effective rights are in issue (in this case the Framework Directive) EU law must be the starting point of the analysis and may also be the finishing point since it "takes priority over domestic law in accordance with the provisions of the European Communities Act 1972." The Framework Directive conferred on all persons (including police officers) a directly effective right to be treated in accordance with the principle of equal treatment in relation to employment and working conditions, including dismissals (Article 3(1)(c)); and it obliged the UK to ensure that judicial or administrative procedures were available to all persons who considered themselves discriminated against i.e. wronged by a failure to apply the principle of equal treatment to them. Sanctions must be applied which are effective, proportionate and dissuasive. Moreover, the procedures under national law must comply with the principles of effectiveness and equivalence with the right to an effective remedy under article 47 of the charter of fundamental rights of the EU. The Supreme Court considered that the ability of a police officer to bring a claim of discrimination before an employment tribunal would fulfil the principles of equivalence and effectiveness. The same could not be said for the ability to pursue a complaint to the police appeals tribunal. Lord Reed stated *"the right not to be discriminated against on grounds including disability is a fundamental right in EU law, protected by article 21 (1) of the charter. It follows that, even if it is designed to protect the officer under investigation, the creation of a statutory process which entrusts disciplinary functions in relation to police officers to persons whose conduct might arguably attract judicial immunity under domestic law cannot have the effect of barring complaints by the officers to an employment tribunal that they have been treated by those persons in a manner which is contrary to the directive. National rules in relation to judicial immunity, like other national rules, can be applied in accordance with EU law only insofar as they are consistent with EU law... the reasoning of the Court of Appeal in relation to EU law, cannot therefore be regarded as correct."* This meant that the police officer was entitled to pursue the claim to the employment tribunal because he was entitled to an appropriate enforcement mechanism for the vindication his EU rights and the application of JPI in that case would have removed his recourse to that enforcement mechanism. Any putative JPI had to give way to the primacy of EU rights that have direct effect.

221. In Aston v The Martlet Group Ltd UKEAT/0274/18 the EAT summarised the ratio of P as follows: *"any person must have the right to present to an employment tribunal (as the judicial body that can provide an effective remedy, and as the one to which others have access) a claim of infringement of a right within the scope of the equal treatment directive."*

222. This led to a third crucial issue which is the scope of the Equal Treatment Directive 2006/ 54/ EC, specifically Article 3(1)(c) which applies the Directive to: "employment and working conditions, including dismissal and pay." It has been said by the editors of Harvey on Employment Law that things said or done as an integral part of the judicial process are perhaps unlikely to also amount to something which could be described as employment and 'working conditions including dismissal and pay'. In P itself they did because the acts of complained of related to the dismissal of the officer. But in Aston the EAT concluded that statements made by an employer, through the medium of a

witness giving evidence at a hearing of a claim against it, did not fall within the scope of the Directive.

223. The upshot of the above case law appears to be that in any given case a series of questions fall to be considered:
    a. Is the decision which is to be challenged that of a judicial or quasi-judicial body?
    b. If it is, does this decision fall within the scope of judicial proceedings?
    c. If it does, it would prima facie fall to be protected by judicial proceedings immunity and therefore it would not be possible to challenge it within employment tribunal proceedings.
    d. However, following the line of reasoning identified in P v Commissioner of Police for the Metropolis, an additional question may be posed: Is the act which is challenged by the claimant in the employment tribunal proceedings within the scope of his directly effective EU rights? Does it fall within the scope of the Article 3(1)(c) of the Directive? If it does, P would seem to suggest that the right to an effective remedy for an infringement of directly effective EU rights trumps the protections afforded by JPI. It should therefore be possible to pursue the claim in the employment tribunal.

    In short, the question should be: first, does the act complained of fall for protection under JPI? If it does, is that protection then ousted by the right to an effective remedy to protect a citizen's directly effective EU rights? If JPI is ousted in this way then the tribunal can go ahead and hear the discrimination claim which is based on the 'judicial' act in question.

224. The crucial question in the context of this case therefore appears to be what the nature or quality of the act complained of can be said to be. What type of act is it? Is it an act in furtherance of a judicial function? Or is it something akin to a management decision which might be taken in the course of an employment relationship? If it is the latter, and the claim is one provided for by the Equal Treatment Directive (e.g. a claim of discrimination under the Equality Act 2010) then JPI is likely to be ousted and the claim can be pursued and determined in the employment tribunal.

CONCLUSIONS

225. The Tribunal has drawn conclusions in relation to each of the issues identified and agreed at the outset of the hearing as set out in the following paragraphs.

Failure to make reasonable adjustments

The "provision, criterion or practice" ("PCPs") relied upon by the claimant

226. The claimant identified and relied upon six separate PCPs as part of her reasonable adjustments claim.

227. The first PCP was said to be, "The requirement to provide written statements (an SSCS judgment in full) without the use of voice recognition software."

228. There was no explicitly stated requirement to provide written statements of reasons without the use of voice recognition software. However, there was a requirement to provide written statements of reasons in line with the SSCS President's Protocol No. 4. There was also a practice of not providing voice recognition software to fee paid judges as standard. The default position was that fee paid judges provided their own equipment and tools to carry out the role. The upshot of this was that, in reality, the claimant was required to provide the written statements without the assistance of voice recognition software. Indeed, this was the position all fee paid judges were in at the relevant time. Unless specifically notified to the contrary, this is also what the respondent would have understood the position to be. The reality is, therefore, that in substance the claimant *was* required to provide written statements without the use of voice recognition software up until the point in the chronology where a computer with such software was provided to her by the respondent. Therefore, this PCP *was* applied in this case to the claimant and other fee paid judges albeit not throughout the entire chronology that we have been asked to consider. We have found that the claimant was provided with an open build laptop with Dragon Dictate and Read & Write Gold software installed on it on the 6th of December 2018. Therefore, the PCP was applied up until that date. The claimant may well have had complaints about the functionality of the software after this date. She may well have felt that it did not do all that she required it to. However, upon provision of the software this PCP was no longer applied in this case.

229. The second PCP identified by the claimant was said to be, "The requirement to take a note of the evidence during a hearing (either handwritten or on a laptop).

230. We do not accept that this was a PCP in this case. The actual requirement upon the claimant was to ensure that there was a formal record of proceedings- an "ROP". That was the PCP in this case. This does not mean that there was a requirement that the claimant take a note of the evidence during the hearing in either a handwritten format or on a laptop. We accept RTJ Maddox's unchallenged evidence that a Record of Proceedings *"must be in such medium as the member may determine"*. This was also confirmed by DTJ Roberts' email to the claimant of 21st October 2020. In the claimant's case the Record of Proceedings consisted of the audio recording of proceedings. To this extent she was not required to take a handwritten or laptop note of the evidence at all. Of course, she might well wish to take her own notes as the hearing progressed for her own purposes and to assist her in conducting the hearing and making a determination on the day. Again, she decided whether this was done and, if so, the method used. This was not a requirement or a PCP in this case. In practice, the claimant listened back to the audio recordings for the purpose of constructing any SORs which were requested after the hearing.

231. The third PCP identified by the claimant was said to be, "The provision of written material up to, but often less than, two weeks before the hearings."

232. We accept that this was a PCP in place in the claimant's case. This is so even on the basis of the respondent's own evidence. We do not understand the respondent's assertion, made in closing submissions, that this PCP must have been abandoned by the claimant. It does not fit the evidence we have heard from either of the parties. The material question is actually whether this PCP triggers a duty to make any of the reasonable adjustments contended for by the claimant. That is an issue to which we return below.

233. The fourth PCP identified and relied upon by the claimant was, "The requirement to provide Written Statements within two weeks of the request by an appellant."

234. This PCP does not accurately reflect the factual position in the claimant's case and is not accepted by the Tribunal. As explained by RTJ Maddox and DTJ Macmillan, the Presidential Protocol required judges to produce the SORs and send them to the internal administration of the tribunal within 22 days of the request so that the statement could be sent out to the appellant within a month of the request. Whether we examine the internal administrative timeframe or the external timeframe (in sending the SOR to the appellant) the PCP as formulated by the claimant does *not* reflect the true position in this case. This PCP therefore falls at this stage.

235. The fifth PCP identified by the claimant was, "Writing correspondence threatening judicial misconduct for the delay in providing Written Statements."

236. We do not accept that this was the PCP in this case. The correspondence relied upon by the claimant to demonstrate this PCP does not actually say what she asserts. It does *not* threaten judicial misconduct. None of the standard form reminder letters threaten judicial misconduct for the delay in providing written statements. Nor could it reasonably be suggested that they could be interpreted in that way. The content and text of the letters has been set out in the findings of fact, above.

237. The sixth PCP relied upon by the claimant was, "Requiring the claimant to complete a performance review programme because of her appraisal scoring." It is accepted that the personal development plan was implemented for the claimant in order to deal with some of the concerns that had led to the appraisal grade "some concerns". The respondent says that this was a one-off decision and therefore cannot amount to a PCP. We respectfully disagree. The personal development plan is a tool which is available to the respondent as part of the appraisal scheme in order to deal with performance concerns and to encourage improvements and development in the future. This is a tool which could be used in many cases, not just the claimant's. We find that it has the necessary element of repetition to constitute a PCP. There is a prospect of a personal development plan being used in any case where similar performance concerns arise. In short there is a prospect of repetition by the respondent in similar circumstances.

<u>The PCPs and substantial disadvantage.</u>

238. The next question which the legislation requires us to address is whether the application of any of the PCPs put the claimant at a substantial disadvantage

in relation to a relevant matter in comparison with persons who are not disabled. It is said that the claimant's dyslexia prevented her from working in the manner and/or working as quickly as was required by the respondent's PCPs.

239. The specific substantial disadvantages relied upon in respect of the provision of written statements were those set out at paragraph 7 of the agreed list of issues, as considered below.

240. The claimant says that she encounters difficulty in writing the statements and processing the information relevant to the statements. We accept that in relation to the first PCP (the requirement to provide statements without voice recognition software), the claimant would be at a substantial disadvantage given the nature of her dyslexia and the impact that it has upon her ability to read, write and assimilate information. This disadvantage is substantial in that it is more than merely minor or trivial. The various occupational health reports in this case clearly demonstrate the difficulties the claimant has in this regard, hence the recommendation of assistive technology, including voice recognition software.

241. The second disadvantage relied upon is that "the claimant is thereby incapable of providing written statements in a timely manner, including in adherence with the respondent's expectations." We do not accept that the claimant is *incapable* of providing the written statements within the relevant timeframe as she asserts. If she were incapable of meeting the timeframes and expectations one would expect it to have seen it picked up in early appraisals or during her time working in the South East region. This is not what happened. The PCP did not render her *incapable* but we do accept that it would result in significant difficulties in this regard. It would be *one* factor but not the *only* factor. It would hamper her ability to provide the statements in the correct timeframe and in line with expectations. We consider that this would be a substantial disadvantage i.e. more than minor or trivial. The claimant does not have to be "incapable" of providing the written statements in order for the relevant limb of the statutory test to be made out. We appreciate that it would not be uncommon for all judges to receive letters chasing late statements. However, this does not mean that the claimant was not at a comparative disadvantage. She would still have more problems to overcome in doing the statements in time with the absence of voice recognition software combined with her disability. We note that the respondent argues that the claimant's RSI and arthritis must be taken to have a significant effect on her ability to provide timely written statements and that these are not the disabilities relied on in this case. We have not heard enough evidence in this case about the effect of arthritis to draw the conclusion that the respondent contends for. Furthermore, the dyslexia could well have a significant impact in this regard even if the arthritis also contributes. It is not an 'either/or' proposition. Both can have an impact. We accept that the issue for us is whether the relative disadvantage is "substantial" i.e. more than minor or trivial. Similarly, the fact that the claimant may have wanted to sit more frequently than non-disabled colleagues does not, of itself, mean that the absence of voice recognition software didn't put her to substantial disadvantage in relation to timely written statements. Sitting more frequently might well make it more likely that statements would be produced late.

However, this should not be allowed to obscure the correct comparison. If one considers two judges, both sitting above the average number of sitting days, both writing statements without voice recognition software but only one of them having dyslexia, it becomes apparent that the PCP puts the claimant at a substantial disadvantage as compared to those who are not disabled. The fact that there may be one more than one factor causing the delay in written statements does not mean that the PCP does not itself put her at a substantial disadvantage in the manner required by the Equality Act. There can be more than one causative factor in any given case.

242. We accept that the claimant could well suffer from more anxiety than a non-disabled person in the same circumstances. She would be put at a substantial disadvantage, albeit not *wholly* connected to the PCP or her disability as compared to the natural anxiety which would arise from providing SORs late. We accept that any judge being chased for SORs will suffer from stress but the claimant will suffer more stress because she is only too aware of the additional barriers she faces to rectifying the problem and clearing the backlog.

243. The claimant asserts that she is unable to sit as frequently because more time is required to write SORs arising from previous sittings and she is concerned about sitting more frequently because she will then be incapable of responding to requests for written SORs. We do not accept that this is borne out on the facts of this case. At the beginning of 2016, the claimant changed her listing profile to provide for a 10 session per week level of availability. Thereafter, over the relevant period, she had some of the highest levels of sittings amongst the SSCS fee paid judges. Further, the nature of the claimant's flexible working request on 11 April 2018 undermines the claimant's case in this regard. If there was a substantial disadvantage, as alleged, the claimant would not have made the request for more sittings in the terms that she did.

244. The claimant asserts that it is a substantial disadvantage that she "has and may face criticism and/or warnings by her DJ or RTJ. However, we don't accept that she was criticised in the manner alleged or warned of disciplinary consequences as she asserts. Rather, she was just chased for the SORs and asked to comply with the relevant timeframes. The correspondence in question just indicates what may happen in the long term if a backlog is not cleared. Even the letter dated 20th October 2016 from RTJ Curran proposing to remove the claimant from sittings did not seek to criticise the claimant, nor was it a warning. It was a proposal to help her clear the backlog- which she needed to do. The claimant's overdue SORs have not resulted in any referral to the Chamber President.

245. The claimant also alleges a substantial disadvantage in that she "has and may face" complaints from members of the public. It is common ground that members of the public have raised complaints about the timeliness of her SORs. However, there is no substantial disadvantage in the prospect of members of the public pursuing a complaint. Such a substantial disadvantage would only arise if a complaint was made because of the late provision of a written statement and the complaint was upheld. However, no complaint has

been upheld. There is no substantial disadvantage in the public having a right to make complaints, even if they are not subsequently upheld.

246. The claimant alleges that any warnings and/or complaints may further reduce her ability to sit and/or may be recorded on her appraisal and/or may impact on any application she may make for tickets in alternative jurisdictions. There is no evidence of any warnings or the prospect of warnings. Whilst the presence of these would be recorded on an appraisal it would not have a material effect on her ability to apply for a different role. This was the unchallenged evidence of RTJ Maddox and DTJ McMillan and was accepted by the Tribunal. The claimant's case in this regard is based on too many "what ifs" and is not sufficiently supported by the evidence in the case.

247. The second PCP which the Tribunal concluded had been established in this case was, "The provision of written material up to, but often less than, 2 weeks before the hearings". However, we were not satisfied that this PCP put the claimant at a substantial disadvantage as compared with non-disabled people based on the evidence that we heard. The claimant said to the Tribunal that she could "whip through" the reading and preparation for the hearings and that she had no particular difficulty with this. She was relatively nonchalant about it. She did not suggest that she needed more time to go through the documentation and prepare for the hearings. This is not what she would say if the PCP in fact put her at a substantial disadvantage. So, based on the evidence that we heard and which the claimant gave to the Tribunal, we do not accept that this PCP had the necessary substantial disadvantage.

248. The third PCP which the Tribunal found proved in this case was, "Requiring the claimant to complete a performance review program because of her appraisal scoring." However, we do not accept that this PCP put the claimant at the necessary substantial disadvantage. We cannot see that the claimant would be put at any *comparative* substantial disadvantage by this PCP even if one accepts that a PDP is in some way detrimental or disadvantageous. Both non-disabled and disabled employees working to a performance review programme would be in the 'same boat', broadly speaking. If a PDP is viewed as disadvantageous to this disabled claimant then it would also be seen as equally disadvantageous to a non-disabled person.

249. It follows from what has been said in the preceding paragraphs that the only PCP which we found applied in this case which could possibly trigger the duty to make reasonable adjustments (because it put the claimant at a substantial disadvantage compared to a non-disabled judge) was that set out at paragraph 5(a) of the agreed list of issues, namely: "The requirement to provide written statements without the use of voice recognition software."

<u>The adjustments contended for.</u>

250. In considering whether the respondent breached any duty to make reasonable adjustments we note that it is just that: a duty to make *reasonable* adjustments. The respondent is not necessarily or automatically legally required to give the claimant exactly what she wants or asks for. Nor is it necessarily legally required to give the claimant exactly what is referred to in the occupational health reports unless that follows from the proper application

of the statutory framework. The question is whether the respondent has taken such steps as are 'reasonable in the circumstances'.

251. The agreed list of issues set out a number of potential adjustments, both under specific headings and more generally. Given the overlap and duplication it is not possible to cross refer specifically and accurately to the paragraphs in the list of issues. Instead, we deal with each potential adjustment separately.

252. The claimant asserts that it would have been a reasonable adjustment to provide her with voice recognition software. It is important to look at the totality of the arrangements in place for the claimant. Taken in the round did the claimant have the necessary 'tools of the trade' in order to carry out her judicial function without the substantial disadvantages which flowed from her disability?

253. In summary, until December 2018 when the claimant received her open build laptop she was without access to functioning Dragon dictate software. She also received no training in the use of said software. In December 2018 she received her new laptop complete with Dragon Dictate and also Read & Write Gold voice recognition software. It was not until May 2019 that she completed the training in the use of the said software. Only once she had received this training was she able to properly dictate documents and then get the computer to 'read' them back to her aloud so that she could correct her mistakes and proof read prior to promulgation.

254. Running alongside this was the issue of the Dictaphone to provide transcription of her dictated SORs. If fully functioning this would have provided a suitable alternative to voice recognition software as it would have enabled the claimant to dictate SORs which could then be transcribed by a typist prior to proofreading and promulgation. At the outset the claimant was provided with a digital Dictaphone. This meant that she could listen back to her own dictation. However, she was not provided with the necessary software to download the recordings so that they could be sent to a typist for transcription. This meant that the digital Dictaphone was virtually useless in terms of the purpose for which it was provided. As far as this Tribunal has heard, the issue of software to download recordings was never satisfactorily resolved for the claimant. The digital Dictaphone therefore failed to provide any workable solution for the totality of the period under consideration. The alternative solution was the analogue Dictaphone. This had its own difficulties in that there were shortages of the necessary tapes. On occasion the claimant was able to obtain further supplies from her judicial colleagues. When this system worked, she would therefore be able to dictate her decisions send them to a typist and receive them back for proofing before promulgation.

255. As a Tribunal we have had the opportunity to stand back from the detail of this case and look at it holistically. Unfortunately, nobody within the respondent's organisation was able to do the same. Put simply, the respondent organisation did not know how to handle the claimant's situation properly. There was no pre-existing policy to deal with a judicial officeholder facing the challenges that were faced by the claimant. We accept and

appreciate that the individuals within HMCTS were doing their level best in the circumstances to provide the claimant with what she needed. But in the absence of an appropriate policy or procedure they came up against significant obstacles in doing this. Furthermore, the absence of an overall policy meant that nobody took ownership of the problem. It also meant that lines of accountability were unclear. Who had responsibility for taking the various steps required? If those steps were not taken (or not take timeously) who should the claimant approach to have this rectified? Indeed, who should her leadership judges have been able to approach to rectify the problem? It is this overall lack of coordination and preplanning which has led to such a lengthy and problematic chronology of events in the claimant's case.

256. The first adjustment the claimant says she should have received was provision of voice recognition software. We agree. Given the specific difficulties the claimant faced and the requirements of her role, the provision voice recognition software would have gone a long way to removing the disadvantages she faced. This is particularly so given that she did not have access to reliable digital dictation with playback and downloading facilities to be used in conjunction with a human typist. In addition, voice recognition software, when functioning properly, is a potentially more efficient way for the claimant to complete her written work. It removes unnecessary delay and is instantaneous insofar as the claimant can immediately read back what she has dictated from the computer screen. There is no need to send a recording away for a third party to type it and send it back to the claimant, some time later, for the claimant to review. Removing this delay also means that the case in question will be fresher in the mind of the claimant when she comes to proofread her work. One would reasonably expect her proofreading to be more effective and efficient in those circumstances.

257. In the circumstances of this case and based on the evidence as we heard it, we find that the respondent was in breach of its duty to make reasonable adjustments when it failed to provide the claimant with working voice recognition software. The software in question was Dragon Dictate. That was provided with the new laptop on 6th December 2018. The respondent was therefore in breach of the duty to make reasonable adjustments in this regard up until 6th December 2018. At that point the claimant received Dragon Dictate and also Read & Write Gold.

258. It was not unreasonable to expect the respondent to provide this software. Indeed, as we have said, it was provided later in the chronology. There was no particular reason why it could not have been provided earlier. We therefore find that the respondent was in breach of its duty to make reasonable adjustments by failing to provide voice recognition software in the period up until the 6th of December 2018.

259. The claimant also asserts that a reasonable adjustment would have been to provide adequate training in the use of said voice recognition software. We agree. We consider that most people would require specific training in the use of such software in order to get the most out of it. Any equipment will be of limited utility if a person is not trained how to use it. A car may be useful but not to someone who has not received driving lessons. The utility and functionality of the software would clearly be curtailed without the relevant

training. Without training, it would not be as effective to remove or ameliorate the substantial disadvantage arising from the PCP. There was no reasonable explanation for the respondent's failure to provide the training. Indeed, the training was provided in May 2019. It could and should have been provided earlier and to this extent we find that the respondent breached its duty to make reasonable adjustments by failing to provide training in the use of software over the period up to May 2019.

260. The claimant asserts that it would have been a reasonable adjustment to provide her with extra time in which to complete the written statements. Yes, it would, and in fact the respondent *did* give her extra time as set out above. There is nothing to suggest that she required even more extra time over and above that already given. Nor is there anything to show that any *further* 'extra time' would be reasonable in all the circumstances when one balances the claimant's needs against the interests of the public and the respondent in the efficient and timely administration of justice and the discharge of judicial functions. We do *not* find that the respondent breached its duty to make reasonable adjustments in this regard.

261. The claimant says that it would have been a reasonable adjustment to provide her with someone to proofread her draft statements of reasons before they went out to the appellants. We have concluded that in the absence of a software solution the claimant needed a proofreading mechanism. The PCP put her at a substantial disadvantage. If there was no software to assist then the "second best" option would be to provide a proof-reader, something which might not be required with good software. To that extent, we have concluded that the respondent was in breach of its duty to make reasonable adjustments in this regard up until December 2018 when the software was provided and the proofreading typist was in place. Thereafter the disadvantage was ameliorated by the combination of measures that the respondent put in place.

262. Quite apart from recording the claimant's dictation of her SORs, recording provision is relevant in another way in this case. The claimant says that she should have been provided with recordings of the hearings. This means, not only the recording of what the claimant said at the conclusion of the case in terms of her decision, but also recordings of everything said during the course of the hearing. As a matter of fact, the Tribunal has some sympathy for the proposition that a recording of the hearing would be a reasonable adjustment for this claimant. However, the Tribunal is mindful that it has to judge the claimant's case as she actually put it during the hearing and based on the PCPs which she identified and asserted. The PCP which might have triggered a duty to record the hearing wasn't found to be applicable or correctly formulated in this case. In reality the correct PCP to trigger such a duty would have been, "The requirement to take a note of the evidence." That was not the claimant's case.

263. This Tribunal's hands are somewhat tied. Appellate guidance, such as Secretary of State for Justice v Prospere UKEAT/0412/14/DA indicates that the Tribunal must consider the claim that has actually been made to it by the claimant. The Tribunal took time and care at the outset of the hearing and prior to submissions being made, to ensure that the list of issues was agreed by the parties. The list of issues was also drafted during a period in the

litigation when the claimant was legally represented. It therefore accurately represented the case the claimant wished to place before the Tribunal. The respondent was entitled to present the case on the basis that it was pleaded and not have the nature of the claim changed after the end of submissions. We therefore decline to reformulate the PCP for the claimant in order to make this aspect of her claim work within the structure of the statutory test.

264. The claimant asserts that the respondent breached its duty to make reasonable adjustments in that it failed to provide a suitable recording system for her. However, as set out above only one of the asserted PCPs triggered a duty to make reasonable adjustments in this case: the PCP set out at paragraph 5(a) of the list of issues. That PCP had nothing to do with recording systems and would not trigger a duty to make this adjustment. There was therefore no trigger to make a reasonable adjustment in relation to suitable recording systems in this case. We do not find the respondent in breach of its duty in this regard.

265. Likewise, the claimant's contention that she should have been provided with a suitable 'back-up' recording system falls away for the same reasons. In any event, the adjustment made in this regard was that if the recording system actually in place broke down on any given day, the hearing would be cancelled at no cost to the claimant in terms of her fees. That is the adjustment that was in place, and we find that it was reasonable in all the circumstances. No respondent could reasonably be expected to guard against any and all technological failures in recording systems. To require a backup to the recording system is to go one step too far. The most that would be reasonable would be to expect the respondent to provide a reliable recording system in the first instance, not to provide two recording systems in case the first broke down. Had a reliable recording system been introduced instead of the Coomber machines then it would not have been necessary to provide a "back-up" recording system as some sort of failsafe. The relatively infrequent failure of an up-to-date system would have made it disproportionate and unnecessary to provide a back-up system. Indeed, on the odd occasion that any system might fail the respondent could (and in fact did) cancel the hearing and rearrange it on another day. The claimant could still be (and was in fact) paid for any hearings which were cancelled on the day due to such technical difficulties. That would be a legitimate and reasonable business decision for the respondent to take in the prevailing circumstances.

266. The claimant asserts that a reasonable adjustment would have been to provide the material to the claimant for a longer period of time ahead of each hearing. This does not marry up with any of the PCPs we have found applicable in this case. Any duty to make such an adjustment has not been triggered in this case. In any event, as indicated above, the claimant did not suggest in her evidence that late provision of the material actually caused her any particular difficulties in preparing for, or conducting, the hearings. Indeed, the claimant asserted in the course of her evidence in relation to preparation time in the SSCS, that she could mainly "whip through them" (i.e. the papers provided in advance of the hearing). She apparently did not need (and would not particularly benefit from) this particular adjustment.

267. At page A107 of the bundle the claimant sets out a number of "general adjustments". The first of these is: "Writing: best practice examples, including a template to use." We find that such an adjustment is not triggered by the PCPs which we have found in this case. Even if such a duty had been triggered, we do not consider that the respondent could be said to have breached it. The claimant may not have considered that she was provided with templates which were adequate for her own needs and preferences, but we do not consider that her preferences constituted the benchmark for a reasonable adjustment in the circumstances of this case. As set out above, the claimant was given access to a suite of previous judgments/SORs which she could (and, arguably, should) have used to collate her own precedents to use in writing SORs. The claimant was given adequate resources in this regard. It was for the claimant to adapt the previous best practice examples to her own way of working. This is core to the concept of judicial independence and the judicial function. The decisions and statements of reasons would have to be the claimant's. It would be for the claimant to set out her decision and the reasons for it clearly. There is nothing in the evidence before us to suggest that the claimant hadn't been adequately told the requirements for a statement of reasons. She would have known the statutory requirements and what was required of her. The issue for her was how best to achieve this. There is a limit to how standardised a statement of reasons can be. As an independent judicial officeholder, the claimant must 'own' her decisions and develop her own written style. Nobody else can do this for her. We find that she had access to good examples of statements of reasons and it was down to her to decide what use she made of them. Anything more than this and she would be expecting the respondent to be unreasonably prescriptive. This would be too great an incursion on the independent judicial function. We also find that statements were covered in induction training. She was told and trained using small group examples how to do an SOR.

268. We do not accept that the bank of previous decisions that she had access to could be said to be anything other than examples of 'good practice'. It is nonsensical to suggest that Judge Macmillan would have collated and shared examples of bad judgments- at least not without specifically pointing out to the claimant that this was an example of 'how not to do it'. So, the respondent did, in fact, make this adjustment and acted reasonably in doing so even though there was no PCP triggering a legal duty to act in this way.

269. The claimant contends that she should have been given explicit feedback on her performance (with examples) as a reasonable adjustment. In fact, no PCP in this case triggered such a duty. In any event, on the facts, she *was* given explicit feedback on her performance, with examples. This formed a large part of the three appraisals which she underwent during her time as a fee paid judge. It cannot reasonably be said that the respondent failed to make this adjustment for the claimant. In fact, such feedback, when provided, was not always welcomed by the claimant however constructive it was intended or designed to be. As a Tribunal we cannot say what extra feedback she should have got in addition to that which she actually received in the appraisals. If we were to do that, we would risk taking over the task of judicial appraisal ourselves. This would not be appropriate. In any event, we also note that the claimant was in fact resistant to a further appraisal when it was offered as part of the PDP. In the judicial context feedback can be said to

come from two sources first, as previously mentioned, the appraisal. Second, in a way, judgments from the appellate courts. They inform the judge at first instance where errors have been made and how they should be resolved. Any further feedback over and above that actually provided in the claimant's case would not be a reasonable adjustment in our view.

270. The claimant contended that in regard to reading and writing she should be provided with 25% extra time to allow her to complete written tasks effectively and accurately. In fact, on the evidence we heard, she *did* receive this 25% extra time. There was no breach of duty by the respondent in this regard.

271. The claimant contends that she should have been provided with a proofreading 'checklist' to help minimise the errors she made when proofreading documents. No duty to make such an adjustment was triggered by the PCPs found in this case. We do not accept that there was a breach in this regard and we do not think that this was a reasonable adjustment in all the circumstances. The tenor of the Lexxic report was actually that the claimant should be coached to come up with her own tools such as a proof-reading checklist, not that someone else should do this for her. We pause to note that, prior to taking up her fee paid judicial role, the claimant had spent a considerable period of time in private practice. In the course of that private practice she would naturally have had to proofread written work. One might have expected the claimant to have developed her own proofreading tools (perhaps including a checklist) in the course of her professional life prior to taking up the judicial appointment. This would not have been a new requirement coinciding with her appointment as a judge. Given that fact, the respondent might well have not realised that this was something specific that it needed to help her with without specifically being put on notice. The respondent was not, in fact, put on notice that the claimant might need this. It would have had no reason to appreciate that a proofreading checklist was necessary or advantageous. On the contrary, it is the claimant who would know what she would find useful. She would know whether a checklist would assist and yet she never asked for one. We find that the respondent was entitled to assume, unless told otherwise, that a proofreading checklist was not reasonably necessary. So, there was no reasonable knowledge of the disadvantage caused by the absence of the checklist. Indeed, it was not mentioned in the Wingfield occupational health report. It was mentioned by the second occupational health report from Lexxic. Once it was mentioned the respondent put it in place. (See the training provided as a result of the Lexxic report). On balance, we think that this proofreading checklist could be considered an option which is "nice to have" rather than the <u>reasonable</u> adjustment for this employer to make. This could be said to be guided self-development.

272. The claimant contends that being listed in hearing centres or rooms which have recording equipment so that she had an accurate record of what was said to assist her with completing written reasons when required would have been a reasonable adjustment in her case. However, none of the PCPs found in this case would trigger such a duty. There is no breach by the respondent in this regard.

273. The claimant makes a further general assertion that the respondent should have taken, "Such reasonable steps which would have enabled her to provide written statements in a shorter space of time". She has not specified what such reasonable steps would have been over and above those already specified and discussed in this case. If it is a reference to the provision of suitable equipment, it has already been dealt with in the course of these reasons. Alternatively, it might be a reference to reducing the number of sittings to enable her to clear the backlog in written statements. However, this was suggested by the respondent and the claimant did not want to do it. In fact, she felt it was unfair to suggest it or require it of her. It might also be a reference to adjusting fee payments associated with providing SORs. But we find that the respondent *did* make adjustments to payments. The claimant was treated better financially than a non-disabled fee paid judge would have been in relation to time spent providing written SORs. She received boosted remuneration for this as compared to the non-disabled. If this general request for reasonable adjustments refers to anything else it has not been clarified. We don't know what it is that the claimant is asking for. It does not add to the specifics she has already set out.

274. The claimant asserts that it would have been a reasonable adjustment to not threaten her with judicial misconduct given that, "The respondent was well aware that it is the non-provision of reasonable steps that caused her to be unable to provide written statements in the expected timeframe." As set out in our findings of fact above, we do not accept that she was threatened with judicial misconduct. Therefore, there was no breach of any such duty. In any event we do not accept that such a duty was triggered by the PCPs established in this case.

275. The claimant claims that it would be a reasonable adjustment to provide her with a proof-reader to review her written statements for IAC sittings. As set out above, we have not found a PCP which triggers the duty to make this adjustment. She has not had a PCP applied to her in relation to IAC sittings because she has not yet started sitting in that jurisdiction. Up until this point the claimant has been undergoing her observational sittings and her judicial mentor has been available to proofread any decisions before they are sent out. Furthermore, now that she has software and has received training in relation to both the software and proofreading techniques this should be enough to meet her needs. It would be easy for this Tribunal to say that the claimant requires a proof-reader in the IAC just because she has already had one in SSCS. However, this would not be comparing like with like. At the time she needed a proof-reader in SSCS this was because there were no other adjustments in place to assist in ensuring the accuracy of her written statements. Either she did not have the software, had not been trained on it, or had not been taught proofreading techniques herself. That set of circumstances no longer obtains. She has the software and has been trained on it and has greater knowledge of how to proofread herself following the Lexxic training. It is not reasonable, in this Tribunal's view, to require the respondent to provide a human proof-reader on top of and in addition to those other adjustments. The adjustments already made are reasonable to meet the need. A human proof-reader may be desirable as an extra from the claimant's point of view. However, that does not mean that a failure to provide one is a breach of a legal duty to make reasonable adjustments on the

respondent's part. Furthermore, we heard no evidence as to whether a human proof-reader would in fact be provided for the claimant to use in the IAC when she commences her sitting in the jurisdiction.

276. At page A108 of the bundle the claimant contends that reasonable adjustments should have been made in relation to her appraisal. She says that there should have been a reference in the 29th April 2019 appraisal acknowledging that she had encountered difficulty in providing written reasons and providing her with more time to provide written statements of reasons. Our first conclusion is that this adjustment does not fit the PCPs established in this case. In any event, the appraisal document does what the claimant asks. It puts her performance in an appropriate context. It does not ascribe blame to her. It is unnecessary to record the requirement for more time to provide written statements in this document given what is already included in the appraisal.

277. The claimant further suggests that her appraisal of 29 April 2019 should be corrected to note that the cause of concern was as a result of her dyslexia and a failure to take reasonable steps to obviate or remove the disadvantage caused. The claimant has misinterpreted the contents of the appraisal. We find that it does what she is asking it to do. It puts her situation entirely and squarely in an appropriate context so that the objective reader would understand the position appropriately and understand which elements of her difficulties were in fact linked to her disability and the lack of appropriate adjustments.

278. Issue number 9 in the list of issues required us to consider the issue of knowledge. The respondent conceded that it knew the claimant was disabled at the material time. The remaining question was whether the respondent knew or could reasonably be expected to know that the claimant was likely to be put at the stated disadvantage by the relevant PCP in this case. Given all the facts examined above we consider that the respondent either did know or could be reasonably be expected to know that the claimant was placed at the relevant disadvantage. It is a common-sense conclusion to be drawn from all the circumstances of this case and the evidence available to the respondent at the relevant time. Had the respondent applied its mind to the circumstances it would have seen the disadvantage.

Section 15 discrimination arising from disability

279. We deal with each allegation of unfavourable treatment in turn below.

The correspondence to the claimant expressing concerns over the late provision of written statements

280. We accept that the correspondence in question could be considered unfavourable treatment. It certainly would not be welcome to the claimant. We also accept that it is "because of something arising in consequence of disability" insofar as her late written statements were connected to her dyslexia. However, we have concluded that the respondent has established

that it was a proportionate means of achieving a legitimate aim such that this limb of the section 15 claim fails and is dismissed.

281. The respondent relied on the text of the judicial appraisal scheme and the President's Protocol No4 in support of its defence to all of the section 15 complaints in this case. We set out the relevant passages here, for ease of reference.

282. The judicial appraisal scheme for SSCS starts at page 1465 of the bundle. The objectives of the scheme are set out at paragraph 4. The following objectives are relevant in this case:
    a. to evaluate and improve individual judicial performance with a view to ensuring that high standards of tribunal work and decision-making are maintained;
    b. to apply and maintain uniformity of judicial practice, wherever desirable;
    c. … to provide an assessment of future training needs;
    d. to enable regional tribunal judges to decide what types of cases the judiciary should be asked to hear.

283. Further legitimate aims are set out in the President's Protocol for the Social Entitlement Chamber [1511], in particular paragraphs 2 to 4 which state:

    2. "Every tribunal judge has responsibility for providing the statement of reasons to explain the decision of the tribunal within the time limit set down by the rules.
    3. It is essential that this requirement is met. The parties are entitled to know within a reasonable period of time after the decision why they have won or lost their appeal. A statement of reasons is also a prerequisite to a further appeal.
    4. It is expected that in the absence of special circumstances a statement of reasons will be produced within 22 days of it being requested from the judge. When a tribunal judge fails to meet this time limit he or she is not acting in the best interests of the parties nor in the best interests of the tribunal as a whole."

284. In essence for this particular allegation of unfavourable treatment the following legitimate aims are particularly relevant:
    (a) Improving individual judicial performance with a view to ensuring that high standards of tribunal work and decision-making are maintained;
    (b) Applying and maintaining uniformity of judicial practice;
    (c) Ensuring that the tribunal judge is acting in the best interests of the parties and in the best interests of the tribunal as a whole.

285. Having identified the legitimate aims relied upon we went on to consider whether the means used were a proportionate means of achieving them. We consider that they were. The respondent took an incremental and proportionate approach. No threats were made. Rather, concerns were raised and deficiencies identified so that they could be rectified. We asked ourselves what a more proportional means of achieving the legitimate aims in this case would look like. We could not think of a more proportionate way of achieving these aims. If the respondent were precluded from sending correspondence (often automatically generated) expressing concern over the

late provision of written SORs they would be unable to raise concerns at all. It is the precursor to establishing and upholding judicial standards. It is the most preliminary and incremental step available short of abandoning the standards set out in the documents altogether. As previously stated, there are good public interest reasons why the standards are in place. They are to the benefit of the public as a whole and litigants within the SSCS in particular.

286. As a result of the foregoing this part of the s15 claim fails and is dismissed.

The allegation that the claimant's conduct may amount to judicial misconduct.

287. We do not accept, for the reasons already stated, that the respondent made the allegation that the claimant's conduct may amount to judicial misconduct. This is not what the correspondence in question said. We go back to the form of words utilised at page 1273 as an example. The letter says: "there are two aspects to the delay: not only has there been a breach of the standards in the President's Protocol Number 8, but excessive delay in producing the statement of reasons is also capable of amounting to judicial misconduct. The principles of natural justice require that an appellant is entitled to know, within a reasonable period, whether or not grounds exist for an application to appeal to the Upper Tribunal."

288. To see an allegation that the claimant's conduct may amount to judicial misconduct within this letter is not a reasonable reading of the letter. All it states is that excessive delay *is capable* of amounting to judicial misconduct. Not that *the claimant's* excessive delay amounted to judicial misconduct. This is an important distinction.

289. Furthermore, even if the first limb of the section 15 test were made out by the claimant, we have concluded that the "allegations" were a proportionate means of achieving a legitimate aim on the same basis as in relation to the first allegation of section 15 discrimination referred to above. Namely, to achieve the legitimate aims set out in the appraisal scheme and the President's Protocol. The correspondence in question did not form part of a "disciplinary" type procedure. It did not form part of a formal procedure regarding capability. It was not even the preliminary stages of such a procedure. It was merely a restatement of the principles in the Protocol underlining that there may be consequences in the longer term if the judicial office holder is excessively late with written statements on an ongoing basis. The correspondence did not go as far as stating that the claimant was such a judicial office holder or that any procedure was being considered in relation to her. Hence, it was a standard form letter automatically generated by the administration. This element of the claimant's claim therefore fails and is dismissed.

The concerns expressed in the Claimant's appraisal dated 29th April 2019.

290. We do not accept that the contents of the claimant's appraisal constitute unfavourable treatment within the meaning of the act. As previously stated, the appraisal is a fair and balanced document and should be read as a whole. It would be unfair and unreasonable to the author of the document to 'cherry pick' out of it and take comments out of context. We also note that not all of

the criticisms of the claimant can be said to be because of something arising from her disability. Some of the criticisms relate to her legal knowledge and other elements of her judicial skill-set which were, as far as we can see, unaffected by her dyslexia.

291. Even if we accepted that the appraisal and the comments within it were unfavourable treatment, we would have found that it was a proportionate means of achieving a legitimate aim, particularly those aims set out in the appraisal scheme itself (evaluating and improving individual judicial performance; ensuring that high standards of tribunal work and decision-making are maintained; applying and maintaining uniformity of judicial practice; assessing of future training needs; enabling regional tribunal judges to decide what types of cases the judiciary should be asked to hear). If it were otherwise, how would the respondent operate an appraisal system at all? How could appraisals be undertaken if the appraiser is unable to make any critical observations of the appraisee? Such a scheme would be meaningless and would assist neither the administration of justice generally nor the individual judicial office holder in particular. It would be perverse not to allow the respondent to raise criticisms and concerns about judicial performance in the context of an appraisal report. Furthermore, as already noted, it was a fair and balanced assessment. In no way could it be said to be gratuitously or unfairly critical of the claimant. In pursuing this element of her claim what the claimant is actually asking us to do is to rewrite the appraisal in terms which she is prepared to accept. We do not accept that it would be appropriate for us to do that. It would fatally undermine the appraisal system and usurp the function of the appraiser who has actually (let it be remembered) seen the claimant in action sitting as a judge. This Employment Tribunal has got to permit the appraiser to express evidence-based conclusions. This is what the appraiser has done. This element of the claimant's claim fails and is dismissed.

<u>The decision to review the claimant's performance as suggested by DTJ Macmillan in the Claimant's appraisal dated 29th April 2019.</u>

292. Once again it is important that care is taken to establish exactly what the respondent did in this case. Part five of the appraisal starts at page 1141 of the bundle. It sets out the grade (level 2) and it states that a personal development plan would be helpful. It then sets out the personal development plan in a series of bullet points. The final bullet point is the relevant one for the purposes of this allegation. It states: *"This plan should be reviewed in six months' time and Ms. Clarkson offered the opportunity for a further appraisal if she so wishes."* What the appraisal states is an intention to review the *personal development plan* in six months' time, not the claimant's performance. The offer of a further appraisal is just that: an offer. It is not mandatory. It is entirely for the claimant to decide whether she wants her performance assessed again in an early further appraisal. A review of the plan is not a review of the claimant. Reviewing the plan would enable the respondent to see if the measures of support and development which it intends to put in place for the claimant are in fact meeting needs and are still required. It gives the respondent a formal opportunity to reassess whether it needs to take further steps to help the claimant. It may even result in the removal of the personal development plan on the basis that its objectives

have been achieved. On that basis, we conclude that the claimant's allegation in this part of her section 15 claim does not accurately reflect the facts of the case. The respondent did not act in the manner that the claimant alleges. The respondent's position is far more nuanced than that.

293. In any event, we conclude that what the respondent did do in relation to the personal development plan and the proposed (optional) further appraisal was not unfavourable treatment of the claimant. On the contrary it was designed to support and assist the claimant. If the claimant did not want to have her performance assessed in an appraisal she did not have to take up that opportunity. Furthermore, even if the claimant had established that this was unfavourable treatment, we would have concluded that it was a proportionate means of achieving a legitimate aim. Relying on the legitimate aims previously stated above, particularly those contained in the appraisal scheme.

294. In light of the above all of the claimant's allegations of section 15 discrimination fail and are dismissed.

Section 26 Harassment

295. The claimant asserts that there were a number of incidents of unwanted conduct which constituted harassment. We deal with them, in turn, below.

Correspondence from her District Judge ('DJ') advising her that the delay in providing written reasons is a contravention of the standards expected in the President's Protocol No 8 and that this may amount to judicial misconduct. The claimant received this correspondence on numerous occasions.

296. This allegation relates to standard template correspondence from the claimant's district judges. An example is at page 998. It states: "*The clerk tells me that a request for a statement of reasons in respect of the above-mentioned appeal has met with no response and so the matter has been referred to me under the terms of the President's Protocol No 8. I should be grateful if you will let the clerk have the requested statement within five working days. If this is not likely to be possible I shall be glad to receive your observations. Yours sincerely et cetera"*

297. It is apparent that the text of the correspondence does not in fact match the claimant's allegation. It merely states that a statement of reasons request has not been responded to and that it has been referred to her under the terms of the President's Protocol. It gives a time for the claimant to provide the requested statement or, in the alternative, her observations to the district judge. It does not say anything about judicial misconduct. It does not even say in terms that the delay is a contravention of the protocol. All it does is to say that the case has been referred to the district judge in line with the protocol.

298. Given the terms of the correspondence, we accept that this was not welcomed by the claimant. To that extent it was unwanted conduct. However,

the terms of the correspondence are basically neutral. In those circumstances we do not consider that it can be said to have had the necessary purpose or effect within the meaning of the Equality Act. We have specifically considered the relevant limbs of section 26 (4). To the extent that the claimant may have perceived that the correspondence created an intimidating, hostile, degrading, humiliating or offensive environment for her, we do not accept that this perception was reasonable in all the circumstances of the case. We appreciate that the claimant has had a lifetime of dealing with others' perception of her abilities and disability. This may well have made her acutely sensitive to any criticism of her performance or any attempts to manage her performance. She may well, subjectively, see this as unwarranted scrutiny and criticism related to her disability. However, that is objectively emphatically not the case in these circumstances. Nor was it reasonable for her to come to that conclusion based on her experiences of the respondent. The respondent cannot be held responsible for the claimant's possible earlier bad experiences in relation to her disability at the hands of other individuals and organisations. This would be to make the respondent responsible for the actions of others, in some cases many years before the events we are concerned with. The fact that this was a standard form letter which was automatically generated is an additional factor which renders the claimant's perception unreasonable. On balance we do not accept that this correspondence had the necessary harassing purpose or effect within the meaning of section 26. This limb of the claimant's complaint fails and is dismissed.

Correspondence from the Regional Tribunal Judge in which she is advised that the failure to provide a written statement within two months of the day it fell due would amount to a contravention of the standards expected in the President's Protocol No 8, that the failure to provide written reasons is also capable of amounting to judicial misconduct, and requiring completion of the statement "by return" the claimant received this correspondence on numerous occasions, most recently received such correspondence on 28th February 2020 from acting RTJ Peter Maddox.

299. An example of this correspondence is at page 226 of the bundle. It states: "I regret to note that the statement of reasons is still outstanding despite reminders from the tribunal clerks and your district judge. There are two aspects to the delay: not only has there been a breach of the standards in the President's Protocol No 8, but excessive delay in producing a statement of reasons is also capable of amounting to judicial misconduct. The principles of natural justice require that an appellant is entitled to know, within a reasonable period, whether or not grounds exist for an application to appeal to the Upper Tribunal. If there is a particular problem with these cases, please contact Jane Spickett, Yvonne de Claire or your district judge to explain the circumstances. Otherwise I should be grateful if you would complete the statements by return." That particular correspondence came from Regional Tribunal Judge Curran. A further example from Judge Maddox is at page 1273 and is in identical terms.

300. Once again, this correspondence needs to be seen in context. It is just reinforcing what the claimant has already been told. It is not a threat. Clearly

it is unwanted from the claimant's perspective. However, it does not have the necessary purpose or effect. As in the case of the correspondence from the district judge we have considered the relevant parts of section 26 (4). We do not consider the claimant's perception of the correspondence to be reasonable on the basis already stated. We reiterate the need to consider the other circumstances of the case and the context in which this letter was written. We do not consider that it is reasonable for the correspondence to have had a harassing effect on the claimant. The claimant is merely being asked to complete the task she has been appointed to do. We consider that it is as neutrally phrased as reasonably possible in the circumstances, given the purpose of the correspondence.

Written complaints from members of the public to the late provision of written statements

301. We accept that members of the public did complain about the claimant's late SORs. None of those complaints were upheld. Members of the public were entitled to make a complaint. The respondent cannot be held responsible for their actions in doing so. Clearly a complaint would be unwanted from the claimant's perspective but we cannot see that it could have the necessary harassing effect taking into account all limbs of section 26(4). We also query whether it could be disability -related in circumstances where members of the public (prior to the response to the complaint) would not be aware of the claimant's disability. This complaint fails and is dismissed.

On 25 February 2020 when responding to a member of the public querying the delay by the claimant in the provision of a written statement, RTJ Maddox made reference to the claimant's need for reasonable adjustments when explaining that delay, commenting that there had been a delay in provision of these adjustments which has contributed to a backlog in written statements.

302. We accept that Judge Maddox was required to investigate the complaints and invite comments from the claimant about the reason for the delays. We accept that a final decision dismissing a complaint about delay would have to include reasons for that decision and would have to include Judge Clarkson's explanation. We accept that Judge Maddox showed the claimant, in advance, the explanation that he intended to provide in his final letter dismissing the first complaint in time that had been made about delay. The claimant approved the terms of that letter. The letter which she now complains of, dated 25 February 2020, was in materially identical terms to that earlier, approved letter. She had consented to the use of that form of words. Both letters (6th February and 25th of February) were sent to the same organisation. The claimant described Judge Maddox in her oral evidence as being "extremely kind" for his handling of this matter.

303. In the context of the evidence in this case we do not accept that the letter of 25 February 2020 was in fact unwanted conduct given that the claimant had consented to a previous edition of the same letter. We conclude that the terminology used and the information conveyed in that letter was consented to by the claimant and that in that context it could not (and did not) become unwanted conduct on the part of the respondent. For similar reasons, it could not be said to have the necessary harassing effect. We do not accept that the

claimant subjectively found this to be intimidating, hostile, degrading, humiliating or offensive. Nor do we accept that it would be reasonable for her to perceive it in this way given the circumstances of the case. It would not be a reasonable effect of the correspondence. This element of the claim fails and is dismissed.

In her 29th of April 2019 appraisal DJ Macmillan classified her performance as level 2 -some concern. The basis for this grading was "her ongoing problems around statements of reasons". DJ Macmillan went on to say that this warranted the implementation of a personal development plan, which was to be reviewed within six months.

304. The context of the grading was explained by Judge Macmillan in her witness evidence which was not challenged by the claimant in cross examination. Further, we have found the appraisal report to be balanced and fair. Further, the claimant said in evidence that she did not think that Judge Macmillan's intentions were wrong and she was grateful to Judge Macmillan for making efforts to help her. She expressed gratitude for her sentiments which were "well-placed". Her difficulty was with the grading, which is a middle grade that has no disciplinary consequences. That grading also has to be viewed in context, as we have previously indicated. It was accompanied by a PDP with an option of an early appraisal. This supportive measure was to enable the claimant to have a fresh appraisal and achieve a competent grading. It was not a punishment or a mandatory measure to put her career in jeopardy. In fact, it was the opposite of that, as was clear from the terms of the PDP. There was no basis for the claimant to contend that *"if I did not improve in six months I would receive another negative appraisal stopping me from applying for other jobs…"*. The claimant's perception of the events in this context is clearly unreasonable. It cannot be reasonable for her to consider that the suggestion in the PDP that she was "encouraged to discuss any complex or unusual statements of reasons with one of the Bristol DTJ's in advance of drafting them", which many fee paid judges did as a matter of course, was to be equated with District Judge Macmillan making clear, "that she considered me to be unsatisfactory". Furthermore, there is the unexplained delay of two months between the filing of the appraisal and the claimant's complaint. If there had been unlawful harassment, the claimant could and should have amplified her concerns at an early stage. When she did raise concerns about her grading she expressed gratitude for the option of a further appraisal and for the PDP. On the basis of the foregoing we conclude that this conduct did not have the necessary purpose or effect to constitute harassment contrary to section 26 of the Equality Act 2010. Consequently, we dismissed this element of the claimant's claim.

305. Further to the above, all of the claimant's complaints of harassment fail and are dismissed.

Indirect discrimination

306. The claimant relied upon the same PCPs in respect of her indirect discrimination claim as in respect of her claim for reasonable adjustments. In line with our findings in the reasonable adjustments claim we find that only

PCPs 5 (a),(c), and (f) were established in this case. Looking at them through the lens of the section 19 test we draw the following conclusions.

307. The requirement to provide written statements without the use of voice recognition software was applied to the claimant. It was also applied to those without dyslexia. We accept that it puts or would put those with dyslexia at a particular disadvantage compared with those who do not have dyslexia. The disadvantage in question has been well rehearsed in the preceding paragraphs but in essence amounts to particular difficulties in drafting, proofreading, and promulgating statements of reasons in a timely manner. A dyslexic judge without voice recognition software will be put at a particular disadvantage in relation to this. We also find that the claimant was put to such disadvantage. We do not accept that the PCP was a proportionate means of achieving a legitimate aim. Whilst the respondent was entitled to uphold proper standards and timeframes for provision of written statements failing to provide the voice recognition software prior to December 2018 was not a proportionate means of achieving their stated legitimate aims. Other than the confusion and the piecemeal approach of HMCTS to the provision of judicial equipment, there has been no real explanation as to why it was not provided earlier. The respondent clearly did not object in principle to providing voice recognition software. It just found it difficult to do so in a more timely manner. It cannot be said that this was a proportionate means of achieving a legitimate aim. The respondent's defence in this regard fails and this part of the claimant's case for indirect discrimination succeeds and is upheld.

308. The second PCP upheld in this case was "the provision of written material up to, but often less than, two weeks before the hearings." Whilst late provision of written material, possibly less than two weeks prior to the hearing, might be expected to disadvantage dyslexic fee paid judges as compared to non-dyslexic prepaid judges it did not put the claimant herself to a particular disadvantage as required by section 19(2)(c). On her own evidence (as set out above) the claimant did not suffer any particular disadvantage by the late provision of hearing materials. Her evidence was that she was able to 'whip through' the documents and adequately prepare for the hearings. Preparation for hearings and sittings was not in reality the real concern or difficulty in this case. The claimant's concerns and difficulties primarily arose in the follow-up to the tribunal hearings when written work was required.

309. In light of the above a crucial limb of the section 19 test is not met in this part of the case and this complaint of section 19 indirect discrimination therefore fails and is dismissed.

310. The final PCP upheld in this case is "requiring the claimant to complete a performance review programme because of her appraisal scoring." We do not accept that this put the claimant at a particular disadvantage compared to non-disabled judges given the positive and supportive nature of the performance review programme and the optional offer of a further appraisal. Nor do we consider that the relevant and necessary group disadvantage is established. Going back to the wording of the performance review programme there is nothing in it which is particularly disadvantageous to those with dyslexia or more difficult for them to comply or deal with than for those without dyslexia. On that basis, the necessary limbs of the section 19

test are not met and this aspect of the indirect discrimination claim is dismissed.

311. In light of the above the only limb of the section 19 claim which succeeds and is upheld is that in relation to PCP 5(a): "the requirement to provide written statements without the use of voice recognition software." Furthermore, that element of the claim only succeeds for the period up to 5 December 2018 when the claimant was in fact provided with said voice recognition software.

Judicial Proceedings Immunity

312. Strictly speaking it is not necessary for us to consider the issue of judicial proceedings immunity ("JPI") further given the findings we have made in relation to the substance of the claims brought by the claimant based on the relevant sections of the Equality Act 2010. However, for completeness, we have dealt with the law relating to this area above and we proceed to deal with its application to the facts of this case in the following paragraphs.

313. The legal principles derived from our assessment of the case law in this area indicate that where a matter is covered by judicial proceedings immunity we do not have jurisdiction to consider it further or find that it is an actionable incident of discrimination. However, in cases falling within the ambit of the Equal Treatment Directive that immunity is ousted. The Tribunal does have jurisdiction to consider such matters. The first question is whether the act which forms the basis of the claim was performed in the exercise of a judicial function so as to attract immunity. If the answer to this question is yes, is there anything about the act which allows us to go behind that shield of immunity? In this case it may be that the alleged act falls within the scope of the Equal Treatment Directive. If so, that is a provision with Direct Effect which basically trumps JPI. This means that JPI is ousted and the claimant can bring a claim to the Tribunal for an effective remedy in relation an infringement of her directly effective rights under EU law.

314. We have therefore gone through each element of the list of issues applying these tests. The question for us, therefore, appears to be to determine on which side of the line each allegation falls in a factual sense. Are the actions complained of properly characterised as the exercise of judicial functions or the prosecution of litigation, or are they better characterised as the sort of managerial actions which commonly take place in line management relationships between employer and employee? We accept that the claimant is not an employee. However, it is necessary for us to consider, in light of the case law, whether any of the actions of the respondent have that employment/workplace/line management characteristic or 'flavour'.

315. We have proceeded to go through the agreed list of issues and assess each of the elements of the list of issues which the respondent asserted was covered by JPI. The first such area is at page A105 in relation to the reasonable adjustments claim. The respondent claims that "the requirement to provide written statements within two weeks of the request by an appellant" is covered by JPI. We agree. This is a core part of the judicial function. It is part of the standards set in relation to the judiciary to ensure the proper

administration of justice for the public. It is a requirement designed to meet the needs of the public at large and the litigants within the system. It has nothing to do with a quasi-employment relationship between the claimant and the respondent. It is an "outward facing" standard set to ensure public confidence in the system rather than an "inward facing" rule designed to govern the relationship between 'employer' and 'employee'.

316. The respondent asserted that "writing correspondence threatening judicial misconduct for the delay in providing written statements" was also protected by JPI. We do not accept that. Although it relates to standards of performance which are set for the benefit of the public if (and in this case it did not occur) correspondence threatens judicial misconduct proceedings against a judge, that is tantamount to the threat of disciplinary action. This tips it over into the quasi-employment arena. If this factual assertion were taken out of the judicial context it would be a clear threat of disciplinary action which is at the core of the employment relationship and, we think, falls within the Equal Treatment Directive exception to JPI.

317. The respondent asserted that "requiring the claimant to complete a performance review programme because of her appraisal scoring" was protected by JPI. We disagree. We feel this falls within the workplace exception. A performance review programme is a managerial tool applied in a given case for the performance management of an employee. Accepting the fact that the claimant is not an employee, we nevertheless conclude that this falls on the workplace/employment/managerial side of the line.

318. The respondent asserted that the substantial disadvantages relied upon by the claimant at paragraph 7(ii), (iii) and (iv) of the list of issues were also protected by JPI. Given that these paragraphs described the substantial disadvantages the claimant said she suffered it is hard to see how they, in themselves, fall within the ambit of JPI. They do not refer to the actions of an alleged tortfeasor. They describe the impact upon the claimant. We cannot see, therefore, that they attract the protection of JPI.

319. The respondent then referred us to paragraph 8(d) of the list of issues which states "the claimant asserts that she ought to have been provided with a longer period of time in which to complete written statements." The timing and provision of written statements are core aspects of the judicial function which, we think, would attract JPI. There is no employment/managerial element to that to oust the protection of JPI.

320. Going forward to consider elements of the section 15 claim as set out at paragraph 10 of the list of issues, the respondent asserted that "the correspondence to the claimant expressing concerns over late provision of written statements" was covered by JPI. We agree. This is a core judicial function in pursuance of public standards and as part of the administration of a public complaints system. It is covered by JPI. In paragraph (ii) the respondent refers to "The allegation that the claimant's conduct may amount judicial misconduct." Again, this is tantamount to a threat of disciplinary action (if it occurred) and within the scope of the managerial/employment type relationship. We therefore think that JPI is ousted in relation to this allegation.

321. In relation to the harassment part of the claim the respondent asserts that the action at paragraph 12(i) is covered by JPI. ("Correspondence from her District Judge advising her that the delay in providing written reasons is a contravention of the standards expected in the President's Protocol No 8 and that this may amount to judicial misconduct.") We do not accept that. We think that this falls on the employment/managerial side of the line and that JPI is thereby ousted. The same is true of paragraph 12(ii), "Correspondence from the Regional Tribunal Judge in which she is advised that the failure to provide a written statement within two months of the day it fell due would amount to a contravention of the standard expected in the President's Protocol No 8 that the failure to provide written reasons is also capable of amounting to judicial misconduct, and requiring completion of the statement "by return."

322. We consider that the issue at paragraph 12(iii) is a core an aspect of Judicial Proceedings Immunity namely, written complaints from members of the public to the late provision of written statements. This has nothing to do with a quasi-employment relationship and everything to do with properly upholding the administration of justice for members of the public and litigants alike. The Equal Treatment Directive does not act to oust the protection provided by JPI in this part of the case.

323. The final element for which the respondent claims JPI is that set out at paragraph 12(iv): "On 25 February 2020 when responding to a member of the public querying a delay by the claimant in the provision of a written statement RTJ Maddox made reference to the claimant's need for reasonable adjustments when explaining that delay, commenting that there had been a delay in the provision of the adjustments which has contributed to a backlog in written statements." We conclude that this falls full square within the concept of JPI. Again, it is outward facing, dealing with the administration of justice and the upholding of proper standards for members of the public and litigants alike. It does not have that employment relationship character or quality which might oust JPI. It does not relate to the relationship between the claimant and the respondent and the way that the claimant worked within that relationship. Rather, it relates to the interaction between the judiciary and members of the public for the purposes of litigation.

Time limit/jurisdictional matters

324. The final question which we were asked to address was whether any of the claims which would otherwise succeed should be dismissed for having been presented to the tribunal outside the primary limitation period. We were further asked to consider whether, if any of the claims were out of time, it would be just and equitable to extend time to deal with the complaint.

325. Which claims were presented in time? The first set of proceedings were presented to the Tribunal on 12th March 2019. Taking into consideration the impact of ACAS Early Conciliation on time limits, we have concluded that any complaint about matters pre-dating 28th October 2018 has been presented outside the primary limitation period. The claimant obtains the benefit of the so-called "stop-the-clock" Early Conciliation extension (s140B(3) EA 2010)

but the dates of the EC period do not assist to give an extra extension under s140B(4) EA2010 (see below).

326. When does time start to run for the purposes of the discrimination claims? We address the reasonable adjustments claim first. In line with Matuszowicz (above) a claim of breach of a duty to make reasonable adjustments falls to be considered as an omission within s123(3)(b) EA 2010 rather than as 'conduct extending over a period' within s123(3)(a). In the absence of evidence as to when the respondent decided on a failure to do something we must apply the provisions of s123(4)EA 2010.

327. Given the evidence that we have heard in this case, we conclude that this is a case to which s123(4)(b) EA 2010 applies. We have therefore asked ourselves when did it become clear, or when should it have become clear to the claimant, that the respondent was not complying with its duty to make reasonable adjustments? We have regard to the facts known by the claimant and those which ought reasonably to have been known by the claimant.

328. In relation to the failure to provide voice recognition software and training in the use of the software, we consider that time started to run from 28th September 2018 for these purposes. On 28th September the claimant presented a formal complaint to the respondent about the absence of the correct software [674]. She noted that at that point in time it was nearly 5 months since the Wingfield report had recommended provision of the software to address the claimant's disability related needs. Throughout the chronology the overall position of the respondent had been that it needed to have an occupational health report making recommendations regarding appropriate equipment (including software) before it would make an adjustment. It took the view that the claimant's own preferences and requests were not, on their own, sufficient. They needed to have some expert guidance before they were in a position to make the adjustments. The claimant was aware that this was going to be their approach. Thus, once the Wingfield report was produced the claimant reasonably expected that its recommendations would be implemented. As a matter of practicality, the recommendations could not be implemented overnight. A reasonable period had to be allowed for the equipment etc. to be ordered and then provided to the claimant. As far as the claimant was aware, in the weeks and months following the report, the respondent was taking steps to get the software. She, quite reasonably, gave the respondent some time to do this and continued to live in hope that they would provide the equipment and software. At some point the claimant realized that the adjustments recommended in the report were not going to be forthcoming any time soon. Hence, she raised her formal complaint on 28th September 2018 which specifically alleged a breach of the Equality Act 2010. We therefore conclude that it was on 28th September 2018 that the time started to run. At this point the period during which the respondent might reasonably have been expected to make the adjustments expired. This part of the claimant's claim should therefore have been presented to the Tribunal no later than 9th February 2019. It was therefore presented about one month late.

329. The position is different in relation to the failure to provide a typist to proofread the claimant's SORs. The respondent was also put on notice that this might

be needed by the Wingfield report. However, the claimant was told by RTJ Curran on 18th May 2018 [566] that she should use the services of the typists at Eastgate House to ensure her SORs were proofread. At this point the respondent made the adjustment contended for and it was up to the claimant to avail herself of these proof reading services. It appears that the claimant chose not to do this until 2019. RTJ Maddox gave evidence in relation to this at paragraph 21 of his statement and the documents referred to therein are important. In particular, the typist's log at [1767] indicates that no proof reading was requested by the claimant in 2018. Given that the adjustment was first noted as necessary in the report of 10th April 2018 and had been made by 18th May this aspect of the claim was presented to the Tribunal at least 5 months out of time and possibly more. Taking the date on which the respondent actually made the adjustment (which is the date most favourable to the claimant) and counting forward 3 months the primary limitation period lapsed on 17th August. Early Conciliation took place outside the primary limitation period and so has no impact in extending limitation: the Early Conciliation "stop the clock" provisions do not apply. This aspect of the claim would therefore be nearly 7 months out of time. Even if the stop the clock provisions did apply, the time limit would have expired on 2nd October so that the claim would be over 5 months late.

330. Given that both aspects of the claim were presented out of time we have considered whether to extend time on a 'just and equitable' basis (section 123(1)(b) Equality Act 2010). In relation to the claims which were presented one month late we have concluded that it would be just and equitable to extend time by one month. We consider that one month is a relatively short delay which has no impact on the cogency of the evidence in the case. Both parties have been able to present their evidence on this issue to the Tribunal. The overall chronology in this case is one of years rather than months. The Equality Act requires us to identify a rather arbitrary date from which to say the time limit started (in this case, 28th September 2018). Whilst that date is grounded in the evidence provided to the Tribunal and answers the question posed by the legislation and appellate case law, we accept that, from the point of view of the real-life litigant going through this experience, the significance of this date might not have been obvious. The claimant may not, in reality, have appreciated the significance of this particular date even though we say (after the event) that she should have done. She may not have appreciated that one month made any real difference to limitation in her claim. As there was no particularly obvious date on which she was put to her election to bring the claim it would be unduly harsh to criticize her for waiting 1 month too long- given the overall length of the chronology of events in this case. All that has happened here is that the claimant has kept hanging on and giving the respondent further opportunities to remedy the breach one month past when she should have said 'enough is enough'. To that extent there is a good and reasonable explanation for the delay. We consider that the balance of prejudice therefore favours extending time in the claimant's favour. Otherwise, the claimant would be left completely without a remedy for the respondent's breach of the duty to make reasonable adjustments and this would be something of an unjustified windfall for the respondent.

331. The position is different in relation to the claim which is 5 -7 months out of time. Firstly, the length of the delay is more significant, especially in

circumstances where the primary limitation period is 3 months. She is more than twice the length of the primary limitation period late in presenting the claim. Second, the burden is on the claimant to show that the Tribunal should exercise its discretion and part of this involves giving some reason why the claim was presented late. Whilst we can readily understand and discern from the evidence why the software/training claim was not presented sooner, we struggle to see why the proof-reading allegation was left so late. The proofreader issue ceased to be a live issue in May 2018 when she was offered the services of the typists. Why did she not present this claim whilst she was still facing difficulties in getting a proofreader to look at her SORs? Or why not bring the claim within 3 months of the provision of access to a proofreader by the respondent? Why wait until the following year when it was no longer an active problem for her? This aspect of her claim may have been an afterthought tagged on to the more substantial part of her allegations. It could be seen as a make-weight claim. Once the claimant decided to make a claim to the Tribunal about her more substantial areas of concern, she included this older claim which was no longer an active problem for her at the time of presentation of the ET1. Insofar as this may explain the claimant's actions it is not a good enough explanation and does not tip the balance of prejudice in her favour in circumstances where she is not left completely without a remedy as another part of her claim is to be upheld. The substance and weight of her claim lies elsewhere and she has a remedy for that. This part of the reasonable adjustments claim is therefore dismissed.

332. The claimant also brought her claims via a section 19 indirect discrimination complaint. We have found that one aspect of that claim is meritorious. That relates to one PCP namely: the requirement to provide written statements (an SSCS judgment in full without the use of voice recognition software. There is nothing to suggest that the Matusowicz principles apply in a section 19 claim. We do not think that we must find that this is an omission. Rather, we consider it is an act extending over a period namely the period of time when the PCP was in place. In this case, that would be the period from September 2016 until 5th December 2018 when the new software was provided. We conclude that this section 19 claim was therefore presented within the limitation period, given the impact of the Early Conciliation period.

333. If we are wrong about that and the section 19 claim should also be characterized as an 'omission' then we adopt the same reasoning as above in the reasonable adjustments claim. This means that the section 19 claim would also have been presented 1 month too late but we would extend the time limit on a just and equitable basis for the reasons already stated at paragraph 330 above.

Employment Judge Eeley

Date signed: 3rd December 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

13 January 2022

FOR EMPLOYMENT TRIBUNALS

ANNEX 1: THE AGREED LIST OF ISSUES FROM PAGE A103 OF THE HEARING BUNDLE

Disability

1. It is accepted that the Claimant is disabled in accordance with section 6 of the Equality Act 2010 ("EqA") for reason of dyslexia.

Jurisdiction; time limits and conciliation

2. Whether the alleged acts of discrimination and/or failures to make reasonable adjustments occurring more than 3 months prior to the claims being received on 19 March 2019, 1 April 2020[1] and amended on 8 January 2021[2], constituted a continuing course of discrimination under section 123 of the EqA? The Claimant will allege that the adjustments set out in paragraph 7 below ought reasonably to have been affected soon after September 2016. She claims that an Occupational Health assessment ought to have been undertaken upon Judge Curran's request (26 September 2016). Had it been, the Claimant contends that the adjustments which were subsequently recommended in April 2018 would have been recommended and implemented much sooner. The Respondent, however, contends that the Claimant was asked to complete a referral form within the timeframe September 2016- June 2017 and her alleged failure to do so, stymied the referral process.

3. Whether, if the Tribunal finds that there was no continuing act of discrimination, it is just and equitable to extend time under section 123 (1) of the EqA?

4. Whether matters relied on occurring after 8 November 2018 =(post-dating the date of the ACAS EC Certificate) have been appropriately conciliated to fall within the Tribunal's jurisdiction or are required to be?

Failure to make reasonable adjustments – sections 20 and 21 EqA

5. Did the Respondent apply the following provisions, criteria and/or practices ('the PCPs'), namely:

   a. The requirement to provide Written Statements (an SSCS judgment in full) without the use of voice recognition software;
   b. The requirement to take a note of the evidence during a hearing (either handwritten or on a laptop);
   c. The provision of written material up to, but often less than, 2 weeks before the hearings;
   d. The requirement to provide Written Statements within 2 weeks of the request by an appellant;
   e. Writing correspondence threatening judicial misconduct for the delay in providing Written Statements; and
   f. Requiring the Claimant to complete a performance review programme because of her appraisal scoring

6. Did the application of any such provisions put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that her dyslexia prevented her from working in that manner and/or working as quickly as was required by the Respondent's PCPs.

7. The substantial disadvantages relied upon in respect of the provision of written statements are as follows:

   i) The Claimant encounters difficulty in writing the statements and processing the information relevant to the statement;

   ii) The Claimant is thereby incapable of providing written statements in a timely manner, including in adherence with the Respondents' expectations;
   iii) This causes the Claimant anxiety and stress;
   iv) This also means the Claimant is unable to sit as frequently because: a) more time is required to write statements from previous sittings; and b) she is concerned about sitting more frequently because she will then be incapable of responding to corresponding requests for written statements;
   v) The Claimant has and may face criticism and / or warnings by her DJ[3] and/or RTJ;
   vi) The Claimant has and may face complaints from members of the public;

   vii) Any warnings and / or complaints may further reduce her ability to sit and / or may be recorded on her appraisal and / or may impact

on any application(s) she may make for tickets in alternative jurisdictions; and

viii) Any other further substantial disadvantage that the Claimant may identify.

8. Did the Respondent take such steps as were reasonable to avoid the disadvantage and/or provide such auxiliary aids as were reasonably required in the circumstances? The burden of proof does not lie on the Claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

a. The Claimant claims to have required voice recognition software, adequate training in its use, recordings of the hearings, extra time in which to complete the Written Statements and somebody to proof-read the drafts before they were sent out;

b. The Claimant claims that she ought to have been provided with recording equipment and suitable back-up systems in the event that they failed;

c. The Claimant alleges that she ought to have been provided with the material for a longer period of time ahead of each hearing;

d. The Claimant asserts that she ought to have been provided with a longer period of time in which to complete Written Statements.

The Respondent alleges that it was not on notice of the specific adjustments required by the Claimant prior to receipt of the Sarah Winfield report of 10 April 2018 and which point it took reasonable steps to provide them. The Claimant accepts that the Respondent did take some reasonable steps to provide the reasonable adjustments sought (including those referred to in the OH report of 19 October 2019) but alleges that there was nonetheless an unreasonable delay in providing the reasonable adjustments and/or that a number of reasonable adjustments were not provided at all. In particular, the following is a list of reasonable adjustments that the Claimant claims the Respondent has not provided (the Respondent disputes / makes no admissions in respect of the same):

General adjustments

i) Writing: Best Practice Examples, including a template to use;
ii) Performance: Explicit feedback with examples;
iii) Reading and Writing: 25% Extra time, to allow her to complete written tasks effectively and more accurately;
iv) Writing: Proofreading Checklist, which will help minimise the errors she makes when proofreading documents; and
v) Being listed in hearing centres / rooms which have recording equipment so that she has an accurate record of what is said to assist her with completing written reasons, when required.

Reasonable adjustments to provision of written statements

i) Allowing her more time to provide written statements;
ii) Taking such reasonable steps which would have enabled her to provide written statements in a shorter space of time;
iii) Not threatening her with judicial misconduct given the Respondent was well aware that it is the non-provision of reasonable steps that caused her to be unable to provide written statements in the expected timeframe;
iv) Providing her with a proofreader to review her written statements for IAC sittings; and/or
v) Such other steps as may be considered reasonable.

Reasonable adjustments to the Claimant's appraisal

i) A reference in the 29 April 2019 appraisal acknowledging that she had encountered difficulty in providing written reasons, and providing her with more time to provide written statements of reasons;
ii) Correcting her appraisal of 29 April 2019 to note that the cause of concern was as a result of her dyslexia and a failure to take reasonable steps to obviate or remove the disadvantage caused; and/or
iii) Such other steps as may be considered reasonable.

9. Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

Discrimination arising from disability – s15 EqA

10. Did the conduct referred to below amount to unfavourable treatment because of something arising in consequence of the Claimant's disability? The 'something' relied upon by the Claimant is her difficulty in reading and writing resulting from her dyslexia.

The Claimant relies upon the following conduct as unfavourable treatment:

i) The correspondence to the Claimant expressing concerns over the late provision of written statements;

ii) The allegation (which is disputed by the Respondent) that the Claimant's conduct may amount to judicial misconduct;

iii) The concerns expressed in the Claimant's appraisal dated 29 April 2019; and/or

iv) The decision to review the Claimant's performance as suggested by acting DJ Macmillan in the Claimant's appraisal dated 29 April 2019 (this is disputed by the Respondent).

11. Can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Harassment related to disability – s26 EqA

12. Did the conduct referred to below amount to unwanted conduct related to the Claimant's disability?

The Claimant relies upon the following alleged conduct:

i. Correspondence from her District Judge ('DJ') advising her that the delay in providing written reasons is a contravention of the standards expected in the President's Protocol No.8 and that this may amount to judicial misconduct. The Claimant received this correspondence on numerous occasions;

ii. Correspondence from the Regional Tribunal Judge ('RTJ') in which she is advised that the failure to provide a written statement within two months of the day it fell due would amount to a contravention of the standards expected in the President's Protocol No. 8, that the failure to provide written reasons is also capable of amounting to judicial

misconduct, and requiring completion of the statement "by return". The Claimant received this correspondence on numerous occasions, most recently received such correspondence on 28 February 2020, from acting RTJ Peter Maddox.

iii. Written complaints from members of the public to the late provision of written statements.

iv. On 25 February 2020 when responding to a member of the public querying a delay by the Claimant in the provision of a written statement, RTJ Maddox made reference to the Claimant's need for reasonable adjustments when explaining that delay, commenting that there had been a delay in the provision of this adjustments which has contributed to a backlog in written statements.

v. In her 29 April 2019 appraisal DJ Macmillan classified her performance as Level 2 – Some concern. The basis for this grading was "her ongoing problems around statements of reasons". DJ Macmillan went on to say that this warranted the implementation of a personal development plan, which was to be reviewed within 6 months.

13. If so, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

14. In deciding whether the conduct had the effect set out above, each of the following must be taken into account – (a) the perception of the Claimant; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.

Indirect discrimination – s19 EqA

15. Did the Respondent apply the PCPs referred to at (5) above?

16. If so, did the PCP put or would it put persons with the Claimant's disability at a particular disadvantage when compared with persons who do not share her disability, and put or would put the Claimant at that disadvantage?

17. If so, can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

18. Remedy; declarations, recommendations, loss of income following failure to make reasonable adjustments (including pension loss), damages for injury to feelings, aggravated damages, interest and ACAS uplift.

(i) In relation to loss of income following the alleged failure to make reasonable adjustments, the Claimant claims that if the Respondent had taken reasonable steps then she would not only have sat more frequently but would have applied for tickets in the Employment Tribunal, the Special Education Needs Tribunal, the Court of Protection, and the Mental Health Tribunal. She would also have applied to become a District Judge in the SSCS, a Deputy District Judge in the civil circuit and a Costs Judge. If the Claimant had been successful in applying for these posts then she claims this would have created more opportunities to sit. The Claimant claims she could have sat 5 days a week. The Claimant further claims that it would also have increased her earning potential given some of these appointments paid more than the IAC and SSCS appointments currently held by the Claimant. The Claimant claims that she would have put herself forward for the best paid sitting available (once ticketed). The Tribunal will be invited to determine the appropriate % loss of chance suffered by the Claimant in respect of each of these tickets she was unable to apply for as a result of the Respondent's alleged failure to take reasonable steps.

The Respondent disputes the causation and losses claimed.

In summary, the Claimant claims;

vi. Declarations;
vii. Recommendations;
viii. Loss of earnings (including pension);
ix. - Injury to feelings;
x. Aggravated damages;
xi. Interest; and
xii. ACAS Uplift.