EMPLOYMENT TRIBUNALS

Claimant: Mr W Johnstone

Respondent: The Crown Prosecution Service

Heard at: **Leeds Employment Tribunal**
On: **11th to 15th May 2026**

Before: Employment Judge Singh
Mr K Lanaman (Non-legal member)
Ms J Hiser (Non- legal member)

Representation
Claimant: In-person
Respondent: Mr R McLean

JUDGMENT

1. The Claimant's claim for Indirect Disability Discrimination is not well-founded and is dismissed.

2. The Claimant's claim for Discrimination Arising from Disability is not well-founded and is dismissed.

3. The Claimant's claim for Failure to Make Reasonable Adjustments are not well-founded and is dismissed.

WRITTEN REASONS

Summary

1. The Claimant brings claims for Disability Discrimination. He is a senior crown prosecutor for the Respondent, the Crown Prosecution Service.

2. The Claimant has ADHD. The claim is about adjustments the Claimant says were not made by the Respondent and treatment of the Claimant by the Respondent because of the need for those adjustments

3. The Claimant remains employed by the Respondent but is currently on long term absence.

4. The Claimant went to ACAS on the 25th April 2025 and received a certificate on the 1st May 2025. He then submitted his Tribunal claim on the 1st May 2025.

The hearing

5. The hearing was listed to take place over 5 days between 11th and 15th May 2025 in person in Leeds.

6. The Claimant attended and represented himself. He had previously had legal representation, but this had ceased by the time of the hearing.

7. The Claimant had made an application to postpone the hearing in the previous week, but this had been refused as the Claimant had not submitted sufficient medical evidence to justify a postponement

8. The Claimant explained at the start of the hearing that he had not been able to prepare fully for the hearing. He did not clearly explain the difficulties he had had but it seemed to be a combination of having to represent himself and an exacerbation of his health condition.

9. The Claimant said however that he had spoken to his doctor who had identified that the tribunal proceedings was one of the things causing his health problems and that delaying the hearing would only continue those problems. As such, he was content to proceed.

10. To assist, the Tribunal ensured the Claimant's evidence was concluded on day 1 so that he could focus on preparing questions for the Respondent witnesses on the evening of day 1. The Tribunal also gave the parties additional time to prepare their submissions. The Claimant appeared to have been able to prepare questions for cross examination of the Respondent witnesses as his questioning was thorough and covered all the relevant areas.

11. The Claimant did not raise that he needed more time during the hearing and said he felt he had done all he was able to given his level of executive

function. It was however confirmed to the C that he could ask for additional breaks at any time.

12. Even though the Claimant had not made a further application to postpone, given what the Claimant had said about his ability to prepare, the Tribunal considered of their own volition whether it was reasonable and fair to continue with the hearing. We decided that given that the Claimant had been given extra time to prepare during the hearing and the fact that the Claimant as a solicitor would have some experience preparing for a hearing, and given his comments about wanting to proceed for his own health, it was in the interests of justice to proceed with the hearing. We were mindful throughout that this decision might need to be reviewed if the Claimant expressed during the hearing that he felt disadvantaged, but this did not happen.

13. The Respondent was represented by Counsel. They called 4 witnesses,

    - Mr David Gibbs (the Claimant's Line Manager)
    - Ms Claire McCullion (Senior District Crown Prosecutor)
    - Ms Emma McIlvaney (Area Business Manager)
    - Ms Zoe Speake (Area Business Manager)

14. All witnesses attended and were cross examined apart from Ms Speake. The Claimant had no questions for her.

15. The Claimant had produced a document that was titled "witness statement" but did not seem to cover all the matters in the claim. The Claimant explained that he had not been able to prepare the statement in as much detail as he would have liked due to the lack of representation. He had therefore used the document he submitted to the Respondent as his grievance. The tribunal did not consider that it was reasonable to delay the hearing to allow the Claimant more time to complete a statement.

16. The Claimant had had several months since the Case Management Hearing to prepare this statement. Whilst he did not have legal representation at this time, he did have it for some months after the Case Management Hearing. There was no reason given why his solicitor could not have prepared this for him before coming off record.

17. Further, the Claimant was an experienced solicitor, and we would have expected him to be able to put his evidence in a statement, given that the Tribunal sees Litigants in person who have little or no legal experience do this regularly without issue.

18. Allowing the Claimant more time to submit an updated statement we felt was not fair on the Respondent either as they would need time to review this and this may mean the hearing would have to be postponed, causing unreasonable delay on the conclusion of the matter.

19. In any event, the Claimant was content to proceed with the statement he had submitted as he said he did not feel he would be able to produce anything better in the time available.

20. Evidence was concluded on day 2 and the parties were given time on the morning of day 3 to prepare their submissions before giving them orally. The tribunal then deliberated until the afternoon of day 5.

Claims and issues

21. The claims and issues were set out in a case management hearing in front of EJ Ayre in August 2025. The Claimant had been represented by a solicitor at that hearing.

22. The Claimant suggested that some of the matters he was unhappy about had not been covered in the list of issues, but he accepted that the tribunal could only make decisions about the claims set out in that list and did not make an application to amend his claim.

23. The complaints set out in EJ Ayre's orders were as follows; (for all claims the Claimant relied upon his ADHD as his disability)

24. Discrimination arising from disability

    a. Did the Respondent treat the Claimant unfavourably by
        i. Subjecting him to a probation extension process
        ii. Placing him on an informal PIP
        iii. Restricting his leave

    b. Did the following arise in consequence of his disability
        i. The Claimant's inability to meet the respondent's performance targets at the required speed and level of performance

    c. Was the unfavourable treatment because of that?
    d. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says the legitimate aims were

        i. Ensuring staff meet the appropriate standard expect of them
        ii. Having a workforce that is able to carry out the required duties;

iii. Enabling the proper, reasonable, fair and effective management of the workplace and/or the respondent's staff and probationers

e. (knowledge of disability was listed as one of the issues but the Respondent accepted that it knew of the Claimant's disability from the start of his employment)

25. Indirect discrimination

f. Were the following Provisions Criterions or Practices (PCPs) applied by the Respondent to the Claimant and other Senior Prosecutors ?
    i. A requirement to work quickly
    ii. A requirement to manage 94 cases at any one time
    iii. A requirement that staff are up to date with workloads before taking leave.

g. Did the PCPs put Senior Prosecutors with ADHD at a particular disadvantage when compared to those who did not have ADHD? Did they place Claimant at the disadvantage? The disadvantages identified by the Claimant are
    i. They are unable to meet the requirements of the PCPs
    ii. They are at risk of a Performance Improvement Plan and disciplinary action;
    iii. They are at increased risk of sickness absence
    iv. As a result, they are at risk of loss of earnings whilst off sick and of action being taken under the respondent's attendance management policy

    In relation to these disadvantages, I clarified with the Claimant that the disadvantage he was essentially relying upon was the inability to keep up with his work and the other elements above consequences of not being able to complete his tasks.

h. Were the PCPs a proportionate means of achieve a legitimate aim? The Respondent relies upon the same legitimate aims as above

    i. Ensuring staff meet the appropriate standard expect of them
    ii. Having a workforce that is able to carry out the required duties;
    iii. Enabling the proper, reasonable, fair and effective management of the workplace and/or the respondent's staff and probationers

26. Failure to make reasonable adjustments

i. The Claimant relies upon the same alleged PCPs for this claim

   i. A requirement to work quickly
   ii. A requirement to manage 94 cases at any one time
   iii. A requirement that staff are up to date with workloads before taking leave.

j. Did the PCPs place the Claimant at a substantial disadvantage in that
   i. His probation was extended;
   ii. He was put on a Performance Improvement Plan; and
   iii. His mental health deteriorated

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

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

   i. Not extending his probation;
   ii. Not putting him on a Performance Improvement Plan;
   iii. Changing his line manager; and
   iv. Reducing his workload by 50%

m. Was it reasonable for the Respondent to take those steps?

n. Did it fail to take those steps?

27. Time limits- the Respondent alleges that any part of the claim that occurred before 25th January 2025 is out of time, based on the date the Claim form was submitted and the ACAS conciliation period.

28. For those complaints, should the time limit be extended because

   o. They form a continuing sequence of events and the date of the last incident in the sequence occurred in time? Or
   p. Because it is just and equitable to do so?

Findings of fact

29. After hearing all the evidence and reading the documents we were directed to, the tribunal made the following findings of fact.

30. The tribunal felt it was necessary to make clear that we can only make findings based on the evidence presented to us. Some assertions were made by the Claimant, but he conceded that the evidence about them was not presented to the Tribunal. Whilst oral evidence does carry some weight, it is difficult to make findings based on bare assertions.

31. The tribunal also limited themselves to making findings on those matters in the list of issues. Lots of things were raised by the parties that were not directly or tangentially relevant to the claims and issues and we have not touched on these.

32. The Claimant began working for the Respondent in August 2022. He had been an experienced Criminal Solicitor for 30 years before joining the Respondent. Although he had not been a prosecutor and had not worked for the Respondent prior to that date, he was very experienced in managing cases of the kind that he would be expected to deal with at the Respondent.

33. The Claimant had recently been diagnosed with ADHD a few months before joining the Respondent. He disclosed his condition to the Respondent, and they made a referral to Occupational Health shortly after the Claimant began working for them.

34. The Tribunal found that the Respondent had no issue with the Claimant's condition when he started with them. If they did, they could have easily chosen not to hire him. Given that they did and they did an early referral to Occupational Health to determine what support he might need showed to the Tribunal that the Respondent was not inherently prejudiced against the Claimant's disability.

35. At the time of starting, Claimant was line managed by Vanessa Birchell-Edmonson. She made the first referral to Occupational Health on the 13th September 2022. The Claimant did not raise that he had any issue with the referral and so the Tribunal can only conclude that he was satisfied with it.

36. The Occupational Health consultation took place on the 21st September 2022, and a copy of the report was in the bundle at page 122.

37. The report stated that

"The symptoms of ADHD can have an impact on performance and productivity if they go unaddressed and untreated. However, with appropriate support, management and treatment, I do not believe his condition will pose problems to remaining in his role".

38. The report recommended the following adjustments

    i. A stress risk assessment
    ii. A workplace needs assessment
    iii. Time for the Claimant to attend appointments
    iv. Coaching facilitated by the Respondent
    v. Regular short breaks throughout the day (the Claimant made it clear in his evidence that he had no issue with the amount of breaks he was given)
    vi. The Respondent ”*regularly review the Claimant’s workload to ensure that it is commensurate to his working hours and what he is able to reasonably cope with.”*

39. On the 24th September 2022, Vanessa Birchell-Edmonson contacts the Claimant to confirm she has contacted HR about referring the Claimant to an ADHD Coach. It was clear that Vanessa Birchell-Edmonson wanted to ensure that the Claimant was given a coach specific to his condition and to support his needs. The Tribunal agrees that it would not have been reasonable to get just any coach for the Claimant.

40. An overarching theme of the Claimant’s complaints is that he felt that the Respondent took too long to implement the recommended adjustments. He says that the Respondent should not have delayed and that things could have been done almost immediately.

41. The tribunal considered that this ignored the fact that as a large public sector organisation, there would be procedures to follow before any adjustments could be implemented. Recommendations would need to be approved and funding allocated. If the recommendation involved an external supplier, they would need to be sourced and there would likely need to be a procurement process.

42. The tribunal accepted that in some cases that length of time might be unreasonable, but it was important to take into all the facts and weigh up the reasonableness from the perspective of the Respondent as well as the Claimant. Whilst the Claimant might want things to be done immediately, that may not always be practicable or possible.

43. In this instance, with the ADHD coaching, we can see that Vanessa Birchell-Edmonson has requested it and explained that she has gone to HR to understand the process. It is clear action is being taken, and the Respondent is not sitting on their hands or delaying the process unreasonably.

44. She also confirms that she has contacted HR about arranging the Workplace Needs Assessment and stress risk assessment. She offers to discuss the report with the Claimant.

45. The Tribunal notes that the Claimant does not reply to say that he is unhappy with the delay or the fact that a process needs to be followed.

46. The Claimant then needed to have a probation review after 3 months. The probation period was 6 months but under the Respondent's process, there was a review carried out midway through that period. This was done for the Claimant on the 15th November 2022

47. The Tribunal noted from the review (at page 128) that there were no issues with the Claimant's work identified and that the Claimant had no time off by the date of the review. Vanessa Birchell-Edmonson says that she discussed the report with Claimant before sending it (page 126). Despite it being 2 months since the Occupational Health report he does not say to Vanessa Birchell-Edmonson in the probation review that he is dissatisfied that adjustments have not been made. Nor does he complain about workloads.

48. Also, on that day Vanessa Birchell-Edmonson tells the Claimant that she has made a request for Dragon software (this is a dictation software). The Tribunal noted that although Vanessa Birchell-Edmonson made the request, the Occupational Health report that was most recent at that time did not suggest this was a necessary adjustment for the Claimant. It was clear then to the Tribunal that Vanessa Birchell-Edmonson was willing to go above and beyond the report and listen to any requests the Claimant made outside the report.

49. Vanessa Birchell-Edmonson also chases up the Workplace Needs Assessment in November 2022. Again, there was no evidence that the Claimant was chasing her or that he had expressed that he was unhappy with the delay.

50. Vanessa Birchell-Edmonson then completed a referral form for the Workplace Needs Assessment on 28th November 2022 and got the Claimant to sign it off. Again, this appeared reasonable. It would not be fair for the Respondent to send off a referral if the Claimant had not approved that he agreed with what was being said about him.

51. The assessment took place on the 9th December 2022. The report was in the bundle at page 149. It is not clear what date it went to the Respondent as it is dated “29/11/2021”. The assessment was on the 9th December so the report must have gone to the Respondent after that date.

52. The report set out what the Claimant says he has difficulty with that would affect his work. The Tribunal noted that this was not the assessor's opinion of the Claimant's difficulties but a record of what the Claimant told the assessor.

53. The Claimant says in that section that he has Rejection Sensitivity. The Claimant explained that he has difficulty approaching people and responding to rejection. He also told the assessor that he has time blindness which makes planning time and prioritising tasks difficult.

54. The report makes specific recommendations for adjustments

    q. Dragon software
    r. Mindview software
    s. A mentor
    t. Stress risk assessment
    u. That instructions for new tasks or processes are provided in writing
    v. Training
    w. Coaching

55. The tribunal noted that nowhere in this needs assessment did the Claimant say he was not coping with the workload or that he needed an adjustment in relation to that. As no adjustments were in place we can reasonably assume that the Claimant was carrying a full caseload at that time.

56. David Gibbs explained that caseloads in the Respondent fluctuate as they are a demand led organisation and have to respond to the referrals made by the police. However, at that time he believed the average caseload for a senior in the Claimant's post was between 90-100 cases.

57. At that time, the Claimant's Line Manager changed from Vanessa Birchell-Edmonson to David Gibbs.

58. David Gibbs explained that he intended to discuss the report with the Claimant to check the adjustments proposed were correct, but the Claimant was absent for most of December 2022. He returned to work on the 27th December 2022 which we note is in the Christmas break period

59. It is the Tribunal's finding that there was no delay by David Gibbs in not implementing any of the adjustments earlier. It was reasonable for him to need to discuss the adjustments before he could start implementing them and he could not do this until the Claimant was at work.

60. In January 2023, David Gibbs also had to complete a probation report for the Claimant, in advance of the end of his probation period.

61. We saw the report at page 155 of the bundle. We note that David Gibbs identified that Claimant has not met the milestones he would expect a new starter to have hit by the end of their probation and was not able to complete the work as expected. The Claimant did not challenge this and accepted he was not fully completing his duties.

62. However, David Gibbs accepted that the Claimant's change in Line Manager, his absences and importantly, the fact that the adjustments haven't been implemented yet were potential reasons for the milestones not being met.

63. We find that this again showed David Gibbs was being reasonable. He took into account that the Claimant needed adjustments and did not have them yet and that therefore it was reasonable to excuse him for not yet being up to the standard required.

64. We also note that in that report, David Gibbs identified that the Claimant was not working well with his mentor. The Claimant has expressed that he found it difficult to approach his mentor, James Goddard. David Gibbs explained in the report that he had spoken to Mr Goddard to try and resolve the issues and Mr Goddard said he was happy to continue working with Claimant.

65. David Gibbs explained in oral evidence that he felt that there was a good working relationship and wanted to see if he could salvage that before assigning a new mentor to the Claimant. He also felt that stability rather than change would be beneficial. We accepted that this was a reasonable approach.

66. At the end of the report, David Gibbs proposed extending the probation by 3 months. According to the Respondent policy, there were 3 options available at the end of the probation period. The first was to pass the probation. This was not appropriate given the Claimant was not meeting the standard required.

67. The alternatives were to extend the probation or dismiss the Claimant. We note that David Gibbs has given the Claimant the benefit of the doubt. It was open to him to dismiss but we feel it is again a reflection of the Respondent's reasonableness that he has chosen extension rather than dismissal.

68. On the 25th January 2023 we see the Respondent HR urgently chasing PAM (an external Occupational Health organisation) to arrange the

coaching. Again, it is clear the Respondent must go through an external agency to arrange this adjustment and therefore it is difficult to blame them for any delay. The fact that they were chasing would satisfy us that they aren't sitting back and causing the delay to become worse.

69. David Gibbs emailed on the 1st February 2023, following a meeting with the Claimant on the 31st January 2023, to further update the Claimant on the progress of the adjustments. In relation to the Dragon software, it was apparent that the Claimant did not just need the software but must also be trained on it. Those things meant it cannot be provided for the Claimant in just one day as was suggested by the Claimant. The training can't be arranged until March 2023.

70. Mr Gibbs also confirmed he would go through the stress risk assessment with the Claimant the next day.

71. The Claimant gave his own summary of the meeting on page 173 but we note that he still does not say then that his case load was unmanageable or that he raised such an issue with Mr Gibbs.

72. A meeting was scheduled with Emma McIlvaney to discuss the probation report. In advance of the meeting, the Claimant was sent the Respondent's documents about the probation period. The Claimant says that the policy documents said that one of the potential outcomes of the probation was dismissal. The Respondent said that was correct, as in some cases failing probation would mean someone is dismissed.

73. However, David Gibbs made it clear that he had never told the Claimant that he would be dismissed or that this was an option the Respondent was considering. He says that he had explained to the Claimant that his proposal was to extend the probation. The Tribunal accepted his evidence about this point.

74. The Claimant's union rep emailed Emma McIlvaney on the 3rd February 2023 to say that the documents received have exacerbated his condition. We accepted that the Claimant may have been upset when reading the document, but we also take into account that David Gibbs expressly told the the Claimant that he was not considering dismissal. We do not agree therefore that it was reasonable for the Claimant to be have been concerned that he might be dismissed as part of the process.

75. Emma McIlvaney said in her evidence that because of the concerns raised by Claimant she also made it clear at the start of the meeting that dismissal was not an option the Respondent was considering and the likelihood of it was extremely small. We again find that this was a

reasonable step and can't see what else the Respondent could have done to reassure the Claimant that he was not going to be dismissed.

76. Clearly the policy documents must explain all possible options but nothing the Respondent had said to the Claimant should have led him to conclude he was potentially going to be dismissed. The Claimant accepted that this was a perceived issue "in his head" caused by his condition. There was nothing to indicate to the Respondent before they sent the documents to the Claimant that he would have this perception and as soon as the Claimant raises it as something he is worried about, Emma McIlvaney put his mind to rest.

77. The Claimant emailed on the 3rd February 2023 and complained that the Respondent's failure to implement the adjustments "in a timely manner" was a breach of the Equality Act 2010. He was then signed off sick.

78. Upon review of the timeline of events, the Tribunal does not agree that the Respondent has not acted quickly enough. As set out above, it is clear that the wheels are turning and steps are being taken to get the adjustments for the Claimant. The Respondent was also chasing things up when they believe things weren't moving. We found that this was reasonable in the circumstances.

79. After the probation meeting on the 8th February 2023, which the Claimant attended, Emma McIlvaney wrote on the 9th February 2023 to say that she has decided to accept David Gibbs's suggestion that the Claimant's probation should be extended so that he has time for the adjustments to be implemented before he can be measured against the required performance standards.

80. She also confirmed that the Respondent was making further attempts to get those adjustments in place and explains to the Claimant the external bodies they were waiting for.

81. David Gibbs also continued to chase the adjustments in February 2023. However, we note that the Claimant was still off sick and had requested disability leave. As such, even if the adjustments were arranged in that period, they could not have been implemented until the Claimant was back at work. The Disability Leave was granted from 3rd February to 7th March 2023.

82. In an email on the 21st February 2023, the Claimant confirmed he had spoken to an ADHD coach and was trying to find a suitable time for more sessions. This adjustment therefore appears to be in place by that time.

83. By the 3rd March 2023 the Claimant confirmed he had now had the Dragon training and was eager to return to work. He also had the Mindview software and had been trained on it.

84. We note in his email on that day (page 211) the Claimant again does not raise any concerns about workloads.

85. In an email on the 21st February 2023 (213) the Claimant said that he believed the probation extension should not have started until the adjustments were in place. We can see the logic in this as it would not be fair to expect the Claimant to improve his performance until these are done.

86. In response, Emma McIlvaney wrote on the 28th February 2023 (page 214) to say that she had decided to reverse her decision to extend the probation and instead confirmed the Claimant in post, with effect from 21st February 2023, effectively passing the Claimant's probation.

87. Although the Claimant was technically still in the extended probation for 2 weeks after the 21st February, we cannot see that he suffered any detriment from this. There was no impact to him as he was absent from work during that period (firstly as sick leave but then this was changed to disability leave). The Claimant has not expressed that the extension caused him to be upset or distressed. In light of Emma McIlvaney 's decision on the 28th February, we have difficulty finding that the initial decision on the 8th February (to extend the probation) was unfavourable treatment or a detriment that put the Claimant at a disadvantage.

88. The Stress Risk Assessment was completed on the 5th April 2023 with the Claimant and David Gibbs. There was a discussion about work and workloads during that assessment. The Claimant did not say he had too many cases but David Gibbs noted that the Claimant needed to stick to task dates. We were taken to some other emails from before the 5th April 2023, where David Gibbs also had to remind the Claimant about deadlines for tasks.

89. On the 18th May 2023 (page 238) David Gibbs emailed to say that the temporary freeze on case allocation that had been done for the Claimant would be lifted from 22nd May 2023. However, he also said that the Claimant would be given no "Threshold" or "CTL" cases (which are more complex) and that the Claimant would not be on the "Red Rota" (which requires urgent responses) until September 2023.

90. David Gibbs explained the background to these decisions. As a way to assist the Claimant, the Respondent had agreed to freeze allocation of

new work to the Claimant for 2 weeks. David Gibbs explained that this was because the Claimant had let his task list become too big. This was therefore a way to allow the Claimant time to focus on clearing his current tasks before the new ones were added.

91. David Gibbs explained that this was done more than once during the Claimant’s employment, when the Claimant had expressed that he had too much work. Those 2-week freezes were also extended if the Claimant had said at the end of the 2 weeks that he was still not up to speed. The Claimant did not dispute this.

92. The Claimant said that the freezes did help him, but he had felt that he was in a (what he described as a) “Catch 22” situation; as when the flow of new work was turned back on the task list would increase again.

93. We asked the Claimant what he thought the Respondent should have done and he said they should have reduced the number of new cases being given to him when the flow of new work was turned back on.

94. The Respondent explained that they did actually do this. The number of new cases being given to the Claimant was lower than to other staff in the same role. They also ensured that he was given a reduced number of complicated/high level matters.

95. Again, we felt that the Respondent had acted reasonably in relation to this. The Claimant had to be given work to do, they could not stop that completely. However, by freezing the new allocation for a period in time, they were giving him breathing room to focus on his current work and avoid the “Catch 22” situation the Claimant continually referenced.

96. They then continued to support him by reducing the flow of new work and making sure he had mainly straightforward matters to deal with. They also took him off the rota which required work to be done to a short deadline.

97. We note that reducing the flow of new work to the Claimant would have an impact on the rest of the Claimant’s team. As the Respondent was not able to control the referrals coming in to them, referrals not passed to the Claimant would have to be passed to other colleagues to deal with, increasing their workloads.

98. The correspondence after that between David Gibbs and the Claimant showed that David Gibbs was aware that the Claimant was not keeping on top of his workload. David Gibbs was regularly notifying the Claimant that cases weren’t being worked on and that tasks were building up. Although the Claimant expressed that he had been having difficulties we did not see

him make a specific request for any alternative adjustments during that period.

99. We were also taken to correspondence about the Claimant making short notice request for holidays. In response to these requests, David Gibbs asked the Claimant to ensure that he had completed some time sensitive or outstanding tasks. David Gibbs did not make a general statement that the Claimant could not take leave until his work was done (and that would have been impossible given the size of the Claimant's task list). However, he instead highlighted specific pieces of work and requested they were completed before the Claimant took time off.

100. We do not consider that David Gibbs had been unreasonable here. David Gibbs explained that these tasks was not simply dumped on the Claimant at the last minute. They were things that had been on the Claimant's task list for some time. Mr Gibbs also told us that the Claimant would have had sufficient time before his holiday to complete the tasks. Again, none of this was disputed by the Claimant.

101. At no stage does David Gibbs say that the Claimant is unable to take leave unless the work is completed.

102. If the work was not done, then another colleague would have had to deal with it during the Claimant's absence.

103. Although the Claimant was not performing up to the expected standard, we note that David Gibbs does not take any action against him. We note that the Respondent policy would have allowed him to implement capability procedures against the Claimant. However, David Gibbs decided to refer the Claimant to Occupational Health again in October 2023 to see what other adjustments could be made. Again, we find that this is the actions of a reasonable employer who is looking to try and support their employee.

104. David Gibbs had a Personal Development Review (PDR) with Claimant at the end of October 2023 and commented in it about the Claimant still not being up to date with his task list.

105. David Gibbs stated that the Claimant had an ever-escalating task list with 2 pages of overdue tasks and was not completing work in requisite timescales. He also stated in the PDR that this was despite the Claimant not handling a full case allocation, which had been in place since May 2023 to allow the Claimant to catch up.

106. In response the Claimant emailed on the 1st November 2023 to say he felt he had too much work on.

107. In response to this, David Gibbs sought guidance from Emma McIlvaney who suggested that David Gibbs spoke to HR about reducing the Claimant's workload on a long-term basis. Again, it appears that the Respondent was doing all they could to support the Claimant and wanted to retain him as a valued employee.

108. There was an Occupational Health report on the 11th November 2023 which suggested additional adjustments. It suggested that the Respondent

x. Review and monitor the Claimant's workload.
y. Carry out an up-to-date stress risk assessment
z. Provide coaching
aa. Provide regular breaks
bb. Provide written instructions for tasks that need to be completed
cc. Carry out a workplace risk assessment

109. In relation to the adjustment regarding monitoring and reviewing the Claimant's workload, we felt that the Respondent was already doing this. We saw evidence of David Gibbs regularly contacting the Claimant to discuss how much work he had, and we saw that the Respondent was taking steps to make the Claimant's workload more manageable for him.

110. We note that the Occupational Health report did not say there was specific limit on how many cases the Claimant should have had.

111. There then continued to be correspondence about the Claimant not carrying out his duties properly between November 2023 and February 2024. By 23rd February 2024, David Gibbs completed a table of the adjustments the Claimant had in place and sent this to HR (page 366).

112. We note from this that the Claimant's mentor had been changed twice by that time, and therefore it appears that the Respondent was taking into account the concerns raised by the Claimant about him not getting on with James Goddard.

113. David Gibbs continued to raise performance concerns with the Claimant following email to HR in February 2025.

114. On the 27th March 2024, the Claimant emailed David Gibbs (page 380) to say that he was unhappy that 5 months after the last Occupational Health report, the suggested adjustment of providing a coach to the Claimant had still not been implemented. The Claimant said that having a coach would have assisted him in putting strategies in place to deal with

his caseload. We note that the Claimant does not say in the email that any other adjustments were outstanding.

115. However, we also saw emails that suggested that the coaching had been implemented previously. However, only a fixed number of sessions had been booked and paid for by the Respondent and the course had ended. We were taken to an email from February 2024 which showed that the Respondent was chasing to try and arrange more for the Claimant. Again, we feel that the Respondent was acting reasonably and supportive of the Claimant. We do not accept that this adjustment had not been implemented.

116. There was a further referral to Occupational Health in March 2023. It appears that this was done just so that the Respondent could justify obtaining more coaching sessions for the Claimant. Again, we felt that this showed that the Respondent was supporting the Claimant and that they were acting promptly when the Claimant raised a need.

117. The Claimant emailed again in April 23 (page 406) to complain about a perceived failure to make adjustments. The Claimant was not specific however and we could not see that the Respondent was specifically failing at that time.

118. In the PDR in April 2023, David Gibbs again noted that the Claimant was not meeting his performance targets in that reporting period. David Gibbs states

"Iain's struggles continue to be in relation to timeliness and the quantity of his work output. His task list and prioritisation of his work are areas of concern."

119. By April 2024 the coaching sessions started again and were scheduled for the next 12 months.

120. By October 2024, the Claimant was still not performing and David Gibbs subsequently sought advice from HR about a discussion about performance management with the Claimant.

121. They advised him about the possible process. They suggested an informal period of monitoring with the support of a PIP. It was clear to us from the HR advice (page 548) that this was only an initial step. If the Claimant's performance was still not up to standard, then a formal procedure would start. If the Claimant's performance was not satisfactory after the initial stage of the formal procedure, then a first written warning would be issued. There would then have been a further period of formal monitoring.

122. There was no sanction outlined to the Claimant as part of in that initial informal monitoring period. If the Claimant had not met the standards required by the end of the informal period the only thing that would happen was a move to the formal process. It was clear to the Tribunal from this that the initial informal monitoring was to support the Claimant to try and improve. The Tribunal struggled to see how the initial informal monitoring could be unfavourable or detrimental treatment.

123. David Gibbs made it clear to the Claimant in a meeting and in a follow up email sent at that time that the initial monitoring was only an informal period of monitoring. There was no suggestion from the Claimant that he was confused about that or was given the impression that this was a formal period or there would be a sanction that would be imposed (such as a warning) if he did not meet the standards required.

124. In the PIP, (582), one of the objectives was about “Timely and proportionate completion of green PCD cases”. Within the “comments” box of that objective, David Gibbs noted that Claimant had a case load of 83. This, we were told by the Respondent (and had no reason to disbelieve) was lower than the average case load of Claimant’s colleagues which was 120-130. Claimant was therefore only holding a case load of 63-69% of his colleagues. David Gibbs stated that he thought a case load of 70-80% would be reasonable.

125. David Gibbs also noted in the PIP that only 57 of the 83 cases that the Claimant holds are “live”, but we accept that for the Claimant’s colleagues not all 120-130 cases would be live either. Therefore the overall percentages are more important to look at.

126. We note that although the Claimant had complained about his task list, he had not said that the number of cases was an issue, although we also accepted that a larger caseload would have a knock-on effect on the task list. If the Claimant had a lower caseload, he would have fewer tasks to deal with.

127. However, at that time, the Respondent had no medical or Occupational Health advice about the Claimant needing a specific level of caseload.

128. It was not until November 2024 that the Claimant’s workplace coach wrote to say that they believed reducing the Claimant’s case load to 50% of that standard caseload would assist him. The coach stated that the Respondent should reduce the Claimant’s caseload immediately and then gradually build it up again.

129. However, we acknowledge that to do that, the Claimant's current caseload would need to be redistributed amongst the wider team, putting pressure on them. Claire McCullion said in her statement that there were other Senior Crown Prosectors who also had reduced caseloads (as an adjustment) and as such, there was a narrow pool of available staff to redistribute the Claimant's work to.

130. David Gibbs told us that the next step in response to that suggestion from the Claimant's coach would have been to discuss it with the Claimant, however that was not possible due to the Claimant being on sick leave. We accept that that was reasonable.

131. We also noted that the reduction was only a suggested by the Claimant's coach and not Occupational Health or any medical practitioner. Nevertheless, David Gibbs discussed the proposal with Clair McCullion on the 25th November 2024 (632). In that, it is decided that a further reduction could not be managed but a further freeze could be.

132. In our opinion, the Respondent was acting reasonably and considering making the suggestion but was prevented from doing so by the Claimant's absence.

The law

<u>Discrimination arising from Disability (s15)</u>

133. A claim for discrimination arising from disability is set out in section 15 of the Equality Act 2010.

> *(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*

134. In order for the claim to succeed, the Claimant must first identify the "something arising" in consequence of his disability that he is relying on.

135. The "something" must actually be a result of the disability. The typical example is a sickness absence. If the employer dismisses the employee for that absence and that absence as caused by the disability, the Claimant will have a potential claim under s15.

136. If that is done, the Claimant must then prove to the Tribunal that the unfavourable treatment was done because of the something arising from.

137. Unlike direct discrimination, there is no need to compare yourself to a comparator. The treatment does not have be "less favourable" than the treatment someone else received. It only has to be "unfavourable".

138. That being said, the Claimant must still show that the treatment they are complaining about was in some way bad or detrimental to them. A claim will not succeed if the Claimant received better treatment than others or the Claimant is seeking to complain about a positive step the employer took.

139. In *Pnaiser v NHS England and anor 2016 IRLR 170, EAT*, Mrs Justice Simler summarised the proper approach to establishing causation under S.15. First, the tribunal must identify whether the claimant was treated unfavourably and by whom.

140. It must then determine what caused that treatment. This is done by focusing on the reason in the mind of the perpetrator, which might need an examination of the conscious or unconscious thought processes of that person (although the actual motive of the alleged discriminator in acting as they did is irrelevant).

141. If that is done, the burden of proof switches to the Respondent as they can defend against a claim if they can show that their actions were a proportionate means of achieving a legitimate aim.

142. Again, this is a 2 step process as the Respondent will firstly need to identify its aim and the Tribunal will need to consider if it is a legitimate one.

143. Secondly, the Tribunal will then need to consider if the Respondent's actions were a proportionate means of achieving that aim. This is an objective test considering the competing priorities of both parties to determine proportionality. It is not just about what the employee needs, but the other pressures the employer might be under.

144.
In *Gray v University of Portsmouth* Mrs Justice Eady in the EAT made it clear that, in the context of a S.15 claim, a tribunal will be expected to

provide sufficient reasoning in its judgment to demonstrate that it caried out a critical evaluation on the question of objective justification

145. A failure to consider whether a lesser measure could have achieved the employer's legitimate aim may mean that the tribunal finds that the Respondent's actions weren't proportionate- for example, in *Ali v Torrosian and others (t/a Bedford Hill Family Practice) EAT 0029/18*

Indirect discrimination

146. Indirect discrimination is a claim similar to a section 15 claim. This claim is found in section 19 of the EA 2010.

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

147. For this claim to succeed, the Tribunal must first understand what the provision, criterion or practice (PCP) is. This could be a formal or informal workplace rule or policy or a system of working.

148. However the PCP being relied upon by the Claimant must actually be being applied by the Respondent on its staff. If it is not, the claim will fail.

149. Once the PCP has been established, the Tribunal must consider if that PCP puts people who share the same characteristic as the Claimant at a disadvantage. It may be that not everyone is suffering the disadvantage, but it is sufficient that a higher proportion of those people are being placed at a disadvantage than are not.

150. The Claimant must also be put at that disadvantage. The claim cannot succeed if the Claimant, due to their own unique circumstances, is not actually being troubled by the PCP.

151. If that is all proven, the burden of proof again switches to the employer to show their actions were a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

152. The duty to make adjustments arises from s20 of the EA 2010. There are 3 circumstances which would require a reasonable adjustment. This claim only deals with the first requirement.

(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.

153. As above, the Tribunal needs to first understand what the PCP is that the Claimant relies upon and find that that PCP was being applied by the Respondent to the Claimant.

154. If that PCP places the Claimant at a substantial disadvantage compared to a person without the Claimant's disability, and the Respondent had knowledge of the disadvantage being claimed, then the duty to make adjustments will arise.

155. The obligation is to make adjustments that would prevent the disadvantage the PCP is being caused. Further, the duty is not to make all the adjustments that the Claimant requests. Instead, the employer only needs to make those adjustments that are reasonable.

156. The test of reasonableness is an objective one that considers the view of both parties. For the tribunal to view the matter almost entirely from one of the parties' perceptive only is likely to amount to an error of law (*Birmingham City Council v Lawrence EAT 0182/16*).

157. This may mean that the Tribunal has to substitute the employer's view with it is own. It may be that the employer believes that the adjustment being asked for is unreasonable, but a tribunal may conclude that objectively, that is not the case. See *Royal Bank of Scotland v Ashton 2011 ICR 632, EAT*.

158. A tribunal may also conclude a different adjustment to the one being pleaded by the Claimant should have been applied and was reasonable (*Garrett v LIDL Ltd EAT 0541/08*)

Applying the law to the facts

159. The tribunal made the following unanimous decisions about the Claimant's claims based on the facts found above.

Discrimination arising from disability

160. The Claimant relied upon ADHD as a disability. Respondent accepts that this meets the test for disability in the EA 2010 and that they had knowledge of the condition from the start of the Claimant's employment.

161. Of the alleged unfavourable relied upon by the Claimant, the tribunal found that there was no evidence that the Respondent had restricted the Claimant's leave. The Claimant accepted this when this was put to him. As such, the complaint about this cannot succeed.

162. In relation to the probation extension process, the Claimant acknowledged that the decision had been reversed after 10 days or so, but said that the Respondent putting him through the process was unfavourable treatment.

163. We accepted that extending someone's probation rather than passing it is unfavourable. It may make someone feel upset or distressed. Although it was made clear that at that stage the Respondent was not considering dismissing Claimant, he would have been acutely aware that if his performance did not improve after the extension he might be dismissed then. It might have been a remote possibility but a possibility nevertheless.

164. The Tribunal then needed to consider whether the reason for that extension was because of the Claimant's inability to meet the Respondent's performance targets. We found that it was. It is clear the probation was extended because the Claimant was not performing.

165. The Tribunal would need to find that the performance issues arose out of the Claimant's disability. The Respondent did not put any arguments forward against this.

166. The final part of the test is whether the Respondent's actions were a proportionate means of achieving a legitimate aim.

167. We accepted that the Respondent’s aims were legitimate. It is legitimate for a Respondent to need their staff to work to a reasonable standard.

168. We also find that the Respondent acted proportionately in achieving it. We considered that the Respondent acted reasonably in applying the process. Not taking the Claimant through a process and simply passing his probation was not reasonable given the Claimant had not met the standards required.

169. Further, the Respondent acted sensitively. They made it clear to the Claimant that they were not considering dismissing the Claimant to reassure him. They also were acutely aware that the reason for the difficulties the Claimant was having was not down solely because of him, but also because the adjustments had not yet had time to be implemented.

170. Finally, they also took on board the Claimant’s concerns and reversed their decision very quickly and passed the probation instead.

171. The Claimant’s claim in relation to this therefore fails.

172. The other alleged unfavourable treatment was putting the Claimant on an informal PIP.

173. Again, we accepted this was unfavourable treatment. Although the Claimant was underperforming and a PIP would be merited, it is arguable that the Respondent could have chosen to do nothing

174. We also accept that this was done because of the Claimant’s inability to meet performance targets, which arose in consequence of his disability.

175. However, we also again agree that the Respondent’s actions were a proportionate means of achieving a legitimate aim. We again accepted the Respondent’s aims were legitimate

176. We also agreed that the Respondent’s actions were proportionate. The Claimant had had several months of underperforming before the informal monitoring had started.

177. Despite the Claimant’s protestations, the Respondent had also implemented all the adjustments requested by the Claimant by the time the informal monitoring started. The Claimant was still however not hitting the required standard.

178. He had had extensive overview and input from David Gibbs as well as regular Occupational Health referrals.

179. It was therefore completely proportionate to now move to another process to see what could be done to support the Claimant to improve. It was clear everything that had been happening so far had not worked for the Claimant.

180. The Claimant stated in his submissions that the caseload should have been reduced to 50%. We note that this proposal was not suggested until after the informal monitoring and this could not be implemented as the Claimant went off sick. Further, this was a suggestion from Claimant's coach only and therefore it was not clarified whether this was an adjustment that was needed because of the Claimant's ADHD.

181. The informal monitoring had no sanctions attached to it so the Claimant would not face a reprimand if he failed to hit the targets. It was clear from the discussions David Gibbs was having that the aim was to support rather than punish.

182. Given the Claimant needed help to improve as he was not achieving this on his own, we find Respondent's actions were proportionate and so the Claimant's claim in relation to this fail.

<u>Indirect discrimination</u>

183. In relation to the first PCP, the requirement to work quickly, we did not accept that this was a PCP applied by the Respondent.

184. The Respondent only had deadlines in relation to PTPH matters which was 21 days. There was no suggestion in the evidence that this was a short deadline or one that was unobtainable.

185. The Respondent did not impose time targets on employees. The Claimant's complaints were about the build-up of tasks over time. The Claimant was not completing matters in a timely manner and so they became urgent because of the Claimant's inaction. We therefore cannot find that the Respondent was imposing this time pressure on the Claimant.

186. As such, we find that the claim in relation to this cannot succeed.

187. The next PCP was the requirement to manage 94 cases at one time. We accepted that this number was not specific and that the Claimant was complaining about the requirement to manage a full case load which was originally between 90-100 cases. This then increased to 120-130 cases by 2023/2024

188. This was a PCP applied by the Respondent, however we find that certainly by the time adjustments were identified, this was not applied to the Claimant. It was clear that the Claimant was given a reduced number of cases to deal with throughout and this was done by freezing allocations to him for periods and then giving him fewer allocations than colleagues when the freeze was lifted.

189. As this was not a PCP applied by the Respondent to the Claimant, this complaint cannot succeed either.

190. The final PCP was the requirement that staff are up to date with workloads before taking leave. Whilst there was no restriction on taking leave if work wasn't completed, there was at least an expectation was up to date. We were happy to give a wide interpretation of "PCP" and accept that this was something required by Respondent

191. However, we did not accept that this PCP placed the Claimant or anyone with ADHD at a particular disadvantage. Certainly, none of the disadvantages identified by Claimant (which are in relation to him not meeting the performance standards) are affected by this.

192. Also, as stated, there was no sanction for not being up to date with work before going on leave. The Claimant did this more than once and the most he received was an email from David Gibbs expressing that he should have done the work before going off.

193. As no disadvantage was caused by that PCP, the claim for indirect discrimination arising cannot succeed.

<u>Failure to make reasonable adjustments</u>

194. The claims in relation to reasonable adjustments fail for similar reasons to the above claims.

195. As stated above, we did not find there was a PCP to work quickly.

196. We also did not find that the PCP of having a case load of 94 cases was applied to the Claimant.

197. Finally, in relation to the requirement to make sure that work is up to date before taking leave, we did not find that any of the substantial disadvantages identified by the Claimant were because of that PCP.

198. As such, these claims also fail.

Employment Judge **Singh**

13th July 2026