EMPLOYMENT TRIBUNALS

Claimant: Mr A Parkin

Respondent: Driver and Vehicle Standards Agency (DVSA)

Heard at: Manchester **On:** 30 and 31 May, 1-2 June 2023. In chambers 2 June (p.m). and 3 July 2023.

Before: Employment Judge McDonald
Mr J King
Mr N Williams

REPRESENTATION:

Claimant: In person
Respondent: Mr T Kirk (Counsel)

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant's claim that the respondent directly discriminated against him because of disability in breach of section 13 of the Equality Act 2010 fails and is dismissed.

2. The claimant's claim that the respondent submitted him to disability-related harassment in breach of section 26 of the Equality Act 2010 fails and is dismissed.

3. The claimant's claim that the respondent subjected him to unfavourable treatment amounting to victimisation in breach of section 27 of the Equality Act 2010 fails and is dismissed.

4. The claimant's claim of reasonable adjustment is dismissed on withdrawal.

REASONS

Introduction

1. By a claim form dated 20 April 2020 the claimant brought claims of disability discrimination and victimisation under the Equality Act 2010. On 2 September 2021 Employment Judge Doyle allowed amendments to the claim.

2. At the start of the hearing, we dealt with various preliminary matters described below. Having dealt with the preliminary issues the Tribunal then retired to read the witness statements and the documents in the case.

3. We heard evidence over the first 3 days of the hearing. We heard submissions from the parties on 2 June. We reserved our decision. We deliberated in chambers on the afternoon of the 2 June and on 3 July 2023.

The Issues

4. A List of Issues had been drafted and sent to the Tribunal on 21 December 2021. At the start of the hearing the Tribunal spent some time clarifying the issues with the parties. In particular, we clarified the following:

(1) The claim of a failure to make reasonable adjustments (paragraphs 8-12) in the List of Issues dated 21 December 2021 did not appear to the Tribunal to be very clearly a claim of a failure to make reasonable adjustments. The claimant confirmed that his complaint was that he was treated less favourably than others because of his disability by the respondent refusing to act on his complaint of bullying. Mr Kirk confirmed that the respondent did not object to an amendment by way of relabelling that claim. It was added therefore as a further complaint of direct disability discrimination. For the avoidance of doubt we have dismissed the reasonable adjustment claim in our judgment.

(2) Complaint 5(c) was of direct disability discrimination in relation to the "first written warning" which the List of Issues said was received on 23 January 2020. There were in fact two warnings. The first written warning was dated 25 April 2019, whereas the final written warning was the one dated 23 January 2020. The claimant confirmed that his complaint was about the first written warning in April 2019. He accepted that the warning on 23 January 2020 should have been given. His claim, however, was that had he not wrongly been given the previous first written warning, that warning in January 2020 would have been a first written warning rather than a final written warning. He was not saying that being given a final written warning was an act of disability discrimination. He was saying that being given the written warning on 25 April 2019 was.

(3) We took some time with the claimant to clarify whether he was saying that the issuing of the first written warning on 25 April 2019 was an act of direct disability discrimination or of a failure to make a reasonable adjustment. It was explained to the claimant that the Tribunal needed to understand

whether he was saying that the respondent had treated him less favourably by issuing him with a first written warning because of his disability, or whether he was saying that the respondent had failed to make a reasonable adjustment by failing to take into account his disability when deciding whether and what disciplinary sanction to impose. We gave the claimant an opportunity to discuss the matter with his wife in a break. On his return he confirmed that the claim relating to the warning on 25 April 2019 was a claim of direct disability discrimination.

Preliminary Matters

Disability and reasonable adjustments

5. During the preliminary hearing discussions Mr Kirk confirmed that the respondent accepted that the claimant was a disabled person by reason of dyslexia at the relevant time. It did not accept that it had knowledge of the claimant being disabled at the relevant time.

6. We discussed with the claimant what reasonable adjustments the Tribunal might need to make to its process to take into account his dyslexia. We identified the need to give the claimant extra time when reading documents and the claimant also explained that at times he needs more time to process matters. We started the hearing later on 2 June to allow the claimant more time to prepare his submissions.

7. For the respondent, one of its witnesses (Mr Clarke) has medical conditions. Mr Kirk explained that it might be that he needed more regular breaks but the main issue for Mr Clarke was if he was required to stand for a long period of time. He was not required to do so in giving his evidence or in attending the Tribunal.

The Tribunal Bundle and audio recordings

8. There was a final hearing bundle. The version the Tribunal originally had amounted to 429 pages. Mr Kirk confirmed that there were some additional documents which had been sent to the Tribunal. Those were located and added to the bundle with no objection before the Tribunal started reading the witness statements and documents. With the addition of those documents, the bundle was 463 pages.

9. References in these Reasons to page numbers are to page numbers in that bundle.

10. At page 421 there were quotes transcribed by the claimant from two meetings with Mr Clarke. The first meeting was on 25 June 2019 and the second on 8 August 2019. The claimant confirmed that he had recordings of those meetings on his phone. Mr Kirk applied for disclosure of those recordings. He submitted that it was important for the Tribunal to have those quotes put into the context of the meetings as a whole. We agreed it was important for us to have the transcript of the whole meeting. The parties worked together to provide transcripts which we received at lunchtime on day two of the hearing. We had an opportunity to read the transcripts before the cross examination of the claimant by Mr Kirk restarted on the afternoon of day two. The claimant confirmed that he was happy with the transcripts subject to a few minor errors.

Mr Kirk was able to cross examine the claimant on the contents of the transcripts at the start of the afternoon on day two. During submissions, the claimant said that the tone of voice used at the meetings was relevant and that we should listen to the recordings of the meetings. We did so in chambers during our deliberations.

Witnesses

11. We had written statements for three witnesses for the respondent, being Mr David Clarke ("Mr Clarke"); Mr Mark Pearson-Leach ("Mr Pearson-Leach") and Mr Edward Longman ("Mr Longman"). Mr Kirk confirmed that Louise Sanders (referred to in allegation 5(d)) was not being called as a witness as she was no longer at the respondent. The respondent was not in a position to call Kevin Rigby (referred to in paragraph 6 of the List of Issues) to give evidence in relation to the comparator named by the claimant, Angela Tarr, because Mr Rigby had retired and there are no documents relating to the incident relied on as comparable to the claimant's treatment. That claim would have to be decided, therefore, based on the hypothetical comparator approach.

Findings of Fact

Background

12. The claimant had been employed by the respondent since 6 October 2016. He remained employed by it at the time of the Tribunal hearing. At all relevant times he was employed as a Driving Examiner. His main function was to take driving candidates on driving tests to assess whether they should pass or fail.

13. For the majority of the time to which the case relates the claimant's manager was Mr Clarke. The claimant had previously been managed by Julia Ford, Mr Longman and Mr Pearson-Leach. Mr Pearson-Leach is also involved in these proceedings because he was the person to whom the claimant raised a grievance on 18 November 2019 and the person who the claimant asked to review his first written warning on 1 November 2019. He also dealt with the claimant's discipline meeting in January 2020.

Knowledge of the claimant's disability

14. The claimant's case is that both Mr Longman and Mr Pearson-Leach were aware of his dyslexia when they managed him. Their evidence was that they were not aware of it up to the point where they were asked about this by Mr Clarke during the factfinding he carried out before the meeting on 8 August 2019. We find that both managers were aware that adjustments had been made to enable the claimant to type up his driving test reports and that was because he was known to have difficulties with writing them up. We find that Mr Clarke was not aware of that or the claimant's dyslexia until the June 2019 meeting.

Incidents leading up to the first written warning

15. On 8 March 2019 the claimant accepts that he took out the wrong test candidate. That is clearly a matter with potentially serious consequences. If the wrong candidate is taken out and the driving licence issued in the name of the candidate who should have been taken out then a driving licence might be issued to someone who

has not actually passed the driving test. On the particular day in question the claimant and another examiner, Paul Howbrook ended up taking out the wrong test candidates having effectively "swapped" candidates.

16. If this does occur, then there is a process which examiners are required to follow to set it right. This involves completion of a specified form which then has to be authorised by a manager. The claimant accepts that although the relevant form was completed he did not get authorisation from Mr Clarke or the covering manager. He says that is because Mr Clarke was on leave on Friday 8 March 2019 and he could not contact the covering manager. The claimant intended to contact Mr Clarke to obtain authorisation on the following Monday (11 March 2019) but accepts that he forgot to do so.

17. On 25 April 2019 the claimant was issued with a first written warning for the incident on 8 March 2019. Paul Howbrook was also issued with a first written warning. The claimant accepted that so far as he was aware Mr Howbrook did not have a disability.

18. Mr Howbrook was not issued with his written warning until November 2019. We accept Mr Clarke's evidence that that was because, unlike Mr Howbrook, the claimant opted for the "Fast Track" process whereby he accepted the sanction without the need to go through a full disciplinary process. Mr Howbrook had initially agreed to the fast track process but then changed his mind so his warning was issued after a full investigation and disciplinary process. We find that accounts for the difference in when the first warning were issued.

19. The claimant's own evidence was when the incident occurred he had not made the connection between his dyslexia and the failure to spot that he had the wrong candidate. He said that a possible connection only became clear when he discussed the matter with ACAS later around June 2019.

20. The claimant when cross examining the respondent's witnesses asserted for the first time that he knew of others who had done the same as he had, i.e. taken out the wrong candidates, but that they had not been disciplined. He did not assert that in his witness statement or give evidence about that. The response to the claimant's FOI request about this did not assist because it could not disclose what action had or had not been taken against the examiners involved in the 4 such incidents in the 3 year period ending on 1 September 2021 (p.416-419). It could only confirm that all were subject to "appropriate action". We accept Mr Kirk's submission that the claimant's claim that the FOI response supported his assertion that not all examiners had been disciplined was speculative at best. We find there was no evidence to support a finding that other examiners had not been disciplined for taking out the wrong candidate. The warning issued to Mr Howbrook suggested the opposite was true.

<u>Issues between the claimant and Roger Taylor</u>

21. In the background to the claimant's case are his allegations that he was being bullied by another examiner at the Hyde Test Centre, Roger Taylor. That bullying is not directly part of the claimant's case, although the respondent's failure to deal with it is. It led to a formal investigation by the respondent following an incident on 4 September 2019. We deal with that below. The claimant's case is that he told his

manager (i.e. Mr Clarke) about Mr Taylor's behaviour on several occasions in their discussions and in his review meeting in April 2019. The claimant's case (as set out in his grievance in November 2019) was that he had on 2 occasion advised Mr Clarke that he wanted to make a complaint against Mr Taylor because of his behaviour and that Mr Clarke told him to put this in writing.

22. The claimant's initial evidence was that he had done so and that Mr Clarke's response to that was to refuse to take the matter any further, offering no explanation for this or support. The claimant's evidence about whether he did put his complaints in writing to Mr Clarke was inconsistent, however. In answer to a question from the Employment Judge the claimant said that he had done so around May and June 2019. The Tribunal questioned why those documents were not in the bundle. The claimant said that he did not have access to them because he no longer had access to his email account with the respondent. Mr Kirk confirmed that he had raised this issue with his instructing solicitors prior to the hearing and been told that there were no such documents. Mr Clarke in his evidence disputed ever having received anything in writing from the claimant by way of complaint. When the Tribunal Judge asked the claimant for more information about the written complaints, the claimant appeared to change his evidence and said he was not sure that he had ever put the complaints in writing.

23. Although there is reference to a meeting in April 2019 in the claimant's grievance, the claimant in evidence said that that was probably a mistake and that it should have referred to his raising the issue of bullying in his quarterly conversation on 19 June 2019 (page 94). That does record that "I have voiced my concerns about office bullying". The claimant confirmed that he filled that box in. There is no separate box for action to be taken and no suggestion that there was an action point for Mr Clarke from that meeting.

24. On this matter we prefer Mr Clarke's evidence. We find that the claimant did raise with him the issue of Mr Senior and Mr Taylor swearing at him. We find that the respondent's grievance policy required matters to be resolved informally as a first step if possible. We find Mr Clarke gave the claimant 2 options – to raise a formal grievance or for Mr Clarke to seek to resolve matters informally by having a word with the perpetrators. We find the claimant was happy for Mr Clarke to take that second approach and that that is what Mr Clarke did. The claimant accepted Mr Clarke "had a word". Matters with Mr Senior improved to the extent that Mr Senior was the claimant's companion at a subsequent investigation meeting in November 2019.

25. The claimant was clearly familiar with the grievance procedure having raised one in relation to this probation. He could (and indeed in November 2019 did) pursue a formal grievance if Mr Clarke had indeed failed to progress his complaint. There was no evidence that he raised any grievance about these matters in writing before November 2019. We find he did not do so until then.

<u>Second wrong candidate incident and the meeting with Mr Clarke on 25 June 2019</u>

26. On Friday 21 June 2019 the claimant again took out the wrong candidate for a test. He was clearly concerned that because he was already on a first written warning that this might have serious repercussions for his job. On Monday 24 June 2019 he sent an email to Mr Clarke. In that email he said that he had "mentioned to yourself

and previous managers that I struggle with dyslexia". He raised (he accepted for the first time) the possibility that the dyslexia might have in some way contributed to the errors that he had made. He asked if there was any support available or any reasonable adjustments that could be made in work to help with his dyslexia. He said that he was aware that workplace assessments can be requested to help identify relevant support for individuals with dyslexia and wondered if that could be requested in this case (p.97).

27. Mr Clarke spoke to Mr Pearson-Leach and Mr Longman to check what they knew about the claimant's dyslexia and arranged for another examiner to take the tests the claimant was due to do.

28. Mr Clarke met with the claimant on 25 June 2019. We find that his main concern was the health and safety implications for the respondent if the claimant was now saying that his dyslexia meant the issue of taking out the wrong candidate could happen again.

29. We do find that Mr Clarke voiced some scepticism about whether the incidents were linked to the claimant's dyslexia. He pointed out both incidents had happened at the end of a Friday afternoon with the claimant "rushing" to get away" and wondered whether that was the cause of the error, i.e. rushing rather than anything to do with dyslexia. He was also sceptical because the claimant had carried out around 4000 tests without any such incidents which suggested that the recent errors were not linked to the claimant's dyslexia. The claimant himself was at a loss to explain how the error had happened twice in relatively short succession. He was by no means certain in his own mind that dyslexia was the cause.

30. We find that Mr Clarke was trying to establish the magnitude of risk of the same error happening again by exploring whether there could be other causes of what had happened than the claimant's dyslexia. We do find that he told the claimant that if he could not be certain that the same error would not happen again that was a health and safety risk and that he would have to consider pulling the claimant off driving tests. We find that he did go on to say that if the claimant could not carry out driving tests that was an issue because that was his job. We do not find that was done in a threatening or antagonistic way. There were no raised voices. Instead, Mr Clarke was spelling out the ramifications of the situation for the claimant.

31. It was agreed that to minimise the risk of mistakes there would be an adjustment implemented of the claimant going down to the waiting room last so that his candidate was the only one left. The claimant at the time said that was a good idea. At the hearing he suggested that it was not because it reduced the time he had to carry out and write up his tests. That was not something he raised with Mr Clarke at the meeting.

32. We accept Mr Clarke's evidence that he would have raised the same concerns about the safety and suitability of a driving examiner continuing to take candidates out if there were concerns about their ability to do so safely for non-disability reasons. He gave the example of a case where that had happened, namely where an examiner who had simply not been sufficiently trained to ensure that they could take out candidates safely was taken off tests.

<u>The Occupational Health Referral and the Access to Work application</u>

33. It had also been agreed Mr Clarke would make an Occupational Health Referral which he did on 27 June 2019. In the referral form he refers to the claimant's "dyslexia (not diagnosed)". The referral set out the circumstances of his taking out the wrong candidates. It recorded that the claimant "previously told two managers he suffered dyslexia but only required an adjustment of typing out his test reports and nothing else". The referral said that the claimant had carried out 4,000 driving tests to date and had twice had incidents of staff telling him he had the wrong candidate before he had taken them out in the car and had twice actually taken out the wrong candidate. Although the referral did ask whether the claimant had a disability covered by the Equality Act 2010, and whether there were any reasonable adjustments it was recommended the respondent make, it focussed on whether dyslexia could be the cause of the claimant's taking out the wrong candidate if that had happened in only 4 occasions out of approximately 4,000 tests. The referral also questioned why the claimant had never pursued getting a diagnosis, merely saying he was dyslexic of his own accord.

34. The OH Report was provided by Dr Coolican, an accredited specialist occupational physician. The original report was dated 16 July 2019 but was amended on 24 July 2019 to correct the wrong name on it (pages 111-113). The report was based on an assessment carried out at Dr Coolican's clinic in person on 10 July 2019.

35. Dr Coolican reported that the claimant had been told by his school when around 15 that he likely had underlying dyslexia. He recorded the claimant as reporting difficulty with spelling and reading and that he can be distracted by loud noises. An on-line test the claimant had carried out on the Dyslexia Association website suggested there was a was a strong possibility he had moderate to severe dyslexia. Dr Coolican recorded the claimant as saying he felt unsupported at work which was adding to his stress.

36. Based on his assessment, Dr Coolican advised that the claimant might well have an underlying dyslexia condition. He recommended that ideally the claimant's condition needed to be fully diagnosed so the severity of his condition could be ascertained and specific details of how his condition affects him could be identified. That assessment would enable the identification of appropriate adjustments and modifications to be tailored to the claimant's abilities. The assessment would need to be done through a trained professional (which Dr Coolican was not) and could be accessed through the Dyslexia Association.

37. Dr Coolican advised the claimant remained fit for his role as a driving examiner. However, he would need consideration of adjustments or modifications in place to support him at work. In general terms that meant more time to process and assimilate written information which might apply to any new written training he undertook. He would need the scope to use a spell checker when carrying out typing or written based work. Dr Coolican advised that other adjustments and modifications would become apparent on receipt of the diagnostic dyslexia assessment report.

38. When it came to the claimant identifying candidates through reading and written measures Dr Coolican advised that additional quality controls would be needed. Dr Coolican agreed that they might involve (as had already been suggested) the claimant being the last examiner to take out the last candidate, or other measures such as other examiners double checking the correct candidate had been picked.

39. When it came to the question of whether dyslexia had caused the claimant to take out the wrong candidate, Dr Coolican's conclusion was that: "if dyslexia is indeed to be confirmed to be present (which it appears likely is) then this could be responsible for taking out the wrong candidates secondary to the reading impairments involved."

40. At the same time as the Occupational Health referral, the claimant was seeking to progress an Access to Work ("AtW") workplace assessment to identify what support the claimant could be given in work. At that point the claimant was in contact with Joe Wildash of the DVSA's "Expert Services" team. AtW had contacted Mr Wildash on 19 July having been given his details by the claimant. That contact indicated (page 118) that as a large employer there would be a mandatory cost share requirement in the event that support was awarded. The cost share for large employers like the respondent was £1,000 plus 20% of the balance. Agreement in principle was sought for that.

41. On 22 July 2019 the claimant confirmed that he was ok with delaying the AtW application until the Occupational Health report had been received. On 23 July 2019 Mr Wildash confirmed to AtW that the claimant had agreed to put a slight delay on the assessment pending the receipt of the Occupational Health report.

42. On 30 July 2019 we find that Louise Sanders (from the respondent's HR team) contacted and had a conversation with the Occupational Health provider. As a result of that conversation the Occupational Health provider emailed Ms Sanders on 31 July 2019 with further advice (p.119). That advice (quoted in the email from the adviser) came not from Dr Coolican but from a Dr Simpson. The claimant had not spoken to or been seen by Dr Simpson.

43. There was no record of the conversation between Ms Sanders and the Occupational Health provider. However, based on Dr Simpson's response, we find that the query Ms Sanders raised was in relation to the specific question in the Occupational Health referral about whether the dyslexia was likely to have caused the claimant's 4 errors in 4,000 tests. Dr Simpson's advice was that was that if the 4 occasions were related to a "putative diagnosis of dyslexia" it was "almost certain" that such traits would have manifested themselves at a much earlier stage in the claimant's role at the DVSA. Noting that he had carried out 4,000 tests, Dr Simpson said that "it would be unlikely that [the four incidents] would only manifest themselves at certain times of day and certain times of the week". Dr Simpson noted that Dr Coolican had referred to there being no other underlying medical conditions identified which were likely to be causally related to reported events. Dr Simpson recommended that the events were discussed with the claimant to explore his perceptions of any other underlying reason, such as stress or fatigue. That would allow remedial measures of an interim or long-term basis to be put in place. Dr Simpson further suggested that if there were continuing concerns, they could arrange a formal dyslexia assessment but that he "would not recommend this as an immediate action until other causes have been explored".

<u>Meeting with Mr Clarke on 8 August 2019 and next steps</u>

44. Acting on the respondent's HR team's advice, Mr Clarke met with the claimant on 8 August 2019. We find that the purpose of the meeting was to implement Dr Simpson's advice to explore the potential underlying causes of the recent events. Mr

Clarke showed the claimant the email from the Occupational Health provider to Ms Sanders. The claimant was not happy that the respondent was relying on Dr Simpson's email in preference to Dr Coolican's report.

45. The claimant's position at that meeting was that the respondent was obliged to and must carry out a workplace assessment. Mr Clarke's position was that the respondent had already put adjustments in place (in relation to report writing and by the claimant going down last to minimise the risk of picking up the wrong candidate) to address the claimant's identified needs. He made it clear he was trying to help the claimant but that the claimant was not helping to identify specific adjustments which might help him other than asking for an assessment. Mr Clarke passed on HR's advice which was that the respondent would not pay to obtain a diagnosis of dyslexia for the claimant. He said that was something the claimant would need to take the lead on.

46. We do find that, as alleged by the claimant, Mr Clarke said that the claimant couldn't just throw all the onus on [the respondent] for what was wrong. Referring to his own health issues, Mr Clarke also said "I don't do that you know, you're quite happy to spend the DVSA's money but you're not happy to spend any of your own and that doesn't ring true". The context of those comments was the discussion about the underlying causes of the 2 incidents of the claimant taking out the wrong candidate which Dr Simpson had advised take place.

47. The claimant says that Mr Clarke's conduct at that meeting amounted to disability related harassment. Having listened to the recording of the meeting we find that Mr Clarke's approach to the claimant was calm and reasonable. He was attempting to implement Dr Simpson's advice and the advice he was being given by HR to the best of his ability. He gave the claimant an opportunity to explain what other adjustments would help him. We find that the claimant was combative in his approach to Mr Clarke. He described Dr Simpson's advice as a "load of rubbish" and said that he could not give an opinion because (unlike Dr Coolican) he had never met the claimant. He told Mr Clarke that he would go to ACAS because they would pick up the case immediately because it was discriminatory. He also raised problems with the adjustment of going down last, which he had previously agreed was a good idea.

48. The claimant emailed Mr Wildash the day after that meeting to report his disappointment that a workplace assessment was not being offered. Mr Wildash responded the same day (p.120) to confirm that the respondent wanted to address the concerns the claimant had but needed more information from him in order to do identify the appropriate adjustments for him. He confirmed Mr Clarke's advice at the meeting that the respondent would not pay to obtain a diagnosis of any medical condition. He advised the claimant to contact the British Dyslexia Association ("the BDA") who would be able to arrange an assessment. He confirmed that he would support any request from the claimant to set time aside during his working day to contact the BDA.

49. The claimant contacted the BDA who confirmed by email on 15 August 2019 that a diagnosis and dyslexia assessment was the appropriate next step "organised and paid for by the employer". The claimant forwarded that advice to Mr Wildash who on 16 August confirmed the respondent was keen to get the matter resolved but that the claimant did not appear to want to arrange a dyslexia assessment himself so he would seek approval from Occupational Health for an assessment which the

respondent would pay for. The claimant on 19 August 2019 confirmed that he would attend any appointment made for an assessment (pp.126-127).

The Incident on 4 September and subsequent investigation

50. On 4 September 2019 there was an incident between Mr Taylor and the claimant. We find that Mr Clarke had suggested that the claimant and the other examiners have a "clear the air" chat at the end of their regular "corporate connectivity" meeting on that date. In brief, we find that Mr Taylor "laid in" to the claimant and in retaliation the claimant accused him of "bubbling" (i.e. blowing the whistle to managers) about the claimant and Mr Howbrook taking out the wrong candidates in March 2019. Mr Taylor raised a grievance about the incident, alleging that the claimant had behaved inappropriately towards him at that meeting, specifically by accusing him of "bubbling".

51. On 11 September 2019 Mr Clarke held a series of "fact finding" meetings with the claimant and other witnesses to the incident on 4 September. As a result of those meetings, Mr Clarke recommended that a formal investigation be carried out. During his meeting with Mr Clarke, the claimant made counter-allegations against Mr Taylor, accusing him of swearing, calling the claimant a liar and being aggressive towards him. He asked Mr Clarke whether he could complain about that. Mr Clarke's response was "yes, put in an official complaint and this will be dealt with as a separate issue".

52. On 27 September 2019, Mr Pearson-Leach instructed Craig Adie (a Local Driving Test Manager) to investigate Mr Taylor's complaint. On 7 October 2019 Mr Adie wrote to the claimant to notify him that he was investigating an allegation of misconduct against him. He explained that the investigation would determine whether there was a case to answer. If there was, the claimant would be invited to a discipline meeting. On 10 October the claimant was invited to an investigation meeting by Mr Adie to take place on the 29 October 2019 (subsequently rescheduled to 6 November 2019 because the claimant's chosen companion was not available on 29 October).

53. We find that Mr Adie carried out a thorough investigation, interviewing the relevant witnesses during October 2019 and producing his Investigation Report on 11 November 2019 (pp.259-261).

54. In summary his conclusions were that the working environment at the Hyde test centre was unhealthy and that the major contributing factor to that was the inability of the claimant and Mr Taylor to interact with each other. Their relationship was distinctly dysfunctional (he found it "unacceptable and unbelievable that two adults at EO grade in the civil service can display such behaviours"). Both showed a lack of self-awareness although whereas the claimant was open to mediation Mr Taylor would "not entertain the notion" because he did not believe the claimant could change his behaviours.

55. Mr Adie concluded that there had been wrongdoing by the claimant. He found he had accused Mr Taylor of whistleblowing. However, Mr Taylor was equally culpable and that it was Mr Taylor's derision of the claimant which caused him to make the accusation in retaliation.

56. Mr Adie's recommendation was that both the claimant and Mr Taylor had acted unprofessionally and outside the core values expected of a civil servant so there was a case for disciplinary action in relation to both.

Other events from September 2019 to November 2019

57. On 20 September 2019 AtW approved the claimant's application for a grant (pp.137-143). Applications to AtW are made by the employee rather than the employer. The grant included specialist aids and equipment consisting of Dragon dictation software; a Dragon USB Headset; Grammerly Premium Software and Ideamapper Pro software. The grant covered training on Ideamapper (1/2 day) and Dragon (2 x ½ days). It also covered Work Related Strategy Training consisting of Neurodiversity Disability Awareness training and 6 x ½ days of Coping Strategies. The total cost was £3877.28 with AtW contributing £2745.83 and the respondent being expected to pay the balance.

58. On 25 October 2019, Mr Wildash confirmed to Mr Clarke that the equipment covered by the AtW grant had been ordered. On that date, Mr Wildash also signed off training Application Forms for claimant relating to the various training courses covered by the grant. The claimant chased Mr Wildash for an update on 13 November 2019. We find that there were delays in getting the software and training put in place for 2 reasons. The first was that the respondent as a government agency was covered by procurement rules and existing supplier arrangements. It had to order products through its existing suppliers and obtain alternative quotes for the training to comply with procurement rules. The respondent found it difficult to obtain quotes for the proposed Neurodiversity and Ideamapper training. The second issue was that any software loaded on to the respondent's system had to be approved from an IT point of view because it would be uploaded on to a government secure network. We find Mr Wildash was genuinely trying to move matters forward but was hampered by the respondent's systems and processes. He found these delays frustrating, commenting in an email on 22 November to Ms Bailey (the colleague at the DVSA Training Academy who was trying to sort these matters out with him) that "we do make things difficult for ourselves" and pointing out that the only person who was going to suffer was the claimant.

59. On 28 November 2019 Mr Wildash emailed an update to the claimant. He explained the request to use Grammerly had been rejected because of data protection concerns raised by the respondent's IT security team. He suggested an alternative he had found but explained that would need to be cleared by security before it could be downloaded. He explained Ideamapper would also need not be reviewed by security as it was not currently approved but suggested an alternative which he had found. We find that, as Mr Wildash said in that email, he was "trying to speed things along". By the time Mr Wildash sent the update the claimant had been signed off sick.

60. In the meantime, on 1 November 2019 the claimant wrote to Mr Pearson-Leach to request that the first stage written warning could be taken off his disciplinary record because it could have been contributed to by his dyslexia. He explained that he had made the request already to HR on advice from ACAS but that HR had said they could not remove the warning. HR had said it was a matter for the claimant's direct line management. On 3 November 2019 Mr Pearson-Leach refused that request. He was satisfied that the request was out of time and that the claimant had not followed the

relevant operating procedures for identifying the correct candidate and when it came to the test swap procedure. He was satisfied the failures to follow procedure were not due to misreading (i.e. were not linked to the claimant's dyslexia). He concluded the warning was correctly given and should stay on the claimant's file.

61. Mr Pearson-Leach wrote to the claimant on 15 November 2019 to invite him to a discipline meeting on 28 November. He did so to implement Mr Adie's recommendation in his Investigation Report about the 4 September incident so Mr Pearson-Leach sent the claimant a copy of that report.

62. On 18 November 2019 the claimant was signed off sick with work related stress. Mr Pearson-Leach wished him a speedy recovery on the following day and provided him with the contract details of the Employee Assistance Programme ("EAP"). He confirmed that EAP would be in touch with the claimant by the end of 20 November 2019. Th misconduct proceedings against the claimant were put on hold because of his sickness absence.

63. Also on 18 November the claimant sent a lengthy grievance email to Mr Pearson-Leach. The Respondent accepts that email was a grievance even though it was not necessarily on any kind of formal form. The grievance raised was about being bullied by Mr Taylor; Mr Clarke's failure to act on the claimant's complaints of bullying; and the failure to progress the recommendation of the AtW assessment by putting in place equipment, training and adjustments. We find the claimant was emboldened to raise his grievance against Mr Taylor by the evidence given by others to Mr Adie's Investigation which he felt supported his view that Mr Taylor was the instigator of the trouble between them.

Events from December 2019 to February 2020

64. On 13 December 2019 the claimant attended an Occupational Health assessment. Mr Clarke had referred him to OH on 28 November 2019 because of his stress-related absence since 18 November.

65. The OH report advised that the claimant was expected to be fit to return to work if the "perceived factors at work" giving rise to his stress could be discussed and suitably addressed. Those "perceived factors" were reported to be a couple of difficult workplace relationships (one of which had been resolved); being singled out and bullied by management; the claimant's needs around dyslexia not being taken seriously; and an AtW assessment had been "blocked by management". We find the reference to an unresolved difficult workplace relationship was to Mr Taylor. We do not find that the respondent had "blocked" an AtW assessment. There may have been some confusion on the part of OH between the AtW assessment and grant (which had been approved by AtW and was being progressed by the respondent) and the dyslexia diagnosis assessment (which the respondent had confirmed it was for the claimant to arrange). The OH adviser had suggested mediation as a helpful way of engaging in dialogue about the workplace issues but reported that the claimant was not convinced that would be impartial and that he appeared to have lost trust in the respondent.

66. Mr Wildash was continuing to work with Ms Bailey to put in place the training agreed as part of the AtW grant. On 17 December 2019, Ms Bailey confirmed that the relevant purchase orders were now in place and the training (apart from Ideamapper

training) could be booked. We find the Ideamapper training was not booked at that stage because the Ideamapper software did not have security approval. On 20 December 2019, Mr Wildash confirmed to Mr Clarke that the training had been approved and suggest that Mr Clarke check with IT about downloading the software. Mr Wildash was not aware until that email exchange with Mr Clarke that the claimant was off sick.

67. During his absence the claimant was reporting to Julie Ford, a LDSM based at Bredbury Test Centre, rather than Mr Clarke. That was because the claimant had said that one cause of his absence was Mr Clarke bullying him. At his 21 day absence catch up with Ms Ford in mid-December the claimant had asked to meet with Mr Pearson-Leach. Mr Pearson-Leach was the decision manager in his misconduct case.

68. The claimant was still off sick at that point but was responding to emails on his ipad. Mr Pearson-Leach emailed him on 18 December to explain he would not be able to meet until after the Christmas break but suggested they catch up by phone on 19-20 December so the claimant was not "left hanging over the festive period". They met on 6 January 2020.

69. We find that meeting was a positive one and that Mr Pearson-Leach discussed ways of resolving the issues at work set out in his grievance. Although that meeting was not documented, the claimant accepted in cross-examination evidence that he had met with Mr Pearson-Leach to discuss his grievance and that that grievance had been dealt with.

70. We find that at that meeting the claimant also said that he was at a stage where he felt it would be helpful to him if they could conclude the misconduct proceedings which had been paused because of his sickness absence. As a result, Mr Pearson-Leach held a discipline meeting on 17 January 2020. Mr Senior was the claimant's companion at that meeting. The claimant apologised for accusing Mr Taylor of "bubbling" and agreed to mediation with Mr Taylor and Mr Clarke. Mr Pearson-Leach issued a final written warning to the claimant.

71. In his decision letter dated 23 January 2020, Mr Pearson-Leach said that the claimant's conduct in accusing Mr Taylor of "bubbling" was a violation of the respondent's whistleblowing policy and was also bullying. However, he took into account the claimant's apology and fully accepted the comment was made in retaliation to what the claimant felt was bullying by Mr Taylor. He imposed what he felt was the minimum possible sanction. He explained that in normal circumstances that would have been a written warning. However, because the claimant already had a "live" written warning that minimum possible sanction was a final written warning.

72. Mr Taylor would not agree to mediation with the claimant. Mr Taylor was issued with a written warning. During the Tribunal hearing the Claimant expressed surprise at that. He thought Mr Taylor had done some things in the past which meant he would already have been on a first warning and so should have been issued with a final written warning. There was no evidence that Mr Taylor had any "live" disciplinary warnings at the point Mr Pearson-Leach issued the written warning.

<u>Events from March 2020 onwards</u>

73. The claimant returned to work in March 2020. He and Mr Clarke took part in mediation in March 2020 and Mr Clarke resumed his duties as the claimant's line manager. He and the claimant completed a Workplace Adjustment Passport and a Workplace Adjustment Checklist on 6 April 2020. That recorded the adjustments which had been approved by AtW. In section 5 of the Checklist the claimant acknowledged that all the adjustments deemed reasonable had been granted with one exception. That exception was that "I at the appropriate time intend to apply for a dyslexia assessment with a professional body" (p.371).

74. Mr Wildash continued to liaise with the claimant and colleagues in the respondent throughout March and April to enable delivery of the software and training envisaged by the AtW grant. We find that the respondent's internal processes continued to cause frustrating delays leading to Mr Wildash still working to get the Ideamapper software delivered in July 2020.

Findings of fact relevant to time limits

75. The claimant accepted he had contacted ACAS on a number of occasions to seek information. That clearly started before 1 July 2019 and was ongoing after that. His evidence was that he was not aware of any time limit issues until the first preliminary hearing. The claimant confirmed that after being referred to EAP by Mr Pearson-Leach in response to his grievance he had been told by them that he needed a solicitor not advice from them. The claimant confirmed he had contacted a solicitor.

Relevant Law

The Equality Act 2010 claims

76. The complaints of direct disability discrimination, harassment and victimisation were brought under the 2010 Act. Section 39(2)(d) prohibits discrimination against an employee by subjecting him to a detriment. Section 40(1)(a) prohibits harassment of an employee. Conduct which constitutes harassment cannot also constitute a "detriment" (section 212(1)), meaning that it can only be pursued as a harassment complaint.

77. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides 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."**

78. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

Direct disability discrimination

79. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as material reads as follows:

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

80. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

81. Where the treatment of which the claimant complains is not overtly because of a protected act, the key question is the "reason why" the decision or action of the respondent was taken.

82. In **O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33**, EAT, the EAT took the view that the protected characteristic need not be the main reason for the treatment, so long as it was an 'effective cause'. The House of Lords adopted a similar approach in **Nagarajan v London Regional Transport 1999 ICR 877, HL**, holding that where a protected characteristic has had a 'significant influence on the outcome, discrimination is made out'. The Equality and Human Rights Commission's Statutory Code of Practice on Employment ("the EHRC Code") says that 'the [protected] characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause' — para 3.11.

Harassment

83. The definition of harassment appears in section 26 of the 2010 Act which so far as material reads 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 sub-section (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."

84. The Equality and Human Rights Commission gives more detail on the factors relevant in deciding whether conduct has the effect referred to in s.26(1)(b) at paragraph 7.18 of the EHRC Code:

"7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

85. Not all conduct, even if unwanted and even if it causes upset will meet the definition of a harassing effect in s.26. In **HM Land Registry v Grant (Equality and Human Rights Commission intervening) 2011 ICR 1390, CA**, it was stressed that Tribunals must not cheapen the significance of the words used in s.26(1). They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment

86. In **Grant** the Court of Appeal also confirmed that (as stated by the EAT in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**) when assessing the effect of a remark, the context in which it is given is always highly material. A humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.

87. Conduct can only be harassment within the meaning of s.26 if it is "related to" the protected characteristic, in this case disability. In **GMB v Henderson [2017] IRLR 340** the Court of Appeal suggested that the question of whether the conduct complained of "is related to" the protected characteristic, will require a consideration of the mental processes of the putative harasser.

88. The EAT provided guidance on 'related to' **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor 2020 IRLR 495**. It pointed out that whether conduct is related to a protected characteristic is a different test from that of whether conduct is "because of" a protected characteristic, which is the connector used in the definition of direction discrimination. It said that "put shortly, it is a broader, and, therefore, more easily satisfied test. However, of course, it does have its own limits."

Victimisation

89. S.27 of the 2010 Act makes victimisation unlawful:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because —**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."**

90. This means that for a victimisation claim to succeed, the claimant has to show three things. First, that they did a protected act; second, that they were subjected to a detriment; and third that they were subjected to that detriment because of the protected act. The claimant does not have to show "less favourable treatment" so there is no absolute need for a tribunal to construct an appropriate comparator in victimisation claims.

91. As to the meaning of a protected act in 27(2)(c), the EAT in **National Probation Service for England and Wales (Cumbria Area) v Kirby Holland v National**

Probation Service for England and Wales (Cumbria Area) [2006] IRLR 508 described the equivalent (though differently worded) subsection in Section 2(1)(c) of the Race Relations Act 1976 as a "catchall" in a case where the alleged "victim" has otherwise done anything … by reference to this Act in relation to the discriminator" or any other person.

92. In **Aziz v Trinity Street Taxis Ltd [1988] ICR 534, 542, CA** Slade LJ said: "An act can, in our judgment, properly be said to be done "by reference to the Act" if it is done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act."

93. S.27(1)(a) refers to detriment because of a protected act but does not refer to "less favourable treatment". There is therefore no absolute need for a tribunal to construct an appropriate comparator in victimisation claims. The EHRC Code at para 9.11 states: 'The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act'.

94. Where it is not entirely obvious that the claimant has suffered a detriment, the situation must be examined from the claimant's point of view. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL**, established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. In **Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] UKHL 16** the House of Lords stressed that the test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances. Accordingly, the test of detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his or her perception must be 'reasonable' in the circumstances. This means the employee's own perception of having suffered a 'detriment' may not always be sufficient to found a victimisation claim.

Discussion and Conclusions

95. The Tribunal deliberated on the afternoon of 2 June 2023 and in chambers on the afternoon of 3 July 2023. We reached the following conclusions.

Jurisdiction

1. Were the claimant's complaints of discrimination submitted within 3 months of the acts complained of (s.123 EA 2010)? On the face of it the claimant's claims are out of time in respect of any matter occurring prior to 25 December 2019 (3 months prior to ACAS early conciliation being commenced on 24 March 2020), unless they form part of a continuing act extending beyond that date.

2. If not, would it be just and equitable to extend time for such claims?

96. As we explain below, all the claimant's claims of disability discrimination fail. The issue of time limits therefore does not arise.

Disability

3. Did the claimant have a disability at all material times which satisfied the definition under section 6 of the Equality Act 2010? The claimant relies on Dyslexia.

97. The respondent at the hearing conceded that the claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 by reason of disability.

98. The respondent disputed that it was aware of the claimant's dyslexia until June 2019. We find on the facts that the respondent through Mr Longman and Mr Pearson-Leach were aware of the claimant's dyslexia and its effects from the period when they managed him. We find they were aware of the adjustments made to assist him to complete reports. We find that they knew, or ought reasonably to have known that he was a disabled person from when they managed him, i.e. from before the incidents giving rise to this claim began. We do not find that Mr Clarke was aware of the claimant's dyslexia or that he was a disabled person on 25 April 2019 so that did not play a part in his decision to issue a first written warning to the claimant.

Direct Disability Discrimination (s.13)

4. Did any of the following occur?

    a. On 25 April 2019 did the claimant receive a first written warning from Dave Clarke?

    b. From 19 June 2019 the respondent refuse to act on the claimant's complaint of bullying as per its standard operating procedures?

    c. On 25 June 2019 did Dave Clarke threaten the claimant with losing his job when he made a request for a workplace assessment regarding his Dyslexia (see paras 3- 5 FBP)?

    d. On 31 July 2019 did the Louise Sanders seek to undermine the findings of an Occupational Health report written by Dr Coolican by seek further advice from Dr Simpson (see para 7 FBP and section 8 of the ET1 claim form)?

5. Did any of the above treatment amount to treating the claimant less favourably than a hypothetical comparator without the claimant's disability would have been treated?

6. If so, was the reason for that treatment the claimant's disability?

99. We deal with each of the alleged acts of direct disability discrimination in turn below.

- On 25 April 2019 the claimant receiving a first written warning from Dave Clarke

100. It is accepted that the claimant did receive a first written warning from Mr Clarke. However, we find that was not less favourable treatment. In this case we have a direct

actual comparator, namely Mr Howbrook. He was in the same or not materially different circumstances as the claimant, having also taken out the wrong candidate for a driving examination. His circumstances were a mirror of the claimant's – he took out the candidate the claimant should have taken out and vice versa. He was issued with a first written warning. We accept the respondent's explanation about the different dates when the warnings were given. There was no less favourable treatment. There was no evidence that Mr Howbrook was disabled. In those circumstances we find that the claimant was treated in the same way as a non-disabled comparator in the same circumstances. He was not directly discriminated against because of disability when he was issued with the first written warning by Mr Clarke.

b. From 19 June 2019 the respondent refusing to act on the claimant's complaint of bullying as per its standard operating procedures

101. We find that on the facts this did not happen. The respondent did not refuse to act on the claimant's complaint. To the extent this allegation is about Mr Clarke failing to address complaints made by the claimant in June 2019, we find that he did not refuse to act. The evidence is the opposite-he acted by having a word with Mr Senior and Mr Taylor and this led to improvement in Mr Senior's working relationship with the claimant. We find that dealing with matters informally as a first step was in accordance with the standard grievance procedure.

102. When the claimant asked Mr Clarke at the fact-finding meeting on 11 September 2019 whether he could raise a complaint about Mr Taylor's behaviour, Mr Clarke encouraged him to do so. Then the claimant did escalate matters by way of a formal grievance in November 2019, that was dealt with by Mr Pearson-Leach. In the circumstances we find that the respondent did not refuse to act on the claimant's complaint of bullying. There was no less favourbale treatment and this claim of direct disability discrimination fails.

c. On 25 June 2019 did Dave Clarke threaten the claimant with losing his job when he made a request for a workplace assessment regarding his Dyslexia?

103. On the facts, we find that during the meeting on that date Mr Clarke did explain the potential consequences if he was unable to confirm the reason why the claimant had taken out the wrong candidate (something which the claimant himself was at a loss to explain). We find he did say that ultimately that could involve losing his job (though not expressly in those terms). We do not find that that amounted to a "threat". It was an explanation of the ramifications if there was a health and safety risk

104. On the facts, therefore, we find that the alleged discriminatory act did not happen. Mr Clarke did not threaten the claimant. If we are wrong about that and Mr Clarke's words did amount to a threat, we find that was no less favourable treatment of the claimant because of disability. Mr Clarke would have raised the same concerns about the safety and suitability of a driving examiner continuing to take candidates out if there were concerns about their ability to do so safely for non-disability reasons. We do not find the claimant was treated less favourably due to disability in relation to this matter.

d. On 31 July 2019 did the Louise Sanders seek to undermine the findings of an Occupational Health report written by Dr Coolican by seek further advice from

Dr Simpson (see para 7 FBP and section 8 of the ET1 claim form)?

105. The claimant's claim as we understand it is that Louise Sanders asked for a second opinion from a different Occupational Health doctor to undermine the conclusion in Dr Coolican's report that the claimant was likely to have dyslexia. On the facts we do not find that that is what happened. We find that Louise Sanders sought to clarify a question which she felt that Dr Coolican's report had not answered, namely whether it was likely that dyslexia was the cause of the claimant taking out the wrong candidate given that had happened only 4 times in 4000 tests.

106. We found no evidence to suggest that it was Ms Saunders/the respondent's decision who would respond to the request for clarification. It appears to us it was the Occupational Health adviser who decided to seek Dr Simpson's advice rather than asking Dr Coolican. That seems to us to support our finding that this was not a case of Louise Sanders seeking to "undermine" the findings of an Occupational Health report by going back to a different doctor.

107. On balance we find that Ms Saunders would have sought further clarification in the case of any Occupational Health report which failed to her mind to answer the specific question put in the referral. Her approach would not have been different if the report was about a hypothetical comparator, e.g. someone who had an injury but was not a disabled person. In those circumstances we find that there was no less favourable treatment of the claimant because of disability in relation to this allegation and the claim it amounted to direct disability discrimination fails.

Harassment

7. Did the Respondent engage in any of the following matters?

    a. On 8 August 2019 did Dave Clarke refuse to provide a workplace assessment and say "*you can't just throw all the onus on your employer for what's wrong. I don't do that you know, you're quite happy to spend the DVSA's money but you're not happy to spend any of your own and that doesn't ring true"* (para 10 FBP).

    b. From 21 December 2020 – 18 January 2021 did the respondent fail to implement the recommendations of Dr Coolican's OH report by completing an assessment for dyslexia (para 15 FBP)?

8. If so, did any of the above matters amount to unwanted conduct?

9. Did such conduct relate to the claimant's disability?

10. Did such conduct have the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

a. On 8 August 2019 did Dave Clarke refuse to provide a workplace assessment and say "*you can't just throw all the onus on your employer for what's wrong. I don't do that you know, you're quite happy to spend the DVSA's money but you're not happy to spend any of your own and that doesn't ring true".*

108. We found that Mr Clarke did say the words alleged. We find that was in the context of a meeting where he was seeking to implement the recommendation from Dr Simpson to discuss with the claimant whether there were any other underlying causes of his taking out the wrong candidate. We found that in that meeting the claimant was combative in his attitude whereas Mr Clarke was calm and reasonable in his approach. We accept that Mr Clarke's conduct in saying what he did was unwanted and do find that it was related to the claimant's disability. However, we do not find that it had a harassing purpose nor a harassing effect. In reaching our decision we bear in mind the guidance in **Grant** about not cheapening the words of section 26 of the equality Act 2010. We have no doubt that the claimant was frustrated by what Mr Clarke was telling him. In the meeting he threatens to go to ACAS and says that what is being done is discriminatory.

109. We accept that the claimant may have experienced the comments as having a harassing effect in the sense of it being offensive, but we do not find that he experienced it as humiliating, hostile, degrading or intimidating. We find it was not reasonable for the claimant to have experienced what Mr Clarke was saying as having a harassing effect. The context of the remark was a meeting in which Mr Clarke made it clear that he was trying to help the claimant but needed his help in order to identify adjustments which might help. He explained the respondent's position and used his own situation to seek to explain the position. There is no suggestion in the recording of the meeting that he did so in a dismissive or offensive way. We are not saying that Mr Clarke in his behaviour at that meeting achieved what would be regarded as "good practice". It is true he might have been more sympathetic. However, we find that his conduct falls short of having the harassing effect alleged. The claim of disability related harassment in relation to that incident therefore fails.

b. <u>From 21 December 2020 – 18 January 2021 did the respondent fail to implement the recommendations of Dr Coolican's OH report by completing an assessment for dyslexia (para 15 FBP)?</u>

110. Throughout this case there has been some confusion about the different assessments and actions which the respondent was (according to the claimant) required or should have taken. The List of Issues refers to failing to complete an assessment for dyslexia as recommended in Dr Coolican's Occupational Health report. We accept the respondent's case that in the Workplace Adjustment Checklist dated 6 April 2020 the claimant had made clear that he intended to seek such an assessment "at the appropriate time". There was no evidence to suggest that the position had changed by 21 December 2020. We find that the respondent was entitled to take the view that the claimant had decided to take on responsibility for obtaining that assessment.

111. When it comes to Dr Coolican's report, we find that the respondent's position was that that had been superseded by Dr Simpson's subsequent report. Mr Clarke had sought to implement Dr Simpson's recommendations by discussing with the claimant whether there were any other issues which could have given rise to the error in relation to the candidate. We do not find that the respondent failed to implement Dr Coolican's recommendations – they simply thought they were no longer in play. They had been superseded by Dr Simpson's report and by the claimant's assertion in the Workplace Adjustment Checklist that he would obtain an assessment.

112. For the avoidance of doubt, we have also addressed the issue which the claimant raised in his written submissions, which was to suggest that the reasonable adjustments which had been identified through AtW were not implemented for 15 months. When it comes to that, we find that the evidence shows that the respondent did try to implement those recommendations by providing assistive software and training to the claimant. It is clear that there were difficulties from a bureaucratic point of view in securing and procuring the relevant software and making sure that it was compatible with the security requirements of the respondent's systems. Mr Wildash summed things up by saying that the respondent "does not make life easy for itself" in terms of procuring and obtaining services. However, we do not find that that delay amounting to a "failure to implement" AtW's recommendations or Dr Coolican's.

113. If we are wrong and the respondent did "fail" to implement the recommendations, we accept that would be unwanted conduct related to the claimant's disability. However, there was no evidence this was done with a harassing purpose. Nor do we find that it had a harassing effect. We have our doubts whether (except in hindsight) the claimant himself felt this to have a harassing effect. Even if he did, however, we find that it was not reasonable for it to have that effect. We do not see how the delay in obtaining a dyslexia assessment could have a harassing effect when the claimant had himself agreed to take responsibility for obtaining one "at the appropriate time" in the Workplace Adjustment Checklist. Equally we do not accept that it was reasonable for the delays in implementing the AtW adjustments to have had a harassing effect (however frustrating) when it was clear that at least some of those adjustments had been provided by the time the claimant returned to work in March 2020 and the claimant was being kept up to date about the issues by Mr Wildash who was assisting him to resolve them.

114. The claim of disability related harassment related to this allegation therefore fails.

Victimisation

11. Did the claimant do a protected act for the purposes of s.27(2) EA 2010? The claimant relies on making a request for a workplace assessment in or around June 2019.

115. The claimant made a request for a workplace assessment in his email dated 24 June 2019. Mr Kirby submitted that making a request for a workplace assessment did not amount to a protected act. His submission as we understand it was that this was not sufficient to amount to an allegation of a breach of the Equality Act 2010. It is true that the claimant did not in his email of 24 June 2019 suggest that there was a failure to make reasonable adjustment or allege that the failure to provide a workplace assessment was an act of direct discrimination. However, it does seem to us that making a request for a workplace assessment in or around June 2019 would amount to doing an act otherwise in relation to or under the Equality Act 2010 (i.e. within the definition of a protected act in s.27(2)(c). The claimant was asking the respondent to take steps (albeit preliminary ones) to enable it to identify steps it need to take to comply with its duty to make reasonable adjustments. It seems to us that the purpose of the victimisation provisions is to prevent an employee who raises (at however preliminary a stage) a need or potential need for reasonable adjustments not to be penalised for doing so. It seems to us that our finding that the claimant's

request for a workplace assessment was a protected act accords with that purpose. On balance, therefore, we do find that the claimant did a protected act by requesting a workplace assessment in his email of 24 June 2019.

12. Did any of the following occur?

- On 25 June 2019 did Dave Clarke threaten the claimant with losing his job when he made a request for a workplace assessment regarding his Dyslexia (see para 3 FBP).

116. We have set out our finding on this treatment in relation to the direct discrimination claim based on the same facts. We find that Mr Clarke did not threaten the claimant as alleged.

13. If so, did the above treatment amount to subjecting the claimant to detriment?

117. We have found that there was no threat and do not find that there was a detriment. We find that a reasonable employee would not have regarded Mr Clarke setting out the potential consequences if they were unable to confirm the reason why they had taken out the wrong candidate as a disadvantage. The conduct does not meet the definition of a "detriment" in **Shamoon**.

14. If so, did the respondent subject the claimant to such detriment(s) because he did a protected act?

118. This issue does not arise because we have found that the alleged detriment did not occur. If we are wrong and the conduct was a detriment, we would have found that Mr Clarke did not set out the potential consequences because the claimant did a protected act. He would have done so in any case where an employee was unable to explain why they had taken out the wrong candidate so there was a risk of recurrence.

Remedy

15. What compensation is the claimant entitled to (if any)?

119. This matter does not arise because all the claimant's claims fail.

Summary

120. We have found that all the claimant's claims of disability discrimination, disability related harassment and victimisation fail. Our conclusions on those claims should not be read as commending the respondent's approach in this case. The Tribunal's view is that the respondent could have been more proactive in its support for the claimant when it came to seeking to identify how his dyslexia might have been impacting on his work for it and whether it could make adjustments to help address any disadvantages arising. To be clear, we are not by saying that making a finding that the respondent failed to make reasonable adjustments. We do, however, suggest that it would benefit the respondent to consider the advice given in the ERHC Code and the ERHC other guidance on workplace adjustments in the workplace.

Employment Judge McDonald
Date: 15 September 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
22 September 2023

FOR THE TRIBUNAL OFFICE

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Annex
List of Discrimination and Victimisation Allegations

Claims

1. The claimant purports to bring the following claims:

    a. Direct disability discrimination (s.13 of the Equality Act 2010 ("EA 2010"))

    b. Harassment (s.26 EA 2010)

    c. Victimisation (s.27 EA 2010)

Jurisdiction

2. Were the claimant's complaints of discrimination submitted within 3 months of the acts complained of (s.123 EA 2010)? On the face of it the claimant's claims are out of time in respect of any matter occurring prior to 25 December 2019 (3 months prior to ACAS early conciliation being commenced on 24 March 2020), unless they form part of a continuing act extending beyond that date.

3. If not, would it be just and equitable to extend time for such claims?

Disability (s.6)

4. Did the claimant have a disability at all material times which satisfied the definition under section 6 of the Equality Act 2010? The claimant relies on Dyslexia.

Direct Disability Discrimination (s.13)

5. Did any of the following occur?

    a. On 25 April 2019 did the claimant receive a first written warning from Dave Clarke?

    b. From 19 June 2019 the respondent refuse to act on the claimant's complaint of bullying as per its standard operating procedures?

    c. On 25 June 2019 did Dave Clarke threaten the claimant with losing his job when he made a request for a workplace assessment regarding his Dyslexia (see paras 3- 5 FBP)?

    d. On 31 July 2019 did the Louise Sanders seek to undermine the findings of an Occupational Health report written by Dr Coolican by seek further advice from Dr Simpson (see para 7 FBP and section 8 of the ET1 claim form)?

6. Did any of the above treatment amount to treating the claimant less favourably than a hypothetical comparator without the claimant's disability would have

been treated? ***The claimant relies on the treatment of Angela Tarr as an actual comparator, in relation to the treatment by her manager Kevin Rigby when she took out the wrong test candidate.***

7. If so, was the reason for that treatment the claimant's disability?

Harassment (s.26)

8. Did the Respondent engage in any of the following matters?

   (a) On 8 August 2019 did Dave Clarke refuse to provide a workplace assessment and say "*you can't just throw all the onus on your employer for what's wrong. I don't do that you know, you're quite happy to spend the DVSA's money but you're not happy to spend any of your own and that doesn't ring true"* (para 10 FBP).

   (b) From 21 December 2020 – 18 January 2021 did the respondent fail to implement the recommendations of Dr Coolican's OH report by completing an assessment for dyslexia (para 15 FBP)?

9. If so, did any of the above matters amount to unwanted conduct?

10. Did such conduct relate to the claimant's disability?

11. Did such conduct have the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Victimisation (s.27)

12. Did the claimant do a protected act for the purposes of s.27(2) EA 2010? The claimant relies on making a request for a workplace assessment in or around June 2019.

13. Did any of the following occur?

   (a) On 25 June 2019 did Dave Clarke threaten the claimant with losing his job when he made a request for a workplace assessment regarding his Dyslexia (see para 3 FBP).

14. If so, did the above treatment amount to subjecting the claimant to detriment?

15. If so, did the respondent subject the claimant to such detriment(s) because he did a protected act?

Remedy

16. What compensation is the claimant entitled to (if any)?