EMPLOYMENT TRIBUNALS

Claimant: Mr D Ghelani

Respondent: Secretary of State for Work and Pensions

Heard at: Leicester **On:** 20-23 August 2018

Before: Employment Judge R Clark
Miss McLoud
Mrs Pattison

Representatives

Claimant: Mr Hyams of Counsel
Respondent: Mr Feeney of Counsel

RESERVED JUDGMENT

Upon **withdrawal** by the claimant:-

1. The claim of direct disability discrimination is **dismissed**.

2. The claim of discrimination because of something arising in consequence of disability is **dismissed**.

The unanimous judgment of the tribunal is that:-

3. The claim of indirect disability discrimination **fails and is dismissed.**

4. The claim of failure to make a reasonable adjustment **fails and is dismissed.**

5. The claim of victimisation **fails and is dismissed.**

REASONS

1. Introduction

1.1. The claimant presented a number of allegations of discrimination. The claimant had previously presented a claim to the Employment Tribunal in December 2015 relating to events during an earlier period. That claim was dismissed. The claimant confirmed that such factual overlap as remains with that earlier claim is advanced before us only as part of the general background to the current claims and he does not seek to re-litigate those earlier complaints. Our principal focus, therefore, is the period of around 18 months from mid 2015 which broadly coincides with the appointment of Mr Graham Bee as the claimant's Team Leader.

1.2. The current claim is itself an old one, having been presented in October 2016. It has been subject to a stay and now comes before us approximately two years after the relevant events.

2. Issues

2.1. It has always been accepted by the respondent that the claimant is disabled by virtue of his visual impairment.

2.2. The issues in the claim were identified and further particularised in the preliminary hearing held as long ago as 3 January 2017, before REJ Swann. They are now, as Mr Hyams puts it, "considerably narrower in scope". With the agreement of the parties, we identified the extant issues as follows:-

a. The claim of direct discrimination under s.13 of the

Equality Act 2010 ("the 2010 Act") is no longer pursued and will be dismissed on withdrawal.

b. The claim under s.15 of the 2010 Act did not originally identify any unfavourable treatment. We explored this with Mr Hyams and time was given for reflection. On day two we were told this was not being pursued and will be dismissed on withdrawal. (We note, however, the claimant's closing submissions referred in passing to a s.15 claim in the alternative although in the event no further submission was made on it).

c. The claim of indirect discrimination under s.19 of the 2010 Act relies on a PCP of **"the requirement that administrative officers carry out their work to a certain standard of performance standard/target achieving as his colleagues who are not disabled."***.* The particular disadvantage was identified as "**not being able to perform as well as those without the disability**" which we extrapolate to mean those that share the claimant's disability face an increased prospect of performance management and/or disciplinary sanction than those without the relevant disability. If that is found, the question is whether the claimant was himself subject to that particular disadvantage. If so, the respondent seeks to justify the PCP on the basis of the legitimate aim of **providing efficient and effective services to the public and taxpayers**. In terms of its proportionality, it also points to the adjustments it makes to its usual performance targets.

d. The claim that the respondent has failed to make reasonable adjustments under s.20 of the 2010 Act relies on two PCP's. The first is **the requirement that administrative officers carry out their work to a certain standard of performance standard/target achieving as his colleagues who are not disabled.** The second PCP relied on is **requiring the claimant to work with the software system "CMG 2012".** The substantial disadvantages were identified as him being **"unable to manage his workload and unable to properly perform to the same standard as other colleagues**". In closing, Mr Hyams sought to expand this disadvantage to include a detrimental effect on the claimant's promotion prospects. There were originally two adjustments contended for. The first is "**that consideration be given to transferring him to a different location with a view to doing more MS Office based work so that he was no longer required to use the DWP CMG 2012 system"**. The claimant does not now rely on the second adjustment of installing the Magic Screen Magnification Software.

e. The claim of victimisation under s.27 of the 2010 Act relies on protected acts within the claimant's 3 grievances lodged on 18 September 2013 [75a], 4 August 2015 [103] and 3 November 2015 [140] together with the earlier ET claim presented in December 2015. The respondent accepts all but the grievance of 4 August 2015 are protected acts. The detriment alleged is **being subject to a disciplinary process** from April 2016. The principal issue for us is whether any of the protected acts were a

material factor in the reason why Mr Bee reached his decision to instigate the disciplinary process.

3. **Preliminary Matters**

3.1. Various adjustments were made within the hearing itself. The initial plan to prepare a large text bundle proved impossible. Mr Nelson, of the claimant's solicitor's firm, provided some assistance as a reader albeit in the event this proved unnecessary. Documents were otherwise read out loud in the course of any examination of the claimant. When the claimant was not giving evidence, we indicated further time would be available in the timetable for breaks should Mr Ghelani wish to consider documents or discuss matters and give instructions. The respondent brought to the hearing the document magnifier previously used by the claimant in his job.

3.2. We also took notice of the effects of Mr Bee's own disability when he gave his evidence.

3.3. We refused the claimant's application to amend his claim made on day one of the final hearing. He sought to add a new claim under s.15 of the 2010 Act on the basis that he was subject to unfavourable treatment in respect of the respondent instigating the disciplinary investigation. As will be seen below, this was in response to the allegation that the claimant had made verbal threats to harm other members of staff. Relying on **York City Council v Grosset [2018] EWCA Civ 1103**, he sought to argue that the threats arose in consequence of his disability.

3.4. We unanimously rejected the application to amend. We considered the relevant guidance in **Selkent**. Firstly, we noted that

where the ET1 touched on this matter it remained ambiguous as to whether it formed part of a claim or not. That ambiguity was clarified by the further and better particulars provided to REJ Swann in the Preliminary Hearing in January 2017, over 18 months ago. Had it then been articulated in the terms now advanced, it may have been less of an issue. However, it was not and for the past year and half the parties have prepared disclosure and evidence on the basis of the claim as it was understood. Secondly, we accepted that there is some overlap in the evidence between the proposed claim and the existing claims, but that they are not at all coterminous. The claimant acknowledged this was not a case of relabelling. There remain gaps in the evidence of the alleged something arising in consequence and there will need to be fresh consideration of the legitimate aim in evidence which could well, albeit not definitely, jeopardise this already delayed listing. Thirdly, we considered the manner and timing of the application. It is made at the start of the first day of the final hearing. It arises for no other reason than counsel being instructed at some point in the past week. It is clear Counsel did not settle the pleadings nor has had any prior conduct of the case. For perfectly understandable reasons, he has applied his experience to assessing the merits of the case and the various claims advanced by his instructing solicitor, who has been instructed throughout. Mr Hyams argues that the decision in **Grosset** justifies the late application as it presents a change in the law. We rejected that argument. Firstly, it was a second appeal which upheld the earlier EAT decision. Secondly, both upheld the first instance decision which itself applied s.15 as it has been understood for some time. In any event, it is consistent with earlier EAT authority on the point (for example **Risby v London Borough of Waltham Forest UKEAT 0318/15**). We are left without a persuasive reason for the later late application. The timing sits within a chronology where this claim is

already of some age. It is a 2016 claim, itself now nearly 2 years old and the claimant has been legally represented throughout. We also considered how to approach the question of time limits of the proposed claim as the allegations relate to a decision taken in April 2016, some 2 ½ years ago and itself within a period of the chronology that is prima facie out of time even by the time the original claim was presented. However, although this is a factor against allowing we do not see it carries a great deal of weight in the balance as the question of time limits was already a matter that in part falls to be considered. Whilst we clearly do not try to determine the proposed case at this stage, we do have some regard to how it will be advanced and two matters loom large. The first is the fact that the claimant's case *in fact* is that he did not say the things he is relying on in support of this amendment. It must therefore stand as an alternative case in fact. The second is that we would be bound to favourably consider any amendment application by the respondent particularly in respect of any legitimate aim advanced. We note that the employer's response to the allegation was no more than to investigate the allegations at a preliminary stage prior to the instigation of any disciplinary charge. It did not suspend the claimant. It then decided to take the matter no further. If there was unfavourable treatment, the question of proportionality of its response is therefore engaged.

3.5. Finally, we considered the relative hardship of allowing or not allowing the amendment. If we do allow it, further evidence will be required. It will either lead to an adjournment or will have to be given on the hoof, which itself could well through up issues which lead to an adjournment. That is undesirable at this already late stage. The respondent, and particularly its witnesses, have the same entitlement to a prompt and fair determination of the claim as the claimant. If we refuse the application, the claimant will be denied the opportunity to

advance a case which is at odds with his factual case and faces some hurdles. He will, however, still be able to advance the claims that he and his lawyers identified some time ago. For those reasons, we concluded that the balance tips against allowing this late amendment.

4. **Evidence**

4.1. For the claimant, we heard only from Mr Ghelani himself. For the respondent, we heard from Miss Ellen Mary Chadwick, the HR adviser involved in the claimant's transfer request, and Mr Graham Bee, the claimant's line manager. All witnesses spoke to their written statements and were questioned. Mr Ghelani sought to adduce some supplementary evidence. The parties had agreed that this would be provided by way of a short supplementary witness statement which was served on the morning of day two. We agreed to that.

4.2. The bundle ran to 554 pages. We considered those pages we were directed to.

4.3. Both Counsel spoke to written submissions in their closing submissions

5. **Facts**

5.1. It is not the tribunal's role to determine each and every dispute of fact between the parties. Our role is to make such findings as are necessary to determine the issues before us and to put them in their proper context. We record here that the evidence before us has touched on a wide range of issues over a long chronology, a number of which are not necessary for us to go into, either in detail or at all, in

order to resolve the remaining issues in the claim before us. The parties should not, therefore, expect to see here a blow by blow account of every matter raised. On that basis, and on the balance of probabilities, we make the following findings

5.2. The claimant has been employed in the civil service, specifically what is now the department for work and pensions, since 1993. He has held various posts at various locations. His career started with a view to him training as an accountant within internal audit. This career path was curtailed by the deterioration in his vision. The claimant has a congenital condition. He is now blind in his left eye and has reduced vision in his right. He is registered as severely visually disabled.

5.3. From July 2012, he transferred to Leicester and, from October 2014, to the child maintenance group. That is the area of work we are concerned with. He works at the grade of administrative officer ("AO").

5.4. In July 2015, his role within the Child Maintenance Group changed when he joined the post classification team ("PCT"). The Child Maintenance Group handles a large volume of post related to child benefit claims. The claimant was one of three AO's engaged in post allocation. They would each be responsible for classifying and allocating such of the incoming post that failed the initial electronic process of automatic allocation.

5.5. The PCT also undertook some basic administrative tasks related to estates work. One of the claimant's complaints is that he was not able to do this work but on other occasions he described undertaking his own training in the work. We found his evidence

inconsistent on that point. We find he was able to do such estates work as there was.

5.6. We find his job in the PCT was focused on computer use. That is keying, or using a mouse for data entry and reading documents. Any aspect of visual interface clearly presents an issue for anyone with visual impairment. The role required use of the child maintenance group 2012 computer system ("CMG2012"). The claimant alleges that the software installed to aid the claimant's use of that system was defective. We return to the various adaptive or assistive magnification software and its efficacy below. In broad terms, however, we do not accept the software interface was "defective" as alleged and note the claimant's own account of it improving and that he was eventually working effectively with Zoom Text. We further find that all areas of work realistically open to the claimant's skill set would require some use of CMG2012 or the equivalent departmental systems. We find that, in turn, would require Zoom Text or equivalent software. In particular, opportunities to work in audit or fraud would, on the balance of probabilities, require access to those systems even if the work also enabled some use of more general "office" computer packages which may have its own integrated means of enlarging text. The evidence before us does not, therefore, lead us to a finding that there are alternative roles which substantially remove the reliance on Zoom Text or equivalent adaptive or assistive software.

5.7. We find the respondent had put the following adjustments in place in respect of the claimant, his disability and his work:-

a. He had financial support in getting to and from work by taxi.

b. He had various ergonomic adjustments including a specific chair and a rise and fall desk.

c. He had a screen magnifier (as used during the hearing) for magnifying hard copy documents which appeared not to be subject to any criticism.

d. The claimant had access to adaptive or assistive software, principally in the form of "ZoomText" software which was installed to enable him to use and view the same operating systems that other employees used.

e. The sickness absence trigger points (that is, the point at which there would be some management intervention in respect of absences) were adjusted from 8 to 12 days.

f. The respondent sets performance targets for the PCT staff. The standard individual target is set at an average of 180 items of post to be processed per day. In the claimant's case, the respondent adjusted the standard 180 items down to 125.

5.8. In terms of the adaptive assistive software, we note there was a recommendation at a later stage in the chronology to try an alternative package to "ZoomText" called "MAGicScreen". We find, as with any range of software addressing a particular function, each package was likely to have its own strengths and weaknesses and would cope better or worse than the other, in this case in how it interfaced with various programmes. We find any such software is therefore likely to create its own issues or have some side effects. The issue with the reasonableness of any adjustment is that it works to either remove, or substantially mitigate, the disadvantage that it is there to address. We are satisfied that either software package substantially achieved this. We are also satisfied that any software overlaid with any other underlying software is likely to have this partial

degree of success and there may remain some issues with the efficacy of the operation of the underlying system. That does not mean making that adjustment is not reasonable.

5.9. In terms of the performance targets, we find the use of a target in itself is necessary to understand and manage volumes. If nothing else, it is necessary to understanding the staffing levels needed. At the material time, we found there were 3 employees in this PCT. It might have needed 2 or 4 members of staff. Without some individual measure, it would not be possible to determine whether any failures were due to individual performance failing or inadequate staffing numbers.

5.10. We have seen some statistics for the PCT staff performance over a period of 18 months [470A]. We find the claimant typically met his target as did his two colleagues. That, in isolation at least, strongly suggests there was no disadvantage to him insofar as being able to undertake the requisite volume of work. In fact, we find the picture on a day to day basis is actually much better than that recorded due to the way the data is captured and presented. These performance figures were arrived at simply by dividing the monthly items processed by the number of days in the month. Both the claimant and his colleagues appear to have missed their average daily target in some months. However, any number of days during the month might be lost to sickness, annual leave or simply due to time spent engaged in other work. This would obviously mean work was not done on post classification. The statistics do not adjust for this and so the figures are likely to produce an average lower than the true rate of individual daily productivity. That is consistent with the claimant's repeated assertion that he always met his targets. From the respondent's perspective, we found Mr Bee was equally satisfied

that the claimant always met his targets. For that reason, we are satisfied the claimant's performance was never in fact a concern.

5.11. In fact, it is that state of affairs which leads us to accept Mr Bee's evidence that the target was reviewed in 2016 with a view to being increased to 140 items and we are satisfied this was done with the claimant's agreement. We find the claimant was competent in his job within PCT and so much so that it was him that trained other members of staff such as Sevita.

5.12. We find each member of staff within this PCT each has their own health or disability issue to deal with. Mr Bee is also disabled. We find he was a manager who applied a very level headed approach to his role as Team Leader. We found him to display empathy for the claimant's circumstances, was supportive and generous in the time he gave to the claimant and the issues arising. We accept his evidence of his own engagement with the claimant to support him in his role, particularly in respect of the adaptive software, its set up and use. Mr Bee's assessment was that after January 2016, or thereabouts, any remaining problems with the claimant's software interface were better described as "user issues", and not "software issues". By user issues, we find Zoom Text, like most software, had various options and user defined settings that could be made to its functionality. We accept as a fact that the system does not alter its settings by itself. Mr Bee was reluctant to accuse Mr Ghelani of adjusting the settings but on the evidence we heard that is the more likely reason. In any event, that is not a criticism. It is perfectly appropriate that Mr Ghelani was able to, and did do, but we find it was the adjustments he made to the system in this way that had the effect of reintroducing issues of flickering or jumping that had otherwise been addressed by the system settings

applied with Mr Bee's support.

5.13. There have been various Display Screen Equipment ("DSE") assessments undertaken in the past in respect of the claimant's work and workplace. These were in 2012 [62], and two in 2013 [68,70]. The claimant criticises these as having been done merely so that the respondent looked like it was meeting its duty of care. We were not sure what point this criticism went to. There was a duty to undertake DSE assessments for all relevant staff and, particularly those in the claimant's situation. We find they were done and appeared to have been done appropriately.

5.14. In terms of the work undertaken within the PCT, we were not always clear how the claimant felt about his work and whether the nature of it could be fairly described as routine or even "mundane". Our understanding of the role suggested it offered limited scope for intellectual stimulation although, of course, it required a wide understanding of all the various processes engaged in the management of child benefit claims which in itself was likely to be a significant undertaking. We find that whilst the claimant did want a more stimulating role, he insisted the role was not mundane or boring. He expressed how he was content with a meaningful day's work of whatever nature and gained fulfilment from the sense that he had contributed something.

5.15. Whilst our focus begins in 2015, the first of the claimant's relevant grievances was lodged some time earlier in September 2013 [75a]. It was a grievance against a previous line manager called Rashida Popat from a time before he joined the PCT. The essence of it related to a particular incident with her about the prospect of some medical treatment he was undergoing, or hoping to undergo,

and more generally, in respect of his view of her victimising him. This grievance was not upheld.

5.16. Another manager, Mona Patel, was the focus of a further grievance submitted in August 2015 [103]. This related to her assessment of his suitability to join the Talent Management Programme ("TMP"). The TMP is an internal programme for career development. He alleged unfairness in the scoring matrix she applied which meant he was not recommended for the programme. This grievance was, in due course, dismissed. We have not been taken to the substance in any great detail. We have seen the grievance documentation and the manager's response. There are aspects of the very full response from the manager which appears to show a persuasive account of how, frankly, the claimant did not help himself in the application process to join the TMP. The failings appear to relate to the extent to which he completed his own self-assessment and compiled the necessary evidence to support the application. There are echoes of that trait in 2016 when Mr Bee would become concerned the claimant was not bringing evidence to his end of year reviews. Otherwise, the claimant appeared to have received reasonable support for the TMP. From what we do have of this matter, we find that the difference in the positions of him and his manager was down to his perception and poor recollection of matters and we do not find it surprising that the grievance was rejected.

5.17. This August 2015 grievance does not explicitly refer to discrimination or make any reference to the Equality Act. Mr Ghelani himself identified it as simply being about the TMP. There is a specific box on the internal grievance forms for discriminatory complaints which the claimant has left blank. The passage relied on as turning the grievance into a protected act is in the statement that:-

> **"*On his last day, my EO took me by the hand, as I was finding it difficult to see, to him [the HEO] to ensure I got his support via the email but sadly it did not materialise"*.**

This is said to be an account of a discriminatory act due to the manner in which the claimant was physically handled. That is how the claimant puts the complaint both in later complaints and before us. In terms of this grievance, however, it is difficult to see how the reference to being taken by the hand is anything other than positive assistance particularly, as the complaints are otherwise not aimed at the first line mangers, who are described as "genuine, caring and very supportive" and "supportive and very keen in my development", but against more senior managers alleged to have stifled his opportunities to progress.

5.18. The effect of this episode with Mona Patel led to a period of sickness absence in August/September 2011 after which he returned to the PCT on a phased return. Graham Bee took over as the team manager from August 2015, almost as the claimant himself started in the PCT. One of his first management interventions was to refer the claimant to occupational health in respect of his recent sickness absence. The occupational health report is dated 28 September 2015 [117]. The report is prepared by an OH adviser. It relates specifically to the claimant's stress and anxiety arising from his previous grievances and his perception that his senior managers were not addressing his concerns. It refers to the claimant's view that he was not doing challenging work. It recommended he continue with the phased return plan and made a specific practical recommendation in respect of reducing the number of smart cards he used. It suggested contacting the RNIB to review his software. The

advisor recommended the claimant undergo counselling.

5.19. We find Mr Bee was supportive to the claimant in general and specifically in respect of issues arising from his disability. We find the claimant himself shared a positive view of his new manager with the OH adviser. We reject the claimant's characterisation in evidence to us that "he was only supportive to start with". We note the claimant did agree how Mr Bee provided support as he was able to immediately resolve an issue the claimant had had over using the two smart cards. All staff used smart cards as a means to log into the various systems. The claimant had ended up with two and this could potentially lead to problems and risk of security breaches. Mr Bee was able to quickly resolve this problem whereas other managers had previously been unable. Mr Bee also supported the claimant in an external application for a post within the Land Registry in the course of which we find he made substantial efforts to enable the claimant to undergo an assessment on a different date and location that he would otherwise have missed due to being off sick at the allotted time. Similarly, we find Mr Bee provided supported to the claimant to attend a self-development event around May 2016. We find the reason the claimant refers to Mr Bee as being supportive only initially is because of his own changing opinion of the service and that he does not accept the underlying basis for various management interventions during the following months. They include addressing sickness absence and the referral for a disciplinary investigation. We return to that below but we find that the fact Mr Bee had to deal with these issues did not mean he otherwise altered his supportive approach to the claimant.

5.20. As a new team leader, Mr Bee found himself responsible for the mid-year reviews of staff that he did not yet know and in respect of

annual plans that he had not been involved in setting as part of the annual appraisal process. This fell due for the claimant in November 2015, a matter of weeks after Mr Bee had joined. We find Mr Bee therefore felt that he had to complete the process based on the previous line manager's assessments. That was Mona Patel. That ultimately led to a low score in the bracket "must improve". It seems that assessment was not against any current year objectives as these had only been set since the claimant had joined the PCT in August. The claimant was not happy and made this clear in an email and that he intended to raise a grievance. We find this system seems not to cater particularly well for the situation where the manager changes during the year. We find Mr Bee was genuinely doing what appeared to him to be a reasonable means of dealing with the half year review when he himself had no evidence on which to undertake the assessment. In due course, there would be criticism of this in a later appeal. We share that criticism but do not find it undermines Mr Bee's generally supportive approach to the claimant. In fact, we found Mr Bee to be someone who would genuinely try to do the right thing in any given situation and he approached the application of all internal procedures or processes in good faith and in a manner he understood they had to be applied.

5.21. The claimant's third grievance was lodged on 3/11/15 [140]. It makes a series of allegations of some age but said to be continuing against Mona Patel, another senior manager called Gary Wignall and a Ms Sodha, a consolidator who had been supporting the claimant. It does not name Mr Bee and he was not responsible for determining it. Ultimately this grievance was rejected due to the allegations either having been dealt with within previous grievance investigations or being out of time.

5.22. In November 2015, Mr Bee met with the claimant to discuss the review and to explain further the situation leading to his end of year review. The purpose was to explain the rationale and avoid the issue becoming the subject of a formal grievance. The claimant had been given opportunity to demonstrate where Mr Bee may have under rated the claimant which we find Mr Bee's assessment was that he had not identified evidence to change his assessment. There was a further meeting later in the month [167]. The end result was that Mr Bee stood by his decision. He took the view there was evidence supporting the assessment from the claimant not engaging in his own reviews, and not having provided evidence in any of the previous review meetings and other basic behaviours such as management of flexi-time. The claimant expressed the view that it was the senior managers, such as Gary Wignall, who were behind his negative reviews.

5.23. In addition to his PCT role, the claimant had been supported to engage in work on a separate project called Community 10,000. The purpose of this was to engage with outside charities and other community groups who require or could benefit from help from those with certain skills in government departments. An example was schools receiving careers advice. It was a project made up of a handful of volunteers, led by an HEO, one EO and a few AO's including the claimant. It was a voluntary project that individual employees undertook in addition to their roles and with their manager's support in order to report on their research and develop proposals for taking matters forward across the department. Mr Bee did have some concerns that Mr Ghelani had been doing his own thing in respect of this project and had at times gone off on a tangent. He was concerned he had not been kept informed of the project and what Mr Ghelani was actually doing. We have received very little

direct evidence on the opportunities that may have arisen from performing this project work. It was suggested that a permanent post was created to take forward the work flowing from the project group's report. We are simply unable to determine the nature of any such role as there was or that it should have been given to the claimant instead of his PCT role. We do not find that the claimant applied or was prevented from applying.

5.24. By November 2015, the claimant was exploring the possibility of a transfer to a new area or work [166]. We find the reason for this was expressed as being "the stress he feels CMG is causing him". We find his reference to CMG is to the past relationships with Mona Patel and others from earlier, and not Mr Bee. We find the issues that we have before us in respect of the efficacy of the adjustments in place to enable the claimant to do the job he was employed to do is not part of any reasoning for any transfer.

5.25. To put matters in context, it is at this point in the chronology that the original ET claim was presented on 9 December 2015. We have not seen evidence going to establish any link between the claim and the alleged detriments, either in fact or merely by virtue of knowledge of it. That ET claim did not mention Mr Bee. That claim was dismissed following withdrawal in February 2016.

5.26. On 5 January 2016, the claimant underwent a second occupational health report [206]. It reported how the claimant was continuing to suffer with anxiety and stress. He reported having no time to deal with his grievances and should be given time to address them. It refers to his display screen "jumping". The occupational health adviser noted that the claimant had not contacted the respondent's counselling service for support but he had now referred

him. He assessed him as fit for work with adjustments. He recommended giving consideration to obtaining support and advice from RNIB and that a new stress risk assessment be undertaken. He advised that KPI's/targets should be adjusted to reflect this man's impaired vision and stress. We find the claimant did not mention headaches as a result of using the software.

5.27. We find the respondent did not contact RNIB as advised by this report although it had in the past in respect of Mr Ghelani. However, we find this decision was not through any sense of it not being relevant or necessary to seek advice, but simply because by then DWP had its own specialised reasonable adjustment team in house. We find the respondent did engage with the stress risk assessment [215] and that it has kept the process of stress risk assessments under review with the claimant periodically throughout. We find it did make adjustments to targets.

5.28. In terms of allowing time to address his grievances, we find this employer did explicitly discuss and agree time out for the claimant to spend time working on his own grievance submissions. Mr Bee agreed to 2 days out of work which were taken on 11 and 12 January, a state of affairs we found to be unusually generous when compared to our broader experience of industrial practices.

5.29. The claimant's fourth grievance was lodged on 25 January 2016. [224]. It related to the mid-term performance review undertaken by Mr Bee. The outcome at first consideration was communicated to the claimant in April. It was to reject the grievance. The claimant subsequently appealed substantially out of time in November 2016. Nevertheless, we find the appeal was accepted and considered on its merits. The appeal upheld his grievance [446]. We

note this grievance does focus on Mr bee but is not relied on as a protected act.

5.30. On 17 February 2016, the claimant underwent a third occupational health referral [245]. The content of the report raised similar issues to the previous reports. It noted the continued stress and anxiety at work, but now made reference to some ongoing I.T. issues as contributing to that. The claimant discussed with the OH adviser the prospect of a transfer to a different role. In the course of that discussion, the adviser recorded how they had:-

> ***"discussed the possibility of a transfer within the business but when I asked him how this would help, he was unable to give any clear rational to this".***

He went on to explain how:-

> ***"for me to recommend a transfer on medical grounds without reasonable justification was not professional"***

His advice concluded with:-

> ***"Mr Ghelani is very upset with his employers generally and until the outstanding work issues have been fully addressed to the satisfaction of both parties, I am of the opinion a transfer is unlikely to improve his health at this time"***

5.31. We have seen a further grievance form completed by the claimant on 8 March 2016. This would be the claimant's fifth grievance in the chronology before us [249]. The essence of this was said to be a change in the claimant's trigger points for sickness absence. We cannot see that this grievance process was pursued to

a conclusion. In any event, it is not a grievance relied on as a protected act.

5.32. On 14th March 2016, the claimant and Mr Bee met in the context of considering a performance action and learning plan. That is a development plan to address identified deficiencies. We find the concerns were not in respect of the claimant's performance, but in how Mr Ghelani was engaging with Mr Bee and increasingly his aggressive nature and disparaging references to others in respect of which Mr Bee had had to ask him to be careful what he said about people. In general terms, the claimant's perception of his past relationships was now overtaking the way Mr Ghelani was interacting with his current manager. It is in the course of that discussion that Mr Bee perceived the claimant to have become very sensitive and aggressive in his tone and body actions, particularly in discussing Mr Wignall who the claimant regarded as being at the route of a senior manager conspiracy to cause him problems. In the course of the exchange we find the claimant threatened to "get" Gary Wignall as "he knew which way he cycled home". We find Mr Bee was concerned about these comments. He was concerned it was a threat to Mr Wignall. He encouraged the claimant to calm down and compose himself and did not take matters any further at that stage. The claimant took a period of sickness absence shortly after this meeting. However, on 4 April 2016 the two were engaged in the claimant's return to work meeting which, this time, also included a Melanie Mansell. The reason for her attendance was described by Mr Ghelani as being either because he felt he was being bullied or because Mr Bee may have felt he (Mr Ghelani) had been acting inappropriately. During the meeting, the claimant again made similar concerning statements, this time threatening "to kill himself and the others that had caused this to him". Mr Bee understood this to be a

threat to the claimant's previous managers including Gary Wignall who had been identified during the previous meeting. We find he was concerned not to dismiss this repeated threat in case something should happen at a later date and him be accused of not acting. We find he referred the matter for investigation under the disciplinary process in what he believed to be the appropriate internal process for investigating the concerns. The result was that on 19 April 2016 the claimant was invited to an investigation to be conducted by an independent investigator, Helga Rawley [274]. The purpose was to explore the comments made and decide whether there was a disciplinary matter to take forward. The claimant was not suspended during the course of this investigation. We further find that the investigation was a precursor to the formal disciplinary process.

5.33. On 25 April 2016 Mr Ghelani commenced a further period of sickness absence which continued until 20 June 2016 and delayed progress in the investigation. As a result, he was referred once again to occupational health. On 12 May 2016, a further occupational health report was produced this time by Dr Alan Scott [279]. He described Mr Ghelani as being capable of working with the necessary level of support and adjustments. We find that related to steps taken in respect of Mr Ghelani's impaired vision and to be something different to the psychological issues now presenting themselves. Dr Scot then went on to refer to those psychological issues and opined that:-

> ***"the situation is more difficult. I'm sure the opportunity to vary his work would improve his sense of well-being, and make him feel less 'different' from his colleagues. However, I think that his relationship with 'management' is now completely dysfunctional. We did discuss solutions like conflict resolution but I fear that we have passed the point we could all 'kiss and make up, and live happily ever after'. Therefore, it***

is likely that the only solution is for redeployment to a different building. Obviously, that is a management decision not a medical one but he is happy to consider any reasonable offer or location around the East Midland.

5.34. A meeting took place on 4 July 2016 between Mr Ghelani and Mr Bee. The meeting was held under the attendance management procedures and resulted in Mr Bee issuing a first warning under that procedure. The claimant received a first warning under the sickness absence procedure on 5 July. We find that in issuing this first stage attendance warning, Mr Bee was simply applying the internal procedure which is triggered on an objective assessment of reaching a certain level of absence. At the end of the meeting the claimant accused Mr Bee of trying to falsify previous notes. Mr Bee advised caution in making such an accusation, he observed how the meeting had been courteous and supportive and in line with DWP procedure but that he was offended by this accusation and would be taking it further. The circumstances of this accusation were forwarded to Ms Rawley to be considered within the existing investigation. To the extent the fabrication related to the records Mr Bee had made of what Mr Ghelani had said about getting others or killing others, we do not accept they was inaccurate, still less fabricated.

5.35. On 12 July 2016, a workplace assessment was undertaken by a Mark Parton of the reasonable adjustment team within the DWP on the claimant's systems and working practices. Although this is a specialist department, we find the report is a review of what might be relevant and possible. It is not an assessment of the reasonableness of any alternative options. The report that followed on 15 July 2016 [331] succinctly summarised the claimant's disability, his working circumstances and the adjustments already in place. It comments on

two issues in particular. The first is the efficacy of the ZoomText software and the consequences of the "flicker" or "jumping". Secondly, it records Mr Ghelani's preference to do different, higher level, work in an environment where he could make more use of general office software programmes in preference to CMG2012. It records the line manager, that is Mr Bee, being engaged in the process.

5.36. Of the two matters Mr Parton included, the first was actually implemented there and then, which was to turn off all Zoom Text tracking options except the mouse pointer option. We find this to be an option within the user defined settings we have referred to already. By doing this, Mr Parton reported:-

> ***"This stopped the screen jumping and reduced the screen flicking cause by using Zoon Text with DWP software."***

He went on to note that there was potential to supply MAGicScreenmagnification software as an alternative to ZoomText.

5.37. We understand the various references to "Flickering" and "jumping" to mean the effect of screen refreshing. In the case of most computer systems, a screen may present with various fields or boxes of data. Moving between each field or area by use of the return key or the click of a mouse presents little disturbance on screen. The use of ZoomText or similar software on such systems typically enlarges the data entry area or the area being read at the expense of what else can be seen of the rest of the page. Moving from one area to the next necessarily causes the screen to refresh in a way that does not happen during ordinary operation when ZoomText is not being used. Depending on the ZoomText settings, this can sometimes result in

slow or delayed change, an apparent “jumping” or refreshing in a way that creates momentary flickering. We accept this could be both a distraction and exaggerate nystagmus, a condition the claimant had. In reaching some sort of understanding of the scale of the problems cause by this flicking or jumping, we find it particularly illuminating that the reasonable adjustment expert, Mr Parton, referred to it as “glitches”. Moreover, they were glitches that could be easily resolved. We, therefore, do not find this to be a substantial issue in the operation of the Zoomtext software.

5.38. The second matter was “to give consideration to providing Mr Ghelani with a new role, maybe involving a transfer to a different location”. The justification for this was that Mr Ghelani felt his current role was restricting his progression and future opportunities and referring back to Mr Ghelani’s preference to work in other areas with less need for ZoomText.

5.39. We find all of Mr Parton’s conclusions were taken further by the respondent. We find the respondent installed the alternative adaptive software in place of ZoomText following consultation with the claimant in which he indicated he would like to try it. It was installed on 26 September 2016. By 17 October 2016, at the claimant’s request, ZoomText was reinstalled. We reject the claimant’s contention that the software was only installed because he had, by then, commenced early conciliation with ACAS. We find the claimant decided himself to revert to ZoomText as he was familiar with its operation. He said how he did this albeit the MAGicScreenwas in some respects better in dealing with the flickering. We find this consistent with it being a minor problem which can, with appropriately adjusted settings, be all but eliminated.

5.40. We find Mr Parton's second recommendation was little more than a statement of the claimant's intention. It arises in the context of what Dr Scott referred to as a break down in relationships and not something he could advise based on any medical opinion. The claimant had, in fact, already begun his search for alternative work some time before and we find the respondent engaged with the claimant in exploring his preference to move to an alternative role. We find Mr Bee provided assistance to the claimant in use of the Civil Service jobsite where vacancies were advertised and applied for. We find the claimant was not proactive in searching for opportunities and did not, during this period, apply for any external roles. The possibility of him transferring, including under a supported move, was considered at the "one service network" ("OSN") workforce Management meeting, which we understand to be a regional workforce planning coordinating group straddling various groups within DWP. The timing of the consideration faced a significant hurdle in that the likely areas of alternative employment were themselves subject to a recruitment freeze and under a major staffing review. We find the OSN were already considering transfers for other employees, at least one of which was itself as a reasonable adjustment.

5.41. Two potential areas were considered. The prospect of moving to a fraud role within "FES" based at Leicester came to nothing because of the recruitment freeze at least as a supported move. The only possibility would be if a vacancy arose which they were permitted to fill whilst under the freeze which was expected to remain in place until at least November 2016. It looked like the possibility of a trial within Leicester FES had arisen in December and we find Mr Bee made efforts to support the claimant in that, including personally providing transport for him to get there. In the event, it was cancelled as the vacancy freeze was not lifted and, in due course, the national

staffing review would result in all FES AO roles being based in London.

5.42. Another possibility was a Debt Management role based in Corby. We find there was no vacancy as such, but the result of a workforce planning exercise had identified the need for a role in the future. Consequently, we cannot say when such a role would have materialised, and it may well not have been during the current financial year, but we are satisfied it was likely to materialise in the future absent any unforeseen circumstances. In any event, this did not become a viable option for the parties. Firstly, we have already expressed our findings that there was no realistic prospect of removing CMG2012 or its equivalent from the claimant's work altogether. We find neither the FES nor the Corby role would have been any different. We find the tasks involved would have required the claimant to use the relevant departmental systems with the assistance of ZoomText. We also note when this possibility first came to light in May 2016, we find the claimant was not interested in it and he made his position clear [304]. There were then further discussions in July during which he altered his position but only on the basis that he suffered no financial outlay, in other words in respect of the additional travel to work cost. We were taken to some consideration by HR advisers as to whether this potential move to Corby could be seen as an adjustment or not and whether it attracted financial relocation support or not. The respondent took the view that this was not a disability related reasonable adjustment based on a medical view of the impairment, but was a supported move. For that reason, whilst the claimant's current package of adjustments would remain, it would not finance the cost of travel to Corby. That said, we do find the claimant was still given a priority status in any transfer that could have arisen and preferential treatment in any selection process.

5.43. The claimant had attended an investigation meeting on 8 August 2016 with Ms Rawley in respect of the threats to managers and the accusation of falsifying minutes. We find Ms Rawley considered the evidence and interviewed witnesses, in particular the note taker responsible for the meetings in which Mr Ghelani accused Mr Bee of trying to falsify. In respect of the first matter he faced, threats against Mr Wignall, she concluded it should not be taken further due to a lack of evidence, the time elapsed and there being no independent witnesses. The second matters in respect of threats to managers generally, was similarly concluded due to there being insufficient evidence. In respect of the third, that is accusing his manager of falsifying meeting notes, she found there was sufficient evidence. We find her report and recommendations were then considered by a decision maker, Mr Payne. We do not know how long he had the report before him but his decision on whether to take matters further was sent to the claimant on 24 October 2016. His decision was that no disciplinary action would be taken at all [401].

5.44. Mr Bee continued as the claimant's line manager, at least during the period relevant to the matters before us. We find he continued to support him as best as he could. We find the stress reduction plan continued to be reviewed periodically. During such a review in December 2016, we find the claimant made clear his issue was not with his current working environment in the PCT or his workload, but with the fact he was struggling to let go of work issues from previous years.

Discussion and conclusions

6. Reasonable Adjustments

6.1. So far as is relevant to the circumstances of this case, the duty to make adjustments arises under section 20(3) of the 2010 Act where: –

> ***a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.***

6.2. In determining whether the duty has arisen, the Tribunal must identify each element of the section in turn, that is to identify the PCP; the identity of a non-disabled comparator (where appropriate) and the nature and extent of the substantial disadvantage suffered by the claimant. Only by breaking down those elements can a proper assessment be made of whether the adjustment contended for was reasonable or not. ***(Environment Agency v Rowan [2008] IRLR 20 EAT***). The presence of a PCP and consequent disadvantage will identify if the duty is engaged but not whether it is breached. We must then consider whether the claimant has established the facts of the broad nature of an adjustment contended for such that we could conclude the duty has been breached until and unless the respondent establishes that such an adjustment was not a reasonable one. (***Project Management Institute v Latif [2007] IRLR 579***)

6.3. Whether an adjustment is reasonable or not is a question of fact for the Tribunal taking into account all the relevant circumstances and applying the test of reasonableness in its widest sense. Guidance similar to that which used to exist under s.18B of the repealed Disability Discrimination Act is now found in the code of practice. We are reminded that we are concerned with a balance between the cost

and disruption of implementing an adjustment and the effect it would have on the disadvantage arising. Whilst the aim is to eliminate the disadvantage, it may still be reasonable to make an adjustment which only reduces it. Equally, it may be reasonable to make an adjustment which has only a prospect of removing it. (***Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075***).

6.4. We remind ourselves that we are seeking to determine the pleaded case before us. There has been some drift or evolution in the claimant's case and where that fits with the pleaded case we have considered it. We do not, however, seek to determine a different case to that which is before us.

6.5. The first of the two pleaded PCP's is an expectation that the claimant would perform work to a certain standard or performance / achieve targets at the same level as his colleagues. The disadvantage this PCP is said to put the claimant at is that he is unable to manage his workload and unable to properly perform to the same standard as other colleagues. Beyond that, the disadvantage was not articulated but we would be prepared to accept such a state of affairs would increase the prospect of performance or disciplinary sanction. We are satisfied that the respondent does apply a target to the staff working in the PCT including the claimant in the form of an expectation of the daily average units processed. However, we are not entirely satisfied that this PCP, as it is articulated, is in fact made out. There was never a time when the respondent expected the claimant to "perform work to a certain standard and/or achieve targets at the same level as his colleagues" as he was never expected to achieve the average 180 units per day which is the standard expectation of output. However, an alternative approach is fir us to conclude that that target of 180 units was notionally applied to the

claimant, simply by virtue of him being in the PCT role, but in that case, we are satisfied that at all times an adjustment was put in place to reduce the expectation to a level that was both within his capabilities and with his agreement. As a fact, his performance was never in issue whether viewed quantitatively or qualitatively. Such disadvantage as might have arisen from such a notional PCP was therefore entirely eliminated by the adjustment made and such duty as the respondent otherwise had was therefore discharged. There was therefore no failure to make a reasonable adjustment.

6.6. The second PCP relied upon was the requirement to work with the current system (i.e. the CMG2012 software). The respondent accepts that PCP was applied, indeed it says it would be an inherent aspect of any role undertaken by the claimant. Both PCP's are said to give rise to the same disadvantage. We are satisfied that were the claimant to be required to use CMG2012 without any adjustment, it would put him at a substantial disadvantage. However, he has never been required to use it in isolation. The disadvantage that it would present has been mitigated by the use of both adaptive or assistive software and the application of reduced targets. The cumulative effect of these, and other, adjustments is that the disadvantage has been all but eliminated. In any event, such residual disadvantage as exists is in our judgment within the meaning of minor or trivial. The claimant's case on disadvantage evolved during the course of the hearing to one of inhibiting his promotion and career development opportunities. We do not accept that flows from this PCP. It flows from the claimant's view of historic matters which during 2016 became a destructive and distorted focus of his attention. That aside, we have considered this within the context of the package of adjustments made and our findings that his performance is more than satisfactory. It may have been different if there had not been the

adjustments in place as that may well have resulted in him being labelled a poor performer and, in such a case, that may well mean career development was inhibited. However, that was simply not the case. We arrive at the same conclusion in respect of both PCP's. Such duty as existed was discharged by the package of adjustments. The further adjustment contended for is not a reasonable adjustment to make once the disadvantage has been addressed.

6.7. In any event, we have considered further the adjustment contended for, namely "to give consideration to transferring the claimant to a different location with a view to doing more MS Office based work so that he was no longer required to use the DWP CMG 2012 system". So far as what is sought is for the respondent to "give consideration" to such a transfer, we are satisfied that the respondent did in fact give reasonable and genuine consideration. But even if it had not, consideration in itself will usually not fall within the concept of an adjustment. (***Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664***). In any event, we are not satisfied that there was such a vacancy that did not require use of CGM2012 or an equivalent departmental system which would have meant some form of assistive software remained necessary. We are satisfied that the evidence before the respondent meant it was entitled to treat this request for a transfer as a preference arising out of the claimant's dissatisfaction with historical matters, and not arising as a means of mitigating a disadvantage caused by the interaction of the disability with any particular PCP. Nevertheless, the claimant was still treated as a priority mover but the requirement in law to make a reasonable adjustment was not in play as the disadvantage was already eliminated. The claimant was not failing to manage his workload or unable to perform to the same standard as his colleagues, insofar as each had their own target to achieve, and the claimant met his. The

respondent has not failed to make a reasonable adjustment.

7. **Indirect Discrimination**

7.1. Section 19 of the the 2010 Act 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 relevant protected characteristic of B's.***
> ***(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if***
>
> ***(a) A applies, or would apply, it to persons with whom B does not share the characteristic***
>
> ***(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,***
>
> ***(c) it puts, or would put, B at that disadvantage, and***
>
> ***(d) A cannot show it to be a proportionate means of achieving a legitimate aim.***

7.2. We must be satisfied that the alleged PCP was in fact applied. If it was, whether it puts those with whom the claimant shares the characteristic at a particular disadvantage (at this stage, there is no legal burden on the claimant to explain why any disadvantage exists. It is enough that it does). If it does, whether it in fact puts him at that disadvantage. If the answers at that stage of the analysis establish a prima facie case, it is then for the respondent to satisfy us that applying that PCP was a proportionate means of achieving a legitimate aim. It is not until all four parts of the statutory tort are made out that unlawful discrimination is established. **(Essop and others v Home Office (UK Border Agency); Naeem v Secretary of State for Justice [2017] UKSC 27).**

7.3. In determining whether s.19(2)(b) is made out in any particular case, it may be necessary to consider the appropriate pool of individuals exposed to the PCP. Such a comparison falls within the requirement of s.23 of the 2010 Act in that it is an exercise of comparison in which the circumstances of the individuals in one group must not be materially different to those in the other group. The key is to ensure a comparison which logically tests the particular discrimination complained of (**Eweida v British Airways [2009] IRLR 78**). A pool so narrow that no comparison can be made at all is unlikely to serve this end nor is a pool so large that the comparison is no longer one of like with like (see **British Airways v Grundy [2008] EWCA Civ 1020, [2008] IRLR 74**).

7.4. In determining whether a respondent has justified a PCP we must be satisfied the objective it serves is a legitimate aim. We must be satisfied that the application of the PCP is a proportionate means of achieving that aim. In deciding whether it is proportionate, our task is to weigh in the balance the reasonable needs of the employer achieving that aim against the discriminatory effect on the group and make our own assessment of whether the former outweighs the latter (**Hardys & Hanson PLC v Lax [2005] IRLR 726**).

7.5. We received next to no submissions from the claimant on the application of this claim although we did not understand it to have been abandoned. It was left hanging as an alternative to the reasonable adjustment claim. We have sought to analyse this claim on a number of levels. In each case, however, we have reached the conclusion that the indirect discrimination claim fails because it is not possible to consider the facts without reference to the package of adjustments in place for the claimant which remove the potential

disadvantages.

7.6. We first consider whether the employer applies a PCP of "requiring that administrative officers carry out their work to a certain standard of performance and/or achievement of targets as colleagues who are not disabled". Our principal conclusion is that we do not accept that is the case as we found there to be an established practice of adjusting, reviewing and agreeing the target average to take into account the individual employee's personal circumstances. It is not insignificant that all in the PCT have some form of health or disability issue which may interact with aspects of their work. At no point was the claimant required to work to a standard that would have applied to a non-disabled comparator. (i.e. a daily average of 180). To that extent, we conclude the PCP is not applied neutrally and the claim would fail at that first hurdle.

7.7. However, we have then considered whether the PCP is applied to all in a notional sense. In other words, that the starting point is to apply an average daily output of 180 units. That is the position before any adjustments are applied. To that extent, it is a PCP that could be said to be applied to all, albeit in theory. We would readily accept, as the respondent conceded, that such a PCP would put those who share the claimant's disability at a particular disadvantage as their level of output is likely to be materially less than the non-disabled comparator. Such an employee then faces in increased prospect of some form of performance or disciplinary sanction. The question then becomes whether the claimant is himself subjected to that disadvantage. We have found as a fact that he is not and the claim fails at that stage. The reason he is not subject to the particular disadvantage is because of the package of adjustments put in place in his case.

7.8. We finally consider whether the correct analysis is that the adjustments should be kept out of account at that stage of individual disadvantage. We doubt that is so, and it renders the analysis of justification artificial, but it is only if the claim gets that far that the obligation to justify the PCP is engaged. We are satisfied that providing an efficient and effective service to taxpayer and public at large is a legitimate aim. Applying targets or standards to the work employees such as the claimant forms part of that. We are satisfied that it was proportionate because the assessment of whether that PCP was met or not was done in the context of an individual variation that was reduced to a level which was both achievable and agreed upon within a package of other individual adjustments to enable the claimant to do his work to a satisfactory standard, which in fact he did.

8. **Victimisation**

8.1. So far as is relevant to this case, section 27 of the 2010 Act provides:-

> ***1) A person (A) victimises another person (B) if A subjects B to a detriment because—***
>
> ***a. B does a protected act, or***
>
> ***b. A believes that B has done, or may do, a protected act.***
>
> ***2) Each of the following is a protected act—***
>
> ***a. bringing proceedings under this Act;***
>
> ***b. giving evidence or information in connection with proceedings under this Act;***
>
> ***c. doing any other thing for the purposes of or in connection with this Act;***

d. making an allegation (whether or not express) that A or another person has contravened this Act.

8.2. There are three constituent elements necessary to make out the claim. The existence of a protected act (or a finding of fact of holding a belief that the claimant had done a protected act), the subsequent detriment and the causal link between the two that shows a prima facie case that the detriment occurred *because of* the protected act.

8.3. In determining causal link, the correct question to ask is whether the protected act was the "reason why" and not whether "but for" it, the detriment would have occurred. **(Greater Manchester Police v Bailey [2017] EWCA Civ 425)**

8.4. Four protected acts are relied on. Three of which are accepted as amounting to protected acts. They are the grievances on 18 September 2015 and 3 November 2015 together with the previous ET claim presented in December 2015. The fourth is not accepted as being a protected act, that is the grievance on 4 August 2015. Nothing much turns on that unless we were to reach a conclusion that an alleged detriment was done because of that alleged protected act, but not the others. Even then, the matters contained in the disputed protected act are largely expanded upon in later grievances which form protected acts in their own right. To the extent that we need to resolve it, we are not satisfied that this does convey a protected act. in reaching that conclusion we have had regard to the threshold of meeting the test, particularly in respect of doing things "for the purpose or related to" the act and also in respect of implicit allegations of contraventions. (**Aziz v Trinity Street Taxis [1988] EWCA Civ 12**).

8.5. The treatment said to be an unlawful detriment is the decision to embark on a disciplinary investigation, the decision to do so being communicated to the claimant on 19 April 2016. The respondent argues that what followed does not amount to a detriment. In particular, it relies on the fact that the claimant was not suspended and after attending one investigation meeting in August was told at a later date that there was no case to answer. It puts those matters against the respondent's obligation to investigate such concerns. We understand the respondent's argument and accept that the *outcome* of the process does not lead to any detriment. However, we are unable to accept the *process*, of being subject to a disciplinary investigation itself was not, in these circumstances, capable of amounting to a detriment. A detriment will exist where a reasonable worker could take the view that the relevant state of affairs was to his detriment. Even without being suspended, there is a risk of a serious disciplinary outcome and we are satisfied that a reasonable employee subject to a disciplinary investigation could not at any time be sure such a benign conclusion as in fact did result, would necessarily follow. Until that conclusion was confirmed, we are satisfied the claimant continued to be subject to a detriment.

8.6. The crux of this claim is the reason why he was subjected to that detriment. In that regard, we are entirely satisfied that the reason for this was the genuine concern Mr Bee had about the apparent threats the claimant was making during their meetings in March and April. We are satisfied that the disciplinary investigation that followed would have occurred whether or not there had been previous grievances or protected acts. In reaching this conclusion we have noted that Mr Bee was not involved in the previous ET claim and the focus of the claimant's protected acts is in respect of earlier events

with other managers. Mr Bee is a relatively junior manager and his engagement with any of the protected acts is next to nil. We are satisfied Mr Bee's management style did not alter during the time he was responsible for Mr Ghelani and he maintained the open culture within this part of the organisation whereby the raising and resolving grievances through the formal process is the correct process. We are satisfied there is such a culture of grievances being a normal part of working life for those involved. We note how Mr Bee was supportive of the claimant in respect of him airing his grievances and even to the extent of authorising two days of work time for him to concentrate of lodging his most recent grievance. We found evidence of Mr Bee's positive support for the claimant continued before and after the investigation. His behaviour is not consistent with a detrimental response to Mr Ghelani's earlier grievances or previous ET claim. In any event, there is a positive reason why such investigation would take place which is not at all related to the protected acts. We are satisfied Mr Bee was genuinely concerned about the claimant's comments which were open to him to interpret as genuine threats, particularly when repeated. For those reason, the claim of victimisation fails.

8.7. We have also considered whether there is a jurisdictional bar to this allegation and have considered the question of time limits. The claim was presented on 28 October 2016 after early conciliation between 23 August and 7 October. The earliest date in time is therefore 24 May 2016. This date falls after the date on which Mr Bee referred the matter to the disciplinary investigation. His decision to do so is therefore out of time. However, we have considered Mr Hyams' submission that the detriment continued as long as the claimant was subject to the investigation with the risk that it could lead to disciplinary consequences. The notice of its conclusion that it

was not going to be taken any further was sent on 24 October 2016. That date is a date which is in time. We are satisfied that the threat posed by the detriment continued until that date. Section 123(3) of the 2010 Act provides that conduct extending over a period of time is done, for the purpose of time limits, at the end of that period. We are satisfied that what was taking place during that period was conduct, and not merely the consequences of allegedly discriminatory conduct. This claim is therefore in time.

_____

Employment Judge Clark
Date 5 November 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE