EMPLOYMENT TRIBUNALS

Claimant: Mr M Somasundaram

Respondent: Employers Network for Equality and Inclusion

Heard at: London South by CVP **On: 12, 13, 14, 15, 18, 19 January and in chambers on 20, 21 January 2021 & 17 March 2021**

Before: Employment Judge Khalil sitting with members
Mrs F Whiting
Mr P Adkins

Appearances

For the claimant: Mr Bhatt, Solicitor
For the respondent: Mr J Arnold, Counsel

RESERVED JUDGMENT

Unanimous decision:

- The claimant's claim for direct race discrimination contrary to S.13 Equality Act 2010 is not well founded and is dismissed.

- The claimant's claim for direct disability discrimination contrary to S.13 Equality Act 2010 is not well founded and is dismissed

- The claimant's claim for discrimination arising out of disability contrary to S.15 Equality Act 2010 is not well founded and is dismissed.

- The claimant's claim for a failure to make reasonable adjustments contrary to S.20 Equality Act 2010 is not well founded and is dismissed.

- The claimant's claim for victimisation (disability) contrary to S.27 Equality Act 2010 is not well founded and is dismissed.

<u>Reasons</u>

<u>Claims, appearances and documents</u>

1. This was a claim for Race and Disability Discrimination (Direct, S.13), Discrimination arising from disability (S.15), Reasonable Adjustments (S.20) and victimisation (S.27) Equality Act 2010 ('EqA'). The claim form was issued on 29 March 2019 following ACAS Early conciliation between 29 January 2019 and 1 March 2019.

2. Initially, the Tribunal heard from the claimant plus three witnesses on his behalf – Ms Anne Marie Senior, a former employee of the respondent, Ms Katrine Steenland, the claimant's former support worker and Ms Usha Manojkanth (the claimant's wife, whose evidence was unchallenged) and three witnesses for the respondent – Mrs Denise Keating, the former Chief Executive of the respondent, Mr Alaba Okuyiga, the former Training Manager of the respondent and Mr Harry Gaskell, the former Chair of the respondent .

3. There was an agreed bundle of documents (901 pages) and an agreed list of issues.

4. The claimant was represented by Mr Bhatt, Solicitor and the respondent by Counsel, Mr Arnold.

5. On day 1 of the Hearing, when addressing preliminary matters, the Tribunal discussed with Mr Bhatt whether any adjustments were required for the Hearing because of the claimant's dyslexia or polio. A hard copy of the bundle was requested. There had been additional disclosure and as the Hearing had been converted from an in person Hearing to CVP, an updated hard copy had not been produced. The claimant's representative was prepared to arrange for a copy to be couriered to him but wished to seek the costs of that from the respondent who had had responsibility to produce the bundle. The Tribunal decided to reserve a decision on responsibility of costs until the end of the Hearing in order to get the Hearing started as quickly as possible. Assistance was also requested with regard to the claimant's wife being allowed to take the claimant to the page numbers of the bundle. This was permitted. The respondent did not object. The Tribunal cautioned the claimant that his wife could not assist him in responding to questions asked of his evidence.

6. The Hearing took place over 9 days, which comprised 6 days of reading, evidence and submissions and 3 days in chambers.

7. Additional evidence/documents were admitted during the hearing on the application of both parties on the basis of actual or potential relevance. These included a text message sent by the claimant on 25 September 2018 regarding the ESC paper, witness statements of Mr Anthony Cluer (respondent, regarding the weight of a laptop) and Ms Anna Golawski (claimant, regarding a meeting on 7 August 2018). The claimant also produced his August 2018 calendar. This was pursuant to the Tribunal's enquiry of evidence relating to the 7 August 2018 meeting.

Relevant Findings of Fact

8. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

9. Only relevant findings of fact pertaining to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

10. The respondent is an employer's network promoting equality and inclusion in the workplace. It is a not for profit organisation. Primarily, it provides advice and training to its members on equality issues, including disability.

11. The claimant commenced employment with the respondent on 18 June 2018. He was employed as the Disability Lead on a 1 year fixed term contract. This was a first appointment in such a role in the respondent organisation. This was clear from the job advertisement.

12. The claimant has two underlying conditions – poliomyelitis ('polio') and dyslexia. Both were conceded by the respondent as disabilities within the meaning of the Equality Act 2010 at the material date (from commencement of employment on 18 June 2018 to termination on 5 November 2018). The date of knowledge of dyslexia was not agreed and in relation to the reasonable adjustments claim, knowledge of the extent or degree of disadvantage was also not agreed.

13. In the claimant's application for employment dated 22 April 2018, he declared he had become disabled from the age of 2. This was in his covering letter at page 601. In his CV, he declared he played, trained and coached wheelchair basketball and wheelchair tennis.

14. The claimant's CV set out a substantial and impressive history of his work experience in relation to his jobs involving Equality and Diversity, in particular disability. He had held many roles as an equality officer, he had a lot of training experience (including train the trainer experience on the Equality Act 2010). Academically, by way of examples (not exhaustively) he had a Masters degree in Human Resources Management, a Disability Equality Trainer qualification and a CIPD qualification in Diversity Management and the Law. The Tribunal had regard to his full CV at pages 607-610. The claimant's covering letter at pages 604-606 was consistent with his CV credentials. The claimant highlighted amongst other things, his confidence in public speaking and his experience of delivering training presentations on equality and diversity.

15. The advertisement for the role was at page 141. It stated that if an applicant declared he/she had a disability and met the minimum requirements for the role, an interview was guaranteed. For the purposes of the issues in this claim, under the responsibilities section of the job profile, the requirement to do webinars was listed as part of the role.

16. The claimant was interviewed for the role on 15 May 2018. The claimant attended the interview with a walking aid (a single crutch). He had declared in an email to Ms Vicky Keating ('Ms V Keating') on 4 May 2018 that he had "walking difficulty" but could manage a few steps. On the interview day, the claimant was able to use the lift to the basement where the interview took place.

17. At the interview, Mrs Keating realised when the claimant walked in that he was using a crutch (she referred to a stick in her statement but said she meant a crutch) and assumed this was for the disability he had referred to in his application. The Tribunal found that Mrs Keating was not made aware of the claimant's email of 4 May 2018. This would not be particularly unusual as the CV and cover letter already disclosed the claimant had a disability which was about mobility.

18. The notes of the interview were at page 611 of the bundle. The Tribunal accepted these to be a contemporaneous note, there was no evidence before the Tribunal to indicate the contrary and Mrs Keating's evidence was accepted in this regard.

19. The notes record, in brief, a discussion about the claimant's mobility. The Tribunal accepted that the claimant's mobility would be relevant to his need to get to and from the office, his mobility around the office and further as training was part of his role, this would require travel to and from a client/member on occasions. Mrs Keating's evidence on that need to travel was accepted. That was not challenged (although Mr Bhatt did challenge that the job advert did not expressly identify a need to travel which the Tribunal found it did not do so expressly). However, the claimant did not say in evidence that travelling was not said to be part of his role.

20. Mrs Keating asked the claimant if he could get around alone. The claimant responded that he could. The claimant accepted this was asked and that he replied that he could. Mrs Keating also recorded that no reasonable adjustments were requested. The claimant said in evidence that he understood the question to be about whether he needed to be accompanied when travelling. The Tribunal accepted his evidence that he genuinely thought that is what he was been asked. However, the Tribunal went on to find that a natural consequence of the discussion about the claimant's mobility enquiry would and should have entailed the claimant expressing any other/wider support needed in relation to travel unaided. The Tribunal found that there was no inhibition to the claimant to request that he needed some support in this regard. His mobility disability was visible and obvious but the extent or degree would not be. The best enquiry would be that of the claimant directly who had a long work history.

21. There was nothing recorded in the notes that the claimant told Mrs Keating that he was also dyslexic. The claimant's evidence was he told Mrs Keating he was dyslexic and that he would need a support worker. If the claimant had said this it would have been a stark omission from the notes – it would be remarkable for Mrs Keating not to make any reference to dyslexia; or to the support worker need (which in particular would require some planning, arranging, approvals

and cost considerations); or to then record there were no reasonable adjustments needed. This was not plausible . At this point there was no issue between the parties, on the contrary, the respondent was recruiting and Mrs Keating confirmed that she got on very well with the clamant at the interview and he was a stand out candidate. For completeness there was no direct or indirect reference to dyslexia in his CV or in his written application either. The Tribunal found that the claimant did not mention his dyslexia at the interview. This view was reinforced by the surprise exhibited by Mrs Keating when she claimed the claimant did inform her of his dyslexia on the second day of his employment (19 June 2018) and by the claimant's assertion that nothing had been arranged in relation to a support worker (or taxi support) on his first day – nothing had been said in the offer letter and the claimant had not said anything in response or made any enquiry about either.

22. The claimant's offer letter was at page 612. He was offered employment on a 1 year fixed term contract subject to a 12 weeks probation period.

23. On the claimant's first engagement with Mrs Keating, on the first or second day of his employment, he informed her he had to walk from the tube station to the respondent's office. This was a 5 minute walk for a person without any restrictions on mobility but the claimant said it had taken him 15 to 20 minutes. The discussion surprised Mrs Keating as she had asked the claimant about whether he was able to get around alone during the interview. There was a discussion about parking, which came to nothing as the disabled parking place being discussed was a public not a private space. The claimant also informed Mrs Keating that he was dyslexic and that he would need a support worker. He said he was applying to access to work ('ATW') for assistance and he informed Mrs Keating he had used them before. This was not challenged. Whilst surprised to be told this (as she had not been informed before), she had no issue and felt reassured that the claimant knew what to do.

24. In relation to his travel difficulty to the office, Mrs Keating agreed to permit the claimant to work from home, apart from when he had to attend a client meeting. This would obviate the need to travel to the office. Mrs Keating said in testimony that as result, the claimant only ever attended the office on a rare occasion. The Tribunal accepted that this was agreed from 19 June 2018. The claimant's evidence was less sure, he accepted this was agreed but from sometime in August 2018. The calendar for August 2018 was produced during the course of the Hearing and showed several working from home entries for the month. The Tribunal did not have any other calendar entries available. On the occasions the claimant came in to the office thereafter voluntarily, this was not because of a requirement or expectation to do so. The claimant's evidence that he did so because he didn't want to lose his job was not accepted – there was no rational basis for such a belief at that time.

25. The claimant was given some objectives to focus on consisting of preparing an Executive Steering Committee ('ESC') presentation on disability strategy, a notable dates plan and to compile a bank of associates who the respondent could use. The Tribunal found that these were matters to be fleshed out and developed by the claimant and were not exclusive or exhaustive tasks. This

would or should have been known to the claimant having regard to the advertisement for the role and the job description.

26. An application to ATW was made and on 20 June 2018, Mrs Keating received an email from Mr Rob Ackroyd, requesting a workplace assessment. Mr Keating responded on the same day welcoming an assessment. She queried what the costs would be making ATW aware that the respondent was a not for profit organisation with 18 employees. In a further email on 21 June 2018, Mr Ackroyd confirmed that as the application had been made within the first 6 weeks of employment and because the respondent had less than 50 employees, ATW would fund any support required including future costs. The process however was for the respondent to fund any recommendations and claim back. These emails were at pages 615-616.

27. The ATW workplace assessment took place on 29 June 2018. This was carried out by RBLI Specialist Employment Solutions. The report was at pages 199 to 206. The assessment took place with the claimant (only). This was clear from the report as the customer only box was ticked, the customer identified as the claimant.

28. The report was produced on 2 July 2018. The Tribunal did not know when this was sent to the claimant. The Tribunal found it was likely to have been received in close proximity to that date.

29. The report identified some support measures including:

    a) The provision of a digital recorder to assist with the need to take notes at a meeting inhibited by his dyslexia (recommended)

    b) The provision of a lighter laptop to assist with the need to carry his laptop to and from meetings inhibited by his polio

    c) The claimant had identified a need for a support worker and the report stated he should contact his ATW adviser for further support in this regard

    d) In relation to travel to and from work, the claimant had advised that he experienced cramping and fatigue making it difficult to drive and walk. He was advised to contact his support adviser in this regard.

30. There was no evidence in the bundle that this report had been sent to Mrs Keating by ATW or by the claimant. There was no email with an attachment to which the Tribunal was taken. It was not referred to in any one to one discussion. The Tribunal did not know that the report had been sent by the claimant to anyone else at the respondent either. The claimant's witness statement did not address this. It was only in oral testimony that the claimant said Ms V Keating had a copy of the report.

31. The Tribunal found that whether or not Ms V Keating had seen a copy of the report, Mrs Keating had not. Neither was Mrs Keating to be fixed with knowledge of the report because it had been sent to Ms V Keating, the Office

Manager. The Tribunal might have reached a different finding if she had been designated to receive such a report or was the claimant's line manager or more senior to Mrs Keating. In any event, the Tribunal was also not satisfied that Ms V Keating had received a copy of the report at the time. No-one ever referred to the report – the claimant, Ms V Keating or Mrs Keating in all of the ATW email dialogue at the time.

32. There was subsequent dialogue between ATW and Mrs Keating on 10 August 2018, 22 August 2018 and 28 August 2018, in relation to a support worker, a digital recorder, a substitute voice recorder respectively. (A specific dialogue about a lighter lap top did not occur until 24 September 2018 and the issue of a support driver was not raised until 23 October 2018).

33. The Tribunal found Mrs Keating to be positive, responsive and transparent in each of her communications with ATW. In several communications on 22 August 2018 (pages 621-622), she had expressed her lack of knowledge regarding the voice recording equipment and had proactively asked about the laptop (which she volunteered she had discussed with the claimant – paragraph 22 of her witness statement) and had gone on to ask if there was anything else (page 621) – on each occasion copying in the claimant.

34. The claimant had various one to one meetings with Mrs Keating in June, July and August 2018. Other than on 19 June 2018 Mrs Keating said these occurred on 28 June 2018, 4 July 2018, 30 July 2018, 14 August 2018 and 23 August 2018. Whilst the claimant could not remember the precise dates, he accepted in evidence that he had frequent interactions with Mrs Keating. The Tribunal found these meetings took place during which work matters, performance and support would have been discussed informally.

35. There was no written output from these meetings the Tribunal accepted they were informal in nature. There was no contemporaneous email from the claimant about any concerns. In oral testimony, the claimant asserted he had raised concerns about the adjustments he needed at each and every one to one and that this related to all adjustments generally. Mrs Keating, on the other hand said at each meeting, the claimant had confidently reassured her that everything was in hand regarding support and he had dealt with ATW before**.** The Tribunal noted that the claimant had not put anything in writing at the time; he had not said anything in his witness statement regarding the one to ones, which was very surprising as there had been so many. The Tribunal rejected that the claimant had raised concerns.

36. In the period since 19 June 2018 to 6 September 2018, the claimant had been working on producing a disability strategy paper for the Executive Steering Committee ('ESC'). There was a dispute between the parties about whether and the extent to which the paper had received input from Mrs Keating. It was not disputed that Ms Rotchell had provided input as her changes were shown tracked on the version at pages 280-285. The Tribunal understood the version in the bundle which was the closest to the final version was the one on pages 697 - 700 (paper D). There was little evidence given by the claimant or Mrs Keating in the witness statements about the scope and details of the changes.

Mrs Keating, was questioned by the Tribunal in evidence regarding her changes/input and she said this was about creating sub-headings and in particular the 'next steps' action and 'future actions' were added/changed including the content. There were also changes to the timeline by Mrs Keating. Mrs Keating did give some specific examples in her witness statement regarding her input in relation to competitor analysis and the respondent's market position and promoting 'Disability Confident' (paragraph 64). The claimant said Mrs Keating's changes were minor but he did not pinpoint these but he accepted that Mrs Keating changed the timeline for example on page 700. However, it was not made clear if these dates were the final dates.

37. The Tribunal had regard to the contemporaneous email on 6 September 2018 which recorded that Mrs Keating had made 3 changes to the paper (page 259). This was not disputed at the time, either the fact of, or the nature of the changes. This point received added attention at the Hearing as it was also submitted but the not pursued that there had not been any changes/input from Mrs Keating. At the time, there was another contemporaneous email recording a discussion after the email of 10 September at page 259. By another email on that day, there was a discussion about the claimant's reluctance to do webinars, his preference to train on the social model of disability and not the respondent's 'medical' model and an agreement to reduce his working week to 4 days to remove the requirement to do webinars. Nothing was said about the ESC paper. The Tribunal preferred the evidence of Mrs Keating which was supported by the contemporaneous emails and more specificity.

38. On 7 August 2018, there was a meeting of trainers and consultants. Mr Okuyiga was leading the meeting. The claimant was present. Ms Anne Marie Senior, a former employee and Ms Anne Golawski, an associate, were also present. At this meeting it was alleged that the claimant had informed the group that he had not prepared slides as he was dyslexic. Mr Okyiuga disputed he had said this at the meeting. His evidence in his witness statement was that he couldn't recall the meeting and that the claimant had not told him he was dyslexic. In the light of three other testimonies to the contrary, the Tribunal found that the claimant had mentioned his dyslexia to the group whilst presenting. The Tribunal noted that Ms Senior had unsuccessfully raised a grievance relating to Mr Okuyiga and had outstanding Employment Tribunal Litigation in relation to that against the respondent, but notwithstanding, her evidence in relation to that meeting was accepted. The Tribunal found this was not evidence that would be motivated by being of beneficial value to her or equally borne out of hostility towards the respondent. It was corroborated by one other too.

39. The claimant alleged that as a result of this knowledge, Mr Okuyiga's approach to the claimant changed. The Tribunal will deal below with the taster session training but as a general proposition this caused some difficulties for the Tribunal. First there was no evidence (examples) of the relationship or interactions (frequency or nature) to date; second, no evidence was given of when and how Mr Okuyiga changed his approach towards the claimant thereafter; third, when and how Mr Okuyiga became dismissive of his input and started to ignore the claimant. The only example cited in the claimant's witness statement (paragraph 28) repeated in oral testimony was not a very clear

example at all of adverse treatment – it was lacking in any context. No other examples were given.

40. The claimant did produce a taster session in draft for Mr Okuyiga's consideration in relation to a 2 hour 'Disability in the Workplace' session and a 2 hour Bullying and Harassment session for AWE. The brief from the client (AWE) was it had to be practical for managers and colleagues, update any legislation, address possibilities of misunderstandings and how to deal with difficult situations and regarding the latter definitions, how/what/when to challenge and responses to dominance.

41. The claimant was challenged by Mr Okuyiga on the nature and content of his draft in an email dated 9 August 2018. He said that the claimant was using terminology which was unfamiliar (referring to previous discussions about this). In oral testimony he explained that this was the claimant's use of the phrases 'disability equality' and 'mental health equality'. He also considered the content too legislative. Finally he commented on grammatical mistakes, 'as presentation was part of the sale' (page 247).

42. In his witness statement Mr Okuyiga stated that the grammar errors were the least of his concerns. He said his main concern was the claimant not delivering what he and the client wished for. The training was re-assigned to Ms Anne Marie Senior. In response to Tribunal questioning, Mr Okuyiga said if it had not been for the grammatical errors he would have permitted the claimant to do the training. The Tribunal will analyse below its resolution of what appeared to be a contradictory position. The Tribunal did find however that at the time, that confidence in the training delivery and delivering content that was asked for, were key concerns. The Tribunal understood, from its collective experience, that training, just as legal advice, had different approaches and there was a difference between a legalistic/risk averse approach and one which was focused on pragmatism/practical solutions.

43. Mr Okuyiga also said in oral testimony that he also had some concerns about the claimant's intentions with regard to training as the claimant had informed him he ran his own business too. He had asked to see other training material to review, not just on disability. This evidence was not challenged. This was also set out in paragraph 10 of his witness statement. This, he said partly fed in to his decision not to have confidence, at the time, in giving training to the claimant on 8 August 2018. This was not said at the time and the Tribunal did not make a finding that this was part of the claimant's intention. However, it did provide a non-grammar related reason for his apprehension. The training material was sent to the claimant.

44. The claimant's belief that he was treated unfavourably in relation to the taster session arising from his dyslexia, was in part based on an alleged comment made by Mr Okuyiga when he drove the claimant back to a train station from a training course the claimant was observing Mr Okuyiga deliver in Leicester on 12 July 2018. During this journey, Mr Okuyiga was alleged to have made adverse remarks about Ms Senior's performance and that she had multiple sclerosis because of which she couldn't manage her work and should be fired.

45. Mr Okuyiga accepted he had discussed Ms Senior not securing a piece of work following a proposal and felt that Ms Senior may not have impressed the client. He rejected the other allegations attributed to him and stated that he did not know of Ms Senior's disability, which he only discovered in November 2018. At the time he believed she might have had Parkinson's. Further, he did not believe that her 'disability' had any impact on her performance at the proposal interview; further in light of the organisation he worked for who train employers on how to help employees with disabilities, he would not have said such a thing.

46. The Tribunal noted that the claimant, despite being shocked, did not raise this at the time. Ms Senior did not mention in her witness statement that her diagnosis of multiple sclerosis was known by Mr Okuyiga in August 2018. The claimant had spoken to Mrs Keating regarding the re-assignment of training to Ms Senior on 14 August 2018 but did not think to say something about a comment that a colleague should be sacked because of her disability or for something arising from it, or the alleged breach of confidence. The Tribunal noted that Mr Okuyiga had been candid regarding his discussion regarding her performance.

47. The Tribunal found based on the above that it was not plausible that Mr Okuiyga would mention or discuss Ms Senior's work *by reference* to her disability. The Tribunal found this was a discrete, albeit unwise, conversation regarding a sales pitch he perceived had gone wrong.

48. Mrs Keating did follow up with Mr Okuyiga, the claimant's concern about the taster training session being reassigned to Ms Senior. She was told he did not have confidence at the time in the claimant doing the training. She trusted his judgment and relayed this back to him and said it was not a statement about the future. The Tribunal found it was more likely than not that the claimant raised grammar errors as part of the feedback he had been given, after all this was mentioned in the email from Mr Okuyiga; however the Tribunal found that Mrs Keating's response, following her discussion with Mr Okuyiga, was not about the grammatical errors in the draft presentation but concerns about having confidence in what he would deliver, which the claimant accepted was the feedback given (paragraph 36 of the claimant's witness statement). The Tribunal found this matter was raised informally and dealt with informally.

49. The claimant had a support worker assigned from ATW with effect from 20 August 2018.

50. On 6 September, the claimant had a probation review meeting. The claimant did not pass his probation but Mrs Keating extended it for a further 8 weeks. The claimant was advised:

    a) about Mrs Keating's concerns with the ESC paper which had received 3 sets of input from her and separately from Ms Rotchell.

b) he had scoped out 5 in house training sessions but had not sent complete or final versions for Mrs Keating's approval. In addition, the claimant had not developed a plan in relation to these notable dates.

c) the claimant had not identified a network of associates.

d) in relation to webinars, the claimant had been reluctant to do them. The tribunal accepted discussions had taken place between the claimant and Mrs Keating about webinars in which the claimant's preference to do face to face training over webinars had been expressed. This was not in dispute between the parties, though the reason was as Mrs Keating said it was a personal preference, whereas the claimant said it was because of his dyslexia and because they were medical webinars, though the tribunal found the latter (medical webinars) was only articulated by the claimant on 10 September 2018

e) ability networks – Mrs Keating had asked the claimant to create a plan for the respondent to run its own ability networks around the country. There were already 2 networks in place Wharfability and Midlands and Mrs Keating had wanted the claimant to work alongside Ms Brooke and Mr O'Reilly to develop the respondent's own network. Mrs Keating expressed frustration that the claimant had not understood this.

f) He needed to complete responses to the Arts and Heritage and South Bank proposals.

51. The claimant challenged that he was reviewed against matters outside his 'performance agreement'. Further, in evidence, that he had done work on the outstanding Arts and Heritage and South Bank proposals but Mrs Keating had refused to discuss that work. Also, Mrs Keating had refused the claimant's request to prepare a new form and to meet again for the probation review.

52. While there were no minutes of this meeting, there was an email sent on 10 September 2018 by Mrs Keating in which she captured what she believed had been discussed (pages 260-262). This also set out what had been discussed and what her expectations were going forward. These were set out in separate bullets. Mrs Keating also expressed her view that the claimant, in 51 working days, had done 5 working days of work or 10 days if she was being generous.

53. There was a subsequent discussion on 10 September 2018 which was also captured in an email from Mrs Keating (page 259). The two notable discussion points were Mrs Keating's agreement to allow the claimant to work a 4 day week only as he did not wish to do webinars. Further, that there was a disconnect between a medical vs social model of disability (the Tribunal's understanding was the latter was the claimant's preference and removing webinars - but which he would arrange to have delivered using external support - was favourable to the claimant as those were not focused on the social model). The Tribunal noted that there had been discussions to transfer the webinar work to Ms Brookes previously but because of the claimant's conduct

towards her, this had not been successful and for which the claimant had to apologise (page 715).

54. This second email of 10 September 2018 was important for a number of reasons. It was sent on the same day as the discussion. It did not record any other challenge to the previous discussion and ‘earlier’ email of 10 September 2018. There was no reason thus to consider that earlier email had recorded anything not discussed or anything that was inaccurate. Further, the second email did record the claimant’s consideration of the earlier email, hence his key issue with webinars. If the claimant had felt that either email was misleading, or that the claimant had been prevented/refused requests (as set out above), or he done more work (measured in working days or otherwise), he could have said this. He could also have said this in a separate email in the following days. He did not do so. The Tribunal found the emails to accurately record what had been discussed and without any element of surprise. Regarding the performance agreement objectives, which had been discussed and which the claimant had said were the only expectations of him in this period, the Tribunal found these were focus points not exclusive expectations as otherwise the job description would have little or no relevance. Further, Mrs Keating’s evidence that additional matters/tasks were given to the claimant to develop e.g. Ability Networks, webinars was accepted. Whilst not agreed as being part of his review, on the claimant’s case he did not express surprise (about Mrs Keating’s expectations) in the sense of not having discussed these matters when told. On the contrary, it was clear from the claimant’s oral testimony, he had been engaging with Ms Brooks and Kieran regarding the ability networks and had been in discussions with Ms Brooks regarding webinars (24 August email, page 715). Also, there was no indication that the webinar delivery had anything to do with the claimant’s dyslexia.

55. To the extent there had been confusion, uncertainty or a lack of clarity about the probation period expectations and the performance agreement objectives, there could be no doubt, in the extended 8 week period, what the respondent was expecting of the claimant. The claimant’s support worker did not attend the meeting (s) of 10 September 2018 but the claimant was content to proceed without her. Mrs Keating checked this before proceeding.

56. There was an exchange between ATW and Mrs Keating on 24 & 25 September 2018 regarding the prospect of a lighter laptop. Mrs Keating offered a contribution of £200 towards it. She expressed that if required to visit members/clients, the claimant would need to take a laptop with him. However in evidence, the claimant said he never took his laptop with him, he did not say however that was because of its weight. Mrs Keating also said in evidence that most staff left their laptops in the office and took memory sticks. In the light of this evidence, which was not challenged, the Tribunal found Mrs Keating’s reference to the claimant needing to take a laptop to a member or client meeting as being, in reality about the possibility of this and in the context of not being able to say he would not need to do so on any occasion. She had also referred to the dictation machine solution too (which appeared to have been resolved from when the substitute voice recorder had been suggested as the alternative on 28 August 2018 (page 628).

57. One of the tasks set for the claimant had been to produce the ESC Strategy paper for the ESC on 2 October 2018. There was a dispute between the parties regarding whether the claimant knew he would be presenting the strategy paper at this meeting and also how the meeting went. Mrs Keating said that the claimant had referred to his paper and said 'I know it's long paper, has anyone got any comments?' and then proceeded to speak about a previous NHS experience related to his private business.

58. Mrs Keating said she realised the claimant had attended not ready to present and instead Mrs Keating stepped in to do so. It was not plausible that the claimant had a belief that he would not be presenting. Mrs Keating was clear in her evidence that he would present his paper. It was more likely than not that the claimant would be given the platform to present a strategic paper on an area for which he was a subject matter expert and was the Disability Lead tasked to produce a strategy and the Tribunal found that he knew this long before he said he realised (the day before) that he would be presenting. Alternatively, even late in the day, as the custodian of the ESC paper, he did not demonstrate his presenting skills by drawing upon his vast training and speaking experience. Even on his own case in testimony, he was expecting to be questioned on the paper, he would have known the content better than anyone else.

59. On 11 October 2018, the claimant and Mrs Keating met which included feedback and a discussion of the ESC presentation of 2 October 2018 (as above). In addition, Mrs Keating discussed tasks that she felt the claimant should be working on including:

    a) Promote and support 'Disability Confident'
    b) Ability Networks plan
    c) Promote Mental Health & Wellbeing (focusing on Mental Health first aiders)
    d) Promote Intersectionality
    e) Global Disability, Mental Health & Well-being strategy
    f) Social Model of Disability
    g) Member survey

60. The claimant was set further tasks to undertake as a result. This included presenting a 2 hour Disability Equality & Inclusion session for the team. The objectives for 'Disability Confident' and Mental Health included webinars. In the email following this meeting dated 19 October 2018, Mrs Keating expressed her concern about the claimant's lack of traction, 17 weeks in to the role. The email was at page 329.

61. On 15 October 2018, the claimant expressed a desire to attend a mental health training event to obtain a mental health first aider qualification. Mrs Keating's evidence that she advised hm she was happy for him to attend was accepted. The evidence was not challenged.

62. On 23 October 2018, ATW emailed Mrs Keating regarding a lighter laptop and whether she was still prepared to contribute £200 and asking questions of her

regarding a support worker driver that they were looking in to (page 633). There was no evidence before the Tribunal about how the claimant was visiting clients, or that this was ever raised with Mrs Keating on any occasion. The Tribunal were informed the claimant had carried out 7-8 visits in total, about 3-4 alone (and he was accompanied on others, but the Tribunal had no evidence about how those visits were undertaken either from a travel perspective).

63. On 25 October 2018, Mrs Keating emailed the claimant about the presentation he would be delivering to the team on disability. She sought clarification that it would be run as if he were delivering training to clients as upon her review of the material, there appeared to be questions appearing to help the claimant to help the respondent's members and to test out 'Disability Confident'. She stated that the purpose of this training was to see the claimant 'in action' – so what he would be training people on. The claimant responded on the same day noting Mrs Keating's observations, saying that the session would be as if he was delivering to a member though he wanted to make it relevant to ENEI staff (pages 340-352).

64. The claimant emailed Mrs Keating in relation to the Ability Networks plan on 25 October 2018 (pages 336-339). Mrs Keating's response of 31 October 2018 was at page 335. Mrs Keating challenged several aspects of the claimant's plan. She did not understand what a pre-strategy was and in particular, that the claimant had not come up with a plan about how *the respondent* would be the catalyst for a UK framework of Ability Networks. Mrs Keating noted there were no timelines or financials too. She said she had wanted a National Strategy for Ability Networks by January 2019 (a date she had pulled back from March 2019). In summary, she expressed reluctantly, that the claimant had missed the brief entirely.

65. On 31 October 2018, the claimant presented his 2-hour disability workshop to his colleagues. Mrs Keating felt the ice breaker session went on too long, further, the guest speaker, Mr Malik spoke for approximately an hour. This meant the claimant ran out of time and he did not finish the workshop (in her view). The claimant received 8 feedback forms, four of which provided an overall score of 7 or more (which the claimant had been targeted with on 10 September 2018). In relation to the actual comments, there were several positive comments that the session was informative, interesting, thought provoking and useful. There were negative comments too including that the presentation was irrelevant, off track, boring and unstructured. There were also several comments that the structure could be improved, even from those who had been otherwise positive and there were some comments about the opening session (ice breaker) being too long (between 30-40 minutes) (pages 353-361).

66. The Tribunal found this session was to enable the claimant to demonstrate/showcase his credentials as a trainer to Mrs Keating, for onward delivery to clients as confirmed in her email of 25 October 2018. It was open to Mrs Keating to form a view that the structure of the session was not appropriate to enable Mrs Keating to assess him. It was a 2 hour session and in that context the claimant's time keeping and management of the session was poor. In that sense, the peer feedback was secondary. The claimant also believed that Mrs

Keating and her son and daughter, who also worked for the respondent and were at the session, had started to exchange texts towards the end of the session. There was partial corroboration for this from Ms Senior, though she said in her witness statement, that this was whilst the feedback forms were being completed which would have been at the end of the session, which was not consistent with what the claimant said. The Tribunal did not find there was any evidence supporting the exchanging of texts during the session or collusion in the feedback. The feedback forms were anonymous; there was no evidence of any ill feeling towards the claimant and it was not enough, without more, that there were three family members present and that there were performance concerns to date being handled by Mrs Keating. The Tribunal also observed that Ms Senior, who gave evidence for the claimant, had commented herself that the session needed some development.

67. On the same day (31 October 2018) the claimant submitted a grievance against Mr Okuyiga regarding the re-assignment of the taster training (for AWE) and in relation to a Global Competency training event which took place on 29 October 2018, which the claimant alleged he had not been invited to.

68. Also, on the same day (31 October 2018), the claimant emailed Mrs Keating and expressed his disappointment with the way his probation had been handled. This was the first time the claimant had responded in these terms since his probation meeting of 6 September 2018, his meeting with Mrs Keating of 10 September 2018, the two emails from Mrs Keating of 10 September 2018 and Mrs Keating's email of 19 October 2018. The claimant's email was a day before his probation review meeting (extended from 6 September 2018 for 8 weeks).

69. The claimant's concerns were that he did know he had to provide his probation review form self- completed in advance; that he had been asked to update Mrs Keating on what he had been doing since day one; he didn't think Ms Brooks needed to get upset because of his feedback on her slides; he felt he was being made to fail if he had to focus on medical conditions/health & safety, away from the social model of disability. (pages 368-369).

70. Mrs Keating responded on the same day expressing surprise at the claimant's comments, as nothing had been said by him before (since the meetings & emails referred to in paragraph 66 above). She said she had listened to and helped the claimant and had never required of him to present on anything medical (page 368). The Tribunal was surprised by the timing of this email as these concerns could and should have been raised before. In any event, they did not directly address what appeared to the Tribunal to be key concerns of Mrs Keating: the ESC paper and presentation, the Ability Networks plan, the Notable dates plan (including the events), webinars (even though the claimant was relieved from delivering personally) and the most recently delivered disability training session (although that had only just been delivered). It appeared to the Tribunal that there was an underlying theme relating to an absence of the ownership of or creation of planning. In addition, in Mrs Keating's email of 19 October 2018, she had been content for the claimant to develop on his social model of disability.

71. The claimant's probation review meeting was pushed back to 5 November 2018 to accommodate the claimant's support worker's availability. On the morning of the probation review meeting, the claimant sent an email at 8.27am. Although Mrs Keating said she would have expected that sooner, she did read it before the meeting. In oral testimony, she confirmed to the Tribunal that she had prepared for the meeting and knew that most of the tasks had not been completed, as, for example, she would have needed to sign off on actions relating to Notable dates activities. The email was at page 383. It addressed the ESC paper and presentation and the disability training session on 31 October 2018. There was no new content contained therein beyond that which has already been addressed above.

72. The performance document with the claimant's populated documents at page 390, were not provided to Mrs Keating before the meeting on 5 November 2018. This appeared to be common ground. The claimant's support worker was present too. Her evidence was consistent in this regard. She referred to the claimant working through a checklist with Mrs Keating disputing he had met the standards. Ms Steenland confirmed that in giving her overall assessment, Mrs Keating said she was not devaluing the claimant's experience, but felt there was a disconnect on timescales. She expected more output after 22 weeks. According to Ms Steenland, the atmosphere was not pleasant, in oral testimony she said it was on the way to becoming hostile but she did not attribute this to any side.

73. Mrs Keating said there was a lot of discussion regarding notable dates (paragraph 112 of her witness statement) which appeared consistent with the populated performance document. Mrs Keating's view was there had been inadequate or a lack of progress with these dates. Several events had merely been acknowledged since 6 September to 5 November 2018 with no evidence of any additional activity. Mrs Keating's evidence, which was accepted, was that the acknowledged events would be an automatic marketing activity. She would need to sign off for anything more and had not been asked to do so.

74. Regarding the Ability Networks plan, the Tribunal were left with an overwhelming impression that Mrs Keating had become frustrated that the claimant was unable to use his initiative to inform Mrs Keating what he thought should happen, even if his enquiries meant the Ability Networks development was not a good idea based on his discussions with Mr O'Reilly and Ms Brooks. Mrs Keating was looking to the claimant for direction and decisiveness in this regard.

75. It was not the case that Mrs Keating was saying the claimant had done nothing, neither did the Tribunal form that view. He had attempted to achieve some of the tasks, but unsatisfactorily in Mrs Keating's view, alternatively, he had simply not delivered the planning, strategy or events required. It was difficult for the Tribunal to form a view on exactly what was or was not specifically addressed at the meeting or accepted as satisfactorily done. The Tribunal accepted that a mental health course for example had been drafted by the claimant. However the respondent took and was entitled to take a holistic view of performance to

determine whether the claimant had passed the extended probation review period.

76. The claimant was dismissed at this meeting. Mrs Keating had informed the claimant that his grievance relating to Mr Okuyiga would be separately investigated.

77. Initially, the claimant was incorrectly informed that he did not have a right of appeal. This was rectified. The Tribunal accepted this was an error. The claimant submitted an email dated 12 November 2018 (447), an email dated 22 November 2018 (page 449) and a letter dated 23 November (452) 2018, in which he sought to appeal against his dismissal and raise a grievance against Mrs Keating (too).

78. The investigation of the appeal against dismissal and the grievance was outsourced initially to an HR Consultant Ms Alison Broomfield. However the claimant expressed concern regarding her impartiality because of her alleged (close) relationship with Mrs Keating. Whilst this was not accepted, to avoid the perception, Mr Marcus Adams, HR Consultant at Foster Adams was appointed instead. He was in the people pool of DAC Beachcrofts (page 522).

79. There followed a substantive investigation, involving interviews with several individuals. The reports with all appendices were at pages 527 (appeal against dismissal/grievance regarding Mrs Keating) to 716 and 721 to 811 (outcome of grievance against Mr Okuyiga).

80. The Chair of the respondent, Mr Harry Gaskell, a partner at Ernst Young, considered and reviewed the investigation reports and both grievances and the appeal against dismissal were not upheld. Mr Gaskell wrote to the claimant. The letters were at pages 813 to 817 and 819 to 822. The claimant was given a right of appeal but he did not exercise this.

81. The claimant gave little evidence about the post termination investigation in his witness statement and there was minimal questioning of the investigation process or content by either side. The Tribunal read and considered the investigation report and the outcomes but were of course not bound by the findings. The Tribunal did find them to be thorough and there was no basis for drawing any adverse inference in relation to the respondent's approach or conduct in this regard.

82. In relation to the grievance concerning the alleged exclusion of the claimant by Mr Okuyiga from the Global competency event on 29 October 2018 (the only other example given), the Tribunal found that the evidence showed that the claimant was invited, as an optional attendee, to the Global Competency event on 29 October 2018, by an invitation sent on 23 August 2018. Whilst the email invitation on page 257 did not show he had been included, the Tribunal were taken to 3 outlook documents – 2 of which were screenshots which showed he had been invited. These documents at pages 871, 878 and 879 had no dates. However, there was no evidence or allegation before the Tribunal that they had been manufactured or fabricated for these proceedings. The Tribunal noted that

that disclosure was to have been completed by 26 June 2020. Mrs Keating did not leave until 30 June 2020. Hence, it was not irregular/inconsistent that she did not have a cross against her name with her email address not recognised or sending an out of office reply (page 878). The Tribunal found that as the invitation was sent on 23 August 2018 for an event 2 months later, it was possible that the invitation was overlooked or that, as an optional attendee it would not automatically be inserted in to the claimant's diary. In addition, no specialist IT evidence was produced to indicate that the Tribunal's finding was unsafe for technology/electronic reasons.

83. The Tribunal noted Mrs Keating's evidence, relevant to credibility and plausibility, that in a team of 18 employees, eight had disabilities and four were dyslexic. Many had reasonable adjustments. The evidence on this was not challenged or disputed.

Applicable Law

84. The claimant's claims are for race and disability discrimination (direct) contrary to S. 13 of the Equality Act 2010 ('EqA'), S.27 (Victimisation (Disability)), a failure to make reasonable adjustments and discrimination arising from Disability contrary to sections 20 and 15 of the EqA respectively.

85. S.13 (1) provides:

Direct discrimination

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

86. S.15 provides:

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.

87. S.20 provides:

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 ('PCP') 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.

88. Part 3 of Schedule 8, S.20 EqA provides:

Part 3
Limitations on the duty
Lack of knowledge of disability, etc.

20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know:

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

89. S.27 eqA provides:

Victimisation

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

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

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

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

90. Pursuant to S. 212 EqA,'substantial' means more than minor or trivial.

91. The general burden of proof is set out in S.136 EqA. This provides:

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

92. S 136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

93. The guidance in ***Igen Ltd v Wong 2005 ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

94. In ***Laing v Manchester City Council 2006 ICR 1519 EAT***, the EAT stated that its interpretation of Igen was that a Tribunal can at stage one have regard to facts adduced by the employer.

95. In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated:

"*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination"*

96. More specifically, in relation to reasonable adjustments, a claimant must establish he is disabled and that there is a provision, criterion or practice which has caused the claimant his substantial disadvantage (in comparison to a non-disabled person) and that there is apparently a reasonable adjustment which could be made. The burden then shifts to the respondent to prove that it did not fail in its duty to make reasonable adjustments ***Project Management Institute v Latif 2007 IRLR 579***. The respondent may advance a defence based on a lack of actual or constructive knowledge of the disability and of the likely substantial disadvantage and the nature and extent of that because of a PCP - S.20, Part 3, Schedule 8 EqA & ***Newham Sixth Form College v Sanders 2014 EWCA Civ 734***.

97. In relation to discrimination arising from disability, once a claimant has established he is a disabled person, he must show that 'something' arose in consequence of his disability and that there are facts from which the Tribunal could conclude that this something was the reason for the unfavourable treatment. The burden then shifts to the employer to show it did not discriminate. Under S.15 (2) EqA, lack of knowledge of the disability is a

defence but it does not matter whether the employer knew the 'something' arose in consequence of the disability. Further an employer may show that the reason for the unfavourable treatment was not the 'something' alleged by the claimant. Finally, an employer may show the treatment was a proportionate means of achieving a legitimate aim.

98. In ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN*** the EAT stated:

"26. *The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" - and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.*

27. In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability."

99. In ***Pnaiser v NHS England & Anor UKEAT/0137/15/LA*** the EAT stated, in reviewing the authorities:

"*31 (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

31 (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it"

100. In ***Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16/JOJ*** the EAT stated:

"*15. In those circumstances, I do not consider that there is any conflict between the approach identified in Hall and that identified by Langstaff J in Weerasinghe. As Langstaff J said in Weerasinghe the ingredients of a claim of discrimination arising from disability are defined by statute. It is therefore to the statute that regard must be had. The statute requires the unfavourable treatment to be "because of something"; nothing less will do. Provided the "something" is an effective cause (though it need not be the sole or the main cause of the unfavourable treatment) the causal test is established.*

16. In this case, the Tribunal recognised that the requirement in section 15 does not involve any comparison between the Claimant's treatment and that of others. It expressly accepted that in considering a section 15 claim it is not necessary for the Claimant's disability to be the cause of the Respondent's action, and that a cause need not be the only or main cause provided it is an effective cause (see paragraph 29.2). Notwithstanding the arguments of Mr McNerney, I can detect no error of law in that self-direction.

17. At paragraph 29.3 the Tribunal applied the facts to that statutory test, adopting the two-stage approach identified in Weerasinghe. In light of my conclusions above, I do not consider that there was any error of law by the Tribunal in taking that approach. The Tribunal was entitled to ask whether the Claimant's absence, which it accepted arose in consequence of his disability, was an effective cause of the decision to dismiss him. To put that question another way, as this Tribunal did, was the Claimant's sick leave one of the effective causes of his dismissal?"

101. By S.123 (1) EqA, a claim 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.

102. Pursuant to s.123 (3) (a) EqA, conduct extending over a period is treated as done at the end of the period.

Conclusions and analysis on the issues

103. The following conclusions and analysis are based on the findings which have already been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

Knowledge of disability

104. The Tribunal concluded that in relation to the claimant's physical mobility impairment, the respondent had knowledge when they received the claimant's application for the job, alternatively at the very latest, the date of interview (15 May 2018). The claimant had disclosed he had been disabled since the age of 2 and that he was a player and coach in wheelchair basketball and wheelchair tennis in his CV. The Tribunal concluded that Mrs Keating was not made aware

of the email dated 4 May 2020 regarding the claimant's interview arrangements and his ability to manage a few steps.

105. In relation to the claimant's dyslexia, having regard to findings above it was more likely than not that the first discussion about dyslexia was on 19 June 2018. That was the Tribunal's conclusion. There was no earlier discussion or information in this regard.

106. In relation to the respondent's knowledge of the nature and extent of the claimant's substantial disadvantage caused by any provision, criterion or practice of the respondent, this was considered alongside the issues in relation to reasonable adjustments.

Issue 3 (a) & (b) - S.13 (Direct Disability Discrimination)

107. The claimant was given his performance document at his first meeting with Mrs Keating (19 June 2018). She had written down 3 focus areas – the strategy paper for the ESC, a Notable Dates plan for future training and other events (instructions, guidance and events) and to look at a network of associates for the respondent's use. The Tribunal concluded and accepted Mrs Keating's evidence that these were some objectives for the claimant to flesh out and work on; they were not exhaustive or exclusive; these objectives could not have captured all aspects, the job description was broader and wider and the amount of time these tasks would have taken (and did take) would have made it obvious that these were 'priority' areas to develop at that time and for the claimant to provide input and develop but not to the exclusion of the job description and/or on-going expectations and reasonable instructions from Mrs Keating. The Tribunal's view may have been different if there had been no further dialogue or very little on-going communication but the contrary was true. It was obvious to the Tribunal that there was another key focus point (Ability Networks plan) which had developed through on-going dialogue and thus there was fluidity in the performance expectations. The Tribunal also concluded that the network of associates had become less important as evidenced by Mrs Keating's comments in her email of 10 September 2018 (page 261) which referred to an interview with an associate on 5 July 2018. When Mrs Keating did reduce her expectations in to writing, in comprehensive detail, this was not challenged by the claimant regarding the legitimacy of Mrs Keating's expectations save in relation to a further discussion wherein the claimant expressed his desire not to do 'medical conditions webinars.' (page 259). At the time, no surprise was expressed beyond that at all. It was clear he had been tasked or expected to do other things. For example, there had been dialogue about webinars, he had been approached about the disability taster training session. There had been regular and numerous one to ones with Mrs Keating. Mrs Keating had discussed the Ability Networks plan with him too. The fact of these discussions was not challenged by the claimant. Even if the Tribunal was wrong in its conclusion about this, the Tribunal concluded, emphatically that the reason why the claimant was assessed on matters beyond the three matters initially written down, was not that the claimant was disabled by reason of his mobility impairment or dyslexia. The email traffic with ATW went against the

grain of such a conclusion, including proactively raising what else she (Mrs Keating) could do; so did the arrangement to work from home not support such a conclusion. The claimant was also employed knowing he had a mobility impairment. The Tribunal also had regard to the unchallenged evidence that Mrs Keating had, in a team of 18 employees, 8 with disabilities, 4 of whom had dyslexia. More specifically, the Tribunal did not follow how issue 3 (b) was being advanced as a direct discrimination claim.

Issue 4 – Direct discrimination comparators relating to issue 3

108. The claimant relied on 2 comparators for his direct discrimination claim – Ms Sarah Carey (Client Engagement Manager) and Mike O' Hanlon (Membership Engagement Manager). It was not disputed that Ms Carey was not disabled. However, without evidence of Ms Carey's performance agreement, the Tribunal was not satisfied she was an appropriate comparator under S. 23 (1) & (2) of the EqA. Alternatively, the claimant offered insufficient evidence regarding the alleged performance concerns of Ms Carey for her to be an appropriate comparator. There was no email or other written document in the bundle; Ms Carey was not called as a witness. The claimant's evidence in paragraph 74 was challenged by the respondent. Mr Okuyiga, to whom Ms Carey reported, had no knowledge of any performance concerns. Mrs Keating corroborated that evidence and rebutted directly in oral testimony that there were any concerns with her and said she believed she was doing a good job and was very professional. She was also not a Manager, she was the next level down. The respondent would be best placed to provide this evidence .

109. Mike O' Hanlon (Member Engagement Manager) was disabled as a result of having suffered a stroke. Without evidence of Mr O'Hanlon's performance agreement, the Tribunal was not satisfied he was an appropriate comparator under S. 23 (1) & (2) of the EqA . Alternatively, the claimant offered no evidence regarding the alleged performance concerns of Mr O'Hanlon. There was no email or other written document in the bundle; Mr O'Hanlon was not called as a witness. The assertion in para 74 of the claimant's witness statement, repeated in evidence, was not evidence that Mrs Keating had concerns about his performance. Mr Okuyiga, to whom Mr O' Hanlon reported, had no knowledge of any performance concerns. Mrs Keating corroborated that evidence stating she had no performance issues and that he was a good performer. He was also not a Manager, but had an autonomous role, not managing individuals. The respondent would be best placed to provide this evidence.

110. Based on its findings, conclusions and analysis above regarding issues 3 and 4, the Tribunal concluded the burden of proof did not shift to the respondent as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of direct discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimant's disabilities.

Issues 5 & 6 - S.13 Direct Discrimination (Race)

111. Both of the claimant's comparators were white British. The Tribunal repeats its conclusions regarding Mr O'Hanlon above. The claimant offered no evidence regarding the alleged performance concerns of Ms Brooks. There was no email or other written document in the bundle; Ms Brooks was not called as a witness. The allegation in the claimant's witness statement, paragraph 75, was not an allegation related to performance at all. In any event, Mr Okuyiga and Mrs Keating both denied and corroborated that there were no performance concerns. The difference in treatment regarding delivery of training and adjustments made was completely different to the performance issue/allegation advanced by the claimant. The Tribunal was not satisfied she was an appropriate comparator under S. 23 (1) & (2) of the EqA.

112. Based on its findings, conclusions and analysis above regarding issues 5 and 6, the Tribunal concluded the burden of proof did not shift to the respondent as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of direct discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimant's race.

<u>Issue 7, 8, 9 - S.15 Discrimination arising from disability (taster training)</u>

113. The Tribunal spent a significant amount of time deliberating this issue. The Tribunal concluded that removing the claimant from the taster training session was unfavourable treatment. Training was a part of the claimant's role, he held himself out as having subject matter expertise and desired to do the training. It was not disputed that the 'something arising' (i.e. the claimant's grammar errors) were caused by his dyslexia. However whether the treatment was for the something arising from disability (the claimant's grammar errors) caused the Tribunal some difficulties. Grammatical errors were cited in Mr Okuyiga's email of 9 August 2018, page 247. Chronologically, it was mentioned as the last point and in a separate sentence prefaced with 'also'. The first two concerns were in relation to terminology and legislative focus. The Tribunal questioned Mr Okuyiga in evidence about the earlier discussion regarding terminology and he repeated his evidence in his witness statement regarding use of phrases 'disability equality' and mental health equality' both of which he said he was unfamiliar with. The Tribunal also read this email in the context of the 'brief' from the client (AWE) set out in the email dated 8 August 2018, page 248, wherein emphasis was placed on practicality for managers and colleagues, addressing misunderstandings and how to deal with difficult situations.

114. Mr Okuyiga's witness statement prepared for these proceedings was consistent with his email, paragraphs 19-23 in particular. In particular, that the grammar was the least of his concerns.

115. In oral testimony, Mr Okuyiga also volunteered his concerns/suspicions that the claimant might use some of the training material for his own business. This was not said at the time.

116. In response to Tribunal questioning however, Mr Okuyiga said that if it was not for the grammatical mistakes, he would have permitted the claimant to undertake the training. This was a surprising answer in the unanimous view of the Tribunal. It was arguably an entire u-turn from Mr Okuyiga's position on this point to date. It was possibly an admission abandoning all that he had said to date. It was open to the Tribunal to reach this conclusion. However, after careful reflection, the Tribunal concluded that Mr Okuyiga's response in this regard was a mistake/an error and was caused by confusion. The Tribunal thus, preferred the contemporaneous account of his reasons, which had formed the platform of his prepared witness statement and which had formed the basis of the cross examination of the claimant's evidence too. The Tribunal was slow to reach this conclusion but when it did, the Tribunal were very sure of their conclusion unanimously. The grammatical reason was minor or trivial and had no relevance to the delivery of training/presenting or the content. The unfavourable treatment did not arise because of the grammatical errors.

117. There were facts from which the Tribunal could conclude that the 'something arising' (grammar errors) was the reason for the unfavourable treatment which caused the burden of proof to shift. However, in pursuance of the foregoing findings and analysis and Mr Okuyiga's thought process, the Tribunal was satisfied that the grammar errors were not a significant influence or an effective cause of the unfavourable treatment by Mr Okuyiga (***Pnaiser & Charlesworth applied)***

Issues 10-12 –S.15 Discrimination arising from disability (training exclusion)

118. In the light of the Tribunal's findings in paragraph 80 above, the Tribunal concluded the claimant was invited to the Global Competency training. The fact that he was invited as an optional attendee was not an issue before the Tribunal. There was thus no unfavourable treatment.

119. As there was no unfavourable treatment, the Tribunal concluded the burden of proof did not shift. ***(Pnaiser & Weerasinghe*** applied).

Issue 13-15 S.15 Discrimination arising from disability (Probation extension and dismissal)

120. The Tribunal concluded that the extension to the claimant's probation on 6 September 2018 was not unfavourable treatment. The probation review period in his offer letter was 12 weeks. The respondent was entitled to review the claimant's performance at that point. The extension of time to assess his performance was favourable treatment as the claimant's employment could have been terminated. The Tribunal understood the claimant's case not to be that his probation should have been confirmed (i.e. that he had passed) but that it was unfavourable to assess him on 6 September 2018 when he had only had his support worker since 20 August 2018. Whilst the Tribunal accepted the

generality of the help the claimant would get from his support worker, there were no specific examples of how or in respect of which tasks the absence of a support worker had caused the claimant not to be able to do something at all, timeously or insufficiently. Alternatively, an 8 week extension to the probation review period was not an unfavourable period of extension. Mrs Keating said probation extensions were normally a couple of weeks, so 8 weeks was quite generous. This was accepted. The expectations for that 8 week period were set out clearly and in writing in detail too. ***(Pnaiser & Weerasinghe*** applied).

121. The dismissal on 5 November 2018 was an act of unfavourable treatment.

122. That unfavourable treatment did not however arise from the support the claimant needed with reading, drafting and typing; or from disadvantage delivering webinars or his need for support with mobility. The reason for dismissal, in the Tribunal's conclusion, having regard to its findings above, arose from performance concerns, in particular:

a) *The quality, structure and content of the ESC paper* - this had received substantive input from Mrs Keating – on at least 3 occasions and it was more than cosmetic - and Ms Debbie Rotchell, an associate. There had been no challenge to this after the contemporaneous email confirming this point on 10 September 2018 (page 260). In addition, Mrs Keating was not satisfied with the claimant's presentation of that ESC paper on 2 October 2018. These concerns did not arise from the claimant's mobility or dyslexia and neither did the claimant allege this at the time.

b) *Lack of activity with the Notable Dates Plan including events* – these concerns did not arise from the claimant's mobility or dyslexia and neither did the claimant allege this at the time.

c) Lack of activity with the Ability Networks plan- the claimant created a pre-strategy paper (page 336) which Mrs Keating responded to on 31 October 2018 (page 335). She did not understand what a 'pre-strategy' paper was. She was looking for direction, ownership and output from the claimant to inform Mrs Keating what the respondent should be doing.

d) *In house training presentation 31 October 2018* - this session was to enable the claimant to demonstrate/showcase his credentials as a trainer to Mrs Keating, for onward delivery to clients. The claimant had invited a guest speaker who spoke for about an hour. Several of the feedback forms commented on his introduction session going on too long, at least 30 minutes. He had prepared slides for the presentation (38) but was unable to complete presenting on them properly. The feedback was positive and negative but in the Tribunal's view it was open to Mrs Keating to form a view that the structure of the session was not appropriate to enable Mrs Keating to assess him. It was a 2 hour session and in that context the claimant's time keeping and management of the session was poor. Mrs Keating denied using her phone to text, but in any case, she determined that it was for the

trainer to be in control. These concerns did not arise from the claimant's mobility or dyslexia.

123. With regard to the claimants unwillingness to do webinars, this was because of an unspecified past experience. In addition, the Tribunal concluded that there was insufficient evidence from which it could conclude that difficulty with webinar delivery arose from the claimant's dyslexia. A webinar would enable the claimant to prepare and rehearse in advance in the same way as a face to face presentation. He would not be at any disadvantage by preparing slides and speaking from speaker notes. Any difficult words in the notes or the slides, medical or otherwise, could be substituted as they would be in a face to face session. In any event, Mrs Keating was prepared to remove the need for the claimant to do webinars by allocating this to Ms Brook. However, the claimant's conduct towards Ms Brook, caused her to become upset and thus this became an unviable option for that reason (page 715). It was notable that in the claimant's apology email the claimant expressed a view that he was not confident on presenting disability training on medical conditions/impairments which was consistent with his view on the social model not, the respondent's model. This was at least a part of the claimant's struggle. In furtherance of its efforts to find a solution, the claimant's offer to go to 4 days and for an associate to pick up webinar activity, was accepted by the respondent. The Tribunal considered if the respondent could have maintained the claimant on 5 days and reallocated his webinar delivery, but decided that this was not a reasonable adjustment as it was not satisfied that doing the webinars was a substantial disadvantage to him; alternatively and in any event, the claimant was responsible for the alternative measure put in place (Ms Brooks) not working.

124. Thus, webinar delivery no longer featured as a requirement for the claimant to *personally* deliver and thus that did not form a part of the reason to dismiss. However the claimant remained responsible to arrange for the webinars to be done, externally or otherwise (and if external, cost neutrally if possible)– this was made clear in Mrs Keating's email of 19 October 2018 (page 330). As a charity, there was nothing unusual in the opportunity to save on cost.

125. The reasons for the claimant's dismissal were the respondent's performance concerns of the claimant which did not arise from either of his two disabilities. The Tribunal were cognisant of the claim before it. This was not an unfair dismissal claim and/or the assessment of whether or not it was reasonable to give the claimant more time to improve.

<u>Issues 16 – 19 S.20 Reasonable Adjustments (Support Worker before 20 August 2018)</u>

126. The provision, criterion or practice ('PCP') was not articulated. However, the Tribunal concluded, from the evidence and information before it, that the PCP was the requirement to produce written work/output of a good standard without grammatical or spelling errors.

127. In relation to whether the PCP substantially disadvantaged the claimant up to 20 August 2018, because he did not have a support worker before 20 August 2018, the Tribunal concluded that from when the claimant said he would need a support worker (19 June 2018), this would reasonably indicate that the impact of the claimant's dyslexia on his written output/work was *potentially* substantial. A support worker requirement would suggest a higher degree of the need for support with regularity. No immediate support was put in to place. An email exchange occurred with ATW on 20 June 2018; they visited on 29 June 2018 and a report was produced on 2 July 2018. There was a dispute thereafter about whether the report was seen by Mrs Keating. There was no email suggesting she was copied in on any email from ATW or an internal email from Ms V Keating to Mrs Keating or from the claimant to Mrs Keating. The ensuing email dialogue with ATW, did not cross refer to the report especially page 619 (10 August 2018) which was an enquiry in to his role in connection with his request for a support worker. On page 628, Mrs Keating expressed she didn't know the nature of the equipment (digital recorder). On 22 August 2018, page 621 she asked, proactively, ' What about the laptop and anything else?'

128. The Tribunal accepted that the claimant could *potentially* have been substantially disadvantaged regarding the pace or accuracy of his written output between 19 June 2018 and 20 August 2018. However, *crucially*, the Tribunal did not hear any evidence, neither was it asserted, that there was any particular task , activity or requirement which the claimant could have completed better or quicker if he had a support worker in that period. Using the ESC paper as an example of a task he was likely to have prepared a draft of in that period, which was a key piece of written output expected of the claimant, the claimant did not say he was inhibited from producing a better quality paper or a better structured paper either sooner or at all, because he did not have a support worker. The amendments made by Mrs Keating and Ms Rotchell were regarding the content, sub-headings and timeline. There was no reference to grammar. Additionally, the claimant was questioned on whether a Word spell check/auto-correct would have alleviated any disadvantage and the claimant did not say this could not be done and in fact said he could have done it.

129. The claimant was a disability expert who must have known or ought to have known that such examples were required to be given in such a case. The Tribunal also refers to its conclusions regarding the taster training session that the claimant's treatment was not unfavourable arising from his grammar errors. This was the only specific arguable example which was put before the Tribunal in this period.

130. The claimant provided no specific examples however by reference to any tasks or requirements of him. The respondent's evidence too was in general terms in relation to this period – paragraphs 33 to 35 of Mrs Keating's witness statement. In that context, the Tribunal found that the PCP in that period, did not put the claimant to a comparative substantial disadvantage, in particular that the nature or extent of it required any interim support. The statutory language is that it does put the claimant to that substantial disadvantage, not, for example in contrast with indirect discrimination

provisions, that it would put, the claimant to a substantial disadvantage. This would require evidence and examples of that disadvantage.

131. Alternatively, if the Tribunal was wrong in its conclusion in this regard, the Tribunal concluded that the respondent did not know and could not reasonably be expected to know, that the claimant was likely to placed at a substantial disadvantage in that period, in particular that the nature or extent of it required any interim support. The conclusions above are repeated at paragraphs 124-128. Additionally, as found above, the claimant had several one to ones with Mrs Keating and he did not raise any concerns regarding the written output or the pace of that required of him in relation to any task or action at that time. The Tribunal has found that Mrs Keating was regularly told and assured that the claimant was dealing with ATW with whom he had dealt with before and was assertive and confident with Mrs Keating in this regard.

132. In reaching these conclusions, the Tribunal had regard to ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734.*** In that case, the Court of Appeal said:

" In my judgment these three aspects of the case -- nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments -- necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable"

133. In the further alternative, if the duty to make reasonable adjustments was triggered, the Tribunal concluded that the respondent did make a reasonable adjustment by extending, by 8 weeks, the period within which to assess the claimant's performance. During that period the claimant did have a support worker. The respondent also asserted that that the claimant had done 5 working days of work since his employment began up to 6 September 2018, alternatively, no more than 10, which was not challenged by the claimant. The Tribunal concluded this was in itself an accommodation – a reasonable adjustment – to the expectations the respondent would have had at that time.

134. As the Tribunal concluded there was no PCP which had caused the claimant substantial disadvantage (in comparison to a non-disabled person) the burden of proof did not shift to the respondent. Alternatively, the duty was not engaged because of the respondent's lack of knowledge of the nature and extent of disadvantage and in the further alternative, there was no failure to discharge its S.20 duty, if it did apply.

Issues 20-24 S.20 Reasonable Adjustments (Taxis)

135. The respondent did, initially apply, a PCP that the claimant was required to travel to the office and to clients with his own means of transport.

136. However, this PCP changed on or around 19 June 2018 when the claimant was given general dispensation to work from home save on rare occasions and thus not requiring him to travel other than to attend a client appointment. The evidence of Mrs Keating that it was a rare occasion was not challenged.

137. In so far as the claimant was required to come in to the office on a rare occasion, the Tribunal concluded that this was minor or trivial and not a substantial disadvantage because of his mobility impairment compared with a person without that disability. On other days, this was voluntary – it was neither a requirement or an expectation in the Tribunal's conclusion. There was no clarity of evidence by way of examples of when the claimant attended the office. Other than his probation meetings, the Tribunal concluded the claimant was in the office on 7 August 2018 (training meeting), 2 October 2018 (ESC presentation), 29 October 2018 (Global Competency, which the claimant had not accepted and was an optional attendee), and 31 October 2018 (Disability workshop). There was no evidence offered about how the one to one meetings with the claimant took place and whether these were by phone, virtually or in person.

138. Alternatively, the respondent did not know or could not reasonably have known of the nature and extent of any disadvantage (***Sanders***)– there was no evidence about how the claimant had chosen to travel in on those days, whether he did come by train/public transport and undertake the 5 minute walk but in 15 to 20 minutes; was he dropped off by his wife; did he arrange to be collected by a colleague from the station (or could he have – he was already getting peer support with work, he had been dropped off at a train station on 12 July 2018); did the claimant take a taxi, if so, why didn't he request reimbursement as an exceptional expense – he had not raised this in any one to one and had said in his interview he was ok to get around. The Tribunal noted that in all of the ATW dialogue the issues of taxis had not featured at all – on 10 August 2018, the dialogue was about a support worker (page 619); 0n 22 August the dialogue was about a digital recorder (page 622); on 28 August 2018 the dialogue was about a substitute voice recorder (page 628) on 24 September 2018 the dialogue was about a lighter lap top (page 631). It was only in an email of 23 October that the issue of a support driver was raised, which email, incidentally referred to client funding out of London travel (page 633).

139. In relation to the requirement to travel to clients, the Tribunal heard no evidence of how the claimant did travel to those appointments, with the exception of the visit he made to Leicester when he did at least part of the journey by car with Mr Okuyiga (to the train station). The claimant made between 7 to 8 visits. He said he did about 3 or 4 alone, he was accompanied on the others. Again, the Tribunal were not offered any evidence about how

those visits were made with regard to travel, or the locations – whether they were in London (thus whether or not the Underground was or was not used) or whether outside London. The claimant had a motability car though the Tribunal understood his wife would drive him around if there was likely to be a parking issue (page 200). Moreover, the Tribunal had regard to the ATW report which noted the claimant's difficulty with driving and walking because of fatigue and cramping in his right leg. On that basis, it was more likely than not that the claimant did not drive to a client appointment.

140. The Tribunal were not informed whether the claimant could or did take a taxi from his home to a train station and then a taxi at the other end to the client's site. If he did do this, why that caused him a substantial disadvantage and if he did not do this why not? The Tribunal used its collective experience to conclude that it would have been common practice for a client to be re-charged travel expenses (and was here with at least out of London travel). The respondent's policy about this, the Tribunal concluded, was not explicitly about client expensed travel but even if it was, taxis would likely form an exceptional situation especially for the claimant.

141. The Tribunal concluded however that the claimant was likely to be substantially disadvantaged by travelling through a train station as this would require him to walk more than 30 or 40 steps in most cases. On this basis alone, the Tribunal accepted the PCP substantially disadvantaged the claimant.

142. However, the Tribunal concluded that the respondent did not know and could not reasonably be expected to know, that the claimant was likely to placed at a substantial disadvantage by the PCP to visit clients and/or the nature and extent of that (***Sanders***). The Tribunal has found that Mrs Keating had not seen or been provided with the ATW report. There was no reason for her evidence to be evasive on this, she had regular dialogue with ATW and was responsive and indeed proactive to issues being raised. The claimant and ATW did not cross refer to the ATW report. That was where it had been stated that the claimant struggled after 30-40 steps and suffered from fatigue and cramping if he had to drive and walk. The email before the interview was not seen by Mrs Keating wherein the claimant had said he could manage only a few steps. As found above, the claimant had not said anything at his interview about his mobility needs, in fact he had said he could get around alone and did not request adjustments, both of which were noted by Mrs Keating. The claimant had not said anything to Mrs Keating in multiple one to ones about taxi support (interim or otherwise)- or outside of these verbally or in writing. The claimant's contrary case was only given in oral testimony, it was not in his witness statement. When put to him by the Tribunal that he could have dropped Mrs Keating a short note or email, he said he didn't think to do this. If there had not been any ATW email dialogue and/or the volume of one to ones (19 June, 28 June, 4 July, 30 July, 14 August and 23 August 2018), the Tribunal would more likely than not have concluded that the respondent ought to have known of the substantial disadvantage because of its lack of enquiry. In fact on 13 August 2018 Mrs Keating had expressly raised the question of a solution to the claimant's need to travel to clients because of his mobility. She had also asked if there was 'anything else?' in her email of 22 August 2018 in relation to

adjustments. There was no response from the claimant or ATW in response regarding mobility and taxis or travel.

143. In so far there was a substantial disadvantage (travel to the office or for client visits), which caused the burden of proof to shift, the duty to make reasonable adjustments was not engaged because of the respondent's lack of knowledge of the nature and extent of the disadvantage.

Issues 25-29 S.20 Reasonable Adjustments (Laptop)

144. The Tribunal first examined the alleged PCP and concluded that it was not the PCP which was applied. From 19 June 2018, the claimant was no longer required to attend the office save on rare occasions (about which the Tribunal heard no evidence that a laptop was required, or if it was on which occasions) and could work from home unless he needed to attend a client site. In so far as the client visits were concerned, the PCP was to attend with a laptop *or in relation to a presentation, having emailed the client the presentation beforehand or, by attending with a memory stick and in relation to a non-presentation meeting, with the means/facility to take notes.* This PCP was, in the Tribunal's conclusion, the correct/accurate formulation having regard to all the information and evidence before the Tribunal.

145. The Tribunal noted the claimant's evidence that he did not attend any of his client meetings with a laptop.

146. In addition, Mrs Keating's evidence was that most staff generally left their laptops in the office and attended meetings by taking a memory stick. This was not challenged and in this regard Mrs Keating's evidence and the claimant's evidence corroborated each other. The Tribunal has found above in paragraph 56 what it considered was in reality Mrs Keating's reference to the claimant's occasional rather than regular need to take a laptop to a client meeting. In saying so, the Tribunal concluded that whilst Mrs Keating's email to ATW might have been an overstatement, it was supportive to the claimant's interests.

147. The alleged disadvantage was put on the basis of the need to take his laptop to and from client meetings and to and from the office. The latter was eroded by the dispensation to work from home (and see findings above in paragraph 24 and the Tribunal's conclusions in paragraph 134). With regard to the former, as the claimant said he did not take his lap top to any client meeting, there was, thus, no disadvantage. The ATW report pinpointed the remedy to the disadvantage with regard to taking notes at a meeting by providing a digital recorder. There was no dispute about that in this case.

148. Thus, the issue regarding the weight was in fact not of any material significance which caused any substantial disadvantage. That the claimant, respondent and ATW were in dialogue about this did not affect the Tribunal's conclusion. The Tribunal concluded, as noted above, that ATW were not provided with an up to date or accurate position regarding working from home but also that the claimant did not take his lap top, on his own evidence, to any

client meetings. ATW and the claimant were already aware of the digital recorder provision for the purposes of taking meeting notes.

149. In the alternative, the Tribunal repeats its conclusions in paragraph 135 and 139 above regarding the respondent's lack of knowledge of the nature and extent of disadvantage which apply equally in relation to the laptop (***Sanders***)

150. In so far there was a substantial disadvantage (travel to the office or for client visits with a heavy laptop), which caused the burden of proof to shift, the duty to make reasonable adjustments was not engaged because of the respondent's lack of knowledge of the nature and extent of the disadvantage.

Issues 30-31 – Victimisation

151. It was accepted that the claimant's grievance of 31 October 2018 was a protected act. The Tribunal concluded however that the protected act was not the reason why the claimant was dismissed. The burden of proof did not pass to the respondent. The probation review meeting had been fixed before the respondent knew of the 31 October grievance and the performance concerns of Mrs Keating, rightly or wrongly in the context of the victimisation claim, were well documented and known to the claimant before the protected act in the letter following the probation review meeting sent on 10 September 2018. (pages 260-262). The Tribunal considered but rejected the possibility that the sanction might have been increased/more severe because of the protected act. The claimant's probation had already been extended once for 8 weeks and pursuant to the Tribunal's findings and conclusions above, termination was open to the respondent which had nothing to do with the 31 October grievance. That grievance was in fact narrow in scope as it focused on the alleged treatment by Mr Okuyiga with regard to the taster training session and the invitation to the 29 October 2018 Global Competency training event (pages 378-382).

152. Based on its findings, conclusions and analysis above, the Tribunal concluded the burden of proof did not shift to the respondent as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of victimisation. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the protected act.

Jurisdiction

153. The claim form was presented on 29 March 2019. The Early Conciliation dates were 29 January 2019 to 1 March 2019. On that timeline, allegations of discrimination predating 30 October 2018 were, prima facie out of time.

154. That could, potentially, have put a number of the allegations out of time. The Tribunal considered if the allegations however could be considered conduct extending over a period of time pursuant to S.123 (3) (a) EqA.

155. The alleged decisions, actions and omissions in that period were taken in the main by Mrs Keating and there was a sufficient link between them to make it a continuing state of discriminatory affairs. However in ***South Western Ambulance NHS Foundation Trust v King 2019 UKEAT 0056***, it was said if any of the constituent acts are found not to be an act of discrimination, then it cannot be part of a continuing act. The EAT said in paragraphs 23, 33 and 37:

"*23. Given that the time limits are such as to create a jurisdictional hurdle for the Claimant, if, ultimately, the acts relied upon are found not to form part of conduct extending over a period so as to enlarge time, then the claim would fail, unless, that is, the Tribunal considers that it would be just and equitable to extend time in respect of any acts that are proven but out of time.*

33. In order to give rise to liability, the act complained of must be an act of discrimination. Where the complaint is about conduct extending over a period, the Claimant will usually rely upon a series of acts over time (I refer to these for convenience as the "constituent acts") each of which is connected with the other, either because they are instances of the application of a discriminatory policy, rule or practice or they are evidence of a continuing discriminatory state of affairs. However, if any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing act. If a Tribunal considers several constituent acts taking place over the space of a year and finds only the first to be discriminatory, it would not be open to it to conclude that there was nevertheless conduct extending over the year. To hold otherwise would be, as Ms Omeri submits, to render the time limit provisions meaningless. That is because a claimant could allege that there is a continuing act by relying upon numerous matters which either did not take place or which were not held to be discriminatory.

*37. That analysis seems to me to be supported by the conclusions reached by the EAT in the **Jhuti** case where it was held that:*

Accordingly, we consider that (after a substantive hearing) where there is a series of acts relied on as similar or continuing acts, there is no warrant for a different interpretation to be applied and we reject Mr Jackson's argument that in the case of a series of acts none of the acts need be actionable. In our judgment, at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s.48(3)(a) ERA. Acts relied on but on which a claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant for these purposes ." (Emphasis added)"

156. However as the Tribunal has not found any of the earlier acts (pre-dating 30 October 2018) to be discriminatory at what was a final (substantive) Hearing of the issues, the continuing act was not made out. On that basis, it was not necessary to decide if it is was just and equitable (discrimination) to extend time as there were no discrimination claims proven/made out in respect of which any discretion needed to exercised.

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Employment Judge Khalil
20 March 2021