EMPLOYMENT TRIBUNALS

Claimant: Mr M Bradley

Respondent: North Cumbria Integrated Care NHS Foundation Trust

Heard at: Manchester **On:** 1 - 4 September 2020

Before: Employment Judge Phil Allen
Mr J King
Ms C Clover

REPRESENTATION:

Claimant: In person
Respondent: Mr J English, solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant did have disabilities as defined by the Equality Act 2010 of: Dyslexia; and, from 24 September 2018, PTSD (Post Traumatic Stress Disorder);

2. The claimant's claim for direct discrimination because of disability is not successful;

3. The claimant's claim for discrimination arising from disability was not entered at the Employment Tribunal within the period required by Section 123 of the Equality Act 2010 and it is not just and equitable to extend time;

4. The claimant's claim for indirect discrimination in relation to disability was not brought within the period required by Section 123 of the Equality Act 2010 and it is not just and equitable to extend time;

5. The claimant's claim in respect of the alleged failure to make reasonable adjustments was not brought within the time required by Section 123 of the

Equality Act 2010, but was brought within such further period as the Employment Tribunal considers just and equitable and accordingly the Employment Tribunal has jurisdiction to consider the complaint;

6. The respondent did breach its duty to make reasonable adjustments as required by Sections 21 and 22 of the Equality Act in the period from 2 November 2018 until 28 February 2019;

7. The claimant's complaint that the respondent breached its duty to make reasonable adjustments in respect of treatment does not succeed as it is not in the employment field and/or falls in the exception contained in paragraph 19 of Schedule 9 of the Equality Act 2010; and

8. The claimant's claim for unlawful deduction from wages does not need to be determined as the respondent has paid the amount claimed since the claim was issued.

REASONS

Introduction

1. The claimant was employed by the respondent (and its predecessor organisation) from 16 February 2015. The claimant brought claims for disability discrimination (direct discrimination, discrimination arising from disability, indirect discrimination and failure to make reasonable adjustments). The claimant relies upon alleged disabilities of Dyslexia and PTSD.

2. The claimant also brought an unlawful deduction from wages claim in relation to alleged failure to pay him injury allowance, payable under a scheme operated by the respondent (in common with other NHS Trusts). However, after the Tribunal claim was entered (22 July 2019), the respondent decided (on or about 1 November 2019) to pay and did pay the claimant injury allowance, which was backdated to the date it was first due.

Claims and Issues

3. Prior to the Employment Tribunal hearing the claimant had been represented by solicitors. Following a Preliminary Hearing (case management) before Employment Judge Ainscough on 1 November 2019, the claimant provided further and better particulars of his claim (64–73) and a disability impact statement (74–81), and the respondent provided an amended grounds of response (105–113).

4. Based upon the claimant's further particulars, an agreed list of issues was prepared by the respondent and agreed by the solicitors instructed by the claimant. That identified the issues as outlined in below (number one not being an issue which needs to be included):

Disability

2. The Claimant claims to be disabled by reason of Dyslexia and PTSD (Post Traumatic Stress Disorder). The Respondent has not conceded that the Claimant is a disabled person by reason of either condition. The Respondent concedes that it was aware that the Claimant had dyslexia from at least 13 September 2017 onwards. In relation to the Claimant's claim that he is disabled by reason of dyslexia:

    a. Is the Claimant a disabled person by reason of dyslexia?

    b. If so, on what date was the Respondent aware (or reasonably ought to have been aware) that he was disabled (if not 13 September 2017)?

3. In relation to the Claimant's claim that he is disabled by reason of PTSD:

    a. Is the Claimant a disabled person by reason of PTSD?

    b. If so, on what date was the Respondent aware (or reasonably ought to have been aware) that he was disabled?

4. The Respondent was aware that the Claimant suffered from a stress-related condition from on or after 24 September 2018, and that he had been diagnosed as suffering from PTSD on 18 March 2019.

Limitation

5. The Claimant has raised claims of disability discrimination outside the usual 3-month time limit for presenting claims. The Claimant contacted ACAS on 12 July 2019, and therefore any acts or events before 13 April 2019 fall outside that limit. The Claimant's complaints regarding clinical supervision in his CAMHS role and his dealings with Ms Wilshaw predate 16 October 2017.

6. Has the Claimant brought his complaints of discrimination within the appropriate time limits in accordance with Section 123 of the Equality Act 2010? In particular:
    a. What are the dates of the alleged acts of discrimination?

    b. Were the acts or events that would otherwise fall outside of the limitation period part of a continuing course of conduct extending over a period of time that would therefore be within the limitation period?

    c. If not, would it be just and equitable for the tribunal to consider those complaints?

Direct Discrimination (Section 13 of the Equality Act 2010)

7. Did the Respondent discriminate against the Claimant by treating him less favourably than the Respondent treats or would treat others because of his disability?

Discrimination Arising from Disability (Section 15)

8. Did the Respondent subject the Claimant to discrimination arising from his disability (Dyslexia) by subjecting him to unfavourable treatment, namely refusing to provide *'paper work time and clinical supervision'* . Para 17 of the Amended Particulars of Claim?

9. Was this as a result of some 'thing' arising as a consequence of his disability? (The Claimant has not identified the 'thing' arising from his disability).

10. Was the existing provision of paperwork time and clinical supervision a proportionate means of achieving the legitimate aim of *'managing a reasonable case load and maintaining accurate and contemporaneous records*' (para 39 of the Amended Particulars of Claim)?

Indirect Discrimination (Section 19)

11. Did the Respondent indirectly discriminate against the Claimant on the grounds of his disability (PTSD) by applying the provision, criterion or practice (PCP) of "…*the requirement of no mental health support or supervision for mental health nurses*." (para,18, Amended Grounds of Resistance)? In particular:

    a. Did the Respondent apply that PCP (or would it apply it) to persons with whom the Claimant does not share the protected characteristic (disability)?

    b. Did the PCP put (or would it put) disabled persons at a particular disadvantage when compared with persons who were not disabled?

    c. Was the Claimant subjected to the particular disadvantage "…*that he did not receive Injury Allowance when his mental health prevented him from working due to sickness, as a direct result of his employment*" (or would he have been subjected to that disadvantage)?

12. Can the Respondent show the PCP to be a proportionate means of achieving a legitimate aim, namely, providing appropriate clinical and professional supervision to the Respondent's workforce in accordance with the needs of the organisation and staff?

Failure to Make Reasonable Adjustments (Section 21)

13. The Claimant has not specified the disability relied upon but it is presumably PTSD.

14. The Claimant has not identified the PCP he relies upon in respect of this claim but presumably it is the requirement of not providing mental health support or treatment out of area, as opposed to treatment by his professional colleagues.

15. The Claimant has not identified the substantial disadvantage that he claims he was subjected to.

16. The Claimant claims that the reasonable adjustment would have been "…*to provide mental health support out of area so the Claimant would not be treated by his professional colleagues.*" (para.20 of the Amended Particulars of Claim).

5. It was agreed at the start of the hearing that this list did contain the list of issues which needed to be determined by the Tribunal. The one exception was that it was accepted by the claimant that he had received the sum he was claiming as an unauthorised deduction from wages and therefore the Tribunal did not need to determine that claim (and those issues (which were 17 and 18) have not been re-produced in the list above).

6. As is clear from the wording used in the list of issues, the precise way in which the reasonable adjustment claim was brought was not something which had been identified with any specificity prior to the hearing. The reasonable adjustments claim was more particularly detailed in paragraph 20 of the amended particulars of claim (70). As explained below, the precise PCP relied upon by the claimant and the reasonable adjustment contended was confirmed with him and clarified during the hearing, being not restricted to provision of out of geographic area support but also being the provision of treatment/support by those outside the Trust and/or paid for on a private basis, and it related to both assessment and treatment.

Procedure and Evidence Heard

7. The “Code V” in the heading indicates that this was a remote hearing conducted by remote technology undertaken by CVP, in which the parties participated. Members of the public were able to join the hearing by CVP if they wished to do so.

8. The claimant appeared in person at the hearing. The respondent was represented by Mr English, Solicitor.

9. The parties had exchanged witness statements prior to the hearing. On the first day of hearing the Tribunal read the statements prepared by the witnesses.

10. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative. The Tribunal also heard evidence from the following witnesses for the respondent: Ms Helen Johnstone, Clinical Services Manager (Strengthening Families, Children & Families Care Group); Ms Lyn Durrant (formerly Moore), Assistant Director of Nursing, Children and Young People; Ms Joanne Miles, Clinical Lead – Safeguarding Nurse Team; and Ms Deborah Irving, HR Advisor. Each of the respondent's witnesses was cross examined by the claimant. Ms Miles was recalled to give evidence again after Ms Irving's evidence had been heard, as a result of some documents that had been identified in evidence and provided after her evidence had been completed. The claimant cross examined her further in the light of those documents.

11. The Tribunal was provided with an agreed bundle of documents which ran to 665 pages, with some limited additional documents being added to the bundle in the course of the hearing. The claimant had also produced a supplemental bundle of 56 pages. The Tribunal read only the documents to which it was referred, either in witness statements or in the course of the evidence and hearing

12. As well as the agreed list of issues, the Tribunal was provided with a Chronology and a list of the key people (which was agreed).

13. On the fourth day of the hearing each of the parties made verbal submissions. The respondent also relied upon a written skeleton argument

14. During the course of the hearing the Tribunal took more breaks than would usually be the case. This was both because the hearing was conducted remotely by CVP, and to ensure that the claimant was fully able to conduct the hearing and represent himself.

15. At the end of submissions, the Tribunal reserved judgment and accordingly provides the judgment and reasons outlined below. The Tribunal was grateful to both the claimant and the respondent's representative for the way in which the hearing was conducted.

Facts

16. The claimant's evidence was that he was formerly diagnosed with Dyslexia when he was at University. He had struggled at school but his Dyslexia had not been picked up at that time. When it was diagnosed at University, he was provided with adjustments to things such as reading time for exams and was supplied with a grey overlay which helped him read. The claimant's evidence was that when he looked at a page without the overlay and/or when on screen without adjustment, the words would spin. The Tribunal was provided with no documentation recording the diagnosis. The claimant's evidence was that he had provided a document recording the diagnosis at University to the respondent during his employment, which had not been returned to him (and had been the only copy).

Supervision and the claimant's role in CAMHS

17. Prior to October 2017 the claimant had previously worked as a Mental Health Nurse for a previous NHS employer for approximately ten years. He moved to Cumbria in February 2015 and began working for the respondent. At that time the name of the organisation was different. It was subsequently changed as a result of a reorganisation of NHS services. As nothing material turns on the change in the name of the organisation, this judgment will refer to the respondent throughout albeit at the time the organisation may have had a different title.

18. The claimant previously had a split role in which he worked for both the Youth Offending Service (YOS) and as part of the Child and Adolescent Mental Health Services (CAMHS). The claimant's evidence was that he received all the support he needed as part of the YOS team. However, in the CAMHS team the claimant's evidence was that he did not receive any clinical supervision whatsoever. The claimant's evidence was that as the team in CAMHS reduced over time, he was left feeling unsafe with the size of caseloads and the length of time people waited, as well as finding insufficient time available for him to make the necessary notes in relation to the service users, particularly in the light of his Dyslexia. The claimant's evidence was that he informed his then manager about his Dyslexia. His evidence was that he was entirely open about it. His evidence was also that he explained to his manager the issues he was having on a number of occasions.

19. In his own evidence, the claimant explained how the manager had told him that she had to prioritise her own full-time staff in CAMHS and that she had no time to be the clinical supervisor for the claimant. He described the paperwork as being heavy and requiring completion of a significant amount of forms and letters.

20. The Tribunal did not hear evidence from the claimant's manager at the time as she had left the respondent's employment. There was a summary of a telephone discussion in the bundle, which recorded a conversation between the manager and Ms Johnstone on 3 March 2020 in which she said that both management and clinical supervision had been undertaken with the claimant at the same time.

21. The Tribunal found the claimant to be a credible and genuine witness, however the Tribunal is aware that it has not heard evidence from the claimant's manager at the time about this period. The Tribunal was provided with no documentation whatsoever which evidenced any clinical supervision being undertaken and the paperwork in relation to managerial supervision was somewhat limited and incomplete.

Change of role

22. On 16 October 2017 the claimant's role changed and he moved to working in the Safeguarding Hub full time. Accordingly, the issues raised by the claimant in relation to his then manager and the work undertaken as part of CAMHS, ceased on or around 15 October 2017. Thereafter, the claimant raised no

issue about clinical supervision. The Tribunal was provided with some limited documentation about the respondent investigating thereafter what support it could provide the claimant with undertaking his duties in relation to his Dyslexia.

23. There was no dispute that the role undertaken by the claimant throughout his career in the NHS was one that was emotionally challenging and involved dealing with situations which anybody would find difficult and stressful. The person specification for the claimant's role, to which the Tribunal was referred, refers to an essential personal quality of the role being that the individual *"understands the potential personal impact of safeguarding work on professional and is able to recognise and respond to this sensitively in relation to yourself and others*".

Sickness absence

24. From in or around March or April 2018, the claimant began to experience an increase in anxiety, panic attacks and flash backs. The claimant describes himself as being hyper vigilant and experiencing low moods together with poor sleep. He describes these symptoms becoming more intense and distressing over time.

25. The claimant commenced sickness absence on 24 September 2018. He arranged to visit his GP on the same date. This is when the claimant felt that the symptoms became too significant for him to carry on in his role. In his evidence the claimant explained in considerable detail how these symptoms became much worse at that time, which led to him taking time off work. The records of the GP on 24 September (239) record increasing stress, having flashbacks, constantly feeling ill, sleep issues and not fit for work.

26. The claimant had a good relationship with his manager Ms Myles, and it was his evidence that he informed her about these issues at the time. The claimant did not return to work from this sickness absence. The claimant was thereafter signed off with a series of fit notes which recorded the reason as being "*stress related problems*".

27. The claimant met with Ms Myles regularly during his absence and he kept her informed about his condition and how it was affecting him.

28. An occupational health referral form was completed by the claimant's manager, Ms Myles, on 4 October 2018 (393) which stated that the claimant *"has been signed off for one month as of 24/9/18 with stress related symptoms. He has been feeling increasingly stressed and anxious over the period of the last few months … Matt has found that he has been experiencing what he describes as panic attacks and fluctuations in his mood as well as flashbacks to previous incidents at work and it is likely that the cumulative stress of his current role has contributed to this. Matt has been able to see his GP and they recommended EMDR therapy – we are keen for Matt to be able to access the best support available and would be grateful of your assessment"*.

29. The claimant subsequently saw Dr Andrews, the respondent's Consultant Occupational Physician, on 2 November 2018. His report (397) which was provided to Miss Myles, and confirmed that the claimant's absence was "*due to symptoms of stress*". He stated that the claimant was unfit for work at the time and said that Dr Andrews could not predict with any degree of accuracy when the claimant would be fit to return to work *"as this would require a significant and sustained improvement in symptoms".* Dr Andrews advice was *"I think it might be beneficial to refer Mr Bradley to Dr Vincenti, Consultant Psychiatrist and Mr Bradley would be happy to attend such an appointment. I would, however, need to have the funding for such a referral authorised".*

Relevant policies and documents

30. The respondent has a lengthy attendance management policy and procedure which the Tribunal will not reproduce in this judgment. However, it does record (131) that a referral to occupational health should always be undertaken "*immediately where the absence relates to musculoskeletal problems, stress at work and any accidents occurred at work where the employee is expected to be off for seven days or more*".

31. The other key relevant parts of the procedure are as follows:

    at 3.1.23 (133) it says:

    "F*ast track physiotherapy service – Employees are able to complete a self-referral form to access fast track physiotherapy, which can be found on the intranet. Managers are also able to refer employees with any musculoskeletal conditions immediately if employees are absent from work due to these conditions, using the OH management referral form".*

    and under the heading "Injury Allowance" at 3.11 (140):

    "Eligible employees who have injuries, diseases or other health conditions which are wholly or mainly attributable to their NHS employment will be entitled to an injury allowance, subject to the conditions outlined below and with reference to Section 22: Injury Allowance of the NHS terms and conditions of service handbook. The injury, disease, or other health condition must have been sustained or contracted in the discharge of the employee's duties, or an injury which is not sustained on duty but is connected with or arising from the employees' employment".

32. Section 22 of the NHS terms and conditions of service (181) is incorporated into the claimant's contract of employment, being part of the national collectively agreed terms. That records that eligible employees are entitled to receive injury allowance as a pay top up to 85% for a period of up to twelve months (following receipt of six months full pay and six months half pay, which is the normal sick pay entitlement). Section 22 provides "*Eligible employees who have injuries, diseases or other health conditions that are wholly or mainly attributable to their NHS employment, will be entitled to an injury allowance … The injury, disease or other health condition must have been sustained or contracted in the discharge of the employee's duties of*

employment or an injury that is not sustained on duty but is connected with or arising from the employee's employment. The attribution of injury, illness or other health condition will be determined by the employer who should seek appropriate medical advice.".

33. Section 22 also provides that (182): *"Employees claiming injury allowance are required to provide all relevant information, including medical evidence, that is in their possession or that can reasonably be obtained, to enable the employer to determine the claim".* Section 22 also provides that any dispute is to be determined via the local grievance procedure.

34. It was not in dispute that the claimant had never actually seen the terms of Section 22 and was not aware of the obligation to provide information and did not know the process for challenging or appealing any decision. The respondent at that time did not operate a policy procedure or protocol in relation to injury allowance and it was a common thread through the evidence given by the respondent's witnesses that they expected an employee's trade union representative to inform them about the requirements of the process (albeit the claimant did not have advice from a trade union representative himself).

35. The claimant placed some emphasis upon a document entitled rapid access to treatment and rehabilitation for NHS staff, which was published by NHS Employers in March 2018. That is, it is not a contractual document, but guidance provided for NHS organisations. That document emphasises the importance of rapid access to treatment and rehabilitation and to the benefits that can have for employees. It, in particular, provides (6 of the claimant's bundle) "*There is demonstrable evidence that the facility to self-refer, for example to physiotherapy, is the quickest and most effective way to support employees back to work and in some cases, avoid staff absence altogether*". It also says that Annex 26 of the NHS Staff Handbook recommends that "*to avoid premature and unnecessary ill health retirement employers should consider the following interventions as early as possible (ideally when staff are still in work), and at the latest within one month of an employee taking sick leave".* It goes on to say *"Rapid access recognises the importance of facilitating a rapid return to work for the benefit of the health of the individual, the patient and the organisation".*

Dr Vincenti's report

36. In the period before he saw Dr Vicenti, the claimant was again seen by Dr Andrews on 31 January 2019. He reported on 4 February (399) that there had been no improvement in the claimant's symptoms and confirmed *"Dr VIncenti would be able to undertake an assessment and will be able to give advice regarding diagnosis and treatment options but would not be able to provide that treatment*".

37. The referral to Dr Vincenti recommended by Dr Andrews on 2 November 2018 did not in fact occur until February 2019. The letter inviting the claimant to an appointment with Dr Vincenti was sent to him on 28 February 2019 (400). The respondent's case was that the funding was approved on 15 February 2019,

albeit the claimant was not informed at that time. The respondent's case was that the delay was as a result of approving funding. Dr Vincenti was not an NHS Consultant but a private doctor and the cost of his advice was quoted as being £500. There was some discussion within the respondent before that was approved. The respondent's evidence was that it was exceptional to refer someone outside of the NHS to a private consultant, although not unheard of.

38. The claimant saw Dr Vincenti on 18 March 2019 and a lengthy report prepared by Dr Vincenti was provided to Dr Andrews in a letter dated 21 March (which states that consent to release was given on 22 March). It is not necessary for the Tribunal to reproduce the majority of the content of what is a very full and thorough report. Dr Vincenti diagnosed the claimant as suffering from Post-Traumatic Stress Disorder. He described the impact that condition had upon the claimant and explained that the claimant's symptoms caused such a sufficient degree of mental impairment that he had little doubt that it met the definition of disability (whilst acknowledging that it is not the consultant's role to determine whether the claimant had a disability). The report confirmed what the claimant informed the Tribunal about his Dyslexia. It confirmed that the claimant's PTSD symptoms had increased over the previous year and related to flashbacks of past cases (that is there was not a single trigger event). The report also addressed the complication for the claimant of knowing many of the health professionals in his area, and the difficulty for him of undergoing treatment locally. It stated that Dr Vincenti anticipated that the claimant would recover from his PTSD, but he was less certain whether he would be able to return to nursing.

39. In terms of future symptoms, Dr Vincenti recorded *"If left untreated, the majority of cases of straightforward PTSD show significant improvement in about 50% of cases by the end of one year and, by the end of the two-year point, only 30% of patients report ongoing symptoms. … The situation is not as simple in more complex cases, as here, and I think such is the severity of Mr Bradley's PTSD symptoms and the extent to which they impact upon his day-to-day function, that probably without specific evidence-based treatment he is unlikely to recover spontaneously".*

Subsequent reports

40. Upon receiving the report, the claimant immediately informed Miss Irving of the respondent of his PTSD diagnosis. Dr Andrews briefly summarised what the report had said in a letter of 11 April 2019 (411), although he did not confirm the precise diagnosis. Dr Andrews' letter explained that Dr Vincenti had indicated that the claimant should be delivered up to twenty sessions of psychological therapy, that the claimant could be seen more quickly in a private sector, and that the claimant *"might need to be referred out of area, or some thought given to funding private treatment if that were practicable. However, occupational health would not be in a position to fund such therapy".*

41. Dr Andrews also provided further reports on 23 September and 24 October 2019 (415 and 416). The 24 October was the first time in which the respondent's occupational health physician informed the respondent's

managers of the claimant's precise diagnosis. The same report said *"Therefore, in my opinion, the diagnosed condition seems to have arisen as a result of NHS employment and in my opinion, the criteria for Temporary Injury Allowance would be satisfied".* A further report was provided by Dr Andrews on 6 December 2019 (423) in which he confirmed that the Equality Act would, in his opinion, apply and he stated that the claimant hadn't made any significant or sustained improvement in his symptoms.

42. It was the respondent's evidence that the managers responsible for considering temporary injury allowance only saw Dr Vincenti's report as part of disclosure in the Tribunal proceedings. That is the report was provided on 30 October 2019.

Treatment

43. In terms of treatment, the claimant's evidence was that he found it very difficult to access local treatment because of three things: the difficulty of being treated by somebody he knew; the difficulty of his name being recorded in the system and on the relevant files so that others within the service would know that he was receiving treatment; and the fact that anyone from whom he sought assistance or treatment may be someone with whom he would need to come into contact in the future, even if he did not know them at the time.

44. The evidence of Miss Irving was that the respondent had, on its own website for staff, a link to First Steps (the treatment and support service). Miss Irving's evidence was that that link was one that was also available to any other member of the public who wished to be a service user, it was just hosted on the site to enable such assistance to be easily accessed by employees. The claimant himself was able to access First Steps. His GP would at any time have been able to refer him to First Steps.

45. On 12 February 2019 Ms Irving endeavoured to make contact with the Clinical Director at First Steps in order to see what would could be done for the claimant in order to assist him being referred into First Steps without his name being identified. Following contact with the relevant person on 7 March, Ms Irving was able to arrange for a process whereby as soon as the claimant registered with First Step his notes would be locked down so that nobody else could access that information. As a result, a link was sent to the claimant and he immediately registered with First Steps to receive treatment.

46. The evidence before the Tribunal was that the treatment the claimant received was exactly the same as the treatment that any other service user would have received, save that his records were locked down so that employees could not access them.

47. The claimant's evidence was that once he had been referred to First Steps it would always be very difficult, if not impossible, for him to return to work because of the challenge of needing to work with those who had provided treatment to him.

48. The claimant's statement records that a telephone assessment with First Steps took place on 22 March 2019 and thereafter he was seen by other professionals. The Tribunal was not provided with the exact date upon which the claimant first received treatment.

Injury Allowance

49. The claimant's period of full sick pay expired on 28 March 2019 when he dropped to half pay. On 19 May 2019 the claimant identified from the NHS employers' website that there was an entitlement to injury pay for those injured whilst discharging their duties. He accordingly applied for injury allowance. The Tribunal finds that the claimant did not see, nor was he aware of, the terms and conditions which governed injury allowance (referred to above).

50. On 11 June 2019 Ms Durrant, who was then the Associate Director of Operations Children and Families, met with Ms Irving and Ms Jeffries (both members of the respondent's HR department) to reach a determination on the claimant's application for injury allowance. The Tribunal was provided with some limited handwritten notes of the conversation (522). Ms Durrant was aware of the PTSD diagnosis. Her decision was the claimant would not receive injury allowance as she felt there was insufficient evidence to meet the criteria laid down in Section 22. Ms Durrant did offer to extend the period for which the claimant would be paid sick pay by two months.

51. The Tribunal found Ms Durrant to be a genuine and credible witness and accepted her account of her reasons for rejecting the claimant's injury allowance application. Her reasons did not distinguish between physical or mental impairments, her decision was based upon her consideration of the (limited) evidence available to her and the criteria laid down in section 22 of the terms and conditions document referred to above. In her evidence Ms Durrant acknowledged that someone in a role such as the claimant would face stress as part of the role and it was her view that to receive injury allowance an individual would need to demonstrate more than that stress, and it would need to be demonstrated that it had resulted from their NHS employment.

52. The claimant was not provided with any written outcome to this decision, nor was he provided directly by Ms Durrant an account of the reasons for her decision. Instead, the claimant was provided with an explanation for the outcome by Ms Miles and Ms Irving in a meeting with him on 4 July 2019. There is no record of what was said in that meeting. It is unsurprising that there was a difference in view between the claimant and Ms Durrant as to why his application was rejected, as the reasons were only provided to him by a third party recalling what they believed Ms Durrant had taken into account.

53. As a result of the 4 July meeting, the claimant sent an email to Ms Miles which included two extracts from Dr Vincenti's report (526). Ms Miles sent an email to Ms Johnstone on 8 July 2019 (527) advocating strongly that the claimant be entitled to injury allowance. That email said *"The feedback from Debbie and my understanding is that the PIA for Matt has been declined on the*

grounds that there is an understanding that the type of work he is involved in could have an impact on emotional health". Accordingly, whilst we accept Ms Durrant's evidence about the actual reason for her decision, Ms Miles at the time believed that an assessment of the likelihood of someone suffering adverse mental health in the role filled by the claimant had been a factor in Ms Durrant's decision.

54. Ms Johnstone essentially reconsidered the injury allowance application following a meeting with Ms Miles on 14 August. She provided her response by email on 23 August (534). The Tribunal finds that Ms Johnstone also genuinely endeavoured to apply the Section 22 criteria, based upon the medical evidence that was available to her.

55. Ms Johnstone's decision was recorded in an email sent to Ms Miles, stating that the respondent was unable to support the claimant's claim on the grounds of having insufficient evidence to make an informed decision. The claimant was not sent this outcome, nor was he provided with any written account from the decision-maker. The decision was sent to the claimant's manager only and the claimant was essentially left in the dark about the process that had been followed.

56. After receipt of Dr Vincenti's report, Ms Johnstone reviewed the decision within two days. The result of her further review was that on 1 November 2019 the claimant was informed that Ms Johnstone accepted his request for injury allowance. This was backdated to when the claimant had reduced to half pay, and it was stated that this would be processed through November's payroll.

57. The process followed by the respondent in considering the claimant's injury allowance application was poorly recorded. The respondent failed to adhere to any transparent procedure or process. The claimant was provided with the outcome to a decision made, by those who were not the decision-maker and it was clear that those informing him had not understood the reasons for the decision reached.

58. The respondent's witnesses were keen to emphasise that the claimant was free at any time to provide Dr Vincenti's report in full to them, and, had he done so, he would have received a decision in his favour on the injury allowance earlier. However, there was little or no information provided to the claimant about how he should apply or challenge the process or what it was he needed to show. Nobody informed the claimant about the process for appealing the decision, nor did anyone even provide the claimant with the precise criteria that had been applied. The Tribunal is surprised that no one thought to ask the claimant to disclose (or allow disclosure of) Dr Vincenti's report in full, nor did anyone highlight to the claimant that if he provided Dr Vincenti's report in full the outcome may be changed. The relevant employees of the respondent appear to have assumed that the claimant would have either understood the process and criteria, or have had access to a trade union representative who did. The claimant did not.

Grievance

59. It is not necessary for the Tribunal to recount all the details of the ongoing management of the claimant throughout the relevant period. However, the key relevant dates in relation to a grievance raised by the claimant about his treatment were as follows:-

- On 20 January 2019 the claimant raised a formal grievance;
- On 19 February 2019 the claimant raised a further complaint, as a result of the lack of progress of his grievance;
- In March 2019 Ms Irving compiled a fact-finding report about the issues in the claimant's grievance. Ms Irving could neither remember who had commissioned the report nor who it was provided to. The claimant was not at the time provided with the report and no action seems to have been taken as a result of it. The majority of the report provided a time line of events as they had occurred. Ms Irving's evidence was that she believed that the grievance was being dealt with informally, albeit the report is anything but informal.
- Ms Miles met with the claimant regularly throughout his sickness absence. These meetings took place in a public setting. They were focussed upon discussing the claimant's absence. None of the meetings were formal, none of them had invites, and no minutes were taken of them (in the majority of cases there was no record whatsoever of what was discussed). Ms Miles believed that she was progressing the absence and pay issues which were part of the grievance, but it was her evidence that the Director of Nursing was responsible for dealing with the other elements of the grievance. However, there was no evidence provided to the Tribunal about any progress made in addressing the grievance at all (save as recorded below). The claimant was not advised at any time in writing that his grievance was being dealt with informally or what process was being undertaken;
- Ms Miles had a period of sickness absence which began on 18 October 2019. Thereafter, Ms Johnstone seems to have taken responsibility for the grievance. Ms Johnstone sent the claimant a letter headed "Grievance review update" on 22 October 2019 (558) which summarised a meeting which had been undertaken by Ms Miles which Ms Johnstone had not attended (and the claimant was critical of the fact that the letter did not summarise what had been discussed at all). The letter still did not explain why the grievance was being dealt with in this way and why a formal hearing had not been arranged;
- A grievance meeting was held with the claimant on 6 December 2019, conducted by Ms Johnstone. There were no formal notes provided for that meeting. No written invite was provided to the

Tribunal. The letter informing the claimant of the outcome was sent on 17 February 2020;

- A further grievance outcome letter was sent to the claimant by Ms Johnstone dated 5 March 2020, addressing one of the issues raised by the claimant in the light of further investigation;

- Ms A Stabler, the Interim Chief Nurse, wrote to the claimant on 30 April 2020 (625) addressing the claimant's grievances (albeit it appears without meeting with the claimant). Amongst other things she said "*I wish to apologise on behalf of the Trust for the delays you have encountered in accessing treatment (appointment with Dr Vincenti and appointments with First Steps). I agree that the Trust does need to look into the process for accessing this type of support for our employees*". She also agreed that the grievance process had taken a considerable amount of time, but (rather surprisingly) stated that she was not "*clear how this could have been dealt with sooner*"; and

- The claimant appealed the outcome of his grievance. An appeal hearing took place on 11 May 2020. A lengthy outcome letter was sent on 18 May 2020.

60. The claimant resigned on 14 February 2020 (albeit his grievance letter was dated 14 January but was not sent on that date) (576). That is before the claimant was sent the letter providing an outcome to the grievance.

61. The Tribunal accordingly finds that no formal meeting was arranged in response to the claimant's grievance until ten and a half months after the grievance was raised. An outcome was not provided until thirteen months after it was raised.

62. Whilst some of the respondent's witnesses appeared to believe that the grievance was being dealt with informally, the claimant was never told of that approach. Indeed, there appears to have been a degree of misunderstanding within the respondent about who was dealing with which parts of the grievance (or indeed if anyone was dealing with the grievance at all). It is not surprising that the claimant became confused and disillusioned with the progress of his grievance. At the least, the Tribunal would have expected the respondent to have followed its own formal procedures after the claimant made his further complaint on 19 February 2019 that his grievance was not being addressed.

63. The Tribunal was shown the respondent's grievance policy and procedure (154). Whilst that procedure is somewhat difficult to follow, it appears to involve the following steps in response to a grievance: acknowledgement; a meeting with the manager; an appointed investigating officer; that officer submitting the report to the commissioning manager; a decision being taken; and the complainant being invited to a meeting to receive feedback on the grievance. The Tribunal is unable to identify that any of those steps were complied with by the respondent, save for a meeting occurring on 6

December 2019 and two outcomes being sent to the claimant a number of months afterwards.

The Law

The Relevant Law

Disability

64. Section 6 of the Equality Act 2010 provides that:

"A person (P) has a disability if:

(a) P has a physical or mental impairment, and

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

65. Section 212 of the Equality Act 2010 provides that "substantial" means more than minor or trivial.

66. Schedule 1 Part 1 of the Equality Act 2010 includes further provisions regarding determination of disability. For the purposes of this hearing the key provision is paragraph 2 which provides that:

"The effect of an impairment is long-term if:

(a) It has lasted for at least 12 months;

(b) It is likely to last for at least 12 months; or

(c) It 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 normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur"

67. The tribunal has taken account of the guidance on matters to be taken into account in determining questions relating to the definition of disability, issued by the Secretary of State. That guidance confirms that "likely" should be interpreted as meaning that it could well happen.

68. The onus is on the claimant to prove that the relevant condition was a disability at the relevant time.

Time limits/jurisdiction

69. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (with the applicable extension arising from ACAS Early Conciliation), or such other period as the Tribunal thinks just and

equitable. Conduct extending over a period is to be treated as done at the end of the period.

70. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** makes it clear that the focus of inquiry must be on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible, in which the claimant was treated less favourably.

71. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Factors relevant to a just and equitable extension include: the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings); the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed; the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application; the conduct of the claimant over the same period; the length of time by which the application is out of time and the reason for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim; and the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

72. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. The factors are outlined in **British Coal Corporation v Keeble [1997] IRLR 336** and **Department of Constitutional Affairs v Jones [2008] IRLR 128**.

Discrimination

73. The claimant claims direct discrimination because of the protected characteristic of disability. The claimant has not identified a named comparator, so the question is whether he has been less favourably treated than a hypothetical comparator.

74. Section 6(3) of the Equality Act 2010 provides, in relation to disability, that:

"**a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability; a reference to persons who share a protected characteristic is a reference to persons who have the same disability**"

75. Section 13 of the Equality Act 2010 provides that:

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

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."

76. In this case, the respondent will have subjected the claimant to direct discrimination if, because of his disability, it treated him less favourably than it treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case.

77. Section 15 of the Equality Act 2010 provides that:

"(1) A person (A) discriminates against a disabled person (B) if

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

78. Section 19 of the Equality Act 2010 provides that:

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

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

(*a*) A applies, or would apply, it to persons with whom B does not share the characteristic,

(*b*) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(*c*) it puts, or would put, B at that disadvantage, and

(*d*) A cannot show it to be a proportionate means of achieving a legitimate aim."

79. Sections 20 and 21 of the Equality Act 2010 say:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

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

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

80. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee: as to the terms of employment; in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; or by subjecting B to any other detriment. It is only where the discrimination comes within the employment provisions – that is the employment field – that the Tribunal has jurisdiction to determine the complaint. Other complaints about the provisions of goods and services can be brought and determined by the Courts, but the Tribunal does not have jurisdiction to determine such complaints.

81. Paragraph 19 of Schedule 9 of the Equality Act 2010 includes the following exception to the employment provisions of the Act:

"**A does not contravene a provision …in relation to the provision of a benefit, facility or service to B if A is concerned with the provision (for payment or not) of a benefit, facility or service of the same description to the public. This does not apply if the provision by A to the public differs in a material respect from the provision by A to comparable persons.**"

82. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

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

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".

83. In short, a two-stage approach is envisaged:

i. at the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than his hypothetical comparator and that he has a disability and they do not share that disability; there must be some more.

ii. the second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

84. In **Shamoon v Chief Constable of the RUC [2003] IRLR 285** the House of Lords said the following:

> **"employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as he was, and after postponing the less favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason?"**

85. In **Johal v Commission for Equality and Human Rights UKEAT/0541/09** the EAT summarise the question as follows:

> **"Thus, the critical question we think in the present case is the reason why posed by Lord Nicholls: "Why was the claimant treated in the manner complained of?""**

86. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867**. In order for the burden of proof to shift it is not enough for a claimant to show that there is disability and not, and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

87. Further, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.**

88. The Tribunal took into account the content of the EHRC Code of Practice on employment and, in particular: section 5 as it relates to disability related discrimination and identifying the something arising when considering such a complaint; and sections 6.19-6.22 on employer's knowledge and the duty to make

reasonable adjustments. 6.19 says that, in respect of reasonably being expected to know that an employee has a disability, that "**The employer must, however do all they can reasonably be expected to find out whether this is the case"** (and the Tribunal noted the example given at 6.19). 6.21 says:

> "**If an employer's agent or employee (such as an occupational health asdvser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's…disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment….information gained by the OH adviser on the employer's behalf is assumed to be shared with the employer, the OH adviser's knowledge means that the employer's duty under the Act applies"**

89. In terms of knowledge of disability and reasonable adjustments, the duty only applies if the respondent: knew or could reasonably be expected to know that the claimant had the disability; and knew or could reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage compared with persons who are not disabled (that is aware of the disadvantage caused by the application of the PCP). The question of whether the respondent could reasonably be expected to know of the disability and/or the substantial disadvantage is a question of fact for the Tribunal. The focus is on the impact of the impairment and whether it satisfies the statutory test and not the label given to any impairment (**Jennings v Barts and The London NHS Trust UKEAT/0056/12**).

90. The Tribunal identified and highlighted to the parties the decision of the Court of Appeal in **Tiplady v City of Bradford Metropolitan District Council [2019] EWCA Civ 2180**. Whilst that is a Judgment regarding whistleblowing, Underhill LJ provides a detailed analysis and explanation of the way in which claims under the Equality Act 2010 in the Tribunal are limited to detriment in the employment field. He says:

> **"I find it most helpful to start with the position under the discrimination legislation. I do not believe that Lord Hope's statement in *Shamoon* formally constitutes binding authority. Nevertheless, it is highly persuasive, and I respectfully believe that it is right: that is, I believe that the structure and language of the pre-2010 legislation means that the phrase "any … detriment" should be understood to refer to a detriment to which the employee has been subjected "in the employment field". As Lord Hope says, that imposes a limitation on the otherwise broad meaning of the phrase, and it has the result that some detriments to which an employee may be subjected by an employer on a protected ground cannot be complained of in the ET.**
>
> **…. The particular point that Keith J makes at para. 22 of his judgment about the importance of employees of public authorities not being in a better position than other citizens is also cogent, but it derives from the more basic point that it is an integral part of the structure of the legislation that it is necessary to characterise detriments as arising in either the employment field or some other field.**

> **Although *Shamoon* and *Martin* were concerned with the predecessor legislation I have no doubt that the position is the same under the 2010 Act. The headings to the relevant Parts no longer use the language of "fields", but the division of protection between different kinds of relationship, enforceable in different tribunals, is retained, and the essential basis of Keith J's reasoning is unaffected."**

and, later in the Judgment:

> **"There remains the question of how exactly a detriment is to be recognised as arising, or not arising, "in the employment field": what are the boundaries of the field? Lord Hope did not have to consider this in *Shamoon*, and *Martin* was a plain case because it concerned the exercise of public powers which clearly fell in a different "field" under the 1976 Act. … I do not think the boundaries of the employment field should be drawn narrowly…There are bound on any view to be borderline cases, and I do not think that it would be right for us in this case to attempt any kind of definitive guidance."**

91. The respondent placed emphasis on two particular authorities: **Pnaiser v NHS England [2016] IRLR 170** (which provides guidance on the correct approach to discrimination arising from disability); and **Dunn v Secretary of State for Justice [2019] IRLR 298** (which is provided as authority for the fact that an arcane and unwieldy process does not necessarily mean it is discriminatory).

92. Simler J's guidance in **Pnaiser**, says:

"From these authorities, the proper approach can be summarised as follows:

> **(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
>
> **(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**
>
> **(c) Motives are irrelevant. ….**
>
> **(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of**

> **B's disability'. That expression 'arising in consequence of' could describe a range of causal links. ….**
>
> **(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.**
>
> **(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.**
>
> **(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed."**

93. In **Dunn** Underhill LJ highlights at paragraph 44 that if the ill-health retirement process followed (in that case) was inherently "*defective***"** in the ways found by the Tribunal in that case, it did not follow that it was "*inherently discriminatory*". An argument that a claimant would not have been the victim of delay and incompetence if they were not disabled, is not the sort of causation which is sufficient to constitute direct discrimination.

Applying the law to the facts/Discussion

94. In reaching its decision the Tribunal followed the list of issues which had been agreed at the start of the hearing as the matters that needed to be determined.

Disability - dyslexia

95. The claimant's evidence, which the Tribunal finds to be truthful, was that his dyslexia was a lifelong condition, albeit it had only been diagnosed when he was at University. His evidence was that at University the equipment he needed was identified. The claimant himself gave evidence about words spinning and the benefits he received from a grey screen.

96. The medical evidence available to the Tribunal was somewhat limited. Dr Vincenti's report provides corroboration from a medical professional that the claimant had in fact been diagnosed with Dyslexia, the date of diagnosis, and what the claimant said was the impact that it had upon him.

97. Applying the test outlined in the law section above:

a. the condition is long term because it has lasted for the whole of the claimant's life;

b. it did (and still does) have an impact on the claimant's ability to undertake day to day activities in terms of reading documents and screens, and writing documents and reports; and

c. the impact of the claimant's dyslexia on his ability to undertake day to day activities was substantial.

98. In respect of the key question of whether the impact was substantial, the respondent emphasised that the equipment that the claimant described had not been available for him while had worked with the respondent. However, as substantial means more than minor or trivial (and not something more significant), the Tribunal finds that the impact of the claimant's Dyslexia on his ability to undertake normal day to day activities, such as reading documents or computer screens, was more than minor or trivial. The Tribunal finds, based upon the claimant's evidence, that he could get by at work with various coping mechanisms and had utilised them during his employment with the respondent, but the fact that he could and did do so does not mean that the claimant's Dyslexia had (and still has) an adverse effect on his ability to carry out reading of documents and screens which is more than minor or trivial.

99. In terms of knowledge, it was the claimant's evidence that he told the respondent about his Dyslexia from the start of his employment and that, in particular, he informed his manager. His evidence was also that he had provided the report from the University to the respondent. His evidence was that he was open about it. There was no evidence from the respondent which contradicted the evidence of the claimant. Accordingly, the Tribunal finds that the respondent knew about the claimant's Dyslexia from the start of his employment, or shortly afterwards.

Disability- PTSD

100. In submissions the respondent accepted that the claimant's PTSD did amount to a disability, but argued that it was not a disability at the relevant time. The respondent contended that the PTSD only became a disability as at either: the date of Dr Vincenti's report (21 March 2019); or twelve months after that - when it had been long term (March 2020). In his submissions, the claimant's case was that his PTSD had developed, to the extent where it fulfilled the Equality Act 2010 definition of disability, when his sickness absence commenced, that is on 24 September 2018.

101. The Tribunal has particularly taken into account: the records of the GP on 24 September; the series of fit notes which record the claimant as not fit for work; Dr Vincenti's report; and the claimant's own evidence.

102. Dr Vincenti's report contains a very full and thorough medical diagnosis of the claimant's condition and the impact it had on his day to day activities – the detail of which it is not necessary for the Tribunal to fully reproduce in this judgment. Dr Vincenti recounts the claimant as, at that time (21 March 2019), having been struggling to cope over the past year and records flashbacks as occurring in that time period. It is clear from Dr Vincenti's report that he was not diagnosing only that the claimant had developed PTSD at the date of the appointment, but rather he was diagnosing what had been the claimant's condition throughout the preceding period. It is clear from the report that the condition had increased in intensity and significance in the period leading up to the claimant's absence.

103. As of 24 September 2018, the claimant was not fit for work. At that time the impact of the condition upon the claimant was not minor or trivial. It clearly impacted upon his ability to undertaken normal day to day activities. That is evidenced by the claimant himself and the notes recorded by the GP.

104. Dr Vincenti's report includes an account about PTSD and when peoples' conditions normally improve. He makes it clear that, for the majority of people, PTSD lasts longer than a year. He records that the majority of those with straightforward PTSD would only show a significant improvement by the end of a year. As recorded above, he places the claimant's PTSD in the category of more complex cases and therefore the severity and extent of impact is more significant for him and he recorded it was unlikely he would recover spontaneously. As a result, as at the date of the report, the claimant's condition was long term, in that it was likely to last longer than a year.

105. The significant worsening in the claimant's condition occurred on or around 24 September 2018. Based upon Dr Vincenti's report, as the claimant appears to have developed PTSD at that time (albeit undiagnosed), it was also likely that the claimant's PTSD (and the impact it had on his day to day activities) was going to be long term from the time when his absence commenced, as it was likely to last for more than a year (at that time). It is possible that the condition might have met the definition of disability earlier than 24 September 2018, but the Tribunal does not have the evidence to determine that. The fact that the impact of the claimant's PTSD did in fact go on to be substantial and adverse for a period of significantly longer than a year after 24 September 2018 provides some corroboration for the fact that as at that date it was likely to do so, but is not the basis for the Tribunal's decision. As the claimant's condition was not one triggered by a single event it is more difficult to determine when it first became a disability, but the Tribunal finds that the claimant had a disability from 24 September 2018, that is the date proposed in his submissions.

106. In terms of the respondent's knowledge, it is the case that the respondent was only informed the precise diagnosis on 18 March 2019. However, the respondent knew that the claimant was absent from 24 September 2018 and the notes provided record that this was stress related absence. There is no dispute that the claimant kept Ms Miles informed about his absence and the reasons for it and they met regularly during his absence and spoke about the reasons for it from the time when the absence commenced.

107. It is clear from the wording of Ms Miles' referral to occupational health on 4 October 2018 that she (and therefore the respondent) was aware of the seriousness of the claimant's condition and the impact that it was having upon him at that time. Dr Andrews report of 2 November 2018 also makes clear that he knew of the seriousness of the claimant's condition and he both records that it would require a significant improvement in the claimant's symptoms for him to be able to return to work (while explaining that he couldn't say with accuracy when that would be) and making the unusual proposal that the claimant should be referred to Dr Vincenti, a private Consultant Psychologist.

108. Applying what is said in paragraphs 88 and 89 above and in the light of Mr Andrews' knowledge being that of the respondent, the Tribunal finds that the

respondent was aware of the claimant's PTSD disability on 2 November 2018, or at least could reasonably have been aware of it by that date. As the precise condition from which the claimant suffered was not diagnosed until 21 March 2019 the respondent was not aware of that diagnosis, as indeed no one was. Knowledge of the precise diagnosis is not required for a condition to amount to a disability. The respondent was aware of the claimant's impairment, the impact it had upon him, and the seriousness of that impact (including the fact that it was likely to be long term) by 2 November 2018.

Limitation/time limits

109. In relation to the claimant's complaints, these essentially breakdown into three separate elements as follows:-

a. the claimant's complaints about the lack of clinical supervision and time for him to undertake paper based work, and the issues in the CAMHS service;

b. the decisions made in relation to obtaining a medical assessment and/or treatment for the claimant, while in the Safeguarding Hub;

c. the respondent's decision regarding the claimant's application for injury allowance.

110. The agreed position was that anything which occurred prior to 13 April 2019 was out of time and the Tribunal did not have jurisdiction to consider it, unless it was part of a continuing act which ended on or after that date, or it was just and equitable to extend time.

111. With regard to (c) - the claimant's application for injury allowance and the determination of it, that was clearly in time. Indeed, the respondent only made the decision to approve injury allowance long after proceedings had commenced.

112. With regard to (a) - the alleged failings in clinical supervision and the requirements in relation to paperwork, these matters ceased on 16 October 2017 when the claimant moved into his new role. The claim was entered on 22 July 2019, over twenty one months after that date, being therefore eighteen months out of time.

113. In considering whether it would be just and equitable to extend time for issues (a), the starting point is that time limits are there for a good reason and this claim was entered significantly out of time. The respondent identified prejudice which it had suffered, being that two witnesses have left the Trust (including the key witness on the issues); the service was no longer part of the Trust; and the Trust was unable to locate some records relating to it. There is significant prejudice to the claimant, as he is not able to have these claims determined. There was no particular reason why the claimant had not entered his claim in time. While his ill health may have had an impact upon him following September 2018, that was already eleven months after the acts complained of. The claimant was as able as anyone else to research time limits and to make a claim. The claimant did not receive legal advice until after his claim was entered. Whilst the respondent's conduct in addressing the claimant's grievances might have been a relevant factor in considering whether it was just and

equitable to extend time, the claimant's grievance itself was only raised fifteen months after the issues complained of (meaning that it is not a significant factor). Issues (a) are not part of a continuing act in relation to the other issues, being very much discrete and specific to the CAMHS service.

114. As a result, the Tribunal finds that it is not just and equitable to extend time for issues (a). The claimant could have claimed at any time. The claim is significantly out of time, there is no reason for not entering the claim in time, and there is significant identified prejudice to the respondent of the delay. Accordingly, the Tribunal does not have jurisdiction to determine these issues.

115. With regard to (b) - regarding assessment and treatment, the appointment with Dr Vincenti took place on 18 March 2019, albeit that the appointment was arranged by letter of 28 February 2019. With regard to the complaints related to the obtaining of treatment, a telephone appointment with First Steps was arranged on 7 March and undertaken on 22 March 2019. Whilst, arguably, the alleged less favourable treatment only ceased when the claimant was actually seen by a medical professional, as the Tribunal is not aware of the date when that occurred it can only consider the time limits with regard to the dates relating to the telephone appointment. Those dates are earlier than 13 April and therefore the claims are out of time.

116. In considering whether it is just and equitable to extend time for these allegations, the Tribunal has applied the factors outlined above and starts with many of the same factors as explained at paragraph 113. However, some of the factors differ significantly for these allegations to those explained for allegations (a). The last dates for the breaches of the duty alleged were less than five months before the claim was entered (for the assessment being arranged) or four months (for the treatment commencing). The claims were entered, at most, two months out of time, and arguably less. The respondent has identified no specific prejudice as a result of the delay and indeed has fully defended the claims, calling the witnesses that it wished to on the issues (the respondent does have the prejudice, if time is extended, of having to defend the claims). If the claimant is not able to have these claims determined, it will be a significant prejudice to him. At the time that the claimant was due to enter his claim he was unwell, having substantial health issues, providing a reason for the delay. The respondent's delay in dealing with the claimant's grievance is also a relevant factor, albeit in the Tribunal's view not a significant one. Balancing all of these matters and, in particular, the relative prejudice to the two parties, the Tribunal finds that it is just and equitable to extend time for these claims (c) to be heard.

Direct Discrimination

117. At the start of the hearing the claimant was asked to confirm the direct disability discrimination claim that he was pursuing. The claimant's claim was that people with musculoskeletal injuries would be fast tracked when those with his condition (or any mental health condition) were not. In pursuing this claim, the claimant placed reliance on the Trust policy detailed in its attendance management policy and procedure (as recorded at paragraphs 30 and 31). Comparing himself to a hypothetical comparator with a musculoskeletal condition who needed treatment, the claimant alleged that he was treated less favourably by having to wait for

assessment and treatment rather than being fast tracked in the way outlined in the policy. This was not a comparison about the speed with which PTSD treatment would be provided, but was a claim about the approach to the speed of treatment which differed for different types of condition (PTSD contrasted with musculoskeletal).

118. The respondent contended that the claimant was able to obtain treatment by way of a fast track, because he could have been referred by his GP. The respondent also contended that the claimant was seen by Dr Andrews relatively quickly and endeavoured to provide explanations for any delay in treatment.

119. The Tribunal does not agree with the claimant's identified hypothetical comparator. When considering this issue, the circumstances must not be materially different. The correct comparator needs to be identified in the light of the treatment alleged and what the claimant was seeking. The Tribunal finds that the correct hypothetical comparator for this direct discrimination claim is someone seeking assessment and/or treatment for a mental health condition, not someone seeking a different type of treatment. When undertaking this comparison using a hypothetical comparator who is any other employee of the Trust seeking treatment for a mental health condition, the Tribunal finds that the comparator would have been treated in the same way as the claimant.

120. In reaching this decision, the Tribunal is reassured that this analysis is correct by the implications which would otherwise result from simply comparing the claimant with someone with a different condition and the access to fast track treatment for the other condition. To consider as an example an employer who chose to provide enhanced or quicker treatment for those with mental health conditions (as is increasingly becoming common for many employers tackling stress related illnesses), if an employee with a different condition was simply able to refer to the lack of fast track treatment as being direct discrimination, it would enable any employee with any physical impairment to allege discrimination and to succeed. The Equality Act does enable employers to treat people with disabilities more favourably, and that must include being able to treat people with some conditions more favourably than those with other conditions in terms of access to the treatment required. That is employees with some conditions may be particularly assisted by an employer, without that being direct discrimination against those with another condition.

121. Accordingly, the Tribunal does not find that the claimant was less favourably treated because of his PTSD. The claimant's direct discrimination claim does not succeed.

Discrimination arising from disability

122. The claimant's claim for discrimination arising from disability was based upon the alleged refusal of the respondent to provide paperwork time and clinical supervision. This allegation relates entirely to the claimant's period while working in CAMHS, which ceased on 16 October 2017. That is, this is a claim which falls into category (a) addressed in respect of limitation and time limits above. For the reasons outlined, the Tribunal has determined that it does not have jurisdiction to consider

this complaint which is brought out of time and it is not just and equitable to extend time.

123. Whilst the Tribunal has accepted the claimant's evidence, the Tribunal has not had the benefit of hearing evidence from the claimant's manager at the time. The Tribunal does not make any findings with regard to this allegation, as it does not have the jurisdiction to determine it.

124. The Tribunal would emphasise that it is aware of the value of clinical supervision and does not underestimate the strength of the claimant's complaints in this respect. However the claimant's claim of indirect discrimination does not succeed for the reasons given.

Indirect Discrimination

125. The claimant's complaint of indirect discrimination was in respect of the lack of support and clinical supervision for mental health nurses whilst working in CAMHS. This was also a claim which falls into category (a) addressed in respect of limitation and time limits above. For the reasons outlined, the Tribunal has determined that it does not have jurisdiction to consider this complaint which is brought out of time (as the period in which he alleges he was unsupported ceased on 16 October 2017) and it is not just and equitable to extend time.

126. In any event, the claimant pursues this allegation based upon his PTSD rather than his Dyslexia. The Tribunal has found that as at 16 October 2017 the claimant's PTSD was not a disability. It first became a disability from 24 September 2018. The claimant cannot have been indirectly discriminated against, relying on his PTSD, in the period ending in October 2016.

127. The final part of this indirect discrimination claim (recorded as issue 11(c) above) was that the claimant alleged that he did not receive injury allowance, which was the disadvantage suffered as a result of the application of the PCP. The PCP relied upon was "…*the requirement of no mental health support or supervision for mental health nurses*". The non-receipt of injury allowance was evidentially not something which occurred as a result of the failure by the respondent to provide clinical support or supervision. This might have been a potential remedy issue if the indirect discrimination claim had succeeded, but it is not found to be a disadvantage which resulted from the PCP relied upon.

128. With regard to the claimant's injury allowance application more generally, the Tribunal does find that the process followed by the respondent was one which could and should have been easily adjusted. The respondent was aware that the claimant had been off sick for a substantial period of time and was aware of the diagnosis of PTSD at the time it considered the claimant's injury allowance application. As detailed at paragraphs 55 and 56 above, the Tribunal has found that there were failings in the process followed by the respondent. Had the claimant presented a complaint that the respondent had failed in its duty to make reasonable adjustments and had he identified a PCP which had been applied, it is entirely possible that the claimant might have succeeded in a claim. However, that was not a claim before the

Tribunal and, in respect of the indirect discrimination claim pursued, the claim does not succeed.

Failure to make reasonable adjustments

129. The reasonable adjustments alleged fall into category (b) as outlined above in relation to time limits. As a result and as explained, the claims were entered outside the primary time limit, but the Tribunal has found that it was just and equitable to extend time.

130. In considering the claimant's failure to make reasonable adjustments claim, the Tribunal has considered this separately for the question of assessment and treatment.

131. In the list of issues, the provision, criterion or practice recorded was the requirement of not providing mental health support or treatment out of area. However, in the course of the hearing, the PCP was clarified and identified in more detail. As is clear from the wording used in the list of issues, the precise way in which the reasonable adjustment claim was brought was not something which had been identified with any specificity prior to the hearing and it did in fact become clearer during the hearing (the issues not having been identified with the same particularity for this allegation). What the claimant relied upon was not simply a PCP of not providing mental health support or treatment out of geographic area. It was also:

a. in relation to the provision of assessment, the requirement that the assessment would only be undertaken by a Trust employed doctor and not another provider (such as one out of area or providing a private service); and

b. in relation to treatment, the requirement that the treatment be provided by the respondent service in the same way as for others.

132. With regard to assessment, the PCP applied was that the claimant would only be referred to a Clinical Psychologist who worked for the Trust (at least without exceptional agreement). This placed the claimant at a significant disadvantage because it was recommended by Dr Ashworth on 2 November 2018 that the claimant be seen by Dr Vincenti, a doctor who did not work for the Trust. This was not arranged until 18 March 2019, with the appointment being confirmed in a letter of 28 February 2019. The delay in the claimant seeing Dr Vincenti was a substantial disadvantage (when compared to those who do not share the claimant's disability).

133. The period between 2 November 2018 and 18 March 2019 was a significant delay, as was the delay to 28 February 2019 when the referral was arranged. The referral only occurred almost three months after it was recommended by Dr Ashworth, and over five months after the claimant's absence had commenced. The Tribunal cannot understand why it took so long for the referral to be approved and made, and the delay is not reasonable. Some limited delay between Dr Ashworth's recommendation and the appointment being arranged/occurring would have been understandable, but the time from when the report of Dr Andrews made the recommendation that the claimant should see Dr Vincenti and it occurring, was a significant one. The significance of that delay for the claimant (and those with

comparable conditions) is demonstrated by what is said in the NHS Employer's rapid access to treatment and rehabilitation for NHS staff document, detailed at paragraph 35 above (and relied upon by the claimant).

134. The Tribunal finds that referring the claimant to a Clinical Psychologist not employed by the Trust was a reasonable adjustment for the respondent to make. It cost only approximately £500. The Trust did ultimately authorise that expenditure, which of itself is relevant in demonstrating that the adjustment was reasonable. It is an adjustment that the respondent ultimately did make for the claimant.

135. The Tribunal finds that the significant delay in doing so, means that the respondent did breach its duty to make reasonable adjustments for the period from 2 November 2018 until the referral took place on 28 February 2019. As a result, and for that period, there was a failure by the respondent to comply with its duty to make reasonable adjustments. Thereafter, the respondent did make the reasonable adjustment required.

136. As outlined above, the Tribunal is only able to determine issues in the employment field, applying the guidance outlined above from **Tiplady**. The facts of this case mean that it is on the boundary of the employment field, as it is described in that Judgment. For the assessment and the adjustment sought, that is a matter which could arise for any employer undertaking any occupational health referral. The assessment undertaken was part of the occupational health referral provided to the claimant as an employee, and was not something provided to the public by the respondent. The boundary of the employment field should not be drawn narrowly. The Tribunal finds that this falls within the employment field.

137. In relation to the treatment, the respondent did operate a practice that the treatment would not be provided out of area, and the treatment would be provided by people who were (or might be) the claimant's professional colleagues. The Tribunal finds that the claimant was placed at a substantial disadvantage by the application of the PCP because he found it difficult to access treatment and support for his mental health because: he didn't want to be treated by those he worked with; he was concerned about confidentiality; and he didn't want to work in future with those who knew about his mental health. The Tribunal accepts that the claimant was at a disadvantage and understands why he would be at a disadvantage if he was entered into the system and treated by those he knew, and with those he knew being aware that he was being treated. In a Trust providing mental health services it would seem reasonable for an organisation to make some adjustments to protect the anonymity of those being treated and to take steps to avoid professional embarrassment (and the claimant's evidence was that other Trusts do). For the reason explained below, the Tribunal does not need to determine whether there was a failure by the respondent in this case to make a reasonable adjustment. In terms of confidentiality, the Tribunal does find that (as explained at paragraph 45) Ms Irving made her best endeavours to sort out a confidential referral process and therefore in that respect the Trust did make an adjustment to enable the claimant to be referred without his colleagues seeing that he was being treated and the details of that treatment. The Tribunal also acknowledges the respondent's contention, that those who treated the claimant would themselves be bound by professional duties of confidence.

138. However, the Tribunal's finding is that the answer to whether what is alleged falls within the employment field, is different for treatment than assessment. The Tribunal is only given jurisdiction to determine matters in the employment field. As confirmed, the Tribunal has, in particular, taken account of the guidance in **Tiplady** First Steps is a public service which is available to any service user. The evidence to the Tribunal was that anybody could access it and that, once an employee accessed the service, they were in the same position as any other NHS service user. The claimant could have accessed the service by being referred by his GP (albeit that would not have addressed his confidentiality concerns). Whilst HR did provide a link to access First Steps and, in this case, did take steps to assist in achieving a lockdown of notes, neither of those steps are a fundamental part of the service provided nor do they mean that the service provided differed in any material respect to that provided to the public.

139. As a result, the Tribunal finds that the provision of treatment by First Steps to the claimant is not something which falls in the employment field and therefore is not a detriment for which the respondent can be liable under (collectively) sections 21, 22 and 39 of the Equality Act 2010.

140. The Tribunal also finds that under the provisions of paragraph 19 of Schedule 9 of the Equality Act 2010, this was a service of the same description with which the respondent was concerned with the provision to the public. The provision to the public did not differ in a material respect from that provided to the claimant. Whilst the Tribunal has considered whether the locking down of the notes meant that this service was materially different, it finds that it was not.

Conclusion

141. Accordingly, the Tribunal's decision can be summarised as follows:

a. The respondent did fail to comply with its duty to make reasonable adjustments, in relation to the provision of assessment, when applying its PCP that the assessment would only be undertaken by a Trust employed doctor and not another provider, and not making the reasonable adjustment of referring to a non-Trust employed Doctor (in this case Dr Vincenti) during the period from 2 November 2018 until 28 February 2019;

b. The Tribunal does not have jurisdiction to consider the claimant's complaints of discrimination arising from disability and/or indirect discrimination;

c. The claim for direct disability discrimination is not found;

d. The Tribunal does not have jurisdiction to consider the claimant's other claim for a breach of the duty to make reasonable adjustments (with regard to treatment), because that is not a claim in the employment field and/or it falls in the exception contained in paragraph 19 of Schedule 9 of the Equality Act; and

e. The claimant's claim for unlawful deduction from wages does not need to be determined as the claimant was paid the sums sought by the respondent, after the claim was issued.

Remedy

142. The case will need to be listed for a Remedy Hearing. The hearing will be listed for one day. The following directions are made in relation to that remedy hearing:-

(i) If either party wishes to rely upon any documents other than those already included in the bundle provided to the Tribunal, they must be sent to the other party (together with a list) no later than 28 days after the date when this judgment is sent to the parties;

(ii) The claimant is to write to the respondent to confirm the remedy which he seeks for the claim in which he has succeeded by no later than 28 days after the date when this judgment is sent to the parties;

(iii) The respondent is to respond to the claimant in writing to explain whether it agrees with the remedy sought by the claimant and if it does not, why not. That is to be done 14 days after receipt of the document from the claimant; and

(iv) No later than 7 days before the date for which the case is listed for a remedy hearing, if either party wishes to call any further evidence in relation to remedy (including any evidence from the claimant himself), a statement of that evidence must be sent to the other party containing the evidence that will be given. A party will be able to rely upon witness evidence already given at the liability hearing.

Employment Judge Phil Allen
14 October 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
16 October 2020

FOR THE TRIBUNAL OFFICE