EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MR DAVID MUZI-MUBASO		SECRETARY OF STATE FOR JUSTICE

Heard at: London Central, by CVP

On: 14 to 18 March and 5 April, 2022;
Tribunal members met in private 12 April 2022.

Before: Employment Judge O Segal QC
Members: Mr Martin Simon; Mr Fred Benson

Representations
For the Claimant: In person
For the Respondent: Mr D Ruck Keene, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

(1) The claim pursuant to ss. 20, 21 Equality Act 2010 succeeds in one respect, being the failure of the Respondent to make a reasonable adjustment to the Claimant's workload on the day of 2 August 2019.

(2) The Claimant's other claims under the Equality Act, including those of race discrimination, victimisation and his other claims of failures to make reasonable adjustments fail and are dismissed.

(3) The issue of remedy is adjourned to a date to be fixed if the parties cannot agree it. The parties are to write to the tribunal within 14 days of this Judgment to say whether remedy has been agreed, and if not to seek a hearing date.

REASONS

1. The Claimant (C) is Black African and suffers from dyslexia amounting to a disability within the meaning of the Equality Act ('the Act'). He brings various claims arising out his period of employment as a Probation Services Officer (PSO) and Professional Qualification in Probation (PQIP) Learner, which began in January 2019, based for the most part in the Respondent's Yeovil office.

2. C was dismissed in about October 2020 for reasons unrelated to the matters about which he claims in this case and we did not hear evidence and we make no findings in relation to that dismissal.

3. Most or all of the claims in this case are in effect made against the Respondent (R) as vicariously liable for the acts of C's manager between January and November 2019, Sara Hillier (SH).

Evidence

4. We had an agreed bundle, to which documents were added by both parties at the outset and during the hearing.

5. We had witness statements and heard live oral evidence from:

5.1. the Claimant;

5.2. Ms Hillier, a Senior Probation Officer (SPO) based at Yeovil;

5.3. Ms Amanda Moreton (AM), a Practice Tutor Assessor (PTA), who coordinated and supervised to some extent C's training during the relevant period;

5.4. Mr Des Grant (DG), the Divisional Training Manager in the region; and

5.5. Ms Louise Arscot (LA), a SPO based in Exeter, who took over C's line management from 25 November 2019.

Procedural matters

6. At the outset of the hearing, R objected to parts of C's Amended Witness Statement; and C objected to a proposed Supplementary Statement by SH.

7. As to the first objection, the tribunal did not allow the addition of evidence relating to claims and/or people which had not previously been identified, or identified as relevant (in particular in relation to C's later dismissal); but did allow C to include (not as a new claim, but as evidence supporting his claims of race discrimination) new allegations of racially discriminatory comments/jokes made by SH, as well as a previously un-pleaded allegation of an informal 'grievance' made by him to SH on 22 July 2019.

8. On day three, the tribunal, having been provided with a draft of SH's Supplementary Statement, ruled that only some 22 paragraphs of the some 100 in the draft would be admitted; and a finalised Supplementary Statement was produced by R, based on that ruling, the following day.

Credibility and challenges to the authenticity of documents

9. Before turning to our factual findings, it is appropriate to make certain observations about the evidence before us.

10. There is an unusually large number of facts relevant to the claims in this case which are substantially in dispute. Sometimes, that might be explained by differences between the recollections of witnesses, each of whose evidence was similarly reliable. However, in the majority of instances it is clear that the evidence of one party must be treated as unreliable (whether by reason of a conscious attempt to reconstruct the facts, or because the witness is not able to provide reliable evidence which would conflict with that party's case).

11. Generally in such a case the tribunal would be guided primarily by the contemporaneous documents; and the majority of the relevant interactions between the parties were (as one would expect within the environment of a trainee in the Probation Service) directly or indirectly documented at the time. The contemporaneous documents provided to the tribunal in the hearing bundle substantially support R's case – as C was often prepared to accept. However, both parties – and in particular C – accused the other party of not providing authentic, or complete documentation.

12. In fact, C's case was largely founded on the following propositions:

12.1. R had almost complete control of the relevant documents; C was dependent on R to produce on disclosure those documents, since he had no access to them himself (which seems broadly to be the case).

12.2. R had been selective in its disclosure and, most critically, had in a number of key instances altered documents to make them more supportive of its case.

13. For its part, R disputed the authenticity of a small number of documents purporting to be an email exchange between C and a fellow trainee Helen Doherty (HD), which (when challenged) C withdrew from evidence; and R did not accept that two other emails purportedly sent by C to R before his employment formally began had been received by R, who (R maintained) could not trace or retrieve those emails.

14. In the circumstances, we must decide whether we are able to rely on the contemporaneous documents provided to us.

15. Dealing first with the documents provided by C which were challenged by R:

15.1. The pre-employment emails are not hugely relevant and appear authentic on their face. In the circumstances, we are not prepared to find that they have been fabricated.

15.2. The emails between C and HD, by contrast, appear inauthentic on their face. HD's name is spelt incorrectly on each of them; one of the email addresses is clearly wrong in any event (containing a comma instead of a full stop); and the content jars in one respect: *"I will report and fight the suspension"* does not seem like something a fellow trainee is likely to say (though it is possible in isolation that someone might write *"will"* by mistake for *"would"*). Equally significantly, in response to C producing those documents R wrote to HD (who no longer works for the Probation Service), who responded that she did not use the email addresses in question, she did not write the emails attributed to her by C and she stated that the content of those emails was false – in particular that neither she nor any other trainee had handed in to their managers/PTAs workbooks that trainees were supposed to complete (see below for the relevance of that proposition). We therefore find that, on the balance of probabilities, C fabricated these 'emails' (whether in order to produce 'evidence' he believed to

be correct, or more mischievously is not clear). As we say, C sensibly withdrew any reliance on those documents, but we cannot but observe that the initial attempt by him to present them as authentic emails does not support a view that C's evidence as to the authenticity of documents more generally can be relied on.

16. More fundamentally, we are entirely unpersuaded that R has withheld or illicitly amended relevant contemporaneous documents, at all, let alone on the widespread scale suggested by C. Those documents provide a consistent and plausible narrative of events; other than C's case that they conflict with his recollection, there is nothing to suggest they are not authentic. Moreover, in key areas C's suggestions of what the contemporaneous documentary record would have shown if produced by R without selection or amendment are not at all plausible. We set out some of the most important of those areas here:-

    16.1. It is C's case that between the start of his employment in early January 2019 and 18 June 2019 he spoke to both AM and SH on several occasions about his dyslexia and the adjustments he would want to see made to assist him to mitigate the effects of that condition. C accepts that if this were right, that would have been recorded in various documents, including some which we have in the hearing bundle from that period which expressly record that C did not mention any need for such adjustments. He therefore challenges those documents as unreliable. However, it is not plausible in the relevant environment (which includes that SH herself suffers from dyslexia and has various significant adjustments made available to her at work, and that both she and AM have worked in the past with dyslexic staff who have had such adjustments made) that SH and AM would not have accurately recorded any statement by C that he too needed adjustments to mitigate his dyslexia and would not have tried to put those adjustments in place. Nor is it plausible, if they already knew about C's dyslexia, that they would each write, after C did raise his dyslexia in a document in June 2019, that they were surprised and disappointed that he had not raised that issue with them before – which it is common ground they did write at that time, and some of which documents C signed off at the time.

    16.2. One of the triggers for perhaps the most important event in this case, SH's decision to review C's work in detail in late July 2019 and the decision of R in

early August 2019 to put an Action Plan (AP) in place, which had the effect of 'suspending' C's training for 3 months, was SH's discovery that before going on annual leave on about 23 July 2019 C had sent a text to various work colleagues, from his personal mobile to theirs, including details of the names and dates of birth of offenders/service users. It is agreed a text was sent and that it would have been entirely inappropriate for such details to have been included in that non-secure communication. C's case is that in fact the text did not contain such details (but only initials of service users) and that SH arranged for all copies of the text to be deleted so that this could not later be proved. C himself was not, he told the tribunal, able to retrieve the text he sent. We regard it as implausible that SH would falsely state that this data breach had taken place if it had not, all the more so given that if C had been able to produce the text he actually sent (which he must have been able to do at the time and has not given the tribunal any satisfactory explanation of why he did not, saying only that he did not think he could get SH to change her view of the matter), it would have swiftly undermined the presumed misrepresentation by SH. We note in passing that C said in his November grievance that *"a copy of the text message will be provided as evidence"*; but this apparently did not happen.

16.3. C contended that his complaints about the amount and content of SH's critical feedback would have been supported had R not produced amended versions of certain documents showing lesser and less critical feedback. In particular, he contended that copies of two draft OASYS Assessments (a key document that all PSOs and Probation Officers (PO) regularly had to produce, with recommendations as to risk, etc, in respect of individual offenders including for use by the criminal courts) which contained hand-written comments by SH, had originally contained far more numerous and critical hand-written comments by her. It is not plausible that further hand-written comments could have been removed without trace, and only scarcely more plausible that the attempt would have been made if it had been possible.

16.4. A critical document is the AP created in early August 2019. There are three versions of this in the bundle. The first two are identical save for the addition of some hand-writing on the first page. The third is an agreed document, signed by

the parties, the content of which is materially the same as the earlier version but which is structured/formatted differently following a meeting with C at which he reasonably asked for some of the longer paragraphs to be broken into more 'bullet point' form. Importantly, C accepts that the first version in the bundle is not in principle objectionable (he said in cross-examination *"If I'd been given this document, there would not have been a quarrel"*), but frequently made the point that there was an earlier version, not in the bundle, which he recalled as being somewhat different and which was objectionable. We did not find that to be plausible. First, it would be unlikely that the content of the document would have changed significantly (save as to format) from the draft to the final agreed version. Secondly, C's case would involve SH not simply withholding the original document, but creating two copies (one with hand-writing, one without) of an intermediate document to replace the original, presumably in order to mislead the tribunal – this seems even more unlikely.

17. We note for completeness in this context that R produced word versions of the minutes of two supervision sessions on different dates with identical content. SH's explanation is that she intended to save each minute as a word document and accidentally saved the same one twice. This seems plausible. Certainly it would not be plausible, as C accepted, that R anticipated that the tribunal might accept the two identical documents as reflecting what had been said on two separate occasions.

18. Finally, on the issue of credibility generally, it is right to deal at the outset with the allegations of racial comments/jokes by SH that C raised in his Amended Statement. C alleges that in about February 2019 SH made comments/jokes to him along the lines, *"Like are the police after you that why you don't want to drive?"*; *"Choc-ice, Nig-nog (like in knock-Knock)"*; *"Where are you really from?"*; *"Oh, you are so good with the probationer, you have much in common with them?"*; *"You know I visited Gambia and all they do all day is play the bongo! Why do you think they do that? Is this the same for all Africans?"*.

19. We find that these comments were, on the balance of probabilities, not made. We say so for these reasons:

19.1. First, we find it barely plausible that if such comments had been made, C would not have raised them in his internal complaints or, at least, in his tribunal claim, which was particularised by him after initially being lodged. In this regard we accepted DG's evidence that C did not raise an issue of race discrimination with him when they met, and had C done so DG would have taken that up with more senior management.

19.2. Secondly, having heard the evidence of SH in extensive cross-examination, we consider it unlikely that the comments, which are denied by SH, were made by her. SH impressed the tribunal as a careful and to some extent pedantically literal and accurate witness, who would not have been likely to make such obviously outrageous and offensive comments to a black colleague.

20. All of the above means that the tribunal has grave doubts about the reliability of C's evidence where it conflicts with the evidence of other witnesses and in particular where it conflicts with the contemporaneous documents. That is not to say that the tribunal believes that, at least as regards the large majority of his evidence, C was actively seeking to mislead. Instead, we formed the view that he was 'recalling' events and documents which were consistent with the narrative he had come to accept – that he had been most unfairly treated, with (as he put it more than once) no explanation other than his race; rather than objectively 'remembering' those events and documents, such that his evidence could be relied on. It was more than once obvious that C sincerely 'felt' his narrative to be correct.

21. We do not go so far as to say that we preferred R's evidence on any disputed point; but importantly we do say that we consider the documentary record to be reliable (save in the one or two peripheral instances indicated above) and that we rely on it as our primary source of evidence.

Facts

22. Other than as already set out in the previous section, we make the following material factual findings.

23. C had worked in the civil service between 2004 and 2016 (as well as serving in the Air Force between 2005 and 2009). In 2018 he obtained an MSc qualification in Health Psychology from UWE.

24. In 2017 a psychological assessment of C was undertaken by a Chartered Psychologist with a view to identifying what adjustments if any should be implemented by UWE to take account of dyslexia and dyspraxia which C had been aware of since childhood (the '2017 Report'). The 2017 Report noted difficulties with reading and writing speeds, auditory memory and processing skills, despite excellent intellectual ability. It was recommended that he be given 50% extra time for exams, a PC for exams (which C declined) and potential adjustments when making oral presentations to an audience.

25. After completing his MSc, C applied to be a trainee probation officer and was offered a 'guaranteed interview' on the basis of his having a disability. Due to a confusion as to whether C was an 'internal' or an 'external' candidate, information about C's disability was not passed on to local management.

26. The tribunal finds, as noted above, that SH, AM and DG did not know that C suffered from dyslexia until June 2019 and that C did not raise his dyslexia with SH or AM in conversations before that time. We also find that there was nothing to put SH and AM 'on notice', by reason of C's performance at work during that period, that he suffered from dyslexia. In fact, his performance was generally of a good standard, he did not miss any deadlines in that period, he was well on track to pass his 6 month probation and SH's expectation was that C would develop into a strong member of the team. That view was summed up in what SH wrote on C's Learning Agreement Report on 22 July 2019: *"No deadlines have been missed and Delius entries are good"* (Delius is R's electronic document system).

27. Concurrently with his employment as a PSO, C embarked on a 21 month PQIP training programme, comprising (1) a 6 month foundation stage during which C was to attend training and complete assessment modules with the University of Portsmouth, including the completion of four mandatory 'workbooks'; and (2) a 15 month 'core' programme. As explained below, C in fact did not progress to the core programme during the relevant period.

28. C was (along with all trainees) provided with a timetable at the outset of the PQIP training, showing all events, assignments and activities to be completed, month by month. That timetable stated that: workbook 1 was to be completed by week 4; workbook 2 in month 2; workbook 3 in month 3; and workbook 4 in month 6. The workbooks in effect test that a trainee has absorbed and understood the training relevant to the subject matter of each book. We accepted the evidence of all of R's witnesses (including LA) that, whilst a failure to produce the completed workbooks on time was not a disciplinary matter and would not of itself mean that a trainee did not pass their probation, or per se be cause for placing a trainee on an AP, R expected all trainees to produce the completed workbooks, preferably on time, so that managers could satisfy themselves that the training was progressing well and the trainee had a good understanding of the relevant core concepts. That evidence was supported by the emails from HD to R referred to above, in which HD said that all trainees were expected to complete the workbooks and that she had done so and provided them to her PQIP tutor on time.

29. At times, C sought to compare his treatment in respect of the workbooks with that of a colleague, 'Person A', who started her training around the same time as C. However, Person A was on the 15 month, not the 21 month training programme and was not required to complete the first four workbooks that C was required to complete.

30. C's case as to this was that he did complete as far as he was able each workbook at the appropriate time, omitting only sections which he could not finish because the corresponding training module had been cancelled or deferred, and had sent those when asked to AM and/or SH. The documentary record does not support that case. Rather, the documents make clear that other than the first Gateway to Practice workbook, the other three were not completed and sent to AM/SH until long after the due dates.

    30.1. It may be that C said he had sent one or more of the first three, or that he had sent one or more of those very incomplete, at some point (there is no direct evidence of that, but there is a reference in the Learning Agreement Report on 15 April 2019 to *"David to restend [sic] works one to three to Amanda and Sara"*;

although other notes in the same document suggest that only the 'Module 1 Workbook' was *"almost complete"*).

30.2. On 22 July, it was noted *"Workbooks to be sent to Amanda and Sara by 7/8/19"*.

30.3. On 3 August, C wrote to SH, *"The initial position was that I did not get a clear understanding of whether it is to be submitted at a specific period.. Furthermore, at every occasion you have requested the workbooks I have stated that I am working through them and not completed them"*.

30.4. At the first AP Review on 30 August 2019, C wrote *"The workbooks are still outstanding I suppose"*; and 'next steps' were agreed for C to *"Send any completed workbooks to Sara and Amanda. Send all other workbooks due by this stage by the 25.10.19"*.

31. C's foundation stage of the training programme concluded on about 7 June 2019 and he was booked onto a VQ induction session on 18 June 2019, the purpose of which was to formally enrol him and explain to him the vocational part of the programme. It is not in dispute that this was a significant session and that C failed to note that date in his diary and thus did not attend that session.

32. AM sent C a VQ Enrolment Form to complete, which he did. That form had an Equal Opportunities Monitoring Form attached to it, on which C ticked the box saying that he considered himself to have a disability and within the body of the VQ enrolment form said that he suffered from dyslexia. That prompted conversations between C and AM and between C and SH as to the effects of C's dyslexia and what adjustments might be made to mitigate those effects.

32.1. It was identified with AM that C preferred feedback to be in writing, using bullet points, video conversations preferred to (we assume) phone conversations, and meetings to be put into the ediary.

32.2. Similar points were noted by SH following a meeting on 15 July 2019, as well as that *"[C] Takes time to process information and recording information."*.

C said at that meeting he would provide the 2017 Report to SH, and he did so some time afterwards.

32.3. Shortly after receiving the 2017 Report, SH made a referral for C to have an appointment with Occupational Health (OH) so that the need for any reasonable adjustments because of his dyslexia/dyspraxia could be assessed in the specific context of his work as a PSO.

33. On 19 June 2019 it was recorded that C had satisfactorily completed his probation period.

34. Importantly, on 22 July 2019, C, SH and AM completed C's Learning Agreement Report. The document must be read as a whole, as we have done; it is a generally positive assessment of C's progress and the expectations for his future within the Probation Service – there is certainly no indication of serious concern or of any negative attitude towards C. As well as the significant comment quoted above, *"No deadlines have been missed and Delius entries are good"*:

34.1. C wrote *"My weakness is in OASys, particular the issue of risk in the RMP, my planning in advance needs further work"*.

34.2. SH wrote "*I am pleased with how David has become a strong member of the team. I have good positive feedback from offenders and others, which is a very important part of the work he undertakes. David needs to increase the speed of his assessments and follow the guidance given."*

34.3. AM wrote "*I am pleased that the bullet point feedback following assessment planning has helped David so far. I am pleased that David has the opportunity to go to the planning training in Central 9/8/19. I will review this training with David the following week to ensure that he has implemented some of the advice for organising deadlines. The one developmental observation was really good and I echo the good engagement practice with the offenders."*

35. It was noted in that document that *"Sara has started the process of getting IT equipment to assist David"*. SH explained, and we accept, that by this she meant that she had made the referral to OH, who would include in their report recommendations

of any additional equipment C might benefit from, and that it was not anyway possible for her to order such equipment (particularly if it were costly, like Dragon software) without such a recommendation. There is no reference in any of the documents up to this point of C asking for any particular equipment (as opposed to for bullet point feedback, etc.).

36. C was due to be on annual leave between 23 July and 1 August 2019, returning to work on 2 August.

37. On 15 July SH gave C two OASYS reports to complete. Those reports needed to be finalised by SH on or before 5 August. The expectation was that C would complete them initially by 22 July and if necessary finish his work on them on 2 August (a Friday) so that SH could finalise them by the following Monday (5 August). C says that the time given was inadequate, at least taking account of C's dyslexia, and that SH deliberately created a situation where C would fail to meet the deadline, as an act of race discrimination and/or to justify her perception of his disability.

38. It is common ground that it would take at least a day properly to complete from scratch a single OASYS report. There were some 6-7 working days between 15 July and 2 August (not counting the days C was to be on leave). Appointments had been booked for each of the service users to attend to meet C. C's overall workload at the time, recorded on R's Work Management system, was not heavy. SH's evidence, which C did not dispute, was that C and she discussed the deadline at the time of allocation and C did not raise a concern about not being able to complete the reports in time. Indeed, C accepted in answer to a question from the tribunal that, although 'tight', he could have completed both reports before doing on leave had the service users turned up ready to be interviewed.

39. In fact, one service user did not attend and the other attended in no fit state to be interviewed. It is possible and expected that in such a situation the member of staff will complete as much of the report as possible from court records, etc, leaving blanks or noting where further information is to be included following an appointment attended by the service user (there was some debate whether the report in such a form was properly characterised as 'interim', but we considered that to be of no relevance).

C did provide a necessarily incomplete report in draft to SH on one of the cases before going on leave, which SH returned with feedback.

40. It caused SH some concern that C had not been able to part-complete the two OASYS reports by 22 July and that he had not made it clear to her that he would not be doing so until shortly before going on leave.

41. The service users were interviewed by colleagues while C was on leave and some of the work on the reports had been done by them. When C returned to work on 2 August, SH said that he should complete the two reports that day by 4.30. Initially, C told her that would be possible. It did not prove to be so. SH in the end took one of the reports to allocate to a more experienced colleague. C did not understand why the reports had to be completed by his on 2 August, as opposed to by 5 August; he felt the reallocation of one of the reports on 2 August as humiliating. SH's evidence, which we accept, was that after a member of staff completes an OASYS report, she would need up to one day to apply the AQA process and complete the AQA form; which is why she needed the reports by the end of 2 August.

42. Before going on annual leave, C sent the text we referred to above to some colleagues' mobile phones, containing sensitive personal data, which it is common ground should not have been included in such a communication (though, as noted above, C denies having including it). When that came to light, SH was very concerned. She discussed the issue with her manager, required all recipients of the text to delete it, and informed the data security team, who confirmed there had been a significant breach of GDPR. Given C's relative inexperience, SH and her manager decided not to pursue the event as a disciplinary matter, but to speak to C on his return.

43. Partly as a result of C's action in sending the texts, partly because of an increasing concern about C's organisation and planning skills (which, as noted above, had been recorded previously and which SH was further evidenced by the non-completion of the two OASYS reports by 22 July), SH decided on 23 July to review C's work to date in detail – which she did whilst he was on leave. That review was referred to in evidence as a 'deep dive'. SH said – and we accept – that she had and would conduct

such reviews whenever there were significant concerns about a member of staff, particularly if still on training.

44. The deep dive revealed to SH concerns about the detailed content of C's written entries on Delius, specifically in terms of the level of risk management in place; and that the level of contact he was having with service users was not in keeping with HMPPS' National Standards. As to the former, SH's evidence was that on some cases conflicting risk assessment information was recorded by C and in particular that comments about the risk of serious harm and/or re-offending included in the 'check in' and 'intervention' sections, were not reflected in the 'summary' section, which officers tend to look at first to understand the current situation on a case; also that some 'registration summaries' were missing or out of date in respect of service users C was working with.

45. C's case is that those concerns were exaggerated or contrived. It is not clear on what basis we might conclude that to be the case. There was little or no cross-examination by C of SH as to the detail of her evidence in relation to any particular case(s) or report(s). The tribunal has looked in detail at the handwritten comments by SH on one OASYS report in the bundle, and there is nothing in those which suggests they were not appropriate (see further below). We do not have the relevant expertise to adjudicate the quality of C's assessments of risk management, etc, for ourselves, in the absence of evidence or even submission on the specific cases.

46. We therefore have no reason to doubt SH's assessment in this regard. We note that two other senior officers reviewed an OASYS completed by C, who both had some concerns about them (AM and Ms Gemma Wilcox, a quality development officer – the latter commenting that the OASYS needed more work and was in part contradictory and in part lacked supporting evidence/analysis); and that LA (who C considered to be a good and supportive manager) expressed some misgivings about C's 'written work', commenting in re-examination that, considered as a PQIP trainee, C *"in conversation seemed to understand [the relevant issues], in written work did not evidence that understanding"*.

47. LA also gave evidence that an AP *"can provide really helpful scaffolding and clarity"*, that they were *"not rare, not common"*; that an AP would be appropriate if

"there is a noticed pattern of issues, as opposed to an off day; … 2 or 3 OASYS reports not meeting requirement [would] suggest a broader issue".

48. We also consider it would be somewhat unlikely if SH, having been broadly positive and supportive of C until 22 July, should suddenly begin criticising his work unnecessarily a day or so later.

49. We put this to C during his closing submissions, asking him for his own interpretation of why SH's attitude to him might have altered so substantially during that period if it were not for the reasons she explained (C had said in answer to a tribunal question that prior to going on leave on 23 July, *"I'd have given SH 60-40 [as a manager]"*) . C's answer was that he had made a 'low level complaint' on 22 July about SH having given him the two OASYS reports to complete; that SH had been told this; and that at a meeting between C, SH and two other senior staff (MS Comer and Ms Evans), SH had been 'absolutely fuming', which had 'precipitated her actions' in the following days (that is, on C's case: fabricating the report of a data breach, going through his work and finding unnecessary fault with it, and as a result putting C on the AP). He summed up the position, *"SH felt aggrieved I've annoyed her on 22 July; [her reaction was] I shouldn't have done that – then they did all these things just to punish me, to stop me from progressing. They [SH and AM] treated other staff [differently], with courtesy and empathy"*. C's conviction is that this 'punishment' happened in part because of his race.

50. SH denies that the 'complaint' or meeting about it on 22 July occurred. The 'complaint' did not form part of C's case until his Amended Witness Statement dated 18 February 2022; but even there, he does not refer to a meeting with SH or to SH demonstrating any anger/annoyance with C raising the issue of having been given insufficient time to do the OASYS reports.

51. In the circumstances, we cannot accept the factual premises for C's interpretation of the actions he complains about in late July/early August:

    51.1. He did send texts including sensitive personal data;

    51.2. On the balance of probabilities, there were issues with some of C's reports/assessments of risk;

51.3. On the balance of probabilities, even if SH learnt of C's unhappiness with her giving him the two reports to complete on 15 July, SH did not become angry or annoyed with C as a result on 22 July.

52. C learnt of the data breach issue on 23 July, whilst on leave. His evidence to the tribunal was, *"I knew something was not right and that Ms Hillier was up to no good. I was a BAME trainee so I felt very anxious and afraid"*.

53. SH sent what the tribunal considers to be a revealing, and genuine, email to AM on 23 July, which we set out in full:

> *Hi Amanda,*
>
> *I have had to submit a security incident form in relation to the text message sent by David with offenders details.*
>
> *David has already resubmitted the OASys but failed to make all the amendments so I have had to reject it again.*
>
> *I do feel that you and Anna need to take his case to the Programme Board as whilst he has the potential to be a really good PSO with some more training, he is not ready yet to become a Probation Officer and I feel he is going to struggle with the PQiP programme currently.*

54. In her reply the same day, AM wrote, *"I agree with your assessment, that he is not assessment ready, and will struggle with the numerous demands of the PQiP"*. AM told the tribunal, and we accept, that when SH's concerns about his work were made known to her, she felt that *"putting him under the additional pressures of the VQ might not be beneficial"*.

55. On 30 July, SH and AM spoke with Anna Beddis, Deputy Divisional Training Manager, and it was agreed that C would be put on an Action Plan. That was drafted and agreed (as a draft) by Ms Beddis on 1 August.

56. SH presented the draft AP to C at a meeting on 2 August at which Ms Beddis was present. SH says that meeting appeared to go well and C continued to work that day. The AP itself is a two page document detailing Areas for Improvement, Performance

Expectations and specific Actions C could take to achieve those, with four-weekly review dates. Ms Beddis told C that there would need to be a referral to the Progression Board of the training organisation (the Board) recommending that the vocational training be suspended whilst the AP was fulfilled.

57. Suspension of the training programme follows almost automatically if a trainee is put on an Action Plan. Of course, the suspension of training is a very different thing to the disciplinary suspension of an employee. However, it was clear during the hearing that the connotations of the word 'suspended' in an employment context were unfortunate and keenly felt by C at the time. C's case as to what happened whilst he was on annual leave, was summed up by him in answer to a question in cross-examination, *"SH had invented reasons to suspend me"*.

58. As to the frequency of such 'suspensions', we accept DG's evidence that out of each cohort of up to 60 trainees, some 5-10 might have their training suspended (with no disproportionate impact on BAME trainees); and SH's evidence that she personally knew of two other such cases.

59. We have described what happened with the OASYS reports on 2 August. C says he felt humiliated that SH took a report from him to be completed by a colleague; he says that action was done aggressively, which SH denies. It seems clear that SH did have to reallocate the report (the contemporaneous emails show that C was not able to meet the deadline he had hoped to meet). We are not able to make a finding as to the manner in which that was done; however, what is clear is that following being told he was being put on an AP and that his training was likely to be suspended, C had lost almost all trust in SH and would be likely to view any action by her in the least favourable light.

60. That was clear from C's evidence, but also from emails he sent on 2 and 3 August responding to matters set out in the AP and said at the meeting.

    60.1. On 2 August, he wrote asking for the AP to be reorganised into bullet points (which was later done). He also requested that all discussions in the future be logged (minuted) and that a third person be present at all meetings if at all possible.

60.2. On 3 August, he wrote saying that SH had in effect changed the deadline for completion of the reports from 5 August to 2 August without good reason.

60.3. On 3 August, he wrote querying the concern SH had raised about non-completion of the workbooks, from which we have quoted above.

60.4. On 3 August, he wrote in two emails to rebut supposed criticisms of his having *"missed several training sessions"* and being *"dishonest and evasive"* in relation to the late submission of a piece of academic work. On an objective reading of the AP, C had no cause to believe that SH had made such criticisms.

61. SH replied to those emails on 5 August. She agreed to break down the AP into bullet points and that she would convert all supervision notes and case discussions into MSWord format, for C's ease of reference. She said that she could not agree to line management discussions being conducted with a third party, or always having a structured agenda circulated in advance. She explained her perspective on the two OASYS reports and her concerns about some of C's adherence to AQA standards. She stressed the importance of completing the workbooks. She stated she was aware C had only missed one training session.

62. Without tracing each piece of correspondence in this period (C sent further emails on 4 August, to which SH also replied in her email of 5 August), it is clear that C considered that he had been ambushed by being put on an AP, that this was unwarranted; and as a result he lost all trust in SH and much of any trust in AM. The situation was compounded by C suggesting that both SH and AM had known of his dyslexia for much longer than they had done, and had in effect ignored it.

63. At root, much of the problem lay in R (SH, AM, Ms Beddis and DG) seeing the AP and the suspension of the training as an appropriate supportive measure; and in C seeing it as an unjustified punishment. To say that the die was cast from that moment would be to over-state the position; but certainly the prospects of a constructive working relationship between C and SH/AM were very much damaged.

64. C put in an informal grievance on 7 August about his suspension from the training programme. Only the Board could approve such a suspension, which had not yet happened. In so far as there had been miscommunication about the process to C, DG

apologised for that. In the interim, DG made it clear that C's training, including AM's role in that, should continue – he acknowledged that AM should not have written to C saying that her role as his PTA was immediately paused. AM contacted C on 8 August to confirm her continued involvement.

65. On 16 August SH and C met to discuss and amend the AP, both adding content and improving its layout.

66. On 29 August 2019, C's suspension from the training programme until November was confirmed. That day, C wrote to Dr Farrar, CEO of HMPPS, complaining of having *"been suspended from training for three months"* without any proper basis and (he said) with *"a clear motive to eventually remove me from the course"*. He began that email: *"I hereby petition you on a matter which is very worrying and deeply troubling. The fact that I am of a BAME background is critical to the matter"*. That is the only reference in the documents, prior to C lodging his claim, to his race or to race discrimination.

67. Having received the 2017 Report, SH made the OH referral on 14 August 2019, but unfortunately no appointment was arranged by the OH provider for over a month, despite SH chasing the OH provider. Following the appointment, a report was prepared, which at C's request was initially released only to him, not to R. Several weeks went by, during which SH chased for the report, being given to understand that it had not been released to her because C had not given consent for that. Eventually, C supplied a copy of the OH report to SH on 18 November 2019.

68. In the Claimant's Staff Performance and Development Report mid-year review dated 2 September 2019, Ms Hiller stated (emphasis added by the tribunal):

> ***David has the skills to be a very effective and efficient Probation Officer****, the last few months of his PQiP journey has highlighted some areas of improvement. David is currently subject to an action plan this was implemented on the 2nd August 2019. Because of this the PQiP Progression Broad were approached and they met on the 28thAugust 2019..*
>
> *The decision to place David on an action plan was to allow David the time to develop the skills and knowledge needed to complete the VQ element of the PQiP*

programme, the Action Plan is reviewed every four weeks, the first review was undertaken on the 30th August 2019. The next reviews are due on the 27th September 2019 and the 25th October 2019.

What has been very noticeable since the Action Plan was put in place is the different attitude displayed by David, towards myself. An example of this was at the first review meeting for the Action Plan, David did not really engage with this and spoke very little. The same limited engagement was also displayed during his recent supervision session and this SPDR process. *...*

David also needs to take a pro-active involvement in his own journey, some examples of this are the submitting of his workbooks, ...

Whilst the action plan is in place, David's interim SPDR marking is improvement required. ***I am confident that David will complete the Action Plan, re-join the PQiP programme and achieve the SPDR marking of good at the end of the SPDR year.***

69. In the Action Plan review on 30 September 2019, C recorded that all his workbooks should be in by 25 October . SH recorded that there had been a positive step in use of CMS; however, an OASYS (Case 'D') had been submitted late and rejected as inadequate – a new deadline of 15 October 2019 was given. SH stated *"Case discussion booked for 12.9, there has been improvement but further work is needed around risk factors, protective factors, sentence objectives, so 22.10.19. Overall there has been improvement and I am confident with this will continue in the right direction."*

70. SH reviewed the OASYS for Case D on 21 October 2019 and marked it as *"improvement needed"*. AM assessed another OASYS (Case 'C') 22 October 2019 and marked is as *"inadequate"*.

71. C submitted a formal grievance on 30 October 2019 against SH, which stated that he believed he was being bullied but was unsure of the motive for the bullying, and being victimised because he raised a complaint in August 2019. He complained that all work he had submitted since had been rejected, that *"the reasons for the rejection*

is not clear and over pedantic" and that *"The standards expected of me are not applied uniformly to other staff members"*.

72. Again, whilst C's case is that these criticisms of his written work were exaggerated or pernickety, we were not taken to the detail of those documents, nor was either SH or AM challenged on that detail in cross-examination. Nor was there any direct evidence of SH/AM applying more lenient standards to the written work of other PSOs. C himself was inconsistent in his oral evidence on this point: on one occasion, asked about the feedback SH provided to others, he said *"I can't say. I did not see the feedback for others"*; on a subsequent occasion, he answered that *"The feedback to other officers was clearer, less pedantic"*.

73. SH and the C were due to have a final AP meeting in early November 2019. C said he would rather go through his AP not with SH alone, but during a meeting scheduled for 11 November with C, SH, DG, AM and Ms Beddis. SH replied on 7 November,

> *Hi David,*
>
> *I have given this some thought, and if you really don't want to meet with me, I will fill in a draft version minus your comments and send it to you, Des and Amanda for it to be discussed on Monday. That way it can be amended after the meeting.*
>
> *Kind regards Sara*

74. SH therefore completed the AP without discussion or comments from C. Much of what she wrote was positive and recorded improvement against the AP objectives. However, in two instances SH recorded the objective as not yet achieved:

    74.1. OASYS reports – SH recorded that those submitted by C did not meet AQA standards despite detailed feedback having been given on drafts of two reports.

    74.2. Understanding caseload – Based again on the OASYS reports and on case discussions between C and SH, SH recorded that questions remained about C's understanding of risk and protective factors and how those fed into sentence plans and work with service users.

75. SH also commented that she was surprised that while C had been attending his timetabled training, he had not yet attended RM2000 or ARMS training. In oral evidence she explained that was expressing surprise in particular as C had, she thought, told her and AM that he had completed his training. C's case is that SH was implying that he had deliberately missed important training. The tribunal does not accept that interpretation as objectively fair.

76. SH also wrote in this document

> *Cover for leave – This again has improved but we need consistency, for example David went home suddenly on Monday 4th November 2019 at lunchtime. He sent an email to me stating "I am not particularly well so have gone home". He did not let his colleagues know and he failed to mention the appointment he had in the afternoon.*

77. The tribunal accepted SH's evidence, not really challenged by C, that this is what happened.

78. Prior to the 11 November meeting, SH and C copied correspondence between them to DG and AM. SH wrote

> *Please see below for an email train as way of explanation for this email, I have not had a response from David for either of my emails, nor has he spoken to me in person about today's meeting after my emails. As I have not heard anything and it is now 2:30pm, we were due to meet at 2pm, I am taking this as a sign that David would like to discuss it all on Monday. To that end I attach the action plan with my comments, I am happy to amend these after our discussion on Monday. This does not include any comments from David, again I am happy to add these after our discussion on Monday*.

79. C forwarded SH's email of 7 November (above) to AM, DG and Ms Comer (Ms Spencer's business manager) saying that SH was misleadingly alleging he was insubordinate. Again, this is not a reasonable interpretation of SH's email.

80. DG, SH, AM and Ms Beddis conducted a review meeting with C on 11 November 2019 to discuss his progress on the AP. On 13 November 2019, DG submitted an

updated referral to the Board, which stated that C had not fully met the requirements of his AP and that despite there being some improvement, he continued to show gaps in his understanding of risk following three AQA assessments. DG also noted that C had recently had an OH assessment due to his disclosure that he suffered with dyslexia, but that R had not yet received a copy of the report. On this basis, DG requested a further short 3-week suspension to C's PQIP programme in order for R to acquire a copy of his OH report from C and implement any recommendations made by OH.

81. C was very upset at this, believing that it was a prelude to his being removed from the PQIP training. He wrote on 14 November to Ms Spencer, by way of adding to his grievance, challenging SH's assessment of his work and treatment of him more generally as unfair and discriminatory (though he made no express reference to any protected characteristic). He acknowledged that he had areas to improve in relation to OASYS reports, but he contended that in this, as in several other respects, SH was treating him differently to other students by putting him on an AP and now recording that he had not met the relevant objectives yet. C wrote that he was likely to present a complaint to the tribunal shortly.

82. One point C sought to make in that letter (as he did in evidence to us) was that more senior colleagues, he said, were puzzled at the level of scrutiny and criticism of his OASYS reports by SH, not least because one of his colleagues had assisted him with two of those reports. The tribunal had no direct evidence of this (although C's case was that had he been able to obtain a witness order to compel one such colleague, Ryan Kempe, to attend, he would have been confident that Mr Kempe would have supported him in this regard). We repeat, SH was not cross-examined on the detail of her comments on any OASYS report prepared by C; and, for our part, although we went through and discussed those comments – and conscious that we are not sufficiently knowledgeable about probation service requirements to make any confident judgements in this context – we could not identify any comments that appeared irrational or hostile (either in content or tone), and only one or two comments (out of a much larger number) which could be criticised as somewhat general/abstract, as opposed to concrete and specific.

83. The tribunal also went through the type-written comments by SH on one of the workbooks submitted by C. In general, those comments seemed appropriate – and in some cases obviously correct, where for instance SH noted that C had not answered the question(s) completely. C was cross-examined on some of these comments and in the main accepted that they were *"fair on their face"*; but he contended that the document in the bundle looked *"suspicious"*, suggesting that other objectionable comments had been removed or altered (which the tribunal does not accept, see above).

84. Despite DG having only sought a three-week extension, the Board confirmed on 20 November 2019, that C's suspension from the PQIP programme would be extended for a further period of 3 months, to allow R the opportunity to review the OH report and implement any reasonable adjustments recommended. C was informed of that decision by DG on 21 November.

85. The OH report noted that C's dyslexia was likely to affect his ability to organise work effectively, accurately and speedily proofread, formulate concise reports or longer pieces of text and be able to understand ideas/concepts easily. OH recommended that C be provided with text to speech software, coloured overlays for use when reading documents, and assistance for deadline creation such as electronic pop-ups. Short meetings should be held on a regular basis with management to ensure work demands were on track and C should be given email reminders for work deadlines. Perhaps most importantly, OH recommended a long-term workload reduction of 10-15% (as even with software he would require additional time to assist with the accuracy and quality of his written work). They also recommended that C be allocated a buddy/mentor (so that information and instructions were consistent and less ambiguous) and an additional half day per month for learning purposes.

86. In light of C's grievance against SH, and to ensure that C felt supported, Ms Spencer arranged for C to be allocated a different line manager for a temporary period. On 25 November 2019, LA became the Claimant's line manager, mainly working with C remotely.

87. The grievance meeting took place on 28 November 2019 with Ms Spencer (C was accompanied by Ms Charmaine Smart, the RISE staff network area lead for the

region). C repeated and developed what he had put in his written grievance letter. Of note, C is recorded as responding to the observation that the extension to the suspension of his training had been requested to enable reasonable adjustments to be implemented per the OH report, *"DMM advised that he has his own methods he has developed over years for overcoming these difficulties, and will be able to improve to the required standard even without reasonable adjustments. DMM stated that the difficulties he has experienced are not due to dyslexia."*

88. Ms Spencer did not uphold the grievances against SH (though did uphold the part of the grievance relating to the way in which the term 'suspension' had been used). C appealed and his appeal was not upheld.

89. Subsequently, C was suspended from work on 13 February 2020 pending a disciplinary investigation into allegations being made against him by other staff. C was dismissed by R in about October 2020.

The Law

90. There was no dispute, and almost no discussion, as to the relevant principles of law.

Direct discrimination

91. As to the claims of direct discrimination, s. 13 EqA 2010 (the Act) provides that

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

92. Section 136 of the Act provides, as to the burden of proof, that

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

93. Although the two-stage analysis of whether there was less favourable treatment followed by the reason for the treatment can be helpful, as Lord Nicholls explained in Shamoon at [8], there is essentially a single question: *"did the claimant, on the proscribed ground, receive less favourable treatment than others?"*

94. A claimant does not have to show that the protected characteristic was the sole reason for the decision; *"if racial grounds or protected acts had a significant influence on the outcome, discrimination is made out"*: Nagarajan v London Regional Transport [2000] 1 AC 501 at pp512-513. The discriminator may have acted consciously or subconsciously: Nagarajan at p522.

95. We refer to well-known remarks of Mummery LJ in Madarassy v Nomura International Plc [2007] ICR 867, [56-58] on the burden of proof issue, albeit in the context of a claim that the claimant had been treated less favourably than actual comparators: that for stage 1 of the burden of proof provisions to be met, what is required is that *"a reasonable tribunal could properly conclude"* from all the evidence, that discrimination occurred.

The reasonable adjustment claims

96. Section 20 of the Act provides that

> *(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….*

97. Section 21 of the Act provides that

> *(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. …

98. Laws LJ in Newham Sixth Form College v Saunders [2014] EWCA Civ 734 noted that *"the nature and extent of the [claimant's] disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP"*

99. In Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep), EAT, HHJ McMullen said that *"it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage"*. The EAT in that case then went on to uphold a finding of a failure to make a reasonable adjustment which effectively gave the claimant 'a chance' of getting better through a return to work.

100. Finally, the duty to make adjustment arises by operation of law. It is not essential for the claimant himself to identify what should have been done (Cosgrove v Ceasar and Howie [2001] IRLR 653, EAT). The EAT held in Southampton City College v Randall [2006] IRLR 18 that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time.

Victimisation

101. Section 27 of the Act provides:

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

(a) B does a protected act, …

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

…

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

102. Section 136 (reversal of the burden of proof) applies to victimisation claims: Greater Manchester Police v Bailey [2017] EWCA Civ 425.

Time limits

103. In relation to the tribunal's wide discretion to extend time when just and equitable to do so, pursuant to s. 123 of the Act, the burden is on the claimant and there is no presumption that a tribunal should do so: Robertson v Bexley Community Centre [2003] EWCA Civ 576, [2003] IRLR 434, at para 25, per Auld LJ.

104. However, in Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327 the Court of Appeal dismissed any suggestion that Auld LJ's comments in Robertson were to be read as encouraging tribunals to exercise their discretion in a restrictive manner. According to Sedley LJ: *"there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised"* (at [31]); whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case *"is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it"* (para 32).

105. There is no 'list' of relevant factors, but they generally include: the length and reason for the delay; the prejudice suffered by each party if time is/is not extended; and the merits/potential merits of the claim: Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, [2021] ICR D5.

Discussion

52. Both parties provided lengthy written submissions during the period between the conclusion of the evidence and the resumed hearing to deal with submissions (C's written submissions to some extent replying to those of Mr Ruck Keene).

53. Both parties then made oral submissions to the tribunal (again, C largely by way of replying to point made by Mr Ruck Keene), for most of a full tribunal day.

54. We have taken those fully into account and refer to them as appropriate.

55. We will set out our findings by reference to the agreed List of Issues appended to the case management discussion notes made following a PH on 21 December 2021.

The claims of race discrimination and victimisation

56. C placed some reliance on a March 2021 HM Inspectorate of Probation report, which considered inter alia the experiences of black probation staff. It found that a 'reasonable majority' of BAME staff felt that equal opportunities were promoted within R, but there were considerable concerns around recruitment and how managers address complaints of discrimination. There were also concerns about under-representation of BAME staff at management levels, in part correlating to an imbalance in 'outstanding' appraisal markings between BAME and white staff. The report was silent on the treatment of those doing PQIP training, or being placed on action plans or other formal capability procedures. The report did not make a finding that R was 'institutionally racist'.

57. The tribunal did not discount this report, but considered it was of little evidential weight in seeking to resolve these claims, which turn largely on disputed issues of fact.

The Claimant was required to complete certain tasks within a specific time

58. Under this head, C relied on the requirement to complete workbooks and the requirement for him to complete the two OASYS reports in July/August 2019.

59. On the factual findings we have made:

    59.1. There was no differential requirement imposed on C to complete workbooks. The original deadlines were centrally established. R gave C considerable additional time to complete those workbooks. A reasonable tribunal could not properly conclude from those facts that discrimination occurred in this respect.

    59.2. The requirement to complete first drafts of the two OASYS reports by 22 July was not unreasonable, as C acknowledged. This part of that claim must fail.

59.3. The requirement for C to finish the two reports on 2 August was again, in theory, not unreasonable, given that C had already done at least one (R says two) drafts of one of the reports before going on annual leave and that both service users had been interviewed by colleagues while he was away. A reasonable tribunal could not properly conclude from those facts that discrimination occurred in this respect. We shall have more to say on this issue below, however, by reference to the reasonable adjustment claims.

The Claimant was not given clear and specific instructions

60. In cross examination C clarified that this allegation primarily related to a lack of clear and specific instructions and to overly abstract feedback given on his OASYS reports, in particular by SH. C also referred to the comments made in his Action Plans.

61. We repeat that, on the evidence before us, there was no noticeable lack of clarity in instructions given, whether by way of feedback or otherwise, to C by SH (or other managers). Further, in so far as there was any lack of precision or clarity, C's case was not so much that SH's feedback/instructions were less clear to him than to others (though he did contend she was more critical of him), but rather that because of his disability he required an additional level of precision and clarity – which is a reasonable adjustment claim, not a discrimination claim. A reasonable tribunal could not properly conclude from those facts that discrimination occurred in this respect.

Whether the Respondent, in particular, Ms Hillier applied instructions and/or orders to the Claimant that were not applied to any other PQIP Learner, and/or required him to complete particular tasks

62. Aside from in respect of the completion of the workbooks, C stated that he had been given an unusually and unfairly large number of cases to work on throughout the relevant period.

63. This had not been a specific area of C's 'pleaded' claim and we had no specific evidence as to how many OASYS assessments or case files were allocated to other PQIP trainees. However, the tribunal had the PQIP timetable, which refers to up to 5 appropriate cases between 3 weeks and 6 months; and up to 15 appropriate cases thereafter.

64. The tribunal also heard evidence from SH and LA on what happens in practice, to the effect that when starting out trainees might have 6-7 cases, increasing up to 10, and by the six month point potentially having 15 cases.

65. We also had the evidence Cases of R's Work Management system showing C was not working to full capacity. Further, we note that, other than in respect of the two particular OASYS reports given to C on 15 July, it does not appear that at any material time C himself considered (let alone complained) that he had an excessive workload.

66. Based on that evidence as a whole, we do not consider that C was required to take on more case work than other trainees were/would be asked to take on. A reasonable tribunal could not properly conclude from those facts that discrimination occurred in this respect.

Whether the Respondent, in particular, Ms Hillier requested the Claimant to complete workbooks when the associated training had not been completed without requiring any other PQIP Learner to complete same

67. On our findings of fact, the factual premise of this allegation is not made out. It must therefore fail.

Ms Hillier made untrue statements about the Claimant at his August 2019 performance appraisal [that is, the initial draft AP], specifically statements to the effect that the Claimant was disobedient, uncooperative, incompetent and/or resists orders

68. SH did not state in the draft AP that C was disobedient, uncooperative, incompetent or resisted orders.

69. The draft AP did record SH's honest assessment that C often did not take on board guidance and instructions; the fact (as we have found it) that C had repeatedly been asked to share his completed workbooks but had not done so; and the admitted fact that C had failed to attend *"some of the training"* (it would have been preferable had SH written *"one training event"*). Even these comments were removed from the final agreed AP, which was re-structured to focus expressly on behaviour expectations for the future (with any historic deficiencies left implied).

70. SH also wrote in the draft AP that C had *"not shared essay's marks"*. C said he interpreted this as an accusation of deliberate concealment. It referred to C's admitted error in submitting one assignment properly to the university, as a result of which he was required to re-submit with the mark capped at 40%. SH's comment simply reflected AM's evidence (which we accept and which was not challenged in cross-examination) that she heard first about this direct from the university, rather than from C.

71. On our findings of fact, this allegation must therefore fail.

The Claimant was placed on a Performance Improvement Plan [that is, the AP]

72. This is at the heart of this case. C believes that had he not been black SH would not have reviewed his work whilst he was no annual leave and in any event would not have put him on the AP.

73. On the findings of fact we have made, those beliefs are erroneous.

74. We consider that a reasonable tribunal could not properly conclude from those facts that discrimination occurred in this respect.

75. However, even if we were to accept that the burden of proof had 'shifted', R has shown that the reason C was placed on an AP was not because of his race, but because SH (and AM and Ms Beddis) believed that this was the appropriate and supportive way to address what was hoped were temporary shortcomings in some of C's work.

76. We also note that C himself attributed what he acknowledged was, on his case, a significant change in SH's attitude towards him between 22 July and 2 August, primarily to the fact of his challenging SH on 22 July (although not doing any protected act). We have found as a fact that this did not happen and therefore and in any event it played no part in SH's decision to review C's work and put him on an AP. However, this explanation, if correct, would strongly indicate a non-discriminatory reason for the actions complained of – albeit C submitted that SH would not have reacted so strongly to this alleged challenge had he not been black.

Between June and November 2019 Ms Hillier falsely alleged that the Claimant had failed a university module and that he had been dishonest about it

77. There is no evidence that this happened (see above). Rather, the documents simply reflect SH's (and AM's) concern that C should promptly communicate to them university assessment information, which he had not done on one occasion. This claim must fail.

Ms Hillier thereafter continued to make false and/or unfounded and/or exaggerated statements about the Claimant and his performance, including after the Claimant complained about Ms Hillier. These statements were in particular those contained in the Claimant's Action Plan reports, and in his mid year SDPR review in November 2019

78. On the factual findings we have made, we are not able, on the balance of probabilities to hold that any statement made by SH in the AP reports or mid-year SDPR review were false, unfounded, or exaggerated.

79. Much of the feedback by SH in those documents was positive. Where the feedback was more negative, SH explained her views in her statements and was not challenged on the detail of that. It is simply not possible, in the circumstances, for the tribunal to find that such negative feedback was unfounded and we do not make that finding.

80. We refer to our findings above in relation to other comments, not specific to work performance, made in the November AP report and in an email of 7 November 2019 by SH, to which C took objection.

81. In the circumstances, a reasonable tribunal could not properly conclude that discrimination occurred in this regard.

82. Finally, C made much of the fact that Ms Spencer had written in an email recording that R had not yet been able to get hold of the OH report in November 2019, that C had *"refused consent"* for it to be released. C said that this must have been based on what she had been told by SH. The tribunal is not able to find that SH did use those words to Ms Spencer – she did not recall doing so. It is more likely that Ms Spencer based that comment on an email sent to her by Ms Comer on 13 November, which

said *"I can confirm that an OH referral was conducted for David however the report has never been released to us following prior sight request. I can confirm with OH tomorrow during their working hours, but the file notes would suggest this is because consent was not given for it to be released"*.

83. The reality is that R reasonably inferred that the reason the OH report was not being released to them was because C had not yet, some several weeks after receiving a copy himself, given his consent for that to happen. In the circumstances, there is not much material difference between saying that C *"had not given his consent"* and saying that C had *"refused consent"*. In all events, a reasonable tribunal could not properly conclude that discrimination occurred in this regard.

84. For completeness, we find that although it is not disputed that C did protected acts in complaining in August and October/November 2019, the statements made by SH about C or his work after those protected acts, were not made because of those protected acts.

The Claimant was suspended from his PQIP training program on 29 August 2019 without proper procedures and/or grounds, and that suspension was thereafter extended on 20 November 2019, and again on 12 February 2020

85. We have already found that the AP – and therefore the suspension of C's training, which followed almost automatically – was not made without proper grounds.

86. As to procedure, R quickly acknowledged at the time that in one respect C had been caused wrongly to believe that the suspension of his training had occurred before the Board had made that decision. We can see no basis on which to infer that this – and in particular AM somewhat 'jumping the gun' – was because of C's race, as opposed to a genuine error. We accept AM's evidence that this was what it was.

87. In his closing submissions, C pressed the argument that the correct procedure would have been for R first to give informal notice to improve where a trainee's performance gives rise to concern, then if necessary place them on a Performance Improvement Plan (PIP) – and only if that does not work, put them on an Action Plan. That argument is based on two misconceptions:

87.1. First, formal action needs to be taken, as set out above, if there are significant issues exhibited over time – as SH found to be the case in July 2019.

87.2. Secondly, an AP is a less formal and more supportive measure than a PIP, which is a capability procedure, the failure to succeed during might lead to dismissal.

88. Also in closing, C suggested that the only proper grounds for suspension from training were a failure in academic work or a failure to attend training. It is true that these are mentioned in the Initial Learning Agreement as matters possibly leading to suspension from training. However, there is nothing to suggest that these are the only grounds on which training is suspended. Rather, the evidence was clear that if a trainee is put on an AP by R (for any reason), that will almost automatically lead to a suspension from training.

89. Again, we have made findings that SH's view that the AP needed to be extended in November 2019 was not without proper grounds. We note that DG's recommendation was that the extension in the suspension of training only be for three weeks. A reasonable tribunal could not properly conclude from those facts that discrimination occurred in this respect.

90. We heard no evidence and no submissions in relation to what happened in February 2020. We therefore make no finding on that issue.

Conclusion on the race discrimination and victimisation claims

91. We therefore do not uphold the claims of race discrimination and victimisation.

92. Primarily, we do not accept C's evidence as to the facts on which those claims are based, nor his characterisation of written statements made by SH about him/his work, as accurate.

93. In the circumstances, we do not go on to decide issues of limitation in respect of those claims, though we have some sympathy with C's submission that time should be extended if material, in light of his internal complaints and his frank disclosure to R in early November 2019 that he was preparing a tribunal claim. (See below in relation to time limits in relation to one of the reasonable adjustment claims.)

The reasonable adjustment claims

94. We heard much evidence and detailed submissions on the issue of R's knowledge or constructive knowledge of C's disability. In the end, we accept C's submission that even if (as we have found) SH and AM did not themselves have actual knowledge of his dyslexia, R as an organisation did have that knowledge. In all events, AM and SH did have actual knowledge from about 18 June 2019.

Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant, which it also applied to employees who did not share the Claimant's disability. The PCPs relied upon by the Claimant are: (a) He was asked to complete certain tasks within a prescribed period of time; and (b) His managers failed to provide clear management instructions and clear feedback

95. We will not repeat our factual findings and our analysis of these matters set out above.

80. It is accepted that C was asked to complete his workbooks, albeit given generous extensions of time to do so; and that he was required to complete various written work including the two OASYS reports in July/August within the statutory timeframes.

81. It is not clear to us how a failure to provide clear instructions/feedback could amount to a PCP, but we have found as a fact that there was no such material failure.

If so, did those PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? Did the Respondent know or could it reasonably have been expected to know that they put the Claimant at that disadvantage?

82. In relation to the workbooks, the answer to the first question must be that C was not placed at a disadvantage. C himself did not at the time or in evidence suggest that he had not been able to complete the workbooks in time by reason of his dyslexia. In any events, the timeframes were initially generous, were significantly extended; and having looked at a completed workbook the tribunal does not consider, objectively, that C could have been put at any substantial disadvantage in this context.

83. In relation to the instruction to complete the first two draft OASYS reports on 15 July, we have found as a fact that C – as he accepted – would have been able to do so in the eight days or so before going on annual leave, given his overall workload at that time. We do not therefore accept that C was put at any substantial disadvantage in comparison with persons not suffering from dyslexia in that regard.

84. We take a different view in relation to SH's instruction to compete the two reports on 2 August. By then SH knew C was suffering from dyslexia and had recorded on 15 July 2019 that C *"Takes time to process information and recording information"*. SH also knew that she and C would be meeting that day to discuss the AP (on any view, likely to put C under some mental stress). The tribunal considers that, on the balance of probabilities, someone not suffering from dyslexia would have done well to finish the two reports by 4.30 that day – taking account, of course, of all the work that had already been done on them by that time. We consider that by requiring C to do so, SH did put him at a substantial (more than trivial) disadvantage in comparison with persons not suffering from dyslexia in this regard.

85. In so finding, we take into account that SH had not yet made, let alone had the result of, the OH referral. However, we found LA's evidence persuasive: first, that she would probably have reallocated one or both of the OASYS reports once it was known that the service users had not been interviewed before C's annual leave; and secondly, that in respect of another dyslexic member of staff, whilst she had not implemented a formal workload reduction prior to receipt of an OH report, she bore in mind that she should not overload that person in the meantime given the likely OH recommendation to make that reduction.

86. We find, on the balance of probabilities, that SH could reasonably be expected to have known by 2 August 2019 that she was putting C at a substantial disadvantage by requiring him to finish off the two reports by 4.30 that day, by comparison with persons not suffering from dyslexia.

Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage. The Claimant asserts that the Respondent should have made the following reasonable adjustments:

It should have given the Claimant additional time to complete his Workbook

87. For the reasons set out above, this claim must fail.

It should have given the Claimant feedback in a dyslexia-friendly format

88. We have found that in general the feedback given to C by SH was clear and specific. In so far as it was not always as clear and specific, or set out in bullet points, we find that until 18 June 2019 SH could not reasonably be expected to have known that she was putting C at a substantial disadvantage in that regard, by comparison with persons not suffering from dyslexia. C had not told SH that he had any requirement of that type (indeed had not told her about his dyslexia). Further, each individual suffering from dyslexia has different specific needs in relation to their work environment; and we note in passing that the recommendations in the 2017 Report did not include one relating to a requirement for feedback to be of a particular kind or in a particular kind of format.

It should have acceded to the Claimant's request to engage with only one work assessor

89. We heard little evidence or submission on this issue.

90. C did not make such a request prior to August 2019 and we accept Mr Ruck Keene's submission that this was not a reasonable adjustment: that it was appropriate for C's written work to be assessed by different experienced probation officers who could give him appropriate constructive feedback, which also ensured that C was assessed against the AP fairly.

It should have acceded to the Claimant's request for an assessor who understood the characteristics of dyslexia.

91. This was an allegation which again was not pursued at any length by C.

92. It is not clear if/when C made such a request.

93. In any event, it is obvious that SH did understand the characteristics of dyslexia (as C accepted); and the tribunal accepts AM's evidence that she too had successfully supervised trainees with dyslexia.

It should have acceded to the Claimant's request for new assignments to be given with sufficient time.

94. Again, it is not clear if/when C made this request.

95. We refer to our findings above in respect of the matters on which C relied in this context: the requirement to complete the workbooks and to complete the OASYS reports in July/August.

96. However, even if C did not make any specific request in advance, we find that it would have been a reasonable adjustment for SH to have made not to require C to finish off the two reports on 2 August, presumably by reallocating one or both in advance.

Not suspending him from the PQIP training program, including not postponing his suspension pending completion of a risk and health assessment.

97. We refer to our findings above about putting C on an AP and how suspension from the training followed almost automatically.

98. C appeared to accept in cross-examination that not suspending him from the PQIP training would be *"pushing it"* as a reasonable adjustment. Rather, he argued that he should have been given a period of time to improve prior to being referred to the Board. However, as DG explained, the Board would want reasonable adjustments in place before C continued with the programme. Moreover, if referral to the Board had been delayed pending the OH Report, it would resulted in C being unfairly assessed in the interim.

99. In the circumstances, it would not have been a reasonable adjustment not to refer C to the Board resulting in the suspension of his training.

100. The tribunal does not understand the allegation that it would have been a reasonable adjustment arising out of C's dyslexia to have performed a risk assessment

of any risk to his physical or mental health in referring him to the Board. This allegation, it seems to the tribunal, could only make sense in relation to another potential disability referred to by C, namely depression, but which was not an issue in evidence before us.

Making clear and unambiguous statements about the Claimant

101. We refer to our findings above about the statements made by SH about C and his work. We do not accept the factual premise of this allegation, that SH made unclear and ambiguous statements about C and his work.

Time limit in relation to the reasonable adjustment claim upheld by the tribunal

102. The complaint about SH's failure to make the reasonable adjustment on 2 August in relation to her requiring C to complete the two OASYS reports that day, is over four months out of time.

103. That failure is a one-off event, and not part of an act extending over a period of time.

104. It therefore falls to be considered whether it would be just and equitable to extend time in respect of this claim, pursuant to s. 123 of the Act.

105. The tribunal decides it would be just and equitable to do so in respect of this claim for the following reasons:-

105.1. The length of the delay is not excessive in circumstances where C was pursuing an internal grievance and warning of the tribunal claim by early November 2019.

105.2. The reason for the delay, seeking to resolve the disputes internally and/or without litigation, is not objectionable.

105.3. There is no prejudice caused to R by the extension of time, the relevant evidence being largely documentary and SH having an excellent recollection of the material events even over two and a half years later.

105.4. The claim is clearly meritorious, in that the tribunal has upheld it.

105.5. The prejudice to C in not extending time would therefore be obvious.

Remedy

106. It would appear that remedy in respect of the allegation we have upheld will be limited to compensation for non-pecuniary loss/'injury to feelings'. The parties have not made submissions on the amount of the appropriate award. The issue of remedy is therefore adjourned.

Oliver Segal QC

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Employment Judge

22 April, 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

22/04/2022....