EMPLOYMENT TRIBUNALS

Claimant:	**Mr J Coffey**		
Respondent:	**Chief Constable of the West Yorkshire Police**		
Heard at:	**Sheffield**	**On:**	**24 March, 27 to 31 March**
			3 to 5 April 2017 inclusive
Before:	**Employment Judge Little**		
Members:	**Mr D Fell** **Mr L Priestley**		

Representation

Claimant:	Mr M Budworth of Counsel (instructed by BRM Solicitors)
Respondent:	Mr J Arnold of Counsel (instructed by South Yorkshire Police Legal Services)

JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. The claim fails and so is dismissed.
2. The Claimant shall make a contribution to the costs incurred in defending this claim. That contribution is £10,000.
3. The Costs Order is made on the understanding that South Yorkshire Police Legal Services who have incurred the costs of defending the claim have been acting as agent for the Respondent consequent upon the substitution of the Chief Constable of West Yorkshire Police as Respondent in place of the Chief Constable of South Yorkshire Police as per the Tribunal's Order made on 4 August 2016.

REASONS

1. These reasons are given at the request of the Respondent within it's email of 6 April 2017.
2. **The Complaints**

   In the claim which was presented to the Tribunal on 27 April 2016 the Claimant had brought complaints of direct disability discrimination;

discrimination arising from disability; indirect discrimination; failure to make reasonable adjustments; harassment and victimisation. In response to a request for further and better particulars the Claimant filed a Scott Schedule on 29 June 2016 which contained 19 allegations. A revised Schedule was then filed on 18 August 2016. There were still 19 allegations but allegation 17 had been narrowed. The majority of the complaints are complaints of victimisation. On the first day of our hearing (which was primarily a reading day) we were informed that the Claimant had just withdrawn eight of those allegations. On the fourth day of the hearing and immediately after the Claimant's case had been closed he withdrew a further four allegations. Accordingly ultimately we were only required to adjudicate on the remaining seven allegations. By reference to the most recent Scott Schedule those were allegations 3, 9, 10, 12, 13, 15 and 17. All but allegation 17 were complaints of victimisation only. Allegation 17 included a complaint of victimisation but also direct discrimination; discrimination arising from disability and harassment related to disability.

3. **The issues**

The parties had agreed a list of issues which was handed up on day one. We do not here reiterate the whole of that list but we do record that it was common ground that the Claimant had done a protected act when in March 2013 he brought his first Employment Tribunal claim which was one alleging disability discrimination. We were told that that claim had been comprised before trial. That is the sole protected act on which the Claimant relies.

Nor was there any dispute about disability status. The protected characteristic of disability was in any event now only directly relevant to allegation 17. The Respondent conceded that the Claimant was a person with a disability by reason of Lyme's Disease from December 2015 and accordingly that he was a person with a disability within the meaning of the Equality Act at the material time. It was also conceded that the Respondent was disabled by reason of a shoulder injury although that disability was not relevant to allegation 17.

The only issue on the question of knowledge taken by the Respondent as per the agreed list would have been in relation to the now withdrawn complaint of a failure to make reasonable adjustments. That had been in what was allegation 19 one of the allegations withdrawn on day four.

4. **The evidence**

The Claimant has given evidence and evidence on his behalf has been given by his wife Alison Coffey. The Respondent had served 10 witness statements and a further witness statement was served and filed on day three – the Claimant did not object to that. Whilst the Tribunal had (prior to the day four withdrawals) read all of those witness statements, by reason of the withdrawals the Respondent did not in fact call former assistant Chief Constable Joanne Byrne (she was to give evidence as disciplinary officer); Emma Hardwick senior HR officer (who would have given evidence about various grievances or fairness at work complaints brought by the Claimant) and Detective Chief Inspector Melanie Palin (who had heard two of the Claimant's grievances). The witness statement of Allyson Pankethman an HR officer was agreed and so she was not called. In the event the matter which her evidence dealt with (allegation 18) was another of the allegations withdrawn on day four. The witness statement served by the Respondent

during the course of the hearing came from Christopher Arnold, a crime scene investigator supervisor. The Claimant agreed his evidence and so he was not called.

It follows that the Tribunal heard from six witnesses who were Detective Chief Inspector Jade Brice; Mrs K L Whitehead, CSI supervisor; Ms J M Minihan, CSI supervisor; Detective Sergeant Jillian Hall; Mr F Harkness, regional area forensic manager and Ms A L Smith formerly employed by South Yorkshire Police as a human resources manager. Ms Smith had provided a signed witness statement to the Respondent but on day one Mr Arnold applied for a witness order as there was some doubt about Ms Smith's willingness to attend. We duly made that order. The application was made in open Tribunal and Mr Budworth did not object. As the case developed Mr Arnold took the view that it was no longer necessary for Ms Smith to give evidence and sought the revocation of the witness order. Mr Budworth objected to that and having given the matter consideration the Tribunal considered that it was likely Ms Smith would be able to give relevant evidence. Accordingly we decided that we would "adopt" witness order. In the event Ms Smith attended and was fully co-operative in answering questions from both sides and the Tribunal. She confirmed truth of the witness statement she had provided.

5. **Documents**

The Tribunal had a substantial number of documents running to 1,972 pages contained within five volumes.

6. **The relevant facts**

6.1. The Claimant's employment commenced on 1 January 1994. That was as a crime scene investigator (CSI). His employer was the Chief Constable of South Yorkshire Police.

6.2. On 30 March 2011 the Claimant incurred injury to his shoulder whilst at work.

6.3. On 12 March 2013 the Claimant presented a claim to the Employment Tribunal. The grounds of that complaint are at pages 706 to 709. A witness statement which the Claimant prepared in connection with those proceedings or at least a draft witness statement is at page 326. The claim alleged disability discrimination in the context of a restructuring process known as regionalisation. That claim did not reach a hearing because the parties came to terms. As mentioned above, it is this claim which is the agreed protected act.

6.4. On 7 December 2015 Detective Inspector Brice had occasion to telephone the Claimant's department and spoke to the Claimant. It is this telephone call that forms part of allegation three. The context of the call was that DI Brice was investigating the death of a four year old child who had apparently drowned in a bath. DI Brice wanted to check with the Claimant's department that someone from CSI would be available to attend the post mortem at the children's hospital the following day.

6.5. Mr Brice was concerned about the Claimant's language and demeanour during the course of this telephone conversation. Subsequently he sent an email to one of the Claimant's supervisors Ms Minihan. A copy appears on page 730A. At this time the

supervisor was known by her married name of Haynes. DCI Brice commented that the Claimant had however referred to her as Jo Minihan throughout the conversation. He had found the Claimant over familiar, rude and dismissive. Mr Brice had been concerned that the Claimant had twice referred to Sheffield Children's Hospital as "the kiddies". When Brice had enquired whether someone would be coming to the post mortem the Claimant's response was alleged to have been "I haven't got a clue". He also objected to the Claimant referring to Mr Brice as "mate" throughout the conversation. The Claimant and Mr Brice had not met or spoken prior to this conversation.

6.6. Ms Minihan (as she is now known having reverted to her maiden name) referred the matter to her line manager Mr Harkness.

6.7. On 8 December 2014 Mr Harkness asked the Claimant to see him so he could discuss the Brice complaint. Mr Harkness read DII Brice's email out loud but the Claimant insisted on seeing it. Mr Harkness denied him that opportunity and the meeting became heated. So much so that the Claimant left the meeting and despite being requested to do so refused to return. In fact he then advised Mr Harkness that he was ill and went home. This meeting is a further aspect of allegation three.

6.8. Although Mr Harkness had intended that the meeting on 8 December would be an opportunity to resolve the complaint raised by DC Brice, Mr Harkness now considered that there was a further potentially disciplinary matter because of the Claimant's behaviour towards him at that meeting. It was in those circumstances that Mr Harkness sent an email to Lorna Smith head of conduct HR service. That email dated 9 December 2014 appears at pages 731 to 731A. Having explained the circumstances Mr Harkness asked Ms Smith to "identify my options on a course of action against John relating to his behaviour". This referral is a further aspect of allegation three – that is the Claimant alleges that it was victimisation.

6.9. On 26 February 2015 Ms Smith sent an email to the Claimant and to Mr Harkness and a copy is at pages 800 to 801. She explained that she intended to make recommendations "for going forward which I feel are pragmatic and appropriate". Having reviewed the evidence before her she noted that there were grounds to consider sending the matter to a local misconduct meeting but that she felt that would be disproportionate. She noted that there appeared to be a breakdown of trust between the Claimant and Mr Harkness. The only action that Ms Smith intended to take was recording the circumstances as set out in her email. However she did offer to both the Claimant and Mr Harkness the opportunity for them to meet with her to discuss the working relationship and how that could be improved. However she went on to note that the Claimant had indicated to her that he felt that to do that at the current time would be "impracticable". It appears that that was because of litigation regarding the Claimant's injury at work.

6.10. In or about April 2015 the Claimant acquired an outside business interest which was operating boats and a railway in a park. Under

the terms of his employment he was required to seek permission from the Chief Constable to operate this business whilst employed by the Chief Constable. Consent was given and the document issued on 18 April 2015 is at page 746.

6.11. On 13 May 2015 Mr Harkness sent an email to the Claimant's department on the subject of annual leave. That email appears at page 754. He noted that he had become aware that CSI staff were booking regular recurring single weekly or monthly leave days in advance. He considered that that did not provide an equal opportunity to all CSI staff to book blocks of holiday. He referred to repeated requests for annual leave on Friday afternoon and on Saturday. He said that he had discussed the matter with HR and the unions and that it was his intention that whilst staff could continue to book recurring single weekly or monthly leave days in advance those bookings would only be authorised one month in advance of the day requested. He sought the views of staff before making the change. Mr Harkness' evidence was that the staff he particularly had in mind were Elaine Barnes, Liz Bartrop and the Claimant. The Claimant contends (as allegation nine) that this proposed change was a further act of victimisation.

6.12. On 14 May 2015 Katy Whitehead, a CSI supervisor who had particular responsibility for preparing rotas, sent an email to the Claimant. A copy is on page 755. It was about leave the Claimant had requested for the 4 and 5 July which the Claimant had queried in an email of 13 May to Ms Whitehead. In the email Mrs Whitehead first points out that it appeared that the Claimant had applied for the wrong hours and so she had cancelled that request. With regard to what she described as the correct leave request she said that that would remain on the list and would be granted one month before the date "in line with Frank's email that was sent out yesterday due to you making repeated requests for AL at the weekends". It was the evidence of Mrs Whitehead that she had mistakenly thought that Mr Harkness' email of 13 May effected the change rather than sought views before the change. She also told us that despite the reference to the change being made due to "you making repeated requests" she had simply meant that the Claimant was one of the people who had made requests into the proposed change.

6.13. On 17 May 2015 the Claimant responded to Mr Harness' email of 13 May (see page 758). He objected to the change in robust terms. He said that he had documentary evidence which suggested that the proposed change was directly targeted at him. He asked for reconsideration of what he described as a recent cancellation of leave already granted.

6.14. Mr Harkness wrote to the Claimant in response on 18 May 2015 and a copy appears at page 756. He pointed out that the proposed changes had not been decided and he agreed that the Claimant had been quite correct saying that Mrs Whitehead should not have cancelled any leave requested recently. That leave would be reinstated as soon as possible. In relation to the other comments the Claimant had raised Mr Harness suggested that it would be best

to discuss that face to face and he proposed a meeting the next time both were on duty. The Claimant declined such a meeting.

6.15. Since February 2015 the Claimant had been selected to attend a training course at Catterick which was to be held on 20 and 21 May 2015. The Claimant had been granted the 19 May to travel to Catterick. However on 13 May 2015 the Claimant had been contacted by a DS Slater warning him that the Claimant would be required to give evidence in a criminal trial later that month (see 1800). It appears that the Claimant may around that time have informed his direct line manager (and supervisor) Mr Stewart Sosnowski that he would be likely to attending court some time in May.

6.16. In the event the Claimant was again contacted by DS Slater at some time shortly prior to 19 May indicating that he would definitely be required in court on 20 and 21 May. The Claimant did not inform Mr Sosnowski or any of the other supervisors that that is what he would be doing. Nor did he make any record for instance in the Respondent's global rostering system (GRS) or on any system which might feed into that GRS. The Claimant's case has been that he asked DS Slater to inform the Claimant's supervisors what was happening. Clearly if that was the request DS Slater did not comply with it. The Claimant's evidence to us was that whilst he did not either travel to Catterick on 19 May or go in to work he was nevertheless carrying out work in that he was preparing for his attendance at court the next day. However we find that the explanation which he would at the material time subsequently give to Mrs Whitehead was different. That was that "he was busy sorting things out and had a lot on".

6.17. On 22 May 2015 Mrs Whitehead was surprised to see the Claimant in the office as he was supposed to be at the course in Catterick. Moreover he was wearing a suit which suggested that he had been to court. She sought an explanation from the Claimant who confirmed that he had not been to the course because on the morning of 19 May he had received a call from an officer stating that he was needed in court the following day. Mrs Whitehead also enquired about what had happened on 19 May and in the circumstances said that because the Claimant had neither been travelling to the training course nor he reported for any tour of duty she believed the 19 May would have to be recorded as annual leave or a re-rostered rest day. This is the basis of allegation 10 where, in his Scott Schedule the Claimant contends that Mrs Whitehead was looking for anything to get him into trouble and that in the meeting to which we have just referred she was confrontational.

6.18. Mrs Whitehead duly reported this matter to Mr Harkness and because of it and other concerns that Mr Harkness had about the Claimant's work and attitude he made a referral to the conduct unit. That was done by completing a Gen2 report which was dated 9 June 2015. A copy is at page 1715 in the bundle. It is addressed to Ms Smith. It begins by referring to the Claimant's disengagement from the team and his lack of commitment and personal

responsibility. It goes on to deal with the annual leave issue earlier in the month and then the Catterick issue. It concludes by noting that:

> *"Since John's experience and treatment by the force at the start of Regionalisation his behaviour towards CSI management has become distinctly hostile where he challenges almost every change especially if he considers it is directed towards him. John's overall behaviour towards management has become a disruptive element within the office but is proving difficult to address by John's failure to engage with me or other managers".*

6.19. On 1 July 2015 Ms Smith wrote to the Claimant. A copy of the letter is at pages 1713 to 1714. It contained four allegations which were in relation to the Catterick course and subsequently the Claimant's unwillingness to submit an annual leave form in relation to 19 May, allegations about failure to respond to supervisor's emails and a failure to carry out an EDIT test at Attercliffe police station and failure to deliver property to Barnsley police station. The Claimant was advised that acting inspector Jill Hall who conduct a fact finding of meeting on 13 July 2015. The Claimant contends (as allegation 13) that the commencement of this disciplinary action and investigation is a further act of victimisation.

6.20. On a balance of probability we find that it was Jill Hall who requested statements from Mrs Whitehead and Ms Minihan. Mrs Whitehead's statement is also in the form of a Gen2 and this is at pages 865 to 867. It is dated 9 July 2015 and it is addressed to Jill Hall of PSD (Professional Standards Department). Ms Minihan's statement is also in a Gen2 form and is also dated 9 July 2015. This is at pages 868 to 870.

6.21. The disciplinary interview of the Claimant by DS Hall duly took place on 13 July 2015. The interview was recorded and the transcript begins at page 1180. The Claimant complains that this interview as under caution and he was made to feel like a criminal. What was actually said to the Claimant (see page 1181) towards the beginning of that interview was in these terms:

> *"What I need to warn you is that anything you say today could be used in disciplinary proceedings if it is progressed that far. Do you understand that?"*

The Claimant was accompanied by Ms K Orwin from the Unison union. During the course of that meeting the Claimant was issued with a notice of complaint and that appears at pages 884.

6.22. Allegation 12 arises out of a separate matter on 13 July 2015. Ms Minihan who was the on duty supervisor that day had been unaware that the Claimant was to attend a disciplinary interview. At the beginning of the day when she became aware she asked him how long the meeting was likely to take. The Claimant replied 10 or 15 minutes. Ms Minihan took that to be a facetious reply. Nevertheless she hoped that the Claimant would be able to take work some time after 10 o'clock that morning – the disciplinary meeting being scheduled for 9. In the event the disciplinary

interview took somewhat longer than that. At the end of the meeting the Claimant spoke to his union representative and then somebody else he chanced to meet in the car park. He then began a mobile telephone call which was to his wife. Ms Minihan saw what was happening from the office and was concerned that the Claimant had not come back to work. She went out and, she says respecting his privacy, did not get too close but called over to him how long he was likely to be. Her evidence was that the Claimant replied I'm on the phone and made a reference to having just come out of a disciplinary interview. He then turned his back on Ms Minihan. When he returned to the office he announced that he was then taking his meal break. Ms Minihan told the Claimant that he had already had his meal break whilst he was on the phone. The Claimant was upset and apparently became ill and so had to go home.

6.23. At the end of a thorough investigation DS Hall prepared a report and a copy of that begins at page 1404 in the bundle. It is dated 4 September 2015.

6.24. At the beginning of the disciplinary process a preliminary assessment had been made as to the level of misconduct that was concerned. This exercise was conducted by CI Foster and he made an assessment of gross misconduct (other options being complaint misconduct or criminal). We understand that CI Foster would have conducted that exercise on paper. We have not heard from CI Foster. There was then a final assessment form and a copy of that appears at pages 1294 to 1296. That left the assessment at gross misconduct. It appears that this exercise was completed by DCI Darbyshire from whom we have not heard either. That assessment is dated 18 September 2015.

6.25. The disciplinary hearing proceeded on 27 November 2015 and was conducted by assistant Chief Constable Joanne Byrne. On this occasion the Claimant was accompanied by his union representative Ian Armitage. The meeting was recorded and the transcript begins at 1621. The management case begins at page 1366. A C C Byrne made and announced her decision during the course of that hearing (see page 1683 onwards). The decision was that the Claimant be issued with a first written warning.

6.26. The warning was contained in a letter to the Claimant from a Jane Marshall of the conduct unit. The letter is dated 30 November 2015 and appears in the bundle between pages 1038 to 1040. Unfortunately that letter was not received by the Claimant until either 15 or 16 December 2015. On receipt the Claimant's wife sent an email to Jane Marshall (see page 1316 pointing out the discrepancy between the date of the letter and the date of it's receipt. Ms Marshall's reply on the same page in the bundle explained that although the conduct union sent out it's correspondence by first class and recorded mail they were currently "experiencing difficulties with postal service provide to them by Royal Mail". In those circumstances there was apparently an arrangement for mail from the professional standards department (conduct unit) in Chapeltown Sheffield to be sent to Police HQ at

Carbrook in Sheffield and collected from there. Although it occurred after the material time which we are considering, we were informed that following an appeal the written warning was overturned at the end of September 2016 although observations were made by the appeal officer as to the Claimant's competence if not conduct in the matter.

6.27. Returning to the material time – and in fact a date before the Claimant received the formal written warning (although he would of course have known of it in the sense that it was announced by a C C Byrne on 27 November) a further incident occurred which is allegation 15. This was a meeting on 8 December 2015 between the Claimant and Mr Harkness. The 8 December was the Claimant's first day back at work after approximately two weeks off ill. In advance of his return Mr Arnold – a CSI supervisor at Doncaster police station made arrangements for the meeting and was present at it. In the witness statement that Mr Arnold made and which was served during the course of our hearing he says that he cannot remember the exact content of the meeting but does recall that it was conducted politely and without raised voices. The Claimant contends that Mr Harkness made references to both drawing a line under matters and to sweeping matters under the carpet. In his witness statement (at paragraph 226) the Claimant states:

> *"Although Frank Harkness did not specifically say if you drop your complaints we will drop the disciplinary action this was clearly what he meant".*

The evidence from Mr Harkness was that he neither said nor implied any such thing. Instead the intention of the meeting was to endeavour to restore a good working relationship and in that sense to draw a line under what had gone before – but there had been no reference to sweeping things under the carpet. It was also during this meeting that the Claimant told Mr Harkness that he had received a positive diagnosis of Lyme's Disease (the Claimant had been advised of that diagnosis on 4 December).

6.28. The matters giving rise to allegation 17 arose on 12 April 2016. The Claimant contends that what was allegedly said to him on this occasion by Mrs Whitehead amounted to direct disability discrimination, discrimination arising from disability, disability related harassment and victimisation. The day in question was the Claimant's first day back at work after a sickness absence of some four months. The Claimant's evidence is that after having received a telephone call from control (that is the Claimant received such a call) Mrs Whitehead spoke to the Claimant and said that control had told her that the Claimant had been rude over the telephone to control. Originally part of allegation 17 concerned this interaction between Mrs Whitehead and the Claimant. In paragraph 15 of the particulars of claim that were attached to his claim form the Claimant contended that Mrs Whitehead spoke to him in a raised voice across the office and that was how she spoke to others. The Respondent had a recording of the relevant exchange between Mrs Whitehead and the Claimant. This had been disclosed to the

Claimant during the course of these proceedings and it was Mr Arnold's contention before us that the reason for the Claimant's narrowing of allegation 17 as it appeared in the revised Scott Schedule was because having heard the recording the Claimant realised that it would not be possible to maintain that Mrs Whitehead raised her voice. The Tribunal were during the course of the hearing played this recording twice and we were satisfied that Mrs Whitehead was addressing the Claimant in a perfectly ordinary tone and volume and was simply explaining to the Claimant that she had just received a complaint from control.

Allegation 17 in the form that it remains before us is concerned with the Claimant's contention that after the exchange referred to above Mrs Whitehead moved the conversation towards the question of the Claimant's health and during the course of that conversation said something to the effect "I always knew there was something with your head (or brain)". Mrs Whitehead vehemently denied that she had said that. Her account was that she joined in a group conversation that had already begun whereby the Claimant was explaining to his colleagues the symptoms of Lyme's Disease and had mentioned that the doctors feared that it may have gone to his brain. Mrs Whitehead further says that as at the time her mother in law was suspected of having Lyme Disease she simply asked the Claimant how the doctors knew it had gone to his brain and whether they had done any tests on his brain. We make specific findings of fact on this disputed issue when dealing with allegation 17 in our conclusions below.

6.29. The Claimant presented his current ET1 claim to the Tribunal on 27 April 2016.

6.30. On 1 July 2016 the Crime Scene Investigation Unit of South Yorkshire Police was transferred to the offices of West Yorkshire Police and we understand that that was by way of a transfer of undertakings. It was for that reason as we have already mentioned that at the Preliminary Hearing conducted on 4 August 2016 the Chief Constable of West Yorkshire Police was substituted for the Chief Constable of South Yorkshire Police as the Respondent. We understand however that South Yorkshire Police's legal services department continued and continue to have conduct of these proceedings in effect as agent for the corresponding department of West Yorkshire Police.

7. The parties' submissions

7.1. <u>The Claimant's submissions</u>

???? described the Claimant as a damaged man who had struggled to focus during cross-examination. The Claimant had convinced himself that something was amiss. He had a good relationship with Mr Harkness until 2012. Mr Budworth said that the reason for the change in the relationship was the personal injury the Claimant has sustained and the restructuring exercise which had taken place during the Claimant's absence by reason of that injury. The Claimant was neither a fantasist nor a serial claimant. Mr Budworth accepted that the Claimant had perhaps looked to be on the verge of fantasy when he suggested that the professional standards

department were part of the campaign against him. Nevertheless the Claimant contended that speeding tickets had been buried although it was accepted that that was not part of these proceedings. Mr Budworth referred us to his opening note which we had read on the first day of the hearing and we were reminded that in victimisation cases, the concept of detriment had a low threshold. There was no need for financial loss for there to be a detriment. It was a question of the subjective view of a reasonable worker. It was accepted that it had to be something more than a sense of grievance. Mr Budworth said that his opening note had not been challenged in the Respondent's subsequent written submissions. None of the Claimant's allegations were unjustified grievances. They were all to the Claimant's disadvantage. It was a question of human behaviour. Mr Budworth reminded us of the content of the emails from Mrs Whitehead and Ms Minihan when they had refused to complete the HR78 forms. He described this as a smoking gun. Bitter language had been used and this showed that both Ms Minihan and Mrs Whitehead were dead set against the Claimant. It was personal. Ms Minihan had referred to "wins". The events the Claimant complained about did happen. The protected act had been the motivation for the approach towards the Claimant. It need not have been the predominant reason. Mr Budworth contended that Mrs Whitehead had spoken to Mr Harkness with regard to the previous claim and he had told her of the financial settlement but Mr Harkness in his evidence could not recollect that. However on the balance of probabilities we were urged to find that Mr Harkness was displeased about the settlement and the Claimant's witness statement for the first ET claim had attacked Mr Harkness. The three key actors against the Claimant were Mr Harkness, Ms Minihan and Mrs Whitehead. The latter two had completed their Gen2s on the same day. There was no clean break between the protected act and motivation. It was difficult for a claimant to prove victimisation but that was why there was the reverse burden. It was contended that there was a lot of material to show that the prior claim was in the forefront of those actor's minds. It was suggested that when completing their Gen2s Ms Minihan and Mrs Whitehead had simply put in anything they could to suggest that the Claimant was below par. DS Hall had said that she had not requested that information. However even if she had it was clear that Ms Minihan had made allegations about the EDIT test without checking the facts. It had been a witch hunt. With regard to the non attendance at Catterick there had been some communication to Mr Sosnowski. No checks had been made with DS Slater. We should not accept the evidence of Mrs Whitehead that it would not have been necessary to prepare for the crown court hearing.

Dealing with the specific allegations, with regard to allegation 17 Mr Budworth suggested that Mrs Whitehead had in effect admitted this when she said in cross-examination only that she did not recall making the brain comment. Moreover whilst she had referred to her mother-in-law she did not when asked in cross-examination know what the ultimate diagnosis for her mother-in-law had been.

In relation to allegation 15 the Tribunal should prefer the Claimant's evidence. It was contended that as of 8 December 2015 Mr Harkness would have known of the disciplinary outcome – at least he said he would normally know in such a case. It was suggested by Mr Budworth that as Mr Harkness knew that the Claimant was not going to be dismissed the

purpose of the meeting was to impose further pressure on the Claimant. In relation to allegation 13 the disciplinary referral was an indication of what was described as Mr Harkness' agenda. Allegation 12 had arisen out of Ms Minihan's frustration. In fact she had been incensed. The Claimant's meal break had been denied. We should prefer the Claimant's account. This was disadvantageous treatment of the Claimant.

Allegation 10 was an example of any way to get at the Claimant. With regard to allegation 9 the close proximity to the approval of the Claimant's outside business should not be regarded as a coincidence. There was no clarity with regard to the other two employees affected. It had been the Claimant who was targeted. As to which we were reminded of the content of Mrs Whitehead's 14 May email. She was seeking to impose the policy which was under consultation at the time. It was a valid conclusion of the Claimant that he was being disadvantaged. With regard to allegation 3 and as far as the Brice matter was concerned in other circumstances this would have been a quiet word but Ms Minihan and Mr Harkness referred the matter on. The Tribunal should see behind this. Mr Budworth contended that Mr Brice knew the issues between the Claimant Ms Minihan and saw this as an opportunity to assist Ms Minihan in her battle with the Claimant. The problem had been the Claimant's previous wins. It was satisfactory if there was a conscious or subconscious link.

Mr Budworth went on to address us on the question of the ambit of the Trade Union and Labour Relations (Consolidation) Act 1992 section 207A and the ACAS Code on disciplinary and grievance procedures. It was Mr Budworth's contention that it was immaterial that some of the alleged breaches of the Code applied only to substantive allegations which had subsequently been withdrawn. (Mr Arnold took a contrary view).

We invited Mr Budworth to address us on the limitation point and he confirmed that the Claimant was contending that there was conduct extending over a period. It had involved all the same people with the same motivation and there was no obvious cut off. He also addressed us on the question of contribution which was an issue raised in the agreed list of issues. He contended that there was no blameworthy conduct by the Claimant and the Claimant did not accept the contention in paragraph 232 of the Respondent's written submissions.

7.2. <u>The Respondent's submissions</u>

Mr Arnold had prepared an extremely comprehensive written closing submission which ran to 60 pages. We do not seek to summarise that here.

Mr Arnold limited his oral submissions to a reply to the Claimant's submissions. He contended that the failure by Mrs Whitehead and Ms Minihan to complete and return the HR78 forms and instead send the emails they had was understandable having regard to this being a long drawn out matter and the Claimant's perceived failure to co-operate had led to frustration in the workplace. In relation to our task Mr Arnold confirmed that he was happy for us to take the approach in **Shamoon** – "very often the answer to a case of discrimination lies in the examination of the reason why … putting the spotlight on the Respondent and requiring it to establish a non discriminatory reason" We were also referred to the case of **Hewage and Amnisty International v Ahmed** (see page 8 of Mr

Arnold's written submissions). Mr Arnold suggested that the reason for the recent significant withdrawals of allegations was because the Claimant accepted that the Respondent had given a non discriminatory explanation for the matters complained of. Commenting on allegation 9 (the alleged intentional targeting of the Claimant by the change of annual leave policy) Mr Arnold suggested that the three protagonists must be chess masters if they could have predicted that the change to the policy would have affected the Claimant's business. It had really been Mrs Barnes constantly booking Saturdays off to watch her son play rugby that had been the catalyst. The Claimant was a side issue.

In conclusion Mr Arnold acknowledged that Mr Budworth had been skilful in bringing out the best in the Claimant's case but the reality had been the Claimant's supervisors were trying to manage the Claimant with difficulty and the Claimant now in retrospect was trying to draw various inferences which the Tribunal should not accept.

8. The Tribunal's conclusions

8.1. Limitation

A jurisdictional issue of the time of presentation of the claim is raised by the Respondent who contends that any complaints/allegations occurring prior to 30 November 2015 are out of time. As we have noted the Claimant's ET1 was presented on 27 April 2016. He had sought ACAS early conciliation on 29 February 2016 and the early conciliation certificate was issued on 28 March 2016. Allegation 17 concerning an incident on 12 April 2016 is clearly in time. By reason of the extension of time afforded by the Equality Act section 140B(4) so too is allegation 15 an incident on 8 December 2015.

That leaves the five other allegations as ostensibly out of time.

As we have noted the Claimant contends that we should view what allegedly happened to him as conduct extending over a period so that the conduct should be treated as having been done at the end of that period – that is on 12 April 2016 when the in time allegation 17 occurred. The chronological span involved in that proposition would be

Date	Allegation	Alleged victimiser
9/12/14	Allegation 3	Mr Harkness and Ms Minihan
13/5/15	Allegation 9	Mr Harkness, Ms Minihan and Mrs Whitehead
22/5/15	Allegation 10	Mrs Whitehead
July/2015	Allegation 13 the ongoing start of the disciplinary process ongoing thereafter	Mr Harkness, Mrs Whitehead
13/7/15	Allegation 12	Ms Minihan

The conduct which the Claimant alleges began (for these purposes) in December 2014 was "a campaign" by Mr Harkness, Mrs Whitehead and Ms Minihan to get the Claimant out or otherwise to get rid of him (see paragraph 26 of the Claimant's witness statement as an example of the belief of the Claimant further expressed in various ways throughout his witness statement).

We take the approach that when determining the jurisdictional issue at the beginning of our Judgment we must assume that the Claimant will be able to make out his case. If so that would be that there had been a course of victimisation from December 2014 to December 2015 and then on to April 2016. On that basis we conclude that we do have jurisdiction to determine the whole of the extant claim on it's merits.

8.2. Background material

The Claimant's lengthy witness statement dealt with all 19 allegations. We have read that witness statement understanding that the Claimant wished us to take into account his evidence about the then withdrawn and subsequently further withdrawn allegations as background evidence. For the same reason we have also read all the witness statements served by the Respondent. We note however that very little if any of that background was put to the Respondent's witness they were cross-examined.

8.3. The relevant law

We have had regard to the definition of victimisation set out in the Equality Act at section 27 in these terms:

> "*A person (A) victimises another person (B) if A subjects B to a detriment because … B does a protected act".*

We also note from the leading case of **Nagaraajan v London Regional Transport** [1999] ICR 877 where it was explained that victimisation would occur if the discriminator consciously or subconsciously permits the protected act to determine or influence his or her treatment of the complainant.

8.4. Review of some of the material which the Claimant says should lead us to conclude that there has been victimisation

8.4.1. Mr Harkness

He was aware of the Claimant's first ET claim. He did not see the Claimant's draft witness statement for that claim but he was aware that within that claim the Claimant was blaming, among others Mr Harkness. However Mr Harkness told us that he felt that the Claimant had not been treated fairly by the Respondent at the time of the regionalisation process and that he, Harkness had been, as he put it "the middle man" – conveying information between the Claimant and higher management.

Mr Harkness' evidence in cross-examination was that the first claim had been brought against the Respondent not him personally. He had no knowledge of the details of the settlement ultimately reached.

Mr Harkness had been required to produce a large number of emails and his day book in conjunction with the proposed defence of the first claim.

Although he did not actually prepare a witness statement for those proceedings he believed that some of his "evidence" would have helped the Claimant.

8.4.2. Ms Minihan

When asked by Emma Hardwick of HR to complete the HR78 document to "close" one of the Claimant's grievances, as we have noted Ms Minihan refused to do so. Instead she wrote an email on 7 November 2016 which was sent back to Ms Hardwick. A copy in the bundle at page 1959. Within that email Ms Minihan wrote the following:

> *"Quite frankly, given Mr Coffey's recent appeal [a successful appeal against the written warning] and yet another win for him, it is all a complete and utter waste of my time*".

In cross-examination Ms Minihan accepted that one of the "wins" to which she was referring was the settlement of the first ET claim. As we have noted, Mr Budworth has described this email as a smoking gun.

We note also that Ms Minihan was implicated and blamed by the Claimant for the shoulder injury he suffered at work when removing bodies from a murder scene on 30 March 2011. Whilst that was the subject of civil proceedings for personal injury, it was also part of the subject matter of the first ET claim.

8.4.3. Mrs Whitehead

This witness also declined HR's request for the completion of an HR78 form. In a similar fashion to Ms Minihan she responded to HR to explain why. That is in her email of 4 November 2016 which is at page 1957. She includes within her reasons:

> *"Especially given the fact that John's most recent appeal has been upheld, I feel it makes a mockery of the system*".

8.5. **The extant allegations**

8.5.1. Allegation 3

Whilst, as analysed by Mr Arnold, there are five aspects to this complaint of victimisation, the main thrust is two fold. First that DCI Brice's complaint about the Claimant's conduct and manner on 7 December 2014 was "contrived" and based on false information. Secondly the referral which Mr Harkness ultimately made to the conduct unit – following his exchange with the Claimant on 8 December 2014.

In relation to the first aspect, we found Mr Brice to be a very straightforward and compelling witness. We do not accept that the limited prior professional contact he had had with Ms Minihan – primarily a trip to Poland to carry out a criminal investigation – nor the limited personal contact they had via Facebook – support the argument that he made his complaint about the Claimant to assist Ms Minihan in her alleged campaign against the Claimant. On the largely undisputed evidence concerning the exchange between the Claimant and DCI Brice over the telephone on 7 December 2014, we consider that Mr Brice was justified in raising the issue with Ms Minihan and that in turn she was justified in passing the matter on to Mr Harkness.

We reject the suggestion that the delay in Mr Brice sending his report or Gen2 (pages 734 to 735) to Mr Harkness supports the Claimant's suggestion that this was to give time for Mr Brice to allow Ms Minihan to see the report first.

With regard to Mr Harkness' referral to Lorna Smith, then head of conduct within HR (page 731) we are satisfied that had it not been for the Claimant's behaviour at 8 December meeting with Mr Harkness, the 7 December Brice issue would have been resolved on an informal basis by Mr Harkness and so would not have gone further.

There is a conflict between the Claimant's evidence and that of Mr Harkness as to who was responsible for the meeting becoming "a little heated" in the words the Claimant uses in his witness statement (paragraph 50). It is at least common ground that the Claimant demanded to see the email Mr Brice had sent to Ms Minihan despite Mr Harkness having read it out or most of it to the Claimant. Nor is it in dispute that the Claimant then walked out of the meeting, refused subsequently to return and instead went home on the grounds of ill health.

We find that there was sufficient reason for Mr Harkness to take the view that there was now an additional matter of potential misconduct. Moreover that was a matter in which he Harkness was involved and so was not in a position to investigate or determine. Hence what we find to be the understandable referral to the conduct unit. We conclude that here the Respondent has established a valid, and so non discriminatory, reason for the referral.

We are satisfied that Mr Harkness was influenced by what had allegedly happened on 7 December 2014 and his own experience on 8 December and not – consciously or subconsciously – by the Claimant's 2013 ET claim with which, on our acceptance of Mr Harkness' evidence, he had little involvement with but some sympathy for.

8.5.2. <u>Allegation 9 – change of annual leave policy made 2015</u>

This allegation of victimisation involves both Mr Harkness and Mrs Whitehead. As we have noted it was Mr Harkness who proposed the change of the policy (see his 13 May email at page 754).

It was then Mrs Whitehead who "applied" the policy to the Claimant whilst it was in fact still under consultation. She also allegedly singled out the Claimant as the person at whom the change was directed (see her email of 14 May 2015 at page 755).

On the evidence, we are satisfied that the catalyst for the proposed change was the pattern of weekend leave booking by three individuals of whom the Claimant was one. We accept that the Claimant was given the impression by Mrs Whitehead that the proposed change was just directed at him. However we find that in fact it was not just directed at him. We also take into account that Mrs Whitehead at the same time (her email of 14 May) assisted the Claimant by pointing out that he had apparently requested the wrong hours for leave and so she had correctly cancelled that application. Mrs Whitehead's evidence was that she had wrongly believed the proposed change of policy to have had immediate effect.

In terms of her alleged motivation or influence – the 2013 ET claim – we observe that she was not implicated in that claim and it seems would not have been giving evidence if that claim had proceeded.

We need to return to the words used in her November 2016 email – "it makes a mockery of the system". We note that the comment was made nearly one and a half years after the allegation 9 events – by which time other factors in the working relationship applied – a matter to which we will return.

In the circumstances we are satisfied that Mrs Whitehead made a genuine error and was not consciously or subconsciously influenced by the protected act.

As to Mr Harkness' involvement, we are satisfied that there was a genuine management reason for the proposed change. Mr Harkness conceded that he knew that the Claimant would be affected by the change due to his registered outside business. He also accepted that the proposed change came shortly after the registration of that business interest. However as Ms Barnes and Ms Bartrop's practices were also triggers for the proposed change, we do not accept that the Claimant was individually targeted.

We accept that the change to the policy was a detriment to the Claimant – but it was a detriment because Mr Harkness decided that potential abuse of the leave system needed to be addressed – it was not because of the protected act.

We also observe that it is not plausible that Mr Harkness would have gone to the trouble of taking HR advice and consulting with the unions simply for the purposes of altering a policy so that it would have a victimising effect upon the Claimant.

We are also mindful that Mr Harkness' offer to meet with the Claimant to discuss the proposed change was declined by the Claimant.

With regard to Mrs Whitehead's challenge to the leave which the Claimant sought for the 3 July 2015 (see her email of 30 June 2015 at page 813) we are satisfied that – as stated in the email – the reason for that was that the Claimant was booked on to a training course that day. That was a valid reason and there had been earlier examples of such clashes. Accordingly we find that this allegation is not made out.

8.5.3. <u>Allegation 10 – Mrs Whitehead's treatment of the Claimant on learning that he had not attended the Catterick course in May 2015</u>

We find that the Claimant was at fault in not sufficiently communicating to management that he would be unable to attend the course by reason of being required to attend court. Nor did the Claimant notify the Respondent in advance that he would not in those circumstances be using 19 May as a travelling day.

At best the Claimant had, earlier in May, informed his supervisor Mr Sosnowski that he may have to attend court. We also note that the only explanation which the Claimant gave at the material time was that "he was busy sorting things out and had a lot on". We find that he did not give the "preparing for court" explanation that he now gives in paragraph 122 of his witness statement at the material time.

In the circumstances we find that Mrs Whitehead was entitled to be concerned and to require an explanation from the Claimant. In the light of the Claimant's explanation at the time of how the 19 May was spent we also find that she was justified in requiring the Claimant to take that as annual leave. Her email notifying him of that is at page 761. Allegation 10 is connected to allegation 13 and so we deal with that next.

8.5.4. Allegation 13 – commencement of disciplinary action with regard to Catterick and other matters

Mrs Whitehead reported the Catterick matter as we have found to Mr Harkness in her email of 22 May 2015 (see page 1833). Mr Harkness decided that it was appropriate to refer the matter to the conduct unit. As we have found he prepared the Gen2 report which is at pages 1715 to 1716. As we have already noted, that document began by referring to the Claimant's:

> "*disengagement from the CSI team in particular supervising colleagues together with his lack of commitment and personal responsibility [which was] becoming more acute and concerning".*

Whilst Catterick had been the catalyst for the referral, Mr Harkness began his report by referring to the annual leave policy change issue earlier in May. He referred to his feelings that the Claimant and his wife "were attempting to manage me rather than the other way round". He went on to set out his understanding of the Catterick issue. He concluded his report by commenting that:

> "*Since John's experience and treatment by the force at the start of the Regionalisation his behaviour towards CSI management has become distinctly hostile where he challenges almost every change especially if he considers it is directed towards him. John's overall behaviour towards management has become a disruptive element within the office but is proving difficult to address by John's failure to engage with me or other managers"*.

We find that this statement speaks volumes. It portrays the Claimant as an employee who was becoming unmanageable. Whilst we appreciate that the regionalisation issue was at the heart of the first ET claim, it is clear that Mr Harkness' concern as expressed above was in respect of the Claimant's behaviour in the aftermath of that regionalisation. It was not concern about the earlier ET claim. Indeed Mr Harkness alludes – we consider critically – to the Claimant's "treatment by the force" at the start of the regionalisation. Accordingly Mr Harkness seems to be expressing a view in some alignment to the thrust of the first ET claim.

The Gen2 statement given by Mrs Whitehead for the purpose of these disciplinary proceedings (pages 865 to 867) starts with the Catterick issue but goes on to deal with concerns about a request for the Claimant to carry out an EDIT drug test, where Mrs Whitehead felt that there may be a training issue.

As we have already noted a Gen2 was provided by Ms Minihan (868 to 870). She had not dealt with the Catterick issue. Her report deals with an incident where the Claimant had allegedly failed to transmit some finger prints to a detective constable and she also referred to the EDIT issue and various other alleged inaccuracies in the Claimant's recording of

information on to Socrates (one of the Respondent's computer management systems).

It was put to Mrs Whitehead in cross-examination that the content of her report was as it was because she was looking for any opportunity to contribute to the case against the Claimant. Mrs Whitehead denied that, saying that she had completed the report as requested to do so.

In the cross-examination of Ms Minihan she was asked why her report dealt with matters other than Catterick. Her answer was that she believed that DS Jill Hall (the conduct issue investigator) had asked her to provide information as to the Claimant's work and performance. As with Mrs Whitehead, it was put to Ms Minihan that her report represented "anything she could do to help" the disciplinary process against the Claimant and that it was because of the "wins" the Claimant had achieved. That was denied by the witness.

There was some doubt as to how and by whom Mrs Whitehead and Ms Minihan had been instructed to prepare these reports. They both denied that the request came from Mr Harkness and said that it had come from DS Hall. However when DS Hall gave evidence she said that it was not her. The Tribunal have been assisted by considering a document which appears at page 1793. It immediately follows the Gen2 prepared by Mr Sosnowski. The document appears to be a request for him to provide that Gen2 and it gives guidance as to the areas it should cover. We find on a balance of probabilities that this request (anonymous in a document we have) must have come from DS Hall. She was the investigating officer and it was to her that all the Gen2s are addressed.

Significantly, at point 7 on that request is the following:

> *"Please include any other information you consider to be relevant*".

We find on the balance of probabilities that this explains the content of Mrs Whitehead and Ms Minihan's Gen2s. In other words that they must have received similar requests from DS Hall. We prefer that explanation than that they prepared their statements influenced by the protected act and with the intention of doing the Claimant down.

We also take into account the vivid description which Mr Harkness gives in his Gen2 as to the Claimant's hostile and disruptive behaviour. We consider that this puts the Gen2 reports by Mrs Whitehead and Ms Minihan in context.

At first sights the label of gross misconduct which was applied to the allegations against the Claimant may appear a little harsh. Despite the failure to communicate what he was doing, the Claimant had been "at work" on 20 and 21 May in the sense that the had been attending court to give evidence. He had not been on a frolic of his own. However we agree that the Respondent was entitled to be suspicious about his activities and whereabouts on the 19 May.

DS Hall explained to us that the "severity assessment" in respect of the charge was initially made by CI Mark Foster. That assessment was not altered at the final assessment stage and we have already referred to the document at page 1294. It is not the Claimant's case that he was victimised by CI Foster – or for that matter DCI Darbyshire.

This severity assessment is also relevant to the Claimant's complaint that the DS Hall interview was "under caution" whereas he previous conduct matter undertaken by Lorna Smith had not been.

We find that this was satisfactory explained by DS Hall. Whether or not a caution is given depends on the initial assessment of seriousness of the charge. The matter concerning Mr Brice and 8 December 2014 meeting that Ms Smith had dealt with was not assessed at a level which required the caution. However the matter which DS Hall was dealing with did require a caution.

We should also add that whilst the Claimant says that he was made to feel like a criminal, the caution given was not that applicable to a criminal investigation and we have already referred to what was said as recorded in the transcript at page 1181. Finally in respect of this allegation we accept DS Hall's explanation that it was not part of her role to deal with the Claimant's allegations against his supervisors or other grievances as she was concerned with a disciplinary investigation only. We are aware that the Claimant pursued various grievances but as allegation 11 has been withdrawn we are not now directly dealing with those issues.

In conclusion we find that allegation 13 is not made out.

8.5.5. <u>Allegation 12 – Ms Minihan's interaction with the Claimant on 13 July 2015 in the car park</u>

We conclude that Ms Minihan's treatment of the Claimant on this occasion was unsympathetic and the denial of a meal break was harsh and an over reaction. It was therefore a detriment – however was it because of the 2013 protected act?

We have to take into account the Claimant's actions and we conclude that he had not notified his supervisors or recorded in documentary form the fact that he would be attending a disciplinary interview that day. Perhaps Ms Minihan should have been advised by others of this – however we are satisfied that she was not. If she had of known she would we find have arranged for cover to be provided so that jobs could be undertaken whilst the Claimant was unavailable by reason of attendance at the disciplinary meeting.

We therefore conclude that the reason for Ms Minihan's approach that day was her frustration and as she admits, annoyance, that the Claimant had given her a facetious answer when she enquired how long the meeting was likely to last and then at the conclusion of the meeting had spent time in conversations and on his mobile phone refusing to engage with Ms Minihan.

We find therefore that the Claimant's 2013 ET claim was neither consciously or subconsciously the reason for that treatment.

8.5.6. <u>Allegation 15 – Mr Harkness' alleged "sweep it under the carpet" comment on 8 December 2015</u>

The Claimant contends that Mr Harkness' reference to "we will draw a line under it" or "sweep it under the carpet" meant to the Claimant that Mr Harkness was saying that he had control over the disciplinary process and so could choose whether or not it continued (see paragraph 225 of the Claimant's witness statement). The Claimant goes on to say at page 226 of that statement:

> "*Although Frank Harkness did not specifically say if you drop your complaints we will drop the disciplinary action this is clearly what he meant*".

Our first observation is that Mr Harkness was not "in charge" of the disciplinary process. In fact it was out of his hands and in the hands of A C C Byrne. She had by this date already made her decision – which we believe was announced to the Claimant at the time on 27 November – albeit that that had not been communicated to the Claimant in writing and would not be until the 15 or 16 December 2016 for the reasons we have already found (postal difficulties). We also find that Mr Harkness was not aware of the outcome as of 8 December.

Accordingly there was no power in Mr Harkness to influence a decision which had already been taken at a higher level. Further Mr Harkness denies that he used the phrase "sweep under the carpet". We accept that this is an unlikely phrase to have been used about an issue which, in the hands of others, had already been determined.

We find that the purpose of the meeting conducted on the Claimant's return from two weeks sickness absence was to attempt a fresh start and to repair and rebuild the working relationship. Mr Harkness fully admitted to us that he had been avoiding the Claimant as far as possible to avoid confrontations of the type that had occurred on 8 December of the previous year. He told us that he had thought long and hard about having that meeting (that is December 2015) and had taken HR advice.

The Claimant's case here is based on what we find to be an implausible theory. We prefer Mr Harkness' robust evidence, during the course of which he denied that the purpose of the meeting was to apply further pressure to the Claimant on the basis that he allegedly now knew that the Claimant was not to be dismissed. Accordingly we find that this allegation is not made out.

8.5.7. <u>Allegation 17 – Mrs Whitehead's alleged "something wrong with your brain" comment on 12 April 2016</u>

This as we have noted is brought as a complaint of direct disability discrimination, discrimination arising from disability, harassment and/or victimisation.

There is a conflict of evidence as to whether Mrs Whitehead used the words alleged. Accordingly the first issue for the Tribunal is was there less favourable, unfavourable, unwanted or detrimental treatment?

The task of establishing on the balance of probabilities that it was said rests squarely on the Claimant. (Section 136 of the Equality Act 2010 has no part to play at this stage).

In effect we have the Claimant's word against Mrs Whitehead's. As we have noted she denies using the offending phrase. Neither side has tendered evidence from any other employees who might have been present at the material time.

Mr Budworth has submitted that we should treat Mrs Whitehead's evidence with caution because she went no further than saying that she could not recall using the alleged words. That is the answer that she gave under cross examination. However we do note that in paragraph 32 of her witness statement she says:

"I did not say anything along the lines that I had always thought that the Claimant had something wrong with his brain".

Mr Budworth also reminded us that Mrs Whitehead had not known whether subsequently her mother-in-law had in fact been diagnosed with Lyme's Disease.

Mr Arnold's analysis of this matter is at pages 39 to 44 of his closing submissions. The Claimant's credibility is attacked by reason of the withdrawal of the first aspect originally of allegation 17 as we have described its genesis from it's ET1 through to the final version of the Scott Schedule. As we have noted the Respondent contends that this withdrawal was forced on the Claimant when the audio recording was disclosed.

Mr Arnold went on to urge us to treat the Claimant's evidence with caution because it was as Mr Arnold put it "extremely muddled" during cross-examination and in conflict with the Claimant's evidence in chief.

In chief (paragraph 248 of his witness statement) the Claimant had at least conceded that Mrs Whitehead had asked about Lyme's Disease. However in his answer to the Tribunal's question he had alleged that Mrs Whitehead had just made the comment out of the blue. The Claimant had accepted in cross-examination that Mrs Whitehead may previously have told him that she had a relative who had suspected Lyme's Disease. We were also reminded of Ms Minihan's evidence to us that the Claimant had a habit of discussing his symptoms amongst colleagues in an open plan office. Weighing up the evidence before us and applying the balance of probabilities test we conclude that Mrs Whitehead did not use the alleged words and instead only made the enquiry which she refers to in paragraph 31 of her witness statement.

Accordingly having found that the alleged treatment did not occur, the result is that this allegation and the various complaints of discrimination contained in it is not made out.

8.5.8. <u>Ultimate conclusion on the merits</u>

It follows therefore that the claim overall is not made out and must be dismissed.

8.5.9. <u>The Respondent's costs application</u>

Immediately following the delivery of our Judgment with reasons in Tribunal Mr Arnold intimated an application for costs. He had prepared a written application (8 pages). Within it he contended that the Claimant had behaved unreasonably in bringing the proceedings and/or in conducting them and that the claim had no reasonable prospect of success. Whilst the Respondent's actual costs were in the order of £37,967.66 this application was limited to £20,000. The application went on to review the interlocutory stages of the claim and the difficulty which the Respondent had encountered in getting full particulars from the Claimant. It was alleged that the Claimant's deficient pleading had caused the Respondent to incur additional costs in drafting requests for additional information. In the face of the Respondent's amended grounds of resistance served on or about 26 July 2016 (which contained warnings as to the perceived weakness of aspects of the claim) the Claimant had taken no steps to withdraw any complaint other than reducing the extent of allegation 17.

Instead the Claimant had without explanation withdrawn seven allegations on the first day of the hearing. This meant that the Respondent had incurred costs in addressing those withdrawal allegations in the amended grounds, dealing with those matters with witnesses in conference, drafting witness statements to deal with those allegations and the preparation (said to be some 12 hours) preparing closing submissions on those allegations. The Claimant had then again it was said without proper explanation withdrawn a further four allegations on day four of the hearing. The written application went on to refer to certain recent negotiations between the parties whereby prior to the hearing the Claimant has made an offer of £25,000 (in fact there may be a typographical error in paragraph 21 of the written application and so that could in fact be £2,500). We were also told that at the end of the Claimant's case the Respondent had made a "dropped hands" offer with no order as to costs which had been rejected. The written submission goes on to review the relevant law. The Claimant's alleged unreasonable behaviour was set out further in paragraph 28. Mr Arnold observed that the Claimant had apparently had the benefit of a legal expenses insurance policy which may well have an indemnity for the other side's costs.

8.5.10. <u>The Claimant's position on costs</u>

Initially Mr Budworth submitted that the Claimant was not in a position to defend this application today because a file with some relevant correspondence had not been brought to the hearing by his instructing solicitor. Mr Arnold was concerned at the prospect of a postponement noting that the Claimant had been on notice before that day that a costs application would be made if the claim failed. Mr Arnold indicated that coming back another day would increase costs. After an adjournment during which we read Mr Arnold's written application Mr Budworth informed us that the Claimant was now content to proceed today. The Claimant then gave further evidence as to his means.

Mr Budworth's submissions on the costs application were that various allegations had been withdrawn on the basis that it was not thought that proving them would have added very much to the amount the Claimant hoped to receive by way of injury to feelings. That was the reason for the withdrawal made on day one. The result had been the Tribunal's task was reduced and so too the Respondent's. It meant that the last two of 11 days scheduled for the hearing would not be required and so refreshers would be reduced. The Claimant should not be worse off having withdrawn complaints. We were also reminded that in the case of **McPherson v BNP Paribas** [2004] ICR 1398 the Court of Appeal had found that it was not unreasonable conduct per se for a Claimant to withdraw a claim. That was because it would be unfortunate if claimants were deterred from dropping claims by the prospect of an Order for costs on withdrawal. We would observe that the Court of Appeal also commented that a practice which encouraged speculative claims pursued and then withdrawn at short notice should not be sanctioned. The critical question was whether the Claimant withdrawing the claim or part of it had conducted the proceedings unreasonably not whether the withdrawal of the claim in itself was unreasonable. In respect of the allegations withdrawn on day four that Mr Budworth contended was also a proper step and that he said had been the decision of the Claimant's solicitor not the Claimant (although presumably the solicitor had instructions). There

was also a danger of applying hindsight. The fact that the Claimant's claim had failed was not the same thing as it never having any reasonable prospect of success. Mr Budworth suggested that the Claimant had been forced into bringing proceedings because of intransigence by the Respondent. That was in respect of the allegedly faulty way in which the grievances had been dealt with. The Claimant had therefore been provoked. Mr Budworth noted that the Claimant had been vindicated by the Tribunal with regard to aspects of allegation nine, 10 and 13. We had also found that allegation 12 was a detriment albeit not because of a protected act. It was submitted that the Claimant had a reasonable belief that the key actors were set against him and he was entitled to have that matter tested. It was always difficult to get hard evidence of discrimination. The Claimant had not been hopeless. The Respondent had never issued a costs warning in correspondence prior to the hearing only during the hearing. Nor had the Respondent ever sought a deposit order. We were also informed that prior to the commencement of proceedings the Claimant's solicitors had sought to have a general dialogue with the Respondent about the Claimant's position but that had failed. Moreover the Respondent had not engaged with the ACAS early conciliation procedure.

Mr Budworth raised the indemnity principal in relation to costs pointing out that the current Respondent – the Chief Constable of West Yorkshire appeared not to have incurred costs as the work was being undertaken by the Legal Services Department of the South Yorkshire Police. Mr Budworth went on to comment that if during the course of the proceedings the Respondent believed that it was incurring unnecessary costs it should have made an application for costs at that time rather than now. Mr Budworth contended that the Claimant's schedule of loss was not unrealistic. In relation to the Claimant's legal expenses insurance Mr Budworth believed that the indemnity was all but exhaustive. There may be a couple of thousand pounds left.

8.5.11. The Respondent's reply

Mr Arnold contended that having regard to what the Claimant had told us of his capital then that was something that should be taken into account. There was equity in both his home and in the business. There had been no need to make costs applications at the time of the costs being incurred and it would not have been practical or economic to do so. In relation to the question of indemnity Mr Arnold suggested that the reality was that the work being undertaken by South Yorkshire Police Legal Services Department was being done as on an agency basis. The expense of costs was coming out of the South Yorkshire budget. As an alternative it was suggested that we could reinstate the Chief Constable of South Yorkshire Police for these purposes.

8.5.12. Our conclusions in respect of costs

We considered that the late withdrawals were really the only aspects within the Respondent's application that came within the category of unreasonable conduct of the proceedings. We took the view that because the withdrawals were made so late in fact in respect of four allegations during the course of the hearing the result was that the Respondent had unavoidably incurred costs in defending and preparing for the hearing in respect of what in total were 12 withdrawn allegations.

That had included the preparation and conduct of cross-examination of the Claimant on the four allegations that were immediately withdrawn after the Claimant's evidence concluded. Whilst we accepted Mr Budworth's contention that the benefit of the withdrawals was that the case had been completed in less time than would otherwise have been the case we nevertheless took the view that that only offset some of the Respondent's costs not all of those unnecessary incurred.

In relation to the Claimant's means we accepted that the Claimant's income was modest but noted that there was equity in both his house and business. There was also the possibility that there was a remaining indemnity on the legal expenses insurance policy. We also took into account that the Respondent's costs now sought did not represent their actual costs. However having regard to the Claimant's means which even when taking into account his capital assets remained relatively modest we concluded that it was appropriate to make only an order for contribution towards costs and that would be in the amount of £10,000. On the indemnity point we accepted that the agency arrangement which Mr Arnold had set out was a realistic assessment of the arrangement hence the terms of the costs Judgment we have made.

Employment Judge Little

Date: 19 April 2017