Case No: 2202523/2015

EMPLOYMENT TRIBUNALS

Claimant: Mr M Cook

Respondent: Department for Education

Heard at: London Central **On:** 14 – 22 Nov 2016
23-25 Nov (in chambers)

Before: Employment Judge H Grewal
Ms S Samek & Mr S Soskin

Representation

Claimant: Mr W Young, Counsel

Respondent: Mr A Midgley, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of failure to make reasonable adjustments (in respect of a provision, criterion or practice that required the Claimant to carry out his work quickly and accurately) is not well-founded.

2 The Tribunal does not have jurisdiction to consider any other complaints of failure to make reasonable adjustments.

3 The Tribunal does not have jurisdiction to consider the complaints of disability-related harassment and victimisation.

4 The complaint of disability discrimination under section 15 of the Equality Act 2010 is not well-founded.

5 The complaint of unfair dismissal is not well-founded.

REASONS

1 In a claim form presented on 22 October 2015 the Claimant complained of unfair dismissal and disability discrimination. Early Conciliation notification was given on 17 August 2015 and the certificate was granted on 24 September 2015.

The Issues

2 It was agreed at a preliminary hearing on 11 December 2015 that the issues to be determined were as follows.

Disability discrimination

Disability

2.1 Whether the Claimant was disabled at the material time by reason of having depression and/or dyslexia.

2.2 If he was, whether the Respondent knew or could reasonably have been expected to know that he was disabled. The Respondent accepted that it was aware of the Claimant's depression from 16 November 2011 and of the content of the dyslexia report on 13 March 2014 when it received a summary of the report.

Failure to make reasonable adjustments

2.3 Whether the Respondent applied any of the following provisions, criteria or practices ("PCPs") to the Claimant:

(a) Requiring him to carry out all of the duties of his substantive position, including working within a specific team;

(b) Requiring him to sit with his managers and the other members of his team;

(c) Requiring him to provide evidence and submissions regarding capability on the same day as a performance review meeting;

(d) Requiring him to carry out written work quickly and accurately.

2.4 If it did, whether the PCP in question put the Claimant at a substantial disadvantage compared with non-disabled persons. The Claimant's case was that:

(a) The PCP at 2.3(a) (above) put him, as someone who was disabled by reason of depression, at a substantial disadvantage because the stress which it caused led to depression which made him less able to focus and carry out his duties well, which in turn led to capability or disciplinary processes;

(b) The PCP at 2.3(b) (above) put him at a substantial disadvantage because sitting away from natural light increased his depression, leading to a greater chance of disciplinary proceedings;

(c) The PCP at 2.3(c) (above) put him at a substantial disadvantage because, due to his dyslexia, he was less able to produce evidence and submissions quickly, as a result of which the Respondent did not have any material from which increased the likelihood of him being dismissed or being subjected to disciplinary action;

(d) The PCP at 2.3(d) (above) put him at a substantial disadvantage because due to his depression and dyslexia he was not able to complete work quickly and accurately.

2.5 If it did, whether the Respondent knew or could reasonably have been expected to know that the Claimant was likely to be placed at that disadvantage;

2.6 If so, whether the Respondent took such steps as were reasonable to avoid that disadvantage.

Discrimination arising from disability

2.7 Whether the Respondent subjected the Claimant to a disciplinary or capability process and dismissed him because of delays and errors in his work;

2.8 Whether the delays and errors in his work were due to his dyslexia;

2.9 If so, whether the Respondent can show that the treatment was a proportionate means of achieving a legitimate.

Disability-related harassment

2.10 Whether Ms Walker told the Claimant in March 2015 the he should "work at pace" and the Respondent set him more demanding deadlines than it did for others.

2.11 If so, whether it amounted to disability-related harassment.

Victimisation

2.12 Whether the Claimant did protected acts by alleging breaches of the Equality Act 2010 in his grievances of 8 September 2013, 6 January 2014, 11 August 2014 and his grievance appeal of September 2014.

2.13 If he did, whether the Respondent subjected him to disciplinary proceedings because he had done any of those protected acts.

Time limits

2.14 Whether the claim form was presented after the end of three months starting with the acts of disability discrimination to which the complaint relates (as modified by the ACAS Early Conciliation procedure).

2.15 If not, whether it was presented within other period as is just and equitable.

Unfair dismissal

2.16 What was the reason for the dismissal? The Respondent contends that it was capability.

2.17 Whether the dismissal was fair.

Application to amend

3 At the outset of the hearing the Claimant applied to amend the list of issues and the claim, if that was necessary, to add the following:

(a) To the PCP at paragraph 2.3(a) above the PCP that employees who were engaged in MPP procedures or perceived to be performing poorly were not to be given managed moves; and

(b) To add to paragraph 2.8 (above) "and/or his depression."

4 It was agreed that we would consider the application to amend at the end when we made our decision.

The Law

5 Section 6 of the Equality Act 2010 provides that a person has a disability if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. "Substantial" means more than minor or trivial (section 212 EA 2010). The effect of an impairment is long-term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out his normal day to day activities, it is to be treated as having that effect is likely to recur (Schedule 1, paragraph 2 EA 2010). A reference to a disabled person is a reference to a person who has a disability (section 6(2)) and a reference to a person who has a disability includes a reference to a person who has had the disability.

6 Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. That section, however, does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.

7 A duty to make reasonable adjustments is imposed on a person (A) 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. If the duty arises A is required to take such steps as it is reasonable to have to take to avoid the disadvantage (section 20(3) Equality Act 2010); A is not subject to the duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to in Section 20 (paragraph 20 in Schedule 8 Equality Act 2010).

8 Section 26(1) Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to disability and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has had that effect account must be taken of B's perception, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect (section 26(3)).

9 Section 27(1) Equality Act 2010 provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act. The following amount to protected acts – bringing proceedings under the Equality Act ("the Act"), giving evidence or information in connection with proceedings under the Act, doing any other thing for the purposes of or in connection with the Act and making an allegation (whether express or not) that A or another person has contravened the Act (section 27(2)). Section 27(3) provides that giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made in bad faith.

10 Section 136(2) of the Equality Act 2010 provides that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred unless A shows that he did not contravene the provision.

11 Section 123(1) of the Equality Act 2010 provides that a complaint of disability discrimination may not be brought after the end of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal considers just and equitable. Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)) and failure to do something is to be treated as occurring when the person in question decided on it (section 123(3)(b)). In the absence of evidence to the contrary, a person (A) is to be taken to decide on failure to do something when A does an act inconsistent with it or, if A does no inconsistent act, on the expiry of the period in which A might reasonably have been expected to do it (section 123(4)).

The Evidence

12 The Claimant gave evidence in support of his case. The following witnesses gave evidence on behalf of the Respondent – David Churchill (Head of Delivery, Southern Territories, Academies Delivery Unit), Claire Simpson (Deputy Director, Academies Group), Hardip Begol (Director, Due Diligence and Counter-Extremism), Mary Pooley (Deputy Director, Free Schools Group), Kayleigh Walker (Claimant's Countersigning Officer from January 2015) and Stella Aina (Claimant's line manager). We also had before us six lever-arch files of documents. Having considered all the oral and documentary evidence, the Tribunal makes the following findings of fact.

Findings of Fact

13 The Claimant commenced employment with the Respondent in October 2001. Since about 2002 he has been employed at HEO grade. From about December 2010

he worked as a Project Lead in the Academy Converter Division in the Academies Delivery Group. Joe Farrell was his line manager until March 2013.

14 The Claimant was first diagnosed with depression in August 2007 and was prescribed medication for depression which he continued taking until April 2011. There was no evidence that he was on any medication for depression after that date. His GP referred him for counselling in November 2011 and for Cognitive Behavioural Therapy in March 2012.

15 The Claimant was absent sick from work between 10 and 30 August 2011 because of stress at work. He was given a reduced workload on his return to work.

16 In a report dated 16 November 2011 the Respondent's Occupational Health doctor stated that the Claimant had a long standing history of psychological issues for which he had received counselling and been on antidepressant medication. He said that the Claimant had reported that his recent episode of stress had begun when he started in a new role in January 2011. His perception was that his line manager was not managing him appropriately and he felt that he was being undermined, over managed and bullied. The Claimant had said that he had difficulty sleeping and impaired concentration, but that he was able to manage the workload and that he enjoyed the work. The doctor advised that it might be helpful for the Claimant to have reduced targets for next 4-6 weeks, homeworking one day a week and later starts in the mornings for the next few weeks.

17 Following that report the Claimant was permitted to work from home two days a week and to come into work at 10.30. That arrangement continued until the Claimant's employment terminated.

18 There was a further report from the Occupational Health Service on 2 April 2012 following receipt of a report from the Claimant's doctor. The OH advice was that the Claimant's ability to undertake his role and duties would depend on his response to continued treatment and the extent of a resolution of his perceived work issues, failing which, the Respondent might have no choice but to go down the route of capability.

19 The Claimant's performance was assessed at his 2011-2012 and 2012-2013 annual performance reviews as being satisfactory.

20 In April 2013 Stella Aina became the Claimant's line manager. Joe Farrell was her line manager and as such was the Claimant's countersigning officer. Ms Aina was absent for much of May and June 2013 because of medical reasons and during her absence Joe Farrell acted as the Claimant's direct manager.

21 At about the same time (in about April 2013) the Claimant became Vice-Chair of a branch of the trade union PCS and began undertaking trade union activities. He did not have any agreement with his managers about the amount of time he would spend on his trade union activities and when he would undertake them.

22 At a meeting on 19 July 2013 Stella Aina raised with the Claimant her concerns about the dip in his performance which would result in his being placed in the "must improve" category in the mid-year review unless there was some improvement. Her concerns were based on what Joe Farrell had told her about the Claimant's performance in her absence and what she had seen in the short period since she

returned. She set out certain tasks that she wanted completed by a specific time in the next few days and suggested a further meeting to discuss and prioritise his workload going forward.

23 On 1 August Ms Aina met with the Claimant to discuss what was causing the dip in his performance and possible solutions. The Claimant's explanation for the dip in his performance was that he was experiencing high levels of stress which he attributed to the management style of the team and, in particular, of Joe Farrell and to the fact that he was spending 40% of his time on his time on his trade union duties. The Claimant asked for an Occupational Health assessment to identify whether he had dyslexia or dyspraxia, and said that he wanted to work from 9 to 5 and to leave the team.

24 It was agreed that by 5 August the Claimant would provide Ms Aina with a work plan identifying what his work load was, where he was with each piece of work, the deadline for that piece of work and what he would need to complete the work in time. They would then discuss that at a meeting on 6 August and would thereafter continue to have weekly meetings to discuss and review his workload and to see if any adjustments needed to be made to his workload. Ms Aina said that she would speak to Joe Farrell in detail about the Claimant's medical history and the Claimant agreed to seek medical advice from his doctor about his condition and his ability to work. Ms Aina said that she would refer him for an Occupational Health assessment for dyslexia and dyspraxia once he had signed the consent form. A separate meeting was set up for 8 August 2013 to discuss the issues that the Claimant had raised about his health.

25 The Claimant did not provide Ms Aina with a work plan by 5 August. He informed her on 5 August that he would not be in the office the following day as he worked from home on Tuesdays. Ms Aina said that the meeting could take place by telephone. The Claimant responded that he needed to be provided with further information before the meeting could take place and that he would reschedule it to a date after he had seen his doctor on Wednesday and had had a meeting with her to discuss his health issues. He also said that he did not consent to her speaking to Mr Farrell about his previous medical assessment. Mr Farrell gave the Claimant an informal warning for not attending the meeting. He also told the Claimant that he could not spend any time on trade union activities unless and until he had in place an agreement with either Ms Aina or him about the time that he was going to spend on his trade union activities.

26 The Claimant was absent sick from work from 7 August to 23 August 2013 and his GP certified that he was unfit to work because of "depression.". On 23 August his GP recommended that he work reduced hours for two weeks from his return to work date of 27 August.

27 The Claimant returned to work on 27 August. He had still not given consent for a referral to Occupational Health. Ms Aina had a return to work meeting with him on 29 August**.** The Claimant said he did not like being ill and wanted to discuss an exit strategy from the team and to move elsewhere within the next two weeks. Ms Aina advised that if he wanted to leave the team he should consider looking and applying for suitable vacancies. The Claimant said that he could not understand why he should have to find a vacancy and why the Respondent could not just move him to another role. The Claimant proposed working 4 days a week from 10 to 4 and taking one day off as annual leave each week over the next two weeks.

28 On the same day the Claimant proposed to Ms Aina in an email that he work 50% of his working time on his trade union activities. He proposed working in his role on Tuesday, Wednesday and Friday mornings and on his trade union activities on Monday, Thursday and Friday afternoons.

29 On 4 September 2013 the Claimant sent Ms Aina an email in which he suggested that the return to work meeting should be held again as it had not been conducted properly the first time round. He referred to his depression and suggested that where there was a dip in performance, employers were obliged to consider whether depression had had an impact on the employee's performance. Ms Aina forwarded the email to Joe Farrell. Mr Farrell informed the Claimant on 6 September that the return to work procedure would not be started again. He said that the Respondent was guided by the last Occupational Health report it had and that the Claimant had had a reduced workload and a phased return to work since he returned to work on 27 August.

30 On 8 September 2013 the Claimant raised a grievance of bullying, harassment and disability discrimination by his line management chain. He said he had been subjected to an insensitive and abrasive management style by his team leader between April and July 2013 and that this had intensified on his return from a period of sickness absence in August. When he had raised the impact that this had had upon his health, it had not been dealt with sympathetically. The style of management had not created a productive working environment for him and it had constituted "psychiatric harm" He gave the following as examples of unacceptable management style – the disagreement about facility time, the unjustified criticism of his work and the conduct of the return to work meeting on 29 August.

31 On 9 September Mr Farrell reminded the Claimant that he could not start any trade union activity Stella Aina had agreed the times proposed by him.

32 On 11 September the Claimant informed Claire Simpson that his GP had certified that he was fit to work if he could work reduced hours (a maximum of 25 hours per week) for the next two weeks and suggested that they have another return to work meeting to discuss facility time for his trade union activities, his workload going forward, relocation to a different team and his dyslexia assessment. Ms Simpson agreed to the meeting on the basis that it constituted an attempt by the Claimant to resolve his grievance informally. On the following day Joe Farrell informed the Claimant that Respondent would implement his GP's recommendation but that it needed a copy of the medical certificate.

33 On 13 September Stella Aina agreed that the Claimant could devote 50% of his time to his trade union activities but that the details of the split would be discussed and agreed at the meeting with Joe Farrell which was scheduled to take place on 18 September. At the meeting on 18 September it was agreed that the Claimant would carry out his trade union duties on Monday, Thursday and Friday afternoons and that the phased return to work would begin on 19 September with the Claimant working from 10 to 4 (with one hour's lunch break) for two weeks. The Claimant was given specific tasks to do during the phased return to work period which was significantly less than his normal workload. It was also agreed that there would be a further discussion about his workload going forward with Stella Aina at the end of that period. The Claimant was advised about how he could move to another team if he so wished.

34 On 25 September Mr Farrell reminded the Claimant that before he could begin his trade union activities he had to provide Ms Aina with handover details for the schools that were due to convert in November.

35 On 10 October 2013 Stella Aina had a Mid-Year Review meeting with the Claimant to discuss his performance between April and September. The Claimant had not submitted his self-assessment against his objectives until the previous night although he had been asked for it on 9 September. In his self-assessment the Claimant referred to having severe symptoms of depression in August 2013 which he attributed to having to juggle an intense and full-time workload for ADG with the responsibilities of his trade union post and duties. Ms Aina told him that his marking would be "must improve" as his performance in the previous six months had fallen below that expected of an HEO. This could not have come as a surprise to the Claimant because Ms Aina had raised with him concerns about his performance in July and August and had warned him that it could lead to that rating. The Claimant asked Ms Aina to provide evidence of poor performance and she attempted to do so but the Claimant kept interrupting her and would not let her complete what she was saying. She gave as examples his approach to the Funding Agreement worksheet processes and his failure to save documents in Workplaces (a shared drive that could be accessed by his colleagues).

36 On 13 November 2013 the Claimant gave his consent for a referral to Occupational Health for a dyslexia assessment.

37 In November the Claimant indicated that he wished to withdraw from the Mid-Year Review process and said that, therefore, he should not be given any rating. Mr Farrell informed him that his rating of "must improve" had been approved at the moderation process. On 10 December 2013 the Claimant informed Claire Simpson that he wished to initiate a grievance about his Mid-Year Review rating and that he would build upon the previous grievance which he had parked. Ms Simpson asked him to send his grievance and supporting documents to David Churchill, who would investigate it, by 16 December 2013.

38 At around the same time Stella Aina prepared an informal Performance Action Plan for the Claimant. This set a limited number of tasks that had to be completed by specific dates. The Claimant was not being judged against his full role. Ms Aina asked the Claimant to attend a meeting on 12 December to discuss his performance. The Claimant refused to attend on the grounds that he had raised a grievance about his Mid-Year review. The meeting was rescheduled to 16 December and the Claimant said that he wanted his PCS representative to attend. Ms Aina advised him that there was no need for her to attend as it was an informal meeting to discuss his performance. The Claimant nevertheless attended with his trade union representative Ms Aina took the view that in those circumstances she would prefer to be accompanied by Joe Farrell. The meeting was postponed to 20 December.

39 At the meeting the Claimant was accompanied by his trade union representative, Teresa Clark. The Claimant and Ms Clark objected to the meeting taking place because the Claimant had raised a grievance about his Mid-Year Review and the "must improve" rating. The meeting had to be aborted as they refused to participate in it.

40 On 6 January 2014 the Claimant submitted his grievance which comprised his earlier grievance and further complaints about his Mid-Year Review rating. He said that no evidence had been provided that his performance had dipped. He said that his grievance on this issue should be determined before management proceeded with the performance action plan.

41 David Churchill (Head of Delivery – Southern Territory, Academies Delivery Unit) was appointed to investigate the Claimant's grievance. He interviewed Claire Simpson on 14 January and Stella Aina and Joe Farrell separately on 17 January. Ms Aina provided him with a record of the Claimant's performance from April to November 2013.

42 On 17 January 2014 Mr Farrell advised the Claimant that as it had not been possible to deal with the Claimant's performance informally, they would move to the formal performance management process.

43 On 30 January 2014 Mr Farrell invited the Claimant invited to an Unsatisfactory Attendance meeting on 7 February because he had been absent for 29 days between 6 June 2013 and 15 January 2014 and had, therefore, exceeded the trigger point under the Respondent' Attendance Management Procedure.

44 On 31 January Stella Aina invited the Claimant to a formal meeting under the Managing Poor Performance process on 14 February 2014. He was advised of his right to be accompanied.

45 David Churchill interviewed the Claimant on 4 and 7 February 2014 about his grievance. The two interviews lasted 3.5 hours altogether.

46 On 19 February Mr Churchill advised Stella Aina and Joe Farrell to suspend the performance and attendance management processes until he had concluded investigation of the Claimant's grievance.

47 Mr Churchill met with the Claimant on 27 February to give him his decision on his grievance. He told him that he had that he had not upheld any of his grievances and gave him a copy of his investigation report. The report ran into 40 pages and included notes of all the interviews that he had conducted and all the documents upon which he had relied. In the body of the report Mr Churchill dealt with each of the Claimant's grievances and explained in respect of each why he had come to the conclusions that he had. He concluded, inter alia, the following - the Claimant's managers had adopted a robust but reasonable and appropriate management style although the tone of parts of emails could have been softened; the difficulties in agreeing trade union facility time had arisen as a result of the Claimant not following the facility time guidance correctly; The Claimant had first raised concerns about his health in July 2013; adjustments had been made to both the Claimant's workload and working patterns; the Mid-Year Review had been a fair and reasonable assessment and the process had been correctly followed; adjustments having been made, there still remained concerns around the number of projects that the Claimant had delivered, the number of projects that had had to be handed over to other project leads, issues around project updates, failure to save documents in Workplaces, lack of progress on the migration work on which the Claimant was leading; the action plan could have been broader and had more detail, but the Claimant's unwillingness to engage in a constructive plan was the main hindrance to developing a plan; it would not be in the best interest of the Claimant or any new manager to recommend a

move at that time. Mr Churchill set out some concerns that he had about the way in which the Claimant had approached the formal grievance process but concluded that it was not a vexatious complaint and had been made in good faith.

48 Mr Churchill recommended that the Claimant and his line manager should meet to agree an action plan and a way forward and that the plan should cover any concerns around performance, plans and support to address these, reasonable adjustments and any other relevant factors. He also recommended that in light of the concerns around the Claimant's health and performance he should discuss with his trade union whether the current amount of facility time was appropriate for the Claimant at that time.

49 At the meeting the Claimant said that he did not feel safe. Mr Churchill asked him put in writing by 17 March exactly in what way he did not feel safe, examples of incidents or conversations that had led him to feel unsafe and what he thought could be done to help. He agreed that the Claimant could sit away from his team as a temporary measure.

50 On 10 March Mr Churchill informed the Claimant that the attendance and performance management processes, which had been put on hold pending the outcome of the grievance, would now recommence. He emphasised that the processes were there to help and support the Claimant and that it was important that they proceed swiftly in light of the fact that there had been delays. He also encouraged the Claimant to give his consent for a referral to Occupational Health so that his managers could have an up to date assessment. He offered to attempt to arrange mediation if the Claimant and his managers thought that it would help.

51 On 13 March 2014 the Claimant appealed against the grievance outcome. The appeal comprised eighteen pages.

52 On 13 March 2014 Medigold, the Respondent's occupational health service provider, sent the Claimant and Ms Aina a summary of a report from psychologist at Lexxic who had undertaken a dyslexia diagnostic assessment of the Claimant. The conclusions were that the Claimant's verbal and non-verbal reasoning abilities, verbal comprehension and perceptual reasoning abilities were in the high average range and his ability to sustain attention, concentrate and exert mental control were in the superior range. The Claimant had some difficulties with certain types of processing of sounds in words which were unfamiliar and complex and mild difficulties reading sight words at speed but his score was comparable to the overall population. The only area in which the Claimant's score fell into the below average range was in motor co-ordination which looked at the ability to manipulate, grasp and move objects. This implied that he might have mild difficulties performing tasks which involved fine motor skills and movement. The conclusion was that the Claimant had mild dyslexia.

53 The Clinical Director at Medigold stated that the report had made certain recommendations but that it was for the Respondent to consider whether they were reasonable. The first recommendation was for a workplace assessment to see whether any adjustments were needed within the Claimant's role. Other recommendations included adopting certain computer settings, customising presentation of documents, coloured overlays and reading rulers, provision of text to speech software and training in that and support training.

54 On 15 March 2014 the Claimant sent Mr Churchill an email but did not give the information that he had been asked to provide about why he did not feel safe. Mr Churchill informed the Claimant that as he had not given any further details he could not take any further action on his statement.

55 On 18 March 2014 Ms Aina told the Claimant that she wanted to discuss the dyslexia assessment with him and asked him to let her know when he could meet with her. She also sought further clarification from Medigold as to what mild dyslexia meant in real terms. On 20 March Medigold sent her the full report from Lexxic.

56 The Performance Action Plan was updated on 19 March and on 20 March Ms Aina invited the Claimant to a performance management meeting on 4 April 2015. She advised the Claimant of his right to be accompanied and asked him to notify her in advance as to who would be accompanying him.

57 On 20 March 2014 Mr Farrell sent the Claimant an email that he was expected to be back sitting with his team in the Academies Group team when he was not engaged in his trade union activities. While his grievance was being investigated the Claimant had taken to sitting on a different floor from the rest of his team. The following morning the Claimant approached Joe Farrell**,** who was sitting at his desk in an open plan office, and shouted at him something to the effect of *"This has got to stop. It has been going on for three years. You will not bring back my depression. Lay off*." Mr Churchill spoke to the Claimant later that day and told him that that sort of behaviour was unacceptable, whatever the circumstances, and that it could be considered serious misconduct. He sent the Claimant an email later that afternoon reiterating what he had said and informing the Claimant that he would reflect further on it.

58 On 26 March 2014 Mr Churchill invited the Claimant to a disciplinary hearing on 4 April under the Respondent's Disciplinary Procedure to consider an allegation that he had engaged in offensive personal behaviour by approaching and verbally abusing Joe Farrell on 21 March. Mr Churchill's investigation report was sent to the Claimant on 1 April.

59 On 31 March the Attendance Management process was revived and the Claimant was asked to attend an unsatisfactory attendance meeting on 10 April 2014.

60 The Claimant attended the performance management meeting on 4 April 2014 with Teresa Clark as his trade union representative. Ms Aina asked Mr Farrell to join the meeting. The Claimant and Ms Clark objected to either Ms Aina or Mr Farrell taking notes at the meeting and insisted that they wanted an independent note-taker. When that request was refused they claimed that the meeting was "outside the process" and a different meeting from the one to which the Claimant had been invited. They then insisted that they wanted the meeting to be recorded. The claimant did not have with him the attachments to the email inviting him to the meeting which had set out the areas of concern. When he was given an opportunity to return to his desk to print them out Ms Clark insisted that Ms Aina give him her copies of it to photocopy. Ms Clark then left the meeting to go and speak to HR and came back twenty minutes later and said that HR's advice was that the meeting should cease and should reconvene in five days' time. When she was asked to whom she had spoken in HR she said that she could not divulge the individual's name without the person's permission. The Claimant and Ms Clark sought to obstruct the progress of

the meeting at every stage and made it impossible for Ms Aina to address the issues which the meeting had been convened to address.

61 The Claimant's disciplinary hearing took place on the same day. He said that he had read Mr Farrell's email about returning to sit with his team on his way into work. He had felt that sending it was inappropriate, unnecessary and demonstrated a lack of management skills. He accepted, however, that his response had been inexcusably intemperate but attributed it to the fact that his depression was particularly acute at that point in time. Mr Churchill said that he would consider all the evidence and would notify the Claimant of his decision as soon as he had done so.

62 On 7 April 2014 HR asked Ms Aina whether she or the Claimant wanted to proceed with the recommendations made in the dyslexia assessment. Ms Aina advised HR to refrain from ordering anything until the Claimant had met with her to discuss the assessment and the recommendations.

63 On 9 April Mr Churchill sent the Claimant the outcome of the disciplinary hearing. He concluded that the alleged misconduct had been substantiated and he issued the Claimant with a first written warning which would remain on his personal HR file for 12 months. The Claimant was advised of his right of appeal.

64 The Claimant's appeal against the grievance decision was heard on 9 April 2014 by Anna Paige. The Claimant was accompanied by Teresa Clarke and the hearing lasted one and a half hours.

65 The Claimant did not attend the unsatisfactory attendance meeting on 10 April 2014. He made no contact with the Respondent to explain his non-attendance. Joe Farrell proceeded with the meeting in his absence and sent the Claimant the outcome on 16 April 2014. He gave him a First Written Improvement Warning and told him that his attendance would be monitored for three months from 15 April to 4 June 2014. The end date was clearly an error as it was not three months after the start date. The Claimant was warned that if his attendance was unsatisfactory during that period his attendance would be monitored for a further twelve months and he might be given a Final Written Improvement Warning. He was advised of his right of appeal.

66 In a letter dated 10 April 2014 Ms Aina gave the Claimant a First Written Warning for poor performance. She set out the areas in which his performance needed to improve and a summary of the performance issues that had been identified. She told him that his performance would be reviewed from 14 April to 9 May and that Mr Farrell would monitor his progress and give him feedback during the review period in her absence. She warned him that if his performance fell below the expectations required in the review period he would move to the next stage of the Managing Poor Performance policy and could ultimately be dismissed. He was advised of his right of appeal. The Claimant appealed against that decision.

66 On 11 April the Claimant was at work and produced a medical certificate form his doctor which said that he might be fit for work taking into account the doctor's advice that he would benefit from mediation or a change in team if possible. That advice applied for a period of one week. HR's advice was that it was up to the managers to decide whether to follow the Claimant's GP's advice and whether a change of team was possible. Mr Churchill discussed the matter with the Claimant and made it clear that a move would not happen overnight and would take time. He

said that he would be more supportive of a move if he thought that the Claimant was engaging with his managers in developing an action plan that could help his performance improve. The Claimant continued working after that and did not suggest that he was not fit to work.

67 On 11 April the Claimant sent Ms Aina the consent form for a referral to Occupational Health in which he had filled out his name and address and the details of his GP but which he had not signed to indicate that he consented to the referral. On 14 April the Respondent sent the Claimant a copy of the draft referral to Occupational Health. By 25 April the Claimant had still not given his consent for a referral and Mr Churchill encouraged him to do so as, given the concerns about his health, they wanted to get advice from Occupational Health as soon as possible.

68 On 24 April the Claimant appealed against the warning for unsatisfactory attendance. On 28 April he appealed against the disciplinary warning.

69 In the latter half of April Mr Farrell questioned the Claimant about several private appointments that had been entered in the diary for mornings when he was supposed to be doing his Academies Group work. He was concerned that the Claimant might be carrying out his trade union activities during his working time. The Claimant refused to answer his questions. Mr Churchill became involved and there was communication between him and the Claimant, in the course of which the Claimant complained that the Respondent had not followed his doctor's advice. Mr Churchill reminded him of the conversation that they had had at the time and the fact that the Claimant had continued to attend work and not raised any concerns. He continued,

> "*So we have been working on the basis that you consider yourself fit to work. Your GP does not have a complete view of the situation at work and his suggestion is a change in team if possible. There is no reference to managers. At this time we will not be changing your line management either permanently or temporarily and you we will not be sending you home sick. Of course we will reconsider this position if either the outcome of your grievance appeal or an occupational health report suggest that we should do so."*

He urged the Claimant to give his consent for a referral to Occupational health.

70 On 30 April 2014 Anna Paige dismissed the Claimant's appeal against David Churchill's decision on his grievance. She attached a copy of her report to her decision letter.

71 On 7 May 2014 the Claimant provided to his employers a medical certificate dated 1 May 2014. The certificate stated that he was not fit to work for three months because of *"stress related problem in relation to work environment*". The doctor's comments were,

> "*Mr Cook has significant health related issues relating to members of his team. This is having an adverse effect on his mental health. Must have opportunity to have different line management. Please consider this as a matter of urgency."*

The Claimant also indicated in his email of 7 May that he was ready to attend an Occupational Health assessment.

72 Mr Churchill's immediate reaction was to ask the Claimant why he had come into work for four days when his doctor had said that he was not fit to work and why he had not shared that information with them until then. Having discussed the medical certificate with HR and the Claimant's line managers he wrote to him later in the day. He made it clear that the Respondent's decision remained that it would not be initiating a managed move for the Claimant. He had not upheld the Claimant's grievance against his managers and the Claimant's appeal against that had been rejected by an independent director. They felt that the most appropriate way to work through his concerns over his health, attendance and performance was to stay with his current managers. In terms of going forward, he said that as the Claimant had given his consent for an Occupational Health referral he would ask Joe Farrell to take that forward. As far as the medical certificate was concerned, he said that it was ultimately the Claimant's decision as to whether he felt well enough to work or not and that the Respondent could not compel him to take sick leave. The Claimant continued to work.

73 On 13 May 2014 Mr Farrell informed the Claimant that as his performance had not improved sufficiently during the review period he was moving to the next stage of the Managing Poor Performance process. He attached to his letter the Claimant's performance record which he had updated to reflect a summary of his assessment of the Claimant's performance during the review period. He invited the Claimant to a meeting on 23 May 2014.

74 Different managers were appointed to deal with the Claimant's various appeals. Lorna Howarth dealt with his appeal against the warning for unsatisfactory attendance, Peter Swift with the appeal against the disciplinary warning and Gita Dean Andrews (Assistant Director, School Organisation) with his appeal against the warning for poor performance. Each of those managers had a meeting with the Claimant and then interviewed and sought further information from his line managers.

75 The performance review meeting took place with Mr Farrell (in Ms Aina's absence) on 5 June 2014. Mr Farrell sent the Claimant his decision on 10 June 2014. He said that having considered all the evidence and their discussions he had decided to give the Claimant a Final Written Warning because his work performance had not been at the level that was acceptable to the Department. He gave as examples two particular schools on which the Claimant had been the project lead in the review period and set out the shortcomings in the Claimant's performance in respect of each of them. He said that in general they had been concerned by the extent of micro level guidance and steers that the Claimant had required on delivery of work. Finally, the Claimant's co-operation with management had not been satisfactory. He gave examples of these and pointed out that it had not been appropriate behavior for the Claimant to rap the table and raise his voice to Mr Farrell in the meeting.

76 Mr Farrell informed the Claimant that his performance would be reviewed from 11 June to 9 July. He said that he and MS Aina would discuss his progress on a weekly basis during the review period and would provide feedback through email and telephone discussions. He warned the Claimant that if his performance and behavior fell below the expectation required during the review period he would move to the next stage of the Managing Poor Performance policy. He said that they expected full co-operation from the Claimant and expected him to demonstrate the ability to work effectively in a team, to respond quickly and always to deadline on all requests with

substantive explanation given in advance if the work could not be completed by the deadline. He said that any changes to the split of Academies work in the morning and trade union work in the afternoon should be notified in advance to Ms Aina or him, in Ms Aina's absence, and there should not be any assumptions that changes would be agreed.

77 On 16 June 2014 Gita Dean-Andrews dismissed the Claimant's appeal against the First Written Warning for performance. She found no evidence to support the Claimant's assertion that his managers had not followed the Department's process. Their management records showed that they had regular discussions with the Claimant about his performance and how it fell below expectations and that they had provided support to improve his performance. She accepted that no meaningful discussion about the Claimant's performance had taken place at the meeting on 4 April 2014 but said that that was due to the Claimant focusing on debating points of process which he could have done in advance. She was satisfied that his line managers had provided him with reasonable opportunity to present his evidence and, given his unwillingness to proceed with the meeting on that day, it had been reasonable for them to reach a decision on that day.

78 On 26 June 2014 the Claimant was certified as unfit to work for two months because of "*stress related problem*". The Claimant remained absent sick until 5 January the following year.

79 On 4 July 2014 Peter Swift dismissed the Claimant's appeal against the disciplinary warning that given by Mr Churchill on 9 April 2014.

80 On 4 July 2014 Dr Sheikh of Health Management Ltd ("HML"), who had taken over the provision of occupational health service to the Respondent, provided a report on the Claimant. Dr Sheikh said that the Claimant had informed her that he enjoyed his work and had no concerns about the work he was required to do. The Claimant had told her that a structural change in his department the previous summer had triggered the onset of symptoms again and that he continued to experience significant symptoms particularly when within the workplace. Her opinion was that he was temporarily unfit to be at work and she was concerned that if he returned to the same working environment it would continue to have a negative impact upon his health. She continued,

> "*… as he perceives the prime cause of his symptoms at the present time to be due to work related concerns, I would advise that you consider discussing his concerns with him, to address the situation. I am hopeful that once his concerns have been addressed either for example, through mediation or consideration of re-deployment to an alternative team, this will have a significant positive impact upon his health. I cannot comment upon the veracity of his comments, however, report them to you as discussed during the consultation, particularly in light of the symptoms he is experiencing.*
> *…*
> *Due to the level of symptoms he is experiencing, I am of the opinion that if he were to continue attending work with the current working environment, it could possibly affect his performance at work."*

81 The Claimant's managers and HR considered the report and, in particular, whether the Claimant should be redeployed to another team. They concluded that redeployment was not the solution as the problem lay with the Claimant's

performance and attitude and his taking issue with anyone who tried to manage that. That problem would remain wherever the Claimant went. The poor performance process could not be stopped simply because the Claimant moved elsewhere and it would be difficult for a new manager, who knew nothing about the Claimant and his health issues, to manage that.

82 Ms Aina met with the Claimant on 22 July 2014 to discuss the Occupational Health report. A further meeting took place on 28 July at which David Churchill and Teresa Clark were also present. The Claimant's reading of the report was that it had recommended a move to another team as a reasonable adjustment and that the Respondent should follow that recommendation. Ms Aina explained that the report had suggested that they consider it, as one of a number of possibilities, on the basis of the Claimant's perception of his problems, and that they had done so. She explained why they had concluded that a move to another team was not appropriate.

83 On 25 July 2014 Lorna Howarth dismissed the Claimant's appeal against the warning for unsatisfactory attendance.

84 HR was unhappy about its occupational health service provider recommending managed moves in their reports, particularly where there were performance issues. It discussed the report in the Claimant's case with Health Management Ltd (HML) and asked for an addendum clarifying that while redeployment was given as an example for consideration, any decision on redeployment was an operational one and not a medical one. As a result, on 5 August 2014 HML provided an addendum note. Dr Massey, who wrote the note, said,

> "*I am happy to clarify that whilst I think that it is reasonable for practitioners suggest* [sic] *consideration of redeployment in situations of this kind (which is what Dr Sheikh has done) whether, in practice, this would be considered an appropriate solution is an operational, managerial decision for the employer and not a medical one."*

85 Ms Aina conducted a formal attendance meeting with the Claimant on 8 August 2014. The purpose of the meeting was to discuss the Claimant's welfare, whether he would be returning to work on the expiry of his medical certificate and what support, if any he would require.

86 On 11 August 2014 the Claimant raised a formal grievance on the grounds of indirect disability discrimination and the ongoing failure of the Respondent to make reasonable adjustments. He complained of the conduct of the performance management process, of having been subjected to disciplinary proceedings, the failure of his managers to support him and of their decision to reject the recommendations of the occupational health report. The remedies that he sought were a flexible reallocation outside his directorate, a reduced workload (which he said had previously been refused) and a suspension of the next stage of the performance management process and for the next review of his performance to be deferred for a period of three months.

87 On 13 August HR informed the Claimant that any ongoing performance management processes would not be suspended on account of the grievance being raised.

88 On 18 August Mr Churchill sought the view of Claire Burton, Acting Director in the Academies Group, on the possibility of a managed move of the Claimant to another Directorate. She responded,

> "*A managed move is defined in the Department's guidance as being where an individual is identified as having the right skills and experience for a role and wants to move to another role; (those meeting standards/high performing in their current role). Michael is not meeting standards in his current role and is being managed according to the Department's managing poor performance policy by his current line manager and countersigning officer. He is therefore not eligible for a managed move.*
>
> *Even if it were possible to argue for an exception in Michael's case, I am not persuaded that it would be appropriate to do so at this point in the performance management cycle where continuity and clarity of action plan are critical to Michael demonstrating that he meets the required standards."*

88 David Jeffery, Deputy Director, was appointed to investigate the Claimant's grievance and he met with the Claimant on 21 August 2014.

89 At a meeting on 29 August 2014 to discuss the Claimant's return to work (his medical certificate had expired on 25 August) the Claimant gave Ms Aina another medical certificate that he was unfit to work for a further one month from 28 August. Ms Aina told the Claimant that she needed a certificate to cover the intervening two days. Subsequently, on 4 September the Claimant produced a medical certificate that covered his absence form 26 August to 26 September.

90 On 18 September David Jeffery sent the Claimant his decision on the Claimant's grievance of 11 August 2014. He did not uphold the grievance. He attached to his letter the notes of interviews that he had conducted with Teresa Clark, Stella Aina and Joe Farrell and set out in his letter the documentary evidence that he had reviewed. He reached the following conclusions - the Claimant's managers had taken forward the performance management process in a fair and consistent way in accordance with departmental guidance, having put in place reasonable adjustments. Some of these adjustments (starting work at 10.30, working from home) had been in place for a significant period of time, others (a four day week, sitting separately from his team) had been made on a temporary basis where needed. The decision not to arrange a managed move did not constitute a failure to make a reasonable adjustment. The Respondent's general policy was not to support managed moves in cases where poor performance procedures were underway, and it was reasonable for managers to take account of that policy in determining individual cases. Maintaining continuity of line managers, who understood the nature of his ill-health or disability and the reasonable adjustments that had been put in place, had been one of the factors in reaching that decision. Although that decision had been communicated to the Claimant on a number of occasions he was not sure that a full account of the reasoning behind that decision had been set out in a single clear communication, and he recommended that either Mr Churchill or Ms Simpson should do so. There was no evidence of unfair treatment by his line managers and it had been reasonable for them to expect him to set out in advance the division of time between his work for the trade union and the Academies Group. There was no evidence to suggest that the disciplinary proceedings brought against him had been inappropriate or without merit. The Claimant's managers had provided him with sufficient support to improve – his line managers had provided a "buddy" to support

him, ensured that he had the necessary guidance and desk instructions process, provided close supervision of tasks and had rebalanced the work allocated to him to towards work which played to his strengths and there was an action plan in place. There was some lack of clarity about whether the Claimant's performance was being assessed against a reduced workload, and he recommended that Ms Aina and Mr Farrell should clarify to the Claimant in writing the extent to which he was being given a reduced workload and should consider formally whether a reduced workload would be a reasonable adjustment. The Claimant was advised of his right of appeal.

91 The Claimant was certified as unfit to work a further one month because of "stress related problem" on 26 September 2014. Ms Aina held a second formal attendance review meeting with the Claimant on that date.

92 On 29 September the Claimant appealed against Mr Jeffery's decision not to uphold his grievance. The appeal comprised sixteen typed pages. Susan Acland-Hood, Director, Education Funding Group, was appointed to deal with the grievance appeal.

93 On 10 October 2014 Mr Churchill and Ms Simpson set out in an email their reasons for not arranging a managed move for the Claimant. They pointed out that the Claimant was free to apply for posts and to effect a move for himself and that their view was that, bearing mind the Claimant's disability, it would be better for him to pick a role that he wanted rather than to be placed into one. They also set out the Departmental guidance on managed moves which stated that when deciding whether a managed move/change in role was appropriate, the manager must have considered whether there was a role available into which the employee could move, whether the employee had the right skills and experience for the identified role and whether the individual was meeting performance standards in their current role. They said that it was difficult to find a full-time post for an employee who was only available to work 2.5 days a week. As the Claimant was being managed for poor performance they did not think that a managed move was appropriate and that decision had been supported by the director. His managers were found to have conducted themselves in an exemplary manner and moving the Claimant would imply that that had not been the case. Departmental standards and processes in relation to conduct, performance and absence applied consistently throughout the Department and, therefore, any move to another area would not result in a change in terms of management actions. Finally, his managers were aware of all his health issues, reasonable adjustments and facility time arrangements and as such were better placed to manage him well than new managers who would have to familiarise themselves with all of that.

94 The Claimant was given medical certificates on 27 October and 21 November 2014 that he was unfit to work until 5 January 2015 because of "stress related problems."

95 In a letter dated 1 December 2014 Susan Acland-Hood informed the Claimant of the outcome of his grievance appeal. In considering the appeal she had spoken to David Jeffery on 22 October, Stella Aina on 29 October, Joe Farrell on 30 October and 20 November, David Churchill on 10 November, Claire Simpson and Joannne Banks on 11 November and the Claimant and Teresa Clark on 13 November. She attached the notes of all those meetings to her outcome letter. Her decision was that David Jeffery's decision-making process had been reasonable, given the evidence that was available to him. However, having considered the additional evidence that the Claimant had provided, she thought that there were a small number of decisions

taken by his managers which were unhelpful. She did not consider that he had been discriminated against in any way but said that it was clear that a difficult relationship existed between him and Joe Farrell. Given the strain that relationship had put on both of them she had agreed with his managers that he would be given an alternative countersigning officer. That would give the new countersigning officer a chance to work with him and his line manager but would at the same time maintain continuity of line management which she felt strongly was important if he was to successful overcome the evident concerns about his performance, attendance and behavior. She then set out in detail her reasons for reaching the conclusions which she did on the arguments that had been advance by the Claimant. Her letter comprises ten typed pages.

96 Ms Aina had a formal attendance review meeting with the Claimant on 1 December 2014. It was anticipated that the Claimant would return to work on the expiry of his medical certificate on 5 January 2015. Ms Aina suggested a referral to occupational health to have an up to date report on the Claimant's medical condition and of any adjustments required, but the Claimant refused to give his consent for that. On 5 December Ms Aina informed the Claimant that Kayleigh Walker would be his new countersigining officer.

97 On 17 December 2014 Stella Aina asked the reasonable adjustments team to order some of the equipment that had been recommended for consideration for the Claimant's dyslexia. The items that she wanted purchased were coloured overlays, reading rulers, support training and text to speech software and training. When the Claimant learnt of the items which had been ordered he suggested that they should have a discussion about the measures before spending money on expensive software. He also said that it would make sense to have a workplace assessment, which the dyslexia report had recommended, before any equipment was ordered.

98 In a medical certificate dated 5 January 2015 the Claimant's GP certified that he was fit to work with a phased return to work and altered hours. He suggested that the Claimant work two days a week for the first two weeks, three days a week for the next four weeks and four days a week for the next two weeks.

99 The Claimant returned to work on 5 January 2015 and Ms Aina conducted a return to work meeting with him on that day. Kayleigh Walker, the Claimant's new countersigning officer, was present at the meeting. Ms Aina proposed a four week phased return to work (two days a week in the first two weeks and four days a week in the next two weeks). The Claimant said that he wanted to work the hours suggested by his doctor and Ms Aina advised him that in that case he would have to make an application to return part-time on medical grounds ("PTMG") and the Claimant agreed to do that. It was agreed that the Claimant would work two days a week for the first two weeks (Monday and Tuesday). He would start at 10.30 and work those days in the office. The Claimant said that he did not agree with the change in his line management and had no confidence in the arrangement because he was reporting to someone working in a different team. Ms Aina informed the Claimant of changes that had taken place in his absence. Ms Aina asked the Claimant which of the recommendation from the dyslexia report he thought would be the most helpful. The Claimant said that he had last read the report some time ago and could not recall all the recommendations. It was agreed that he would revisit the report and let Ms Aina know by 12 January which recommendations he would like to be implemented. It was confirmed that the claimant would have a reduced workload and that not all the work would be HEO level work during the phased return to work.

The Claimant was offered a referral to Occupational health but he refused it. Ms Aina suggested that the Claimant complete an Ability Passport and he agreed to do so. Ms Aina advised the Claimant that any performance management and unsatisfactory attendance processes that were in train before he went on sick leave would be put on hold during the phased return to work.

100 On 12 January 2015 Ms Aina contacted Health Management Ltd to discuss the implementation of the recommendation of the Claimant's dyslexia report and to arrange for a workplace assessment to be undertaken. She was advised that HML was prohibited from discussing the Claimant, his case or medical records with the Respondent. Ms Aina spoke to the Claimant about it and he confirmed that the request had come from him.

101 Following the return to work meeting the Claimant formally applied to work part-time on medical grounds for eight weeks in line with his GP's advice. Ms Aina acceded to that request and agreed that from week three he could work one of his days from home. The Claimant had also asked that he be permitted to attend a two day residential trade union course on 9 and 10 February (during the phased return to work). Ms Aina refused his request. The Claimant asked Kayleigh Walker to reconsider it. She did and refused it again for the same reasons – namely, that the dates fell within the phased return to work period and that the Claimant being absent from the office for two consecutive dates would be a marked departure from what he had asked and the parties had agreed. As a result the Claimant formally removed himself from the phased return to work arrangement on 27 January 2015.

102 On 21 January 2015 sent Ms Aina an Ability Passport which he had drafted.

103 On 16 February 2015 Ms Aina informed the Claimant that as phased return to work period had ended on 27 January, the Respondent would resume the performance management and attendance processes. She invited the Claimant to attend an unsatisfactory attendance meeting on 23 February. The letter set out that he had had 189 days' sickness absence.

104 In February Claire Simpson explained to the Claimant that any recommendations form the dyslexia report would have to be implemented through HML who was the Respondent's provider of occupational health services. The Claimant made it clear that he did not consent to HML sharing any medical records that they held on his with any third party, which included the Respondent. Ms Aina contacted HML and asked for them to action the recommendations of the dyslexia report and sought their advice on how to take the matter forward. She was informed by telephone that the Chief Medical officer had given an instruction not to respond to her email and that HML was exercising its blanket ban on engaging with the Respondent regarding the Claimant.

105 The formal unsatisfactory attendance meeting took place on 23 February 2015. Ms Aina conducted the meeting. The Claimant was accompanied by Teresa Clark. Ms Clark said that the meeting should be adjourned because the Claimant should have been sent full records detailing each of the 189 days that he had been absent from work. Ms Aina said the number of days of sickness absence had been taken from the medical certificates that the Claimant had provided and there was no dispute that he had been absent sick on those dates. Ms Aina sent her decision in writing on 27 February 2015. She said that he had been given a written improvement notice on 10 April 2014 and had been told that his attendance would be monitored for

a period of three months. During that period he had commenced a period of sickness absence that had lasted 189 days and had exceeded the trigger point. He had been offered a referral to occupations health during his sickness absence and on his return to work. This would have helped the Respondent decide how best to support him but he had refused. Having taken everything into account, she had decided to issue him with a final written improvement warning. His attendance would be monitored for a three month period from 27 February to 25 May 2015. He was warned that if his attendance was unacceptable at any time during that period, it might result in him being demoted or dismissed.

106 On 2 March 15 the Claimant appealed against the final written warning for unsatisfactory attendance.

107 On 9 March 2015 Ms Aina informed the Claimant that the performance review period (which had been interrupted due to sickness absence) would start again on 9 March and he would have to complete the three remaining weeks of the review period. A formal action plan was attached to her email. She advised him that there would be review meetings on 16 and 23 March and a final review meeting on 30 March at which they would review whether his performance had improved to the required level or they should move to stage 3 of the procedure and refer the matter to a decision manager which could lead to demotion or dismissal.

108 On 9 March Ms Aina also met the Claimant to discuss his Ability Passport and what the Respondent could do to support him. However, it was impossible for that discussion to take place because the Claimant spent the whole meeting berating and insulting Ms Aina – he asked her what courses she would be attending regarding reasonable adjustments, said that she did not care about him and was a poor line manager, told her that she needed to do more reading about his condition, accused her on not respecting the trade union and the work that he did, of being vindictive and bullying him and finally muttered something under his breath and walked out of the meeting. Ms Aina drew his conduct to the attention of Claire Simpson, who suggested that in future she should be accompanied at any meetings that she held with the Claimant. She also said that she would refer that conduct and other concerns to be investigated under the disciplinary process. On 17 March Ms Simpson asked Jane Spence to investigate the Claimant's conduct in relation to his line manager, his countersigning officer and herself. She informed the claimant on the same day that she ahd asked Ms Spence to conduct that investigation.

109 On 10 March Kayleigh Walker made it clear to the Claimant that before any recommendations form the dyslexia report could be implemented HML needed to carry out a workstation assessment to decide what adjustments would be beneficial. She said to move the matter forward he needed either to give his consent for HML to carry out the assessment or contact Access to Work.

110 The Claimant did not attend the review meeting on 16 March which was scheduled for 1 pm. Ms Aina called him at 1.08 but there was no response. The Claimant sent her an email at 1.45 asking her if they could rearrange the meeting. Ms Aina refused as there was no good reason for his not attending. She sent him an updated action plan in which she set out that he had performed the very limited tasks given to him in the previous week. He had missed many of the deadlines, some of the work that he had completed or the information that he had provided on the shared site was not accurate. His attitude at the meeting to discuss his Ability Passport had been confrontational and aggressive and his non-attendance at the

performance review meeting demonstrated that he was not able to comply with reasonable management instructions.

111 On 19 March 2015 Kayleigh Walker asked the Claimant to produce honours citations for four nominees. She sent him a template and guidance on how to draft citations. She asked him to produce a first draft by noon on Thursday 26 March. The Claimant responded that he was going to be away on trade union activities on the Monday and Tuesday and on a course on Thursday morning and, therefore, did not see how he could do the citations. In light of that, Ms Walker changed her request and asked him to produce his first draft for just two of the nominees by Thursday. She said that it should take around two hours to produce a first draft. The Claimant maintained that he did not have enough time to do what she asked. Ms Walker responded,

> "*This comes down to managing your time effectively and working at pace."*

She went through the tasks which he said he had to do (some of which he had chosen to do when there was no need for him to do so at that time) and concluded,

> "*My view remains that if you had prioritised and used your time effectively then you would have had sufficient time to complete all of the requested tasks."*

112 The next performance review meeting was scheduled to take place on 26 March 2015. Kayleigh Walker was to conduct the meeting in Ms Aina's absence. Although Ms Walker had informed the Claimant twice that it was not a formal meeting and that he had should not be accompanied by his trade union representative, the Claimant attended with Teresa Clark. Ms Walker made it clear that Ms Clark could not stay. Ms Clark refused to leave and, as a result the meeting did not take place. Ms Walker informed the Claimant that as he was going to be on annual leave the week commencing 30 March, the final review meeting would take place in the week commencing 6 April 2015. She sent the Claimant an updated performance action plan which set out in detail what tasks he had had in the preceding week and what he had achieved. Her overall conclusion was that he had met the standard in relation to some tasks but not in other areas. In particular, he had not met the standard in relation to behaviours.

113 On 6 April 2015 the Claimant raised a grievance about three matters – his managers' lack of reaction to his news that his brother was seriously ill in Ireland and Ms Aina's comment about his taking leave in the middle of his performance review period, Ms Walker asking him to do the honours citations within an unrealistic timescale, and two breaches of confidentiality in the return to work process.

114 Kayleigh Walker met with the Claimant on 7 April 2015 to review his performance during the period between 23 and 30 March 2015 and then to review his performance throughout the whole four week period. Her overall summary for the last one week was that he had completed a few straightforward tasks during the period but there had been little to demonstrate that he had performed at HEO standard. It was stated that in particular he did not meet the standard in relation to behaviours. Details of the tasks that he had been set and what he had done were set out in the Action Plan. Although the meeting lasted an hour and a quarter Ms Walker did not get the chance to discuss the Claimant's performance over the four week period because the Claimant raised other matters, such as how he felt that his line managers should have reacted to his brother's illness and possible disciplinary action

against his line managers. Ms walker asked the Claimant to stay longer so that she could discuss his performance over the whole review period, but he refused and left.

115 On 13 April 2015 Kayleigh Walker met the Claimant and informed him that, having reviewed his performance during the Stage 2 review period, her view was that his performance had remained below the expected standard and that they should move to stage 3 of the process. She warned him that this could lead to his dismissal. She informed him that Mary Pooley, Deputy Director in Free Schools, would be the decision maker in his case and that she would invite him to a formal meeting to discuss his performance. She advised him of his right to be accompanied. The Claimant said that it would go to the Employment Tribunal and he would not want to be her right now. He said that she had an ethical and moral absence and that his managers had been acting in an ethical vacuum. He said that she had not acted professionally and bullied her way into his return to work meeting in January 2015. Later that day Ms walker sent the Claimant an updated version of his Performance Action Plan with comments on the outcome.

116 On 16 April 2015 Ms Walker referred the matter to Mary Pooley for a stage 3 decision in line with the Respondent's Managing Poor Performance policy. In her referral she detailed all the action that had been taken under the Managing Poor Performance procedure. Her conclusion was that the assessment of the Claimant's performance against the Civil Service Competencies showed that he did not meet the competency standard at EO level, which was below the level at which the Claimant was employed.

117 The Claimant's appeal against the Final Written Improvement Warning for unsatisfactory attendance was heard by Bekah Little on 14 April. The appeal was dismissed in writing on 20 April 2015.

118 On 15 April 2015 the Claimant sent Kayleigh Walker and Stella Aina an email that he was "*minded to discuss expressing consent for"* a referral to Occupational Health "*subject to discussion of the terms of reference and a memorandum of agreement as to the report's confidentiality and distribution."* He said that he understood that for such a referral to take place he would need to contact HML "*to discuss the parameters of my current consent controls"* which he would be happy to do *"after the standard initial discussion around the purpose of the referral."*

119 Ms Walker responded on 22 April that the reasons for the referral were his prolonged sickness and absence and his poor performance at work. She explained in detail the areas on which they would seek, and Occupational Health would provide, advice. She also explained that HML would send its advice to the manager who made the referral and to the Claimant. The Respondent would preserve the confidentiality of the report and would not disclose it to anyone who had no right to see it. However, it might need to be shared with others in his line management chain in order to ensure that he was appropriately supported and so that they could consider how their requests and decisions might impact upon him. She asked him to confirm by 4 pm the following day whether he gave his consent for a referral to Occupational Health and to provide a copy of his email to HML lifting the restrictions that he had placed on them. The Claimant did not give his consent or lift the restrictions by the deadline.

120 On 22 April 2015 Mary Pooley invited the Claimant to a meeting on 5 May 2015 to put forward any information that he thought relevant before she made a

decision. She said that he could provide any written details before the meeting if he so wished and that if there were any mitigating factors, such as illness or disability that had been affecting his performance he should let her know.

121 On 24 April 2015 Ms Walker informed Ms Pooley that the Claimant had not given his consent for a referral to occupational health and had not lifted the restriction on HML communicating with the Respondent about him. She said that in those circumstances there was no reason why the meeting on 5 May 2015 should not go ahead.

122 On 28 April 2015 the Claimant responded to Kayeligh Walker's email of 22 April. He said that he was happy going forward with the referral and asked who would be making the referral and when would be a good time for him to go over the referral with the person making the referral. Ms Walker responded that the deadline for his consenting to the referral had been 4 pm on 23 April and he had not provided any explanation for the delay. She also reminded him that he had been offered a referral in October 2014 (when he had been off sick) and at least on five occasions since he returned to work on 5 January 2015. He had refused to give his consent on each of those occasions. He had given no indication that he would even be willing to consider a referral until 15 April 2015, two days after she had informed him that they were moving to stage 3 of the Managing Poor Performance process. For all those reasons, the Respondent's view was that it would be reasonable to review the issue after the stage 3 meeting had taken place.

123 The meeting that was due to take place on 5 May was rescheduled at the Claimant's request initially to 8 May, and later to 15 May 2105.

124 On 14 May 2015 the Claimant raised a grievance (that ran into 15 typed pages) of failure to make reasonable adjustments for his dyslexia.

125 At the stage 3 meeting on 15 May 2015 the Claimant was accompanied by Teresa Clark. An hour had been allocated for the meeting. Mary Pooley stated at the outset that she wanted the emphasis of the meeting to be the Claimant's views of his performance and she invited him and Ms Clark to detail any concerns that they had on the bundle of documents with which they had been provided. Ms Clark's opening remarks were that the meeting was illegitimate and should not be taking place because the correct procedure had not been followed, in particular, the recommendation made by Occupational Health had not been implemented. Ms Pooley tried to get her and the Claimant to focus on the Claimant's performance by reading out a summary she had collated of the performance issues from documents before her. Ms Clark's response was that if the Claimant's performance had been objectively poor it was as a direct result of the action or inaction of his line management chain which had harassed him, making it very difficult for him to leave the "must improve" category. She cited the following as management's failures – stopping him using the specialist equipment which had been purchased for his dyslexia, not permitting a managed moved which occupational health had repeatedly recommended, having Joe Farrell in his line management chain, his line management creating a climate of insecurity and intimidation, Joe Farrell had added something to an Occupational health referral in 2011 without the Claimant's consent, had shared the OH report with other colleagues and had instructed OH to alter its report. At the end of the one hour the Claimant and his representative had not addressed any of the performance concerns highlighted by management in its documents. Ms Clarke suggested the meeting reconvene to discuss further

irregularities in the process. The Claimant gave Ms Pooley some additional documents. Ms Pooley refused to reconvene the meeting but gave the Claimant an opportunity to submit any further representations that he wished by midnight that day. The Claimant did not submit any further representations.

126 On the same day Chris Armstong-Stacey met with the Claimant to discuss the grievance that he had raised on 6 April 2015. The grievance was dismissed in writing on 20 May 2015.

127 On 15 May 2015 Jane Spence produced a report of her investigation into the Claimant's conduct. She concluded that there was evidence of low level persistent disruption, insubordination, vexatious and offensive behavior which merited a disciplinary case. On the same day Andy Hurdle invited the Claimant to attend a formal disciplinary hearing to answer allegations of repeated and persistent failure to follow reasonable instructions, vexatious grievances and appeals against grievance outcomes and decisions made under the formal attendance and performance processes (ten altogether from January 2014 to 7 April 2015), insubordination, offensive personal behavior and misuse of departmental property. In light of the Claimant's dismissal on the same day no further action was taken in respect of the disciplinary hearing.

128 On 21 May 2015 Mary Pooley gave the Claimant her decision and the reasons for it orally and in writing. Her decision was that he should be dismissed on the grounds of poor performance on that day and that he would be paid for a further 13 weeks in lieu of the notice to which he was entitled. Her reasons were as follows - his managers had regarded him as performing below the expected level for his grade because he required more support than his peers to deliver standard tasks, did not meet expectations for updating the knowledge management system ("KIM"), missed deadlines, did not co-operate with management and did not engage in the process to manage his poor performance. There had not been any improvement in in any of those areas since he had been issued with the final written warning. She gave examples of his continued failings in respect of all the areas of concern. There were some examples of him meeting deadlines and competing tasks to standard but the number of examples of underperformance outweighed these. The Claimant had not argued at the hearing that he was performing to the level expected but had put forward reasons as to why he was not. These in essence were that his managers had not put in place reasonable adjustments in respect of his dyslexia and depression and that they had bullied and harassed him. She had concluded that although there was no evidence in the documents that he was disabled, as defined in the Equality Act 2010, his managers had made a number of reasonable adjustments. The adjustments and support offered by his manages had been sufficient to allow him to meet the required level of standard but he had failed to do so because he had not co-operated with their efforts to improve his performance. She advised him of his right of appeal.

129 The Claimant appealed against his dismissal. The appeal was considered by Hardip Begol, Director for Due Diligence and Counter-Extremism. Mr Begol met with the Claimant and Teresa Clark on 22 June 2015. Prior to that meeting he had supplied to the Claimant various documents and certain information which he had requested. Following the meeting, the Claimant provided Mr Begol with further evidence which he considered should have been taken into account at the stage 3 hearing. Mr Begol sought the Claimant's managers' response to the issues raised by him and documentary evidence to support their response. Ms Aina responded on 2

July. In light of the fact that many of the issues raised by the Claimant had been the subject-matter of previous grievances and appeals, Mr Begol prepared a draft table setting out all the issues, whether they had been the subject-matter of a previous grievance and, in respect of those which has, he asked the Claimant to indicate whether he had new evidence. The Claimant provided a response to that on 22 July 2015. Mr Begol had a further meeting with the Claimant on 4 August 2015 in order to set out his provisional conclusions and to give the Claimant an opportunity check whether there was any evidence that he had missed. Following that meeting, he took further time to consider carefully all the evidence before finalising his decision.

130 Mr Begol's decision was set out in a letter sent to the Claimant on 19 August 2015. He dismissed the appeal and set out in the letter detailed reasons for reaching that conclusion. In coming to his conclusion he took into account the decision of Lesley Jones dismissing the Claimant's appeal against his grievance on 20 July 2015. He dealt with each of the twenty-one points raised by the Claimant in his appeal and explained why he upheld or did not uphold the point in question. He upheld three of the points but these did not impact upon his decision to reject the appeal. He upheld the following three points – Ms Pooley had reached her decision in haste, without the note of the hearing and had not given him sufficient to provide evidence at the hearing and subsequently; Ms Pooley misunderstood the nature of his disability and the Respondent's obligation; the Performance Action Plan made no reference to disability. In respect of the first, Mr Begol said that the time set aside for the hearing proved to be insufficient for the Claimant to make all the points that he wished and that although Ms Pooley took into account a significant amount of information, there was further information which she could have considered if the Claimant had had the opportunity to submit it. However, he had considered the additional points that the Claimant had wished to make and the additional documents submitted by him, and his view was that they did not substantively alter the outcome of his case and that Ms Pooley's decision to dismiss him was fair. In respect of the second one, he concluded that Ms Pooley should not have said in her letter that there was no evidence that the Claimant was disabled within the definition of the Equality Act 2010. In respect of the third, while he was satisfied that reasonable adjustments had been discussed and made, they had not been recorded in the Performance Action Plan and he would recommend to HR to give guidance that they should be included in the Plan. His overall conclusion was that the processes for reasonable adjustment and Managing Poor Performance had been applied properly and fairly and that the decision to dismiss should stand.

Conclusions

Disability

131 We considered, first, whether the Claimant was disabled by reason of suffering from depression. The material time for the purposes of the disability discrimination claims before us is the period between April 2013 and May 2015. However, the relevant provisions of the Equality Act 2010 would apply equally if the Claimant had been disabled by reason of depression prior to that date and was subjected to any discrimination in relation to that past disability. The medical evidence before us was that the Claimant suffered from depression from August 2007 to about March 2012 and that he was treated for it with medication, counselling and CBT. The only medical evidence after that which referred to him suffering from depression was his medical certificate to cover his sickness absence from 7 to 21 August 2013 which stated that he was unfit to work because of depression. The Claimant was certified as being unfit

to work from 26 June 2014 to 5 January 2015 because of a "stress related problem". If the Claimant had been suffering from depression at that time and unable to work because of that, we would have expected his doctor to have said that. The occupational health report of 4 July 2014 did not state that the Claimant was suffering from depression.

132 We concluded that the Claimant suffered from depression between 2007 and March 2012 and in August-September 2013. There was no evidence before us of the impact the depression had, or would have had but for the medication, on the Claimant's normal day to day activities between 2007 and November 2011. In November 2011 the Claimant had difficulty sleeping, which caused him to be tired during the day, and his concentration was impaired. Those symptoms improved with treatment in early 2012 but resurfaced in the summer of 2013. The symptom worsened in August 2013 and the Claimant found it difficult to get out of bed, dress up and go out to work. As a result he was unable to work for two weeks in August. It is likely that the other symptoms (difficulty sleeping, tiredness and impaired concentration) persisted for a short while after his return to work.

133 In November 2011 and the summer of 2013 the Claimant's depression had adverse effects on the Claimant's ability to carry out normal day to day activities. Those effects were not minor and trivial and were, therefore, substantial. They lasted from about November 2011 to an unspecified date in early 2012 and recurred for a few months in the summer of 2013. Although the substantial adverse effect did not last a year between November 2011 and early 2012, they were likely to recur and did in fact recur. In those circumstances, we concluded that the Claimant was disabled by reason of his depression between late 2011 and September 2013. Any discrimination for that past disability would be unlawful under the Equality Act 2010.

134 We then considered whether the Claimant was disabled by reason of dyslexia. The Claimant has had mild dyslexia for many years although it was not formally diagnosed as such until March 2014 when he undertook a formal dyslexia diagnostic assessment. The only effects of the dyslexia were that he had "mild difficulties" reading sight words at speed and performing tasks which involved fine motor skills and movements, such as manipulating, grasping and moving objects. In respect of the former, his score was comparable to the overall population, in respect of the latter it fell in the below average range. We had no doubt that any effect the Claimant's dyslexia had on his ability to read sight words at speed was minor and trivial. On balance, we concluded that because the Claimant had mild difficulties in performing tasks that which involved fine motor skills and movements, the adverse effect on his ability to manipulate, grasp and move objects was minor and trivial. As the dyslexia did not have substantial adverse effects on his ability to carry out normal day to day activities, we concluded that he was not disabled by reason of having dyslexia.

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

135 We considered first the Claimant's allegation that the Respondent applied to him a PCP that he had to carry out all the duties of his substantive position and that he had to work in his existing team. We decided to allow the Claimant's application to amend to add the following PCP – the Respondent applied a PCP that employees who were engaged in MPP procedures or perceived to be performing poorly were not to be given managed moves. We allowed the amendment because it involves the same issues as arise in the existing PCP and appears to us to be a different way of

wording and arguing the existing PCP that the Claimant was required to work in his existing team.

136 We did not accept that the Respondent required the Claimant to carry out all of the duties of his substantive role at the material time. The Claimant's workload was reduced when he returned to work after his sickness absence at the end of August 2013 and that remained the position until his employment was terminated on 21 May 2105. Throughout the period of managing his poor performance, which began with an informal action plan in December 2013, the Claimant was allocated a limited number of specific tasks (which was considerably less that his normal workload) against which his performance was assessed. However, the Respondent did require that the work that he did was of the level expected from someone at his grade, failing which he would be managed through the Managing Poor Performance process. There was, in any event, no medical evidence before us that the Claimant's depression prevented him from carrying out either his normal workload or a restricted workload to the expected level. Nor was it suggested by the Claimant at any stage in the poor performance management process that he was unable to carry out all the duties of his substantive role because of his depression. The Claimant's position throughout the process appeared to be that there were no shortcomings in his performance and his managers were bullying and harassing him by suggesting otherwise. We considered it significant that he informed the occupational health doctor in July 2014 that he enjoyed his work and had no concerns about the work that he was required to do. We, therefore, concluded that the Respondent did not apply to the Claimant the PCP which he alleged that it did. It applied a different PCP which did not put the Claimant at a substantial disadvantage because of his depression.

137 In any event, any claim of failure to make reasonable adjustments in respect of the PCP contended for by the Claimant was not presented in time. If the Claimant's case is that the Respondent required him to carry out all the duties of his role on the expiry of his phased return to work in September or October 2013, that is when the failure to make that adjustment would have taken place and the Claimant would have known that the Respondent had decided not to make that adjustment. The time in respect of a failure to make an adjustment runs from when the employer decides not to make that adjustment or makes it clear by doing something inconsistent with it, that he is not going to make the adjustment.

138 We accepted that the Respondent did apply a PCP that the Claimant had to work within his existing team, to the extent that it was not prepared to move him to another role although he was, of course, free to apply for a role in a different team if he so wished. We considered, first of all, whether this claim had been presented in time. At the return to work meeting on 27 August 2013 the Claimant told Ms Aina that he wanted to discuss an exit strategy from the team and to move elsewhere within the next two weeks. Ms Aina made it clear that if he wished to do that he would have to find and apply for a role elsewhere because the Respondent would not move him. She repeated that advice on 13 September 2013. On 7 May 2014 Mr Churchill made it clear to the Claimant that the Respondent would not be initiating a managed move for the Claimant and gave its reasons for not doing so. The Respondent considered whether the Claimant should be moved to a different team upon receipt of the Occupational Health report of 4 July 2014. They concluded that he should not and that decision was communicated to the Claimant by Ms Aina and Mr Churchill on 28 July 2014. If the Respondent was under a duty to make that adjustment it failed to do so at the latest on 28 July 2014 and any time for presenting a complaint in respect of that would run from that date. The Claimant's grievance in respect of that was

rejected by David Jeffery on 18 September 2014. In accordance with his recommendation, the Claimant was sent another letter on 10 October 2014 setting out management's reasons for not moving him to a different team. We, therefore, concluded, that this claim was not presented in time.

139 In case we are wrong in reaching that conclusion, we set out briefly what we would have concluded if we had considered the matter. The Claimant's depression did not make it difficult for him for him either to do the work that he did in his team or to work with the individuals in his team and, in particular, with his managers. The requirement to do that work with those people in his team did not put him at a substantial disadvantage because of his depression. It was not in dispute that the Claimant was stressed from about the middle of 2013 but that stress arose from the fact that he had taken on trade union responsibilities, there was a dispute with his managers about the times that he could spend on his trade union activities and that his managers regarded his performance as poor and took steps to address it. The stress arose not from the identity of his managers but the fact that they were managing him. The Claimant would have suffered the same stress, regardless of the identity of his managers, if they tried to control and monitor the time that he spent on his trade union activities and raised concerns about and tackled his poor performance. We would have concluded that requiring the Claimant to work within his existing team did not put him at a substantial disadvantage because of his depression. In any event, there was no evidence that he suffered from depression after September 2013.

140 We finally considered the PCP which the Claimant was permitted to add by way of amendment. The Respondent accepted that it generally applied a policy that employees whose poor performance was being managed would not be given a managed move, although it was not a hard and fast rule and each case was considered individually and exceptions were made if the individual situation justified it. We considered that this claim was also out of time for the reasons given in paragraph 137 (above) because the adjustment proposed is the same as for that PCP, namely, that the Claimant should have been moved to a different team.

141 In order for the Claimant to establish that the policy of not moving employees whose poor performance was being managed put him at a substantial disadvantage because of his depression, he would have to establish either that remaining in his existing team out him at a substantial disadvantage or that his poor performance was attributable in some way to his depression. As far as the former is concluded, we have already indicated that our view was that working in his existing team did not put the Claimant at a substantial disadvantage. As far as the latter is concerned there was no medical evidence that the Claimant was suffering from depression after September 2013 or that his depression had impacted upon his ability to perform in his role. On the contrary, there was evidence that in July 2014 he told the Occupational Health doctor that he enjoyed his work and had no concerns about the work that he was required to do. The dyslexia assessment concluded that his reasoning and comprehension abilities and his ability to sustain attention, concentrate and exert mental control were in the high average or superior range. The Claimant had managed to perform satisfactorily in 2011-2012 in spite of suffering from depression in that year. There was no evidence that the Claimant's depression had any impact upon his ability to carry out his trade union activities. It clearly had no impact upon his ability to raise grievances and pursue a large number of internal appeals. For all those reasons, we would have concluded that applying that PCP to the Claimant did not put him at a substantial disadvantage.

142 It was accepted that when the Claimant was at work and doing Academies work (50% of three days because the Claimant worked from home two days a week) the Respondent applied a PCP that he had to sit with other members of his team, subject to a desk being available when he arrived at work. There is no medical evidence that the lack of natural light had an impact on the Claimant's depression. We, therefore, concluded that this PCP did not put the Claimant at a substantial disadvantage in connection with his depression. If it did, the Respondent did not know and could not reasonably have been expected to know that it did. The Claimant never drew the matter to the Respondent's attention. We did not accept that he raised it with Ms Aina at the return to work meeting on 5 January 2015. Had he done so, it would have been clear to him very shortly thereafter when the Respondent continued to require him to sit with his team, that it had decided not to accede to his request to sit elsewhere. Any claim in respect of this PCP would, therefore, be out of time.

143 We considered next the Claimant's allegation that the Respondent applied a PCP that he had to produce evidence and submissions about his performance on the same day as the performance review meeting. We found that the Respondent required the Claimant to produce his evidence and submissions at the stage 3 meeting on 15 May 2015. The Claimant and his representative did not do so because the focused on ancillary matters rather than addressing the main issue. Ms Pooley refused to reconvene the meeting but gave the Claimant and his representative until midnight that night to submit any further evidence and submissions. The failure to make the adjustment (to give the Claimant more time to submit further evidence and submissions) occurred at the meeting on 15 May 2015. The time limit for presenting a claim in respect of that expired before the Claimant gave Early Conciliation notification and the claim was, therefore, not presented in time.

144 In case we are wrong in that conclusion, we set out briefly our views on whether it put the Claimant at a substantial disadvantage because of his depression and/or dyslexia. We have found that the Claimant was not disabled by reason of dyslexia but even if was, bearing in mind the nature of the impact it had on his day to day activities, it would not have impacted upon his ability to present further evidence and submissions. In considering whether the PCP put him at a substantial disadvantage, we took into account the following – the Claimant was first told that the matter would proceed to a stage 3 hearing on 13 April 2015 and was formally invited to the hearing on 22 April 2015. He had been advised at that stage that he could make written submissions if he so wished. By the time of the meeting he had had over three weeks to prepare for the hearing. He had the assistance of a trade union representative. There was no medical evidence that he was suffering from depression in May 2015. There was no medical evidence that his depression or dyslexia had an impact upon his ability to concentrate, comprehend or reason. In all those circumstances, we would have concluded that affording him until midnight on 15 May 2015 did not put the Claimant at a substantial disadvantage because of his dyslexia and/or depression.

145 Finally, we considered whether the Respondent applied a PCP that required the Claimant to carry out his work quickly and accurately. The Respondent did apply a PCP that the Claimant carry out his work accurately. We did not accept that it applied a PCP that he carry out his work quickly. He was set a limited number of tasks each week and he was expected to complete them by the deadlines for those tasks. We have found that the Claimant had a reduced workload since his return to

work in August 2013. For the reasons we have already given about the impact of his depression and dyslexia on his ability to carry out his role, we did not accept that the requirement to complete a limited number of tasks to deadline and accurately put the Claimant at a substantial disadvantage because of his depression and/or dyslexia. Notwithstanding his depression and his dyslexia, the Claimant had performed to an acceptable standard in 2011-2012 and 2012-2013.

146 It was argued on behalf of the Claimant that the PCPs requiring him to carry out all the duties of his substantive role in his existing team were considered afresh by Mary Pooley at the stage 3 hearing and she refused to make the adjustment sought on 21 May 2015 and that claim of failure to make reasonable adjustments was, therefore, presented in time. It was submitted on behalf of the Claimant that the dismissal inherently involved a further failure to make reasonable adjustments. We do not accept that Ms Pooley considered at that meeting whether any adjustments should be made. She considered whether the Claimant's managers had been correct in assessing that he was not performing to the required standard and whether there had been any improvement in his performance since he had been issued with the final written warning. The Claimant had appeared to accept that and had put forward reasons to explain his poor performance. These were that his managers had bullied and harassed him and had not put in place the reasonable adjustments that he required because of his depression and dyslexia. Ms Pooley had reviewed the adjustments that they had put in place and the support that they had given him and had concluded that these had been sufficient to allow him to perform to the required standard. She did not consider the matter afresh. She reviewed what had taken place and was satisfied that his poor performance was not attributable to any failure to make reasonable adjustments.

147 We then considered whether it would be just and equitable to consider those complaints although they were not presented in time. The Claimant did not give any explanation of why they were not presented in time and did not advance any reason as to why it would be just and equitable to consider them. In deciding whether to exercise our discretion we took into account that the Claimant was Branch Vice Chair of PCS and he was represented and assisted by Teresa Clarke of PCS at all material times. He would, therefore, have known of his right to bring a claim before the Employment Tribunal and the time limits for bringing such a claim. He was able to produce lengthy documents in support of his grievances and appeals. There was no reason why the Claimant could not have presented the claims of failure to make reasonable adjustments in time. We, therefor, concluded that it would not be just and equitable to consider them. In case we are wrong in that conclusion, we have in any event have set out what we would have decided in respect of each of those claims.

Harassment

148 This complaint relates to Kayleigh Walker asking the Claimant in March 2015 to do a certain piece of work by a certain time and using the phrase "*working at pace"* in an email exchange with the Claimant when he complained that he could not do it within the time set by her (see paragraph 111 above). This claim was not presented in time and we do not consider it just and equitable to consider it for the reasons we have given in paragraph 147 (above). In any event, requiring the Claimant to do the work within that timescale and Ms Walker saying what she did in her email was not related to disability and was not conduct which had the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment. The Claimant did not give any evidence that it had that effect.

He simply said that he found it offensive. Even if the Claimant had had the perception that it had had the proscribed effect, it was would not have been reasonable, in all the circumstances, for it to have had that effect. There was no evidence that the Claimant could not have completed that work within the timescales set by Ms Walker because of his depression or dyslexia. The Claimant claimed that he could not do it because other commitments and other work that he had to do. Ms Walker's view was that he did not need to do the other work at that time and that the real issue was whether her had prioritised his tasks and used his time effectively. Had we considered this claim, we would have concluded that it was not well-founded.

Victimisation

149 It was agreed that in his grievances of 8 September 2013, 6 January 2014, 11 August 2014 and in his appeal against the decision in the last one in September 2014 the Claimant had made allegations that his managers had contravened the Equality Act 2010. It was submitted on behalf of the Respondent that some of the allegations, which repeated earlier allegations which had already been rejected or suggested that the Claimant had not been provided an explanation when in fact he had been, were not made in good faith but were made in an attempt to obstruct the Claimant's managers from proceeding with processes to manage his poor performance and poor attendance. Although it was not always easy to understand the basis of the Claimant's allegations of disability discrimination and he persisted with the allegations after the Respondent had not upheld any of his complaints of disability we were satisfied that he believed that there was merit in his complaints and that he was being subjected to disability discrimination. In those circumstances, we concluded that they were not made in bad faith.

150 The detriment of which the Claimant complains is the decision to invite him to a disciplinary hearing. That decision was communicated to the Claimant in a letter dated 15 May 2015 and his complaint in respect of it was, therefore, not presented in time. For the reasons given at paragraph 147 (above) we concluded that it would not be just and equitable to consider this claim. Had we considered the claim, we would have concluded that the Respondent invited the Claimant to a disciplinary hearing not because he had complained of disability discrimination but because of his persistent refusal to accept and continuous challenge of the decisions made by his management coupled with an offensive attitude towards his managers. The result was that he insubordinate, disruptive and very difficult to manage. We would have concluded that the Claimant was being subjected to the disciplinary process, not because he had done a protected act, but because he was being insubordinate, disruptive and offensive and the large number of lengthy grievances and appeals were just one symptom of that unacceptable behavior.

Section 15 claim

148 It was not in dispute that the application of the Managing Poor Performance to the Claimant and his dismissal at the end of that process constitute "unfavourable treatment" for the purposes of section 15. It was equally not in dispute that the process was invoked and the Claimant dismissed because he was not performing to the standard expected of someone at his level and that that included delays and errors in his work. The only issues for us were whether his poor performance was attributable to a disability and, if do, whether the Respondent could show that applying the Managing Poor Performance process to him and dismissing him was a proportionate means of achieving a legitimate aim.

149 We first considered whether the Claimant needed leave to amend in order to claim that his poor performance was due to his depression as well as his dyslexia. In his particulars of claim the Claimant stated quite clearly at paragraph 9 that he had been discriminated against by be being dismissed and/or placed on the capability process because of something arising as a consequence of his disability – "*that is to say, the delays/mistakes etc relating to his work which were the result of his Dyslexia."* In those circumstances he needed leave to amend to include depression as a reason for his poor performance. We accepted that the application to amend was being made late in the day and there was no good reason why it could not have been made earlier. That having been said, the Claimant was not seeking to add a new claim but to change the basis for an existing claim. That change in basis could not have taken the Respondent by surprise because the Claimant had already alleged as part of his failure to make reasonable adjustments claim that the requirement to carry out all the duties of his role put him at a substantial disadvantage because of his depression. The amendment that he wished to make would be based on the same factual evidence at the failure to make reasonable adjustments claim. In those circumstances, we concluded that allowing the amendment would not cause the Respondent any prejudice and we allowed it.

150 We have concluded that the Claimant was not disabled by reason of his dyslexia. Even if we were wrong to reach that conclusion, it was clear to us that his inability to carry out his work to the required standard was not attributable in any way to his dyslexia. The impact that the dyslexia had in his ability to carry out his duties at work was negligible. The Claimant had been able to carry out his duties to a satisfactory level, in spite of the dyslexia, in the 2011-2012 and 2012-2013. The Claimant had a reduced workload from September 2013 onwards. The large volume of documents that the Claimant produced in connection with his complaints and grievances demonstrates that he was able to produce documents accurately and quickly. The Claimant did not allege as part of his failure to make reasonable adjustments claim that the requirement to carry out all the duties of his substantive role put him at a substantial disadvantage because of his dyslexia.

151 We then considered whether the Claimant's poor performance was attributable to his depression. For the reasons that we have given at paragraphs 136, 141, 144 and 145 (above) we concluded that it did not. It is not for us to speculate as to what led to a deterioration in the Claimant's performance from April 2013 onwards, but we think that it is not coincidental that his performance started to dip at about the same time that he took on his trade union activities. The Claimant alluded to that connection in his self-assessment for his mid-year review in October 2013. As the Claimant's poor performance, which was the reason for the application of Managing Poor Performance process to him and his dismissal, was not attributable to any disability, his section 15 claim must fail.

Unfair dismissal

152 We concluded that the reason for the dismissal was that the Respondent believed that the Claimant was incapable of performing at the standard that was expected of someone at his grade and level. Its belief in his lack of capability was based on reasonable grounds. They were set out in detail in Ms Pooley's letter of 21 May 2015. There was no medical evidence that his depression or dyslexia impacted upon his ability to do his job. Notwithstanding that, a number of adjustments had been made to support him. He had had a reduced workload since his return to work

in September 2013. He worked from home two days a week. He started work at 10.30. We have not found any of the Claimant's complaints of failure to make reasonable adjustments to be of substance. Ms Pooley's conclusion, which was a reasonable conclusion on the evidence before her and with which we concur, was that the adjustments and support offered by the Claimant's managers had been sufficient to allow him to meet the required standard but that he had failed to do so because he had not engaged with the process to manage his poor performance.

153 It was said that the dismissal was procedurally unfair because Ms Pooley and Mr Begol did not have the Occupational Health report of July 2014 and they did not seek an up to date OH report prior to making the decision to dismiss. It is unlikely that July 2014 OH report would have had any significant impact on the decision. That report recorded the Claimant as saying that he enjoyed his work and had no concerns about the work that he was required to do. The OH doctor had expressed an opinion that if the Claimant were to continue attending in the current working environment it could possibly affect his performance at work. It is significant, however, that the Claimant's performance had started to dip a year earlier and Ms Aina had raised the matter with him at that stage. The Claimant had previously criticised the Respondent's managers for sharing the contents of an OH report. In any event, if the Claimant believed that the July 2014 OH report was a relevant document he could have provided a copy of it to Ms Pooley or Mr Begol. As far as seeking an up to date OH report is concerned, the Claimant had been offered the opportunity to be referred to OH several times since his return to work in January 2015, but he had repeatedly declined it. On 15 April 2015, after he had been informed that he would be referred stage 3 of the Managing Poor Performance process, the Claimant informed Ms Walker that he was minded to consent to an OH referral subject to certain conditions. The Claimant was given a deadline of 4 pm on 23 April 2015 to give his consent. He did not do so. Five days after the expiry of that deadline he said that he was happy to go forward with a referral but even then wanted to discuss the referral. There would undoubtedly have been protracted delays before any agreement was reached. In those circumstances, we concluded that it was reasonable for the Respondent not to have delayed the process by seeking another OH report. If no up to date OH report was available, the responsibility for that lay with the Claimant.

154 We have not found and do not accept that the decision to put the Claimant onto stage 3 of the MPP procedure was unreasonable or that the performance criticisms of the Claimant were excessive or unreasonable.

155 It is correct that the Claimant had not been informed in advance that the stage 3 hearing had a time limit of one hour. If the Claimant and Ms Clarke had focused on the relevant issues it is likely that they would have had sufficient time to put forward what they wanted. That having been said, in light of the fact that the Claimant's job was on the line, it would have been reasonable to afford him some more time. However, whatever failing there was in that respect was remedied at the appeal stage when the Claimant was given every opportunity to put forward whatever he would have advanced had he been given more time at the original hearing.

156 Finally, it was said that the dismissal was unfair because no alternative employment or demotion had been considered. In light of the fact that Ms Walker's assessment of the Claimant's performance was that he did not meet the competency standard of an EO, it was reasonable not to demote him to that level or to give him alternative employment either at that level or at his substantive level. The incapability

of the Claimant to perform at the standard expected of someone at his grade or level meant that he was not capable of carrying out any role at that level. Therefore, alternative employment at the same level or demotion were not viable options.

157 Having taken into account all the circumstances, we concluded that the Respondent acted reasonably in treating the Claimant's incapability to perform his role as a sufficient reason for dismissing him and that the dismissal was fair.

Employment Judge Grewal
28 February 2017