EMPLOYMENT TRIBUNALS

Claimant: Miss V Peers

Respondent: Secretary of State for Justice

Heard at: Liverpool **On:** 12, 13 and 14 February 2024
7 May 2024, deliberation on
28 May 2024 in chambers.

Before: Employment Judge Aspinall
Dr Vahramian
Mr Rowen

Representation
Claimant: Miss Mensah, Counsel
Respondent: Mr Crammond, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaints of discrimination arising from disability fail. The respondent did not have knowledge of disability, and if it had the Tribunal finds that the dismissal and appeal outcome would have been proportionate means of achieving the respondent's legitimate aims.

2. The claimant's complaints of failure to reasonably adjust fail. The respondent did not have knowledge of disability, and if it had the Tribunal finds that the failures to reasonably adjust, if they had been in time, would not have succeeded because the adjustments would not have been reasonable.

REASONS

Background

1. By a Claim Form dated 14 July 2022 the claimant brought a complaint for unfair dismissal and disability discrimination.

2. There was a case management hearing before Employment Judge Butler on 20 October 2022 following which the unfair dismissal complaint was dismissed on withdrawal, the claimant having had less than two years' service.

3. The claimant was employed as a Crown Court Clerk on a one year fixed term contract from 12 July 2021. She was dismissed, after two extensions and eight months service, for having failed her probationary period. The claimant says her dismissal was a failure to reasonably adjust and that it was an act of discrimination arising from her disability. She had anxiety and depression and says that any underperformance arose from that condition. She also said that she had been bullied at work and that the bullying exacerbated her anxiety and so contributed to her underperformance.

4. The respondent said it did not know of her disability at the time; that it would not have been possible to reasonably adjust and that if her underperformance arose out of her disability then her dismissal was a proportionate means of achieving its legitimate aims.

5. The matter came to final hearing in person at Liverpool.

Adjustments

6. The following adjustments were agreed for the claimant:

- She did not give evidence for more than an hour without a break.
- She was given time to think about her answers before answering and support in finding documents in the bundle.
- She gave evidence and was cross-examined from behind a screen so that she could not be observed by the respondent's witnesses.
- She was accompanied to and from the tribunal room by a clerk to ensure that she did not need to meet the respondent's witnesses in the corridors.
- She was provided with a hot drink by the clerk during a break and permitted to bring that into the witness stand with her when she was feeling cold and shaky but wanting to continue.

7. Arrangements were made for the claimant to sit nearest the door in the Tribunal room during the respondent's evidence so that she could leave easily if she felt uncomfortable. She did not want to be screened for that part of the hearing.

She did not need to leave during the respondent's evidence.

The List of Issues

8. The List of Issues had been agreed following the case management hearing as follows:

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 10 March 2022 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Disability

2.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

2.1.1 Did she have a mental impairment: stress, anxiety, and depression?

2.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

2.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

2.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

2.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

2.1.5.2 if not, were they likely to recur?

3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 Did the respondent treat the claimant unfavourably by:

3.1.1 Dismissing her?

3.1.2 Refusing her appeal against dismissal?

3.2 Did the following things arise in consequence of the claimant's disability:

3.2.1 During her probation period, the claimant's ability to concentrate, focus, learn, remember and understand and thus her overall performance and ability to meet the respondent's performance requirements were affected?

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim?

a. The proper, reasonable, fair, effective and/or efficient management of the workplace and or the respondent staff/probationers (including of their conduct, attendance and or performance in the workplace) and including in court, and/or in respect of the proper, effective and efficient management and conduct of court proceedings and or administration of justice

b. The reaching/achieving, maintaining and improving good and or proper conduct, attendance and performance at work and/or maintaining a professional Civil Service and/or otherwise encouraging any of the same to occur

c. The need to have (and seeking to have) fully operational staff/probationers working in the workplace and or the need to meet and deliver services and business priorities

d. The upholding of proper, fair and reasonable standards of conduct, attendance and or performance of staff/probationers in the workplace

e. The proper, effective and efficient management of conduct of court proceedings and or the administration of justice

f. The proper, reasonable, effective and/or efficient managing public funds/resources and all the efficient, effective and fair management of employees and their conduct, attendance and or performance

3.5 The Tribunal will decide in particular:

3.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 could something less discriminatory have been done instead;

3.5.3 how should the needs of the claimant and the respondent be balanced?

3.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

4. <u>Reasonable Adjustments (Equality Act 2010 sections 20 & 21)</u>

4.1 Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date?

4.2 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

4.2.1 A practice of employees having to satisfy performance requirements/standards in order to pass the probation review/performance management process and remain employed. It was explained on the claimant's behalf that this was all contained in a probation review document.

4.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was less able to cope with/satisfy the requirements of the process as her memory, ability to concentrate, learn and understand were adversely impacted upon by her disability?

4.4 Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

4.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

4.5.1 Remove/reduce the oppressive micro performance scrutiny/ management;

4.5.2 Reduce workload / complexity of work;

4.5.3 Allow C to be permanently allowed to stay in Court to carry out non Court related work away from the colleagues she perceived as bullying her;

4.5.4 Allow C to move to a back office within the main office to carry to her non court room duties away from those colleagues she perceived as bullying her;

4.5.5 Deal with and redress C's written grievance about staff bullying her timeously (and before deciding to dismissal) to reduce the impact of her stress and anxiety upon her performance;

4.5.6 To investigate C's verbal allegations that she was being bullied and ostracised by work colleagues in the office that was increasing her anxiety and impacting her performance;

4.5.7 To extend probation further as C was making improvements;

4.5.8 Move C to another Court away from those she perceived as bullying her;

4.5.9 To offer mental health support to C by referring her to OH / EAP and to carry to a stress at work assessment to identify appropriate adjustments.

4.6 Was it reasonable for the respondent to have to take those steps and when?

4.7 Did the respondent fail to take those steps?

5. Remedy for discrimination

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the claimant be compensated?

5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.9 Did the respondent or the claimant unreasonably fail to comply with it?

5.10 If so, is it just and equitable to increase or decrease any award payable to the claimant?

5.11 By what proportion, up to 25%?

5.12 Should interest be awarded? How much?

9. The parties agreed that the List of Issues fully and accurately recorded the claimant's complaints set out in box 8.2 and box 15 of her claim form.

The Hearing

Documents

10. The parties had prepared a bundle of 495 pages to which additional documents were added by consent. The Tribunal then had bundle A of 574 pages and bundle B a supplemental bundle of around 60 pages of medical records.

Oral evidence

11. The Tribunal heard oral evidence from the claimant. It saw a written statement from the claimant's union representative Daniel Martin to which it attached no weight as it spoke only of an opinion of a third party and neither that third party nor Mr Martin gave oral evidence on which they could be cross-examined at hearing.

12. The Tribunal heard evidence from Ms Rosindale, Delivery Manager, who was the claimant's line manager and Mr Cornwall, Operations Manager, who was Ms Rosindale's manager and who made the decision to terminate the claimant's employment. The Tribunal heard from Ms Warren, Operations Manager, who managed the grievance and Ms Beech, Cluster Manager, who made the decision on appeal.

The Facts

13. The claimant applied for a fixed term position in the role of an Executive Officer (EO) Crown Court Clerk in 2021. The key purpose of the role as advertised was:

> *"To manage the court room to ensure the cases are dealt with promptly in liaison with judiciary, the legal profession and staff and to ensure that all subsequent results are accurately and promptly recorded in line with targets. Also to ensure that all ancillary duties are carried out effectively."*

14. The job description then set out key responsibilities for the role which included detail as to the administrative and operational component responsibilities of the role. The job description stressed the importance of accurate recording of relevant matters including judicial decisions, accurate completion of exhibit log and all subsequent forms, orders and results to be exported onto the respondent's portal within target deadlines. The role with the respondent was a significant step up from the Administrative Officer (AO) role the claimant had been performing as a clerk in the Tribunals Service Social Chamber.

15. It required, once trained, the clerk to work independently based in the Crown Court courtroom, managing the hearings, supporting judiciary and parties, and accurately recording all outcomes for onward communication to other parties including the police, prison and probation services.

The claimant's history of work-related stress prior to this appointment

16. The claimant had a history of anxiety and depression and had reported previous work-related stress and harassment at work to her GP. On 24 March 2009 the claimant had reported anxiousness to her GP. The GP records said *feels now being harassed at new place of work*. On 9 January 2015 the claimant's medical records reported *stress at work. Ongoing discussions between work and union about working in another department due to bullying at work*. On 11 February 2015 the medical records report *can return to work as long as she is in a department that has not been involved the previous problems {which} have exacerbated her stress at work. A supportive and reduced stress environment will facilitate a return to work. Her current position at work is currently too stressful to the patient it would not be possible for her to return to this environment. Please consider a managed move to support her return to work.*

17. On 11 May 2015 records again report stress at work and again on 8 June 2015 the claimant saw her GP about stress at work and she was prescribed sertraline.

18. In June 2017 the claimant reported anxiety with depression to her GP. Her record reported *ongoing issue with work, having accuracy rate scrutinised by boss - should be 98% on random checks. Whilst checking all her work and accuracy between 90-96%, feels there is an element of bullying, not checking all of colleagues work. Feels increased pressure at work is reducing her accuracy, often stays late at work to give more time to do job, does find concentration reduces when anxiety and stress at work. Has had a performance review today and was told would be likely to get a final written warning and if accuracy does not increase could be dismissed. Had meeting with union rep who suggested letter from GP might be helpful.*

19. On 6 November 2017 the claimant reported anxiety and stress. The medical record reported a long history of anxiety and stress mainly to do with work. The claimant agreed to restart sertraline medication. On 21 January 2019 the claimant presented at her GP with a stress related problem. The claimant reported that she had been suffering stress for 18 months, that sertraline was helpful. On 29 July 2019 the claimant requested copies of her medical records urgently from 2007 to date. She had seen the GP on 27 July 2019 and reported that she was stressed due to *a tribunal at the moment*. She was the working as an HMCTS clerk. In 2019 the claimant brought an employment tribunal claim against her employer. She claimed disability discrimination. The claim was settled without the need for a final hearing.

The claimant's responses when applying for the EO role

20. The claimant's application form for the EO role with the respondent in 2021 set out her current employment as AO from January 2019 as HMCTS clerk. In response to the question, do you consider yourself to have a disability? She replied, no.

21. The claimant was offered employment in the EO role. She completed a health questionnaire and answered yes to the question *have you ever had an*

illness, impairment, disability accident or condition? When asked did she think she needed any adjustments or assistance to help her do the job she replied, on the questionnaire, no.

22. She also reported on the questionnaire having experienced stress and anxiety between 2014 and 2017 including low mood, lack of sleep, lethargy, anxiety and feeling overwhelmed. The claimant disclosed that she had been provided with the antidepressant sertraline. The claimant said that her condition was well controlled and she *is now able to live a balanced life*. When asked if she ever had a condition that had been caused or made worse by work the claimant said no. When asked if she needed any adjustments or assistance to help her do a job with the respondent, she said no. During her employment with this respondent from 12 July 2021 until her dismissal on 17 March 2022 the claimant did not report any work-related stress, anxiety or depression to her GP.

Starting work for the respondent

23. On 12 July 2021 the claimant began work and started a period of training. She was part of a cohort of new recruits.

24. Her offer letter set out that the post was a one-year fixed term contract with a start date of 12 July 2021 and with the end date of the fixed term being 11 July 2022. The contract of employment provided that the respondent reserves the right to terminate the fixed term contract prior to expiry of the fixed term in accordance with the terms and conditions. The terms and conditions went on to provide that the appointment was subject to a four month probation period to test suitability for the post. At the end of the four month period the appointment would be confirmed provided that the claimant had shown she could meet the normal requirements of the grade, and that her attendance and conduct had been satisfactory. The contract provided:

> *"If you do not reach the required standard, your appointment will normally be terminated. The manager will follow the appropriate action set out in a probation policy before terminating your appointment. Your appointment may be terminated during the probationary period in the case of misconduct or if your performance or attendance are unsatisfactory and it is clear that you will not be able to reach the required standard before the end of the probationary period.*
>
> *Your manager may extend the length of your probationary period, in wholly exceptional circumstances, where you have been prevented from attaining the required standards of performance, attendance or conduct."*

25. The probation period policy provided that in wholly exceptional circumstances the probation period can be extended. If the employee is subject to a probation period of less than six months, as was the case for the claimant, any extension must be proportionate. Probation can only be extended once and only in exceptional circumstances.

26. The probation period policy provided that employee development should be assessed frequently with regular discussions focusing on conduct, attendance and

performance, that any area of concern must be addressed as soon as it arose and that there should be two probation review meetings one at two months of employment and the second no later than one month before the end of the probation period. The policy provided:

> *"The Department may terminate employment at any time during probation if it is clear that the new employee will not meet the required standards of conduct, attendance and performance and they have previously been issued with a written warning."*

27. The claimant's immediate line manager was Ms Rosindale. The claimant's training was structured. Ms Rosindale arranged that the claimant, as for each trainee in the cohort, was shadowing an experienced clerk and accompanied in court by a buddy. She had help preparing the cases before going into court and after the hearings at her desk area (the pod) close to a group of 7 experienced clerks who were there to support her. In the mornings the cases were to be prepared before the clerk went to take her place in the court room at around 9.30 am. The clerks then came back to the pod to do preparation for the next day after the hearings ended. Ms Rosindale sat close to the pod and could observe and support all her staff. Ms Rosindale had supervision of the court lists and allocated clerks to the lists. The allocations were displayed on a table known locally as the Runners list. Ms Rosindale took into account the types of cases, to assess how long or short, how complex and fast paced each list would be. She allocated experienced clerks to the long, complex or fast lists and had a trainee shadow them. She tried to expose trainees to the breadth of the role so that the trainees did not have just one court room or one buddy but were expected to learn from whichever clerk was covering the relevant list in whichever court room.

28. In early August Ms Rosindale was aware that the claimant was regularly doing her file preparation alone, coming in to work and going, not to the pod where there was support, but straight up to court. Mrs Rosindale felt there would be more support for the claimant if she did her preparation alongside the more experienced clerks on the pod in the hour before hearings started and raised this with the claimant. The claimant told Mrs Rosindale that the noise in the office made her anxious. Ms Rosindale asked did she have a problem with anxiety and was she on any medication. The claimant said no, that she was not on medication, she was fine.

29. One of the clerks working in the Crown Court was SC, a colleague with whom the claimant had previously worked in her Tribunals role alongside two former colleagues AW and MH. AW had applied for the EO role the claimant got and had been unsuccessful. The claimant was concerned about working with SC.

30. The trainers began to feedback to Ms Rosindale about the performance of the new trainees. Early in her employment it was clear that the claimant was not grasping what was required as quickly as the other new starters. Ms Rosindale was not concerned about it at that time as she expected that everyone learns at a different pace.

Probation review meeting 1: 6 August 2021

31. The first probationary review meeting took place on 6 August 2021. Mrs Rosindale told the claimant that feedback from the trainers was that she was taking longer than others to grasp what was needed. She was getting there with initial training and file preparation and arraigning. Mrs Rosindale explained that the contract would only become permanent when the claimant passed her probation. The summary outcome record of that conversation required Mrs Rosindale to tick if the claimant was on track with her attendance, performance and conduct. Mrs Rosindale did not tick the performance box.

32. The claimant had a period of annual leave on 7 August 2021 until 23 August 2021.

33. At 9.18 on 22 September 2021 Trainer CS emailed Ms Rosindale with the following feedback. The claimant was coming in after 9.15 which was too late to be ready for the list. She should be in for 8.15 to be prepared in time. *There is no time to properly help her with her preparation?? It's all in the preparation...losing the most important hour of the day. …. Still having to write everything down….Not understanding basic concepts such as concurrent and consecutive sentences……Still struggling with the correct icons to use.*

Probation review meeting 2: 22 September 2021

34. On 22 September 2021 the claimant had a second probation review meeting with her line manager Ms Rosindale. There was some positive feedback but Mrs Rosindale shared that the trainers were saying that the claimant *doesn't seem to be remembering things she has already been trained on. She asks the same questions….making too many notes rather than watching what is going on….gets lost as to where they are up to in the hearing…* Timekeeping was raised as the claimant was not getting in until after 9am which Mrs Rosindale said was not good whilst she was training as she lost that important pre court preparation time with experienced colleagues. The claimant said she did some preparation the night before but Mrs Rosindale explained the need to do it at a time when it could be checked by a trainer.

35. Specific areas were identified for further support and Mrs Rosindale arranged for a one to one session with Sharon Lea to provide that training. Mrs Rosindale told the claimant to focus on getting the logs of what was happening in the court right and to actually running the court room, the disposals paperwork could be addressed later if the logs and court hearing had been accurately managed.

36. On 23 September 2021 the claimant had a one-to-one session with Sharon Lea. Ms Rosindale emailed her staff to ask them to let her know what training they had done with the claimant and how it went. Rachel Jones emailed Ms Rosindale on 23 September 2021. This was a full page email detailing Ms Jones' concerns that having done about 5 days training with the claimant over a six week period she had doubts about the claimant's ability to understand the court proceedings and translate the information and outcomes onto the court log. Ms Jones said that when she had asked the claimant about gaps the claimant explained by saying she had drifted off or that her head wasn't with it. On one occasion when the claimant had been supported by Mr Platt she had said her head

wasn't with it so he had taken over and she had sat in the jury box watching. Ms Jones said that the claimant could not cope with the role even when sitting in with someone else to support her. The claimant struggled with:

- Keeping an accurate log
- Correctly recording the judge's orders
- Empanelling a jury
- Having her indictments prepared and ready before the start of the hearing
- Arraignments

Ms Jones concluded:

> *"I'm sorry that this information appears personal but I would not want her to struggle in a public facing role when she is a lovely person."*

37. On 27 September Sharon Lea emailed Ms Rosindale at 9.16. She had gone over work on correctly adding indictments to the log with the claimant and again covered how to get the entries on the exhibit log correct.

38. On 27 September at 10.50 Claire Sutton emailed Ms Rosindale, she said:

> *"Huge massive list with lots of training scenarios that could have been ran through in the office e.g. prep of majority verdicts, prep of unanimous verdict, prep of indictment and jury words for a 5 handed trial….numerous orders to be prepped…..*
>
> *10am start and 9.20 arrival...no time for any significant prep and nothing has been prepped on Friday, we then had to go up to court at 9.30…. not only is the training significantly hampered but this is particularly stressful for the trainer….going into court unprepared and then having to talk through preparation issues when the court is running…."*

39. On 1 October 2021 Ms Louise O'Carroll gave feedback to Ms Rosindale about the claimant's performance. She said the morning had gone well with just a few pointers given and that she had given guidance on using icons on the recording system and that this was a little list.

40. On 7 October 2021 Diane Mutch emailed Ms Rosindale to explain that she had been putting "XX" marks on the logs, to distinguish her entries from those entries made by the claimant, to assist the claimant to see where corrections had been put and what an entry should look like, but that the claimant had not understood this, despite having it explained to her, and had started adding XX to her own entries. DM had also spoken to the claimant about court etiquette, addressing the barristers as Mr and Miss rather than using their first names. Overall, she reported that the claimant seemed more confident. On 13 October 2021 SL reported that the claimant kept putting unfinished orders in the wrong

place on the software so that SL had to keep going and completing and moving them. SL also raised that the claimant had put a fine against the wrong defendant and that SL had had to take corrective action.

Probation Review Meeting 3: 15 October 2021

41. On 15 October 2021 the claimant had her third formal probation review meeting. Mrs Rosindale shared the feedback from the trainers with the claimant and made a list of the things that the claimant still needed to work on. Ms Rosindale ticked the claimant for conduct but did not tick to approve either her attendance or performance as satisfactory. Ms Rosindale recorded on the review meeting record sheet:

> *"Because there are still too many issues outstanding you are not ready to go into court alone. I am going to extend your probation by a further month and we will agree an action plan and this can be monitored at the end of each week to ensure we address shortfalls in training."*

Claimant on a performance improvement plan; probation extended

42. Following that meeting her probation was extended for a month and the claimant was warned in writing that failure to pass probation would result in dismissal. The claimant and Mrs Rosindale agreed a probation performance improvement plan. This took the form of a table setting out the claimant's objectives, guidance on how to meet them and available resources and support and a target date for each objective.

43. By end of October 2021 two other new starter clerks from July and August cohort were competent to run a court on their own. At the end of October the claimant was wanting to go into court alone. Ms Rosindale reluctantly allowed that but had a colleague listen in by CVP to be remote support. The claimant forgot to swear in a juror, swore in the wrong jurors and this could have led to grounds for appeal save that the judge noticed the error and corrected it. The claimant forgot to ask for a sex offenders order which had potentially serious consequences of a defendant not being put on the register. The claimant did not respond to the emails her remote colleague was sending to prompt her so that the remote colleague had to go up to the court to intervene and correct the position.

Performance meeting on 29 October 2021

44. The claimant and Ms Rosindale met on 29 October 2021 to discuss the performance plan that had been put in place for the claimant. Ms Rosindale had gathered feedback from those clerks who had been training the claimant as she had done for other trainees. On 1 November 2021 Kate Clarke wrote to Ms Rosindale saying that the claimant's logs looked better and that it is hard when another clerk is watching you. KC suggested that the claimant take more control managing the court room and the order of cases.

45. On 1 November 2021 Pam Reid emailed Ms Rosindale with a subject line "*I want to die".* The email said,

> *"She has just sworn a jury in, and she said the def did the act ???? I am mortified with the way she is swearing this Jury in, its embarrassing ???"*

46. Ms Rosindale again consulted the trainers and collated information to prepare for a review meeting with the claimant. Having seen the feedback from trainers Ms Rosindale was coming to the view that the claimant was not suited to the role. Considerable effort had been made to support her training, identify areas for improvement and provide one to one training and there were still issues with basic components of the role.

Feedback meeting 9 November 2021

47. On 9 November 2021 the claimant met with Ms Rosindale who took her through the latest feedback. That day the claimant had attended the wrong court and logged in to the computer systems then gone to see the wrong judge. The claimant's errors were basic but with far reaching consequences. She had wrongly recorded a prison sentence of 18 months when the sentence was 14 weeks suspended for 18 months. She had also put the wrong address down for a defendant and was still failing to use the right icons on the recording system. A judge had given sentence and the claimant had pressed the wrong buttons effectively turning the tape off during the sentencing remarks instead of recording the sentencing. There was no transcript, the claimant had then taken the sentence down wrongly and missed a 2 month sentence on another offence. Ms Rosindale expressed the serious implications of these basic failings.

48. On 10 November 2021 the claimant had a telephone consultation with her GP in which she reported as having tested positive for Covid. She did not raise any anxiety, stress or work related issues in that consultation. She was absent from work from 10 November 2021 until 1 December 2021.

The emails discussing the claimant

49. On 1 December 2021 the claimant forwarded to Mrs Rosindale an email exchange that the claimant had seen between her former colleagues AW and MH. In the email exchange

AW had said to MH:

> *"I've heard Vicky has been rocking up late at the crown, she won't last there long doing that."*

and …

MH replied:

> *"Can't believe we are in this situation and Miss Unreliable gets a permanent EO job."*

AW replied on 29 November 2021 when the claimant was off sick

> *"I think Vicky might have been given the elbow."*

50. He copied the reply, in error, to the claimant who then saw this unkind chain of conversation about her. The claimant told Ms Rosindale that it could be inferred from the exchange that one of her former colleagues had had contact with her current working colleague SC. The claimant, who had only returned to work that day, told Ms Rosindale that she would be working from another room that day to draft and lodge a grievance against AW and MH. Ms Rosindale offered mediation but the claimant did not want to mediate with AW and MH but said she would have mediation with SC who she believed had been passing information about her to AW and MH.

Ms Rosindale seeks feedback on the claimant

51. On 6 December 2021 Mrs Rosindale again consulted trainers as to how the claimant was doing. Ms Rosindale also emailed a judge who had worked with the claimant for his feedback. The judge said in an email dated 8 December 2021:

> *"Before I received your email I was thinking about speaking to you about Vicky, we hadn't met before today. That is because, as the day went on, I became increasingly concerned that she was struggling to deal with the varied cases in my list. At that stage, I didn't know how much experience she had. Now that I know that she's been training for some time, I am worried that she may not have taken on board what she has been taught. As I wasn't expecting to be asked about her performance because I had a busy list, I didn't make notes of specific problems. However, I can generally deal with the topics that you mentioned. She didn't appear to know what was happening or what to expect in the cases listed today. She didn't control the list in the sense of the order in which cases were called on….. familiarity with the advocates in those cases. She didn't seem to understand what I wanted when I asked for enquiries to be made of the listing officer and she didn't seem to understand what I wanted her to do even when I gave her what I thought were relatively straightforward instructions. There were several occasions when Joanne or I had to intervene to take over…. to tell them what to do.*
>
> *I must admit that I'd be very concerned to find that she was my clerk unless she was supported by another, more experienced clerk. In comparison with other new clerks, who have been trained for a similar period of time, she is a long way short of their standard.*
>
> *I hope that this is helpful."*

52. Ms Rosindale sent the claimant an invitation to the probation review meeting in the form of a letter which set out her right to be accompanied and warned her:

> *"This meeting may lead to formal action in the form of a written warning or termination of employment if after assessing all the evidence it is concluded that you will be unable to meet the required standards of performance."*

53. The Probation Period Policy and Procedure were attached.

10 December Probation Review Meeting 3

54. On 10 December 2021 Ms Rosindale had a third probation review meeting with the claimant. She again had consulted the trainers. VW had sat with the claimant on a very short list and reported that the claimant had been prepared and that the logs were accurate. Minutes of that meeting were taken and outcomes recorded in the table performance plan document. Ms Rosindale recorded that the claimant said she had difficulty being around some members of staff in the office and feels they are talking about her and she would prefer to work in the court room. Ms Rosindale said that the claimant should be working on the pod to get support but that if she is feeling very anxious, on occasion, then she can work from the court room. The plan recorded *she is willing to learn and enjoys the job but some of the training is taking a while to set in….. The training given to all new clerks should allow them to record unaided by the 10th week of training… Vicky is now in her 23rd week -2 ½ weeks of leave, four weeks sickness.*

55. Ms Rosindale was aware of the claimant's intention to lodge a grievance and had been talking to her about it. She had asked the claimant if she had wished to move places on the pod to be away from SC whom the claimant suspected of having passed information to AW and MH. The claimant did not want to move places. They talked about performance and Ms Rosindale gave direction, again, that it is better if the claimant can be downstairs on the pod in the mornings to get help preparing her cases. The claimant's reply was that she preferred preparing at night. Ms Rosindale talked through recent experiences with the claimant and reiterated the need to have looked at the cases and prepared for potential outcomes before going into court. Ms Rosindale reiterated the importance whilst training of preparing in the mornings. Ms Rosindale referred to the performance action plan and said there were still main areas of concern. Ms Rosindale asked if with more training the claimant thought she could run a court and she said yes. On that basis Ms Rosindale proposed extending probation again. She said that she would have to check as it had already been extended once but that she was seeing them as exceptional circumstances because the claimant had been off for three weeks and two days with COVID. Ms Rosindale proposed the maximum possible extension of a further three months, making a total of two extensions over four months.

56. The claimant said she was committed and enjoying the role. She said:

> *"I have anxiety. I get the best results with calm people with me….DB is calm and allowed me to take control of the room."*

57. The claimant was critical of another trainer who she said had got uptight with her. Ms Rosindale said the trainer had been frustrated because the claimant was not listening, the judge had fed back that she was not listening in court. The claimant asked if she could have a day out of court every two weeks to catch up and Ms Rosindale explained that there should not be a need to catch up, that she should be able to keep pace with events in the court room but that *someone is needed to check your results and get the errors sent back to you to correct.* They agreed that Ms Rosindale would decide who to place the claimant with to train and that they would meet weekly. Ms Rosindale allocated DB to train the claimant in accordance with the claimant's request.

58. Ms Rosindale checked in with DB about the claimant's progress and found that the claimant was still making basic errors; failing to record adjournment dates, missing icons on the recording system, not linking the court room to the video link, failing to move a case to another court despite saying she had done it and DB had still had to intervene in court room management. There was also positive feedback that the claimant was becoming more confident.

59. On 17 December Ms Rosindale asked the claimant where she was up to with preparation of her written grievance. The claimant said *I'll have the form to you very soon.* That same day DB provided feedback to Ms Rosindale about the claimant's performance saying she had been in court and that the log was not correct, the claimant had referred to the judge as Mr rather than by his judicial title and that the judge had told DB that the claimant did not seem to understand what was happening.

The grievance

60. The claimant submitted her grievance against AW and MH. HG was appointed as investigating officer and the claimant was notified of that on 12 January 2022.

61. On 20 December CG, who had been supporting the claimant in court, reported that the claimant had asked a clerk colleague VN who happened to be married to one of the barristers who had been in court, to take a note home to the barrister. The clerk had reported this to CG as inappropriate and unethical. CG agreed and advised the claimant to put the information on the ECS system where both parties would be able to see it. CG informed Ms Rosindale about the incident saying *it was a very awkward moment because* the claimant *was insisting that VN take the note to Mr N ..she was becoming angry and I left to go home at that point.* CG added that she felt sorry for her colleagues who had been trying hard to support the claimant but the atmosphere was *like walking on pins.*

Performance plan meeting

62. On 21 December there was a further performance plan meeting. There were some positives, Ms Rosindale recorded that the preparation had been better but that the claimant *still isn't preparing before going into court*. The plan recorded that some days, with small lists, went quite well but there had been feedback from a judge that the claimant still wasn't controlling the court room, prompting was required and things were erratic. There was feedback that the claimant had been identifying defendants before the judge was on the bench and hadn't been keeping up to speed with instant messaging. Orders were missing the target deadlines, and lots of work was still needed to be done on getting logs right, disposals were being missed.

63. The claimant had annual leave from 22 December until 4 January 2022. In early January 2022 there were instances of the claimant staying behind until after 7pm to catch up. Ms Rosindale told her that the building is locked at 6.30pm and she must leave by then to allow security to lock the car parks. On 17 January 2022 Ms Rosindale told the claimant *today you are going to focus on disposals as*

you are out of court. We need to increase your speed on these as it's taken too long for you to complete them and get them on the shelf to meet the targets.

Probation meeting 13 January 2022

64. The claimant's next probation meeting took place on 13 January 2022. Ms Rosendale prepared a detailed set of notes of this meeting and sent them to the claimant after the meeting. They provided a full commentary on the ongoing reviews of the claimant's performance, including a summary of the feedback from the judges and the feedback that had come from the clerks training the claimant. Ms Rosindale decided after this meeting to keep the claimant out of the court room for a while to focus on getting the disposals right. The claimant then had a period of sickness absence and returned to work on 20 January 2022.

Grievance investigatory interviews

65. 21 January 2022 was the day on which the investigating officer was conducting investigator interviews in the claimant's grievance. The claimant had her interview on teams on the morning from home and said she would stay in the back training room working on disposals in the afternoon. Ms Rosindale told her it was important that she worked on the pod. That same day SC emailed Ms Rosindale to say she should be made aware that the claimant was telling other people about the grievance and the interviews. The claimant then went off sick again.

66. On 27 January Ms Rosindale conducted a return to work interview with the claimant who said that she had had migraine. Ms Rosindale enquired about the cause and what was needed. The claimant said it was not work-related. There was discussion about how the claimant would manage absence going forward. The claimant said that she gone into a protective shell since the emails about her (the implication being that it was because of the grievance) and had taken herself off into quiet spaces to work. Ms Rosindale again said that this cannot happen all the time, the claimant needs to be part of the team and work on the pod where there is help available to her.

Probation review meeting

67. That same day Ms Rosindale also conducted a further probation meeting. This time the review took a day by day analysis of the claimant's working days from 14 January to 27 January 2022, excluding sickness absence. On 14 January 2022 Ms Rosindale had felt the claimant had been underprepared. In one place she did not know where the trial was up to, wasn't ready to take a verdict so the court room had to wait while the claimant got ready. On 18 January 2022 it took the claimant until 2:30pm to complete one disposal. This wasn't what would have been expected. Ordinarily a clerk should do at least four or five disposals during that time. On 19 January 2022 the claimant gave inaccurate information to listing which meant that the court room was under-used. The claimant was still struggling with icons on the court log which meant that the system was not showing that the defendant had gone from being on bail into custody. This information is vitally important to the police. There was information missing from the relist sheet which might mean that a further hearing would not happen and a case be left in limbo.

The claimant was working on disposals in the back office and Ms Rosindale told her in the morning that she was to go back onto the pod so that she had support and could get help with disposals. By 3pm the claimant had still not acted on that instruction. The claimant only completed three disposals during the whole day. Ms Rosindale felt that a minimum of six should have been done in that time, even for the claimant who was struggling with the pace, and that this was unacceptable. The notes also recorded Ms Rosindale praising the claimant and saying well done for something things she had got right. Ms Rosindale also said that it was concerning that some errors like the monetary orders were still happening when the claimant had been shown this before.

Performance feedback

68. On 11 February 2022 there was a further meeting in which Ms Rosindale told the claimant that she was not at the point to be going solo. The claimant protested and Ms Rosindale said that she was willing to give the benefit of the doubt but with the provision that she had a CVP link open on her laptop so that a clerk in the office could monitor her log and relist sheets. In that way if the log and the disposals were wrong, a clerk could provide support and correction. The claimant agreed to that approach. Ms Rosindale raised an incident that had occurred on 10 February 2022 when the court had been assembled for the verdict at which point the claimant suddenly said she was going to the toilet. The judge came in and the whole court room had to wait for the claimant to return. The claimant said that she had told the judge that she would ring him when they were ready for him to come down but the judge had come down anyway. Ms Rosindale told her that she should only ring the judge to come down when everyone else is ready. Thankfully, on this occasion a clerk, Michelle, had also been in the court room so that the judge was not left in a court room without a clerk. Ms Rosindale was clear that she cannot have this happening.

69. On 15 February 2022 a judge provided feedback that the claimant had clearly been nervous, and had much to do but had managed without problems. Again, on 18 February 2022 Ms Rosindale sought feedback from a judge who said that there had not been much for the claimant to do at the end of short trial and that she had been fine. On 18 February 2022 a judge provided detailed feedback about the claimant including *she appears to be nervous and anxious…. I do have one concern about Victoria, that is her ability to listen carefully and or retain information…. She asked me several times whom counsel was representing a particular defendant. I told her and spelt it out. By the time the case was called on she had forgotten and called counsel by a different name. More than once when she came to see me in Chambers (which she did a lot) she seemed confused as to which case she was referring to and who counsel were on each side. I had issues about the recording of sentences that I had passed. In one case I passed a sentence of 16 months suspended for two years. Victoria then said to me that was a two-year sentence and asked how long it was suspended for. In the same case I imposed 175 hours of unpaid work, I later noticed that she recorded that as 75 hours… This was a particular worry as I'm not asked to confirm non-custodial sentences and I would have been unaware of that had it not been brought to my attention by someone else. In another case I passed a sentence of 16 months in prison for burglary and seven days consecutive for failing to surrender. I asked Victoria to record the result on DCS. She then came to see me to ask what*

sentence I passed. I asked her what sentence she thought I had passed and she said she thought 16 months. It was clear she was unaware of the seven days of failing to surrender.

70. The judge gave other examples of problems with the claimant's performance and said …. *My lists in the last two days have been relatively light. I would be worried if Victoria had to clerk a busy list on her own. If she could find a way to listen carefully and retain information for long enough to recorded accurately that there would be no other problem. Cheers, as I have said {she is} personable.*

71. An issue then arose about the claimant's use of Flexi time. Ms Rosindale wrote to her on 23 February 2022 to remind her to clock out for lunch times. She had only clocked out for 11 lunch times out of a possible 37 which meant that there would have to be 14 corrections on the system for the claimant. Ms Rosindale reminded her that everyone must take and record at least a 30 minute lunch break.

72. Issues with the claimant's performance continued. On 10 March 2022 DN reported to Ms Rosindale that a defendant had been found guilty of an offence at 4:45pm which required him to be entered on the sex offender register because he was on bail. The claimant missed this point but DM frantically emailed the claimant to address this issue.

Final Probation Review Meeting

73. On 11 March 2022 Stephen Cornwall conducted a final probation review meeting with the claimant. Ms Rosindale attended as notetaker and the claimant had her trade union representative Daniel Martin present with her. The claimant had been warned that the outcome might be dismissal. There was discussion about the claimant's attendance levels and absences. The claimant said that the current work environment left her feeling drained and anxious; she felt people were talking behind her back and this impacted her mental health. She said that given the right environment her health would be better.

74. The discussion about performance included the claimant saying that third parties are being unfair to her and that she asked her line manager for those individuals to no longer train her as they made her feel uncomfortable. The performance discussion went over the previous performance and probation review meetings and listed the performance issues at each stage. The claimant alleged that she had been experiencing bullying in the form of scrutiny of her work and people talking about her behind her back. Mr Cornwall said that there had been no formal allegation of bullying until this meeting. The claimant said that she had raised feeling isolated and excluded. She said that Mr Cornwall was minimising the impact of bullying on her. Mr Cornwall said that she was consistently making errors and that this had been dealt with by the line manager and a performance improvement plan. By 11 February, 30 weeks since she started as a court clerk, the claimant still had to be supported in the court room. She had been given an opportunity to go solo and performance issues had continued to arise. Mr Cornwall listed the incidents by date of the errors in the court room in February 2022. He accepted that all clerks make mistakes but said that other clerks are not making the same level of mistakes as the claimant. He then went through the mistakes the claimant had made in March 2022 including on 10 March 2022 alone, failing to

prepare a sex offenders register order, failing to prompt the judge for the requirement for the order for the register, incorrect swearing in of a jury panel requiring the judge to intervene twice, incorrect orders being recorded, the court relist sheets not being electronically saved, required amendment and retyping. Mr Cornwall said that these were basic errors and that the volume of them was not acceptable and the risks associated with them were significant.

75. Mr Cornwall recited the significant amount of staff resource that had been invested in trying to provide the claimant with every opportunity to demonstrate that she was capable of reaching and maintaining the required standard. He went through each of the objectives and said that none of them had been met. The claimant said she felt alone, scrutinised, tired and drained, bullied and that the grievance had affected her. Mr Martin said that anxiety was affecting her. The claimant said that she was not going to progress where she is and that she was thinking about asking for an external move. Mr Cornwall adjourned to make a decision and came back to inform the claimant that she had not successfully passed a period of extended probation her employment with would end that day. She was given information about appeal.

76. On 21 March 2022 Mr Cornwall wrote to the claimant setting out the reasons for termination of her employment. Her last day of service was 11 March 2022. The claimant was to be paid up to Friday 8 April 2022 together with accrued leave and flexi time. The claimant was informed she had 15 days from receipt of the letter in which to appeal.

77. On 23 March 2022 the claimant received her grievance outcome and found that the grievance had been upheld against AW and MH. They had breached the conduct policy by sending unacceptable emails and had showed unacceptable behaviour by spreading malicious rumours or insulting someone which had led to the claimant feeling harassed.

78. The claimant lodged an appeal notification form dated 6 April 2022. She said she had been treated unfairly and subjected to disproportionate scrutiny during her employment. She sought reinstatement. She had six grounds of appeal:

1. as a former civil servant she should not have been subject to probation.

2. bullying affected her performance and ought to have mitigated against dismissal

3. there was a lack of support / failure to promote a culture free from bullying

4. not referred for health review despite sharing that she suffered from anxiety

5. hearing manager did not have all relevant facts to make a fair decision

   (The claimant did not say what facts were missing)

6. procedural failures (unspecified)

79. The appeal was acknowledged by Clare Beech who was to hear the appeal, on 11 May 2022 and the claimant was given an opportunity to provide any further information. She sent a historical medical summary from her doctor which was undated but was sent to the respondent by the claimant on 12 May 2022. It said:

> *"I can confirm the above patient suffered with stress, depression and anxiety intermittently since 2007. It was particularly problematic through the years 2014-2019 with Victoria being seen regularly at the surgery for various interventions."*

80. The appeal hearing took place on 13 May 2022 by Teams. The claimant attended with her TU representative Mr Martin. Clare Beech was the appeal manager and MC took notes. The claimant described how she had felt that there was animosity towards her, that a colleague who had gone for the job and not got it was passive-aggressive towards her, that there was malicious gossip. The claimant told Clare Beech that her grievance had been upheld but (wrongly) told Clare Beech that they had upheld discrimination and disability at the grievance. The claimant alleged that she had been shouted at in court by a trainer in September and that service users had said this was wrong.

81. Ms Beech asked about the over scrutiny. The claimant said *I had seen some of my other colleagues at the same level as me being left and being more independent. I felt anxious and jittery in the court room and didn't feel as confident as I should have been by being spoken to by the trainers….. Having my probation extended and getting to the point where things were starting to work and I was getting to grips with the role….. One of the trainers Denise stated that she was concerned the over scrutiny of me in comparison to other people and she said there had been a few errors but no more than anyone else she said it is experience that is needed and that my confidence had gone down. This was in January 2022 and Denise was going to speak with Debbie Rosindale as the scrutiny was unfair compared to the others.* The claimant said the judges had been asked for feedback about her and that her confidence was crushed.

82. Ms Beech asked if there had been a conversation with the line manager about support and welfare the claimant replied *no it didn't occur to me to ask.*

83. The meeting adjourned to allow the claimant to confer with her union representative. After that adjournment the claimant was asked did she have any new information that she needed to present. She did not. She said that there had been lies told about her, defamation of her and a very difficult working environment. The claimant said that she wasn't taken seriously, that no support was offered to her, there was bullying, no stress assessment had been offered and that she felt isolated. The claimant said that she would expect there to be pressure, that it's the nature of the role part of an ongoing process but she felt pressured and undermined. She said, *"you are in front of the judge and counsel, the pressure, the hostile environment and the grievance process wore away at me and I felt exhausted".*

84. The claimant alleged at appeal that the trainers had been telling her to do things the wrong way. She said she felt ignored in the pod she was on. She said that Ms Rosindale had told her she could go straight up to court. The claimant said

that there were three stages to the job; the preparation work, the court room work and the disposals work. She said that other colleagues were measured differently to her. There was then an adjournment for Ms Beech to make a decision.

85. Following the hearing Ms Beech made some follow up enquiries. She decided to uphold the original decision to terminate employment for failure to pass the probationary period. Clare Beech sent the appeal outcome on 6 June 2022. She replied under each of the appeal grounds 1-6 above giving detailed reasons as to why the appeal was rejected. She said she found no evidence of bullying and harassment. She acknowledged that the claimant may have felt over-scrutinised but found that the interventions were necessary. Clare Beech said that the claimant had mentioned feeling anxious at the final probation review meeting in March but that the claimant herself had said that this was due to the impact of the grievance, the on-going training and her being uncomfortable in the pod. Clare Beech recorded what Ms Rosindale had done to address those issues; extend the probationary period, offer her a move to another workstation on the pod and change trainers for the claimant. Clare Beech said whilst a stress Risk Assessment would have been useful she took into account *the standard required to be a court clerk which could not be adjusted.* She also said it would have been better to have had the grievance outcome before the decision to terminate employment but again found *I do not believe it would have led to a different outcome as Vicki had not demonstrated the competence required to be a court clerk.*

86. The claimant acknowledged receipt of that outcome saying that she still believed she had been set up to fail.

87. On 16 May 2022, despite not having been in work since 11 March 2022 and no longer employed by the respondent, the claimant reported stress at work to her GP. The GP record reports *asking for a sick note struggling at work with stress and anxiety been through grievance and affected her been unwell with headache and feeling drained and tired needing some time off work to get away from everything….feels mentally triggered by the whole process.* In July 2022 she again reported stress at work to her GP, though she was unemployed, and requested a further sicknote. In September 2022 the claimant again requested a fit note and said that she would like to restart sertraline due to stress at work.

Relevant Law

88. The relevant law is as follows:

> **123 Time limits**
>
> (1) Subject to section 140B proceedings on a complaint 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.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of —

(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something —

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 15 Discrimination arising from disability

(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

89. The law on knowledge of disability is relevant in this case. The Tribunal had regard to The Equality and Human Rights Commission's Code of Practice on Employment 2011 which states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability. It suggests that an employer must consider the issue even where an employee has not formally disclosed a disability. It gives an example of a person whose work suffers a sudden deterioration and states that the change in behaviour at work should have alerted the employer to the possibility that these were connected to a disability. The Code says it is likely to be reasonable to expect the employer to discuss the reason for underperformance.

90. In A Ltd v Z ICR 199 the EAT endorsed an approach in which an employment tribunal should take into account what the employer might reasonably have been expected to know had it made enquiries. If an employee is likely to have suppressed information about her mental health, for example, then the employer could not reasonably have been expected to know she was disabled. In Baldeh v Churches Housing Association of Dudley and District Limited EAT 0290/18 the EAT held that a tribunal had erred in not making a finding, when rejecting a section 15 complaint on the basis of knowledge, as to whether the employer had gained actual or constructive knowledge of disability. It was confirmed in CLFIS v Reynolds UK Limited 2015 ICR 1010 CA that the issue is whether the employer had actual or constructive knowledge of disability at the time of the acts of discrimination complained of.

91. In Gallacher v Abellio Scotrail Limited EAT 0027/19 the EAT upheld the decision of the employment tribunal that the employer had not had actual or constructive knowledge of the claimant's disability in this section 15 complaint. There had been a phased return after a period of absence and discussion about medication and managing workload but there was no specific discussion about the menopause and depression which the claimant relied on later as disabilities. The EAT found that the claimant had not provided the detail needed for the respondent to be on notice of substantial disadvantage, the effects of her condition on her ability to perform her normal day to day activities or the duration of any effects. The claimant herself under reported her condition. This tribunal does not suggest that the Abellio decision requires an employer to have been provided with information as to the severity and effect of the condition because it is to be seen in the context of the case. An employee might provide some information, sufficient information for the respondent to then be reasonably expected to make further enquiry.

92. In Donelian v Liberata UK Ltd 2018 EWCA Civ 129 The Court of Appeal restated the test for the Tribunal to apply in relation to knowledge; the respondent "did all they could reasonably be expected to have done to find out about the nature of the health problem that the Claimant was experiencing".

93. Section 20 and 21 EQA deal with reasonable adjustments.

> **20 Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
>
> (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
>
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to —

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Submissions

The respondent

94. The respondent conceded that the claimant had a disability but did not concede knowledge.

95. The respondent submitted that the claimant could not have it both ways; that she reached and maintained the required standard of performance from the end of October 2021 but also that the reasons for her underperformance in December and beyond were the circumstances that led to her grievance, the emails and her sense of people talking about her which heightened her anxiety. The respondent says the claimant has exaggerated the impact of her anxiety on

her at the time and has exaggerated the allegation she now makes of bullying, extending it to 8 people at the hearing. The respondent submitted that no allegation of bullying was made during the employment.

96. The respondent submitted that the Tribunal must have real regard to the medical records on the point of the claimant's credibility about reasons for her underperformance. It pointed out that this was a claimant who had previously gone to her GP about stress at work and anxiety and feeling scrutinized and bullied, in other employments, but did not go to her GP and did not report health affecting her performance during the key period July 2021 to March 2022. The respondent submitted that nowhere in the many meetings did the claimant say that she had a disability that was stopping her from meeting the performance standard. It submitted that the claimant had not said, at all, what her disability stops her from doing.

97. The respondent also submitted that the claimant's indication that she wanted to finish out the twelve month contract elsewhere in an AO role is indicative of the fact that the EO role was too big a step up for her.

98. The claimant's submissions were that she was micro-managed and bullied and that the email exchange showed that she was being talked about, she had not imagined that. She says that climate affected her performance and that she was improving and ought to have been allowed to see out the role either with adjustments or allocated to another court at AO level.

Applying the Law to the Facts

99. All the complaints fail for want of knowledge of disability. The Tribunal addresses that key finding first and then deals with alternate reasoning below.

<u>Knowledge issues</u>

Did R know or ought it reasonably to have known that C was disabled? If so, from what date?

100. The Tribunal had regard to Section 15(2), to the EHRC Code of Practice on Employment 2011 and the case law cited by both Counsel and the authorities above.

101. The claimant, in written closing submissions, extracted the content of all communications that taken together could be said to give the respondent knowledge. This was a helpful approach but had within it an inherent danger of looking at knowledge with hindsight. The Tribunal looked at what the employer ought reasonably to have known in the context of the relationship at the time of the acts of discrimination.

102. *The application form and questionnaire:* The Tribunal accepts that the respondent knew what was in the questionnaire that the claimant had completed during recruitment. The Tribunal accepts the claimant's submission that even if not actually known by Ms Rosindale the content of that questionnaire was known to the respondent. The claimant had said in her reply on the application form that she did not have a disability. The Tribunal finds that this is not determinative as

many disabled people do not consider or choose to label themselves disabled but that would not remove a duty from the respondent to consider whether the Equality Act applied. The Code provides that an employer must do all that it can reasonably be expected to do to find out whether a person has a disability. The claimant said she did not need adjustments but she did report stress and anxiety on the health questionnaire between 2014 and 2017 and that she had, historically, taken anti-depressant, but was now living a balanced life and needed no adjustment. There was nothing in the application form or health questionnaire to require the respondent to do any more during recruitment or on appointment. The questionnaire did not give the respondent knowledge of disability in 2021. It gave constructive knowledge of historic stress and anxiety which may or may not have amounted to a disability for a discreet period.

103. *Disclosures to Ms Rosindale:* The claimant told Ms Rosindale in early August 2021 in response to being encouraged to go to the pod before work to prepare, that the noise in the office made her anxious. At this point Ms Rosindale was alerted to the possibility of a condition or impairment and, appropriately in exactly the way envisaged by the Code, made enquiry, asking the claimant did she have a problem with anxiety? was she OK? and was she on any medication? and the claimant replied, no. The claimant said she was fine. The respondent had discharged its duty to do all it could reasonably be expected to do at that time, it had made reasonably enquiry.

104. *Disclosures to others:* On 23 September 2021 Ms Rosindale saw that the claimant had told Ms Jones, on different occasions over a six week period, that she had drifted off and that her head wasn't with it, that she had fallen asleep. These comments were made in the context of explaining errors she had made in court. She also told Mr Platt on another occasion that her head just wasn't with it. This information passed to Ms Rosindale is seen in the context of multiple reports from trainers seen by the Tribunal, not all of which are reproduced in the facts above, none of the reports reported anything to put the respondent on notice of any health condition nor any potential health impact on performance or disability. In terms of proportionality the comments were a tiny part of a large ongoing discussion and feedback on performance. They were colloquialisms used by the claimant to seek to explain errors. Ms Rosindale was seeing the claimant regularly, the claimant was directed to work with colleagues, had trainers and experienced clerks around her and had not said anything to alert them to the fact that her difficulties in performance might be related to her health. This was a challenging role and in the early stages of July to September, the Tribunal accepts the respondent's evidence that the step up from AO to EO, operating in a public facing pressured court clerk role would be a source of anxiety to anyone.

105. *Behind her cohort:* On 15 October there was the third probation review. By this point other trainees were doing well and almost ready to go solo in court. The claimant had still not said that her poor performance was related to her health in any way. Ms Rosindale shared with her the feedback from trainers. The claimant then reported sick with COVID. Her being behind progress made by others in her cohort was insufficient to alert the respondent to an enquiry about disability. The Tribunal accepts Ms Rosindale's evidence that people learn at different rates and different levels of support are needed.

106. *I have anxiety:* On 10 December another probation review took place and

the claimant said *I have anxiety.* Again the context is relevant and on close examination of the notes of the meetings and the oral evidence the Tribunal finds that the claimant was a) from 1 December 2021 distressed at the unpleasant email exchange she had seen and understandably upset about it and she was assuming that the information had come from someone she works with, which assumption fuelled her reluctance to work with her colleagues and b) she was wanting to express a preference as to who trained her. She talked about calm people. She talked about who she gets on with and who she doesn't find so helpful. There is nothing there in that context of under performance, the grievance issue and the claimant having been reluctant from the outset to work on the pod with colleagues, and her wanting to pick her preferred trainers, to alert the respondent to a need for reasonable enquiry as to health affecting performance or as to disability. Quite the contrary, if it was the claimant's health that was the issue then it would'nt have mattered which trainer she had, she would still struggle. The claimant was advancing a position in which workplace relationships were a factor in her underperformance.

107. *Enquiry:* There was discussion about the claimant's absence. Ms Rosindale asked her about her health and ability to return to work in November 2021 and do her job but the response was around COVID, and later migraine, not anything else. Similarly, the claimant had absences in January 2022 and reported a migraine and when asked, expressly, about her health and ability to work, on return to work she said her headache was not work related. The respondent made enquiry and was not told anything that might alert it to the need to make further enquiry or to be on notice of disability. It was told, expressly, that the reasons for absence were COVID and migraine, that they were not work related and no health impact on performance was indicated.

108. *Claimant's reluctance to work with her colleagues:* Ms Rosindale gave the claimant permission to work from the court room occasionally because the claimant had said she was anxious about working with colleagues that she perceived were talking about her. This came in the context of months of Ms Rosindale trying to get the claimant to use the support that is open to her by working on the pod in the main office. Ms Rosindale even positioned herself on another pod to observe the workplace relationships and saw and heard nothing that would alert her either to any bullying or to the need to make enquiry as to whether a health condition might explain the claimant's under-performance. The claimant's reluctance to work there was not enough to alert the respondent to a disability because the claimant has said, explicitly, that it is because people are talking about her. It was a relationship issue not a health issue.

109. *Feedback from the workplace:* The Tribunal considered was the feedback from judges either alone or taken together with trainer feedback enough to alert the respondent to an enquiry as to disability. The Tribunal finds it was not. The judges raised concentration issues and concern about listening and ability to retain information. The trainer feedback is largely factual and gives credit alongside accounts of failings. The claimant was trained, over the period, by 12 or 13 different experienced clerks. The Tribunal read each of the emails giving feedback and has made factual findings around some of the more concise feedback above which is representative of the total feedback. The portrayal overall is of somebody very personable but not competent in the role. This is not someone who is going

home sick during a working day or saying she is too unwell to cope. There were no health flags to the trainers or judges.

110. *Performance itself:* The Tribunal considered could underperformance itself put a respondent on notice and decided, following case law and guidance, that that is possible. There are cases where a sudden dip or a deterioration or change over time might alert a respondent that enquiry ought to be made as to health based causes. In this case there was no previous high performance, and no sudden deterioration. The claimant accepted in cross-examination that her performance did not meet the required standard throughout her employment. She said *with a little bit more time I would have been at the standard"* but also accepted that what she wanted as at the time of dismissal was to move to another court at a lower AO role. The Tribunal accepts the respondent's submission that the claimant accepted she could not perform at the required standard. The claimant argued that she was improving by the end of October. The Tribunal notes that Ms Rosindale was willing to let her try to perform at the level of the other trainees who by that time were running a court alone "going solo" but the attempt was not successful, and the claimant had to be rescued from a potentially serious consequence by a colleague who had been listening in remotely. A further attempt at going solo in February 2022 was also unsuccessful.

111. The Tribunal finds there was not enough at any point from commencement of employment to dismissal to put the respondent on notice of disability and not enough to alert the respondent to the need to make further enquiry. There were absences not related to the pleaded disability. There were no fit notes relating to the pleaded disability nor any GP fit note raising adjustments for return. This was a challenging role that would have made any new starter anxious, and reassurances were given and support in place on the pod, there were multiple meetings for probation reviews and performance planning, daily management of Lists and work allocation and trainers allocated and preferences met and seen in context not enough even to amount to notice of a health problem let alone to amount to actual or constructive notice of disability. The Section 15 (2) defence succeeds in relation to dismissal.

112. At appeal there is an additional piece of information. The letter has come in from the doctor on 12 May 2022 reciting the history of anxiety and depression and a significant period of depression and anxiety between 2014 and 2019. That was over two years prior to the claimant's role with the respondent. There is no medical evidence of any recurrence since starting the role in July 2021. This is similar to the information provided by the claimant in the questionnaire, historic depression and anxiety. It provides no new information. At appeal the claimant's representative Mr Martin says anxiety is affecting her. He refers to *people talking about her behind her back and willing her to fail.* The anxiety is again expressed as reactive to workplace relationships. The Tribunal finds that there was nothing at appeal to alert the respondent to a health issue. What the claimant was finding difficult was contact with the particular people, those she thought were related to her previous employment and had been spreading information and gossiping about her, rather than a health related problem with contact with people generally. The claimant was not saying, I can't go into court, I can't deal with people. She was saying, throughout, that there were particular people who were making things unpleasant for her. The Tribunal accepts the respondent's submission that the

claimant has made much more of this with hindsight than she did at the time. At Tribunal she listed seven or eight people not all of whose names she could recall, who had bullied her. The claimant accepted that she had not made such a wide ranging nor specific complaint previously. She first raised bullying at the dismissal meeting.

113. The Tribunal finds there is insufficient to alert the respondent to a health problem, insufficient to require it to undertake further enquiry. The claimant has not been off sick with anxiety, stress or depression. She has not said that her healthy is affecting her performance or that she has a disability. Describing herself as anxious, and being better around calm people, and even with a history of anxiety, is insufficient to put the respondent on notice of enquiry as to disability in 2021 and 2022. The complaint at appeal fails for want of knowledge.

114. The disability discrimination complaints must fail. The respondent does not acquire knowledge of disability until after the acts of discrimination complained of.

115. The Tribunal has reasoned below, in outline only, why if the complaints had proceeded beyond this stage they would have failed for other reasons.

Time issues

Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 10 March 2022 may not have been brought in time.

116. The claimant was told of her dismissal on 11 March 2022. The acts of discrimination complained of were, in the section 15 complaint the date of dismissal 11 March 2022 and the date of appeal, 13 May 2022. In the reasonable adjustment complaints the dates of the acts complained ran throughout employment from August 2021 to appeal on 13 May 2022.

Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

(1) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

(2) If not, was there conduct extending over a period?

(3) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

(4) If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

(a) Why were the complaints not made to the Tribunal in time?

(b) In any event, is it just and equitable in all the circumstances to extend time?

117. The claimant went to ACAS on 9 June 2022 which is less than the required three months from the date she was made aware of her dismissal (11 March 2022).

She achieved her certificate on 1 July and commenced proceedings on 14 July 2022. Her section 15 complaints about dismissal and appeal were in time.

118. The claimant's reasonable adjustment complaints prior to 10 March 2022 at 4.5.1, 4.5.2, 4.5.3, 4.5.4, 4.5.5, and 4.5.6 and 4.5.9 were potentially out of time. The claimant was not clear in her pleading as at what dates she alleged each of the failures took place. In cross-examination she said that 4.5.1, 4.5.2, 4.5.3 and 4.5.4 ought all to have been acted on by August 2021. She said 4.5.5 and 4.5.6 ought to have been acted on by December 2021. The claimant said 4.5.7 and 4.5.8 were in March 2022 and that 4.5.9 ought to have been acted on in August 2021.

119. The Tribunal had regard to the facts set out above and considered whether or not those acts that might be out of time formed part of a course of conduct extending over a period. Section 123(3)(a) says that for time purposes conduct extending over a period is to be treated as done at the end of the period and at (b) failure to do something is to be treated as done when the person in question decided on it.

120. Ms Rosindale decided from the point at which she was first asked that the claimant could not work solely from court nor solely from a back office. In the first probation review Ms Rosindale was telling the claimant the importance of doing her preparation on the pod in the mornings. That was on 6 August 2021, if not before. Accordingly, complaints at:

> 4.5.3 Allow C to be permanently allowed to stay in Court to carry out non Court related work away from the colleagues she perceived as bullying her;
>
> and
>
> 4.5.4 Allow C to move to a back office within the main office to carry to her non court room duties away from those colleagues she perceived as bullying her;

were out of time.

Did they form part of a course of conduct extending over a period?

121. The Tribunal finds this was a stand alone decision with an outcome. The claimant was not going to be allowed to work permanently from court or a back office from the outset. There may have been an ongoing impact on the claimant, she didn't want to work on the pod and she was sometimes allowed to have quiet time in court or a back office but was repeatedly instructed to do her preparation and post court work from the pod so as to access support from 6 August onwards and she did not do this. Applying Hendricks, there was no ongoing discriminatory state of affairs. The decision about permanent work base was made in early August and did not change.

122. The complaints at

> 4.5.1 Remove/reduce the oppressive micro performance scrutiny/ management; and

4.5.2 Reduce workload / complexity of work;

which the claimant says ought to have been acted on in August 2021 were part of a course of conduct extending over a period. If the respondent had had an oppressive regime of micro management and scrutiny and giving a heavy workload with complexity of work then it would have been an ongoing state of discriminatory affairs for the claimant to have to work under it.

123. The complaint at:

4.5.5 Deal with and redress C's written grievance about staff bullying her timeously (and before deciding to dismiss) to reduce the impact of her stress and anxiety upon her performance;

was in time. The grievance outcome was not known until 23 March 2022. On the face of the allegation there was an ongoing failure to address the grievance from December to outcome in March 2022. The Tribunal would have found this complaint to have been in time.

124. The complaint at:

4.5.6 Failure to investigate C's verbal allegations that she was being bullied and ostracised by work colleagues in the office that was increasing her anxiety and impacting her performance;

This allegation relates to a period from around early December through to appeal. The Tribunal accepts the oral evidence of Ms Rosindale that she sat on the next pod to observe the relationships and found nothing to suggest the claimant was being bullied. At the latest this decision not to investigate allegations of bullying and ostracism was made in December 2021 so that the complaint in the claim form in July 2022 was out of time.

125. The complaints at:

4.5.7 To extend probation further as C was making improvements;

4.5.8 Move C to another Court away from those she perceived as bullying her; and

4.5.9 To offer mental health support to C by referring her to OH / EAP and to carry to a stress at work assessment to identify appropriate adjustments;

were in time in so far as they related to decisions on dismissal and at appeal, and before that were part of a course of conduct extending over a period as they continued, on the face of the allegation, from around October / November 2021 to dismissal and beyond to appeal.

Just and equitable extension

126. The Tribunal had to decide for those complaints that were not part of a course of conduct extending over a period of time so that a later act brought the

earlier acts into time, would it be just and equitable to extend a discretion to allow them to be heard.

4.5.3 Allow C to be permanently allowed to stay in Court to carry out non Court related work away from the colleagues she perceived as bullying her;

4.5.4 Allow C to move to a back office within the main office to carry to her non court room duties away from those colleagues she perceived as bullying her;

4.5.6 Failure to investigate C's verbal allegations that she was being bullied and ostracised by work colleagues in the office that was increasing her anxiety and impacting her performance;

127. Provision for an extension of time exists at section 123 Equality Act 20210. The Tribunal may allow a claim within such other period as it thinks just and equitable. In Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434] the Court of Appeal considered the extent of the discretion to extend time on a just and equitable basis under the discrimination legislation. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

> **"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."**

In the exercise of discretion the Tribunal had regard to the overriding objective.

128. In Abertawe v Morgan in 2019 CA Leggatt LJ said that there is no checklist of factors, that the Tribunal has the widest possible discretion, each case being decided on its own circumstances. The factors the Tribunal can take into account include the length of and reason for delay in bringing the complaint, the extent to which the cogency of any evidence would be affected by delay, the extent of the respondent's co-operation in the provision of information and the promptness with which the claimant acted when she knew of the possibility of action. The Tribunal took into account the claimant's ability to protest about the email exchange and bring her grievance and her state of awareness of her rights at the relevant time. The Tribunal also considered; potential prejudice to the respondent, availability of remedy to the claimant without the out of time elements of her complaint, the claimant's medical condition and the availability of union advice. The Tribunal looked at all the circumstances of the case.

129. The claimant was able to attend work, save for leave in August 2021 and sickness absence with COVID in November 2021. She submitted a grievance in December 2021 about the email exchange she saw from colleagues. This demonstrated to the Tribunal that she was able to identify issues that she thought were unfair to her and to protest about them promptly. She was able to contact

her union and although she says they were slow to respond she obtained union representation at her dismissal hearing.

130. Her complaints, that she had not been allowed to work permanently from court or a back office and that her bullying allegations had not been investigated, were known to her at the time they arose. She brought her complaint on 14 July 2022. Her out of time complaints dated back to August 2021 and December 2021 and so were approximately (subject to adjustment for ACAS early conciliation if it had been undertaken) 6-7 months, and 3-4 months out of time.

131. The claimant did not give any evidence as to why she could not have brought her discrimination complaints in time. It was her burden of proof to establish the grounds for an extension. The Tribunal considered that extending time would have minimal impact on the respondent in terms of managing the final hearing because it had prepared fully to deal with all of the points at the final hearing but it would expose the respondent to liability that would otherwise have not attached to it.

132. If it had been required to consider this point the Tribunal would not have extended a discretion to the claimant. The Tribunal would not have had jurisdiction to hear the complaints at 4.5.3, 4.5.4 and 4.5.6.

Discrimination arising from disability

Did the respondent treat the claimant unfavourably by dismissing her?

133. The respondent's representative argued that not extending the probationary period was not unfavourable treatment within section 15, but was a failure to exercise a discretion to provide favourable treatment, i.e. the extension. The Tribunal has not addressed that point specifically but assumed for the purposes of this, in the alternative, reasoning that it was unfavourable treatment. The Tribunal had it had to reason this point would have looked, amongst other things, at the impact on the claimant. She lost her job. She was a long serving civil servant who had stepped up into an EO role and within 8 months no longer had employment. Whether that is drafted as a failure to extend probation or a dismissal, it amounted to the termination of employment and impact would have been a relevant factor to consider.

Did the respondent treat the claimant unfavourably by refusing her appeal

134. Yes, for the purposes of this alternate reasoning, the same assumption is made and denying an appeal is also unfavourable treatment as it meant the claimant could not be reinstated to her role.

Did the following things arise in consequence of the claimant's disability:

> *(1) During her probation period, the claimant's ability to concentrate, focus, learn, remember and understand and thus her overall performance and ability to meet the respondent's performance requirements were affected?*

Was the unfavourable treatment because of any of those things?

135. If the respondent had been on notice of disability at the time of the dismissal then the Tribunal would have had to consider if the underperformance arose out of the disability.

136. Applying Pnaiser, the claimant was dismissed for not meeting the required standard. Did that failure to meet the standard arise out of anxiety? The Tribunal has not found a causal link, even in the sense of a loose connection or series of connections, between any (anxiety) disability and underperformance. The claimant has not said what it was that her anxiety meant that she could not do.

137. The claimant argued against her anxiety being the cause of her underperformance when she said that her performance was improving in October 2021 at exactly the same time that she was arguing that her anxiety (and therefore the symptomatology of that) was at its worst following the email exchange and her grievance issue, and when she said that she was improving and was close to meeting the standard at the time of her dismissal.

138. The claimant did not go to the GP to report work related stress or increase in any anxiety symptoms during her employment. She had a telephone consultation with the GP on 10 November and her medical records do not record her reporting any anxiety symptoms affecting her work. She had on previous occasions in her previous roles, reported work related stress and said that she was being over scrutinised in previous employment.

139. The claimant during her employment was saying that micro management, and people talking about her and pressure of the job was making her anxious. The respondent's representative submitted that the claimant exaggerated the impact of her disability on her work and that nowhere did she say what her disability meant that she could not do. He also drew to the Tribunal's attention the difference between what the claimant was saying at the time and what she said at Tribunal. The Tribunal accepts that her evidence at Tribunal in her impact statement was not what was shown by contemporaneous actions and records.

140. The Tribunal finds that her inability to meet performance standards did not arise out of any disability. Her underperformance may have had multiple causal factors and it is not for the Tribunal to speculate as to alternate causes if the link to disability is not made out but the Tribunal accepts the respondent's position that (1) her decision in the early weeks of her new role not to come in early and do preparation in the mornings at the pod with colleagues, but instead to arrive only in time to go up to court was the most significant influence on her underperformance. The claimant chose not to engage with her colleagues, she preferred to be away from them, she chose to work from the court room before the day began losing the preparation time. In oral evidence when asked about this the claimant said that she preferred to work later in the day, to do the preparation in the late afternoons after court for the next day, that she was not a morning person and preferred to come in around 9.15, 9.20 and go straight up to court. She was going into court unprepared. That put her and her colleagues in difficulty. She was given this feedback, given direction to go onto the pod which she disregarded on numerous occasions and then directly instructed to work in the mornings on the

pod but did not act on it. (2) Her discomfort about working with a person SC who she perceived to be connected with people she had worked with before was also a factor. (3) The step up from AO to EO was also a factor.

141. At appeal the claimant alleged that she was being set up to fail and that the colleagues were showing her the wrong way to do things. Clare Beech considered and rejected those arguments. The Tribunal notes that Ms Rosindale extended the probationary period twice (arguably beyond the requirements of the Policy), allowed the claimant the trainers she preferred, allocated the claimant to quieter lists, provided remote support to try and get her to go solo and took her out of the courtroom to get her completing disposals in time and with accuracy. Those are not the actions of a manager setting someone up to fail. There was no evidence of anyone showing the claimant the wrong way to do things. This was not something the claimant raised at her performance review meetings. The claimant was someone who could complain when she was unfairly treated; she rightly did so about the email exchanges, and had done so in previous employment, but did not bring a complaint here about being deliberately shown the wrong way to do things. The Tribunal finds that suggestion was not plausible.

142. Further, the claimant said that her underperformance was because she was affected by the email exchange and this caused her distress and heightened anxiety. The Tribunal accepts the respondent's position on this point that the claimant can't have it both ways, she can't have been both so distressed (understandably) by the emails that her performance dipped when she found out about them and improving performance at that time, from late October through to March, and ready to go solo.

143. The Tribunal notes that the claimant was underperforming *before* the email exchange which became the subject of the grievance. A linear reading of the facts might suggest that the respondent could have intervened to terminate employment for not meeting the standards during the probationary period in October 2021 before the email exchange came to light. It did not. The email exchange was to some extent a side show, something that the claimant could point to by way of partial potential explanation of poor performance and understandable upset. Further, the email exchange was almost four months behind her in March 2022 (and a grievance was being investigated) and she was still not able to perform to the required standard.

144. For all of those reasons the Tribunal would have found that the underperformance did not arise out of any disability. If there had been knowledge of disability and the Tribunal had found the underperformance had arisen out of disability (which it did not) it would have found that the claimant's dismissal and the rejection of appeal was a proportionate means of achieving a legitimate aim.

<u>Was the treatment a proportionate means of achieving a legitimate aim?</u>

145. The Tribunal accepts the following aims of the respondent were legitimate aims: the italics are added by the Tribunal for ease of reference below:

a. *Managing the staff to run the court:* The proper, reasonable, fair, effective and/or efficient management of the workplace and or the

respondent staff/probationers (including of their conduct, attendance and or performance in the workplace) and including in court, and/or in respect of the proper, effective and efficient management and conduct of court proceedings and or administration of justice

146. Managing the staff to run the court was a legitimate aim because without proper management the court cannot function. That would cause delay and affect the liberty of defendants.

b. *Meeting performance standards:* The reaching/achieving, maintaining and improving good and or proper conduct, attendance and performance at work and/or maintaining a professional Civil Service and/or otherwise encouraging any of the same to occur.

147. This is a legitimate aim because it affects service delivery and the confidence that the public can have in the administration of justice and the rule of law.

c. *Having staff who can do the job:* The need to have (and seeking to have) fully operational staff/probationers working in the workplace and or the need to meet and deliver services and business priorities.

148. This aim is legitimate because without properly trained and fully operational staff there would be gaps in service delivery and errors that could have grave consequences. This was a Crown Court clerk role and the Tribunal accepts the oral evidence of the respondent that the outcomes of the job role had serious consequences for the individual defendants, those affected by the alleged crimes, for the courts, prisons, police and the public. For example, and putting it very simply, an error in taking down a sentence might mean someone did not go to prison when they should have, or someone went to prison when they ought to have been released on a suspended sentence. It meant that someone might not serve all of the time the judge imposed as a sentence or, might be released without being entered on the sex offender register, when they ought to have been, potentially putting the public at risk.

d. *Having performance standards:* The upholding of proper, fair and reasonable standards of conduct, attendance and or performance of staff/probationers in the workplace.

149. This is a legitimate aim because if standards are not set and upheld there is a risk that over time performance (including conduct and attendance) deteriorates and that would affect service delivery, as at c. above, and could erode the confidence that the public can have in the administration of justice and the rule of law.

e. *Running the court and the service properly:* The proper, effective and efficient management of conduct of court proceedings and or the administration of justice.

150. This aim is legitimate because the criminal courts deal with serious matters including a person's liberty. The public are entitled to have confidence in the processes and have legal rights such as to a fair hearing.

f. *Using financial and staff resource properly:* The proper, reasonable, effective and/or efficient managing public funds/resources and all the efficient, effective and fair management of employees and their conduct, attendance and or performance.

151. Using the resources properly is a legitimate aim because the justice system has delays and costs that affect people's liberty. Money and staff must be used in a responsible way to meet the needs of the service and its users to minimise cost and delay, maintaining fairness and ensuring the continuing confidence of the public in the criminal courts and administration of justice.
152. Each of the above aims is legitimate because it seeks to ensure performance in the role of a court clerk that means mistakes such as those described above, with their serious consequences, don't happen.

Was the treatment an appropriate and reasonably necessary way to achieve those aims?

153. The first treatment complained of as unfavourable in the section 15 complaint is the dismissal. The Tribunal found that the respondent had extended probation twice, doubling the probation period. There had been regular performance reviews. At 23 weeks of training the claimant was not doing what other trainees had been able to do at 10 weeks. There was some improvement in her confidence though not her competence, but after eight months the claimant was not able to run the court whereas other trainees who started when she started were running the court alone by the end of their ten week training. The respondent had acceded to her request to pick her own trainers. The respondent had acceded to her request to be allowed quiet time to work away from colleagues. She was not performing to the standard required and the claimant accepted in evidence that she did not meet the standard at all during her employment. Dismissing her was an appropriate and reasonably necessary way of achieving the aims at b), c), e) and f) above.

154. The claimant argued that dismissal could have been avoided and she could have worked out the rest of the fixed term (March to July 2022) in an alternate role. The Tribunal considered whether there was less discriminatory action that could have been taken but accepts the respondent's position that it cannot just allocate her to another position in another court. There are robust, fair and transparent recruitment processes to achieve a civil service post. The Tribunal rejects the claimant's submission that giving her (even if it had had authority to do so) an alternate role in another court would have been a proper balance of the needs of the respondent and claimant.

155. The Tribunal finds it was appropriate having tried all of the measures above including extensions to probation, a performance plan and training and line management support, to end the probationary period and bring the employment to an end.

Could something less discriminatory have been done instead?

156. The Tribunal accepts the evidence of the respondent that anything less than dismissal but still within this court would have required a fundamental change to the role of court clerk, because the claimant was not competent to run the court alone. It would not be reasonable to expect the respondent to create a non public-facing, back room duties role for the claimant and, in any event, the claimant was not performing to the required standard in the non court room work such as disposals, either.
How should the needs of the claimant and the respondent be balanced?

157. The role of the court clerk requires accuracy in real time court room work and the consequences of inaccuracy could at the lower end range from errors that colleagues had to pick up, or errors that were not picked up that lost court time, to at the more serious end, there being no fair trial (for example in a jury not having been properly sworn in) no record of the sentence pronounced, defendants being released from prison having served less time than the judge had sentenced, and defendants paying less by way of fine or serving less time in unpaid work than had been sentenced, or defendants not being entered on the sex offender register on release. Balancing the need of the respondent for accuracy at speed with the need of the claimant for a slower pace of work, errors to be tolerated, a shorter court list, being able to work alone from a quiet space effectively amounts to requiring the respondent to create a different role. That would not be fair or reasonable and not proportionate.

158. If the section 15 complaint about dismissal had not failed for the other reasons set out above the Tribunal would have found that dismissal was a proportionate means to achieve its legitimate aims at b), c), d), e) and f).

159. The second less favourable treatment complained about was the upholding of the dismissal at appeal. The claimant submitted that the whole case should be seen through prism of appeal. She said in her claim form that Ms Beech disregarded the impact of her mental health and the bullying she had experienced on her performance.

160. The Tribunal finds that Ms Beech looked at each of the grounds of appeal and provided written reasoning as to why they were not upheld. The Tribunal finds that Ms Beech took into account the letter from her GP reporting historic anxiety and depression and the claimant's representations at appeal. The factual findings above record the factors affecting Ms Beech's decision. The Tribunal accepts the evidence of Ms Beech that she found no evidence of unfair or disproportionate scrutiny of the claimant compared to others and no evidence of bullying or harassment. Ms Beech found not procedural failings that undermined the process. Ms Beech found *Vicki had not demonstrated the competence required to be a court clerk.*

161. Ms Beech could have upheld the appeal but that would not have been a proper balance of the needs of the respondent for a required standard of performance in a court clerk and the needs of the claimant for, in effect, a changed role. A less discriminatory approach would have been to uphold the appeal, or to slow down the appeal to allow for further investigation into the bullying allegations

or to deal with the grievance outcome first. Ms Beech in her evidence in chief balanced the claimant's position, that she could and would meet the standard with the respondent's position regarding underperformance. Ms Beech had regard to the *gravity and frequency of the errors* in reaching her decision. Ms Beech concluded that slowing down to await grievance outcome or have further bullying investigations was not appropriate and would not have affected the fact that, as above, the claimant had not demonstrated the competence required. The under performance had been from the outset, before the grievance issues. Ms Beech gave evidence that when the claimant was raising issues about scrutiny and performance management Ms Beech *kept bringing her back to the reason why management were talking to her….*Ms Beech saw the claimant's allegations of bullying and scrutiny by managers as the claimant's response to proper performance management and concluded that the decision to dismiss was proportionate and fair.

162. The Tribunal finds that dismissing the appeal was a proportionate means of achieving the legitimate aims at b), c), d), e), and f).

Reasonable Adjustments

163. The duty to make a reasonable adjustment arises as soon as an employer knows or ought reasonably to know that an employee is disabled. That point was never reached in this case. No duty arose because the respondent had no knowledge of disability. The Tribunal has gone on to consider what it would have found if there had been knowledge and a duty arising. It would have found that the respondent operated a performance related PCP:

> a practice of employees having to satisfy performance requirements/standards in order to pass the probation review/performance management process and remain employed.

which was applied to the claimant.

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was less able to cope with/satisfy the requirements of the process as her memory, ability to concentrate, learn and understand were adversely impacted upon by her disability?

Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

164. The Tribunal would have found that a performance related PCP had the potential to create substantial disadvantage to a claimant with a disability of anxiety when compared to non disabled people. If it had been that the claimant was less able to cope because of impact on memory and concentration, as above, then there was potential for substantial disadvantage. However, the evidence here from the claimant did not show any such link between anxiety and performance. There was no link between anxiety and substantial disadvantage here. The Tribunal

would have accepted the respondent's submission that what the claimant was saying and doing at the time was not the same as what she said at Tribunal. The Tribunal had regard to the contemporaneous actions of the claimant and the notes of the performance and probation review meetings. There would have been difficulty in establishing substantial disadvantage, and knowledge of substantial disadvantage, if the complaints had got that far. Assuming they had the Tribunal has gone on to consider the reasonable steps in the complaints.

What steps could have been taken to avoid the disadvantage? Was it reasonable for the respondent to have to take those steps and when?

Did the respondent fail to take those steps?

165. What is a reasonable step for an employer to take will depend on the circumstances of each individual case. A reasonable adjustment is one which it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person.

4.5.1 Remove/reduce the oppressive micro performance scrutiny/ management.

166. The Tribunal would not describe the management support in place from Ms Rosindale through trainers as micro-management. It was an appropriate level of supervision and support, tailored to the needs of the claimant, to ensure the service was functioning safely. It would not have been reasonable to remove that level of supervision and support. The claimant had the same training supervision in the beginning as other trainees. It was only when she was not progressing at their pace that there was then feedback, list allocations were reviewed so that the claimant was allocated quieter lists and the identity of trainers was reviewed, with the claimant, to give her the best chance of learning from someone she felt she worked well with.

167. What is reasonable in terms of adjustment is to be assessed objectively, considering the viewpoint of both the respondent and claimant. The Tribunal has taken into account the claimant's perspective that she would perform better with less management. Efforts had been made to allow the claimant to go solo with remote video CVP support in place and it didn't work because the claimant could not manage the messaging to take guidance remotely and the supervising clerk had had to run upstairs to the court room. The Tribunal has taken into account the respondent's concern about the job role and the serious consequences of failings in this role. It was not reasonable to suggest that an adjustment be made to lift the supervision until the respondent could be confident of a safe level of performance. This was in the context of serious errors reported by trainers and judges. The practical effect of less management (whether described negatively as scrutiny or positively as support or adjustment) could have been more errors. The respondent could not be expected to tolerate more errors. The Tribunal would have found that adjusting to remove or reduce performance scrutiny or management was not a reasonable adjustment at any point from July 2021 to dismissal.

4.5.2 Reduce workload / complexity of work.

168. Ms Rosindale had put the claimant on shorter or lighter lists. The claimant was allowed to do disposals from a back office, and work away from the pod, from time to time. The practical effect of the claimant not being court room ready was that the respondent was still having to double-up, providing support for her in court throughout her employment. The court clerk job description means being in the court room, running it in real time. It would not have been reasonable, in the context of a criminal justice system with severe delays, to reduce the number of cases before a particular judge or reduce the complexity of cases before a particular judge that is to create a court list to accommodate the needs of the claimant. The role required the clerk to be able to run the court. The Tribunal accepts Ms Rosindale's evidence that an important pre-requisite for that is the preparation work and getting support to do that preparation from colleagues on the pod in the mornings before going into court. The claimant was choosing not to go on to the pod in the mornings and was going into court underprepared, putting pressure on those who were supporting her to do so during the court hearings and not in advance of them. It would not have been reasonable to have reduced the workload or complexity further.

4.5.3 Allow C to be permanently allowed to stay in Court to carry out non Court related work away from the colleagues she perceived as bullying her.

169. This was not a reasonable adjustment. The Tribunal accepts the oral evidence of Ms Rosindale who spoke of the structuring of the administrative function to allow for sharing of information with administration clerks and other agencies before court time on the pod and after court time and of systems in place, such as the way the court log entries were to be made, for transparency, for multi-use and for support. The Tribunal accepted Ms Rosindale's evidence that support was available to the claimant from colleagues on the pod and that she had sat near the pod herself to observe the relationships and not seen anything to suggest any bullying or lack of support for the claimant.

4.5.4 Allow C to move to a back office within the main office to carry to her non court room duties away from those colleagues she perceived as bullying her.

170. This was allowed from time to time but not as a permanent measure. For the reasons set out above in relation to preparation on the pod and accessing support this, as a permanent measure, would not have been a reasonable adjustment.

4.5.5 Deal with and redress C's written grievance about staff bullying her timeously (and before deciding to dismissal) to reduce the impact of her stress and anxiety upon her performance.

171. The Tribunal finds that this allegation is misdescribed as a failure to reasonably adjust. There was no PCP alleged of dealing with grievances post dismissal. What the claimant was saying, in effect, was that if the grievance had been dealt with sooner her performance would have been better and that might have avoided her dismissal. The Tribunal rejects that suggestion. It accepts the respondent's submission that she can't have it both ways; that is both that the

grievance caused her stress and affected her performance negatively and that she was improving in November and December and ready to go it alone in court just before she was dismissed. The Tribunal had regard to the claimant's underperformance before the grievance matters came to her attention. It considered the practical effect of any such adjustment and would have found that dealing with the grievance sooner would not have had the effect of enabling performance sufficient for her to pass her probationary period. There was ongoing underperformance from July to October 2021 which pre-dated the grievance.

4.5.6 To investigate C's verbal allegations that she was being bullied and ostracised by work colleagues in the office that was increasing her anxiety and impacting her performance.

172. This complaint would also have failed as a reasonable adjustment because of effectiveness. The fact or timing of an investigation would not have had the effect of improving the claimant's performance and in particular her ability to run the court. It would not have removed any substantial disadvantage. The Tribunal refers to its findings about expansion of the bullying and ostracism complaints elsewhere in this judgment.

4.5.7 To extend probation further as C was making improvements.

173. A further extension may have led to improvement but the Tribunal, in considering the reasonableness of an adjustment must undertake a balancing exercise. The claimant was already beyond the first and second extensions to her probationary period and she was two thirds of the way through her contract. She had not met the standard required by the end of October when others in her cohort were running the court alone. In view of the length of the engagement (12 months) and the previous extensions having been ineffective in bringing the claimant to the required standard and the residue of the term (4 months) it was not reasonable to expect the respondent to extend further. Whilst the claimant's confidence had increased, time and support were not delivering sufficient improvement.

4.5.8 Move C to another Court away from those she perceived as bullying her.

174. The Tribunal accepts that the claimant expanded the list of people with whom she had a problem in oral evidence beyond the people with whom she had said she had difficulties during employment. The Tribunal accepts the respondent's evidence that it does not have authority to move the claimant into another role, that there are robust processes for recruitment to other courts and that there would need to have been vacancies. The Tribunal took into account practicability of any such step. The Tribunal accepts that there is also no procedure for a time limited period, that is to say for another department to take her on and train her up for three to four months. Whilst this would not be determinative, for example a secondment could be a reasonable adjustment, in this context the Tribunal accepts that it would have been highly impracticable and resource intensive to do that for just a further four months' service.

175. The Tribunal looked holistically at the steps the claimant was seeking, to see if some or all of them taken together would have given her the chance of

removing some or all of any substantial disadvantage. What would have been required was a different role from that to which the claimant was recruited, that is a job that does not require preparation in the mornings pre-hearing with access to colleagues, a job that can be done alone in court but with a court list that is not too complex nor too busy for the claimant, or done alone in a back office, a role in which errors such as taking down a sentence wrongly or not logging evidence accurately in the log, can be tolerated, a role in which the claimant could work from a room by herself and have less supervision and management than she had in this role. Even then, the Tribunal cannot say that those adjustments would have given the claimant a chance of removing or reducing any substantial disadvantage (if there had been any substantial disadvantage / any knowledge / any disability) so that she could meet the standard required to pass probation, because when she had been allowed to work alone from a private office on disposals her work was still too slow and not accurate enough.

176. In the circumstances, each of the above adjustments, either individually or in combinations looked at holistically, would not have been reasonable.

4.5.9 To offer mental health support to C by referring her to OH / EAP and to carry to a stress at work assessment to identify appropriate adjustments.

177. For the reasons given above in relation to knowledge of disability and substantial disadvantage and in the circumstances of the case the Tribunal finds that this would not have been a reasonable adjustment. A referral to OH is a good first step when an employer knows or might expect that there could be a disability. In this case firstly, as above, the claimant did not ask for referral and there was nothing to put the respondent on notice that the failure to meet performance standards was a health issue. There was nothing here to alert the respondent to any need to refer to OH. Secondly, the claimant was someone with a history in other employment of being able to raise health issues. She did not do that here. That is not to say that the duty to make adjustment lay with her, it did not, but it goes to her credibility as to the impact of health on underperformance at the time. That is to say it is a substantial disadvantage point. The Tribunal accepts the respondent's submission that this is part of the claimant recasting her underperformance as a disability and or bullying related issue after the event. Thirdly, the claimant was offered significant support. She was supported with a trainer, allowed to have her preferred trainer, offered access to the pod to get help each morning, directed to go to the pod and chose not to do so, offered a chance to work one to one with a trainer in the court room, given probation review meetings and feedback and a performance improvement plan, shown trust to try to go it alone and offered remote support to go it alone in court, allowed to work before the hearing from the court room and in a back office alone from time to time and none of those things resulted in performance sufficient to meet the standard. Whilst the content of an OH report should not be second guessed, it is difficult to see what recommendations could have been made, beyond the support given, the implementation of which would not have had a disproportionate impact on the respondent.

178. The respondent had no knowledge of disability, if it had there would have been problems establishing substantial disadvantage, if that had been established

the adjustments would not have been reasonable. The respondent has not failed to reasonably adjust.

Conclusion

179. The complaints of discrimination arising from disability and failure to reasonably adjust fail for the reasons set out above.

Employment Judge Aspinall

Date: 25 June 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

3 July 2024

FOR EMPLOYMENT TRIBUNALS

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