



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Ojo

**Respondent:** The Home Office

**Heard at:** London Central (by CVP)

**On:** 2, 3, 4, 7 and 8  
November 2022

**Before:** Employment Judge H Grewal  
Mr R Miller and Ms J Tombs

## Representation

**Claimant:** Ms E King, Counsel

**Respondent:** Mr D Bayne, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that:

1 It does not have jurisdiction to consider complaints of disability discrimination about any acts or failures that occurred before 30 December 2020.

2 The complaints of disability discrimination about acts or failures that occurred on or after 30 December 2020 are not well-founded.

# REASONS

1 In a claim form presented on 13 April 2021 the Claimant complained of automatic unfair dismissal and disability discrimination. Early Conciliation ("EC") was commenced on 29 March 2021 and the EC certificate was granted on 30 March 2021.

## The issues

2 The issues to be determined were discussed at two preliminary hearings at which both parties were legally represented. They were agreed and finalised at the second preliminary hearing on 1 April 2022. At the start of the hearing before us the Claimant produced an amended list of issues. The Respondent objected to the amended list of issues to the extent that it changed the Claimant's case from what had been pleaded in the grounds of complaint. The Claimant withdrew the complaints of automatic unfair dismissal and victimisation under the Equality Act 2010. Having considered the submissions of both counsel and looked at the grounds of complaint, we concluded that the issues that we had to determine were as follows.

2.1 It was not in dispute that the Claimant was disabled at the material time by reason of schizophrenia.

### Direct disability discrimination

2.2 Whether the Respondent did, or failed to do, any of the following acts and, if it did, whether, because of the Claimant's disability, it treated him less favourably than it treated or would have treated others (the Claimant relied on Esra Agin as an actual comparator and also on a hypothetical comparator):

- i. It did not provide the Claimant with proper and/or adequate support during his probation and extended probation.
- ii. It did not provide the Claimant with proper and/or adequate training during his probation and extended probation.
- iii. It allocated the Claimant excessive workloads during his probation and extended probation.
- iv. Mr Rockall declined the Claimant's request for written performance on his feedback from 1 July 2019 to 20 March 2020. Instead he was given verbal negative feedback.
- v. Mr Talati demanded that the Claimant report his work output statistics to him on a daily basis.
- vi. In an email dated 30 November 2020 Mr Talati asked seven members of his team to check the work that the Claimant produced daily and to provide him with a short summary on his performance at the end of the day.
- vii. Mr Talati and others bombarded the Claimant with excessive emails often with negative feedback about his work performance, and failed to acknowledge any positive aspects of his performance.
- viii. Mr Talati required and/or compelled the Claimant to attend daily performance meetings with him outside working hours.
- ix. It dismissed the Claimant on 13 January 2021.

### Discrimination arising in consequence of disability

2.3 Whether the Respondent treated the Claimant unfavourably by doing or failing to and any of the following acts:

- i. Requiring the Claimant to attend performance management meetings outside of working hours.
- ii. Subjecting the Claimant to an excessive workload by requiring him to report to his manager on a daily basis.
- iii. Requiring the Claimant to meet performance targets.
- iv. Dismissing the Claimant.

2.4 If it did, whether it did so because of something arising in consequence of the Claimant's disability. The Claimant's case was that the Respondent did the above acts because he was slow in performing mental tasks and that that was something that arose in consequence of his disability.

2.5 If the Claimant was treated unfavourably because of something arising in consequence of his disability, whether the Respondent could show that the treatment was a proportionate means of achieving a legitimate aim.

#### Harassment

2.6 Whether the Respondent subjected the Claimant to disability-related harassment by doing or failing to do any of the following acts:

- i. The acts listed at paragraphs 2.2 and 2.3 (above).
- ii. Mr Rockall declined the Claimant's request for someone else to carry out a proof reading of minutes of meeting and report before the Claimant could confirm the report.
- iii. It caused the Claimant to be constantly afraid of his employment being terminated.
- iv. Mr Talati confronted the Claimant about early starts.
- v. During meetings Mr Talati subjected the Claimant to one way conversations.

#### Failure to make reasonable adjustments

2.7 It was not in dispute that the Respondent applied the following provisions, criteria or practices ("PCPs"):

- i. It required employees to meet benchmark levels of performance/performance targets;
- ii. It required new employees to demonstrate competency in all aspects of their job role before passing probation.

2.8 Whether the PCPs put the Claimant at a substantial disadvantage compared to

someone who was not disabled.

2.9 If they did, whether the Respondent made such adjustments as were reasonable to alleviate the disadvantage.

#### Indirect disability discrimination

2.10 The Claimant relies on the PCPs set out at paragraph 2.7 (above).

2.11 Whether the PCPs put disabled persons at a particular disadvantage when compared with persons who were not disabled and whether they put the Claimant at that disadvantage.

2.12 If it did, whether the PCP was a proportionate means of achieving a legitimate aim.

#### Jurisdiction

2.13 Whether the Tribunal has jurisdiction to consider complaints about any acts or failures to act that occurred before 30 December 2020.

#### The Law

3 Section 13(1) of the Equality Act 2010 (“EA 2010”) provides,

“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.”

Disability is a protected characteristic (section 4(2) EA 2010). The reference to the protected characteristic of disability in section 13(1) is a reference to a particular disability (section 6(3)(a) EA 2010). On a comparison of cases for the purposes of section 13 or 19 there must be no material difference between the circumstances relating to each case.

4 Section 15(1) EA 2010 provides,

“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.”

5 Section 19 EA 2010 provides,

“(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 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.”

A reference to persons who share a protected characteristic is a reference to persons who have the same disability (section 6(3)(b) EA 2010).

6 Section 20(3)EA 2010 provides that 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, A is under a duty to take such steps as are reasonable to have to take to avoid the disadvantage.

7 Section 26(1) EA 2010 provides,

- “A person (A) harasses another (B) if –
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of -
- (i) violating B's dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

Section 26(4) EA 2010 provides,

- “In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
- (a) the perception of B;
- (b) the other circumstances of the case,
- (c) whether it is reasonable for the conduct to have that effect.”

8 Section 123(1) EA 2010 provides,

- “Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of -
- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.”

Section 123(3) provides,

- “For the purposes of this section –
- (a) conduct extending over a period is to be treated as done at the end of that period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.”

Section 140B provides for extension of time to facilitate Early Conciliation. The effect of section 140B in this case is that complaints about any acts that occurred before 30 December 2020 will not have been presented within the primary time limit.

### **Reasonable adjustments**

9 The Tribunal, following discussion with the Claimant's counsel, made a number of adjustments for the Claimant. There was a ten minute break every 50 minutes and it was made clear to the Claimant that he could ask for any additional breaks if he required them. He did and his requests were acceded to. The Respondent's counsel and the Tribunal asked questions that were short and clearly framed. At the Claimant's request, questions were often repeated and sometimes phrased differently.

### **The Evidence**

10 The Claimant gave evidence in support of his claim. The following witnesses gave evidence on behalf of the Respondent (their job titles in brackets are the positions that they held at the material time) – Stephen Rockall (Vetting Officer), Dhiren Talati (Vetting Operations Manager) and Tracey Jagger (Deputy Head of Vetting Operations). Margaret Apantaku (Senior Vetting Officer) did not attend to give evidence. She had just started a new job and did not want to take time off. We admitted her witness statement and said that we would attach such weight to it as we thought appropriate in light of the fact that her evidence had not been tested in cross examination. The documentary evidence in the case comprise a little over 2,000 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

### **Findings of Fact**

11 On 1 July 2019 the Claimant commenced employment with the Respondent as an Administrative Officer in the Cluster 2 Security Unit ("C2SU"). The C2SU is responsible for the granting or refusing of security clearance for individuals joining various government departments. Prior to commencing that employment, according to the Claimant's application form, he had worked for six years as a voluntary part-time fitness instructor. His only other work experience was of having worked in Burger King and Dorothy Perkins (retail) between 1994 and 1996.

12 The Respondent's Probation Procedure provides that all new entrants to the Home Office normally serve a probation period of six months. Typically, an employee who is not competent at the end of their probation will be dismissed, but exceptionally the probation period can be extended by up to 15 months.

13 There were six core tasks to the role that the Claimant was employed to perform. They were largely basic administrative tasks. They included checking the NSV applications inbox and pasting the details from applications in Word on to the database, uploading the online forms on to different systems for processing them and using a third system to issue a questionnaire to the applicant, making decisions when a third-party provider had cleared the application, dealing with pending cases where further information had been required and chasers were needed to move the cases forward. Attention to detail was very important for all the tasks as one error could compromise checks, delay the onboarding of the member of staff or cause a data breach incident. The Respondent had benchmarks for many of the tasks. The benchmark for copying the data from Word applications to the database was 70 a day and the benchmark for uploading online applications was to complete 35 a day. The expectation was that employees would attain those benchmarks in addition to completing the other tasks of their role. Most new employees were able to achieve

competency in those six tasks within about three months. The Claimant was made aware at the outset of his employment of the six core tasks.

14 Until November 2019 the Claimant was line managed by Rachel Keppler who was a team leader. Ms Keppler was informed at the outset of the Claimant's employment that he had stated on Civil Service Learning that he had a disability. Ms Keppler and her line manager, Nicole James, met with the Claimant on 4 July 2019 to see how he was settling in. Ms Keppler asked him whether he was prepared to disclose what his disability was and he told them that it was Schizophrenia. He said that he was taking medication for it. Having sought advice from HR, Ms Keppler met again with the Claimant on the following day and discussed referring him to Occupational Health ("OH") so that they could be advised how best to support him. The Claimant agreed to the referral being made. They asked the Claimant to provide a note from his doctor about his condition which they could share with OH.

15 Ms Keppler noticed from the outset that the Claimant was struggling with the job and using IT, and she provided him with support. She provided him with guidance on using the internet, Outlook and basic IT. She created and sent to him a checklist and guide to follow when entering the data from NSV applications and a guide to vetting operations. She moved and sat closer to him so that she could provide more support to him. On 16 July the Claimant informed Ms Keppler and Ms James that he was not able to go on any longer as he was not coping and he was not understanding. They persuaded him not to give up so early and asked him whether there was anything else they could do to support him. He assured them that they were already supporting him. The referral to OH was not made as Ms Keppler was still waiting for the Claimant to produce a note from his doctor. Towards the end of July she was advised by HR that she did not need it in order to make the referral.

16 On 29 July Ms Keppler and Ms James had a weekly catch up meeting with the Claimant. They raised with him the fact that his colleagues had noticed that he was often asleep at his desk. The Claimant denied that he had been sleeping and said that he had just closed his eyes. They also addressed his lack of progress. He had been in the role for four weeks and was still stuck on NSV inbox applications and Ms Keppler still had to check each application. Following that meeting the Claimant sent an email saying that he had decided to resign. Ms Keppler contacted the Claimant and gave him an opportunity to reconsider his decision and said that they would contact him later to find out what he wanted to do. When they spoke later, the Claimant said that he had made a hasty decision and would like to continue working.

17 The OH Physician met with the Claimant on 19 August 2021 and provided his report on 20 August 2021. He said that the Claimant had been diagnosed with schizo-affective disorder in 1996 and that had led to auditory hallucinations. He was under the care of a specialist and was also supported by a community psychiatric nurse. He did not say that the schizo-affective disorder impacted in any way on the Claimant's ability to carry out his role. He had talked to the Claimant about his falling asleep. The Claimant had said that he did not feel tired but could doze on and off throughout the day. His specialist had intimated that it could be linked to the timing of his medications and had advised him to take them before he went to sleep. The Claimant had not followed that advice. He said that the Claimant denied any concerns about his training at work but admitted that it took him longer to take in instructions. The OH advice was,

*"It would be beneficial for Mr Ojo to continue with a degree of work under*

*supervision and support. However, I would not introduce any business critical activities till you are fully confident that he has completely engaged within the work place. I am also concerned that due to his tendency of nodding off throughout the day, this could have an impact on his performance and see you ensure that you are taking steps to monitor the quality of work at the early stages in case mistakes are made.*

*... It is also prudent for me to suggest that he works in a low risk supervised environment and should not work alone in the office.”*

18 Ms Keppler was concerned that the report did not address what the Claimant's diagnosis meant in terms of the support that the Respondent needed to provide him in the workplace. That point was raised with the OH Physician whose response was,

*“In terms of his diagnosis of schizoaffective disorder, this is a mental disorder in which a person experiences a combination of hallucinations or delusions along with mood disorders such as depression or anxiety. I have signposted him back to his specialist for a review of his medication to help with sleep concerns during the day. Although I continue to consider that Mr Ojo is fit to remain at work, there is obviously an enhanced risk of sickness absence given the complexity of his medical symptoms.”*

19 Ms Keppler continued to support the Claimant by sending him guidance documents, checking his work, pointing out the errors and meeting with him regularly to discuss his work. On 2 September the Claimant complained that he was still stuck on NSV applications and they were not allowing him to proceed to other tasks. Ms Keppler explained to him that he was still doing NSV applications because it was clear from close supervision that he was still making mistakes frequently, they were not satisfied with his understanding of and ability to do that part of the job and they would not move him to something else until he had nailed that aspect of the job.

20 In October Ms Keppler arranged for the Claimant to work in another part of C2SU (the Business Support Unit) for a week to see whether he was more suited to that work. It essentially involved inspecting files and repairing and replacing damaged files. At the end of the week the manager of that unit said in an email to Ms Keppler,

*“Despite his apparent methodical working through the shelves, there are some obvious damaged files which have not been repaired. I have noticed on a few occasions him repeat a specific action several times and then return to it again, suggesting that he has lapses in concentration/memory.*

*Although I find him a perfectly nice guy who could potentially be of help to our team. I think the risk of mistakes happening which are not spotted is too great and therefore that his assistance on moving the files to Swadlincote might be detrimental”.*

21 On 9 October 2019 Ms Keppler sent the Claimant the following email,

*“I would like to express the expectation we have on how many NSV applications caseworkers should be completing a day, we expect at least 70 which is 10 per working hour. You managed to complete 2 yesterday and in both you had made mistakes.*



*I sent your first application today at 9.30 which you did not tell me you had completed until 12pm. I then sent you a new application at 12.15 and which you did not advise me you had completed until 2pm. I am worried that these NSV applications are taking you so long to do on average 2 hours per application, are you finding them difficult if so you need to be letting me know. However, I keep finding you on Wikipedia and google outside your lunch breaks. We have discussed how these ongoing bank calls are inappropriate but so is being on the internet, you need to be actively letting me know that you have finished so that I can check, and if I am not around then there are plenty of colleagues and team leaders you can ask, please make use of everyone around you.”*

22 On 30 October 2019 Ms Keppler provided an update on the Claimant to HR. She said,

*“...from what we know so far it looks like Kenneth is fit to work (the conclusion of the OHS and his own view) and his disability should not be affecting his performance.*

*Unfortunately, he has not been able to progress further into the role and is still stuck on the work which he had been doing now for 3 and a half months and he has still not fully got to grips with this, therefore we have not been able to move him onto something else. This work is only about 10% of what we do, and he still struggles sometimes. I would expect that if someone had done this work for 3 and a half months they would be an expert.”*

23 At the beginning of November 2019 Ms Keppler moved to a different role and Stephen Rockall became the Claimant’s line manager. He was managed by Dhiren Talati. (Vetting Operations Manager). On 7 November Ms Keppler met with Mr Rockall to update him on the position with the Claimant. She gave him copies of the OH reports, details of all the interactions that she had had with the Claimant and the documents that she had created or provided to the Claimant to help him with his training.

24 Mr Rockall and Mr Talati met the Claimant on 12 November 2019 to review his work. At that stage the process being followed was that Claimant’s manager would extract two application forms at a time from the inbox and send them to him by email to action. Every application processed by the Claimant was then checked before it was submitted on to the database. Mr Rockall and Mr Talati continued doing that. They met regularly with the Claimant to review his work and provide him with feedback. On 21 November Mr Talati increased the number of application forms being sent to the Claimant to four at a time. At a meeting on 28 November with Messrs Rockall and Talati the Claimant said that he was enjoying his work and appreciated the support he received from colleagues.

25 The Claimant was seen again by an OH Physician on 16 December 2019. By that time OH had received a report from the Claimant’s psychiatrist. The OH Physician explained what his condition was and the effect that it had. He said,

*“Schizoaffective disorder is a kind of mental health illness that affects the person’s moods, thoughts and behaviour. There are different types involving symptoms of schizophrenia and bipolar disorder, including psychosis, mania and depression.*

*... The psychiatrist indicates that since [2015] Mr Ojo has been stable, with underlying chronic low mood and psychiatric symptoms including auditory hallucinations and paranoid ideation...*

*As noted in our previous occupational health reports, there have been problems in relation to sleepiness and his medication."*

In respect of the Claimant's work, the OH Physician said,

*"The role involves computer work, and he told me that he enjoys it. He reported no significant difficulties at work, and told me he does not find the role stressful. He feels well supported by management as he said that he does not feel rushed and is being supported to take things slowly...*

*Regarding work, he reported no concerns with reference to stress, regarding his workload or the nature of the role. The main issue continues to be the sleepiness."*

The recommendations made by the OH Physician were a 20-minute break mid-morning so that the Claimant could sleep briefly until his medication plan was optimised, scheduled regular meetings with his line management as an opportunity to discuss any concerns and stress factors and to spread out any training needed over a period of time.

26 On 7 January Messrs Rockall and Talati met with the Claimant to discuss the OH report and recommendations.

25 On 3 and 23 December 2019 Mr Talati had met with the Claimant to discuss NSV applications that had gone missing as a result of the Claimant either filing the forms in a sub-folder thinking that he had actioned them when he had not or putting them away in the completed folder without updating the system. Mr Talati reiterated that the Claimant should get his work checked after he had completed it before he put it through the system.

26 The Claimant's six month probationary period was due to end on 31 December 2019. He was still unable to complete the first of his six tasks satisfactorily. He was dealing with a limited number of applications and making mistakes which meant that all his work had to be checked and monitored. The Respondent could have terminated his employment at that stage on the grounds that his performance was far below the level that was expected and there were no signs that it was going to get to an acceptable level within the next few months. However, it did not do so.

27 On 14 January Messrs Rockall and Talati met with the Claimant to discuss his lack of progress, and explained to him that they were going to extend his probation period to the end of 30 April 2020. A letter confirming that was sent to the Claimant on 16 January. In the letter Mr Rockall said,

*"Due to your ongoing Occupational Health Management assessment and recommendation it has been decided that your probation period will be extended for a period of four months.*

*This will allow you a full and fair opportunity to demonstrate an acceptable*

*level of performance in your assigned duties and will mean that your probation will now end on 30 April 2020.”*

The Respondent's Probation Procedure provides that extensions of probation should be rare and that extensions should be as short as possible and that in the majority of cases an extension of up to three months should be adequate. If probation is extended it must not exceed fifteen months.

28 On 22 January the Claimant expressed an interest in learning other functions as he said that he felt comfortable with the task 1 (dealing with applications from the NSV inbox). Mr Rockall agreed that the Claimant could start learning the next task – processing uploads – and drew up a detailed Work Plan for the Claimant covering the next six weeks, setting out different aspects of the task that he would be expected to learn and do week by week. He also arranged for an experienced caseworker, Sue McGarrell, to support the Claimant by showing him how the various tasks were done and then to assist and support him in doing them. He gave her a copy of the work plan. It was agreed that the uploads that the Claimant would be asked to do initially would be the more straightforward ones. The expectation was that the Claimant would start learning and doing the second task in addition to the one that he was already doing. The Claimant started on the uploads at the end of January 2020.

29 Mr Talati spoke to the Claimant in January and February 2020 about his falling asleep at work and reminded him of the OH recommendation to take a 20 minute break mid-morning. At a meeting on 13 February 2020 Mr Talati reminded the Claimant that he needed to continue with dealing with the NSV inbox applications. The Claimant said that he needed refresher training on them because he could not remember how to do them.

30 On 27 February 2020 Mr Rockall sent an email to the team leaders about work allocation to the Claimant. He said that for a few days the Claimant had been able to complete the uploads that he had been given which had on the whole been “basic” applications. He said that it would be good if they could continue that and give him five uploads. He felt, however, that it was important that he did them within an agreed session so that a caseworker was on hand to provide support/guidance when necessary and to ensure that the work was checked.

31 In March 2020 the Government announced the first lockdown due to the spread of Covid. On 16 March the Vetting Operations team was instructed to work from home. Consideration was given to whether the Claimant could continue his probationary period working from home. The Claimant was invited to the office to see whether he could be issued with a laptop to use at home and be trained virtually. The Claimant found it difficult to log in to the laptop in the office and it was envisaged that he would also struggle at home to access the device. There were also serious concerns that if the Claimant were to work from home he would not have the support that he had of colleagues working alongside him, it would not be possible to supervise his work and about the safe handling of data. The Claimant was still making mistakes. On 20 March Ms Apantaku drew to Mr Rockall's attention the fact that the Claimant had yet again not added two applications to the system. Anne Robertson, Head of Vetting Operations Team, took the decision to put the Claimant on special leave on full pay. He remained on special paid leave until 14 September 2020. During the period when he was on special leave Mr Rockall telephoned him on a number of occasions to keep in touch with him.

32 In order to determine what action to take after 30 April 2020 and to ensure that it acted fairly towards the Claimant the Respondent made a further referral to Occupational Health. It was decided in the meantime to extend his probation to the end of June 2020. Unfortunately, a letter to that effect was not sent to the Claimant. The OH Advisor's report was provided on 11 June 2020. It stated that the Claimant had confirmed that he enjoyed his work and that he felt well supported by management and colleagues. The OH Advisor was asked the following specific question,

*"We have placed the recommendations as described in the OH referral dated 30<sup>th</sup> December 2019 as a transitional arrangement and so far we have not seen any progress in Kenneth's performance. We want to understand where we go from here. Therefore do you foresee him being able to deliver the objectives against his job description which is attached under supporting documents."*

The rather surprising response was that the Claimant had said that he was not aware of any concerns about his performance and that he had not been given any negative feedback to suggest that. In circumstances where after nearly nine months of employment, the Claimant was only undertaking a small part of two of the six tasks that he was expected to perform his role, he had to be supported to do that, all his work was being checked because he made mistakes, the mistakes were raised with him regularly by his managers and his probation period had been extended, it is astounding for the Claimant to have said that he was not aware of any concerns about his performance. The rather unhelpful advice was that it might be beneficial for his line manager to have regular contact with him to give him feedback about his work. His line managers had been doing precisely that for nearly nine months. In response to the question whether there were any underlying medical conditions that might affect his ability to provide satisfactory performance at work, the response was that he had been diagnosed with schizoaffective disorder but that he did not have any difficulties that were affecting him at work. It was clear from that that the Claimant's schizophrenia did not affect his work performance.

33 Following receipt of that report the Claimant's managers had a discussion with senior managers and HR personnel about what to do next in respect of the Claimant's employment. Anne Robertson, Head of Vetting Operations, was minded to go down the route of starting the formal warning process. The Respondent's probation Policy provides that a written warning may be considered if there is a failure to meet the required standards of performance. She set out her reasons for wanting to do so in an email to Stewart Crook in which she sought his advice. She said,

*"In my opinion, I have no desire to continue to extend Kenneth's probation (he will have been on a 12 month probation come 30 June). From when he joined the team on 13 July 2019 to 17 March 2020, Kenneth has only managed to undertake copying and pasting information from the word document NSV application, but his work needs checking after completing the task, and he continues to perform this task with mistakes (although he thinks he is doing really well). His line manager had tried to move Kenneth onto another task, with a colleague acting as a mentor, but unfortunately, progress has been slow and when the team has attempted to move him back to NSV applications, he struggles to recall the task, making mistakes, resulting in*

*Kenneth becoming stressed. His line manager has had regular conversations about his performance.”*

While advice was being sought, the Claimant’s probation was initially extended to 12 July 2020 and on 10 July to 30 September 2020.

34 The Claimant was due to return to work on 14 September. On 7 September Mr Talati invited the Claimant to a hearing on 14 September under the formal process for managing unsatisfactory performance under the Probation Policy and Procedure. He advised the Claimant of his right to be accompanied and warned him that the hearing might lead to a formal warning. He attached to the letter copies of the relevant documents that would be used at the hearing. They included a copy of the goals for an AO and the training plan, both of which had been provided previously to the Claimant.

35 The hearing took place on 14 September 2020. The focus of the discussion at the hearing was the first task on which the Claimant had been engaged throughout his probation and the concerns about his ability to carry out that task satisfactorily. The Claimant said that he found it very difficult when he started because he had been told by Ms Keppler that he had to complete about 70 a day, but he got better when Messrs Rockall and Talati started to manage him. He said that on a good day he would do 45-50 applications, and on a bad day about 30-40. The Claimant accepted that he had deleted some of the emails containing the applications and that he had filed away applications in the completed folder without having entered the data from them on the system. Mr Talati said that the only work that was being allocated to the Claimant was dealing with the NSV application inbox as they could not move him to other tasks until they were confident that he was competent in that task. On occasions, there were very few applications. Although it had been made clear to the Claimant that he should tell his manager when he had finished what had been allocated to him, he would not do so and would sit staring at his screen. Mr Talati told the Claimant that in the next two weeks he would work on the NSV applications and would be expected to complete 45-50 a day. He said that team managers/members of the team would be on rotation to support him. The Claimant said that he would probably be a bit “rusty” as he had not done them for a while. Mr Talati assured him that they would help him and give him some refreshers. Following the meeting the Claimant was provided with refresher training on that task.

36 Mr Talati sent the Claimant the outcome letter on 17 September. He said that the Claimant’s performance had not met the required standards. He set out the concerns that had been identified at the meeting in respect of the NSV applications in the inbox. He was told that his benchmark for the NSV application would be 40 per day as the Claimant was going to be working in the office from 10 a.m. to 3 p.m. (when other staff members would be present to support him). Mr Talati issued the Claimant with a written warning and told him that his performance would be closely monitored until the end of his probation on 30 September. He continued,

*“During this period, you need to demonstrate satisfactory performance in the key tasks you have been given. As you are aware, these are only part of the full duties of the job you have been employed to do. Failure to meet these expectations may result in the termination of your contract of employment.”*

Mr Talati said that the Claimant would be supported by Mr Rockall and a plan of expected targets and performance would be put in place and monitored regularly,

and that he would be given necessary training. The Claimant's performance would be reviewed and a decision made on or before 30 September. The Claimant was advised of his right to appeal the written warning.

37 The Claimant and Mr Talati agreed that the Claimant would leave work at 3 p.m. and that Mr Talati would review his work after that and then call him when he had gotten home to provide his feedback.

38 The Claimant was referred again to OH to seek advice on how best to support him. In a report dated 21 September 2020 the OH Physician advised,

*"I do note my colleague commented regarding Mr Ojo's tendency to experience drowsiness with his medication. Please do ensure he can continue to take regular rest breaks. His condition and treatment are such that performance may be effected. Mr Ojo may require extra time and prompts to stay on task. Please meet with him regularly to ensure he is coping. Mr Ojo does not report stress or anxiety related to work or otherwise. I would suggest you continue to apply adjustments to Mr Ojo's role. I think he would want to pass on that he feels well supported. He did not report difficulties performing his normal role."*

39 On 22 September Mr Rockall spoke to the Claimant as it had been noticed that by 12 noon he had not started work on the NSV applications. The Claimant's explanation was that he was getting information together to send to the woman who was helping him to appeal the written warning. Mr Rockall told him that he should not be doing that during working hours.

40 On 23 September 2020 the Claimant was invited to a second formal performance meeting under the Respondent's Probation Policy and Procedure. The meeting was to take place on 29 September and was to be conducted by Tracey Jagger, Deputy Head of Vetting Operations. He was advised of his right to be accompanied. He was warned that it might lead to his dismissal.

41 On 25 September 2020 the Claimant appealed against the written warning.

42 The second probation review meeting took place on 29 September 2020. The Claimant was accompanied by Denise Barnes, an employment support specialist employed by the NHS. Ms Jagger explained at that meeting that she would discuss the Claimant's performance since he returned to work and hear his comments on it, but that she would not make a decision until the outcome of his appeal was known. Ms Jagger said that in the past two weeks the Claimant had to concentrate only on one task and to meet a benchmark of 40 applications a day. She said that he had never got to the target of 40 and generally he had done about 20 applications a day. The Claimant said that he had done 36 applications one day and thought that there was another day when he had done 32 application. He also said that the applications had not been straightforward and that he had had to do other things and check his emails.

43 In an email on 30 September Mr Talati explained to the Claimant that he would carry on working on the NSV inbox and that his daily benchmark would be to process 40 applications. He would take a 20 minute break between 10.30 and 11 a.m. and a lunch break. He would have access to all the guidance on the sharepoint used by the team and if he did not have access he should let Mr Rockall know. At the end of each

day he was to inform Mr Rockall or Mr Talati of the number of applications that he had processed. Once he had demonstrated that he had achieved the benchmark of 40 applications, they would move to the next task as per his job goals.

44 On 9 and 12 October 2020 the Claimant processed more than 40 applications. As a result, Mr Talati decided that from 13 October the Claimant would start on the second task – the upload process. He told the Claimant that Margaret Apantku would give him a short refresher on it and that she and James would support him with it on Tuesday and Mr Rockall would support him from the following day.

45 The Claimant's appeal was heard by Luke Fenning, Head of Vetting Operations, on 13 October 2020 and the Claimant was given the decision in writing on 25 October 2020. The appeal was not upheld. The appeal manager recommended that the Claimant's managers must be explicit in their feedback to the Claimant as to whether his performance was or was not on track to reach a performance level where his probation could be confirmed and that such feedback should be provided at regular intervals.

46 On 7 November Mr Talati told the Claimant that he wanted him to focus on uploads and to consolidate that. He noted that the Claimant had been trained on it in February by Sue McGarrell and again more recently. He emphasised that attention to detail was very important as one small error could lead to a data incident. If he was not sure about anything he should seek assistance from his colleagues and managers. Mr Talati told him that for the moment he would only be doing uploads. His benchmark was 20 uploads a day, and if he completed those he was to ask Mr Rockall for more.

47 On 11 November Mr Talati wrote to the Claimant that his probation had been extended to 30 December 2020. He was told that his previous warning would remain in force until that date. The extended period would allow the Claimant the opportunity to demonstrate capability and acceptable level of performance in his assigned duties.

48 On 16 November Mr Talati told the Claimant that the work plan for that week was that he would continue doing uploads (with a benchmark of 20 a week) and that on 18 November he would start doing renewals, which was part of uploads. Some of his colleagues were asked to provide the Claimant with training on renewals and to check his work at the end of the day. The Claimant was advised to approach them if he was stuck on anything or if he had finished his work and needed more work to be allocated to him. The feedback from colleagues who supported him was that the Claimant did not understand what was explained to him, instruction had to be repeated many times, he got confused and he was incapable of doing renewal uploads without supervision.

49 The work plan for the week commencing 23 November was for the Claimant to continue doing uploads and renewal (with a total benchmark of 20).

50 In discussion with Mr Talati the Claimant said that the benchmark of 20 had been set too high and that his mental health had not been taken into account. Mr Talati said that a caseworker would normally upload 30+ application while doing other duties. The Claimant's benchmark had been set on the basis of the number of hours he was in the office and the OH advice on 20 September had suggested that there weren't any barriers that affected his productivity and did not report any substantial health related concerns. Mr Talati discussed the matter with HR and asked whether it

might be appropriate to conduct a stress risk assessment and/or seek further advice from OH.

51 Towards the end of November the Claimant sent Mr Talati a number of emails from his personal email address. Mr Talati did not receive them and said that they might well have ended up in the Spam box. In these he complained that the benchmark of 20 uploads a day was too high based on his mental health condition, the benchmark of 40 for NSV inbox applications was too high based on his mental health and should be about 30-35, and about Mr Talati talking to him about his work at the end of each day, Mr Talati only highlighting negative aspects of his performance and not highlighting anything positive and being abrupt with him.

52 Mr Talati conducted a stress risk assessment with the Claimant on 1 December 2020. The meeting lasted nearly two hours. Prior to that the Claimant's benchmark for the NSV inbox work had been reduced to 35 and the benchmark for uploads to 15. In respect of each of the two tasks carried out by the Claimant Mr Talati discussed the following factors – demands, control, support, relationships, role and change. In respect of the NSV inbox the Claimant initially said that he felt fairly confident about meeting the benchmark of 35, but later said that as he had not done a full work allocation he did not know whether the benchmark was appropriate. The Claimant said that he did not at that time feel supported by his colleagues on the task because they believed that he could do it on his own but he still needed support as he was not 100% comfortable with it. He said that he found the daily performance meetings with Mr Talati overwhelming and would prefer to do them on a weekly basis, preferably on Friday at 5 p.m. Mr Talati acceded to that. In respect of the uploads the Claimant said that the new benchmark of 15 was still too high and more appropriate for an "able bodied person". He felt that 12 would be amore suitable amount for him. Mr Talati said that with the benchmark of 15 the Claimant had to upload four cases an hour. Other employees uploaded more and did other tasks which the Claimant did not do. After consideration, Mr Talati agreed that if the Claimant did a mixture of uploads, renewals and extensions, the benchmark would be 12. The Claimant said that caseworkers were not supporting him adequately as they did not always point out his mistakes.

53 On 4 December the Claimant was invited to a formal probation review meeting with Tracey Jagger on 11 January 2021. The purpose of the meeting was to consider his performance and whether he had satisfactorily completed his probation and his employment should be confirmed.

54 In an Occupational Health report dated 10 December 2020 the OH Physician reported that the symptoms of the Claimant's mental health condition appeared to be reasonably stable and that his condition did not present a risk to his or others' health. It stated that the reported adjustments were appropriate. The Claimant was likely to require ongoing adjustments for the foreseeable future and was likely to continue to perform at the level that they had observed.

55 On 15 December Mr Talati met with the Claimant to discuss the OH report. By that time he had ceased to allocate the Claimant work on uploads/renewals and extensions (task 2) because checks on the cases that he had conducted had identified a lot of errors.

56 Prior to the hearing on 11 January 2022 Mr Talati set out in an email to Ms Jagger the dates of the Claimant's probation period and the period when he had been on



special leave, the dates of the OH reports, the task carried out by the Claimant, the training and support provided to the Claimant and his performance. In essence the Claimant's probation period had lasted a little over 18 months, of which he had worked just under 12.5 months and been on paid special leave for just under 6 months. Throughout that period he had worked only on two of the six tasks which he had been told were part of his role. For the first seven months he had worked only on task 1. He had started on task 2 in February 2020. When the Claimant returned to work on 14 September 2020 he had received refresher training on task 1 and a dedicated team of experienced caseworkers and team leaders was put in place to attend the office on a daily rota to support the Claimant. The benchmark for NSV application was set at 40 a day. At the end of October the Claimant was provided with training for a week on uploads and from 9 November he was allocated uploads as part of his daily work and was expected to carry them out independently with caseworkers on standby to assist him if he required help. The benchmark for uploads was set at 20 a day. The benchmark for the NSV inbox was reduced to 35 and for uploads was reduced to 15 and then 12 a day. At the beginning of December the Claimant was requested to halt on task 2 as dip sampling had flagged up errors. Since 7 December 2020 the Claimant had worked only on task 1. In respect of both tasks the Claimant had not consistently met the lowered benchmarks. Mr Talati set out in detail the mistakes that the Claimant had made on both tasks.

57 Ms Jagger conducted the probation review meeting on 11 January 2021. The Claimant was accompanied by Denise Barnes. Ms Jagger stated that it was the final probation hearing and the purpose was to establish whether the Claimant had passed his probation. She said that on the basis of the assessment made the Claimant had not sufficiently met the performance standards required to pass his probation and that his employment would, therefore, be terminated. The Claimant queried why he had not passed his probation. Ms Jagger explained that the Claimant had not managed to complete all the tasks set in order to pass probation. The Claimant said that he thought that he had not passed probation because the team did not like him and that it had nothing to do with his performance. Ms Jagger responded that that was not the case. She explained that the Claimant needed to have complete six tasks in order to pass probation. He had so far only managed to begin the upskilling and training on two of them, and had to be taken off one of them. He had done well on the NSV inbox applications but he was still making mistakes even though he had been doing it for a long time. There had been a lot of mistakes on the uploads which had led to the Claimant being removed from that task. The Claimant said that he had not been given enough time to learn. Ms Jagger explained that he had been given a lot of extra time as the usual time frame to complete all the six tasks on probation and to be able to work alone consistently was three months. The Claimant had been given far longer than that. She said that he would be dismissed and would be paid in lieu of notice. Ms Barnes said that there had been "*a massive lack of support from the management team.*" Ms Jagger disagreed with that.

58 Ms Jagger confirmed her decision in writing on 13 January 2021. She repeated the reasons that she had given orally for the termination of the Claimant's employment. She said that his employment would terminate with effect from 13 January 2021. He was entitled to five weeks' notice and would be paid in lieu of notice. He was advised of his right to appeal. The Claimant did not appeal.

## Conclusions

### Jurisdiction

59 The only complaints about acts or failures that occurred on or after 30 December 2020 are about the Claimant's dismissal on 13 January 2021 and requiring him to demonstrate competency in all aspect of the role in order to pass probation and to meet performance targets. The complaints of failure to provide proper and/or adequate support or training during the Claimant's probation and extended probation could also be said to have continued until 13 January 2021. Unless we find that there was such a failure between 30 December 2020 and 13 January 2021 and that it amounted to disability discrimination or harassment or that the other complaints about acts/failures that occurred after 30 December 2020 are well-founded, all the other complaints of disability discrimination will not have been presented in time. We would only have jurisdiction to consider them if we considered it just and equitable for them to have been presented on 13 April 2021. Any complaints relating to his treatment in the original six months of probation would be between 18.5 months and a little over one year out of time. Any complaints relating to the period before lockdown (16 March 2020) would be at least nine months out of time. The Claimant has not provided any explanation of why he did not present his claim earlier. Since about 22 September 2020 the Claimant has been assisted and advised by an employment support specialist. There was no explanation of why the Claimant did not commence Early Conciliation for nearly 2.5 months after his dismissal. Having considered the extent of the delay, the lack of any explanation for it and the unfairness to the Respondent of having to defend and potentially held liable for claims presented outside time limits, we concluded that it would not be just and equitable to consider complaints about any acts/failures that occurred before 30 December 2020.

60 In case we are wrong in that conclusions and because we need to consider all the relevant background to determine the claims that were presented in time, we set out below briefly what our conclusions would have been on the complaints that were not presented in time.

### Direct Disability Discrimination

61 We found that from the start to the end of his employment the Respondent provided the Claimant with a lot of training and support and allocated very limited work to him and increased it very slowly and gradually. At the very outset Ms Keppler provided him with guidance on basic IT and using the internet, she sent him a checklist and guide on NSV inbox applications and guide on vetting operations and sat closer to him to support him. On two occasions, when he wanted to give up soon after he had started in the role, his managers encouraged him to stay. Ms Keppler met with the Claimant regularly to discuss his work. She sent him more guidance documents, checked his work and pointed out his mistakes. She arranged for the Claimant to work in a different part of the business to see whether he was more suited to that. She referred the Claimant to Occupational Health and followed the advice it gave, which was that he should work with supervision and support. By the time she left, the Claimant was doing a very limited number of NSV inbox applications per day and still making mistakes in them. He was doing about 10% of the work of an AO and struggling with that.

62 Between November 2020 and March 2021 Messrs Rockall and Talati continued to meet regularly with the Claimant and to provide him feedback and to check his work. They referred him to OH who noted that the Claimant felt supported by his management and that he reported no difficulties at work and had no concerns about his workload or the nature of his role. They extended his probation period by four months in circumstances where the Respondent's policy provided that extensions should be rare and for a limited period only and the Claimant was at that stage still unable to complete the first of his six tasks satisfactorily – he was dealing with a limited number of NSV inbox applications and still making mistakes as a result of which his work still had to be checked. On 22 January the Claimant started learning the second task. Mr Rockall drew up a work plan for the Claimant and assigned an employee to assist and support him. Having started on the second task, the Claimant forgot how to do the first and had to be provided refresher training on it. By the end of February the Claimant was being allocated 5 uploads a day. In March 2020 when the Claimant was not able to work from home the Respondent placed him on paid special leave.

63 While the Claimant was on paid special leave his probation was extended on two occasions and there was a further referral to Occupations Health. When he returned to work he was given training again on the NSV inbox applications and set a benchmark of 40 a day to be done with the support of others in the team. It was the only task he had to do. It was agreed that Mr Talati would review his work at the end of each day and provide him with feedback. There were two further referrals to OH. By the end of September the Claimant had not met the benchmark of 40 on any day. Generally he had done about 20 applications a day. He continued doing NSV applications with the same benchmark. The Claimant was told that at the end of each day he had to let either Mr Rockall or Mr Talati know the number of applications that he had done. In mid-October the Claimant processed more than 40 applications and he was then started again on the second task. He was provided with refresher training on that and the support of a particular colleague on each day. From 7 November the Claimant was asked to do only uploads (the second task) and the benchmark was 20 a day. The probation period was extended to 30 December. The Claimant was then trained on another aspect of uploads and was supported by colleagues who also checked his work. On 1 December Mr Talati conducted a stress risk assessment. The benchmark for the NSV inbox work was reduced to 35 and the benchmark for uploads was reduced to 15 and then to 12. The daily team meetings with Mr Talati were changed to a weekly meeting on Fridays.

64 It is clear from the above, the Claimant was allocated a very small workload which was increased very slowly and gradually and that he was provided with a huge amount of training and support.

65 It is correct that the Claimant was given a lot of, mainly verbal, feedback on his work, that Mr Talati asked the Claimant between 14 September and 1 December 2020 to inform him daily of what he had done and had daily calls to give him feedback and that the Respondent dismissed him. The reason that the Respondent did that was because the Claimant's performance was poor and he made a lot of mistakes. His work had to be checked for the mistakes to be spotted and corrected. His managers had to support him by providing him with feedback on what he was doing wrong and what he needed to do to improve. Much of the feedback was negative because the Claimant's performance was so poor. The need to do that was clearly highlighted by the fact that the Claimant had told OH in June 2020 that he was unaware of any concerns about his performance and Mr Fenning's recommendation

in October 2020 that the Claimant's managers must be explicit in their feedback to the Claimant. The Respondent also needed to know whether the Claimant was meeting the benchmarks that it had set him.

66 The appropriate comparator would be someone whose performance was equally poor but who did not have the a disability or the disability that the Claimant had. There was no such actual comparator. There was no evidence that such a comparator would have been treated any differently from the way the Claimant was treated. In fact, it is very likely that any comparator whose performance was equally poor but was not disabled would have been dismissed much earlier. There was no evidence at all from which we could infer that the Claimant's work was checked and monitored or that he was dismissed because he had schizoaffective disorder. It was checked and monitored because his work was of a very poor standard. He was dismissed because of poor performance and his inability to demonstrate that he was capable of carrying out the tasks of his role.

67 None of the Claimant's complaints of direct disability discrimination are well-founded.

Discrimination arising in consequence of disability

68 We concluded that the Respondent did not treat the Claimant unfavourably by requiring the Claimant to have meetings with Mr Talati when he got home in the evenings, or by requiring him to report to his managers daily the number of applications he had processed or by requiring him to meet performance targets. At the time when the Claimant was attending meetings when he got back home, he was spending less time in the office (because of the need for him to be working when others were there to support him) but his contractual working hours had not been reduced. Hence, the Claimant was not asked to attend these meeting outside his working hours. There was nothing onerous about his having to tell his managers how many applications he had processed each day. All employees are expected to meet performance targets. The Claimant's targets were set later in his employment and were much lower than those of his colleagues. The Respondent did not treat the Claimant unfavourably in respect of any of the above matters.

69 The reason for the above treatment and for the Claimant's dismissal was that his performance was of a very poor standard. He performed a very limited part of an AO role and he made a lot of mistakes. It took him a long time to learn and master the most basic of tasks. There was no evidence before us that the Claimant's schizoaffective disorder impacted on his ability to carry out the tasks that he had to in his role. There was no evidence that it affected his ability to understand or follow instructions or to learn how to do things. There was evidence that his medication made him fall asleep for short periods at work, but that was not the explanation for his consistent very poor performance. We concluded that there was no evidence that the reason for the Claimant's dismissal, which was that that after 18 months (12.5 months actually at work) the Claimant was able to do a very small part of the role of an AO with a lot of support, was something that arose in consequence of his schizoaffective disorder.

70 If we had concluded that it was something that arose in consequence of his disability we would have concluded that dismissing him after 18 months and a very large number of adjustments when the Claimant could still do only a very limited part

of his role was a proportionate means of achieving the legitimate aim which was to ensure that the Respondent delivered an effective and efficient service.

Harassment

71 None of the treatment of which the Claimant complains amounts to harassment related to his ability. The purpose of the treatment was to support the Claimant to help him reach the standard of performance that he needed to achieve in order to continue working. It would not be reasonable for the Claimant to have regarded those measure as having the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Reasonable adjustments/indirect disability discrimination

72 It was not in dispute that the Respondent applied PCPs that employees had to meet benchmark levels of performance/performance targets and that it required new employees to demonstrate competency in all aspect of their role before passing probation. It should be pointed out that it normally expected new employees to demonstrate that competency within six months and to achieve the benchmarks for the first two tasks while performing all the other tasks.

73 There was no evidence that those PCPs put the Claimant at a substantial or particular disadvantage because of his schizoaffective disorder. As we have said before, there was no evidence that that condition had any impact on his ability to carry out the tasks of his role.

74 Notwithstanding that, the Respondent made a large number of adjustments. It extended the Claimant's probation period several times and gave him much longer to demonstrate the competencies, it provided him with a lot of training and support from both his managers and his colleagues, it started out by giving him a very small workload and increased it very slowly and gradually. It would not have been a reasonable adjustment for the Claimant's probation to be extended beyond 18 months in circumstances when after that period the Claimant was only performing a small part of his role and was still making mistakes and there was no indication that he would within the next few months be able to carry out all the tasks of the role satisfactorily. The PCPs (with the adjustments that were made for the Claimant) were a proportionate means of achieving the legitimate aim of ensuring that the Respondent delivered an effective and efficient service.

---

Employment Judge - Grewal

Date: 10<sup>th</sup> Jan 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

.10/01/2023

FOR THE TRIBUNAL OFFICE