EMPLOYMENT TRIBUNALS

Claimant: **Mr G Smallcombe**

Respondent: **Shaw Trust Limited**

Heard at: **East London Hearing Centre**

On: **19, 20, 26, 27, 28, 29 April, 9, 10 & 13 June 2022**

Before: **Employment Judge Gardiner**

Members: **Mrs B Saund**
Mr J Webb

Representation

Claimant: In person

Respondent: Miss L Gould, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

The Claimant's allegations of disability discrimination and victimisation are dismissed.

REASONS

1. The Respondent, Shaw Trust, is a charity. It assists those with mental health conditions to search for and obtain employment. The Claimant, Giles Smallcombe, was employed by the Respondent as an Employment Specialist. He started in the role in November 2019 and was dismissed with immediate effect on 18 June 2020.

2. The parties agree the Claimant was a disabled person, given his symptoms of depression and anxiety. The Claimant's case is that his treatment by the Respondent amounts to disability discrimination. He brings complaints of direct disability discrimination contrary to Section 13 Equality Act 2010, discrimination

arising from disability contrary to Section 15 Equality Act 2010, failure to make reasonable adjustments contrary to Sections 20 and 21 Equality Act 2010, harassment related to disability contrary to Section 26 Equality Act 2010 and victimisation contrary to Section 27 Equality Act 2010.

3. The allegations span several months of the Claimant's employment culminating in his dismissal. All allegations are rejected by the Respondent. Its case is that the way it treated the Claimant was not in any way influenced by the Claimant's disability or its consequences. At the time of the Claimant's dismissal, he was still in his probation period, which had been extended. On its case, the Claimant's dismissal was the result of the Claimant's misconduct in circulating confidential information from service users coupled with the Claimant's ongoing underperformance in key aspects of the role.

4. The Final Hearing was conducted by Cloud Video Platform. The Claimant's particular allegations had not been clearly identified when the hearing started. As a result, the parties and the Tribunal took significant time on the first two days to clarify the issues and finalise a definitive List of Issues. This required the Tribunal to decide whether the issues that the Claimant wanted to raise were part of the original claim or were an application to add additional complaints by way of amendment. We allowed some proposed amendments but not others, for reasons given orally at the time.

5. As a result of this clarification, one further witness was called by the Respondent (Ms Caroline Callow), although the Claimant chose not to ask her any questions. Further documents were disclosed by the Respondent.

6. It was agreed at the outset that the Tribunal would decide only issues of liability. If the Claimant succeeded, then a separate remedy hearing would be listed for which subsequent directions would be given.

7. The Final Hearing could not proceed on the third day, as a result of a health issue. The Tribunal was able to allocate a further day of hearing time to replace the lost day. On the morning of Friday 29 April 2022, the Claimant asked for ten minutes to speak to the Judge in private. That was refused on the basis that this was a public hearing. The Claimant said, in the public hearing, that he felt rushed and wanted the hearing to be extended beyond that day because he had not been able to cover all he wanted to raise in submissions. That request was refused. The Tribunal considered that the Claimant had had sufficient time, given that no evidence had been heard on the third day, allowing the Claimant further preparation time, and a replacement day (Friday 29 April) had been allocated by the Tribunal. The Respondent's counsel made her submissions first and provided written comments in relation to the Finalised List of Issues. The Claimant accepted he would summarise his points orally, without written submissions. The Tribunal told the parties at the conclusion of the submissions that it would fix a time to reconvene to deliberate without the parties being present and would send its decision out in writing.

8. At 00:08 on 3 May 2022, the Tribunal received a twenty-two page long set of closely typed written submissions from the Claimant. The email was also sent to Samantha Jackson and Huzaifa Moosa at the Respondent's solicitors. It was marked for the urgent attention of Judge Gardiner and was before the Tribunal panel when it reconvened on 9 June 2022 to deliberate. There had been no further response from the Respondent's solicitors. Insofar as the document made further submissions and did not introduce fresh evidence (which would by then have been too late) the submissions have been reviewed by the Tribunal Panel in reaching its conclusions, even though they were submitted after the conclusion of evidence and oral submissions. The Tribunal Panel took the view that no prejudice would be caused to the Respondent in considering this document, given that the Tribunal had not yet started its deliberations by the time it had been submitted. The Tribunal exercised its discretion to admit this document, given that the Claimant had asked for more time when oral submissions had started; the Respondent had provided written submissions at that point; and despite being copied into the Claimant's late submissions, had not objected to those submissions being considered by the Tribunal Panel.

9. The evidence considered by the Tribunal was given by the following witnesses:

    a. The Claimant, Giles Smallcombe;

    b. Ms Gillian Smyth, who was at the time Senior Employment Adviser and the Claimant's line manager;

    c. Ms Caroline Callow, who was involved in one event which was the subject of the Claimant's allegations;

    d. Mr Nicholas Giscombe, Senior Employment Adviser, who conducted the meeting at which the Claimant was told he was being dismissed.

    e. David Harper, Senior IPS Lead, who heard the Claimant's appeal.

10. In addition, the Tribunal was directed to several documents in an agreed bundle of documents which comprised 698 pages; and an additional bundle which extended to 116 pages. The additional bundle had been assembled once the issues had been clarified. References in these Reasons in square brackets are to the corresponding page numbers in the agreed bundle – thus: [231] is a reference to page 231. Page references preceded by an A – eg [A50] are to page 50 in the additional bundle.

Factual findings

Methodology

11. We have made our factual findings from the evidence with which we have been provided. Where possible, these have been based on contemporaneous written documents, such as emails and meeting notes. On occasions, there has been a

factual dispute which is not possible to resolve by reference to the documents. In those instances, we have had to evaluate the reliability of the memories of the witnesses providing the evidence. The Claimant fairly accepted in cross examination that his memory was not good for certain details, and his memory was "very selective", although he claimed it was "laser sharp" on other matters. When asked to accept that contemporaneous documents were accurate, the Claimant frequently asserted that unhelpful entries had been amended at a later point to suit the Respondent's case, claiming that these documents had been "plussed". He had not made such an allegation at the time he was first sent the documents, nor in his witness statement. It appeared to the Tribunal that this explanation was his way of reconciling his chosen narrative with inconsistent documentation. We do not accept that contemporaneous documents have been altered in the manner asserted by the Claimant. No convincing reason has been provided by the Claimant as to why this would have been done.

12. Furthermore, the Claimant had alleged that his witness statement was drafted from a contemporaneous diary in which he recorded key events. The Claimant did not produce this diary to substantiate his version of events. Nor did he provide a convincing explanation as to why this disclosable document had not been provided to the Respondent and to the Tribunal. We did not find that the Claimant was a convincing witness in his recollection of disputed events.

13. Ms Smyth's evidence was in accordance with the contemporaneous documents. The Tribunal considered she was attempting to recall events to the best of her ability and gave her evidence in a clear and straightforward manner. The Tribunal took the same view of the other witnesses called by the Respondent.

Individual Placement and Support Service

14. The Respondent's Individual Placement and Support (IPS) service aimed to provide a specialist employment support service to individuals who struggled to gain employment because of mental health issues. Its methodology was derived from an internationally recognised IPS employment model, developed over two decades of research. The IPS model was based on eight key principles, including that the service must work rapidly, and that the service must operate on a zero-exclusion basis. As the Claimant's training stated:

> "There are no exclusions and the option to enroll individuals on programmes is not the decision of the clinical team or employment team, but rather the client. There is no exclusion based on addictions, time off work, diagnosis, past work history, it is open to anyone who is interested in exploring opportunities of employment." [Additional Bundle, 111]

15. The Claimant was recruited to work as an Employment Specialist on a new programme, which was part of this Service. It was called Fast Track to Employment (FTE). It had only been operated by the Respondent since June 2019. This aimed to assist those who had accessed secondary NHS care for more serious mental health conditions to get into paid employment. The Respondent's client was the

NHS Trust that had been treating those who needed assistance to get back into the labour market. Because it was a new programme, with the potential for the Respondent to be engaged by other NHS Trusts if it went well, its success was a matter of importance for the Respondent.

16. The other programme operated by the Defendant as part of the IPS Service was called Aim4Work. The Defendant had been operating this service for a longer period of time, and the Claimant himself had participated in this programme as a client. This was how he had learned of the Respondent's existence.

The Claimant's recruitment

17. The Claimant had been interviewed for the role by Ms Gillian Smyth and her line manager, Samantha Ripley. The Claimant had impressed both of them with his knowledge of the FTE programme and of the Respondent's processes. He assured Ms Smyth and Ms Ripley he was proficient in IT matters. During the interview, there was a brief discussion about the Claimant's previous participation on the Aim4Work programme. The Claimant mentioned in interview he had previously had mental health issues, which had caused a breakdown, although stressed he was doing really well and had in fact recovered. He did not identify when the breakdown had taken place. Ms Smyth asked him if he would need any reasonable adjustments. He replied he did not need any adjustments.

The Claimant's role within the Defendant's Service

18. The Claimant was one of three Employment Specialists working on the FTE programme. He was assigned to the Hackney area of the Respondent's work in East London, where he was working alongside the North Hackney Community Mental Health Trust (CMHT). He worked from the CMHT Building in Hackney. He was given an honorary contract with this Trust, meaning that he was quasi-managed by the NHS. The NHS Team Leader was Catherine Warren, an occupational therapist, who had an ongoing clinical relationship with the participants. Ms Smyth was based in Shoreditch. The Claimant would occasionally visit the Shoreditch office. Ms Warren oversaw the FTE contract and made decisions as to how the contract should be delivered. She reported to Katie Williams, who was the overall contract manager responsible for the IPS service in East London.

19. The Claimant was taking over responsibilities and clients in the Newham area from Mr Kunle Bakare. Mr Bakare was moving to the Aim4Work programme. This was the programme on which the Claimant had previously been a participant himself. This is how he had come to know of the Respondent's work in this area.

20. Ms Smyth line managed three Employment Specialists under the FTE programme, including the Claimant. Her own background included five years training as a qualified counsellor, followed by work treating people with anxiety, bereavement and PTSD. She also line-managed around nine other members of staff, who had an

equivalent role on the Aim4Work programme. She held caseload reviews with those she line-managed for one hour every month.

21. Ms Smyth conducted a performance review with the Claimant on 21 January 2020. She held caseload reviews with the Claimant on 4 February 2020, 31 March 2020, 6 April 2020, 1 May 2020, 13 May 2020 and 17 June 2020. The gap between 4 February and 31 March 2020 is explained by the Claimant's absence on sick leave between 9 and 27 March 2020, and by the imposition of the national Covid-19 lockdown. The meeting held on 17 June 2020 was held on the day before he was dismissed.

22. In addition, Ms Smyth carried out an observation on the Claimant lasting about an hour each month and also monthly one-to-ones. She also chaired a weekly meeting on Fridays attended by the Claimant and by other team members, known as a Huddle. This was sufficiently formal to be minuted. It was attended on a fortnightly basis by Catherine Warren. In the Claimant's case, there were several other occasions when either Ms Smyth or Ms Warren would communicate with him, face to face, by email, by IM, Teams calls or by phone.

Narrative of events

23. The Claimant started in the role on 18 November 2019. The role had a six-month long probation period. At the start, the Claimant was asked to complete various e-learning modules, and to read the information in his induction pack. This included teaching on the eight principles underpinning the IPS programme, including the zero-exclusion principle. Subsequent training provided by the Respondent stressed that the notes of meetings with those he was helping into employment, known as participants, should be uploaded within 24 hours. Training also told him it was a requirement of the programme that participants willing to seek work should be started as quickly as possible.

24. In addition, the Claimant was given training by the Respondent in the privacy requirements that would apply to participants on the FTE programme. This included an assurance given to participants that "information may be shared with third parties for administration, management and/or service delivery purposes, where it is necessary and lawful for [the Respondent] to do so. In all cases we will share only the minimum information necessary and will do this using secure methods such as face-to-face meetings and secure mail".

25. On 20 November 2019, on the third day of the Claimant's employment, Ms Smyth emailed Mr Giscombe in the following terms:

> "The reason I am delaying [the Claimant] going it alone at this point is because he has not worked in this field at all before hence the intense assistance needed"

26. Towards the end of the Claimant's first week, he emailed Ms Smyth, saying "thanks so much for your support this week". Ms Smyth responded: "Thanks and you are doing great".

27. The Claimant was given a detailed 10 week-long induction programme. This timescale meant that his induction programme would continue until around 24 January 2020 [167-175]. By contrast Mr Bakare was only given a four week-long induction when he had started in the Employment Specialist role. The Claimant was allocated a substantially longer induction period than Mr Bakare as he was new to the role of Employment Specialist.

28. The Claimant struggled to fully engage with the e-learning modules he had been asked to complete, preferring face to face training. However, he was reluctant to admit that he was finding particular aspects difficult. This was because he wanted to present himself as fully capable.

29. There is a factual dispute about the extent of the Claimant's IT difficulties. The Claimant's position is that he was capable of operating most standard applications. He accepted in cross- examination that he had experienced difficulties in getting his reconditioned Lenova laptop to turn on. Ms Smyth said that the Claimant needed IT help on his first and second days. This was help that would not normally be provided to new starters. We accept her evidence on this point. The Claimant continued to have IT difficulties on a regular basis throughout his employment, although some of the difficulties were outside his control.

30. On 2 December 2019, after the Claimant had been in the role for two weeks, Ms Smyth wrote to David Harper, expressing concerns about the extent of the Claimant's computer skills. She wrote that the Claimant "had informed her last week of his lack of computer/technical skills which he was not so honest about in the interview". We find that the Claimant had overstated his IT skills during his interview.

31. She proposed moving the Claimant to a different area, where the client was likely to expect less from someone in his role [184]. Mr Harper asked Ms Ripley to respond. Ms Ripley did not support the Claimant being moved as Ms Smyth suggested. In her view, a period of two weeks was a very short time in which to assess the performance of a brand-new member of staff. She recommended completing the competency framework and looking at what support and training could be put in place to assist the Claimant. She emphasised the need for the Respondent to provide the Claimant with every bit of support during his probation period.

32. The Claimant was provided with a huge amount of training in a range of different respects to enable him to carry out his role. This training is recorded on pages 429-430 of the bundle. This was substantially greater than the training that was normally provided for those starting in such a position.

33. An early example of training provided was Ms Smyth asking the Claimant to shadow Ron Kojo Aidoo and asking Mr Aidoo to teach the Claimant how to add meeting notes to the Respondent's digital case management system, MPS. As part of his role, the Claimant was required to keep accurate notes of his meetings with those he was helping and upload them to MPS. The Claimant accepts that Ms Smyth set up this training but criticises her for not ensuring it took place to the extent he considered was necessary.

34. There was a delay in providing the Claimant with access to the MPS software. By 16 December 2019, one month after he had started, he was still unable to access the MPS system [214]. This was only rectified at some point thereafter. In addition, the Claimant was expected to make prompt entries in the equivalent NHS case management system, known as RiO. This contained more detailed records, including the medical history of each participant. Whilst the Claimant had access to this system, neither Ms Smyth nor Mr Harper were able to see what was contained on the NHS system. Information about whether any participant posed a risk to those working with them would only be disclosed by the NHS to those in the Claimant's role on a need-to-know basis.

35. On 5 December 2019, the Claimant told Ms Warren that he was so enjoying the work that he was humming on the way to work [179].

36. The Claimant was due to spend a week shadowing Mr Bakare to enable him to provide the Claimant with a detailed handover of his clients, known as participants. This was due to take place before Christmas 2019. This shadowing did not take place as Mr Bakare had a period of time off work on sick leave.

37. The Claimant also shadowed other Employment Specialists or Advisers to see the work they were doing. This included Ron Aidoo who, as already stated, at Ms Smyth's request, showed him how to add meeting notes to the MPS system, and reviewed MPS with him [A21].

38. The Claimant had a meeting with Mr Bakare on 23 December 2019 at which he met a couple of his participants [215].

39. On 24 December 2019, Ms Warren sent the Claimant the following supportive Christmas message:

> "Hey
>
> Just wanted to say Happy Christmas! (or if you don't see this until afterwards then I hope you had a good one!)
>
> I'm really excited to have you on the team, welcome! I love your enthusiasm and I'm sure you'll pick everything up real quick and settle in fast and relax and enjoy the ride, I'm looking forward to getting to know you more and see how the team grows and develops over the next year.

Merry Christmas and happy new year!"

40. Ms Smyth took some annual leave over the Christmas period. As a result, Mr Giscombe was asked to supervise the Claimant during Ms Smyth's absence. In early January 2020, the Claimant was expected to travel to Homerton CMHT.

41. Given the extent to which someone in the Claimant's role was expected to work from NHS centres and alongside NHS employees, it was standard practice for an Employment Specialist to be provided with an NHS email. The Claimant was not issued with an NHS email at any point from 3 January 2020 until 5 February 2020.

42. On Monday 6 January 2020, the Claimant was asked to go to Homerton CMHT to meet those based there who were assisting the programme. He considered he was underprepared to be asked to do this by himself. Given he was being asked to enrol participants who had been treated at Homerton, this was an appropriate request to make of the Claimant.

43. The expectation was that Employment Specialists would build up their caseload to the point where they would reach an expected caseload of 20 participants. Had the Claimant arrived with more relevant experience this level could have been reached within 2 months. In the Claimant's case he was allowed a longer period.

44. On 9 January 2020, there was a handover meeting between Mr Bakare and the Claimant in which Mr Bakare passed his active cases to the Claimant. By that point, he had sixteen active cases and one pending case. After this meeting, Ms Smyth asked Mr Bakare to complete any notes on the caseload review and send it back to the Claimant and to herself. Mr Bakare did this the following day, 10 January 2020, based on his memory of the participants, copying the Claimant into his email to Ms Smyth. The updated caseload summary for 10 January 2020, now included case specific notes in relation to each of the sixteen participants. On that date, Catherine Warren met with the Claimant to give him more information about each of the cases for which he was to be responsible.

45. Of these, around three participants were not engaging on an active basis. At that point, no deadline had been set for reaching twenty cases. It was only on 31 March 2020 he was set a target of achieving twenty cases in the next two months.

46. On or around 15 January 2020, Ms Smyth arranged for the Claimant to be given safeguarding training on 23 January 2020. She also encouraged the Claimant to book into a mental health first aid course due to take place in March 2020.

47. A Team Huddle took place on 17 January 2020, which was chaired by Catherine Warren and attended by the Claimant. Ms Warren emphasised the need for notes to be entered onto the RiO system within 24 hours [A32]. On 21 January 2020, Ms Smyth sent the Claimant and others the new FTE paperwork. In the covering email she wrote "Any queries let me know".

48. On 24 January 2020, Ms Smyth asked all members of her team, including the Claimant, to complete a questionnaire on learning styles.

49. On 31 January 2020, Ms Smyth emailed Mr Bakare and the Claimant, asking Mr Bakare to liaise with the Claimant to add job outcome details for a particular participant [A55]. This is evidence that Ms Smyth was continuing to assist the Claimant to take over Mr Bakare's files.

50. The Claimant contends Ms Smyth neglected to manage him during January 2020. He points to the phone records of calls received from her phone as evidence showing she did not have sufficient time for him. He notes that Ms Smyth was in the process of moving house. As a result, he argues that she was not nearly as engaged in managing her team members, including the Claimant, as she should have been. Ms Smyth took two days off work on Thursday 16 and Friday 17 January 2020 to carry out the house move. The Tribunal notes that Ms Smyth carried out a performance review of the Claimant on the next working day, Monday 21 January 2020. We do not find that Ms Smyth neglected to manage the Claimant during January 2020. We attach little significance to the raw data evidenced by the phone records, given the extent to which Ms Smyth engaged with the Claimant by other means.

51. In addition to the caseload reviews carried out with Ms Smyth, the Claimant had regular supervision meetings with Catherine Warren to discuss the progress made with those participating in the programme. An early supervision with Ms Warren had taken place on 13 December 2019 [207]. The supervision notes record that the Claimant was feeling well supported and was learning a lot [208]. They state that he was feeling ready to start taking on cases the following week. In evidence, the Claimant accepted he said this during the supervision but explained he was trying to be breezy and upbeat because he did not want to rock the boat. He has argued that it did not reflect the reality of the position. Whatever the Claimant was feeling, the clear impression he was giving is he was coping with what he was being asked to do.

52. The supervision records of a meeting with Ms Warren on 17 January 2020 recorded some positive aspects of his performance, but noted other aspects where there were challenges [235]:

    a. The Claimant was reminded to maintain boundaries in sharing personal information with clients.

    b. He was told to ensure that notes of meetings were sent within 24 hours. Several times this had apparently not been done.

    c. The change of career was noted to involve a steep learning curve for him. He was told to ask for support in specific areas where this was required.

53. In that supervision, the Claimant was reminded of the core values of the programme – including that the Trust worked with anyone wanting to work, not those who were deemed by the Employment Specialist to be ready.

54. At this meeting, there was a discussion about Ms Warren's supervision style, which the Claimant said he found abrupt and rude [236]. Ms Warren explained the thinking behind her approach – namely that she wanted him to problem solve and take responsibility for his own actions. She said she would try to be more gentle in the future.

55. At the performance review meeting with Ms Smyth on 21 January 2020, Ms Smyth summarised his performance in a positive way. She noted that he was asking the right questions when needed, was settling in well and was now building more relationships with the referring care co-ordinators.

56. On 7 February 2020, the Claimant had a meeting with Ms Caroline Callow, who was a Health and Wellbeing Manager. This had been recommended by Ms Smyth and agreed to by the Claimant. Ms Callow was providing a reflective practice to support staff with their difficult caseloads and help them to deal with work related concerns impacting on day-to-day delivery. It was not a counselling service. As Ms Callow explained to the Claimant, what was discussed during the meeting was to be regarded as confidential. During that meeting, the Claimant revealed to Ms Callow he was struggling with aspects of his role. He also said that he was still on medication for anxiety which made him a little slow and forgetful. He said he would be speaking to his doctor about potentially coming off his medication, as he felt that this would help. He had not revealed to Ms Smyth before this meeting that he was still on medication or that his health condition was making him slow and forgetful, nor did he do so subsequently.

57. The Claimant now criticises Ms Callow for not disclosing to others what he told her during this meeting. However, he did not ask Ms Callow to pass on any information. Had she done so in circumstances where she did not consider that there was a particular risk to the Claimant or to participants with whom he was working, this would have been contrary to the confidential basis on which the discussion took place. There was due to be a further meeting between the Claimant, Ms Smyth and Ms Callow in March, which was cancelled due to the Claimant being off work on sick leave. The Claimant did not take any steps to reinstate such a meeting with Ms Callow following his return to work.

58. On 11 February 2020, Ms Smyth sent the Claimant a guide explaining how to add new participants to MPS [580]. The Claimant found that the MPS system was not intuitive. Ms Smyth had created a bespoke guide for the Claimant featuring various screenshots, in order to assist him. The Claimant's response was "fantastic that's really helpful". On 14 February 2020, Ms Smyth sent a guide to action plans on MPS to the Claimant and to others [A68].

59. At the Claimant's February supervision with Ms Warren, Ms Warren noted various positives in relation to the progress that the Claimant was making. These included his good rapport with a group of clients; doing some employer engagement; and praising the quality of the notes provided by the Claimant, whilst reminding him to ensure that all RiO notes were uploaded within 24 hours. The notes recorded the Claimant was frustrated and disheartened by participants not getting jobs and was concerned about the pressure to achieve particular targets. Ms Warren again stressed the importance of the Claimant working with anyone who is keen to work [262].

60. Also on 11 February 2020, Ms Warren observed the Claimant in his role as an Employment Specialist interacting with a participant [272]. She listed a series of strengths, weaknesses, opportunities and threats as a result of what she observed.

61. At a Team Huddle held on 21 February 2020 [A82], the Claimant was told that correspondences and meetings were to be updated daily on RiO then copied over to MPS via email.

62. The previous day, 20 February 2020, the Claimant had emailed Ms Callow to update her on how he was coping with the challenges of the role. The content of the email was hopeful and ended with the Claimant stating: "I'll be speaking to my doctor about potentially coming off my meds, as I feel this will help". The Tribunal regards this email to Ms Callow as indicating that he did not require any further help from her at this point but would be taking medical matters forward himself with his doctor. Ms Callow replied saying "please look after you[rself] and I'm here if you need me". There was no further response from the Claimant. He did not contact Ms Callow again.

63. On 27 and 28 February 2020, Mr Harper and Ms Ripley delivered a two-day IPS training course to all Employment Specialists including the Claimant. This included emphasising the eight principles underlying the IPS Programme, including the zero-exclusion principle.

64. On Tuesday 3 March 2020, the Claimant and Ms Smyth spoke on the telephone. The Claimant had put his phone onto speakerphone and what was said by Ms Smyth was overheard by Ms Sue Buhler who was sitting near the Claimant. Ms Smyth's evidence, which we accept, is that she had asked the Claimant to sign up a particular participant in line with the zero-exclusion IPS model. The Claimant refused to do so, and the conversation became heated. At times, the Claimant spoke over Ms Smyth. The Claimant asked for further support from Ms Smyth, who responded with words to the effect that 'she could not hold his hand'. This comment was made in the context, we find, of the extensive training and significant assistance already provided by Ms Smyth and others to enable the Claimant to take more responsibility and to work independently. We find that both the Claimant and Ms Smyth probably raised their voices during this conversation and in that context, Ms Smyth may well have said to the Claimant that he was shouting at her. Ms Smyth then asked the Claimant to meet her in her office. She wanted to have a

face-to-face meeting in order to clear the air. This meeting took place about an hour later. We return to events on 3 March 2020 later, given the significant that the Claimant attributes to the conversation, which he alleges amounts to an act of disability discrimination.

65. On or around 9 March 2020, the Claimant became ill and needed to take time off work. In his evidence to the Tribunal, he said he considered he was probably suffering from Covid-19, although at that point there was no testing in place to diagnosis the cause of the symptoms. An email dated 19 March 2020 indicates that the Claimant had reported to Ms Smyth he had less lung capacity because of pneumonia [281].

66. The Claimant was off work until 27 March 2020. By the time he returned to work, the UK Government had imposed a national lockdown. There is no evidence the Claimant reported any residual physical or psychological symptoms to Ms Smyth at the point when he returned to work.

67. As a result of the national lockdown, the Claimant was required to work from home. The Claimant was the carer for the mother of his ex-partner. She needed to shield to minimise the risk to her health, given her potential vulnerability to suffer serious illness as a result of Covid-19. The supervision notes carried out on 1 April 2020 noted that the Claimant would be working from home for twelve weeks.

68. A review meeting took place between the Claimant and Ms Smyth on 31 March 2020. There is no reference in the notes of this meeting that the Claimant referred to any ongoing health symptoms. Ms Smyth made various positive comments about the Claimant's performance [247]:

> "Giles is determined, driven, competent and compassionate to his participants and the wider team. He is curious to help his participants and also assists in empowering them whilst not enabling. Giles has all the capabilities needed to be an excellent Employment Specialist and is demonstrating that more as time goes on. Giles has a compassion and willingness to help others, he is also extremely keen to learn and this is something that will assist him"

69. Ms Smyth's assessment in this meeting of his previous performance during February was that he had exceeded the objectives he had been set.

70. Ms Smyth explained that her strongly positive assessment of the Claimant's performance was an attempt to encourage him to improve in circumstances where she had previously found he did not respond well to receiving constructive criticism. The Tribunal accepts that Ms Smyth was deliberately going out of her way to be as positive as possible about the Claimant even though this did not present the full picture as to how the Claimant was performing. The effect of this approach was that the Claimant was led to believe he was doing better than was actually the case.

71. One consequence of the pandemic was that the targets previous applied to all Employment Specialists of achieving job outcomes (ie getting a certain number of participants into work) were removed. This was therefore removed for the Claimant.

72. At the supervision with Ms Warren on 1 April 2020, the supervision record noted that his RiO notes were up to date, clear and well written and showed consistent and thorough work. The records also note he had not logged into his NHS email account since returning to work from sick leave. The following wording was noted "discussed the difficulties of changing career and the steep learning curve. Encouraged to ask for support in specific things when required".

73. During the first two weeks of April 2020, the Claimant was unable to access Teams whilst working from home [372].

74. On 15 April 2020, Ms Warren spoke with the Claimant and summarised the main points of the conversation in an email on the same day [317]. This included a further reminder that RiO notes must be uploaded on Microsoft Teams within 24 hours. She wrote the word "must" in capitals for emphasis: "MUST".

75. By the middle of April 2020, Ms Smyth was aware that the Claimant's six-month probationary period was due to end within the next month. She was also aware that the impact of the national lockdown had curtailed the Claimant's opportunity to undertake all aspects of the role in way that had been intended at the outset. Nonetheless she was, we accept, deeply dissatisfied with the Claimant's performance, which she summarised in this way in her witness statement:

> "I had spent prolonged periods of time investing large amounts of time each week. with Giles and trying manage his refusal to complete tasks when requested. I was frequently having to withdraw requests for Giles to complete tasks because he refused to do them or informed me that he was unable to complete them which put extra strain on the team. Put simply, dealing with the performance issues and refusal to listen to instruction and follow processes for such a long period of time had become relentless and, despite all my best efforts to support him and help him progress in the role, I felt as though we were getting nowhere." (paragraphs 43 and 45)

76. On 20 April 2020, Ms Smyth asked Mr Harper for advice about the ending of the Claimant's probation period. The six-month period was due to end on 18 May 2020. Ms Smyth noted the Claimant was still learning and wanted to know whether she should pass or extend his probation period. Mr Harper's advice was to extend it by three months and to set some objectives the Claimant could complete, particularly in relation to building up his caseload [324]. He said he probably would not expect participants to be securing employment, given the current lock down. Ms Smyth agreed and said she would ask the Claimant to focus on maximising his caseload [323]. She spoke to the Claimant on that date, 20 April 2020, to inform him his probation period would be extended.

77. On 22 April 2020, Ms Smyth reported back to Mr Harper following on from a conversation she had had with the Claimant. She noted that "[the Claimant] started

to act up (again as the behaviour has occurred once if not twice before now)". Later in the email she described the Claimant "as rude and abrasive and frankly very childish" in relation to his attitude to the zero- exclusion policy [327]. She ended the email as follows:

> "I always try to be approachable, kind and understanding and feel no matter how I manage him he is not progressing or respecting my advice. Sorry to rant but a tad upset with him and frankly I do not have much hope for his skills as an ES [ie Employment Specialist]"

78. On 23 April 2020, Mr Harper emailed the Claimant, having reviewed referrals across the service in April. He told him he had heard from Ms Warren that, although two referrals had been made in April, those two individuals had not yet started on the programme. He reminded the Claimant that the Respondent was providing a rapid service and there was a zero-exclusion service. This meant that "so long as someone is motivated, we would always offer support, even if they are unwell, on medication, have a substance issue or are in education". He wanted to know why these two individuals had not yet started on the programme [344].

79. In his response, the Claimant explained why these two individuals had not started on the programme. In short, the Claimant was saying that they were not necessarily ready to start. He said, whilst he understood the Respondent had to meet targets for funding, if the target setting approach feels "desperate, bullying or too forceful it's counterproductive – staff morale, clinical teams and participants can be severely put off". Mr Harper then commented on the Claimant's response, which elicited this further reply from the Claimant:

> "Thanks for taking the time to provide this thorough and inspiring response.
>
> The majority of what you've said I completely agree with … My issue was more to do with objecting to feeling forced to enrol a particular participant that I did not feel was 'work ready'…
>
> Anyway I'll keep trying – conflicts/clashes of opinion/disputes occur – it's how we move forward that defines us" [341]

80. Mr Harper then forwarded this response to Ms Smyth, who started her email in reply with the words "Thanks for this – oh dear lol". She ended her email "Thanks and thank god it is nearly the weekend" [348]. In a further email [333] she wrote to Mr Harper:

> "I am appalled with his email and behaviour – I have done nothing but be patient and supportive and let a lot of issues go … Retraining him several times – I showed him and the team the log the other day for example and he sent it wrong today … groundhog day all the time – Catherine [Warren] feels the same asks for tasks and nothing is done. We are always calm with him even when he acts out like a child.

> Sorry rant over for today – get that Vino down you and open a case of beer – lol"

81. The Claimant focused in his questioning of Ms Smyth on her use of the word 'rant' in this email exchange and also the email of 22 April 2020 sent by her to Mr Harper in which she had written "Sorry to rant". The Tribunal does not regard Ms Smyth's use of the word "rant" on either occasion as inappropriate, given that it was written in a private exchange between herself and Mr Harper. She was frustrated with the Claimant and her language was expressing this frustration.

82. Mr Harper responded to Ms Smyth: "I imagine it is very frustrating and he clearly is not good at taking requests and clearly not good at completing tasks, which we cannot have in any of our services" [333]

83. In his response to the Claimant, Mr Harper told him that "we must always listen to the client and not make a judgment ourselves, the IPS [Individual Placement and Support] Services are about the clients' choices, not our views on whether someone is work ready".

84. The Claimant's response, whilst polite, continued to argue his corner in relation to whether to enrol one of the service users. The Claimant ended by saying "maybe we should stop for a stiff drink huh? Or ten" [336]

85. Ms Smyth emailed the Claimant on the same day, listing the tasks that were required from all staff on a daily, weekly and monthly basis. The daily tasks including logging onto MPS, checking notifications and working through any outstanding issues. In addition, he was given five weekly tasks. The first of these tasks was to call six employers a week. A further four tasks were listed to be actioned by 27 May 2020. She ended the email by saying she would be calling him daily to discuss the tasks and give him support and guidance where necessary [349/50]. She stated she had booked a meeting with the Claimant on Monday, 27 April 2020 to discuss the various points she had listed in the email.

86. In his response, the Claimant thanked Ms Smyth for doing this, saying "it's very useful to have a checklist of sorts … I'll do my best to follow it all. Very helpful – ta very much" [349].

87. Also on 24 April 2020, the HR Service Centre sent the Claimant a letter. It told him his probationary period would be extended to 17 August 2020 and warned him that his employment may be at risk if she did not successfully pass his probation period [352].

88. In a further email exchange with Mr Harper, sent on 24 April 2020, Ms Smyth expressed her frustration with the Claimant. She said he became distracted and forgot tasks he had been set. She said he would be a liability if the Respondent passed his probation in the future. She added:

> "He may well have mh issues but I have witnessed him being very negative about his participants saying he does not feel they are employable at all in some cases … I thought above all he would be compassionate to the participants mh struggles but sadly no.
>
> I also feel that even the gentlest request can trigger him to act out as we have seen recently. I politely and calmly asked for the participants to be started and he reacted so inappropriately. I therefore feel the sooner we can let him go the better, I also know it is a really good time to recruit and there would be a very high calibre of candidates if we did."

89. The Tribunal finds that the reference in this email to "mh issues" was shorthand for "mental health issues".

90. There was a significant factual dispute about the frequency with which Ms Smyth communicated with the Claimant throughout his employment. The Claimant sought to argue from phone records showing calls made by Ms Smyth to his phone that she spent very little time helping him. We accept that Ms Smyth did not necessarily phone the Claimant every working day, as she had promised in the email referred to above. However, she did communicate with him several times a week in a variety of ways – whether in person, on the telephone, by instant messaging, or in a Teams call, as well as during meetings also attended by others. We do not accept that the phone records relied upon by the Claimant are an accurate guide to the extent of the support and guidance provided by Ms Smyth. Self-evidently, they do not record the content of any calls, or the duration of any other form of communication. As we have found, on several occasions, Ms Smyth went out of her way to arrange or provide additional training and support. One example amongst many is the bespoke guide provided by Ms Smyth on 11 February 2020 to adding new participants to MPS.

91. Although this is disputed by the Claimant, the Tribunal accepts that the Claimant shadowed an employee engagement consultant, Magdalena Krawczyk, on 20 April, 22 April and 6 May 2020.

92. On 27 April 2020, Ms Smyth and Faraz Hasan gave the Claimant training in a range of topics that were recorded in an email to the Claimant on the same day. Ms Smyth commented that the Claimant should now know how to successfully carry out these tasks but "if this does change … please contact me immediately and we can discuss it there and then, so you have plenty of time to action the tasks in the timeframe set". In his reply around two hours later, the Claimant said "today was really useful too. I don't think you realise how much I haven't fully picked up yet". He did not dispute that any of these topics in Ms Smyth's email had been covered. We find that the Claimant was provided with the training set out in this email but was struggled to adjust to the requirements of the role as he himself admitted in this email.

93. At a further supervision with Catherine Warren on 28 April 2020, there was a further discussion about the RiO notes. This time it is noted as a success that he has been able to upload RiO notes through the Microsoft Teams platform. It appears from the notes of this meeting that the Claimant had not been making entries on the RiO system even when the Claimant had not been able to contact participants, as he should have been. The Claimant challenged the need for this to be noted. In the context of being asked to make a record in the RiO system in this situation, the Claimant told Ms Warren that he had previous taken an employer to tribunal for bullying and had won his case.

94. On 29 April 2020, Catherine Warren updated Ms Smyth with her views on the Claimant's performance [372]. She told her that action points raised during the supervision on 1 April 2020 and followed up in writing had still not been carried out by 28 April 2020, particularly writing up notes of meetings on the RiO system. She added that in the supervisions the Claimant had displayed a dismissive and mildly aggressive undertone. She said that he had spoken over her during the supervisions and appeared not to have taken on board what had been said.

95. Also on 29 April 2020, Ms Smyth provided the Claimant with further training, this time in relation to action plans. She followed up the training with training notes and guides [380]. In his response, the Claimant wrote "Thanks for today very helpful" [380].

96. On 1 May 2020, the Claimant emailed Ms Smyth with the subject line "Today's tasks". The contents of the email referred to one participant as "very bonkers". Ms Smyth found the Claimant's use of this term to be inappropriate and unacceptable. She also described this as "highly offensive" and showing a lack of empathy with individuals with mental health difficulties.

97. On 5 May 2020, the Claimant says he overheard Ms Smyth referring to a participant as having been institutionalised. Even though he was not party to the conversation and the remark was not directed at him, the Claimant's perception was that this comment was aimed at him. The Claimant's evidence about the exact remark and its context is very vague. He chose not to raise this in his cross examination of Ms Smyth. Given the lack of detail about this allegation, we are unable to make any positive findings of fact that Ms Smyth made such a remark.

98. On 7 May 2020, the Claimant had another supervision with Catherine Warren [384]. The notes record that "on reflection, Giles does not think I was being harsh in previous supervisions, just encouraging him to achieve the best in this role". He shared with her that the work was harder than he imagined and required a lot more patience, tenacity and focus. The Claimant was asked to re-read and review the eight principles underpinning the programme, including the zero-exclusion policy [385]. The obvious inference which we draw from the Claimant being asked to review the eight principles underlying the IPS model is that Ms Warren considered that the Claimant was still not understanding or accepting the core principles underpinning the programme on which he was working.

99. Following the supervision, Ms Warren emailed Ms Smyth in the following terms:

> "I just wanted to email to flag some of my serious concerns about [the Claimant's] suitability for working with clients."

100. She then set out her concerns under two different headings, namely "Lack of understanding and application of IPS" and "Lack of following procedures". [390]. Her concerns included that the Claimant had misgivings about enrolling a patient suffering with paranoia onto the programme and that he considered another potential participant did not need the programme because he was doing alright on his own. She noted that there were numerous incidents of RiO notes not being updated, despite several discussions in supervisions, prompts and reminders.

101. Mr Harper held a meeting with Ms Warren over Teams on 13 May 2020 to discuss her concerns in more detail. We accept Mr Harper's evidence as to the extent of Ms Warren's concerns about the Claimant's suitability for working with clients on the programme. Following this Teams meeting, Ms Smyth contacted HR for advice as to how to proceed. She was advised to schedule a probation review with the Claimant. Ms Warren was informed by Ms Smyth in an email sent at 09:51 on 19 May 2020 that a meeting would be taking place with the Claimant. From the wording of the email, we find that this was to be a probation review meeting.

102. On 19 May 2020 at 16:51, the Claimant was invited to attend a meeting on 21 May 2020 to review his probation. The invitation stated his performance remained unsatisfactory in that he was not able to carry out tasks for which he had been trained and he had not fully completed tasks and requests he had been set. By way of example, she stated he had not updated MPS daily with meetings and correspondence and had not contacted six employers per week as he had been asked to do in the email on 24 April 2020. The Claimant was warned that one outcome of the meeting was that he might be dismissed [403].

103. In his written closing submissions, the Claimant refers to particular screenshots in the bundle which, by his own admission, were "not discussed in the hearing", to show that he had been updating MPS daily with meetings and correspondence. Many of the screenshots to which he has referred relate to entries uploaded by the Claimant that same afternoon, in some cases less than a couple of hours before the time of Ms Smyth's email. We do not consider that this evidence undermines the strength of Ms Smyth's criticism, given that the decision to convene a probation review meeting had already been taken before these entries had been uploaded. The criticism about not updating MPS daily was not specific to events around 19 May 2020 but applied across the probation period as a whole.

104. On 19 May 2020, Ms Smyth notified Ms Warren that she was going to speak to HR in advance of the meeting scheduled for 21 May 2020. She told Ms Warren that "both IT departments will need to suspend his emails and also his work phone will need blocking too. We are nearly there" [398].

105. The Tribunal finds that it was Ms Smyth's intention during this probation review meeting to raise Ms Warren's and her own concerns with the Claimant. She was minded to terminate his probation at that point unless the Claimant raised matters to change her view of how best to proceed.

106. On 20 May 2020, the Claimant emailed Mr Harper informing him that it would be necessary for him to lodge a grievance [404]. That was detailed in a two-page document [405-406], which was described as brought against Gillian Smyth and Catherine Warren. The grievance started with the following wording:

> "Yesterday's email from GS has come as a huge shock – during a chat earlier in the day she had said "well done there's signs of progress". So the content was quite out of the blue and triggered a sleepless night / my anxiety … this morning ACAS informs me because I could be dismissed tomorrow during the 'hearing', I must protect myself [by] registering my complaints while I am still an employee … I had hoped this action would never be necessary, but feel recent events have forced this upon me"

107. It went on to make seven numbered points, with the following headings:

> (1) Hostile management style
> (2) Mischaracterisation of performance
> (3) Lack of reasonable adjustment
> (4) Duty of Care
> (5) Unreasonable workload
> (6) Lack of clear communication
> (7) Personality politics

108. In the first point, he stated that there had been a "lack of patience when training me, a person diagnosed by GP with mild anxiety – ie a mental disability". The only further references to his health was under the heading "duty of care" where he stated that last year he had "suffered a mental health crisis, came to Shaw Trust via Aim2Work. No conversation about how to manage my disability ever took place during induction". He described himself as suffering from a "mild disability". Under the last point, titled "personality politics" he made an allegation of direct disability discrimination against Catherine Walton for saying 'that depends if you are the type of person we like …". He mentioned he had claimed bullying and victimisation in a tribunal claim, and threatened to bring another tribunal claim if he believed he was being unfairly treated/bullied because of his "invisible disability".

109. Because the grievance concerned the conduct of Ms Smyth as his line manager, she stepped down from this role whilst the grievance was ongoing. Her role was taken on by Mr Giscombe.

110. The Claimant was invited to a meeting to discuss his grievance [407]. This meeting was to be held virtually on Microsoft Teams and would be chaired by Karen Hegarty [407]. It was held on 27 May 2020, although no notes of this meeting were

included in the Hearing Bundle. None of the Respondent's witnesses deal with this meeting and the Claimant refers to it only in passing.

111. On 28 May 2020, the Claimant emailed Sharon Barton, David Harper and Karen Hegarty with what he described as reasonable adjustment proposals [412]. He then listed ten points, which started with changing his line manager "for the foreseeable future – until the dust settles". The fifth point was "not extending my probation period beyond Aug 8". Other proposed adjustments included regular training and explanations and a reduced workload. The last reasonable adjustment was expressed in the following terms:

> "Respecting my employer voice - allowing me to express my views openly, have a say over participants suitability on the FT program."

112. Mr Harper scheduled a meeting for 8 June 2020 to discuss the proposed adjustments with the Claimant [431].

113. On 29 May 2020, the Claimant emailed Karen Hegarty and Sharon Barton, HR Business Partner, suggesting his preference would be to resolve the issues in his grievance by way of mediation. By way of explanation, he said he did not want to cause people lots of additional work or be seen to be a troublemaker.

114. This mediation proposal was subsequently declined by Ms Smyth – whilst a mediation may have been an appropriate forum to resolve a personality clash, she did not consider it an appropriate forum to address performance concerns, which she considered was the central feature in the Claimant's case. Her decision was communicated to the Claimant on 12 June 2020 by Sharon Barton in HR [434].

115. On 29 May 2020, Ms Warren emailed Ms Smyth listing the Claimant's strengths and successes and also setting out her concerns. The email then listed seven matters under the heading 'Strengths'. It then recorded her recollection of an incident where she was concerned about the Claimant's conduct, before noting he had shown a "lack of understanding and application of IPS"; "numerous incidents of RiO not being updated"; "numerous examples of people [the Claimant] has struggled to get in touch with" and "many clients he appears to struggle to build rapport with". Under the heading "Lack of understanding and application of IPS", she made various points, including citing two examples of participants that the Claimant was reluctant to enrol, one due to mental health issues and the other due to drug use.

116. On 1 June 2020, Ms Smyth emailed Mr Harper to say that "I think [the Claimant] is basically going around asking other people for training … I think he is trying to stop the inevitable …. He is asking people to take a substantial time out of their days to help him" [418].

117. The following day, 2 June 2020, the Claimant had a more positive supervision with Ms Warren. The notes state that the Claimant felt he was beginning to build rapport and there were some new referrals coming in. He had also completed all his

actions from the last supervision. However, he was not managing to speak to six employers a week. Currently he was only speaking to two or three employers a week. The same notes also recorded that the was struggling with MPS system.

118. The Claimant alleges that, on 3 June 2020, Nicholas Giscombe discussed another staff member in the open plan office, saying that this person had mental health issues. He could not identify the staff member, beyond the first letter of her name. He asserts Mr Giscombe asked the question "What more does she want?" with reference to her being provided with reasonable adjustments.

119. The Claimant's witness statement is silent on this issue. It does not allege there was any incident involving Mr Giscombe on 3 June 2020. It is not referred to in any contemporaneous document. Therefore, the Claimant has led no positive evidence in relation to this matter. For his part, Mr Giscombe does not recall speaking about another colleague in this way. He doubts he would have done so in the open plan office because this would have been unprofessional. Given the wholly unsatisfactory state of the evidence as to this incident, the Tribunal can make no clear findings as to what was said and the context in which any comments were made.

120. On 8 June 2020, Mr Harper and Mr Giscombe held a meeting with the Claimant to discuss his request for reasonable adjustments. No record was made of what was said during the meeting, nor was there any email sent following the meeting summarising what had been discussed. The Claimant's evidence as to the contents of this meeting is very unclear. For instance, he says on page 12 of his witness statement that one adjustment was agreed but does not identify which one. The Tribunal is not persuaded that the detailed narrative in paragraph 32 of Mr Harper's witness statement reflects what was said to the Claimant during the meeting about each proposed adjustment. It is more likely that it reflects Mr Harper's current view as to whether the proposed adjustments were achievable. As a result, it is not possible to make clear findings as to what was discussed during this meeting.

121. On 8 June 2020, the Claimant emailed Ms Warren with the subject: "Reasonable Adjustments". He did not send or copy this email to his line managers at the Respondent. This was a request for reasonable adjustments from the NHS when he was working with NHS patients. He justified his request as being made to prevent his anxiety from being triggered. He then listed nine proposed adjustments, which included "Appreciating and accepting my views and opinions on suitability of referrals/service users". This again was an indication that the Claimant was unwilling to accept the zero-exclusion principle underlying the IPS model. He ended his email by saying that this was not meant to be in any way hostile or confrontational, but just candid and constructive. On 9 June 2020, Ms Warren forwarded this request to Mr Harper and asked him to update her as to whether he had agreed any reasonable adjustments at the recent meeting with the Claimant.

122. On or around 11 June 2020, the Claimant circulated testimonials from the participants with whom he was working about the way he had been helping them.

In one testimonial the participant thanked the Claimant for the support he had provided and for being an excellent mentor. Another testimonial had noted the Claimant's patience and his friendliness. A further testimonial described the Claimant as a "billionaire at his work" who had got this participant back on his feet. The participant awarded the Claimant 10/10 for doing a wonderful job.

123. In yet another testimonial, the participant stated that the Claimant was very well qualified for the role; had been a wonderful person to converse with; and had a thorough understanding of being well informed of a patient's life story. It stated that the Claimant's approach to his new position had been extremely positive for them and had helped them realise that they had the power to make changes in their life. The testimonial also expressed criticism of the Respondent. It stated that the Respondent should practice what it preached and added that the Claimant could sue the Respondent for discrimination. The following content was also included:

> "I really do feel that [the Claimant's] last superior was ignorant, underestimated [the Claimant] and a bully … please do not bully your staff … I really feel you should look into why you recruit and who to let go at Shaw Trust … I suggest you review [the Claimant's] performance and consider a monthly bonus for him … and double his salary and allow him to work flexibly with patients."

124. This testimonial suggested the Claimant had discussed his criticisms of Ms Smyth with that participant. When asked whether this was the case in cross examination, the Claimant replied "undoubtedly". He said it was not inappropriate for him to share his lived experience and did not consider it might damage the participants' ability to trust in the programme. Other wording in the testimonial suggested Ms Smyth's treatment of the Claimant might amount to discrimination.

125. The testimonial also contained significant personal information about the participant's family and their traumas.

126. Ms Krawcyzk asked the Claimant whether she had obtained the participants' consent for the content to be shared. We find consent had not been sought from participants in advance.

127. Mr Harper told the Claimant that these were "great quotes", although he emphasised the need for participants to provide their consent so that the contents could be shared on social media and with the NHS. Mr Giscombe responded by emailing that the testimonials were amazing, "well done". It appears that neither Mr Harper nor Mr Giscombe had taken on board at that point some of the criticisms that were made of the Respondent by one of the participants.

128. On 12 June 2020, Ms Warren emailed Mr Giscombe and Mr Harper to express her concerns about the feedback. She said a plan needed to be in place early next week to deal with the email and with her various other concerns, as well as a "really clear performance management plan". She added "I have found this week that the

Claimant has been challenging very simple requests". She copied her reply to her line manager, Katie Williams.

129. Ms Smyth was also unhappy with the content of the testimonials, as she explained in an email to Ms Warren [447]:

> "My first thought was that he has either put words in his participants mouths or pressurised them for these. We need movement asap"

130. The same day, 12 June 2020, the Claimant was told that Ms Smyth did not want to engage in a mediation with the Claimant. Later that day, the Claimant emailed Sharon Barton in HR to discuss whether to pursue the grievance.

131. On 15 June 2020, the Claimant forwarded a further very lengthy testimonial to Mr Giscombe. This evidenced significant distress on the participant's part. They were describing disturbing personal trauma in a narrative containing highly offensive and discriminatory comments.

132. Mr Giscombe sent this testimonial on to Ms Smyth describing it as "fairly disturbing". Ms Smyth in turn sent it on to Mr Harper, commenting that it was an "awful and worrying email … you may need to brace yourself, it is pretty bad".

133. In reply to questions from Ms Gould about whether obtaining and circulating such a testimonial might amount to gross misconduct, the Claimant accepted it was. He said he should have received a written warning for circulating that testimonial but should not have been dismissed for gross misconduct. He told the Tribunal he wanted to meet with Catherine Walton to explain and apologise for what he had done.

134. By 15 June 2020, the testimonials requested by the Claimant had been seen by Catherine Warren's line manager, Katie Williams. Ms Williams raised a complaint about potential breaches of GDPR, given the contents of the testimonials. The NHS did not allow the forwarding of emails outside of their organisation. Therefore, forwarding emails from participants to the Claimant onwards to the Respondent's email addresses was a potential breach of this requirement. It also appeared to her that participants' underlying health conditions may have been triggered by the content the Claimant was sharing about his own situation at work.

135. The Tribunal finds that Katie Williams was extremely angry. She was adamant that the Claimant would not be allowed to work with the participants given the risk she considered he potentially posed to their safety. She was not willing to discuss the matter further, particularly with the Claimant. The Claimant was asked by Mr Giscombe not to have any contact with his participants. His NHS email account was suspended.

136. On or around 16 June 2020 the Claimant withdrew his grievance. The Claimant was then emailed the same day and invited to attend a probation review meeting

on 18 June 2020 which had been previously postponed to deal with the Claimant's grievance. The email, from Ms Smyth, included the following wording:

> "As you are aware you have failed to meet the required standards at your 6 month probationary review. During the review period you were given a chance to improve and were given further support and training. However, the performance remains unsatisfactory due to not being able to carry out tasks for which you have been trained on and also for not fully completing tasks and requests set for you. An example of which would be updating MPS daily with meetings and correspondence and not contacting to 6 employers per week for Employer Engagement which was agreed on 24 April".

137. This was the same or almost the same wording as the invitation to the original probation review meeting. It indicates that the Respondent was reverting to the procedure it had intended to carry out, but which had been paused pending the conclusion of the Claimant's grievance.

138. The Claimant objected to the hearing being conducted by Ms Smyth. As a result, it was decided it would be conducted by Mr Giscombe. Towards the end of the afternoon on 17 June 2020, the Claimant emailed Mr Giscombe, with his email including several smiley faces and the words "Thanks for kind, patient, guidance over the last few days!" [467].

139. On 18 June 2020, in advance of the probation review meeting, the Claimant emailed Mr Harper saying "Thanks for arranging this, being true to your word. I respect that so much. You and Nic[ie Mr Giscombe] have been very supportive, I really rate your management styles" [469].

140. At the probation review meeting, the Claimant complained about the extent of the training he had been given and the support he had received. Mr Giscombe told him that he had been given a lot of training and extensive support.

141. In advance of this meeting, Ms Smyth had decided that the Claimant should be dismissed. She communicated this decision to Mr Giscombe, who in turn communicated it to the Claimant at the conclusion of the meeting [472]. He was told that he would be dismissed with immediate effect. The Claimant was told he had the right to appeal.

142. On 19 June 2020, the Claimant was sent a letter confirming to him that his employment had terminated on 18 June 2020. It did not detail any particular reason why his employment had been ended.

143. The Claimant chose to appeal and lodged his grounds of appeal on 23 June 2020. His appeal was set out in a four-page long document [480]. He summarised the way he had been treated as amounting to discrimination and victimisation. The appeal hearing took place on 2 July 2020 by Teams and was chaired by David Harper [486].

144. Mr Harper wrote to the Claimant on 24 July 2020 dismissing the appeal and setting out his reasons for rejecting the points made in the Claimant's appeal letter. He stated that the Claimant had not achieved the clear daily, weekly and monthly actions which had been agreed on 24 April 2020. He did not particularise the specific respects in which they had not been achieved. He concluded by stating as follows:

> "The decision to terminate your employment during your probation period, was due to the fact that we felt the amount of training and level of support you had received over the last 7 months was sufficient to warrant a higher level of performance than you had been exhibiting."

145. Around 10 June 2020, a third member had been recruited to the team of Employment Specialists in Hackney. This recruitment process had been initiated because the Respondent was looking to increase the size of the team in Hackney from 2 to 3. Funding for this position had been approved in March 2020 but the national pandemic had delayed recruitment until June. It was not prompted by the decision to terminate the Claimant's employment.

146. When the Claimant had started his employment at the Respondent, he had a current Tribunal claim against previous employers. The Claimant's evidence was vague as to when this was started and when it resolved. The limited documentary evidence suggested that a Tribunal hearing was scheduled for January 2020 [188]. The Claimant said it was a claim for wrongful dismissal and was unclear whether he was aware that there was a three-month time limit for bringing such a claim. He had engaged a solicitor to prepare his Grounds of Complaint.

147. At no point during his employment with the Respondent was the Claimant referred to the Respondent's Occupational Health team. This would have required the Claimant's permission.

ISSUES TO BE DECIDED

148. The issues to be decided were discussed extensively at the start of the hearing to ensure that the formulation of the issues reflected the case that the Claimant had originally issued and was set out in the clearest possible way. Rather than list those issues over several pages in a section of their own, we have listed our conclusions underneath each of the issues. We have set the issues out in bold text to distinguish them from our reasons.

RELEVANT LEGAL PRINCIPLES

Disability

149. The statutory definition of disability in Section 6 of the Equality Act 2010 is as follows:

> "A physical or mental impairment which has a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities."

150. The Tribunal must assess whether this definition is satisfied as at the date of the alleged discrimination, by reference to the evidence as to that point in time. The Tribunal is to deduce the extent of the impairment caused by the underlying condition, where possible, if the Claimant was not taking medication.

151. An impairment is long-term if it has lasted or is likely to last for at least 12 months. The phrase 'likely to last' means 'could well' last. An impairment is substantial if it is more than trivial. The focus is on what the Claimant cannot do, rather than on what he can do.

152. The Tribunal must have regard to the Secretary of State's Guidance on matters to be taken into account in determining questions relating to the definition of disability.

153. Here the Respondent accepts that the Claimant's mental health condition satisfied the definition of disability in the Equality Act 2010.

Direct disability discrimination

154. Section 13 of the Equality Act 2010 is worded as follows:

> "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."

155. With the exception of one allegation where comparison is made with Mr Bakare, the Claimant seeks to compare himself against how a hypothetical non-disabled employee would have been treated, who was in all other respects in a comparable position to the Claimant.

156. The focus is on the mental processes of the person that took the decisions said to amount to discrimination. The Tribunal should consider whether they were consciously or unconsciously influenced to a significant (ie a non-trivial) extent by the Claimant's disability. Their motive is irrelevant.

157. Section 136(2) of the Equality Act 2010 is worded as follows:

> "(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."

158. Guidance on the burden of proof was given by the Court of Appeal in Igen v Wong [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in Madarassay v Nomura International plc [2007] ICR 867 and by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 (at paras 22-32).

159. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that her treatment was in part the result of his nationality.

160. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see Madarassay at paragraph 54). To shift the burden of proof a Claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between her disability and her treatment, in the absence of a non-discriminatory explanation.

161. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the Claimant's treatment.

Harassment

162. Section 26 of the Equality Act 2010 is worded as follows:

> "(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 (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"

163. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally

(Munchkins Restaurant Ltd v Karmazyn and others EAT 0359/09). The Equality and Human Rights Commission: Code of Practice on Employment (2011) states as follows:

7.7. Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not meant that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

164. When considering whether a comment was related to a protected characteristic under Section 26 Equality Act 2010, this covers a wider category of conduct than conduct "because of a protected characteristic" under Section 13 Equality Act 2010. A broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (Bakkali v Greater Manchester Buses (South) Limited t/a Stagecoach Manchester [2018] UKEAT/0176/17).

165. In assessing whether the conduct met the proscribed threshold, Tribunals should not place too much weight on the timing of any objection (Weeks v Newham College of Further Education UKEAT/0630/11). Whether it was reasonable for the Claimant to regard treatment as amounting to treatment that violates her dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context (Richmond Pharmacology v Dhaliwal [2009] IRLR 336). In that case the EAT said:

> "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended."

Failure to make reasonable adjustments

166. The Tribunal must assess whether the Respondent applied a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison to those employees not sharing her disability. If so, the duty to make reasonable adjustments is engaged. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

167. In order for the disadvantage suffered by the employee to be "substantial" it must be more than minor or trivial: Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 at paragraph 21.

168. Paragraph 20 of Schedule 8 to the Equality Act 2010 is worded as follows :

> "An employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know … that the employee has a disability and is likely to be placed at a disadvantage."

169. The burden of proof is on the Claimant to establish the existence of the provision, criterion or practice and to show that it placed her at a substantial disadvantage - see Project Management Institute v Latif [2007] IRLR 579 at paragraph 45. In other words, to establish that the duty to make reasonable adjustments has been engaged.

170. Thereafter the onus remains on the Claimant to identify the potential reasonable adjustments with a sufficient degree of specificity to enable the Respondent to address them evidentially and the Tribunal to consider the reasonableness of providing them. At the point where the duty to make reasonable adjustments has been engaged, and the Claimant has identified one or more potential reasonable adjustments, the burden of proof is reversed. The Respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved – Latif at paragraphs 53-54.

171. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis: Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 at paragraph 73.

172. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice. The Tribunal is required to have regard to this Code when considering disability discrimination claims.

Discrimination arising from disability

173. Section 15 Equality Act 2010 is worded as follows:

> (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.

174. In York City Council v Grosset [2018] ICR 1492, the Court of Appeal considered the extent of knowledge that was required under Section 15(1). In short, there is none. If there is a causal link between the consequences of the disability and the

dismissal, it is not necessary that Ms Caton knew of that connection (see paragraph 39).

175. Section 15(2) provides a limited statutory defence. That is that there is no discrimination arising from disability if the Respondent shows that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability. However, as Sales LJ put it in Grosset "if the defendant does know that there is a disability, he would be wise to look into the matter more carefully before taking unfavourable action" (paragraph 47). By reference to an example at paragraph 5.9 of the EHRC Employment Code of Practice, he stated (at paragraph 51) that "it is not suggested that the employer has to be aware that the employee's loss of temper was due to her cancer, but only that the employer should be aware that she suffers from cancer (ie so that the employer cannot avail himself of the defence in subsection 15(2))".

176. The EHRC Employment Code of Practice states as follows:

> 5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.
>
> 5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

177. A failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to analyse what further information would have been provided had further investigations been made. In A Limited v Z [2020] ICR 199, the claim for discrimination arising from disability failed because the Tribunal found that Z would have continued to suppress information about her mental health problems, would have insisted that she was able to work normally and would not have agreed to any medical examination that might have exposed her psychiatric history. Therefore, in that case A Ltd could not reasonably have been expected to know that she was disabled.

178. If the acts or omissions in issue are influenced by any consequences of the disability, then it is for the Respondent to show, under Section 15(1)(b), on the balance of probabilities that the decision was justified. That requires that the Tribunal form its own assessment of whether these acts or omissions were a proportionate means of achieving a legitimate aim. This is a different analysis from the range of reasonable responses approach required when considering an unfair dismissal claim.

179. In assessing proportionality, the Tribunal must assess whether on a fair and detailed analysis of the working practices and business considerations involved, the decision was reasonably necessary in order to achieve the legitimate aim (Hardys & Hansons Plc v Lax [2005] ICR 1565). In Griffiths v Secretary of State for Work and Pensions [2017] ICR 160, Lord Justice Elias said (at paragraph 26):

> "An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment — say allowing him to work part-time — will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified."

180. The EHRC Code of Practice states:

> "5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."

Victimisation

181. Section 27 of the Equality Act 2010 is worded as follows :

> "(1) A person victimises another person (B) if A subjects B to a detriment because:
>
> (a) B does a protected act; or
> (b) A believes that B has done, or may do, a protected act"

182. Under Section 27(2)(d) "making an allegation (whether or not express) that A or another person has contravened [the Equality] Act" is a protected act.

183. In order to succeed with a claim of victimisation, there must be a sufficient causal connection between a protected act and the consequent detriment.

184. Detrimental treatment amounts to victimisation if a protected act is one of the reasons for the treatment, but it need not be the only reason.

Law on time limits

185. Section 123 of the Equality Act 2010 is worded as follows:

> "(1) Proceedings on a complaint brought within Section 120 may not be brought after the end of –

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

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

….

(3) For the purposes of this section:

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

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

186. Under Section 123 of the Equality Act 2010, proceedings on a complaint 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. The three-month time for bringing Tribunal proceedings is paused during early conciliation such that the period starting with the day after early conciliation is initiated and ending with the day of the early conciliation certificate does not count (Section 140B(3), Equality Act 2010). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (Section 140B(4), Equality Act 2010).

187. Conduct extending over a period is to be treated as done at the end of the period (Section 123(3) Equality Act 2010). There is conduct extending over a period if there is a continuing discriminatory state of affairs as opposed to a succession of unconnected or isolated specific acts. If so, then the three-month time period for bringing a claim only runs from the date on which the state of affairs ends (Metropolitan Police Commissioner v Hendricks [2003] ICR 530).

188. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim if it was brought within such other period as the Tribunal considers just and equitable. Considering a claim brought outside the three-month time limit (as extended by the early conciliation provisions) is the exception rather than the norm. Time limits are exercised strictly in employment and industrial cases. The onus is on the Claimant to establish that it is just and equitable for time to be extended (paragraph 25 of Robertson v Bexley Community Centre (t/a Leisure Link) [2003] IRLR 434, CA).

189. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the Respondent (Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 at paragraph 19). However:

> "There is no … requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the

delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard" (Abertawe at para 25)

190. It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

191. It will frequently be fair to hold Claimants bound by time limits which they could, had they taken reasonable steps, have discovered. If the delay in issuing proceedings has been caused by the fault of an adviser, this is a potentially relevant factor that potentially excuse a failure to issue proceedings in time, or a delay in issuing proceedings thereafter (Hunwicks v Royal Mail Group plc EAT 0003/07; 20 March 2007 per Underhill J at paragraphs 9 and 13). However, to be a relevant factor, the bad advice must have been the reason for the delay.

192. Awaiting the outcome of an internal grievance procedure before making a complaint is just one matter to be taken into account by a tribunal considering the late presentation of a discrimination claim (Apelogun-Gabriels v Lambeth London Borough Council [2002] ICR 713, CA per Peter Gibson LJ at p719).

CONCLUSIONS

A. Disability

(1) The Respondent accepts that the Claimant was disabled for the purposes of section 6 of the Equality Act 2010 by reason of depression and mild anxiety at the material times, during his employment from 18 November 2019 to 18 June 2020.

(2) Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? From what date? The Respondent disputes that it had actual or constructive knowledge of his disability during this time.

193. It is necessary to distinguish between two periods of time – the period up until the Claimant lodged his grievance; and the period thereafter.

194. In relation to the period up until the Claimant lodged his grievance, the Respondent had no actual knowledge that the Claimant was a disabled person because of his mental health. He had tried to present himself as capable – particularly in the way he presented himself in interview in speaking of his recovery from previous mental health problems and declining the offer of reasonable adjustments. He did not provide any medical or other evidence to suggest he had ongoing mental health issues.

195. On the issue of constructive knowledge, we note that the Respondent charity specialises in assisting those with mental health issues. The Claimant was entitled to expect the Respondent to be particularly attuned to signs indicating potential symptoms of mental illness and to expect them to be proactive in investigating whether those signs were indicative of a disability. However, given the need to respect the Claimant's privacy, there still needed to be sufficient signs such that the Respondent came under a duty to make further investigations.

196. We do not consider that there were sufficient signs to put the Respondent on notice that further investigations were necessary. From what the Respondent had been told at interview, he had previously experienced a breakdown and had suffered from mild anxiety and depression in the past. But nothing had been said at interview to indicate that he would find some aspects of the role difficult or need any reasonable adjustments. He had indicated he had recovered from past mental health issues and had rejected the need for any reasonable adjustments.

197. In paragraph 71 of her witness statement, Ms Smyth noted that at times the Claimant had bad days. She allowed him some latitude to deal with things given his previous mental health issues. Despite this reference to "bad days", it is significant that the Claimant did not take any time off work for health reasons (apart from what was thought to be symptoms of Covid-19). Nor did he appear to be struggling with the demands of the job as a result of health issues. He did not refer to his mental health by way of explanation at any point when he was being criticised for failing to carry out aspects of his role to the required standard.

198. He was referred to Caroline Callow because he was struggling with the role, rather than because he was experiencing particular symptoms of mental health. His discussion with Caroline Callow, in which the Claimant referred to the state of his mental health, was confidential. Nothing was said there that ought to have led her to report the contents of the conversation to the Claimant's line managers.

199. The absence of sufficient signs that the Claimant was experiencing problems with his mental health was because Claimant wanted to give the Respondent the impression he was capable of doing the role. If there had been sufficient signs, the Respondent would have asked the Claimant to consent to an occupational health referral. Had such a referral been proposed, we find he would not have accepted it was necessary. The Claimant had never suggested there was a need for such a referral. He would have continued to present as someone without any ongoing mental health issues.

200. Therefore, we do not find that the Respondent ought to have known that the Claimant was a disabled person up until the point when the Claimant lodged his grievance.

201. The Claimant's grievance marked a change in the way the Claimant spoke about his mental health. For the first time he was identifying ongoing mental health symptoms of "mild anxiety" which he considered amounted to a disability. At that

point, the Respondent had constructive knowledge of the Claimant's disability, even if what was said in the grievance was not sufficient to amount to actual knowledge. The Respondent ought to have referred the Claimant to occupational health in order to better understand the extent of his mental health symptoms. Had this referral been made at that stage, then we find that the Claimant would have consented to the referral and provided his full co-operation.

B. Direct Disability Discrimination (section 13 Equality Act 2010)

(1) Did the Respondent do the following things:

a. "Set the Claimant up to fail" because of prejudice against him as a "person on a journey" back to full mental health by:

i. In November and December 2019, Gillian Smyth failing to brief colleagues (Gemma, Ron and Kunle) to provide additional training to the Claimant on the MPS system whilst he was shadowing those colleagues and/or those colleagues failing to provide such training after being briefed to do so

202. We do not find that there was any failure by Ms Smyth to arrange this training. The limited evidence before the Tribunal is that that she was proactively ensuring that the Claimant was familiar with the MPS system. If there was a problem with the Claimant's access to MPS at this time, it was that the Claimant was unable to access MPS as a result of IT difficulties.

ii. The Claimant was not given paperwork in relation to cases inherited by him from Kunle Bakare in January 2020

203. In his oral closing submissions, the Claimant clarified that his concern was that he was not being given paperwork about particular participants who could be potentially dangerous. This information, if known at all, would only be known by the NHS and would be stored on the RiO system, and not by the Respondent, given the NHS's responsibility for each participant's treatment. It was not the responsibility of the Respondent, but that of the NHS, to provide this written information to the Claimant in appropriate circumstances. By 10 January 2020, the Claimant had been briefed by Mr Bakare and by Ms Warren on each of the participants he had been allocated.

204. Furthermore, there is no basis for finding that any failure to provide information about participants was because of the Claimant's disability.

iii. In January 2020, there was insufficient supervision and support provided by Gillian Smyth to the Claimant

205. In our findings of fact, we have found that there was significant supervision and support provided by Gillian Smyth, including in January 2020. She arranged first aid mental health training and safeguarding training on 15 January 2020. She conducted a detailed case review with the Claimant on 21 January 2020. She had also asked staff, including the Claimant, to fill in questionnaires regarding learning styles. There was regular contact from Ms Smyth. The picture presented by the phone records is a very partial one, which does not reflect the full extent of the communication and support.

iv. No structured written feedback was provided to the Claimant by Gillian Smyth from January and February review meetings

206. In the absence of specific evidence showing that structured written feedback was provided as a result of meetings in January and February, we agree with this criticism made by the Claimant. However, there is no evidence that other non-disabled employees were getting a greater level of detailed feedback than was provided to the Claimant. There is no evidence showing the Claimant has received less favourable treatment.

207. Finally, as the Respondent had no knowledge of the Claimant's disability at this point, the failure to provide structured written feedback cannot have been because of his disability.

v. Following an email on 20 February 2020, Caroline Callow failing to follow up with the Claimant on his disclosure that he was suffering with some aspects of working duties

208. The communications between the Claimant and Caroline Callow indicated that he would be seeking help from his doctor and was not asking for further help from Ms Callow. It was not Caroline Callow's responsibility to follow up with the Claimant on medical matters, given her reflective practice role.

vi. In around March 2020, Gillian Smyth insisting that the Claimant add a referral as a participant to his case load, when the Claimant's position was that the individual was not medically ready to work

209. Ms Smyth did insist on this during the telephone call on 3 March 2020. This was because this was a mandatory requirement of the IPS programme. The Claimant ought to have realised, given the extensive training he had received, that he had no discretion whether to enrol participants. If they wanted to participate, they were to be enrolled regardless of their state of health or any features in their presentation.

vii. In an email dated 24 April 2020, setting out guidance of tasks to be completed on a daily and weekly basis, Gillian Smyth did not

specify that a sanction for failing to complete these tasks could be the dismissal of the Claimant

210. This allegation is factually correct. The email dated 24 April 2020 contained a helpful checklist of responsibilities that formed part of the Claimant's role. It was not necessary for Ms Smyth to specify a specific sanction for failing to carry out these tasks within the email itself. On the same day, he was told that his probationary period was being extended and he was reminded his employment could be at risk if he did not successfully pass the probation period. Therefore, on receipt of the email of 24 April 2020, it was or ought to have been clear to the Claimant that, if he did not carry out the required tasks, he would fail his probation. We find he would have been treated in exactly the same way, regardless of his disability.

viii. In June 2020, Gillian Smyth refusing to participate in mediation with the Claimant

211. This allegation is again factually correct. The Tribunal accepts Ms Smyth's reason for refusing to participate in a mediation with the Claimant. At that point, she had significant concerns about his performance which were impacting on her working relationship with the Claimant. She did not consider that these concerns would be adequately resolved through a mediation process. Her decision had nothing to do with the fact that C was disabled.

ix. Gillian Smyth failing to carry out a fidelity review at any point during the Claimant's employment

212. 'Fidelity' refers to the degree to which a service follows the standards for evidence-based practice. A fidelity scale is a tool to measure the level of implementation of evidence-based practice. A fidelity review is a service wide analysis, not an analysis of individual performance. Because it was not specific to any individual, there was no particular reason why such a general review should have been prompted by the Claimant's situation. In any event, any failure was not the result of the Claimant's disability. We do not accept that it would have been carried out had the Claimant not been disabled.

x. Failing to take account of ACAS guidance to consider his health during any disciplinary and/or grievance process, the Claimant states that this refers to his respiratory health following sick leave in March 2020.

213. The reason for the Claimant's absence in March 2020 was said to be pneumonia. Following his return to work from sick leave at the end of March 2020, the Claimant had apparently recovered, or so he communicated to the Respondent. His general presentation was that he was medically capable of performing the role. There was no diagnosis of Long Covid, despite the Claimant's use of this term in his written closing submissions. Indeed, at this early stage of the Covid-19 Pandemic Long

Covid had not been recognised. Given the Claimant's presentation to the Respondent that he had recovered, there was no particular need to take account of any health concerns or refer to ACAS Guidance. In any event, any failure was not because of the Claimant's disability.

b. A campaign of discrimination being constructed by his supervisor, Gillian Smyth demonstrated by:

i. On 18 November 2019, Gillian Smyth stating in an email (not sent to the Claimant) that "*intense assistance*" was required to train the Claimant

214. Ms Smyth identified the reason why she considered "intense assistance" was needed for the Claimant within the same sentence that she used this phrase. This is that he was completely new to this type of work and therefore would need greater training. She organised 10 weeks of training for the Claimant where normally the length of training would be 4 weeks. The Claimant repeatedly requested additional training and this further training was a benefit to him. It is not evidence of a campaign of discrimination.

ii. On 2 December 2019, Gillian Smyth stating in an email (not sent to the Claimant) that "*I have… concerns about Giles… we need to be more confident than I currently am about capabilities*"

215. This sentence was written in Ms Smyth's email to Mr Harper on the same date. She was expressing her genuine concerns about his ability to perform the role given her perception of his lack of basic IT skills. It was nothing to do with any disability, which Ms Smyth did not know existed at this point.

iii. On 3 March 2020, Gillian Smyth "snapping" to the Claimant: "*I can't hold your hand*", said to be overheard by Sue Buhler

216. We have found that both the Claimant and Ms Smyth probably raised their voices during this telephone conversation, and words were said by Ms Smyth to the effect that she could not hold his hand. However, we find that this turn of phrase did not have anything to do with the Claimant's disability. Rather, it reflected Ms Smyth's reasonable perception that the Claimant had already received substantial training as to how to do his role. In her view, he should by this point have been able to make decisions independently without constant support.

iv. On 20 April 2020, Gillian Smyth stating in an email (not sent to the Claimant) that "*I have asked him to focus on maximising his caseload*", during the peak of C19 lockdown

217. The Claimant was asked by Ms Smyth to focus on maximising caseload by increasing the number of participants who were being enrolled. This was done in

the context of the perceived difficulties faced by participants in obtaining employment at that point, given that the national lockdown had been imposed. The implication was that the Claimant would not be expected to carry out other significant aspects of his workload but instead should focus on enrolling new participants. This was a reasonable managerial decision in the circumstances and had nothing to do with the Claimant's disability.

v. On 20 April 2020, Gillian Smyth extended the Claimant's probation

218. This is factually correct. The rationale for doing so was discussed in email correspondence with Mr Harper. We accept that the Claimant's performance at this point was not perceived to have reached a level where the Claimant's probation period could be judged to have been passed. Mr Harper considered that the Claimant had not hit many outcomes but there was a need to show flexibility towards him because the impact of the national lockdown would inevitably have affected his performance. It was not because of the Claimant's disability.

vi. On 23 April 2020, Gillian Smyth in an email (not sent to the Claimant) that:

1. Stating "*I'm appalled with his email and behaviour*."
2. Referring to the Claimant as "*frankly very childish*" and "*he acts out like a child*"

219. These comments were made by Ms Smyth in two different emails, one on 22 April 2020 and one on 23 April 2020. She perceived that he was stubbornly refusing to follow her clear instructions. In characterising this behaviour as childish, she was referring to an aspect of her counselling training, namely Transactional Analysis. One of the three states recognised in the Ego States Model is that of a 'child'. She was associating the Claimant's behaviour as being consistent with him adopting a 'child' state, rather than that of an 'adult' or a 'parent'.

220. Ms Smyth did not know about the Claimant's disability and her comments were therefore not made because of that disability.

vii. On 24 April 2020, Gillian Smyth in an email (not sent to the Claimant):

1. **Referring to the Claimant as being a "*liability*"**
2. **Stating that "*the sooner we can let him go the better*"**
3. **Stating that a "*very high caliber*" candidate should replace the Claimant**
4. **Stating that "*Even the gentlest request can trigger him to act out*"**

5. Stating that "*since January I have given a lot of my time to him*"

221. These comments were made by Ms Smyth in this email. The reference to him as a liability reflected her perception of the Claimant's ongoing unwillingness to follow the IPS model, and the consequent risk to the Respondent's contract with the NHS. The reference to "the sooner we can let him go the better" was because he had reacted "so inappropriately" to polite requests for participants to be started. The reference to "a very high calibre of candidate" reflected her view that better candidates would be available if he was to be dismissed. The reference to "even the gentlest request can trigger him to act out" was made because of her perception that he was very unwilling to follow instructions and would verbalise why he was refusing. In the context of her perception that since January she had given a lot of her time to him, these comments were a reflection of the fact, as she herself said in the email, that she felt she had been pushed to the limit with his behaviour. They were not influenced by his disability.

viii. On 5 May 2020, Gillian Smyth stating to the Claimant "*oh yes, she's been institutionalised*" referring to a participant that the Claimant could not contact.

222. We have not been persuaded that this comment was made by Ms Smyth. As a result, this allegation fails on the facts.

ix. On 1 June 2020, Gillian Smyth, in an email (not sent to the Claimant) [418]:

1. Stating "*I think he is trying to stop the inevitable here…*"
2. Stating "*He won't get it regardless*…"

223. The Claimant had already been called to a probation review meeting by Ms Smyth because it was thought he had not met the required standards. By this point, Ms Smyth had decided that the Claimant's employment ought to be terminated. That was the mindset in which she regarded him as "trying to stop the inevitable here" by requesting further training; and why she felt that he would "not get it regardless". She felt that whatever further training he received, he was unable to accept the zero-exclusion principle.

224. We find that these comments were not influenced by his disability. There is no direct evidence linking these comments to his decision to open up about his mild anxiety disability in his grievance. Nor would it be reasonable to draw any inference that this comment had been influenced by these references in the grievance.

x. On 17 June 2020, Gillian Smyth, in an email (not sent to the Claimant) "*IF HE STARTS TO SHOUT etc.*" [512]

225. This allegation is factually correct. These comments were written in Ms Smyth's briefing note provided to Mr Giscombe for his use during the probation review meeting. It reflected her perception of how the Claimant may behave during the meeting when told his employment was about to be terminated. This perception was based on the state of their working relationship, and particularly the way the Claimant had responded to any criticism of his performance as shown by the heated exchange that had taken place on 3 March 2020. She felt intimidated by this behaviour.

226. Nothing in what was said that raises a prima facie case that Ms Smyth was influenced by the Claimant's disability. Ms Smyth did not know that the Claimant was disabled. In any event, even if the burden of proof passes to the Respondent, the Claimant's disability did not form any part of the reason for her reaction.

c. On 3 March 2020, Gillian Smyth "snapping" that to the Claimant "*I can't hold your hand*", said to be overheard by Sue Buhler

227. This allegation has already been dealt with above.

d. On 20 April 2020, Gillian Smyth extended the Claimant's probation

228. This allegation has already been dealt with above.

e. On 5 May 2020, Gillian Smyth stating to the Claimant "*oh yes, she's been institutionalised*" referring to a participant that the Claimant could not contact.

229. We have not found as a fact that this comment was made. Therefore, this allegation must fail.

(2) If yes, was that less favourable treatment than:

a. For issue B(1)(a)(ii) above [direct disability discrimination in 'setting the Claimant up to fail' in not giving the Claimant paperwork in relation to cases inherited by him from Kunle Bakare] compared to Kunle Bakare

230. We do not find that Mr Bakare was an actual comparator in relation to this allegation. He had a greater level of previous experience and a higher level of performance. There is no evidence that there were any concerns about the standard of Mr Bakare's performance.

b. For all other direct disability discrimination complaints, a hypothetical non-disabled comparator without the Claimant's mental health impairment?

i. The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether the Claimant was treated worse than someone else would have been treated.

231. In relation to all other allegations, the Claimant relies on a hypothetical comparator.

(3) If the Claimant was treated worse than the comparator, was it because of disability?

232. We do not consider that the Claimant has established facts from which an inference could be drawn, in the absence of a satisfactory non-discriminatory explanation, that at least part of the reason for the alleged treatment was because of the Claimant's disability.

233. In each case we accept the non-discriminatory explanations provided by the Respondent for the treatment we have found. Therefore, all of the direct disability discrimination complaints fail and will be dismissed. We do not consider that any part of the reason for the Claimant's treatment was because of his disability.

C. <u>Harassment on the Grounds of Disability (section 26 Equality Act 2010)</u>

(1) Did the Respondent do the following things:

a. On 18 November 2019, Gillian Smyth stating in an email (not sent to the Claimant) that "*intense assistance*" was required to train the Claimant

234. We have found that Ms Smyth did state this in the email.

b. On 2 December 2019, Gillian Smyth stating in an email (not sent to the Claimant) that "*I have… concerns about Giles… we need to be more confident than I currently am about capabilities*."

235. We have found that Ms Smyth did state this in the email.

c. Gillian Smyth on 3 March 2020 "snapping" that to the Claimant she "*I can't hold your hand*"

236. We have found that this comment was made by Ms Smyth and although voices were raised on both sides during the conversation, we do not accept the Claimant's characterisation that she "snapped" this comment at the Claimant.

d. On 20 April 2020, Gillian Smyth stating in an email (not sent to the Claimant) that "*I have asked him to focus on maximising his caseload*", during the peak of C19 lockdown

237. We have found that Ms Smyth did state this in the email.

e. On 20 April 2020, Gillian Smyth extended the Claimant's probation

238. We have found that this was done.

f. Gillian Smyth in emails on 23 April 2020 (not seen by the Claimant until after the termination of his employment)
- **i. describing the Claimant as:**
  1. ***"childish";* and**
  2. ***"acts out like a child"***
  3. **Stating "*I'm appalled with his email and behaviour*."**

239. We have found that Ms Smyth did make these comments in these emails.

g. On 24 April 2020, Gillian Smyth in an email (not sent to the Claimant):

- **i. Referring to the Claimant as being a "*liability*";**
- **ii. Stating that "*the sooner we can let him go the better*";**
- **iii. Stating that a "*very high caliber*" candidate should replace the Claimant;**
- **iv. Stating that "*Even the gentlest request can trigger him to act out*";**
- **v. Stating that "*since January I have given a lot of my time to him*"**

240. We have found that Ms Smyth did make these comments in this email.

h. On 5 May 2020, Gillian Smyth stating to the Claimant "*oh yes, shes been institutionalised*" referring to a participant that the Claimant could not contact.

241. We have not found that this comment was made. As a result, the allegation must be rejected.

i. On 1 June 2020, Gillian Smyth, in an email (not sent to the Claimant):
- **i. Stating "*I think he is trying to stop the inevitable here…*"**
- **ii. Stating "*He won't get it regardless…*"**

242. We have found that Ms Smyth did state this in the email.

j. On 17 June 2020, Gillian Smyth, in an email (not sent to the Claimant) "*IF HE STARTS TO SHOUT etc.*"

243. We have found that Ms Smyth did state this in the email.

> **k. On 3 June 2020 when speaking to a colleague about another person, Nicholas Giscombe said "*What more does she want?*". The Claimant alleges he thought this was disparaging and hurtful to his own feelings.**

244. We have not found that this comment was made and therefore this allegation must fail on the facts.

(2) If yes, was that unwanted conduct?

245. We accept that the Claimant did not want to be criticised by Ms Smyth, whether by email or in person. He did not want his probation period to be extended.

(3) Did it relate to disability?

246. We do not consider that any of the comments made by email related to his disability, or any known consequence of the Claimant's disability. As we have already concluded in relation to the direct discrimination allegations, Ms Smyth's comments related to concerns about the Claimant's inadequate performance. The comment made by Ms Smyth on 3 March 2020 was made in frustration because of her perception that the Claimant was not able to work independently given the extent of the training he had already received, in circumstances where the Claimant was becoming angry at being criticised. The comment in the briefing note of 17 June 2020 related to Ms Smyth's experience of line managing the Claimant in which he appeared unwilling to accept criticism and had become visibly annoyed during the exchange on 3 March 2020.

(4) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

247. All the alleged conduct accepted by the Tribunal (apart from the verbal comment made on 3 March 2020, and the decision to extend the probation period) was made in emails that were not sent to the Claimant. Therefore, the comments were not made with the purpose of violating his dignity or creating an intimidating, hostile, degrading or offensive environment for the Claimant.

248. In relation to the extension of the Claimant's probation period, this decision was taken as part of the ordinary probation procedure in circumstances where there a genuine perception that the Claimant's performance was not at the level expected at the end of the six-month probationary period. It was not taken with the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant – which we refer to hereafter as 'the proscribed environment'.

249. In relation to the "hold your hand" comment made verbally on 3 March 2020, this comment was made in order to encourage him to take responsibility and work independently. It was not taken with the purpose of violating the Claimant's dignity or creating the proscribed environment.

(5) If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

250. Comments made by Ms Smyth in emails not sent to the Claimant and therefore not seen by the Claimant cannot have had the effect of violating her dignity or creating the proscribed environment.

251. In relation to the extension of the Claimant's probation period, we find that this decision upset the Claimant. However, a reasonable person in the Claimant's position would have accepted that the probation period needed to be extended where there remained significant performance concerns about the employee's ability to fulfil the main aspects of the role after around six months' employment. Therefore, the decision to extend probation did not have the effect of violating the Claimant's dignity or creating a proscribed environment.

252. So far as the "hold your hand" comment, this was a robust remark made by Ms Smyth in the context of a heated discussion about the Claimant's performance. It does not cross the threshold so as to amount to a comment which would have violated the Claimant's dignity or created a proscribed environment. Given the context of the conversation, and the extent of the training and support which had preceded it, the Claimant ought to have appreciated that no offence was intended.

253. Therefore, the Claimant's complaints of harassment contrary to Section 26 Equality Act 2010 fail and will be dismissed.

D. <u>Discrimination arising from disability (section 15 Equality Act 2010)</u>

(1) Did the Respondent treat the Claimant unfavourably in any of the following ways:

a. Dismissing him
b. Mis-categorising his performance by:

i. On 19 May 2020, Gillian Smyth wrongly accusing the Claimant of not updating daily MPS meeting notes and correspondence
ii. In the appeal outcome letter, stating that daily and weekly tasks had not been completed.
c. Gillian Smyth falsely accusing the Claimant of shouting at her on 3 March 2020

254. So far as (a) is concerned, the Claimant was dismissed. This was evidently unfavourable treatment.

255. So far as (b)(i) is concerned, we agree that Ms Smyth accused the Claimant on 19 May 2020 of not updating daily MPS meeting notes and correspondence. She did so because, as several contemporaneous records noted, the Claimant had repeated failed to do this task promptly over several weeks – even though some other records suggest that on other occasions he had managed to complete this requirement. As a result, her accusation was not a false one, nor was she mischaracterising the Claimant's performance. If, as we find, the Respondent did not mischaracterise the Claimant's performance, this was not unfavourable treatment.

256. In relation to (b)(ii), Mr Harper did state in the appeal outcome letter that daily and weekly tasks had not been completed. This was his considered assessment having reviewed the evidence before reaching his conclusions in relation to the Claimant's appeal. Given our findings of fact as set out above, we do not consider that Mr Harper was mischaracterising the Claimant's performance. Again, this was not therefore unfavourable treatment.

257. As to (c) we have that both the Claimant and Ms Smyth raised their voices during the exchange that took place on 3 March 2020. We have found that Ms Smyth probably did accuse the Claimant of shouting at her. This was because the Claimant had raised his voice when speaking to her. As a result, this was not a false accusation, but a fair comment given how the Claimant had been behaving. In circumstances where it was a fair comment, we do not find that it was unfavourable treatment.

258. Therefore, the only aspect of the Section 15 complaint for which a remedy can be sought is the Respondent's decision to dismiss the Claimant.

(2) The Claimant contends that the "something" arising in consequence of his disability was a perception of his colleagues that he was weak and not capable, the 'weak link'.

259. The Claimant has not shown that the consequences of his mental health issues impacted on his performance in his role or was responsible for the way he responded to criticisms about his performance. Nor, in circumstances where the Respondent did not know nor ought to have known that he was disabled, has he shown that there was a perception amongst colleagues that he was weak and not capable, the weak link, which had arisen because of symptoms he was experiencing from his disability, even if the fact that he was disabled was not known by the Respondent. As a result, the Tribunal rejects the Claimant's contention as to the alleged "something arising" from his disability.

(3) Did that thing arise in consequence of the Claimant's disability?

260. This has been addressed in relation to the previous issue.

(4) Did the Respondent treat the Claimant unfavourably as alleged because of the something arising in consequence of his disability?

261. This does not arise for decision, given our previous conclusions. However, his dismissal was not the result of any symptoms flowing from depression and anxiety – rather it was the consequence of three factors. Firstly, Ms Walton, the Respondent's primary NHS contact, was refusing to let the Claimant work with those NHS patients on whom the service was focused. Secondly, he was dismissed because of the Respondent's view that the Claimant was guilty of misconduct in soliciting the testimonials, including talking to participants about his own lived experiences and his perception he had been bullied by Ms Smyth, as well as and circulating these testimonials without the necessary consent. Thirdly, his dismissal was the result of the Respondent's perception that he was continuing to underperform and was refusing to follow reasonable management instructions regarding the zero-exclusion principle.

(5) Was the treatment a proportionate means of achieving a legitimate aim? The Respondent will say that its aims were the effective management of the organisation (including during a pandemic).

(6) The Tribunal will decide in particular:

a. **Was the treatment an appropriate and reasonably necessary way to achieve those aims?**
b. **Could something less discriminatory have been done instead?**
c. **How should the needs of the Claimant and the Respondent be balanced?**
d. **Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date? No – sought to downplay symptoms.**

262. Given our previous conclusions, this issue does not need to be decided. In any event, we find that the dismissal decision was a proportionate means of achieving a legitimate aim. Balancing the assumed discriminatory impact of the dismissal on the Claimant against the needs of the organisation, we find that the needs of the organisation are significantly weightier. For each of the three cumulative reasons why we have found he was dismissed, the Claimant had shown he was manifestly unsuitable for the role. Given that Ms Walton was refusing to allow the Claimant to work with NHS clients, there was effectively no longer a role for him to perform.

263. The Claimant's complaints of discrimination arising from disability therefore fail and will be dismissed.

E. Failure to Make Reasonable Adjustments (sections 20 and 21 Equality Act 2010)

(1) Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? From what date?

264. For the reasons already given above, the Respondent did not know, nor could it reasonably have been expected to know that the Claimant had the disability. For this reason, the claim for failure to make reasonable adjustments must fail, and therefore be dismissed.

265. In case we are wrong, we go on to consider the other requirements of a claim for failure to make reasonable adjustments.

(2) A "PCP" is a provision, criterion or practice. Did the Respondent have any of the following PCPs and if so, did it apply those PCPs to the Claimant?

a. A uniform probation management process (which the Claimant states was applied to Gemma Brewer also).

266. Yes. The evidence was that the probation management process that the Respondent applied to the Claimant was the same probation management process that applied to other employees.

b. A practice of issuing only cursory and incomplete instructions

267. There is no evidence that cursory and incomplete instructions were issued to the Claimant or that there was any material difference in the instructions issued to him in comparison to others.

c. A practice of only giving the Claimant supervisions once per month

268. Yes, it was Ms Smyth's standard practice to meet with all of those she managed once a month for an individual supervision meeting on a formal basis. This standard practice applied to the Claimant, albeit that Ms Smyth had several other interactions with the Claimant throughout each month as we have found in our findings of fact.

d. A practice of only visiting the Claimant in the centre where he worked once per month

269. Yes - it was Ms Smyth's practice to make a visit to the centre where the Claimant worked once a month. After the imposition of the national lockdown as a result of the Covid-19 pandemic, employees such as the Claimant worked from home and Ms Smyth would not have visited the Homerton centre as regularly.

e. A practice of only providing 2-3 hours of face-to-face participant observation training per week during the month of December 2019 to the Claimant before he was expected to work solo

270. This was not a general practice applicable to all those in the Claimant's position. Rather it reflects the observation training actually given to the Claimant in December 2019 based on the specific staffing context at the time. Ms Smyth's plan was that he was to do more shadowing than he did during December 2019 [169-170]. This plan was derailed during the week commencing 16 December 2019 in that he could not shadow Kunle Bakare because Mr Bakare was ill. In addition, we accept the Claimant's evidence as set out in his witness statement, that when he had been asked to shadow others, often participants refused to attend scheduled meetings. This limited his opportunities to see others at work.

271. We do not find that there was a general practice of only providing 2-3 hours of face-to-face participant observation training each week during the month of December 2019. This alleged PCP therefore fails.

f. A practice of terminating probationers' employment without putting any Improvement Plan in place.

272. We accept that this was the Respondent's practice. It reflects what is standard practice in most organisations where there is an initial probation period.

(3) Did any PCP that was applied put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he asserts the following substantial disadvantages:

a. That he needed more help and patience than someone without his disability

273. There is no evidence of this. Therefore, we do not find that he needed more help and patience than someone without his disability in complying with any of the proven PCPs.

b. That he had an increased tendency to distractibility, irritability and anxiety

274. He asserts this, but the only medical evidence provided is that from his GP. That evidence suggests he seems to be coping with all aspects of his employment without needing particular extra medical treatment or help [513]. There is no particular evidence that any of the alleged PCPs increased his tendency to distractibility, irritability or anxiety.

c. An undermining of his trust in the Respondent

275. The Claimant has not established that any of the proven PCPs undermined his trust in the Respondent given the nature of his disability.

d. An increased likelihood of failure in his job.

276. The Claimant has not established that any of the proven PCPs increased the likelihood that he would fail in his job, given his disability.

(4) Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage?

277. No – the Claimant insisted he did not need any reasonable adjustments at interview and presented himself to the Respondent throughout his employment as someone who was well enough to cope with all aspects of the role. There were no sufficient signs he was likely to be disadvantaged by any of the PCPs that ought to have triggered further investigations by the Respondent. Therefore, even if the Claimant was in fact placed at a disadvantage, the Respondent did not know, and could not

reasonably have been expected to know that the Claimant was likely to have been placed at this disadvantage.

(5) What steps could have been taken to avoid the disadvantage? The Claimant contends that it would have been reasonable to make the following adjustments:

a. His instructions should have been modified, and more detailed so as to spell out with clarity what he was to do, and how he was to do it.

278. Insofar as particular instructions have been drawn to the Tribunal's attention, he was given sufficiently clear instructions. This is particularly evident in the email of 24 April 2020 listing his daily, weekly and monthly duties, which he seemed grateful to receive. Ms Smyth provided screenshots to guide him through use of unfamiliar technology and offered to share her screen with him [358]

b. He should have had more frequent supervision.

279. There was no need for even more frequent supervision given the significantly higher levels of support he was receiving compared to other new starters. The Tribunal refers again to the two pages of training log detailing the extent of the training actually provided, as well as the extended 10-week induction process.

c. He should have been visited often in the centre where he worked.

280. Up until lockdown, the Claimant was visited once a month by Ms Smyth to carry out an observation of his work. That was reasonable, given all the other support and interaction with which he was provided; and given the number of Ms Smyth's other direct reports and the extent of her other duties. Visiting the Claimant was not possible once the national lockdown had been imposed until restrictions had been lifted.

d. He should have had extra training, because:

i. Sertraline made him dozy.
ii. He needed knowledge reinforcement techniques.
iii. It was wrong to limit explanations of what he was to do to 3 times.
iv. He should have been given training in depth.

281. The Claimant has not identified particular respects which were integral to his role in which he was not trained or not trained sufficiently. We find he was given detailed training in how to perform his role, which went well above and beyond the training normally given to people starting his role. He has not established that his mental health required further training over and above the standard training or that this was raised with the Respondent.

e. An improvement plan to assist the Claimant to deal with any performance issues, which would, he says, have been caused by his claimed mental health impairment, ought to have been put in place on 19 May 2020.

282. We do not find that an improvement plan was required for the Claimant as employee still in his probation period in circumstances where there were significant performance concerns. This is because the essence of probation is that performance ought to be improving week by week and is already regularly reviewed to check this is happening.

283. A performance improvement plan assumes hierarchy of warnings over a period of weeks or months in circumstances where there is underperformance. This is not necessary or appropriate for employees on probation and would not have been a reasonable adjustment in the Claimant's case.

(6) Was it reasonable for the Respondent to have to take those steps?

284. This has been dealt with in the preceding section. It was not reasonable to have taken those steps.

(7) When ought those steps to have been taken?

a. The Claimant states that the adjustments at paragraphs a. to d. inclusive (above) should have been in place from the start of his employment, which commenced on 18 November 2019

b. The Claimant states that adjustment at paragraph 22.e. (above) should have been in place from 19 May 2020.

285. This issue does not arise, given our other conclusions.

(8) Did the Respondent fail to take those steps?

286. This issue does not arise, given our other conclusions.

F. <u>Victimisation (section 27 Equality Act 2010)</u>

(1) Did the Claimant do a protected act on 28 May 2020 by submitting a 'potential grievance' and discussing this with Karen Hagarty and Sharon Barton on this date?

287. The Claimant's grievance was submitted on 20 May 2020, not 28 May 2020. It listed seven numbered points. Under issue 1, he alleged that there had been a lack of patience when training him "a person diagnosed by his GP as suffering with mild anxiety ie a mental disability". Under issue 7 he alleged that a comment allegedly made on 9 March was direct discrimination. He also threatened to bring employment tribunal proceedings, by ending "I obviously don't want to return to an Employment Tribunal again this year … but I will return to court if I believe I am being unfairly treated/bullied because of my invisible disability". In these respects, the grievance amounted to a protected act.

(2) Did the Respondent do the following:

a. Performance management the Claimant following 28 May 2020:

i. Gillian Smyth failing to implement a Performance Improvement Plan, instead of dismissing the Claimant

b. Dismiss the Claimant. The Respondent accepts that the Claimant was dismissed on 18 July 2020.

288. The Respondent never implemented a formal performance improvement plan, nor did it take any other formal step to performance manage the Claimant. His performance had inevitably and entirely properly been managed on an informal basis by Ms Smyth throughout his employment. There is no evidence that this informal performance management became more intense after the Claimant had lodged his grievance. In terms of the chronological sequence of events, it was the decision to invite the Claimant to a probation review meeting of which he had been informed on 19 May 2020, that had immediately preceded his grievance, lodged the next day.

289. The significant event that took place shortly after the Claimant's grievance was withdrawn was his dismissal.

(3) By doing so, did it subject the Claimant to detriment?

290. The decision to dismiss the Claimant did subject him to a detriment.

(4) If so, was it because the Claimant did the protected act?

291. We find that no part of the dismissal decision was taken because the Claimant had alleged discrimination. He was dismissed for the three reasons already stated. The Respondent took his grievance seriously and was prepared to address the concerns raised by the Claimant on their merits. It was the Claimant that chose to withdraw the grievance.

G. Time Limits (section 123 Equality Act 2010)

(1) Did any of breach of the Equality Act 2010 found proved occur before 3rd May 2020, i.e. more than 3 months before the Claimant contacted ACAS to commence Early Conciliation on 2nd August 2020?

292. The Claimant's discrimination allegations span the period from shortly after the start of the Claimant's employment to the Claimant's dismissal and the conduct of the Claimant's subsequent appeal. Several of those allegations occurred before 3 May 2020 and therefore at a point in time where they are potentially outside the statutory time limit. However, we have found that none of the Claimant's allegations amount in law to acts of discrimination or victimisation.

(2) Was any breach of the Equality Act 2010 an individual one-off act of discrimination, or did any act form a continuing course of conduct with any breach of the Equality Act 2010 that occurred on or after 3rd May 2020?

293. We have not found any acts of discrimination and therefore this issue does not arise for determination.

(3) If any breach of the Equality Act 2010 was an individual one-off act that occurred before 3rd May 2020 and so was on the face of it, out of time, is it just and equitable to extend time to hear the Claimant's complaint?

294. Had we found that any of the Claimant's allegation of discrimination had been proven, we would have been minded to extend the statutory time limit on the basis that it was just and equitable to do so. This is because of the impact of the lockdown from March 2020 onwards on the Claimant's ability to consider instigating Tribunal proceedings and because of the Claimant's mental health issues which the Respondent concedes was of a level of severity which amounts to a disability. We also note that the earliest act of alleged discrimination relates to the same probationary process which concluded with the Claimant's dismissal within the statutory time limit for issuing proceedings.

CONCLUSION

295. For the reasons we have given, all of the Claimant's discrimination allegations are without merit and must be dismissed.

Employment Judge Gardiner
Dated: 7 September 2022