EMPLOYMENT TRIBUNALS

Claimant: Mr S Chowdhury

Respondent:
1. The Crown Prosecution Service
2. Miss A Hartley
3. Miss R Atkinson

Heard at: Manchester **On:** 20, 21, 22, 25, 26, 27, 28, 29 June; 2, 3, 4, 5 July; 6 July 2018 in chambers

Before: Employment Judge Feeney
Mr G Barker
Mr W K Partington

REPRESENTATION:

Claimant: Mr Harris, lay representative
Respondent: Mr C Taft, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not disabled within the meaning of the Equality Act 2010 until the end of October 2016.
2. The respondents did not know and could not reasonably be expected to know he was disabled at the relevant time.
3. Accordingly the claimant's claims of disability discrimination fail under the Equality Act 2010 and are dismissed.

4. The claimant's claims of detriment due to making protected disclosures fail and are dismissed.

REASONS

1. The claimant by a claim form dated 17 February 2017 brought claims of detriment due to making protected disclosures and disability discrimination.

Preamble

2. The claimant in the course of the hearing withdrew his claims against the fourth and fifth respondents HA and PH agreeing that he did not wish to cross examine HA, PH or UD. The respondent submitted signed witness statements in respect of these individuals and it was always made clear that the respondent intended to rely on their evidence. The third respondent who no longer worked for the first respondent, had sent a letter to the tribunal including medical advice saying that she was too ill to attend the tribunal and that whilst she was not too ill to undertake her current job any reference to this case was too stressful for the third respondent and therefore she declined to attend.

3. As a result of the claimant withdrawing against the fourth and fifth respondents and as the result of discussions throughout the case a number of the claimant's claims were removed and although a revised schedule of allegations was served on the first day of the hearing of evidence, 21 June, this was further amended including during submissions. We set out the schedule of allegations below.

Witnesses

4. For the claimant the witnesses were the claimant himself, the claimant's wife Mrs Ayesha Chowdhury, Mr Said Atcha, Probation Officer, and Mr Jeremy Mahoney, an approved mental health practitioner. The bundle was agreed and we added in the course of the hearing information regarding custody time limits (CTL) and an article from the Guardian regarding disclosure of rape at trials.

5. The respondent's witnesses were as follows: AH, also respondent 2, deputy head of crown court prosecutions and CPS North West region at the time deputy head of magistrates prosecutions Greater Manchester. PH, HR quality manager (witness statement only). HA, senior HR business partner West Midlands and East Midlands (witness statement only). John Dillworth, deputy chief crown prosecutor for CPS Merseyside at the time DCCP for the North East, and UD, senior district crown prosecutor Mersey/Cheshire (statement only).

Credibility

6. Mrs Chowdhury: We did not find Mrs Chowdhury a wholly credible witness. She sought to support the claimant's case that he was ill from a much earlier period

however this had the taint of being self serving (or hindsight bias as the respondent's counsel described it) as the claimant's obvious main problem on establishing disability was that at the time of the events he relied on for his claim he had only been absent for a couple of months. Whilst this could have been displaced it was not as there was no corroboration for the assertions that the claimant had been ill for a considerable period before his collapse and we found the proposition that after forcing her husband to register with a doctor because he was so ill (rather than because he had not registered with one after their move) she did not ask him what had happened is inherently improbable if he was as ill as she described. Accordingly we could not rely on her evidence.

7. Mr Chowdhury: we had no doubt that the role of AP was rapidly changing and becoming more difficult. The claimant obviously had strengths but unfortunately the new changes 'played' to his weaknesses. In relation to his evidence we felt we could not wholly rely on it due to his skewed perspective, probably as the result of the severe illness he suffered after his collapse, in that he saw bad motive where there was none – for example in believing UD set him a deadline because it coincided with the tribunal one, in his extreme and unwarranted reaction to PH suggesting meeting for the grievance, in seeking to rely in tribunal on a reference to 'nervous breakdown' as actual evidence he was having a nervous breakdown.

8. Mr Dilworth: we found Mr Dilworth a straightforward and candid witness. He agreed to the claimant's propositions regarding how he could have improved his report. His analysis of the issues in the grievance was impressive, as exemplified by the questions he asked. He followed up grievance points in the main assiduously.

9. Mrs Annabel Hartley: Mrs Hartley was an impressive objective witness. She was cross examined for three days and was patient and level headed throughout even when her integrity was severely questioned in relation to the youth murder bail application incident, wherein in effect she was accused of a criminal offence, misconduct in public office and professional misconduct. She did accept she had misunderstood of the respondent's policies and accepted that some of her actions looked insensitive in retrospect but that she was as a new manager trying to follow the respondent's policy. Her internal emails showed she did believe she was trying to help the claimant and the only example of anger was in respect of the youth murder incident where she reacted to the claimant's injudicious 'sandwich' email but only to RA. We can understand why she reacted this way as the claimant had not only failed to do something crucial but that was flippant about it. We found her for the above reasons a credible witness.

10. Mr Atcha and Mr Mahoney: these witness were hearsay witnesses and the information they had was unknown to the respondent in any event .Accordingly they could not really help us in deciding whether the claimant was disabled or the respondent's knowledge of the same.

Schedule of allegations

11. We refer to the numbers in the Schedule of Allegations. As this was an already amended schedule the numbers are not consecutive or complete. However, we wish to continue referring to the numbers as the submissions related to these.

Issues

Disability discrimination

12. The respondent conceded disability but did not concede the claimant was disabled at the time of the relevant events. The issues for the tribunal therefore were:

    (1) from what point was the C disabled in that he had an impairment which had a substantial and adverse effect on his day to day activities and that effect was long term

    (2) did the respondents know or could they have reasonably been expected to know that the claimant had an impairment with a substantial and long-term effect on his ability to carry out day to day activities.

Section 15 claims

13. (2a) refusal to reschedule meeting, (b) continuing with a disciplinary meeting despite knowledge of the claimant's impairments (this unfavourable treatment refers to the disciplinary meeting held on 8 September). The relevant disability was anxiety attached to depression.

14. The claimant stated that the "arising from" was:

    "C suffers from depression anxiety and panic attacks. The proposed postponement was a consequence of his anxiety and therefore C was unfit to attend. R2 ignored C's medical condition which arose from a lack of awareness of the impairments associated with depressive disorders."

    It was then said that:

    "the PCP is said to be the practise of not postponing a disciplinary hearing even where a companion or the employee can attend".

    (Although a PCP is not required for a Section 15 claim).

15. (3) Subjecting C to an overbearing sickness absence regime via R1's sickness absence policy/procedures.

16. What is the "arising from": C suffers from depression anxiety and panic attacks. C's impairments are exacerbated by heightened states of arousal. R2 subjected C to an overbearing sickness absence regime which arose from:

    (a) a lack of awareness of the impairments associated with depressive disorders,

    (b) R2 believing C was fabricating his condition.

    The PCP is said to be the practice of applying an overbearing sickness absence regime

17. (4) Refusal to allow claimant a companion of choice to accompany him to a grievance meeting. The "arising from" is said to be C suffers from depression anxiety and panic attacks C's impairments are exacerbated by heightened states of arousal face to face meetings heightens the claimant's anxiety levels which would have been countered by allowing a companion of choice. R2's refusal to concede on both of these issues arose from (c) lack of awareness of the impairments associated with depressive disorders and R2 believing C was fabricating his condition.

Reasonable adjustments

18. *Claim 12*: PCP was put in the following ways:
(1) The PCP was: the omission of making reasonable adjustments in the light of medical evidence provided by the claimant/medical practitioners and also the PCP of omitting to make an assessment of the claimant's needs.

19. The reasonable adjustments claimed were:
(a) Number of cases to be managed per day
(b) Allocating C an assistant
(c) The type of cases allocated to the claimant and
(d) Effective if computer systems and training.

The substantial disadvantage was said to be:

"C has diminished cognitive abilities when exposed to heightened levels of arousal. This inhibits C's ability to

- Process large amounts of information
- Manage time
- Respond to challenging cases
- Make quick but considered decisions

(November 2015)"

20. *Claim (14)* The PCP is said to be the practise of imposing timeframes for an employee who was unfit for work but it is also described as the PCP of subjecting C to a disciplinary hearing.

Substantial disadvantage

21. In relation to returning to work :"C has diminished cognitive abilities when exposed to heightened levels of arousal. This inhibits C's ability to make informed and considered decisions. Consequently the impact of repeated requests by R2 for C to return to work caused

- Deterioration to his health
- Deterioration to C's ability to make basic decisions concerning his welfare at work
- Loss of confidence
- The need for further time off work"

22. In relation to the disciplinary hearing: the C's ability to contest or challenge the allegations made against him by R2 would be significantly impeded as a consequence of his impairments.

23. The reasonable adjustments contended for relate to an assessment of C's fitness to attend the disciplinary hearing using:
    (1) Medical reports from C's GP and other practitioners and others
    (2) Make an OH referral
    (3) Informal discussion with C
    (4) Allow C a period of time for recovery before attending a disciplinary hearing based on medical evidence and an OH report

24. *Claim (15)* PCP is said to be the practise of imposing timeframes for an employee who was unfit for work and pressurising the claimant to return to work

Substantial disadvantage

25. Substantial disadvantage is that the claimant was unable to attend any meetings because of his heightened state of anxiety without the support of his wife.

Reasonable adjustments contended for

26.
    (1) Medical reports from C's GP and other practitioners and others

    (2) Making an OH referral

    (3) Informal discussion with C

    (4) Allow C a period of time for recovery before attending a disciplinary hearing based on medical evidence and an OH report

27. *Claim (19)* PCP: the omission of making reasonable adjustments in the light of the medical evidence provided by the claimant/medical practitioner however this is then further described as refusing to allow a companion of choice. A reasonable adjustment contended for is allowing the claimant's wife to attend the grievance meeting and hearings

Harassment

28. *Claim (23*): the act of harassment was despite being presented with medical evidence and advised that C was unfit for work, R2 pressurised C to return to work by:
    (1) sending emails
    (2) text messaging
    (3) threats of further disciplinary sanctions
    (4) organisation meetings.

29. The claimant relies on both the purpose and effect of these actions in creating an intimidating, hostile, degrading, humiliating or offensive environment.

Victimisation

30. *Claim (25)* R3 omitted to defer her involvement within C's grievance until C raised a further complaint and R3 attempted to coerce the claimant to having the grievance dealt with on an informal basis as opposed to adhering to CPS's grievance policy. 28 September 2016.
Claim (26) Withdrawn.
Claim (29) Further omissions as Mr Dilworth and MCT rejected the C's request for reasonable adjustments date 1 December 2016.

Protected Acts

31. The claimant relies on his grievances, including the letter of 25th April, as the protected acts.

Detriments due to making protected disclosures

32. The protected disclosures (PD) relied on are as follows:
(1) in 2015 onwards repeated discussions with R2 regarding conditions of work.
(2) 14 April 2016 meeting with R2
(3) 25 April 2016 letter to R2 (health and safety and/or miscarriage of justice)
(4) 8 September 2016 disciplinary hearing (disclosure unknown)
(5) 14 October 2016 grievance letter
(6) 11 November 2016 grievance letter
(7) 21 November 2016 letter

33. The claimant clarified at the start of the hearing that PD1 referred to the respondent's working practises and concerned health and safety and that PD2 and PD3 referred to the PCX incident and health and safety and that (4),(5),(6) and (7) were a reiteration of the above concerns.

34. It was clarified in the claimant's evidence that the protected disclosure regarding PC X was the fact that PC X had made a complaint in March about an incident in January 2016 and the fact that he had complained was likely to cause a miscarriage of justice as he was attempting to intimidate the associate prosecutor into not resisting his contentions regarding opposing bail in the future. It was not a complaint that this had happened on the day of the incident.

35. The detriments relied on were as follows:

In relation to protected disclosure 1:

(32) November 2015 that R2 passed judgement upon C's work without engaging in any discussion and this led to the denial of C's right to test the allegations.

(34) 22 January 2016. R2 ignored complaints raised during a meeting and subsequent meetings throughout 2015/2016. The detriment claimed was the denial of C's right to raise a grievance.

(35) November 2015-August 2016 subjecting C to an overbearing monitoring regime by subjecting C to performance management. meetings whilst ignoring the impact upon C's deteriorating health.

36. In relation to protected disclosure 1 and 2
(35): as above
(37) 14 April 2016 R2 arrived at a meeting concerning C's performance with her mind made up regarding the outcome prior to hearing C's version of events. R2 omitted to investigate the allegations made by PC X with any rigor. R2 ignored the seriousness of C's disclosure. The detriment was R2 ignoring C's disclosure concerning PC X.

37. In relation to protected disclosure 3

38. (38) 25 April 2016 divesting C of his right to raise a grievance and make protected disclosures whereby R2 chose not to comply with R1's policies by a) failing to initiate CPS's grievance procedure and b) failing to initiate CPS's whistle-blowing procedure, the detriment being denying C's right to raise a grievance.
(39) 25 May 2016 C sent an email requesting action of grievances and disclosures made on 25 April 2016 which was ignored, the detriment being denying C's right to raise a grievance.
(40) 25 May 2016 the performance management took a different direction, from being supportive to being overbearing demeaning and vindictive by:

(1) increasing the demands made on C by R2 despite previous concerns over workload.
(2) omitting to act on CPS policy on stress management.
(3) insisting C attended increase number of workplace meetings.
(4) on 5 August 2016 subjecting C to an informal fact-finding meeting at short notice and refusing to allow C to bring a companion.
(5) 22 August 2016 subjecting C to attending a formal disciplinary hearing.
(6) circumventing CPS disciplinary policy by omitting C's right to a disciplinary investigatory meeting.
(7) acted in contravention of R1's disciplinary policy by omitting to appoint an independent investigator.
(8) R2 omitted to provide C with an evidence pack until C involved his union and then only provided the pack three days prior to the hearing.
The detriment being subjecting C to a punishing regime of performance management and subjecting C to disciplinary action.

39. Re. disclosure 5:
(41) 8 August 2016 subjecting C to a disciplinary hearing 16 days after he had collapsed in court due to work-related stress and making no provision to assess C's fitness to attend even though C was signed off unfit for work. No assessment of risk or reasonable adjustments. The detriment is described as subjecting C to an overbearing management regime.

40. (42) R2 acting as judge jury and executioner by failing to step aside from the disciplinary process under the full knowledge of:
    (1) grievances raised against R2 by C,
    (2) contravening the CPS disciplinary procedures,
    (3) R2's role as a key witness within the allegations R2 had raised against C which was contrary to DPP guidance.
    Detriment: perverting the course of justice and denying C his statutory rights. The above rely on protected disclosure 4.

41. (44) 15 September 2016 R2 issued a written warning accusing C of being professional negligent, the detriment being subjecting C to unwanted conduct.

42. (45) 19 September 2016 despite being presented with medical evidence advising C was unfit for work R2 pressurised C to return to work by:
    (1) sending emails
    (2) text messaging
    (3) threats of further disciplinary sanctions
    (4) organisation of meetings.
    The detriment being subjecting C to unwanted conduct and subjecting C to an overbearing management regime.

43. Re. protected disclosure 7:
44. (53) 7 February 2017 the grievance outcome ignored the evidence presented by the claimant and disclosures by the claimant which were in the public interest. The detriment being the perverting the course of justice and denying C his statutory rights.

Findings of fact

The tribunal's findings of fact are as follows:

45. The claimant began working for the respondent in September 2003 as a crown court administrative officer and became an associate prosecutor(AP) four years later. The claimant worked initially in London. Whilst working full time the claimant undertook a law conversion course and subsequently the bar vocational course. In February 2011 he moved to CPS in Manchester as a result of his wife relocating with the BBC to Media City Salford.

46. The associate prosecutor role had changed over time. Originally it only dealt with completely non-contentious matters and was a step up from an administrative grade. As a result of the changes AP's would undertake bail applications i.e. agreeing or opposing bail but they would do so on instructions from a crown prosecutor. The crown prosecutor making the bail decision could be anywhere in the country as the instructions may have been formulated overnight when there is a national duty system. The associate prosecutor can only act on the instructions given and if they wish to change those instructions i.e. from agreeing bail to opposing it they have to contact another crown prosecutor which may be somebody on a telephone line or could be a prosecutor present in the court building.

47. In 2013 there were other changes to the CPS Manchester. This included the removal of paper based files to digital prosecution files which would be accessed via laptop computers that AP's were required to take from court to court. These changes applied to crown prosecutors as well. While there were still some paper files, difficulties arose because courts did not have wifi access and AP's would have to remove themselves to the crown prosecution office within the court to access wifi.

48. It was not disputed that prior to May 2015 AP's were allocated dedicated case preparation time during office hours. However in May 2015 this was removed and AP's were deployed in back-to-back courts having to do their preparation before or after court. The claimant said these changes led to him being stressed and anxious due to the excessive demands placed on him. There is no doubt that the role became harder and some Aps would have coped better than others.

49. In respect of the stress he was under the claimant relied on an email from November 2014 to his line manager at the time Martin Hill. The email trail started off with the claimant complaining about having some missing paperwork. He then emailed his boss forwarding this email saying "it's nearly twenty past one and I've not had lunch yet". Mr Hill replied saying there was an IT issue with GMP and they could not access precons and he had escalated that matter. The claimant replied 4 minutes later "Martin I'm having a nervous breakdown in CT 16… can you please ensure I'm not doing court 16 again this week". We find this does not signify anything other than as in most jobs times can be difficult and 'nervous breakdown' is an expression in general usage for how people feel when working at one of those more difficult times.

50. In March 2015 the claimant had contacted Carrie Bell who was their representative in staff engagement. He raised points regarding complete lack of information and that they generally found out after the event. The claimant mentioned laptops in this but only to say that

> "when you were asked to contribute to meetings on rolling out the laptops they stopped inviting you to meetings when you started to point out the difficulties."

On 14 May 2015 he emailed a colleague describing

> "another horrendous day in court 16 … I've just finished court now, I haven't done HRS and I'm downloading for tomorrow's Bury court. I think my hair is turning white."

These incidents were before the preparation time change.

51. An email of 13 May 2015 from Cheryl Hramiak head of magistrates court prosecutions Greater Manchester set out that the decision to remove preparation time from the rota was partly because lawyers within CPS were not being given preparation time and it was felt that it was a luxury to afford associate prosecutors preparation time. She said she had spoken to a number of associate prosecutors "who have indicated that preparation time is not required for the majority of the courts that they cover" and she indicated that "from next week there will be no preparation time on the rota" she went on to say "if you feel like you are in difficulties you must contact your line manager and agree preparation time on a day to day

basis which would have to be after court" she stated they would monitor the impact as they moved forward.

52. The claimant's evidence was that by July 2015 the changes were having a direct effect on his physical and emotional wellbeing. Each night he would lay awake in fear and panic that he had forgotten to send a document or carry out a task and he would lose his concentration easily. However we do not accept this there was nothing in the claimant's communication with his line managers, even the pre AH ones which suggested this.

53. In October/November 2015 AH, respondent 2, took over line management responsibilities for the claimant and his colleagues. In fact AH was in charge of 17 associate prosecutors and prosecutors. From the beginning of November she was in charge of full operational management although prior to that she had occasionally deputised but had only made decisions about minor issues such as leave etc.

54. The claimant complained about issues he had had with his laptop and said that in November 2015 he spoke to R2 about inadequate computer systems and the impact they were having on his ability to prosecute effectively in court. AH denied that there was any such conversation in November 2015. We refer to our findings on credibility above. In particular we find that as AH took a note of anything significant it was unlikely she would not make a note of such a conversation. She agreed there was a discussion about his laptop although she did refer to a laptop when undertaking an independent quality assessment she undertook on the claimant. These assessments were carried out twice a year whereby she would observe an associate prosecutor in court and fill in a pro forma on their performance.

55. On 16 November she observed the claimant in Stockport magistrates court and she raised with him that he was not using lectern provided for his laptop but was holding his laptop and she felt that this was not an ideal way to be using the laptop. She only mentioned this in an informal way and she says she raised the issue with him not the other way round.

56. In December 2015/January 2016 the claimant did report problems with his laptop and on 15 December a laptop engineer had been arranged but due to the claimant having to attend court this had to be cancelled. On 12 January The claimant contacted AH about his laptop asking for a day to be arranged when he was not in court so the engineer could visit and she acted on this.

57. In his email 12 January he said

> "this HP machine I'm currently using is definitely showing its age. Everything takes longer to do, open files, save information, download, etc".

AH acted on this and also arranged for the claimant to be kept out of court on Friday 22 January so this could be sorted out. This email had been headed up "fan error on laptop".

58. There was no documented evidence of the claimant raising stress and anxiety with AH and we do not accept that he did on the basis of our findings on credibility but also because his email did not refer to any stress or anxiety which we would have expected them to do had he raised it in November and nothing had been done.

59. It was the claimant's belief that shortly after he had mentioned health and safety concerns in November 2015 AH started flagging and documenting issues regarding his work. On 5 November 2015 AH emailed the claimant saying that "she had been asked to look into the following noncompliances and said she was dealing with by word of advice if any of the information was incorrect he should contact her". The claimant contended that as a result of this flagging health and safety concerns the claimant AH started documenting issues with his work, making judgements on errors without first discussing them with him. AH had only just started her role and we find it inherently unlikely that between her starting her role at the beginning of November and the claimant allegedly raising issues she would have subconsciously or consciously decided to penalise him. Further there was " with her either before she became a manager and was just acting up or after at this time.

60. One of the priorities for the first respondent is custody time limits (CTLs) and it is important to work out when the custody is to expire in order to ensure that the putative offender is brought to a hearing before the custody expires and the person is released and if the person is released and then does not attend the hearing obviously that's a major cause of difficulty. It is accepted that it is not always easy to calculate the CTL. AH in her position was required to report to the deputy chief crown prosecutor 5 or more noncompliances with CTL i.e. if any of the prosecutors or associate prosecutors failed to put the correct CTL on file or anywhere at all. Other requirements AH referred to were the claimant's branch performance sheets (BPS'S) which are records of all court sessions attended. The branch performance sheets go to the area business support unit which provides a return to the CPS headquarters and this determines how much money each are is allocated. Advocates must also complete the record hearing sheet RAS or RHO. This is an electronic record setting out the details from the hearing such as any withdrawal of charges any pleas any CTL's, witness requirements and bail. They are completed on the computer and then uploaded so the administrative staff can action cases as necessary and must be returned and cleared within 24 hours. Administrative staff cannot action any action required after the hearing if they do not have an RHS. Home Office production orders (HOPO) are used where a defendant is imprisoned but not remanded for the incident case. HOPO's were required by CPS in order to ensure they properly arranged for the person to appear before the magistrates for the right case. The failure to endorse a HOPO on electronic file can result in cases being ineffective and time and money wasted. Because no one will have ensured the 'accused' attended.

61. On 9 November AH emailed the claimant regarding a failure to compete the RHO's which she had discovered as part of her routine CTL assurance checks. This turned out to be an administrative error. She says that she followed the same procedures with anybody else of raising the noncompliance and then considering the response.

62. On 20 November her office manager reported to her that the late submission of RHO's from the claimant was causing difficulties. She reviewed the situation and decided that there was no non-CTL compliance in this instance and therefore did not pursue the matter. This was one example and there were others where AH did not pass issues straight on to the claimant without looking into it as he believed she did, although on occasions when she did we find the claimant read too much into it. It was a question of simply getting a view as quickly as possible.

63. On 23 November her colleague Rachel Pavion advised her that in the case of RVP the claimant had forgotten to note the need for a HOPO and noted the trial date wrongly on an RHS. This could have led to the failure to produce a defendant at trial. Other issues arose on 21 December. She forwarded an email from administration about a missing RHS.

64. On 11 January Rachel Pavion raised an issue regarding an RHO failing to say a witness needed to be warned and therefore he had not been. He was a vital witness and Rachel Pavion asked AH to ask the claimant about his endorsement or failure to endorse it correctly. She was also asked to ask him about an unprofessional comment on a file R v H & R which was criticising a crown prosecutor.

65. These were all matters referred to AH by other colleagues and which for various reasons she was required to action. By this stage AH decided she should meet with the claimant to discuss his performance and she sent him an email on 12 January saying

> "I'd like to take the opportunity to have a conversation with you over a few issues that have arisen and to catch up in general when you're in the office on 21 January could you complete the CSL self-assessment learning form and could we meet at 11am".

AH explained that that was because AP's were court based and they were not often in the office she would not see them on a regular basis.

The claimant did not know what the CSL self-assessment learning form was and AH advised

> "it's on the civil service learning website portal. It allows you to assess yourself and it gives a list of courses and development opportunities."

66. AH noted the meeting immediately after it finished and her notes said

> "I had invited him in to discuss what I thought was a dip in performance and to try and ascertain if there were any underlying issues that I could help with or assist. I referred to lack of return of branch performance sheets, CTL noncompliance on X, issues with the accurate warning of witnesses on Y, and the RHA endorsement on the case of W. I asked how things were at home he said it was difficult his daughter had not settled at school as quickly as he had hoped and his wife worked away a lot. He was also studying for the LPC all of which with the travel was impacting on him. We discussed the rota and the first spread of courts and he asked if he had to be in Manchester whether he could have a range of courts rather than just 16 I said I would manage to the rota to see this happened. In terms of the issues SC accepted there were errors and I accepted that when dealing with volume there were going to be

more incidences of errors than someone who was only intermittently at court. SC accepted that he needs to be more vigilant with regards to the CTL and we decided that when it came to LWA's C instructions if there were to be a duplicate refix he would say LWAC as before and then the names and any errors would be highlighted. In terms of naming of people in RHO's we discussed the fact that there was often room for interpretation and translation and CS explained there is been no intention to upset Mary merely a request for D to look at the decision and that NS's endorsement was not on the RHO. I asked for NH the RHO endorsements to be non-person-specific."
AH therefore had asked the claimant specifically in the meeting if there were any reasons for the perceived dip in performance and he proffered personal ones.

67. AH also sent the claimant an email after the meeting which said
"thanks for sitting down with me today and discussing the issues outlined. I know you will return your branch performance sheets weekly to BSU and I accept that some have not been returned due to the corruption of your computer hard drive. In relation to file endorsements please ensure witnesses are correctly warned and as a safety net if it is a repeat warning on a refix to specifically say to warn as before highlight any changes. CTL's are always a danger area but accurate endorsement is essential and in terms of date of hearing as well as a CTL itself. Please take special care when dealing with a para B remand. Please keep all HRO endorsements non-person-specific wherever possible. I accept that the tenor interpretation of a written endorsement can sometimes be lost in translation. Please keep me appraised of any entreaty you make to WRAY with regards to your future career development."

68. AH was adamant that no health issues were raised at this meeting. It was the claimant's evidence that he flagged concerns regarding the CPS computerised systems, the volume of work, removal of preparation time, inadequacies of new system and processes, new requirement to undertake back-to-back court, the pressure demands and stress all these changes had, and were having on his health, and his ability to do a professional job. He said she recognised some of these difficulties but she did not take any steps to address them. He said he also highlighted that he was not coping well with these changes and they were creating anxiety, pointing out the inadequacies of his laptop. While it is possible that AH missed all these matters out of her note, we find this is inherently unlikely. She was a reasonably assiduous note-taker and would have had to have been alert to the possibility that the claimant might bring some of claim in the future to make a conscious decision to leave these matters out. Further, the claimant did not query her email of 22 January. Again that supports a contention that he did not raise the myriad of other issues he now relies on. The note and email we find were perfectly reasonable and supportive given the context.

69. Other relevant matters in this period were that it was agreed by all parties that prior to AH's promotion that she had been on friendly terms with the claimant and when the claimant was thinking of sending his children to the same private school in Macclesfield, which her own children attended. She spoke to him about it and

eventually met with his wife to discuss it and gave his wife also advice on more effective booking of annual leave. Basically because this was a private school there were weeks when the school was on holiday when state schools would not be on holiday and therefore she said this was a good time to book leave as there would not be the same pressure on as most other staff with school aged children at state schools would obviously be asking for leave during different periods.

70. Mrs Chowdhury also gave evidence that her husband was becoming increasingly unwell in 2015 and there were many difficulties over Christmas which resulting in her persuading the claimant to sign on with a doctor in January. However, she did not know whether the claimant had raised these matters with the doctor in January when he did register and see the doctor. We find this extraordinary as if the claimant was as ill as Mrs Chowdhury made out and if she had had to put pressure on him to go and register with the doctor to then not ask any questions at all about what he had said to the doctor or what the doctor has recommended is just inconsistent with the claimant being so obviously ill. We therefore do not accept her evidence that the claimant was seriously affected at this point.

71. After the meeting of 22 January AH did indeed alter the rota to give the claimant a wider spread of courts.

72. Following this other problems arose was an incorrect CTL and *a RHS in R v HD* and AH emailed the claimant about this on 2 February. This said

> "further to our meeting last week I have to make you aware of another incorrect date on a CTL case RHO I previously asked you to generate RHO's in Compass to avoid the date of the hearing being wrong. Though it is obvious it was not in October it's imperative that the dates are correct from the outset as it generates more work and leaves the risk of CTL failure as well as being CTL noncompliance. I must warn you that the area and I consider this a performance issue and any further repetition I will have to consider initiating our formal management procedures." (Compass was an internal software programme which would populate different forms for the AP if the requisite information was put in)

The claimant replied

> "Monday at Botlon was a busy day I can't generate HRO's from compass in Bolton mags. There is no wifi and overnight cases are brought directly to court throughout the day as this case was."

73. Another issue arose on 3 February where a crown prosecutor ("Bex") who was unable to attend court and sent some instructions through the claimant who was covering court 16. She referred to applications for the case to be sent to crown square. The claimant replied on 2 February that his papers were not complete, that he did not have an MG5, nor any details of how long the prisoner had been on bail before being remanded by the police. He said he had a busy list and did not have the time to answer the numerous questions he anticipated the DJ would ask about this and he suggested that someone from the crown prosecutor's unit came to deal with it at the hearing: "It's not straightforward and should be managed by someone in complex casework not an AP".

74. At 8:39 3 February the crown prosecutor involved sent a long email to the claimant setting out all the information she thought he would need and said that she had spoken to her boss about this and she did not have time to come to court as she had an urgent ILOR ("international threat to life") to deal with as part of an ongoing police operation.

75. The crown prosecutors' manager Ben Southam sent an email to AH at midday to say that

> "as a result of Subi's email Bex rang me before 8am this morning. She's currently dealing with some urgent international threat to life issues hence why she was not available to attend court. It was hoped her subsequent email summarised to assist Subi and she forwarded relevant documents to the court for the attention of the DJ. She had received calls for the OIC and defence solicitor and therefore has gone over to court to speak to Subi. I'm told he was not willing to read the papers or deal with the case or I gather provide papers or engage with the defence. Bex has therefore returned to court at 2pm in order to deal with the bail application. Given the provision of papers yesterday, further assistance offered, and our limited resources, it should be exceptional having two prosecutors in the same court. Had this been the first hearing for a multi-defended case then it clearly would make sense for the CCU lawyer to attend. I will remind all CCU lawyers that if they have a matter which is suitable to be covered by an area AP or a lawyer that they email yourself, Yvonne or Rachel, provide the papers where possible, the day before the hearing. Equally where there are many defendants listened and anticipated bail applications I would expect them to cover the hearing, notifying yourselves accordingly."

76. Around this time AH also arranged for the claimant to receive his training allowance which he could then put towards the fees for his LPC course.

77. On 22 February Mrs Hramiak forwarded an email from "*Geo Amey*" containing a complaint against the claimant. "Geo Amey" provide customer service for the court on a subcontracted basis. AH said that in the 15 years she had been prosecuting she had never seen a complaint or heard of a complaint by Geo Amey or their predecessors. Mrs Hramiak required AH to look into it. The complaint was that the claimant was laughing at Geo Amey attempting to calm a prisoner with mental health issues who had become upset and angry and this alleged behaviour was believed to have exacerbated the situation.

78. On 28 February the claimant replied. He stated that yes he was smiling not smirking or laughing, he was smiling but it was not in relation to the defendant; the magistrate had made a comment to which he had smiled whilst looking at the magistrate directly, he continued

> "This I believe was at the same time as the defendant had been brought into the dock. He was identified and case management was dealt with he pleaded not guilty and I vigorously proceeded to oppose bail. He was remanded in custody. He did not take well to that and started to make threats to me directly, shouting that he was going to remove my smile.

> The magistrates and legal advisor asked Geo Amey to remove the defendant. At this point Geo Amey staff in the staff in the dock attempted to persuade the defendant to follow them down. They did this politely but not firmly. The longer he was left in the dock the angrier he became and given I just had been had him remanded in custody his anger was inevitably directed at me. This was perpetuated by Geo Amey's failure to remove the defendant from the dock firmly and quickly. I felt they'd allowed his anger to develop significantly by remaining there and thus it continued to be directed at me and at one point indeed looked dangerous given his alleged mental situation. If you need any further information please let me know."

79. AH simply reminded the claimant that in future he should try to be more careful when a mentally ill defendant was in the dock and be more aware of the impact of his behaviour.

80. On 1 March Rachel Pavion brought issues to her attention that the claimant had failed to include in the RHS any actions for updating following the first hearings, who needed to warned, and what material was outstanding. On 4 March he was chased again for an RHS from the previous day.

81. On 14 March the claimant emailed AH with urgent concerns about a case and potential alteration of charge. However she was on annual leave and the matter was not dealt with until the next day. She felt the claimant should have been aware of this and ensured the advice was obtained elsewhere.

82. On 18 March Rachel Pavion asked the claimant to clarify whether additional charges had been made in the case RVS. It was unclear from RHS he had completed.

83. On 23 March one of the senior crown prosecutors emailed AH to complain that the claimant had not noted her review of the case of RVW where she had indicated that the case should be withdrawn, therefore the claimant had failed to withdraw it and the claim was therefore still listed for the crown court when it should not have been which was embarrassing.

84. On 1 April Rachel Pavion emailed AH to ask whether the records for 17 March were correct in showing that the claimant did no work that day despite being in the office. This was in relation to the REM system and payments.

85. On 21 March the complaint regarding the claimant was received from PC X and passed to AH.

86. On 7 April AH requested discussion with the claimant about the above matters. She also asked if they could begin the process of agreeing the claimant's PDR record for the year. This is a performance assessment whereby the individual completes the form themselves at first instance and then the manager looks at the form and it is hoped the matter can be agreed. It was noted that there had been improvements to RHO endorsement and CTL since the meeting in January.

87. Around the same time AH assisted with obtaining leave for the claimant when he was taking his examinations.

88. The complaint from PC X was sent to Rachel Pavion who sent it on to AH to consider. This complaint said as follows

> "please can I raise concerns about the claimant and some comments made by him in court in relation to the bail app which directly contradicted advice I received from a CSP level C lawyer… I spoke to the claimant to highlight that it was part of an operations case that we were pushing for remand as we considered him to be a flight risk and likely to commit further offences also. I had put the grounds on a MG7 but they comprised largely of"

and then he noted the 3 issues.

> "When I highlighted those grounds to the claimant his comments were as follows:
> "(1) I have rapists who appear in court and get bail so hardly any chance with an offer to supply
> (2) breach of police bail is not something that can be used in the magistrates court when speaking of grounds to remand a person in custody, I can't use that it has to be court bail for it to be useful.
> (3) offences committed whilst on police bail do not or cannot constitute offences committed on bail in remand terms, it has to be a court bail.
> (4) learn the bail act then come and speak to me.""

89. PC X believed he had obtained advice to the point where that the claimant's view of the bail act was wrong. It was said that

> "The claimant opposed bail begrudgingly as he was aware I was still in court but grave grounds as simply that he committed theft offences prior and he did not appear to read much of the case file at all or my remand application which I do generally tailor to be as helpful as possible in the magistrates court and I generally write it as I hear it being presented in the magistrates court. Luckily the defence did not seek bail and he was remanded. I am concerned he's not reading the files he's presenting in court and I am worried about the rapists he appears to be unable to remand and wonder if it's connected with his confusion around police bail."

90. It would be fair to say the issues raised were regarding whether he was correct about the bail act, whether he had only half-heartedly opposed bail and read the file, and further whether he had been rude to PC X for e.g. by saying "learn the bail act then come and speak to me."

91. On 7 April the claimant was invited to a meeting AH said "I need to discuss a few issues that have arisen" the claimant asked her what it was about, was there anything he should be worried, "as you know I've got an exam on Monday and now this is playing on my mind"
she replied saying

> "further matters have arisen I need to discuss with you and I've no desire to worry you at a time when you're already under pressure but it's important that they are addressed as soon as possible. The issues relate to PC X on 17 March in relation to R versus B and two other matters that were redacted".

92. Following the meeting of 14 April 2016 AH provided a note of this meeting which referred to the 3 issues which had arisen that she wanted to talk to him about and she wanted to assess if any issues were affecting the quality of his work. She pointed out it was the third meeting since November due to work falling below the required standard and she was keen to support him keeping out of formal proceedings however the more incidents the more serious the situation became.

93. The claimant said he did not accept his work standard had fallen he did not agree with all the criticisms that had been raised. He felt he had been targeted and that he had had lots of previous line managers and no-one has ever had an issue with him before. He had spoken with his colleagues and no-one else was being called in for meetings and he did not understand why it was happening to him. "I explained I was dealing with all matters of performance and that I was having chats with many members of staff." The three matters on the agenda for the day had been referred to AH therefore there was discussion as she had not directly observed the situation. He said he felt he was being picked up on everything that he was being "set up" and "targeted". AH asked by whom but the claimant was not specific and stated he had issues historically with managers at the CPS.

94. AH in the meeting first of all raised the issue regarding PC X. AH's note said that the claimant said "PC X was unrealistic in his request for remand. The MG7 was unrealistic and contained lots of intelligence based on generalisations." And that he had reminded the officer of grounds of the bail act and that though his case was serious rapists and murderers had got bail. Accordingly the claimant's version of events was very similar to PC X's AH suggested it was really maybe the tone of how he had said it that was the issue. The claimant did agree that it was a robust conversation and he would not have done anything differently. AH said had he met aggression with aggression and locked horns with the officer and the claimant said he had not but the officer had an unreal expectation of what could be done and how to rely on the bail act.

95. AH had identified a training course that she thought would assist him however the claimant "put out" by this as he felt he had been working many years in a court and did not feel a course concerning customer care would assist. AH said "after many years we become less able often to deal with other people's idiocy and can become careworn and this course may help".

96. We can understand that the claimant felt affronted but it was proposed by AH in a spirit of empathy as can be seen from her note. She also said that she would send him the details and would facilitate rota time so he could do the course.

97. In relation to the other issues, he said he found prosecuting from his tablet difficult when his eyes became tired after the morning session and found it difficult to absorb the information, and this may affect his mistakes and not seeing the

reviews. She gave him some advice on how to fill in the forms using Compass which would make things easier in future and she reminded him of the need for extra care and vigilance as the consequence of not doing so can be huge.

98. In relation to his eyes she suggested a DSE evaluation (an ergonomic assessment) and undertaking an eye test. she wrote out some action points that she would send the details of the course she thought would be of use.

> "The claimant to confirm whether he wished to do the course and AH would make rota time available. AH to send the DSE evaluation claimant will consider undertaking an eye test and return to AH if required. AH to look at the MG7 and respond to the officer. C would be more vigilant on looking at reviews in the bundle. C will type extra charges on to the charge box of HRO. C will be more vigilant in reading in-house reviews and not just rely on the MG3."

99. Again AH took a note which she sent to the claimant on 14 April it said "feel free to comment" she said she had forwarded the DSE assessment to him as soon as she had it and that she was referring to a course that was on the civil service learning site.

100. The claimant then sent an email to AH on 25 April. The covering email stated

> "please find my response to my meetings discussion my standard of work I'd like my response to be recorded." The claimant relied on this letter for his protected disclosures.

He began by saying "following my discussion with AH dated 14 April and the subsequent email note sent on 15 April detailing this meeting please note my reply below which addresses many of the points raised in the meeting many of which I do not support and/or agree with."

There was some discussion of the purpose of or the nature of this memo at tribunal. Mr Harris for the claimant seemed to accept that it was part a record of the meeting and part further comment by the claimant on the matters that had been raised however he said he had not agreed to this and he submitted it was an actual account of what had happened in the meeting. We cannot agree with this; we think that it is partly his account of things that were not noted in the meeting and partly further comment following his ability to reflect on the matters which arose on 14 April and therefore concerns additional material that was not raised on 14 April. First of all he said it was the first meeting he had been given some information on before the meeting itself but it was only brief. In previous meetings he only found the issues to be discussed in the meetings themselves.

101. The claimant went on to note that she questioned him on a number of issues and he had to answer from memory without having looked into the matter beforehand. He went on to say

> "it was clear conclusions had already been drawn prior to the questions being asked due to the way they were phrased, i.e. the errors were down to my performance, I was at fault, I was responsible for these errors. I was not happy about this and quickly realised that a pattern had developed in these meetings where all discrepancies attributed to me were taken out of context and any genuine mistakes by magnified

whether justifiable or not and recorded as a performance issue. My specific queries are as follows: AH's memo states the meeting was to deal with issues effecting the quality of my work and that it was the 3rd meeting since November we have had due to my work falling below the required standard. She also states she was keen to support me to keep me out of formal proceedings. The memo suggests strongly I was entirely at fault for all the concerns raised and all the incidents were a reflection of a poor standard of work. Indeed, there was not any other justifications other than the conclusions drawn prior to the meeting. In reference to the line in the memo stating "he had lots of previous line managers and no one had ever had an issue with him before" this is wholly inaccurate I did not state this I stated I have had many line managers and when there were matters that needed to be addressed most of them approached the issue in a constructive manner ensuring a complete picture was fairly represented in the context of any issues. This has not been the case with any of the 3 meetings I've had with AH; the focus has been to portray a one-sided version of events devoid of context clearly aimed at apportioning fault on myself. This approach has raised concerns as to whether I was being targeted unfairly for a specific reason which I raised with AH directly in the meeting.

PC X

In regards to the complaint raised by PC X about the handling of the case of R versus B put forward I explained the issue had nothing to do with confrontation with PC X. This issue was entirely with preserving the crown prosecution service as an independent prosecuting authority; and not be bullied by a police officer who in my view was being aggressive and clearly wanted B's liberty removed from him irrespective of whether that was justified in the eyes of the law or not. It has appeared to me from all the information provided and supported by my reviewing colleague on this case that there was not justification for taking the defendants liberty and he could be adequately managed with appropriate bail conditions. However PC X did not accept this and wanted this individual RIC (remanded in custody). I robustly held my position but nonetheless made his concerns as per his MG7 known to the court so the court had full knowledge of all the circumstances before deciding the question on bail. Two points became apparent about PC X's behaviour:

(1) he had very little knowledge of the bail act

(2) he did not care about the bail act and was solely concerned about getting this defendant RIC's whether justified or not.

During the meeting AH asked could my response have deemed to have been aggressive I replied and emphasised though I was assertive given this officer's repeated unreasonable requests I was not aggressive. I explained to AH I did not believe I could have reacted differently and I'm confident I reacted professionally. Given the many years of experience I have accrued dealing with police officers in similar circumstances as a prosecutor in this role. AH's response (as had been the case in previous meetings) was to ignore the underlying concerns I had raised as demonstrating this example (i.e. dealing with bullying officers) and

instead suggested a training programme for me as a solution – implying an alteration of my behaviour would have removed the unreasonable request made by the officer. I do not accept this to be the case in fact I deem this approach as condoning the slow erosion of the crown prosecution service's independent nature and acquiescing to unjustifiable police demands.

CMD

With regard to the case of CMD the memo highlights my observations of how tired my eyes feel by the afternoon from overexposure to the laptop screen. This inevitably leads to mistakes. It is a point I've raised with previous line managers since the inception of CPS's digitisation programme where almost all cases were mandated to be prepared and presented during laptops in spite of the consequences to a prosecutor's health. I have previously been told the issue of eye fatigue and tiredness could be as a result of deteriorating eyesight as a result of over-exposure to laptop screens. AH mentioned that I was entitled to have my eyes examined paid for by CPS; the suggestion being the perhaps I now needed to use glasses. I have never needed to use glasses before.

All my previous line managers in Manchester had also acknowledged that due to the volume of cases associate prosecutors deal with on a daily basis mistakes are inevitable. With the onset of back-to-back courts (which is previously not the case) with limited preparation time given to associate prosecutors who individually deal with by far the largest volume of cases on a daily basis one is indeed bound to get tired and make mistakes. This is compounded by having to prepare and present all these cases on a laptop often with cases that have a large number of documentation – sometimes in no coherent or logical order this of course is very different from many CPS areas where the colleagues are given preparation time and they're not subject to the pressures of back-to-back courts. Together with the pressure of dealing with queries from the court and defence lawyers about specific cases it's inevitable when dealing with a large volume of cases on a weekly basis the occasional mistakes will be made. As stated the majority of our previous line managers have acknowledged these pressures and they place any errors made in the context of these pressures instead of undertaking a finger pointing exercise. I do not believe such items can be put forward as a performance issue; rather more a CPS working practise issue/health and safety issue for staff's wellbeing in Manchester.

Pre-populating charges by using CMS

During the meeting I was told by AH charges should have been put in via compass and self-populated but the absence of that I should type the charges into the charge box with the date laid so there is a single point of review for charges. This is completely new to me I have never done this and there are many examples of HRS endorsement where many of my colleagues do not do this. This also implies I have knowledge of how to do this function CMS I do not. I have raised my lack of knowledge of CMS use with previous line managers all who have promised training no training has ever materialised for me though other colleagues were

> allowed to undertake refresher courses. Again this is a wider issue that needs to be communicated to staff and I therefore do not believe it is fair to be using it in a way to suggest my work is falling below standard.
>
> PDR
> Significantly during my second meeting AH brought to my attention she had combined the PDR process itself with a meeting to discuss secondary issues. On the date of this second meeting in the morning I was asked to complete my written sections of my PDR this was followed by a meeting discussing issues (to which again I had no prior knowledge of the agenda) unknown to me after this meeting AH had updated my PDR with her conclusions from the second meeting. I was not given any information that this had been done. It was only as a result of being concerned about anomalies of how I have been treated since November that I checked my PDR and discovered this information had been inserted; information which I did not agree with or have any knowledge of. This is the exact reason why I had concerns as to whether there was a wider agenda to these meetings and I was being selectively "targeted" for reasons not known to me. Please note none of my previous PDR's have raised any concerns yet within a few months under AH's line management my performance has become so poor that I'm heading towards formally disciplinary procedures. It is also important to note that the actions AH suggests to remedy failures or future errors of this nature from recurring presupposes the recurrence of these errors are able to be dealt with in the manner she suggested. None of these suggestions tackle the underlying cause as to why certain errors have occurred i.e. working practises of CPS Manchester leading in my case to eye strain exhaustion tiredness and fundamentally ignoring the real issues and wellbeing of prosecutors under her management."

102. A few things arise from this memo that need explaining. Firstly, in respect of bail applications i.e. the PC X the situation is that when associate prosecutors were originally set up they did non-contentious work. They then were given some contentious work which included bail applications. Either not contesting bail or opposing bail. Obviously opposing bail requires more work than not contesting it although not in all cases would bail be applied for. In the hierarchy of the CPS a prosecutor who is above an associate prosecutor would provide the associate prosecutor (AP) with instructions as to how bail should be dealt with. These are often done by prosecutors working in effect on a duty line up overnight and the decision and instructions can be drawn up at any location throughout the country where that prosecutor is working from. The next day of course that prosecutor is not on duty and therefore if anything needs changing another prosecutor needs to be consulted either someone at the end of a telephone or a prosecutor present in the court building. APs by themselves does not have any authority to change the decision and the instructions initially given to them.

103. It was Mr Dillworth and AH's evidence that it was common for police officers to challenge the CPS's decision on bail where it was not to oppose bail. Police officers were highly involved with the defendant and had a lot of knowledge of the defendant not all of which would be established by facts. They would also be much

closer to the case and in effect be more subjective with their aim to prevent this person causing damage in the community or seeing them as a potential flight risk. The CPS's duty was to assess a situation in the light of the bail act and what the court was obliged to take into account what was provable etc.

104. In the particular case with PC X the decision had been not to oppose bail and PC X was concerned about this. He had provided his own instructions saying bail should be opposed and the claimant had countered this with the comments recorded in PC X's email. Again, AH and Mr Dillworth's position was an AP could not change the decision and therefore putting pressure on the AP ultimately would lead nowhere. The most you could do was persuade them to ring or contact a prosecutor and put any new information or a new slant on existing information to the prosecutor and ask them if the decision should be changed.

105. It was the claimant's view that this happened a lot and that the prosecutor would come back and say 'oh well it's the court's decision' however the procedure would be either they would change the decision or not. Sometimes the decision would be changed as more pertinent information had become available since the prosecutor had made the decision overnight. There was nothing wrong with that it was perfectly proper and it was acknowledged that sometimes police officers might overstep the mark in promoting their views on whether bail should be opposed or not.

106. Nothing arose after this. AH said that her colleague Rachel Pavion dealt with PC X's complaint. She never saw the reply and she herself took no further action other than suggesting the claimant went on this course. She said she had never had a complaint from a police officer before and we were surprised that a police officer could make a complaint by email directly as PC X had done and that there would not be a procedure for raising matters through each organisation's hierarchy. AH said no whilst there might be such a procedure the CPS would deal with complaints coming from any direction as that was felt to be the most transparent way of proceeding and she did not feel PC X's way of raising his complaint was inappropriate. She supported the claimant's view on the Bail Act and her only view was whether the complaint had arisen because the claimant had been too aggressive with PC X as some of the comments suggested.

107. In relation to the CMS this was a case management online system and it was AH's unchallenged evidence that she did arrange for the claimant to go on a CMS course.

108. In respect to the PDR this was the claimant's personal development or performance development review that was completed annually the claimant had had a meeting with AH where he had made his comments and she had discussed with him what comments she was going to put into the PDR. As far as she was concerned everything she put in the PDR later had been discussed also on 14 April. She said she could not do it in the meeting because she was having trouble with the connectivity of her lead and she acknowledged following Mr Dillworth's investigation that she should really have had a further meeting with the claimant once she had completed her sections of the PDR and set down in writing her views rather than risking the claimant being shocked by the content of the PDR either

because he believed she had not discussed everything with him or because it did not actually accord with what he had said or he had misunderstood what she had said. The claimant believed this had been done in an underhand way to set him up for failure.

109. Following this AH contacted Roz Atkinson an HR manager on 26 April and stated

> "Dear Roz I would welcome a chat with you when you have the time to discuss whether any action is required in regard to this member of staff and how to reply. Since I came into post in October I grouped individual failings into 3 meetings – I chose one of these meetings to coincide with the PDR but separated out the issues and recorded the issues in the PDR document. I worried because he feels he has been targeted – though heavens know why when my actions are motivated by trying to keep him out of formal performance measures if I can provide help and support he is now backpeddling and trying to put a positive spin on his actions I would welcome a bit of a steer."

110. AH took a note of their meeting with Roz Atkinson which took place on 29 April. The advice was:

(1) deal with further incidences as they arrived don't save them up
(2) base on the end of year review produce an action plan
(3) make it over 4 weeks
(4) monitor it weekly
(5) offer support
(6) remind of workplace wellness
(7) send DSE assessment
(8) remind regarding e-learning
(9) acknowledge the note and they will sit alongside
(10) eye test
(11) keep an eye on time and punctuality and refer to flexi forms.

111. AH's contention that prior to the PDR the claimant's performance had improved at times there were less CTL's and RHS noncompliances and the matters that led to the 14 April meeting were different from the matters which she previously had been concerned about with the claimant. There were some positive comments on the PDR which supported her position so we accept this was her perception.

112. Following her meeting with Roz Atkinson AH advised the claimant that she would be putting his notes with hers on the personnel file. This was clearly the advice given to AH and it was consistent with the claimant's covering email which had not positively asked for anything to be done with his letter.

113. She approached the claimant on 10 May proposing an action plan to be reviewed weekly over the next 4 weeks to give as much help and support as possible regarding any issues he was experiencing:

(1) she encouraged him to complete the e-learning suggested. She would provide rota time for this. She told him where it could be found. It was called Delivering an Excellent Service Part 1.

(2) she said she waited to hear whether he had had an ophthalmic assessment and she also attached a DSE link for him to access that.
(3) the claimant to undertake mandatory associate prosecutor e-learning on CTL Part 2 and update her with regards to the other mandatory training what is left to be completed.
She also recommended workplace wellness to him an internal counselling service.

114. On 12 May AH reported to Ian Rushton the chief prosecutor that the claimant had 6 CTL noncompliances. She recorded that she had taken action on each occasion that she had identified training and that the claimant was currently subjected to a 4 week informal action plan. She also said many of the incorrect dates will be eradicated by the wide use of the prosecutor app. At this stage she was simply reporting as she was mandatorily required to do anyone who had more than five CTL noncompliances in a 12-month period. She had begun her 12-month period when she had started in her new role in October. It appeared to us that AH had no choice over reporting this and was actually being supportive by stating what she had done to assist the claimant and she indicated that he incorrect dates would be avoided in the future due to the prosecutor app.

115. In respect of notifying Ian Rushton of the noncompliance, Ian Rushton replied on 18 May saying "I think Subi is on thin ice here, keep me updated". Nothing further occurred.

116. However on 19 May AH asked Roz Atkinson whether she could tell the claimant that any further notification of CTL failures would result in formal proceedings.

117. On 25 May the claimant emailed AH and said

> "thank you for your email and allocating rota time to discuss the suitability of suggested e-learning course. I am happy to undertake any courses which will address the substance of issues raised. While I appreciate training courses will indeed help some of the feedback raised many of the other points mentioned could not be addressed by a course so I'm keen to understand how this will be tackled and I'm happy to discuss further. With regards to my PDR as mentioned additionally notes regarding a meeting was inserted without my prior knowledge and consent. I'm not happy for these comments to remains on my file so I would be grateful if we can revisit this PDR and remove any such notes. In the meantime further to your email I'll look forward to discussing it and exploring the recommendations you have suggested."

118. The claimant's evidence was that he was expecting to discuss with AH his letter of 25th April. There was no response to this email in respect of the line the claimant pointed out "so I'm keen to understand how this will be tackled and I'm happy to discuss further". There was no final reply to this email. AH said she did not see the need to specifically respond. In the claimant's view she was deliberately avoiding responding to what she knew were whistleblowing complaints. We do not accept this – it was perfectly reasonable of AH not to recognise these as whistleblowing complaints after all the claimant did not refer to them as such until a considerable period later. Whilst it would be good practise were there was a hint of

whistleblowing to suggest the use of a whistleblowing policy there were two reasons not to here – firstly that it was not obvious as we have said and secondly that AH had shown this to HR and they had not recognised it as such. The respondent has disclosed a considerable number of emails and none from AH and RA show the slightest hint that they thought this letter might contain protected disclosures which they wished to 'keep the lid on'. There was no apparent incentive to do so in any event as the matters complained of were not ones involving either AH or RA personally which might have given them the hint of a motive to suppress any analysis of the letter as containing protected disclosures.

119. AH however did meet with the claimant on 31 May and there was a list of topics discussed. These were CTL e-learning, CTL performance, mandatory e-learning, DSE and eye test, flexi forms, delivery and excellent, mandatory e-learning matrix, and murder CTL. She advised the claimant of the six CTL noncompliances and advised him she had to report it to the DCCP. She said she could not impress on him the importance of accurately recording and calculating the CTL.

> "To this end I asked you to complete the CTL part 2 e-learning course. If you have any issues with the above, which have all been individually fed back, then please do not hesitate to contact me (referring to the CTL's). Please let me know if you wish to complete the DSE assessment and whether you have undertaken an eye test that requires any intervention. As previously discussed I believe the delivery and excellence course would be of benefit. Please let me know if you wish to do the course and I will allow for rota time. Similarly there is a mandatory e-learning matrix – please let me know which courses you have not done and again I will allow time for them. I do not have a full set of your flexi forms. It is important you send them to me no later than Tuesday after the period ends. I have to keep your folder up to date and it will affect your ability to have a new leave card and therefore leave if they are not there. I therefore need the period from August 2015 to March 2016 and the 18th of April sheets separately for the branch records.
>
> it's been notified by BSU that the branch sheets had not been returned on time please prioritise this return as it materially effects where we are paid for the work we do. As previously indicated this is a four week action plan today's the first time we have discussed it in detail I propose that it starts from the week commencing 30 May 2016. We will review it next week if you have any issues we will raise in the intervening period please do not hesitate to do so."

120. The claimant then sent his flexi sheets in however there were problems with them and on 8 June AH contacted the claimant to say "your sheets are incorrect I'm afraid" and this referred to the court preparation time issue i.e. working from home and it was only allowed to carry over 14 hours 48 minutes therefore there were issues other issues arising. AH then had a discussion with the claimant about converting his flexi leave into annual leave. AH chased him for the up to date sheets on 23 June, asked him why a branch performance sheet was late, and indicated she was arranging a meeting on her return from leave to discuss the action plan. AH accepted at tribunal that she should have not let the issue of the flexi sheets build up over such a long period.

121. On 27 June she emailed him noting that she had no confirmation he had completed the e-learning the mandatory or the voluntary, that of the flexi forms not one was completed correctly and she asked him to resubmit them and chased them but had not received the amended copies. As she was due to go on annual leave she proposed to extend the informal action plan to allow time for the above to be complied with she also asked him to

> "by 1 July complete the ODDP assessment on the prosecution college as per the above attachment and by 18 July to do five actions:
>
> (1) mandatory e-learning, including CTL part 2
> (2) resubmit the last 12 months flexi forms in the correct format
> (3) submit the week commencing 18 April flexi form separately
> (4) submit any future flexi form within 3 days of the close of the flexi period
>
> and
>
> (5) please submit any requests for any credits for preparation to me in writing by email with an explanation as to what the nature of the court was please only then enter them on your flexi sheets with my initials by the side. Please remain vigilant regards to CTL endorsement and calculations."

122. There was an example of AH dealing with a complaint about the claimant on 21 July. She responded to it without raising the matter with the claimant.

123. On 26 July the claimant advised AH that he had managed to complete some of them but that he had not completed the following: CMS refresher training, health and safety for all, basic fire awareness, unconscious bias, ethics for prosecutors, speaking to witnesses at court.

124. A meeting then took place on the 26 July and AH made a list of the things they'd discussed. It was discussed in tribunal during cross-examination of AH it became clear and in fact is self-evident from reading this list that they're not all action points which the claimant has to complete but observations and in fact the email says it's what they discussed it's not action points per se. The email therefore said

> "(1) e-learning: you have completed the CTL 2 but we'll confirm the outstanding mandatory courses you have to yet to complete and I will facilitate (2) branch performance sheets: I will check how often they are to be returned, monthly or weekly, and you will ensure they are returned accordingly to BSU
>
> (3) you will arrange an eye test potentially for the 17th August and I will facilitate on the rota
>
> (4) flexi: we discussed the smarter working, flex credit, flex periods, carry over and flexi themes. This end I attach the smarter working application.
>
> (5) you will start a new flexi period on 8 August carry over a maximum of 14 hours 48 mins.
>
> (6) you will liaise with E.G. regarding last year's carry over of annual leave.
>
> (7) you will rationalise the last 12 months' flexi sheet once this information is known. I can confirm you currently have minus 6.5

> meaning that of the 8 I'll've found you will have a carry over of 1.5. If not we will discuss the flexi credits to rationalise your card.
> (8) please ensure that all flex forms are submitted no more than 3 days after the end of each period.
> (9) please ensure that all smarter working applications even if this is daily are referred to me as similarly all flexi credits outside flexi hours.
> (10) please complete your PDR objectives by 17 August."

125. She ended by saying "I not impress on you the need for greater communication and the need to reply to my emails or ring me if you are unsure or if you need an explanation" and that a review was organised for 27 August which was roughly a month later. We find this email reflects AH being proactive and helpful to the claimant.

126. AH did check the business support unit when BPS forms need to be returned she was advised that it was weekly She passed this information onto the claimant. She also did a note of the meeting with the claimant. She recorded that the claimant had said with his eyes he was not able to prep a court directly after and therefore liked to leave after court to rest his eyes and then do prep. "I said this was remote working and he needed a smarter working application permissions daily so they can be logged." He had said he was finding it difficult to get an appointment to have an eye test and AH agreed to facilitate it by ensuring that he could finish at court on the relevant date. She also said "I raised the need for better communication as silence was not an option and I wished to avoid unnecessary escalation".

127. The claimant then advised AH he had an exam on 17 August but it would not affect his eye test and requested the morning off to take this exam and she agreed to that. In this request the claimant said that

> "most of my work is prepared using a laptop which means my eyes are continuously exposed to a laptop screen everyday from around 8:30am to 1pm without any breaks and then from 1:30 until court finishes. This has caused strain on my eyes and by the afternoon of each working day I suffer from eye fatigue and severe migraines for which I take medication. Furthermore after court I have to prepare my cases for the next day whilst at work premises. This has exacerbated my migraines and led to the possibility of mistakes on case files which could be avoided through more effective flexible working."

AH and the claimant agreed that was the first time she was aware that the claimant was suffering from migraines.

128. There was also another development in relation to working from home which arose from his flexi sheets. The procedure was that working at home could count towards an employee's hours but only if it was approved beforehand by a manager as the manager would assess whether the amount to be worked at home was reasonable for the work the individual had had to do. This led to AH being aware the claimant had not submitted any flexi sheets since 2015.She said it was her fault that this had not been picked up before. In addition there was a pilot in Manchester regarding flexible working called smarter working (as mentioned in the claimant's email following the 26th July meeting) whereby permission would be given in

advance for somebody to work at home. AH encouraged the claimant to apply for it; the claimant applied for this and AH approved it.

129. On 1 August AH asked the claimant to keep her up to date with migraines or his eyes so she could assist and recommended workplace wellness to him

130. In the early morning of 1 August there was an email from AH to Nick Smart regarding a murder case. This stated

> "I spoke with Cheryl and she's happy for Subi to do the case I've spoken with him and briefed him in full. It should be a straightforward up and down considering the coroner's act."

131. The next thing that AH heard about this case was an email from Cheryl Hramiak which from Nicholas Beckett deputy head of crown advocate unit

> "these defendants appeared in custody at Oldham this morning charged with murder. The case was sent and they appeared this afternoon in crown square. No-one told us. It was only when Cheryl say the Manchester Evening News at 1:45pm that we knew it would be heard at 2pm. Please will you find out whether the AP/lawyer told anyone and remind your team to let the CA clerks know in future."

132. The background to this incident is as follows and there was a differing version between the claimant and AH as to what occurred. The claimant's belief that AH was due to take this case to the magistrates court and that she had had to deliberately ask for permission for the claimant to do it. It was further suggested by the claimant's representative that AH had deliberately decided the claimant should deal with this matter in order that he would fail and she would be able to further punish him. We have to say we find this an extraordinary suggestion as the consequences would have undoubtedly reflected on AH as the claimant's manager. She had recommended that he undertook the hearing so her judgment was also at issue. It would have been incredible to risk the safety of the public and potentially the young people accused to deliberately arrange something in order to make the claimant look foolish and incompetent. The ramifications of the respondent failing to oppose bail and the 3 youths walking free in the full glare of the press would have been enormous for everyone involved not just the claimant. In any event the matter complained of was not directly about the hearing itself.

133. It was emphasised by the claimant's representative that the claimant's performance was clearly failing and that nobody would have sent him to do this particular remand case. AH's measured evidence in the light of the accusations which called into question her professional, personal integrity and public duty was that the case was due at all times in Oldham court, the claimant's idea that it was due in Tameside and then transferred to Oldham was a misconception which was partly the result of her own misconception that it was a Tameside case. She had considered that she would do it when she thought Tameside court would be opened specially to do the case but when she became aware it would take place in Oldham, as she knew the claimant was in Oldham and there was nobody else free, she reasonably decided he should do it. There was nothing difficult about the

hearing, the claimant's recent failings were mainly to do with administrative/computer matters and not his performance in court.

134. In respect of the case being heard in Oldham - it transpired that it was simply being sent to Oldham under the brigading arrangements which were in place pending closure of courts. The brigading was a procedure whereby one court would be twinned with another and all cases be heard in one day and then the other the next day. This was because it'd not been decided yet which courts would be closed down and it was a way of getting the courts used to the fact that only one of them would be dealing with cases from both areas in future. She said that she did speak to the claimant briefly about the case, that she had no qualms about him doing the case, he was covering the court it was well within his capability. The issues which had been raised so far had not touched on his capability as a prosecutor. In fact it was a fairly straightforward matter although of high public interest and of interest to the press.

135. The case concerned 3 youths charged with murder in which there was considerable press interest. The procedure was that they would appear in the magistrates and be remanded to appear in crown court normally the next day. The magistrates could not grant bail and therefore the crown court would consider the bail application when the youths appeared there. So the claimant was not being asked to deal with a high profile bail application. However in this case, the magistrates decided the matter would be listed for 2pm that day in the crown court. Obviously CPS would have to organise representation by 2pm which was quite short notice. The claimant said he had tried to ring the admin office to advise them of what was happening but they were engaged and he made no further contact to advise anybody that this case was coming on at 2pm.

136. It was obvious that the outcome of the failure to inform of the 2pm arrangement would have been potentially calamitous in that the three youths would have been produced at crown court, their defence lawyers could have asked for bail, and there would have been nobody from CPS to oppose bail. The media's interest in it would have ensured that it would have been plastered all over the local newspaper.

137. Following notification by NB and also another email from Cheryl Hramiak AH asked the claimant to provide an urgent explanation as to what happened in this case. She said "in the Manchester Evening News it was listed at 2pm why did our crown court department not know? Please advise who you notified and when?" therefore contrary to the claimant's view of AH she was not assuming that it was his fault but thinking it was more an administrative failure.

138. The claimant then somewhat injudiciously replied 2 hours later

> "I did not finish court until 1:30 and had to return back for 2pm. Today we had 15 custodies, many court issues, custodies being transported in and out of court, missing files, officers I had to speak to with on my few 30 min lunch breaks so I did not get the chance to return my HRS in the few minutes I had to eat my sandwich."

139. On 2 August AH after receiving this email contacted Roz Atkinson. She said

> "I have reached saturation point with Subi's shortcomings, I wish to take him into formal performance measures. This is way below the standard we would expect from our prosecutors. You cannot give precedence to your sandwich over internal notification of a murder bail app on four youths. Please can we meet to discuss."

Mr Harrison in cross-examination pointed out that AH had been trying to portray the claimant's performance as improving at times between January and April and here she was saying she had reached saturation point with his shortcomings and therefore she was really trying to paint a rosier picture of his shortcomings than was actually the case.

140. AH stuck by her position that his failings were mainly administrative, most of them were not to do with actual performance in court, and that she felt that she had been doing her best to keep him out of formal performance measures. Indeed she had also replied to NB stating that they were generally not told what time someone would appear in the crown court just that it would be within the next 24 hours and it is the crown court listing office this should be taken up with. At that point she did not assume that it was the claimant's fault. However, this is when it was pointed out to her that the Manchester Evening News knew.

141. Although this was not raised by the claimant in the tribunal the email to Roz Atkinson was an indication that AH had formed a view however we find in the circumstances this was unsurprising but it would have been better for someone else then to deal with matters.

142. Meanwhile another issue arose as well about how a defendant who was subject to a bail appeal and remanded in custody did not have his details updated.

143. AH invited the claimant to fact-finding meeting on 11 August.

144. On 5 August AH also raised with the claimant that he could be referred to occupational health for a report to see whether assistance in respect of his eyesight could be given and she had attached the consent form for this. The claimant had relied he "hoped to get an option to clarify there is a causal link between the eye strain and the migraine" and that he was

> "happy to seek any assistance … occupational health if the genuinely offer credible assistance in the meantime after my appointment with the optician I will let you know his or her conclusions."

It is important to note that OH was offered at this early stage.

145. The claimant replied in respect of the fact-finding to say that he would not be able to get somebody to attend the meeting on such short notice as he was in back-to-back courts. He said the way she had described the issues they were going to discuss made it was very vague and she replied on 9 August saying that the two cases that she needed to establish circumstances were

> "(1) that he was the prosecutor at court Oldham a case that the afternoon hearing listed in open court and I need to understand how he ended up unrepresented at that hearing
>
> (2) you prosecuted a defendant for new matters that were sent to the crown court arising out of the new matters the defendant was in breach

> of bail the matters already listed for trial he had breached the curfew element of his bail the court RIC on all matters. There is no endorsement as to any CTL on the file. The trial is therefore outside the CTL. I need to understand what happened on this case and I require input at the fact-finding hearing."

146. The claimant replied to this on 9 August

> "thanks for your clarification on the 2 cases you mention. With regard to the case of the three youths I have already responded to your previous written request but are happy to go through the facts again. With regards to the case of A, I need to thoroughly look through the case file to provide you with answers to the issues you mention. While I appreciate that you feel the meeting is informal please understand that it is being recorded by a third party for your purpose and for this reason it is only appropriate that I should have an opportunity to have somebody present to assist me. With this in mind please can we reschedule based on my point below that it is indeed very short notice to arrange someone to attend with me by Thursday given that I have no time during the day to make those arrangements."

147. AH replied simply stating "I cannot reschedule this is an informal fact find the meeting will remain at 11 o'clock" she then cancelled the note-taker and said she would take notes herself. She also asked Claire Aitchson who was the clerk sitting at Oldham to ask whether a specific time for the bail application was announced in court. She confirmed that it was announced in court but she could not remember if it was 2 or 2:30. She asked Miss Aitchson about the other issue re. A and asked her a series of questions about that. She also asked Nicholas Beckett how he had found out about the youth murder transfer to Crown court and whether they had managed to arrange somebody to represent CPS in court. Claire Aitchson replied on 12 August she said custody time limit was announced and she had noted on the papers that the consideration needed to be given to moving the trial date.

148. The meeting took place with the claimant as arranged on 11 August. In the interview the claimant said he could not remember a specific time being announced. Neither could he remember if they said later that afternoon or the day after. He said it was he knew that it was definitely later that day but he could not' remember a specific time being given. He said he typed the information in the manual RAS but the case was not in the prosecutors app and he was in a non-wifi court. There was a backlog of cases and therefore Claire Aitchson the court clerk moved onto the next matter and the court did not finish until 1:30. He said he tried to ring "Kylie" on the number he had for her with the information but could not get through. He chased his outstanding custodies, had his lunch, did not leave the court building or make any further efforts to contact CPS as he had to get on with the remaining custodies. She asked him how did think that the bail app was going to be communicated and how they were going to get represented. He said he thought the court would notify all the parties but he did not check whether they had and he did not ask to be excused to contact the office. He said his priorities were the number of custodies he had the number of files that were missing and that he still needed to read.

149. The meeting was then adjourned while he had a chance to look up the background on the other case. It is instructive that the claimant felt that the other matter which occurred on 1 August was more serious. He accepted that his endorsement on the RHO was inadequate and there needed to be a URN (unique reference number) and she asked him how they were supposed to know the case was listed as a video link hearing. The claimant admitted he thought it was police bail rather than court bail. Although we are not aware of the distinction it was clear that in this discussion both parties understood. He said that it was a chaotic court with prisoners coming from different places and there was a considerable amount of confusion. Her fact-finding report AH also said this was the second time such a failure had happened and referred to 5 May. This turned out to be incorrect but we accept it was a genuine mistake.

150. On 19 August the claimant reported that he had had his eye test and was advised he was suffering from astigmatism and needed corrective multifocal glasses and he said that the optician

> "explained to me that although glasses will help they will not alleviate eye strain and headaches without consistent and regular breaks. I was told that if the VDU screen was relatively small font size were not adequate premises lighting were poor the type of work required quick eye movements between different documents with volumes of data then eyes get tired very quickly. She went on to say that because I have astigmatism my eyes have to work harder that even with glasses and without consistent breaks I will continue to suffer irregular migraines and headaches."

151. On 18 August it was again suggested that the claimant should access occupational health and the relevant consent forms were sent to the claimant.

152. On 22 August the claimant was invited to a disciplinary meeting. It is obvious in this case following the fact finding no further investigation took place. In addition in an unfair dismissal case it would not be fair to have the investigator also conduct the disciplinary hearing. However this was not an unfair dismissal case and the claimant was never threatened with dismissal. We also it is allowable within the CPS investigation disciplinary code for a fact finding to be undertaken by the same person as the disciplinary hearing.

153. The formal disciplinary hearing meeting letter of 22 August said as follows:

> "Dear Subi you're required to attend a formal hearing to discuss the following
>
> (1) 1st August 2016 failure to notify the crown court department that a youth bail application on the case of R versus W was listed at 2pm at Manchester crown court square following the case making its first appearance at Oldham magistrates on the morning of 1 August 2016
>
> (2) 1 August 2016 failure to endorse a CTL on the case of R versus A and to bring the trial date within the CTL. A hearing will take place on 2:30 8th September at Sunlight House a note taker

> will be present you have the right to be accompanied by a trade union representative or workplace colleague… I should inform you at this stage that of the allegations are substantiated this could result in a formal disciplinary warning. Please confirm your attendance …"

154. On 23 August AH contacted Roz Atkinson and said

> "I have your advice "park the performance side of Subi pending the disciplinary" – however he has 2 more CTL noncompliances this week. I wonder whether I need to tell him that this element has not gone away and is pending the disciplinary."

She replied

> "yes I would advise you to address the further 2 CTL noncompliances with Subi and explain his performance is not up to the standard expected and document your conversation. He must be made aware of the issues and that they will be addressed if you haven't done so already it would be really helpful if you could put together a timeline including all the of the issues, evidence and discussions you've had with Subi since you've started to manage his performance informally. We will need this to move to formal performance management and/or take further disciplinary action. Please ensure you keep a record of all your conversations with Subi and if it would help please take a note taker in the meetings with you I'm happy to assist you in any meetings you have."

155. There appeared to be other disciplinary meetings going on from the correspondence between Roz Atkinson and AH as its mentioned that there were 3 disciplinary meetings in one day. AH queried Roz Atkinson's email and said

> "just so I'm clear I continue with the performance issues at this time as separate from the disciplinary proceedings. DF (another HR officer) said litigation told him there should be no note-taking at any informal meetings. The thing is that these two new ones will take him into formal performance as he has exhausted all his chances and training how should I proceed?"

156. She replied

> "you must continue to ensure Subi is aware of any issues that arise and they are addressed promptly – we can't wait until after disciplinary then raise it as we will risk not acting in line with policy and this may give rise to an appeal further down the line. Are you able to arrange to speak with to Subi tomorrow if possible? It will be an informal meeting and I can be present to support you and also keep a brief note of what was discussed if you which. The purpose of the meeting will be to make Subi aware of the 2 further CTL non-compliance issues and inform him that he's not met the standard of performance expected despite the support and encouragement you've given him. You will need to tell Subi you will be moving to manage him under the managing poor performance policy (MPP) and you can outline the process so he understands. The first step in MPP is to invite Subi to attend a formal meeting to discuss his performance. We will look to arrange this before the disciplinary meeting so there is no urgency to issue the meeting invite but I would advise we

> ought to arrange the meeting for the week commencing 12 September …"

AH then sent the claimant an invitation to an informal meeting under the managing performance policy and stated it was separate from the disciplinary hearing. She referred specifically to the two CTL noncompliances.

157. On 23 August 2016 the claimant collapsed in court and was taken to hospital. When AH learned of this she made enquiries and attempted to contact and the claimant's wife and sent a text offering her support and help in relation to the collection of their children from school as was explained earlier her children attended the same school and she was concerned that there would be nobody to collect them.

158. After this the claimant texted AH as follows:

> "AH I've just been discharged from hospital they ran a host of tests and will be advising my GP. I've been asked to rest from the next few days and avoid stress. Apparently I have irregular blood pressure and that could have led to me losing consciousness. It is extremely serious given that I am generally fit person. I'm going to take the doctor's advice rest for the next few days and deal with my stress. If Ayesha phones please do not tell her about what has happened she is in America and will worry. My children are with my sister in law so they are fine."

159. AH replied

> "I'm glad you're home rest up and let me know when you are ready to return I am off next week so please link it in with YT if it tips over the weekend. In relation to Ayesha I texted her that you had collapsed in court but that I had little information. If she rings I will direct her back to you. I was worried your kids would be alone I did not know that she was away. Take care of yourself. AH."

160. Following this AH emailed YT who was in charge of the rota and others. She said

> "following his collapse at court this afternoon Subi has been discharged from hospital. He has been advised to rest and avoid stress he therefore won't be in for a few days. I've made rota alterations for tomorrow as advised but we will need to make further continuity plans as I anticipate this will potentially be the start of an extended absence. Please can the rota be amended and I have asked him to link in with Yvonne next week if his absence tips to the bank holidays as I am not in next week."

AH was not asked what she meant by extended absence. Her subsequent actions were consistent with a belief of the opposite i.e. that with appropriate support the claimant would be back working with the respondent relatively quickly. This was supported by the fact the claimant himself indicated that he would be back on 8 September and he did indeed attend work that day and there were discussions, as will be seen, about the fact they were moving offices on that day which he would be involved in. Subsequently of course we will see the claimant went off sick again but at that point in time the reference to extended leave was supplanted by the claimant's indication that he intended to return.

161. AH explained that she had arranged cover for 24 August but had to advise YT as she had access to the rota online and she (YT)would need to make the changes to show the cover person in place rather than the claimant. She had not made any arrangements for 25 August she explained in retrospect this was somewhat short sighted but at the time she did not want to make an arrangement which would then not be required. She expected the claimant to ring in the next day and tell her whether he was coming in on the 25 August however he did not do so. She agreed in the interview with John Dillworth that she understood it was the respondent's policy that employees off sick had to ring in every day to confirm the position but now realised that it was not. She said it was the custom and practise on their hub and in fact she had been told off when off sick once for not ringing in every day. Certainly within our knowledge (i.e. the panel) this is a common custom, practice or even policy in most workplaces these days. We accepted her response she was cross-examined in detail about it and was entirely plausible.

162. However, the claimant had not been off sick before and therefore was probably not aware that it was a requirement of any sort whether policy or custom and practice. Accordingly when AH rang him on 25 August to ask why he had not rung her it is understandable that he would have been upset by this.

163. AH's note said

> "I called Subi at 3pm approximately to ask how he was and enquire as to why he had not rung in either today or yesterday. I said that in consequence we'd not have any cover for his court today and we needed to know on a daily basis how he was in order that we could make arrangements. \he said he had told me in the text that he would not be in for a few days. I said that he still needed to update us. I asked if he had been to see his GP as the hospital had indicated a potentially blood-pressure related he said yes they thought it might be down to the heat but that he had not been in the right place in his head to go today. I asked when he thought he might get an appointment he said tomorrow I asked if he could call me in the afternoon with an update I could not type of notes of the conversation immediately…"

She also advised Roz Atkinson the same day as follows:

> "Subi did not ring in yesterday nor today and as a consequence no-one's been arranged to cover his court at Bolton today. I've spoken to him and asked if he had seen his GP and he said he was not right in his head. I explained his responsibilities to ring in with updates and what had happened today and asked him to update me with regards to his absence on Friday afternoon. He will therefore not be in tomorrow…"
>
> The claimant was concerned that AH was painting a picture of him which was unfair as given he had said he would not be in for a few days it was unfair to suggest he was responsible for Bolton Court not being covered. AH explanation was as before that she understood an employee had to ring in everyday. However in retrospect AH agreed her action appeared insensitive, but she felt she had to follow policy ,neither did anyone at Hr at this point or later advise her her approach was wrong.

It was clear by 26 August that AH knew the claimant was off with stress and that a fit note had been received. She had also received a text from the claimant which said

> "GP has consulted my hospital report from my recent fall, carried out a few tests, and has diagnosed extreme stress. I have a medical certificate until 8 September I will not be back in work until 8 September."

164. AH recorded that she had been advised by Roz Atkinson to nominate somebody else to be the point of contact during her leave absence and to ask the claimant to get in touch before the end of the fit note to advise if he's likely to return to work or receive a further fit note. She set up YT as the point of contact and emailed the claimant the same day saying

> "as you have notified that you have a stress related condition I wish to refer you to occupational health – this is with OH Assist."

That she then went on to quote from the CPS policy

> "CPS make a work focussed approach to help minimise the adverse effects of ill health on an employee's attendance. Being ill or injured does not always prevent an employee from getting to or undertaking some work. A work focussed approach involves
>
> - Early intervention to enable any help or support to be identified
> - A greater emphasis on the manager and employee working together to remove barriers to work
>
> Managers will support employees achieving their aims by helping them remain to in work when the experience ill health or return to work as soon as possible following a period of sickness absence. It may be necessary for us to have review meetings to provide an opportunity for us to identify any help needed to enable you to return to work as soon as you are well enough. The following principle names underpin the attendant management policy and procedure
>
> - Generally being in work is good for physical and mental health and wellbeing
> - The CPS is committed to promoting a culture of attendance and wellbeing where employees feel valued supported and committed to the business and their colleagues
> - Attendance will be managed sensitively, fairly and effectively in a clear and transparent way with appropriate discussions and action being taken when health and wellbeing are at risk and when absence levels are unsatisfactory and/or cannot be sustained
> - Attendance discussions will focus on what the employee can do rather than what they cannot do, enabling them whenever possible to remain at work instead of taking sickness absence. Managers must respect the employee's decision to take non-disability/disability related sickness absence where they feel they are unable to work due to illness or injury
> - The CPS is committed to reducing the number of working days lost through sickness absence and the adverse effect this has on the business and other employees."

Her email continued:

- "Please therefore complete the OH Assist form and return the originals to me and we can work together to get you back to work. Please send your original fit note for the attention of Adriana in my absence. I am back in work on 5 September please link in with Yvonne and Aksha in the meantime with regards to your progress and please remember workplace wellness is at your disposal throughout this time."

AH agreed she was keen to follow the correct policy and procedure and thought this was the next appropriate step.

165. The claimant replied to this email on 4 September he said

"Dear AH on Thursday 8 September I will bring my medical certificate as requested for your records. I am conscious of previous postal mail getting lost of mislaid within CPS's system and therefore would like to hand the note to you in person thus avoiding any further issues as it is my only copy. Thank you for your note regarding CPS's occupational health. Please note as I have mentioned my doctor has signed me off with stress and has advised complete rest until 8 September. I am following this advice. Will therefore look at any further options with OH Assist as stated in your email below should the need arise after this date. As you are aware this is my first period of sickness absence in many years so it's not a regular occurrence I am very much looking forward to returning to work."

This response did not suggest the claimant was distressed by contact with AH at this stage.

166. On 5 September AH queried with Roz Atkinson if the OH referral was voluntary. Could the claimant be made to go? And she replied it was by consent only.

167. There was then some discussion with the claimant and his union representative regarding the notes of the fact-finding meeting in that AH had not sent to him. She promptly then sent them and when cross examined about this stated that she was not aware that it was necessary to send them and that she did so as soon as she was asked. She denied that there was any malevolent intent in not sending them. There was no query at any time from the claimant or his union rep regarding postponing the hearing on 8 September in order to absorb the information in the notes.

168. The hearing therefore took place on 8 September AH said she felt the claimant was able to fully partake in that meeting. There was one request during the meeting for a break but no request for a postponement and that no issues was raised reading the appropriateness of AH holding the meeting when she had done the fact-finding. There was a discussion at the end about the claimant returning to work the next day as it was discussed that he should come in casual clothes as they were moving office and he would need to assist with moving boxes etc.

169. The next day the claimant texted AH to say he would not be in work and was seeing his doctor and that he had a fit note until 23 September. Again the claimant said he would only consider an OH referral after the expiry of the fit note.

170. On 15 September the disciplinary outcome was sent to the claimant. The letter said that she believed he had been professional negligent and that a warning would be placed on his file for disciplinary purposes for 12 months after the date of the letter however any further misconduct may result in a further warning or dismissal and she advised him about appealing.

171. An issue had also arisen in the hearing regarding paperwork the claimant had with him. AH believed the MP7 was included which was a confidential paper that should never had been removed from the office or court and the claimant could not recall whether the MG7 was with it or not and he said they were simply case notes that he had had with him at court. The claimant felt that AH had jumped on this issue with an inappropriate alacrity and was fearful that she would bring disciplinary in relation to that.

172. On 16 September Mrs Chowdhury asked if AH would contact her rather than the claimant as he was not fit for work. She replied saying that she could not discuss any issues with Mrs Chowdhury and that the claimant needed to keep in touch with her directly. She did not have a secure email and so could not contact her by email there.

173. On 18 September the claimant had agreed to an OH referral but as we will see later there were some conditions attached to this.

174. On 19 September the claimant emailed AH and said

> "my doctors have signed me off sick due to illnesses caused by work related issues. Please appreciate my ailments are not minor and I have been prescribed several different types of medication. They have deemed that I am not fit to return to work in any capacity. I am happy for occupational health to liaise with my doctors directly to satisfy themselves of this diagnosis. My wife will be posting the occupational health consent forms for your attention today as I appreciate that my illness may constitute that I am off work longer than I had appreciated. Please liaise with occupational health and my wife Ayesha Chowdhury for updates of my condition and please appreciate that I am not in the right state of mind due to my illness to liaise with you directly."

175. AH contacted Roz Atkinson and said she would be sending a formal attendance letter and that she would not be liaising directly with Ayesha. She replied to the claimant on 19 September as follows:

> "I understand that the nature of your illness is stress related but under paragraph 6 of the policy you and I have a responsibility to work collaboratively. This includes talking together and attending meetings when required and working together to achieve and/or maintain a satisfactory level of attendance. This means exploring ways to enable you to work as you experience ill health or return to work as soon as possible following a period of sickness absence. I would like this dialogue with you and this is not a discussion I can have with Ayesha. I am pleased that you are willing to engage with OH Assist and look forward to the return of your consent form. As appointments are about 4 weeks' waiting time we should not await your fit note expiration or the report before

> these discussions take place as we need to be work-focussed and discuss the ways in which we can assist your return as early as possible. I want to put greater emphasis on us working together to remove any barriers to work. I am in London tomorrow and will be back in the office on Thursday I shall try and call you again then."

176. Around this time also AH made attempts to contact the claimant by telephone and texting and she recorded this in a letter sent to him on 21 September. She said

> "unfortunately all my attempts to speak to you informally have been unsuccessful. I have rung texted and emailed and as your line manager I need to speak to you direct as per the roles and responsibilities of the attendance management policy. I'm writing to arrange a formal meeting as part of the CPS attendance management procedure. You have been absent for 17 days since 24 August 2016. That means you've reached or exceeded your trigger point of 10 days in a rolling 12 month period and I must now consider whether any formal action is appropriate."

177. This letter was mainly a pro forma. It also referred to referring him to occupational health.

178. AH had received advice from Roz Atkinson on 21 September before sending this email which said

> "a formal long-term absence review should be arranged following 28 calendar days of absence… if she used the attendance management timeline document this will identify the dates of required meetings. In respect of Subi's request that all contact be made through his wife this is not acceptable and I would advise you to continue to maintaining keeping in touch arrangements with Subi."

There was then a discussion about the OH consent forms. They also sent the claimant the attendance management policy. Therefore in contacting the claimant after his email of 19th September AH was following HR advice.

179. The claimant's sicknote of 23 September said "reactive anxiety secondary to work related stress."

180. On 23 September the claimant wrote to AH "re sickness absence meeting" with a heading "the following applies"

> "(2) I draw your attention to my updated fit note dated today's date
>
> (3) My GP has signed me off work as unfit to work for a period of 4 weeks
>
> (4) My GP has diagnosed me with an anxiety related disorder which triggers my having panic attacks. My GP has also diagnosed me with depression. For the avoidance of doubt I have a history of asthma which is a recurring disability pursuant to Section 6.1 of the Equality Act 2010.
>
> (5) The cumulative effects of my condition are having a substantial effect on my day to day activities. For the avoidance of doubt the substantial effects are more than minor or trivial.
>
> (6) With regard to attending the meeting on 29 September I am at this time unfit to attend face to face meetings and am profoundly concerned that to attend face to face meetings would trigger my having

> a panic attack/asthma attack. Notwithstanding my cognitive processes thought processes and memory function are impeded as a direct consequence of the aforementioned medical conditions. I appreciate your consideration in this regard."

181. Again AH sought HR advice on this, this time from DF. She stated in this meeting

> "the reference to the Equality Act is a red herring as he is not on a RAP or disability consideration point. My understanding of the policy is there has to be exceptional circumstances to reschedule and we are looking at a 5 day period for things like union availability. I was going to reply as follows: "dear Subi thank you for your letter regarding attendance at the formal attendance meeting. I understand the difficult time you are going through and want to help you find a way to return to work. We need the meeting so I can fully understand your situation and determine a way forward in terms of your absence and its sustainability. The fit note gives you exception from work duties but not form the attendance management procedures unless there are exceptional circumstances. We can postpone only where it's necessary and appropriate and even then only for 5 days. I cannot see that the situation referred to is going to improve with a 5 days postponement and therefore I believe that it is better to keep the original meeting in place for 2pm on the 28th. We will take regular breaks and you have the right to be accompanied. I'll look forward to seeing you there."

A slightly more emollient version of this was emailed to the claimant on 26th September. AH was cross examined at length about her approach she said she had read what the claimant had to say but it was not axiomatic he would 'get what he wanted' as although he was too ill to work that did not mean he was too ill to attend a meeting. In the absence of any medical advice whether from the claimant's GP or OH she followed the respondent's policy.

182. AH was not asked about part of the respondent's policy which said that ' managers must respect the employee's decision to take sickness absence where they feel they are unable to work…" Mr Dilworth was and advised he felt AH's actions in trying to arrange a meeting were not in conflict with this as it was accepted he was unfit to attend work but not necessarily a meeting and a meeting could very well result in measures being taken to help the claimant recover from his illness. The Absence Management process was to ensure that the respondent did everything it could for an employee before a decision to dismiss was made.

183. A letter was then received from the claimant's G.P This in trenchant terms expressed the view that the claimant was not fit enough to attend an attendance management meeting. This letter of 28 September said:

> "On 26 August he attended an emergency appointment with one of my colleagues Dr Hierons following an episode of collapse at work. It was noted that he had had a poor sleep pattern for a few weeks and was suffering from anxiety. The claimant felt there were issues following a change in line management and, having sought advice, thought he was being bullied in the workplace. At this consultation the clinical advice was

> to have rest and time away from work, and he was started on a short course of Zopiclone sleeping tablets to help his sleep cycle. On 9 September 16 the claimant attended a further emergency appointment with myself Dr Holden. He was having ongoing poor sleep with anxiety, had lost 1 stone in weight in the previous 9 weeks, felt unable to eat with poor appetite. On examination he had very low affect and was very anxious and shaking. He denied thoughts of self-harm. He was certainly not fit to work. A med 3 sickness certificate was given for 2 weeks. He was started on an antidepressant which also treats anxiety Mirtazapine, advised to make an appointment with occupational health at work, and given the telephone number for advice from the Citizens Advice bureau.

184. Prior to his arranged follow-up appointment with me he had a further emergency appointment on 19 September 2016 with Dr Hunter. Complaining of increased shortness of breath and wheezing these symptoms were felt to be either due to his anxiety or asthma. On review today, 23 September, unfortunately the claimant's anxiety and depression have become worse rather than improving. The only trigger factor apparent is ongoing pressure from work. I enclose a letter dated 21 September where he has been invited to a formal attendance meeting. From a clinical perspective he is not fit to work currently nor is he fit to attend a meeting. To summarise

> (1) The claimant is acutely unwell with anxiety and depression.
>
> (2) From the clinical history this appears to be secondary to work related stress. There is no prior history of anxiety or depression.
>
> (3) He has started treatment with Mirtazapine 15 mg which is due to be increased.
>
> (4) Zopiclone sleeping tablets were started but of little benefit so subsequently stopped.
>
> (5) The letter that he has received dated 21 September had been detrimental to his health, increasing his anxiety further.

185. I cannot understand why, at a time when an employee is acutely unwell, they would be asked to attend a formal meeting to manage their attendance. I am also concerned that this meeting is being held by the person alleged to be the cause of the workplace stress. To enable the claimant to make a good recovery and therefore make a return to work possible the following is his current treatment plan:

> (1) Continue the Mirtazapine 15 mg increase to 30 in one week if no effect
> (2) If his current suicidal thoughts have become more active he needs to seek help immediately for urgent psychiatric review
> (3) To see your occupational health department as soon as he can get an appointment since his anxiety is work-related
> (4) To contact his trade union representative for support

> (5) When clinically improving he will require counselling in the form of CBT. I have not yet referred for this in view of his inability to concentrate
> (6) Ongoing review appointments will address his breathing symptoms as well as anxiety and depression
> I would be grateful if you could liaise with your occupational health department to address the claimant's ongoing anxiety and depression. I am sure they will also be able to advise on his ongoing progress with treatment and also on instruction to return to when he is fit enough. I trust that workplace issues will be addressed as this is a very important part of the claimant's clinical treatment and recovery. If you need further information please do not hesitate to contact the surgery enclosing permission from the claimant to release his records."

186. No further contact was made with the claimant by AH following this letter.

187. Occupational health referral was also made on 28 September by Roz Atkinson. This would contain matters which the claimant would later object to. The two comments were as follows:

> "Subhanur Chowdhury has been absent from work due to perceived work-related stress since 24 August … Subhanur has not been willing to cooperate with CPS attendance management procedure."

The questions asked were

> " Is Subhanur fit to attend a meeting in line with CPS attendance management policy procedure to discuss his absence and the support required to return to work
> (2) Is Subhanur fit to attend a meeting to discuss his formal grievance?
> (3) Are there any reasonable adjustments the CPS could make to support Subhanur's return to work?
> (4) Is there anything Subhanur could do to help facilitate a return to work?
> (5) Are Subhanur's medical conditions listed above likely to be disability related and covered by the Equality Act?"

188. It is clear that when Miss Atkinson drafted this she was aware the claimant had lodged a grievance as she refers to it in the referral

189. On 28 September the claimant wrote a letter to AH headed "invocation of formal grievance procedure". This was mainly concerned with discrimination in relation to disability and stated that she had failed to make reasonable adjustments to the disciplinary policy and procedures and to the sickness absence policy and procedures to accommodate his anxiety related disorder, depression and asthma/breathing difficulties. He stated that she was putting him under "palpable distress" to attend a face to face meeting to discuss his sickness absence and "disciplinary matters" and that this was supported by his GP. He attached the letter we have referred to earlier. He stated that after he had sent the letter 23 September which she had ignored that she had acted in a way "calculated to seriously undermine if not fundamentally destroy the implied term of mutual trust and confidence" and that he had made it clear that his stress and anxiety triggers

asthma attacks and panic attacks which was made clear on 23 September. But AH had failed to address his disability and was seeking to coerce him into attending a face to face meeting which was discriminatory on the grounds of disability. He said his difficulties would divest him of a fair and equitable disciplinary hearing although at the time there was only attendance management meetings referred to. He said he "felt and continued to feel humiliated stressed on edge patronised and bullied since you've managed me" he also stated that there was "a palpable risk of harm" to his

> "physical and psychological health as a direct consequence of AH's negligence in not preserving a duty of care for my health safety and welfare at work pursuant to Section (1) (1a) of the health and safety at work act 1974…"

he also said

> "I am refusing to return to work by reason of the work environment poses a danger to my health and wellbeing. The CPS needs to ensure a safe system of work for me being free from your ongoing harassment disruption and unlawful victimisation of me. This is currently the cause of a demise in my physical and psychological health"

and said he would be raising a formal grievance.

190. The claimant also asked whether the appeal against the disciplinary findings could be stayed pending an investigation into his grievance and asked her to remove herself from having any further contact with him pending the grievance procedure being exhausted. He said

> "I am asking that a person from HR is assigned to liaise with me during my sickness absence and furthermore with regard to my pending grievances".

191. However he did not here ask for Miss Atkinson to be removed and he then asked for a number of policies which Miss Atkinson replied to the claimant sending him the policies on 28 September and she said that she would be his HR contact with anything he required assistance with.

192. The claimant wrote back to Miss Atkinson on 29 September stating "thank you for your email and thank you for sending the policies" and he asked her to clarify whether any of them were contractually binding and then he went on to say

> "furthermore in regards to my request for an HR contact please may I highlight I request an alternative person to yourself. This is because you have a palpable conflict of interest due to a direct involvement in a disciplinary hearing that took place on 8 September 2016. I therefore feel that you lack the independence required to hear my grievances."

193. She then sent him a further email 30 September which stated

> "we would like to discuss issues raised in your letter with you to try to find a mutually agreeable way of resolving the matter. As detailed in the grievance procedure you should follow the process for informal resolution with the person/persons concerned first and only after all reasonable attempts to address and resolve the issues of concern should a formal grievance be raised. However I note you have now

> requested an alternative HR contact therefore if you would prefer to speak to another member of the HR team about this please contact HA"

She provided to the claimant HA's details. The claimant would claim that this email represented RA putting undue pressure on him to deal with the matter informally when he had clearly asked for a formal grievance to be processed. However in our experience this is quite a common suggestion from HR particularly if their policy also suggests it. An employee does not necessarily have to comply.

194. On 3 October the claimant sent his grievance to RA (Miss Atkinson). We are not clear why he did this given that HA was now his contact. Nevertheless he now set his grievance out.

195. His grievance began

> "prior to the letter which I sent on 28 September 2016 invoking the grievance procedure I previously raised grievance with AH directly. These grievances were discussed in meetings between January and August 2016. My concerns were dismissed, no action was taken. I highlighted some of these grievances once again at my disciplinary meeting on 8 September 2016 when you Roz Atkinson were present and advising AH. She once again ignored my concerns and discredited any context I put forward. Indeed I felt belittled, dismissed, patronised and humiliated every time I raised the issues with you both at the meeting. Pacifically [sic] because of a failure to simply listen I fail I have exhausted all informal efforts to find a resolution therefore I cannot agree to any further informal grievance procedure by reason that he matters are now too serious to be dealt with informally as they have now impacted on my mental and psychological health…"

196. He referred to relentless harassment based on what AH has described as CPS policies and procedures and he said it was concerning that she could not answer the question as to whether the policies he had referred to were contractually binding. Until he knew the answer to that he could not put in his grievance.

197. HA replied to some of these queries on 3 October. She said to send her the grievance and she could take this forward in line with the policy.

198. An issue arose regarding using the claimant's work email and HA asked him if "whether he was happy to continue using this or wished to provide an alternative email?" and she seemed to imply that the policies were contractual in the rest of her letter.

199. A formal grievance was received on 14 October the claimant summarised his grievance at paragraph 7 as:

> "sub-paragraph (1): omitting to act on the following disclosures which I raised in January and April 2016
>
> (2) omitting to follow, observe or implement the ACAS code of conduct
>
> (3) detrimental treatment for having made qualifying disclosures
>
> (4) failure to observe a duty of care pursuant to Section 1 of the health and safety at work act 1974

(5) failure to provide a safe system of work pursuant to Section 2 (1)(2)(a)(e) of the health and safety at work act 1974
(6) failure to follow, observe or implement MHSWR 1999
(7) discrimination arising in consequence of disability pursuant to Section 15 (1)(a)(b) of the Equality Act 2010
(8) relevant affairs by CPS and AH pursuant to Section 20, 21 and 39 of the Equality Act 2010 to make reasonable adjustments to accommodate my anxiety related disorder and depression to attend a sickness absence meeting.
(9) unlawful harassment related by disability by Section 26 of the Equality Act 2010.
(10) defamation
(11) multiple breaches of the implied term of trust and confidence"

200. He then had a separate heading for qualifying disclosures:

"On the 7th April 2016 AH asked me to attend a meeting with her to discuss various matters including my interaction with PC X.
(9) during the meeting I provided AH with facts and information that I reasonably and genuinely believed that a miscarriage of justice had taken place. The facts and information which I raised regarding PC X were made in the public interest. The conversation with AH was expressed to her in the reasonable and genuine belief that what I said to her was substantially true. The predominant reason for blowing the whistle was because I believed that a miscarriage of justice had occurred.
(10) following my discussion with AH on the 14th she omitted to acknowledge and act upon the qualifying disclosures which I brought to her attention by reasonable means. Consequently on 25 April 2016 I sent a letter to AH regarding PC X of the Greater Manchester Police see exhibit 1 below and then exhibit 1 provided AH and CPS with the facts and information that I reasonably and genuinely believed that:

(1) that PC X was attempting to pervert the natural justice by wilfully seeking to flout the bail act
(2) PC X was perverting the course of justice
(3) PC X had sought to remand W into custody whilst arbitrarily ignoring W's legal rights under the auspices of the bail act
(4) PC X of the Greater Manchester Police was exerting his influence and furthermore abusing his position as a police officer to commit a miscarriage of justice
(5) the crown prosecution service's independent nature was being usurped by acquiescing to unjustifiable police demands by PC X to diverse W of his legal rights under the auspices of the bail act
(6) I myself felt threatened and intimidated by PC X's aggressive manner towards me created a hostile oppressive and intimidating environment for me. The incident led to me feeling very anxious and I was distressed."

201. He continued

"The second qualifying disclosure was raised verbally in a face to face meeting with AH on 22 January and subsequently on 14 April followed by in writing to AH on 25 April. This disclosure was the fact that since the inception of CPS digitalisation programme almost all cases are mandated to be prepared and presented using laptops. This being in spite of the consequences to the prosecutors' health. This disclosure was made in the public interest it was and still is my reasonable and genuine belief that using laptops to both prepare and present cases has not only impacted upon my health safety and welfare but poses a foreseeable risk of harm to other prosecutors too. I do not ever recall any risk assessment being undertaken in accordance with the MHSWR 1999 in regard to prosecutors using laptop computers to prepare and present their cases. These matters were raised and are raised as qualifying disclosures in the public interest pursuant to Section 43 a 43 1b and d and 43 c1a of the Employment Rights Act 1996. Put short it's my reasonable and genuine belief (speaking from my own experience of eye strain and migraines) that the CPS has failed and is failing and is likely to continue to fail to:

(1) observe a duty of care of the health and safety and wellbeing of CPS prosecutors pursuant to Section 1 of the health and safety at work act 1974 and furthermore

(2) that the CPS has failed and is failing and is likely to continue to fail to provide CPS prosecutors with whom laptop computers to present their case with a safe system of working pursuant to Sections 2 subsections 1 and 2 (a)(e) of the health and safety at work act 1974.

202. <u>Detrimental treatment</u>:

Blowing the whistle to AH I've been subjected to a series of ongoing acts of detrimental treatment which I believe are a direct consequence of having done protected acts in blowing the whistle to AH. For the avoidance of doubt, the detrimental treatment is outlined as follows:

(1) Not acting on a qualifying disclosure
(2) Not following CPS whistle-blowing procedure
(3) AH alleging I've been aggressive towards PC X or that my response to PC X had been construed as being aggressive
(4) AH micromanaging me
(5) AH threatening me with CPS performance management procedures
(6) AH alleging I've been professionally negligent
(7) subjecting me to a disciplinary investigation
(8) putting me under palpable duress to attend sickness management meetings despite being in receipt of:
(1) A letter from my GP dated the 26th of the 9th outlining the fact I have anxiety and depression.
(2) Being in receipt of a fit note dated the 9th of the 9th outlining the fact that I have stress and reactive anxiety.
(3) My writing to AH to express to her I was unfit to attend face to face meetings.

(9) AH putting me under palpable distress during my sickness absence to answer her emails and respond to her telephone calls voicemails and text messages

203. Final straw 22 for the avoidance of doubt AH alleging I've been professionally negligent on 15 September as a final straw is the last in a series of acts or a train of events which are intrinsically linked to my blowing the whistle. I very much feel the same that I have been professing negligence is defamatory. I don't know whether that consequently AH is personally liable for subjecting me to detriment treatment for having blown the whistle or pursuant to Section 19 of the enterprise and regulatory reform act 2013. I hold CPS liable for their acts and omissions to act pursuant to Section 47b(1) era 1996.

204. Further qualifying disclosures: given the respective images by AH which I raised in January or April I am raising these matters again as qualifying disclosures in the public interest to the CPS pursuant to Section 43a. please accept this letter as an invocation of CPS's whistle-blowing policy and procedures. It's my genuine belief that having failed to act upon qualifying disclosures which I raised to the attention of AH in April 2016 AH has concealed a miscarriage of justice pursuant to Section 43b1e failure to follow ACAS code. This was partly failing to treat the letter of 25 April as a grievance." It was said that "AH deliberately omitted to act upon the grievances which I raised on 25 April to do so would be to expose herself as subjecting me to an oppressive and intimidating course of unwanted conduct which was both uninvited and unwelcome and furthermore to subject me to an ongoing course of harassment victimisation detrimental treatment for having done protected acts and raising both grievances and qualifying disclosure pursuant to Section 27 1a etc of the Equality Act 2010.
Work related stress: I also outline facts and information which were prejudicial to my health and safety at work."

205. The claimant then quoted from his letter of 25 April and asserted that "AH should have undertaken a stress-specific risk assessment following the letter" and referred him to occupational health given that he had stated that he was exhausted. He believed the failure to observe a duty of care for his health, safety and welfare led to his collapse at Bolton magistrates court on 23 August and if it were not for that he would not now be off work unfit diagnosed with anxiety and depression. There was then a section on personal injury which is not so relevant. He also mentioned his migraines which he stated that the computer screen glare and font sized exacerbated migraines, as did certain lighting conditions. Stress was another factor. He had said he was exhausted and "AH should have undertaken a proper assessment" of his "disability and migraines in consultation with him which she omitted to do."

206. The claimant referred further to the fact that he should have been referred to occupational health by AH on 8 August when he complained about migraines. However it appears the claimant did not realise at this point in time that he would

need to consent to that and in fact AH did send him occupational health forms on 5 August.

207. There was a further reference to "having acted in a capricious and arbitrary way" which referred to the disciplinary hearing. He stated that

> "the material time that I attended this meeting I was signed off work as unfit to work by my GP with stress. Attended the meeting under palpable duress I felt the sword of Damocles swung above my head if I did not attend this meeting in person"

and that a reasonable adjustment had not been made to accommodate his disabilities to attend the disciplinary hearing in person. This omission was deliberate. The claimant also listed reasonable adjustments he needed to return to work and he wanted a review of the written warning given to him by AH.

208. On 14 October AH obtained a level D post and was moving to Preston A further fit note was received on 17 October saying reactive anxiety secondary to work related stress.

209. On 19 October PH agreed to act as investigation officer in respect of the claimant's grievance and on 26 October HA requested that UD act as interim commissioning manager for the grievance i.e. that she would oversee the matter which she agreed on 27 October.

210. On 27 October also PH sent a letter to the claimant regarding his grievance. The claimant brought a claim about this letter which he withdrew in the course of the tribunal. PH invited the claimant to attend a formal meeting to discuss his grievance more fully, stated that he could bring a companion a trade union rep or a workplace colleague and that if he or his companion needed reasonable adjustments to advise them of the same. She also mooted the possibility of the meeting being somewhere mutually convenient and she offered him two dates.

211. The claimant replied on 21 October and included these questions:

> "please can you explain how the decision to appoint you as the investigation officer was reached? For the avoidance of doubt I am objecting to CPS human resources department having any influences over the grievances and qualifying disclosures which I have raised on the grounds that this human resources department has a palpable conflict of interest given the grievances which I have already raised to date. That I am asking that a neutral and independent person be brought in from outside the CPS to investigate the grievances and qualifying disclosures which I have raised. May I suggest an investigator from the Black Asian and Minority Ethnic Review Team presently looking into the treatment of professionals and individuals in the criminal justice system chaired by David Lammy MP. My grievance and qualifying disclosures which I have raised can be investigated more fully by a written form following the modified grievance procedure (this appears to be a reference to the previous statutory regime of requiring claimants to bring a grievance before they could proceed to bring a claim at the tribunal). Any and all questions can be sent to me in written form via email and that it was not a propitiate means of achieving a legitimate aim to expect

me to attend a grievance meeting while I am signed off as unfit to work by my GP." He drew her attention to the letter from his GP dated 26 September which stated "From a clinical perspective he is not fit to work currently nor is he fit to attend a meeting" you are therefore putting me under duress to attend a face to face meeting while ignoring medical advice in your possession moreover you have arbitrarily imposed dates based on your needs and convenience rather than enquiring in the first instance if I am indeed able to attend a face to face meeting ignoring the fact that:

(1) I continue to be signed off work.

(2) Knowing that I am unable to attend face to face meetings as detailed in my doctors letter dated 26 September which is in your possession.

212. Furthermore you have then constrained me to feel compelled to attend any meeting within 5 days of the dates arranged this applies a discriminatory effect because of something arising in consequence of my disabilities. For the avoidance of doubt I continue to be unable to attend face to face meetings. I am profoundly concerned that to attend face to face meetings will my trigger having a panic/asthma attack. Notwithstanding my cognitive processes thought processes and memory function are impeded as a direct consequence of my present medical condition."

213. The claimant also complained that

"it's not a legitimate aim for you to follow Section 103 of the Employment Rights Act 1996 strictly (a reference to the statute referring to eligible companions at meetings) by only allowing me a workplace companion or a trade union representative to accompany me to the grievance meeting. Had I been fit and well enough to attend a face to face meeting it would have been a reasonable adjustment to have allowed me to have brought my wife as my chosen companion to the grievance meeting. Given my confidential medical conditions which she is cognisant of. Please note my wife had in fact been my chosen liaison with AH during my sickness absence."

We note that the claimant says 'had I…' a recognition that he was not fit to attend a face to face meeting in any event.

214. PH replied on 2 November explaining she was a chartered fellow of the CIPD and did not work in the HR directorate but in HQ business services directorate which was independent of HR. She stated it was CPS policy to invite employees to raise a grievance to a meeting to discuss their grievance and also how they think it should be resolved. The dates were not intended to be arbitrary or place him under distress but they were the earliest dates she was available as CPS policy requires that grievance are quite rightly dealt with as quickly as possible but they can be rescheduled. If he was not able to attend a face to face meeting but required questions to be sent to him in written form she was sure that could be arranged however reiterated that he could have a trade union representative or an official employed by a trades union or a fellow worker. She ended up by saying "if you have any objections to my appointment then please contact UD, copied to HA".

215. HA wrote to the claimant on 3 November providing him with an appointment with OH provider on 9 November at 9:50-11:10 and advising him that MFT had been appointed to replace AH.

216. HA wrote to the claimant on 7 November asking him if he intended to attend the occupational health appointment. The claimant replied on 7 November. The claimant complained that she had failed to ask him if he needed any reasonable adjustments to attend the assessment which was some considerable distance from his home and appeared to last for an hour and a half without breaks and that she had failed to explain what a case conference involved and this had caused him unnecessary and avoidable anxiety and was a breach of the Equality act 2010 and she had failed to inform him of his statutory rights under the access to medical reports act and failed to provide with a list of questions in advance of the assessment which you the CPS has sent or will send to the doctor. Further before attending the appointment he wished to be provided with the following 7 days before the assessment:

> "(1) a list of the questions CPS wants Dr Archer to ask me
> (2) a copy of OH referral from the CPS
> (3) a list of questions which Dr Archer to ask me during the assessment and
> (4) 3 options under the access to reports act"

217. He asked that the CPS arrange a taxi to and from the assessment at CPS's expense and that his wife be allowed to accompany him. His wife was only available on the mornings of Monday the 21st Friday the 25th of November and the 16th of December. He would need short breaks between the assessments. He also wanted an audio record of the assessment. Other matters he required is:

> "(1) Dr Archer's full name and professional qualifications and what field of medicine she/he specialises in
> (2) Whether Dr Archer is a medical expert for the purposes of the employment tribunal
> (3) In the event that matters are referred to the employment tribunal whether the CPS will seek to use the medical assessment undertaken by Dr Archer in the ET or the county court
> (4) Whether Dr Archer will share the OH assessment with the CPS or just make recommendations based on the assessment
> (5) Whether Dr Archer will share the medical assessment with any third parties and if so the details of those third parties
> (6) I would appreciate you ensure that all the aforementioned matters are in place no later than 7 working days before the OH assessment"

218. He also raised some grievances against HA which he later withdrew that it was ongoing discrimination not to have made reasonable adjustments for him to attend the OH assessment when the assessment was to take place a 90 minute round trip from his home

> "and the relevant failure by you as a HR business partner demonstrates a laissez faire attitude by yourself and demonstrates your indifference towards myself an employee with disabilities and a cavalier attitude towards CPS's public sector equality duty."

219. The claimant wrote to UD on 11 November that

> "with regard to PH's comments in paragraph 3 of her letter it is obvious that as a member of the CIPD she blatantly disregarded the facts and information which I provided with my letter of grievance dated 14/10/2016"

and stated she ought to have known that he was unfit to attend a grievance meeting and he would be put at a disadvantage from something arising in consequence of his disabilities and attending a grievance meeting in person and that he would be put at a substantial disadvantage in comparison to non-disabled people. She did not offer him the alternative of undertaking the grievance procedure by a written form or the modified grievance procedure. He raised a grievance against her in respect of these matters for failing to make reasonable adjustments and also for indirect discrimination. However she had referred to proceeding by way of written questions.

220. He also said he was raising a further qualifying disclosure that it was his reasonable and genuine belief PH had as a member of CIPD and employee in CPS flouted the CPS's public sector equality duty under Section 149 of the Equality Act by failing to eradicate and eliminate discrimination prohibited under the auspices of the Equality Act 2010, remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic and c) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it. The letter to UD complaining about PH was 11 pages long.

221. OH offered an appointment on 15 November after the claimant declined 9 November.

222. HA replied on 14 November acknowledging he said he could not attend the OH appointment. She advised him he had been provided with a copy of the attendance management policy that described what an OH case conference was but she reiterated the point in a letter and she said in relation to the access to medical reports the information sought was explained on the consent he had signed and she sent him a copy of the referral. She said in terms of Dr Archer this is a consultation between the claimant and Dr Archer so she will not have the actual questions the doctor would ask the claimant and as the appointment was in Manchester which is where he used to travel from work which was his permanent base she said she was unaware of any difficulties with him travelling there. However she was looking in to whether the business manager would be prepared to arrange and pay for a taxi to and from the appointment and they have confirmed that they would do. It would be possible ask OH assist for a telephone referral rather than a face to face appointment.

223. She also advised that there was no difficulty with his wife attending a OH appointment it was a matter for him but she was unable to confirm that OH Assist would be able to arrange an appointment for the dates he had suggested as they were an independent body. She had advised them to ensure that they had short breaks throughout the consultation and OH Assist said regarding recording the

assessment that was a matter for OH Assist and she advised him it might not be with Dr Archer because he may not now be available. She could not comment on whether he was a medical expert for the purposes of an employment tribunal and was unable to comment on what documentation CPS would use at an employment tribunal. The report was only shared with CPS if he gave his approval to release it but the purpose was to help CPS in supporting him with a return to work. The contents of the report would not be shared with the third party that she had raised the other points with OH Assist regarding recording the meeting and she could confirm she was a member of CIPD.

224. She said she was sending the final paragraphs of his letter to the commissioning manager for inclusion in his grievance as he was now making complaints about her failures as an HR business partner.

225. OH Assist advised that if they were needing breaks they would need a 3 hour assessment and a higher cost would need to be authorised. They provided the doctor's full name and address and said themselves they did not know whether he was a medical expert for the purposes of an employment tribunal and that he would provide an outcome summary report with his recommendations following his assessment to the referring manager with the employee's consent. The assessment notes are not shared. His wife could attend and they would endeavour to arrange an appointment for the dates suggested.

226. On 18 November the claimant sent another long letter to UD making complaints about HA's handling of the OH assessment

227. A further letter of 21 November was sent to UD regarding CPS's failure to observe the implied terms of trust and confidence. In this letter he was particularly concerned about Roz Atkinson's comments in the CPS referral. In this letter he complains about the use of the word "perceived" and the implication that he had not been willing to cooperate with CPS attendance management procedure. "The statement was a malicious falsehood and factually misconceived". The doctor had advised he was not fit to attend a meeting.

228. The claimant could not understand why Roz Atkinson was allowed to make the referral to occupational health when he had asked for her to have nothing further to do with it. However, from the timing, we have observed the request for her "not to have anything to do with it" came the day after she had sent the referral and subsequent to that there was no evidence she did have anything to do with his case. The letter was 9 pages long and reiterated some of his previous complaints but mainly consisted of complaints about the Roz Atkinson situation.

229. A new investigating officer John Dillworth was then appointed by UD around 22 November.

230. On 23 November the claimant's fit note said severe depression with anxiety confirmed to the claimant on 24 November

231. A further letter from the claimant's practise was received on 24 November. This said

> "I have seen the claimant today and our general practise review of his quite severe depression he is in the process of being referred to a consultant psychiatrist as for whatever reasons he is now suffering quite a severe emotional crisis. During the course of consultation he showed me a letter addressed to him from yourselves which seems to challenge him in quite a forceful way to present for interview and assessment regarding some employment issues. In my professional opinion I don't think he is in a state to cope with cross-examination or interrogation until he has been properly assessed by a consultant psychiatrist and has stabilised on suitable treatment. I would like you to take this into consideration in your future proceedings which are clearly out of my remit. Thank you very much for your attention to this, Doctor Erskine."

232. It is not clear what the doctor was referring to here, what letter the claimant had shown to him, as it does not seem to accord with the letter from PH which was the only meeting in train at that point in time i.e. potentially a meeting to discuss his grievance.

233. Mr Dillworth wrote to the claimant on 1 December 2015. He stated

> "I would normally at this stage of the process invite you to a meeting to discuss your grievance but I am mindful of your medical position from my initial reading of the papers. I wanted to present you with three opinions but would be prepared to consider any reasonable alternative offer you may wish to suggest:
> (1) I could attend your home with a note taker and conduct a meeting
> (2) I could attend a neutral venue to be arranged with a note taker and conduct a meeting
> (3) I can conduct a telephone meeting with a note taker.
> I am writing an issue to invite you to reflect on the above mentioned options. You would of course have the right to be accompanied to the meeting by either a trades union representative or a workplace colleague. I know that you have suggested that you be accompanied by your wife. I am afraid that this would not normally be appropriate and I would like to refer you to paragraph 5.2 of the grievance policy. However I am willing to consider any future proposals that you may have on this point and invite your proposals for being accompanied in line with the policy."

234. Mr Dillworth agreed in cross-examination that he was opening and shutting the door to the possibility of the claimant's wife attending.He said in cross examination that had they claimnat said he could have attended if his wife was allowed to come with him he would have sought further high level Hr advice but the claimnat did not say that. Further he immediately agreed to proceed by way of written questions and answers.

235. JD in his letter then mentioned some initial thoughts he had had: that the claimant was unhappy about the disciplinary outcome, the invocation of the attendance management policy and meeting invitation, the manner of

commissioning the occupational health intervention, the initial grievance investigator's decision as to the location of her meeting with you. He agreed in his letter that in respect of the occupational health intervention the utilisation of the word "perceived" might appear clumsy or prejudicial but it is a word sometimes used when perhaps there are other expressions that would be more apt. He also pointed out the claimant had not invoked his right to appeal regarding the disciplinary outcome. Whilst his appeal was out of time the North West area could be invited to consider exercising discretion given the claimant's medical circumstances. He also mentioned that his view was the crown prosecution service is not in a position to suspend its policies absence without an occupational health intervention and that has not taken place.

236. In respect of the initial grievance investigator's meeting location decision. The location would only ever have been informed by his own doctor given that there was no occupational health report**.** He continued

> "therefore I would invite you to reflect on participating in an occupational health referral. This would be of assistance to me in resolution of the issues that have been raised without further investigation at this stage and the minimalization of any further distress on your part. Please note if there is any additional information you would like to be considered at the formal grievance meeting this information should be sent to me 2 working days in advance of our meeting."

237. On 6 December the claimant wrote back to Mr Dillworth. He stated

> "whilst I acknowledge your proposal was made in good faith none of the three aforementioned proposals would mitigate the stress and anxiety which I would feel in discussing the grievances."

He stated that they were putting him at a substantial disadvantage in relation to requiring a grievance meeting and it would have been reasonable for him to have allowed his wife to be his chosen companion. He proposed a more appropriate judgement would be of undertaking investigation and hearing via written form which had already been put forward by PH. He also enquired that the properties of his letter showed it was authored by Tim Purvis of Bentley Holland and Partners and required an explanation.

238. On 13 December Mr Dillworth wrote back to the claimant. He said it was "vitally important to me that I give you the best possible opportunity to air your grievance" but if it was not possible to engage directly he would conduct his interview with him in written format. He had commenced the process of interviewing the subjects of the grievance and asked him to make any further written submissions by 19 December and identify any witnesses who he felt would help him better understand the issues. Regarding the properties in his letter he said he understood that Bentley Holland and Partners created a template and he could confirm that he had written the letter.

239. He interviewed Roz Atkinson on 13 December and 9 December he interviewed PH.

240. On 16 December the claimant responded to Mr Dillworth's letter of the 13th stating that he had requested the reasonable adjustment of his wife to accompany

him to the grievance meeting and that omission was to his detriment but he went on to say

> "in any event it is the professional medical opinion of my doctors that I am unfit to undertake any face to face meeting until my condition has stabilised from suitable treatment please see attached letter from Dr J Erskine on 24 November 2016."

241. He continued to press the point regarding Bentley Holland and Partners and Tim Purvis. Confirmed that the matters could proceed by written questions. On 20/12 MCT requested a meeting with the claimant to discuss his situation and what he could do to help to get the claimant back to work. Mr Dillworth submitted some supplementary questions to Roz Atkinson on 22 December and had an investigatory interview with HA on 23 December. He sent written queries to the claimant on 29 December. MCT wrote to the claimant again on 30 December as he had not had a reply.

242. On 13 January the claimant's ACAS early conciliation certificate was issued.

243. Mr Dillworth sent written queries to the claimant on 9 January. Mr Dillworth asked the claimant as follows:

"(1) In respect of PC X's issues which arose in January 2016 is it correct that you raised concerns about him or only when he raised concerns about you?

(2) Did you expressly raise your concerns about PC X under the CPS whistle-blowing policy and express them to be under that policy?

(3) Did you escalate any concerns in line with the CPS whistle-blowing policy prior to lodging your grievance?

(4) When you raised the issues of your eyesight with AH in April 2016 do you accept that you were advised that you could have an eyesight test paid for by CPS to be followed up by a deskside evaluation?

(5) Do you accept that AH advised you to do some CSL e-learning to support your performance? Do you accept that you were afforded time to do this training?

(6) Do you accept that AH broached an OH referral prior to the incident when you collapsed in court in late August 2016 in particular following your application for smarter working?

(7) Do you agree that comments were added to your PDR by AH contemporaneously and that she read them to you as she was entering them?

(8) When you attended a disciplinary meeting with your union rep on 8 September can you confirm that neither yourself nor your representative raised any concerns about the process?

(9) When you received the outcome of the disciplinary meeting why did you not forward the relevant policy by lodging an appeal?

(10) You have suggested AH arbitrarily ignored your communication of 23 September 2016. Do you accept that AH endeavoured to address your concerns in her email to you dated 26 September 2016?

(11) You have in effect judged that AH has acted badly towards you. Do you accept that her pastoral concerns for you and your collapse in court on

23 August extended to her seeking to check the welfare of your children in the knowledge that your wife may have been away on business?

(12) By way of a general background question while I understand that you have worked at CPS Manchester for 5 years or so and have had no time off sick during that time have you worked at CPS for the whole of that time as an associate prosecutor? Have you worked for CPS in any other capacities and in any other areas?"

He asked for a response by 16 January.

244. He met with AH on 9 January and she later provided further information regarding the PDR issue. She said the PDR had been electronically completed by the claimant with any comments he wished to make prior to the PDR interview.

> "We had our meeting and I then completed the mandatory section either at the time or shortly after the conclusion of the meeting. Usually I do it at the time of the interview but depends on the availability of network cables in the room and I cannot specifically recall if I had a cable. The nature of the likely entries would have been communicated face to face however as we had a lengthy discussion regarding training needs and performances issues when he emailed me on 25 May some 4 weeks after the PDR had been completed I noted his comments with regard to the PDR and his desire for alteration but he did not indicate to me what specifically he objected to either in that meeting or at any subsequent meeting and the issue was never revisited."
>
> Note that AH admitted in her interview with Mr Dillworth on 9 January that it was a mistake to think he had a duty to ring in every day, that it was not in the policy it was her misunderstanding of the policy.

245. In the claimant's response he said that he believed that PC X made vexatious complaints against him by reason that he

> "would not comply with his request to commit an unlawful act or a miscarriage of justice for I am laying a formal complaint against him which I am asking is investigated by an independent body. Also the practise of police officers seeking to influence officers of the CPS to unlawfully deny members of the public bail rights. In respect of whether he had raised it in the whistle-blowing policy he stated he raised "significant concerns and that AH knew or reasonably ought to have known I was blowing the whistle".

246. The claimant went on to say as follows:

(1) he escalated his concerns by letter of 25 April and mentioned it in a further email of 25 May.

(2) In respect of the second question he said "she was only prepared to offer me a DSE assessment and eye test paid for by CPS. At no point did she offer of discuss referring him to occupational health"

(3) Regarding the e-learning, the course suggested was delivering excellent customer service part 1 and indicated that AH had already decided before the meeting that he was at fault. He said she said she would provide rota time but did not do so (of course the claimant did not say he was going to do the course) and he said that at no time was any rota time

provided to complete any course. So he did not accept that she did provide him time to do his e-learning.

(4) OH referral. He said he had raised many concerns about the difficulties with the IT system and the laptop. It's first mentioned on 5 August in response to the smarter working scheme and then on 26 August after his collapse.

(5) Regarding the PDR he said he did not agree that the comments had been communicated to him already and that he had raised these issues and AH had failed to reply.

(6) He believed that because of the medical information AH had that she should have adjourned the meeting. He felt he had no choice but to attend the meeting.

(7) He said he was too ill to lodge an appeal.

(8) He did not agree that she had endeavoured to answer his concerns she ignored the concerns about his health and put further pressure on him to attend a face to face meeting though on the 23rd he had set out how ill he was. Did not consider that his health circumstances were exceptional.

(9) He said that AH's concern when he collapsed was only what he would have expected and in relation to his last question he provided an outline of his employment history.

247. On 17 January MCT started the process of making occupational health referral again with the assistance of AK from HR.

248. On the 17 January Mr Dillworth completed his grievance report regarding PH and HA and on the 20 January regarding AH and Roz Atkinson. His conclusions in respect of PH were:

> "(1) The claimant did not allow PH to engage with him but immediately moved to assert an unmerited grievance against her.
>
> (2) Had the claimant engaged with PH the current process would potentially have concluded earlier.
>
> (3) I do not uphold the grievance asserted against HA.
>
> (4) HA sought to engage with the claimant in an entirely proper and supportive way.
>
> (5) The claimant did not allow HA to engage with him but moved to assert a grievance against her."

249. The investigation into AH and Roz Atkinson had a number of key findings of fact conclusions and then recommendations. The conclusions were:

> "(1) I do not uphold the grievances asserted by the claimant in respect of AH save to observe as below
>
> (2) AH sought throughout all of her dealings with the claimant to apply the relevant CPS policies
>
> (3) I do not conclude that AH discriminated against the claimant as alleged by him or at all.
>
> (4) I do not conclude that AH victimised the claimant as alleged by him or at all.
>
> (5) I do not conclude that the claimant properly invoked CPS whistle-blowing policy by failing to make it clear that he was doing so.
>
> (6) I do conclude however more by way of observation that the issue regarding the disputed PDR entries should have been resolved more

satisfactorily while ultimately the final say as to the entry lies with the line manager there ought perhaps to have been further prompt dialogue on this issues (need to refer to the issue raised regarding the PDR that it has to be agreed and how this is inappropriate).

(7) I do not uphold the grievance asserted in respect of Miss Atkinson save to observe that as set out in paragraph 5 10 below

(8) Miss Atkinson sought throughout all of her dealings with the claimant to apply the relevant CPS policies

(9) I do not conclude that Miss Atkinson discriminated against the claimant as alleged by him or at all

(10) I do conclude that the wording referred to at paragraph 4.46 to 4.48 i.e. the OH referral was perhaps clumsy and could have been misconstrued (but not such as to warrant the level of the claimant's reaction to it)

(11) notwithstanding my conclusion above at 5.10 I do not conclude that Miss Atkinson had either discriminatory or malevolent intent.

6 recommendations:

(6.1) Language used in OH referrals that might be construed as giving the impression that a judgement has been formed i.e. "perceived" "unwillingness to cooperate" "refusal to attend" should be avoided.

(6.2) Steps should now be taken to work with the claimant to facilitate his return to work including the completion of an OH referral.

(6.3) The North West area should consider whether to exercise the discretion to allow The claimant to lodge an appeal against his disciplinary hearing out of time.

(6.4) The North West area should consider the whistle-blowing issue with The claimant to clarify whether he wishes to pursue the matter.

(6.5) Mediation should be considered between the claimant and AH, the claimant and Miss Atkinson."

In cross-examination MR Dillworth agreed that there were examples of AH wrongly interpreting policy or not following policy which he had not specified in his report. He agreed there were a couple of instances of this, but he did not believe this was unusual given AH was a new manager.

250. The claimant replied to MCT on 23 January he described how serious his illness was and that he was on medication for severe depression and anxiety and his anti-depressant medication had been increased again. He agreed an occupational health assessment was necessary to assist his return to work. He said he had signed the consent form on 18 September and had asked John Dillworth to expedite his request for reasonable adjustments so he could attend the OH assessment.

251. He also listed the reasonable adjustments he wished to have to return to work as follows:

"(1) A phased return to work.

(2) A proper assessment of each of my disabilities and consultation with me, my GP and occupational health.

(3) A stress-specific risk-assessment in accordance with the HSE management standards.
(4) A risk-assessment in accordance with the MHSWR 199 for all areas of my work.
(5) A reduced caseload.
(6) Extra time to prepare cases.
(7) Laptop computer with larger screen and anti-glare technology.
(8) Working from home as and when necessary.
(9) A review of fluorescent lighting in my working environments.
(10) Longer breaks.
(11) Private office or workspace breaking large tasks down into small stages.
(12) Quiet place of work to prepare cases and then reasonable adjustments and sickness absence policy."

252. On 30 January the outcome was sent to the claimant with a covering letter from UD asking him if wished to participate in mediation with AH and Roz Atkinson and she was asking his line manager to liaise with him in relation to any action he wished to take on the whistle-blowing policy. She had declined to exercise discretion to allow an appeal against the outcome of his disciplinary hearing given the amount of time that has now elapsed and advised that he could appeal against the outcome of the grievance by 13 February.

253. The claimant believed that this time was chosen deliberately as it would coincide with when he had to present his ET1 to the employment tribunal. However he withdrew the claim in respect of this, presumably accepting that this was simply a coincidence.

254. The claimant replied to UD on 11 February complaining that his grievance outcome had been sent to his work email address which he rarely checked and so therefore he did not see it until 7 February. He had not received a paper copy of the grievance outcome either nor had he been informed it had been sent to his work email. He intended to appeal it but was unable to appeal it by the date given and also because the investigating officer had failed to provide cogent ground and reasons for not upholding any of his grievances and that he believed that this was a deliberate omission on Mr Dillworth's part, further that giving him until 13 February to appeal the grievance outcome was a deliberate act undertaken with malicious intent as the CPS knew his ET1 had to be lodged on the same date. He said he was unable to appeal until such time as specific grounds as to why his grievances had not been upheld was provided.

255. He then asked a number of questions regarding the reasonable adjustment issue. It is not clear what this referred to, presumably not allowing his wife to attend the grievance hearing. He then did submit a grievance appeal on 13 February and raised grievances against Mr Dillworth. He also was raising a grievance against UD for sending the outcome to his work email and giving him only until 13 February to appeal the grievance outcome which she knew was the same date as ET1 had to be lodged.

256. There was a further letter from the claimant's doctor on 13 February which urged the respondent to complete an OH referral and a letter from the consultant psychiatrist giving the diagnosis of a major depressive disorder on 14 February. On 16 February MCT wrote to the claimant again with an update regarding the occupational health referral. The claimant was advised on 17 February that he could have an extension to the time to appeal to 3 March.

257. Whilst outside the factual matrix of this case the claimant did attend an OU appointment on 29 March. Their report said that OH could not suggest any adjustments, modifications, or redeployment likely to allow an immediate return to work and that he was not fit to meet with management in connection with work issues. The only thing suggested if it could be accommodated was that he had no contact with work for a period of at least 3 months to allow his condition and resilience to improve and that contact should be in writing and via his wife.

The Law

Disability Status

258. Section 6 of the Equality Act 2010 sets out the basic parameters of the definition of a disabled person for the purposes of the 2010 Act. It says that:-

> A person (P) has a disability if
> (a) P has a physical or mental impairment and
> (b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

There is a statutory code of practice to be taken into account in determining questions relating to the definition of disability issued in 2011, the relevant parts of this are as follows:-

> A1. A person has a disability for the purpose of the Act if he or she has a physical or mental impairment and the impairment has a substantial or long term adverse effect on his or her ability to carry out normal day to day activities.
>
> A2. This means that in general:-

259. The person must have an impairment that is either physical or mental (see paragraphs A3 to A8).

260. The impairment must have the adverse effects which are substantial (See Section B.

261. The substantial adverse effects must be long term, See Section C; and

262. The long term substantial effects must be effects on normal day to day activities, see Section D.

263. Whilst it is not necessary for the cause of the impairment to be established the effects that are experienced must arise from the physical or mental impairment. B1 concerns the substantial adverse effect requirement and defines it as follows "a substantial effect is one which is more than minor or trivial". The following matters should be taken into account, the time taken to carry out an activity, the way in

which the activity is carried out and the cumulative effects of that impairment and how far a person can be reasonably expected to modify his or her behaviour with coping and avoidance strategies to prevent or reduce the effects of an impairment on normal day to day activities. The effects of the environment should be taken into account and in relation to the effects of treatment that should be discounted and includes therapies as well as drugs.

264. Section C. In respect of long term the meaning of long term is set out at C1. The act states:-

265. "The Act states that for the purposes of deciding whether a person is disabled a long term effect of an impairment is:-

266. which has lasted for at least twelve months or

267. whether the total period for which is lasts from time from the first onset is likely to be at least twelve months or

268. which is likely to last for the rest of the life of the person affected.

269. Section D addresses normal day to day activities. This is no longer defined as is explained in Section D2 but general day to day activities are seen as shopping, reading, writing, having a conversation, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. It can include general work-related activities, study and education related activities, interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, keeping to a timetable or shift pattern. They did not include activities which are normal for a particular person or a small group of people however it is not necessarily which is carried out by the majority of people.

270. D17 states that some impairments may have an adverse impact on the ability of the person to carry out normal day to day communication activities, for example, they may adversely affect whether a person is able to speak clearly at a normal pace and rhythm and to understand someone else speaking normally in the persons native language. Some impairments could have an adverse effect on a person's ability to understand human non-factual information and non-verbal communication such as body language and facial expressions. Account should be taken of how such factors can have an adverse effect on normal day to day activities. Examples given of a man with Asperger's Syndrome finds it hard to understand non-verbal communication such as facial expressions and non- factual communication such as jokes, he takes everything said very literally.

271. D19 says a person's impairment may adversely affect the ability to carry out normal day to day activities that involve aspects such as remembering to do things, organising their thoughts, planning a course of action and carrying it out, taking new knowledge and understanding spoken or written information. This includes considering whether the person has cognitive difficulties or learns to do things significantly more slowly than a person who does not have an impairment.

272. In the case *of* **Morgan -v- Staffordshire University [2002] EAT** useful guidance was given in respect of mental impairment such as relied on here, even though this was originally in relation to the Disability Discrimination Act 2005 including as follows:-

> "Tribunals are unlikely to be satisfied of the existence of a mental impairment in the absence of suitable expert evidence, however this does not mean that a full Consultant Psychiatrist's report is needed in every case, there will be many case where the illness is sufficiently marked for the claimant's GP to prove it, whoever deposes it will be proven for the specific requirements of a legislation to be drawn to that person's attention. If it becomes clear that despite a GP's letter or other initially available indication an impairment is to be disputed on technical medical grounds then thought will need to be given to further medical evidence. The EHRC Employment Code makes it clear that the term mental impairment is intended to cover learning disabilities".

273. Regarding whether the impairment is likely to have lasted 12 months where it has not actually lasted 12 months at the time of the alleged discrimination paragraph C3 of the guidance states that the test for this is if "it could well happen". In **SCA Packing Limited -v- Wall [2009] HL** the test of "it could well happen" was endorsed rather than more probable than not and it was explained that likely meant something that was a real possibility rather than something that was probable or more likely than not. The issue of how long an impairment is likely to last has to be determined at the date of the discriminatory act and not at the date of the tribunal hearing. Anything that happens after the date of the discriminatory act is not relevant. Account should be taken both of the typical length of such an effect on an individual and any other relevant factors specific to the individual such as general state of health and age.

Section 15 – discrimination arising out of disability

274. The claimant makes a claim under section 15, something arising in consequence of disability. Section 15 states that:

> "A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability; and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

275. An employer also has a defence to a section 15 claim if they can establish they had no knowledge of the claimant's disability (section 15(2)) or that they could not be reasonably expected to know the claimant was disabled. The employer, in accordance with the EHRC Employment Code, must do all it reasonably can to find out if the person has the disability, and knowledge held by the employer's agent or

employee, such as Occupational Health adviser etc., will usually be imputed to an employer.

276. In **Hardys and Hansons PLC v Lax [2005]** Court of Appeal it was said, in respect of justification:

> "It is for the Employment Tribunal to weigh the real needs of the undertaking expressed without exaggeration against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate…A critical evaluation is required and is required to be demonstrated in the reading of the Tribunal. In considering whether the Employment Tribunal has adequately performed its duty appellate courts must keep in mind the respect due to the conclusions of the fact finding Tribunal and the importance of not overturning a sound decision because there are imperfections in the presentation. Equally the statutory test is such that just as the Employment Tribunal must conduct a critical evaluation of the scheme in question, so the appellate court must critically consider whether the Employment Tribunal has understood and applied the evidence and assessed fairly the employer's attempts at justification."

Section 20 – Reasonable Adjustments

277. The claimant also makes a reasonable adjustment claim. Section 20 says:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person this section, sections 21 and 22 and the applicable schedule apply, and for those purposes a person on whom the duty is imposed is referred to as A.
>
> The duty comprises the following three requirements
>
> (1) a provision, criterion or practice of A's puts a disabled person at
>
> (2) a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and
>
> (3) the employer is required then to take such steps as it is reasonable to have to take to avoid the disadvantage.

278. In **The Royal Bank of Scotland v Ashton [2011] EAT** it was stated that the PCP must be a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled, and by comparing to non disabled comparators it can be determined whether the employee has suffered a substantial disadvantage. The correct comparators are employees who could comply or satisfy the PCP and were not disadvantaged.

279. In **Environment Agency v Rowan EAT [2007]** the EAT said:

> "A Tribunal must go through the following steps:
>
> (2) Identifying the PCP applied by or on behalf of the employer;

(3) The identity of non disabled comparators where appropriate;

(4) The nature and extent of the substantial disadvantage suffered by the claimant."

280. Serota J stated:

"In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments…without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed amendment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."

281. Paragraph 21 of schedule 8 to the Equality Act provides that:

"A person is not subject to the duty if he does not know and could not reasonable be expected to know that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace or a failure to provide an auxiliary aid."

282. This encapsulates the idea of constructive knowledge i.e. that either someone within the respondent's organisation who is responsible for these matters, such as Occupational Health, knows of the substantial disadvantage, or that the respondent should have known from all the factors available but closed their eyes to it. This is also referred to above in respect of section 15 claims.

283. Further, the adjustment has to be reasonable and effective. Section 18B(1) of the Disability Discrimination Act 1996 (these matters are no longer in the Equality Act but they are useful to have in mind in considering what would be a reasonable adjustment) set out some factors to take into consideration as follows:

"(1) The extent to which the step would prevent the effect in relation to which a duty was imposed.

(2) The extent to which it was practical for the employer to take the step.

(3) The financial or other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities.

(4) The extent of the employer's financial and other resources.

(5) The availability to the employer of financial or other assistance with respect to taking the step.

(6) The nature of the employer's activities and size of its undertaking and matters relevant to a private household."

284. In respect of reasonable adjustments, the claimant is required to establish the PCP relied on and demonstrate substantial disadvantage. The burden would then

shift to the respondent to show that no adjustment or further adjustment should be made (**Project Management Institute v Latif**).

Harassment

285. Harassment is defined in section 26 of the Equality Act 2010, which states:

"(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of –

(ii) Violating B's dignity, or

(iii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) …

(3) …

(4) In deciding whether conduct has the effect referred to in subsection 1(b) each of the following must be taken into account:

(a) The perception of B;

(b) The other circumstances of the case; and

(c) Whether it is reasonable for the conduct to have that effect."

Victimisation

286. Section 27(1) of the Equality Act 2010 states that:

"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."

287. A protected act for the purposes of section 27(1) are:

- Bringing proceedings under the Equality Act;
- Giving evidence or information in connection with proceedings under the Equality Act;

- Doing any other thing for the purposes of or in connection with the Equality Act;

- Making an allegation, whether or not express, that A or another person has contravened the Equality Act.

288. Therefore, it needs to be established that the protected act comes within the definition, then that the claimant was subjected to a detriment or less favourable treatment, and finally that that detriment or less favourable treatment was because the claimant had done a protected act or because the employer believed he or she had done or might do a protected act.

289. The types of detriment situations which arise are set out in section 39(3) and (4). Section 39(4) states that:

> "An employer (A) must not victimise an employee of A's (B) – as to the terms of B's employment; in the way A affords B access or by not affording B access to opportunities for promotion, transfer or training, or for any other benefit, facility or service; by dismissing B, or by subjecting B to any other detriment."

Indirect Disability Discrimination

290. Indirect discrimination is defined in section 19(1) of the Equality Act 2010 which states that:

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

291. Section 19(2) goes on to provide that:

> "For the purpose of subsection (1) a provision, criterion or practice is discriminatory in relevant protected characteristic of B 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."

Further case law

In respect of disability discrimination the respondent drew our attention to two additional cases: *Spence vs Intype Libra 2007* which established that an Occupational

Health assessment could not be a reasonable adjustment as the outcome would be uncertain (rather it was OH recommendations which could be RAs) and
Gallop vs Newport City Council EAT 2012 in respect of knowledge. The EAT decided that the fact a later medical report establishes that the claimant was disabled at the relevant time (i.e. when the alleged discrimination is said to have occurred) does not stop the respondent from arguing they reasonably were not aware of this at the relevant time.

Protected Disclosures

Meaning of Protected Disclosure

292. Section 43A of the Employment Rights Act 1996 states that "in this act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H, 43B

(i) in this part a qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure (is made in the public interest) and tends to show one or more of the following:

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligations which is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of any individual has been, is being, or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged or;

(f) that the information tends to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed. …

43C Disclosure to employer or other responsible person

(1) a qualifying disclosure is made in accordance with this section if the worker makes a disclosure -

(a) to his employer or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to

(i) the conduct of a person other than his employer or

(ii) any other matter for which the person other than his employer has legal responsibility, to that other person.

(2) a worker who in accordance with the procedure whose use by him is authorised by his employer makes a qualifying disclosure to a person other than his employer is to be treated for the purposes of this part as making the qualifying disclosure to his employer.

293. It has to be established that the claimant has provided information to the respondent, whilst the information may contain allegations within it it must be sufficiently particularised to constitute information. A harsh dividing line between information (as established in **Cavendish Munro PRM v Geldud [2010] EAT**) and mere allegations is no longer required, in **Kilraine -v- London Borough of Wandsworth EAT [2015]** Langstaff J said "I will caution some care in the application of the principle arising out of Cavendish Munroe that the difference between information and allegation is not one that is made by the statute itself, it would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggests that very often information allegation are intertwined, the decision is not decided by whether a given phrase or paragraph is one or rather than the other but is to be determined in the light of the statute itself, the question is simply whether it is a disclosure of information, if it is also an allegation that is nothing to the point".

294. Separate disclosures can be aggregated to establish information, in **Norbrook Laboratories -v- Shaw [2014] EAT** quite trivial matters were involved in a series of emails which taken together constitute a disclosure about Sales Representatives driving in snow. In addition a protected disclosure can be made after the termination of employment (**Onyango v Belvedere [2013] EAT**).

295. In **Babula -v- Waltham Forest [2007]** Court of Appeal it was established that the information must tend to show a breach not that it is accurate. However, a claimant does have to establish a reasonable belief even if their belief is wrong. In **Babula** it was said that the word belief in Section 43B(1) is plainly subjective, "it is the particular belief held by the particular worker, equally however it must be reasonable which is an objective test. Furthermore like in **Darnton** I find it difficult to see how a worker can reasonably believe that an allegation tends to show there has been a relevant failure if he knows or believes that the factual basis for the belief is false".

296. A claimant also has to establish public interest following the Enterprise and Regulatory Reform Act 2013 (although the requirement of good faith has been removed). In **Chesterton Global -v- Nurmohamed [2015] EAT** it was made clear the test of the Tribunal is not an objective one for public interest but rather whether the claimant had a reasonable belief that the disclosure was in the public interest.

297. Further, in **Black Bay Ventures Limited -v- Gaheer [2014]** the **EAT** set out the steps the Tribunal should take in its reasoning in a whistle blowing case. It should:-

(1) separately identify each alleged disclosure by reference to date and contact;

(2) identify each alleged failure to comply with a legal obligation or health and safety matter;

(3) identify the basis on which it is alleged each disclosure is qualifying and protected and

(4) identify the source of the legal obligation relied upon by reference to the statute or regulation.

298. The Tribunal should then go on to consider whether the claimant held a reasonable belief as required by Section 43B(1) of the 1996 Act then the enquiry should move onto whether the disclosure was made in the public interest, following which these obstacles are surmounted a Tribunal must identify the alleged detriment, the date thereof as part of its findings and then ultimately decide whether the detriments arose because of the protected disclosures.

299. The burden of proof is on the claimant to establish a protected disclosure has been made (**Goulding -v- Lands Securities Trillion Limited UKEAT [2006]**).

Detriment

300. Section 47B of the 1996 Act states that:

(i) a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure;

(ii) this section does not apply where:

(a) the worker is an employee and

(b) the detriment in question amounts to dismissal.

301. In **Shamoon -v- Chief Constable of Royal Ulster Constabulary (Northern Ireland) [2003]** House of Lords it was said that "a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had, in all the circumstances, been to their detriment. In order to establish detriment is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of and the detriment can arise after the end of the employment relationship.

Causation (detriment)

302. In respect of the test for whether the protected disclosure was the reason for the treatment in a detriment claim. the Tribunal must be satisfied that the claimant was subjected to a detriment on the ground of the protected disclosure. In this regard the Tribunal must be satisfied the disclosure was a material factor behind the alleged detriment.

303. This is set out in **Feckitt -v- NHS Manchester [2012]** Court of Appeal where Elias LJ held "I agree with the submissions that liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act, the reason which has informed the European union analysis is that unlawful discriminatory consideration should not be tolerated and ought not to have any influence on the employers decision, in my judgment that principle is equally applicable where the objective is to protect whistle blowers particularly given the public interest in ensuring they are not discouraged from coming forward to highlight potential wrongdoing. In my judgment the better view is that Sections 47B will be infringed if the protected disclosure materially influences (in any sense of being more than a trivial influence) the employer's treatment of the whistle blower. If Parliament had wanted the test for standard of proof in Section 47B to be the same as for unfair dismissal it could have used precisely the same language but it did not do so".

304. This raised the issue of whether the individual was responsible for the detriment but was innocent of the whistle blowing disclosures could be responsible for a whistle blowing detriment. In the **Royal Mail -v- Jhuti [2006] EAT** this situation was addressed where Mitton J states, "I am satisfied that as a matter of law a decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee who is in possession of the true facts can be attributed to the employer or both of them". However, **Jhuti** has now been overturned on this point at the Court of Appeal.

305. There is also provision for vicarious liability set out by the Enterprise and Regulatory format 2013 where a worker has been subjected to a detriment by another worker of their employer stating that that should be treated as also down by the worker's employer, whether it was done with the employee's knowledge or approval.

Causation generally

306. In respect of establishing causation more generally this would be decided in many cases by inferences as in a discrimination claim and it is unlikely to be positively acknowledged that whistle blowing caused the detriment or dismissal.

307. For inferences a claimant can rely on natural justice, a defective investigation, bias, breach of protocol or procedure or policies, inferences can be drawn from totality of the primary facts and the context of the case.

Parties' submissions

The parties submisssions are incorporated in our conclusions.

Conclusions

Disability Status

308. We find the claimant was not disabled until the end of October, whilst the medical advice of 28 November recorded he had severe depression, it is likely that he suffered a deterioration in his condition after the warning he received which can be seen reflected in his highly charged letters about PH starting in the middle of October who really had done nothing wrong (as the claimant has acknowledged in withdrawing his claims against her) and the other elaborate letters he sent to UD complaining about other members of staff. Before that point it cannot be said that 'it could well happen' that the claimant would suffer the substantial adverse effects for 12 months. Between 23rd August and end of October there are substantial adverse effects bit it could not be said they could well be long–term.

309. Therefore for acts before November the claimant's claims fail as he cannot rely on the protected characteristic.

310. If we are wrong in this we have gone on to consider the respondent's knowledge in any event.

<u>Respondent's knowledge</u>

311. We agree with the respondent's submission that on 23 August 2016 it was not apparent to the respondent that the claimant's illness would last or was likely to last for 12 months. The respondent had knowledge of a mental impairment of substantial adverse effect from 28 September but still at that point could not have known that it was long-term.

We have considered AH's email where she said "I anticipate this will potentially be the start of an extended absence" but we do not accept that this establishes that the respondents knew the claimant's illness was likely to be long-term in the sense of lasting for 12 months as the claimant returned to work albeit briefly on 8th September and at the time AH was making strenuous efforts to get the claimant back to work.

The claimant relied on various factors as establishing constructive knowledge – that the claimant had lost weight for example but AH said she saw him irregularly and had not noticed, that it would in any event not necessarily signify anything to her as people lose weight deliberately. In addition the performance issues should have alerted AH but by themselves these would not signify anything of the kind and in any event AH specifically asked the claimant if there was any underlying cause and he only referred to his daughter not settling at school. We accept therefore there was nothing to alert the respondent to the claimant having a disability until the letter of 28th September but as referred to above the question of long-term was not resolved by that letter.

The discrimination complained of covers the period (1) when AH managed him i.e. November 2016 – 14 October 2017 the last act complained of against AH was X

and (2) in relation to the grievance meeting beginning with the refusal to allow the claimant's wife to attend on the 1 December 2016.

In relation to period (1) there was nothing in that period to suggest the claimant's illness was likely to last for 12 months. The letter of 28th September does not suggest such a long absence is likely although clearly there was substantial adverse effect.

In relation to period (2) there is more of a case to suggest by 28th November letter the respondent should have (constructive knowledge) known that the claimant was disabled as this referred to 'quite severe depression' However the G.P. was expecting he would be referred to a psychiatrist and given appropriate treatment which would stabilise him. Given that at this point it was only 3 months since the claimant had collapsed on the balance of probabilities it was likely he would recover and return within 12 months - it would not have been a reasonable expectation that the claimant would continue to be off for a further 9 months. In fact it was more likely that the conclusion of the grievance procedure and with AH having moved on to a different job the claimant would be in a position to return to work.

312. Accordingly we find the respondent had no actual or constructive knowledge.

Nevertheless we have considered the claimant's disability claims.

Disability Discrimination

Reasonable adjustments section 20 and 21 Equality Act 2010

313. *Claim 12*: The claimant stated the PCP was the omission of making reasonable adjustments in the light of the medical evidence provided by the claimant/ medical practitioner.

However the PCP must be in this case requiring the claimant to work as normal. This would then arguably put the claimant at a substantial disadvantage because of the matters claimed i.e. his diminished cognitive abilities due to depression.

314. Reasonable adjustments contended for: that in November 2015 there was a failure to adjust the number of cases which the claimant dealt with per day.

(1) There was a failure to allocate the claimant an assistant.
(2) There was a failure to adjust the type of cases allocated to the claimant.
(3) There was a failure to provide effective computer systems and training.

315. We find there was either no substantial disadvantage to the claimant prior to August 2016 when he collapsed compared to someone without a disability on our factual findings or the respondents did not have the requisite knowledge that there was a substantial disadvantage to the claimant

316. Further, in any event the reasonable adjustments suggested would be unreasonable in relation to computer systems and training. This had been provided to the claimant and he had been offered further training but did not take it up.

317. The respondents also point out that this claim is out of time. The claimant has not put forward any contentions as to why it should be allowed out of time. Whilst we would be prepared to state it was a continuing failure to make reasonable adjustments up to when the claimant's absence began on 9 September 2016 this would still make the claim out of time based on an early conciliation certificate of 13th January 2017 and an ET1 of 12th February 2017.

318. *Claim number 14* refers to the PCP of requiring the claimant to attend a disciplinary hearing. Strictly speaking it should be requiring staff to attend disciplinary hearings not concentrating on the claimant; a PCP has to be of general application.

319. The reasonable adjustments contended for were:
(1) Failure to asses Claimant's fitness to attend
(2) Failure to delay disciplinary hearing

320. The adjustments requested were not reasonable because :

Re (1) The claimant had not be advised he was not fit to attend a disciplinary hearing and there was no reason to go behind the claimant's fit note. We also accept the respondent's contention that a fitness assessment can be a reasonable adjustment following *Spence vs Intype Libra (2007)*

Re (2) The claimant had not requested a postponement to the disciplinary hearing. He had attended the doctors and no advice was passed to the respondent that the claimant was not fit to attend the disciplinary hearing. His fit note said he was fit to attend work from the date of the disciplinary hearing. He advised the respondent he would be attending the hearing on 8 September, he discussed attending work the next day, he did not appear unable to participate in the hearing, there was no postponement request from the claimant or from his union representative. To adjourn could not be a reasonable adjustment in these circumstances.

321. Also the fact the claimant had medical advice saying he was fit meant that the respondent were not aware that attending the disciplinary hearing would place the claimant at a substantial disadvantage.

322. *Claim (15)*: On 19 September 2016 the claimant alleges that R2 pressurised the claimant to return to work via sending emails texts messages threatening further disciplinary sanctions and organising meetings.

323. The PCP therefore is requiring the claimant to engage with discussions about his health and return to work.

324. The claimant suggests also the PCP is imposing time-frames and pressurising the claimant to return to work however the PCP has to be a practice etc which applies to all employees and therefore at least should be the application of a policy to encourage employees off sick to return to work.

325. The reasonable adjustments the claimant contended for were:

(1) assessing the claimant's fitness to attend the disciplinary by obtaining medical reports from the claimant's GP and other practitioners and
(2) failure to make an OH referral and
(3) failure to hold informal discussion with the claimant and
(4) failure to delay the hearing and allow the claimant a period of time to recover before attending the disciplinary hearing.

326. Re 1: The claimant's medical advice did not indicate he was unfit to attend the hearing.
Also see reference to case of Spence above.

327. Re 2: There was no refusal to make an OH referral, the claimant refused to consider this on several occasions then when he did consent attached conditions which made it too difficult to arrange. The claimant also referred to the fact that the R2 had asked HR whether they could force the claimant to go to Occupational Health (mainly as an indication of AH's antipathy to him). This was because the claimant was in effect refusing to go. The wish to refer the claimant to Occupational Health was a supportive measure which would have assisted the claimant in reviewing his medical condition and suggesting reasonable adjustments if appropriate. The history of this case may well have been different had the claimant attended Occupational Health at that earlier point in time.

Re 3: AH made efforts to have informal discussions, the claimant did not want informal discussion (or formal), he complained about AH's attempts to speak to him
Re 4: as above.

328. *Claim (19)* Failure to allow C's wife to attend the disciplinary and grievance hearing. There was no request for the claimant's wife to attend the disciplinary hearing (as opposed to the grievance hearing) the claimant was represented by a trade union representative. There can be no PCP of failing to allow anyone not a trade union representative to attend a disciplinary hearing as this was never refused because the claimant never requested it. Neither could the respondent be aware that the claimant was at a substantial disadvantage when he had not requested his wife's attendance.

329. In respect of the grievance meeting the claim was only brought against PH and not JD. All claims were withdrawn versus PH. For completeness sake we would say that the respondent applied a PCP of only allowing a trade union rep or fellow employee to accompany an employee to a grievance meeting as JD's letter of 1 December. PH's letters were simply reiterating policy there was no specific consideration of the claimant's wife as an alternative companion. However in his correspondence with PH the claimant clearly says 'had I been well enough to

attend a face to face meeting'. He reiterates this point with JD and does not suggest that he could attend if his wife is allowed to come with him. Further he immediately agrees to proceed by way of written questions and answers. Therefore, was no substantial disadvantage because the claimant was not fit to attend a meeting in any event.

330. If we are wrong in that, we find it would have been a Reasonable Adjustment to allow the claimant's wife to attend. But the claim fails because of the substantial disadvantage part.

Indirect discrimination section 19 Equality Act 2010

Claim 7: Refusal to allow a companion of choice to accompany C to the grievance hearing. The PCP must be requiring employees to be represented at grievance hearings only by TU representative or fellow employee 9 (this claim referred to PH) Insofar as this is a disadvantage for disabled employees the claimant was not actually put at this disadvantage because the claimant was not fit to attend a face to face meeting.

Section 15 Claims

331. *Claim 2*: On 5 August 2016 and 8 September 2016 AH refusing to reschedule the disciplinary hearing. There was no less favourable treatment of the claimant because he had not indicated that he wished the hearings to be postponed which he could easily have done given that he had trade union assistance.

332. However, the failure to adjourn was not because of something arising out of out or in consequence of the claimant's disability but because the claimant did not ask for an adjournment.

333. *Claim 3:* Subjecting the claimant to an overbearing sickness absence regime

334. The sickness absence regime did result from "something arising from" the claimant's disability i.e. his absence from work. The sickness absence regime was intended to be supportive, to examine how the respondent could assist the claimant in returning to work. The claimant's claim here mainly concentrated on R2 telephoning and emailing him to have informal contact with him, complaining that he had failed to get in touch two days after he had been taken to hospital and alleging that it was his fault they had not had cover in court. R2 was certainly persistent initially in her attempts to make contact with the claimant but the respondent's sickness absence policies encouraged this approach on the basis that it was likely to promote an earlier return to work than if a manager simply left someone off sick without any contact. We find it was not less favourable treatment. If it was it was objectively justified as the respondent is entitled to have a proactive sickness management policy.

335. In respect of the claimant's argument about the attendance management policy where it says

> "managers must respect the employee decision to take non-disability-related sickness absence where they feel they are unable to work due to illness or injury"
>
> We agree with Mr Dilworth's interpretation that seeking to hold a meeting with the claimant is not inimical with this process. The meeting should be entirely supportive and ways of helping the employee such as counselling, specialist care, OH referrals can be discussed.

In any event after the initial attempts at contact and the attempts to arrange the first meeting there were no further actions by R2 to manage the claimant's sickness absence

336. Therefore we find there was compliance with the policy, as it encourages with the one hand proactivity and that this section does not preclude meetings and contact. The only other reasonable interpretation is that depending on the medical advice received a judgment should be made. In this case until the letter of 28 September the respondent had no medical advice, when they got advice they left the claimant alone in line with the medical advice. So there was no less favourable treatment. Alternatively the application of a proactive absence management programme was objectively justified in the absence of any medical advice.

337. (3) Refusal to allow a companion of choice to accompany C to a grievance meeting on 27th October. This is a claim against PH who simply set out the terms of the policy and then asked if adjustments were required. Her involvement then ceased before a final decision was made to refuse the claimant his choice of his wife to accompany him to this meeting.

338. The claimant withdrew this claim in any event against PH, if that was not a withdrawal against the first respondent we find that the claimant's request was due to something arising from his disability but there was no unfavourable treatment as he was not fit to attend any face-to-face meetings in any event.

339. If this is a claim against JD who refused his request on 1st December as the claimant was still not fit to attend a face to face meeting there was no unfavourable treatment. He did not say he could attend if his wife was allowed to accompany him. Further in our view without more (specific medical advice for example, or OH advice) the policy is justified due to issues of confidentiality.

<u>Harassment</u>

340. The harassment was in relation to R2 pressurising the claimant to return to work by:

(5) sending emails
(6) text messaging
(7) threats of further disciplinary sanctions and
(8) organisation of meetings.

This is in the period 23 August 2016 to 26 September 2016.

341. We accept that that R2 was attempting to adhere to the respondent's policy which emphasised the importance of keeping in touch with an absent employee. She acted on HR advice that she should follow the timeline in the absence management policy. Therefore there was no purpose in the sense of intention to create a hostile etc environment.

342. Did her actions have the effect of creating such an environment?

343. Firstly the claimant did not set out how the texts and emails created an intimidating, hostile, degrading humiliating or offensive environment.

344. In addition, it was not reasonable for the claimant to see the texts/emails as having this effect R2 was seeking to manage the claimant's sickness absence as she was entitled to do. She was entitled without more to wish to communicate with the claimant rather than his wife. The claimant did on the 19th September indicate he was not able to liaise with AH directly but given that there was no medical advice regarding the claimant's fitness to attend a meeting it was again not reasonable in these circumstances for the claimant to expect AH to desist from contacting him and trying to arrange a meeting. When the doctor advised contact was inappropriate on 28 September the contact stopped.

345. Further the contact was because of the claimant's absence and not because of a disability as he was not disabled at this point.

Victimisation

346. *Claim 25* : the allegation relates to 28 September 2016 and relates to Roz Atkinson that (1) she failed to remove herself from the claimant's case until there was a further complaint and (2) that she attempted to coerce the claimant into having his grievance dealt with on an informal basis.

347. Re 1:RA did remove herself from the claimant's case immediately the claimant requested it and HA took over once she was asked to. Factually therefore the claimant's contention is incorrect.

348. Re. 2, there is no factual matter on 28 September which is relied on for this allegation and therefore it is not apparent what it is in the claimant refers to when in his written submissions he stated "coerced to have the grievance dealt with on an informal basis as opposed to adhering to the CPS's grievance policy". Further there was nothing in the claimant's written statement which related to this point. On 30 September RA did suggest his grievance could be resolved informally. However this is not detrimental treatment firstly it is standard practice with a grievance to attempt to resolve it informally whether policy recommends or requires it. Secondly there was no compulsion on the claimant to agree. Thirdly this was not pursued in any event and finally .when he did not agree it was treated formally

349. It is not clear what the protected act was we assume it was the claimant grievance of 28 September which did refer to discrimination. The claimant did not

explain on what he relied to suggest that the reason for the treatment9if it was detrimental/less favourable which we have found it was not) was because of a protected act. However we have considered matters from which an inference could be drawn. For eg that Ms Atkinson did not give evidence however she had produced medical evidence she was unfit . Ms Atkinson's motivation in suggesting informal resolution was not within the claimant's own knowledge so his evidence could not in the instance assist. In itself it was not an unusual suggestion neither was any pressure put on the claimant to agree.

350. The only matters from which we could draw an inference other than the failure to give evidence which we have dealt with were the references in her OH assessment referral (the reference to "perceived" and "non-cooperation")
Whilst the use of words was putting a negative slant on the claimant's behaviour it was not outwith how an HR person might describe it. Indeed in order to get the right advice from OH it was potentially relevant information.

351. We have taken into account the fact there were no culpable or malicious emails regarding the claimant from Ms Atkinson in the bundle, which would have expected had she sought to victimise, nor any reference to the discriminatory aspect of his grievance . Accordingly we declined to ascribe to her a subconscious motivation based on the OH referral.

352. Further there were legitimate reasons for saying 'perceived' as there was no medical evidence at that point (that was the point of the referral) and regarding 'non-cooperation' it was true that the claimant had not wanted contact. Whilst there were less negative ways of expressing this as JD would later state in the grievance outcome. We accept that an inference could potentially be drawn from this we find it is outweighed by the positive factors we have referred to above.

353. In submissions the claimant seemed to be relying on these comments as the detrimental treatment. Insofar as he does we do not accept that these words were used as a result of the claimant's grievance. The view had already been formed between AH and RA that the claimant was not cooperating and this had been formed prior to the doctor's letter because he would not answer emails or texts etc , wished to have his wife as point if contact and was refusing to come to a meeting to discuss his absence. In respect of perceived this was not an unusual expression to be used in these situations in our experience as at this stage no medical evidence confirming his illness had been received ,only a sicknote.

354. Accordingly the claims against the third respondent fail.

355. *Claim (26):* on 31 October 2016 the claimant complains regarding PH/R5 against whom the claimant has withdrawn all allegations and therefore we considered this no further.

356. *Complaint (29)* this is that JD and MCT rejected the claimant's request for reasonable adjustments. However it is not clear what this is in relation to in respect of MCT. In respect of JD the issue would be not allowing the claimant's wife to attend the grievance meeting/protected act. The claimant has not suggested any connection between his protected acts and the refusal of JD to allow his wife to

attend rather than it simply being JD's adherence to the respondent's policy and the legal position and advice he had had from HR as JD contended in evidence. We find JD a credible witness. The claimant has not pointed to anything from which we should draw an inference. Indeed JD left the door slightly open on this point. In evidence he said he believed he might have sought further advice from HR had the claimant persisted in his request. However he did not do so. There is no evidence whatsoever that someone who had not done a protected act would have been allowed to have a companion of choice. MCT had no involvement in this situation therefore it is unclear to what the claimant is referring.

357. No other victimisation claims were pursued. We note the respondent pointed out that any such claims against AH could not be pursued ad as she had not be cross examined about her motivation in this context, and indeed the first mention of discrimination was after many of the matters the claimant relied on.

Protected disclosures

358. Did the claimant make a protected disclosure? The claimant's protected disclosures were:

(1) on occasions too numerous to particularise he raised health and safety concerns regarding the working practices of AP's following digitisation.

(2) verbally on 14 April 2016 and

(3) in writing on 25 April 2017 he raised a concern regarding the complaint which PCX made about him on 21 March 2016.

(4) on 8 September at the disciplinary hearing

(5) a grievance letter of 14 October

(6) a further grievance letter of 11 November

(7) letter of 21 November 2016.

359. *Re: disclosure 1*; We have found factually these issues were not raised. Further this is far too vague to qualify as disclosure, taking **Kilraine vs London Borough of Wandsworth** into consideration. There needs to be some factual content and specificity regarding the information provided and the allegation made.

360. *Disclosure (2):* We have found that on the basis of AH's note of the meeting issues regarding the claimant personally were raised re health and safety but not in the public interest. Neither were any wider issues raised re PC X.

361. *Disclosure 3:* Health and safety of staff is referred to in the letter of 25 April 2016.

The meaning appears to be that the claimant should not be picked up on his errors as it is inevitable in the way the job is now configured that these will happen. He says they should not be seen as a performance issue but a working practice/health and safety issue. The claimant does not say in terms that the CPS working practices are creating a health and safety risk for staff however we find that was what was meant and in that context it is a protected disclosure. However it is obscure and that would be relevant to motivation.

362. Re the PC X disclosure it was suggested during the course of the hearing that the disclosure was that PC X had made a complaint against him and not PC X's conduct on the day of the hearing. We reject this description as this was not what the claimant's letter of 25 April said. Nor do we accept that the fact of PC X's complaint suggests a miscarriage of justice as by this stage the actual issue had passed and PC X would not be able to obtain any change to that. Neither was miscarriage of justice referred to in terms or even obliquely.

363. The claimant contended to us that by a GMP PC making a complaint it would intimidate the claimant into not opposing bail if they met again or more generally in the future. We found this is highly fanciful and, given that the claimant was a professional, a bizarre suggestion. Further, in the particular context where AP's do not make bail decisions but have to refer to any changes to a prosecutor makes a complaint pointless after the event.

364. In relation to the conduct on the day it is perfectly in order for a police officer to suggest that the bail advice a claimant had already been given was or should be subject to further scrutiny and in that case it was perfectly proper for the AP, if he felt that was reasonable, to ring the crown prosecutor on duty and have the point considered again. Without any evidence there is no reasonable possibility that an AP would obtain a change of the decision. The AP cannot make that decision on his own, the crown prosecutor being consulted would not change anything without further information.

365. Therefore we find it was not a reasonable belief of the claimant to believe a miscarriage of justice was a possibility.

366. We accept that he did complain PC X was trying to put pressure on him and that this could potentially affect the independence of CPS but not that it was reasonable to believe this would happen in the future as a result of this incident.

367. *PD 4 :* we were unable to ascertain what this was as the references in the submissions to the claimant's witness statement did not correlate to 8th September nor was there anything apparent in the minutes of the meeting.

368. *PD5:*14th October Grievance letter the claimant does refer to qualifying disclosures in this letter which he says were in the public interest in relation to PC X in relation to a miscarriage of justice and he raises health and safety issues regarding the digitalisation of the AP's role. Although here the claimant is saying he has already raised these we accept that by this letter he does raise these two protected disclosures.

369. PD6: This is the grievance letter of 11th November 2016 which referred to breaches of the public sector equality (PSE) duty regarding PH's failures in respect of his disability. He asserted it was in the public's interest for the public to know that she had flouted this duty. However the claimant never relied on this and withdrew his claims against PH. We cannot accept the claimant had a reasonable belief that PH had breached an public duty by simply trying to arrange a meeting to discuss his grievance and advise on the policy regarding who could accompany

him as at that stage it was not apparent the claimant would be unable to comply with these two matters. Accordingly we do not believe this is a disclosure. Simply describing something as a disclosure is insufficient.

370. *PD7:* letter of 21st November 2016 to UD the claimant here refers to his letter of 25 April and reiterates the working practices point, he then says that Roz Atkinson has breached her public sector equality duty in the same way he stated against PH. He then describes the ways in which he believes RA has victimised him and says these are all protected disclosures. These disclosures are not in the public interest but about his treatment. In relation to the PSE Duty that has never been relied on.

371. We would also note that in general the detriments relate to AH who would only have been aware of PD 1 to 5, PD 5 being sent on the day she left the role which related to managing the claimant.

Detriments

372. In respect of the detriments the claimant relies on we have considered these even though we have not accepted protected disclosures were made except in relation to one part of the letter of 25 April and PD 5 on 14 October.

373. C*laim (32)* in November 2015 R2 passed judgement on C's work without engaging C in any discussion. As this is prior to any established disclosures this could not succeed.

374. Further, it was submitted that it is out of time and the claimant has not suggested any reason why it should not be considered that it was not reasonably practicable for him to bring a claim earlier. Insofar as there may have been a course of conduct as R2 stopped managing the claimant in October 2016 a claim should have been brought within 3 months of the last act which was 19 September 2016.The claimant's acas conciliation certificate was sought on 13 December (within the 3 month time limit) so that if a detriment is established on the 19 September the claim is potentially in time – subject to a course of conduct being established.

375. *claim (34*): R2 ignored complaints raised during a meeting on 22 January and in subsequent meetings throughout 2015/2016. There was no evidence of any complaints prior to the claimant's grievance letter of 25 April. As he had asked that that letter be recorded rather than asked it to be treated as a grievance factually he cannot establish that they were ignored as it was reasonable to reply to him that his letter had been noted and would be kept on his personnel file. In fact R2 sought HR advice and this is what they told her. If the claimant was unhappy with the response he could have escalated the matter. There is nothing to suggest that R2 acted in this way because the claimant's letter of 25 April contained protected disclosures.

376. *claim (35):* subjected the claimant to an overbearing monitoring regime by subjecting the claimant to formal performance management meetings while ignoring the impact of C's deteriorating health.

377. The second respondent followed the respondent's policies. She did not institute formal performance management throughout the majority of the period and was practical in the help she offered the claimant. Neither was she aware of any deteriorating health until the claimant collapsed at court except for the eyesight problems and migraine both of which she dealt with very promptly. The claimant took some time to follow her advice. The fact that AH also assisted the claimant in recommending smarter working and supporting his application for smarter working demonstrates further a wish to support the claimant. Further she was required to raise the performance matters with him in her role as manager. The claimant has suggested nothing in particular which links the performance management to his protected disclosures. Indeed, we rely on the fact that the performance management began before the main protected disclosure of 25 April 2016 to find there was no connection.

378. *claim (37)* i.e. that:

(1) R2 pre-judged the complaint by PC X
(2) R2 failed to investigate the complaints made by PC X and
(3) R2 ignored the seriousness of C's disclosure.

379.

(1) We do not accept the factual basis of this as R2 agreed that the claimant had been right about the Bail Act. Insofar as she appeared to believe the claimant may have been rude or undiplomatic in how he had responded to PC X this was a reasonable conclusion to draw from the text of what PC X provided in relation to their exchange. The claimant did not suggest that PC X's account was incorrect.
(2) In respect of investigating the complaint, the claimant has not suggested what else AH should have done and given that there was no formal action taken there appears to have been no requirement to investigate it any further other than what she did which is speak to the claimant. There was nothing unusual to suggest an ulterior motive of any kind.
(3) R2 understood that the claimant was complaining about PC X's conduct on the day putting pressure on the claimant but in view of the context which we have explained, i.e. the limit to AP's powers, duty to the court, role of the court as the final arbiter, the need to obtain a duty crown prosecutor's opinion and permission to change any additional recommendation, there was no reason to view this as anything more than R2 did.
(4) We did not accept in any event the way in which the claimant now contextualises his letter.

380. *claim(38):* On 25 April AH failed to initiate the grievance and whilst-blowing procedures.

381. R2 followed HR's advice as referred to above. The claimant did not state that he wished it to be treated as a formal grievance, in fact he just said he wanted his views recording which is what happened. In those circumstances R2 behaved

perfectly reasonably and there was nothing odd about her conduct to suggest that she was acting as she did because the claimant had raised a protected disclosure.

382. R2 did not initiate the whistle-blowing procedure because she did not understand the claimant had made whistle-blowing disclosures. Given the content of the claimant's letter this was a reasonable assumption to make. Further that because the claimant did not say he wanted anything to be done with the grievance this would suggest that there was no other action that needed to be taken. He did seek a discussion in his email of 25 May but again he did not suggest this was a grievance or a protected disclosure of any kind**.**

383. The fact she took HR advice and acted on it also militates against R2 being motivated by a reaction to anything in the claimant's letter which now is described as a protected disclosure.

384. *Claim (39):* On 25 May AH ignored the claimant's grievance. R2 did not treat the claimant's letter as a grievance because there was no reason why she should have done so. Given how he had presented the letter there was no detriment. If there was there was nothing to link it to any protected disclosures.

385. *claim (40):* On 25 May R2 was overbearing demeaning and vindictive in that:

(1) she increased the demands on C,
(2) she omitted to act on the CPS policy on stress management,
(3) she insisted C attend workplace meetings,
(4) she subjected C to a fact-finding meetings,
(5) she subjected C to a disciplinary hearing,
(6) she omitted C's right to a disciplinary investigatory meeting,
(7) she breached policy by omitting to appoint an independent investigator, and
(8) she failed to provide C with an evidence pack until 3 days prior to the disciplinary hearing.

386. Again the claimant has not suggested anything which links R2's conduct to the protected disclosure of 25 April. Further, there was no evidence to support the detriments the claimant relied on regarding:

(1) there was no evidence of increased demands on the claimant, simply R2 was being thorough in picking up on the BPS and time sheets issue. In fact the time sheet issue showed that she had been lax prior to this being brought to her attention and she had not checked these. She then thought to assist him with sorting out the backlog of time sheets.
(2) the stress management issue was not put to R2 in cross-examination and there was nothing to suggest it should be used. There was no evidence that but for the protected disclosures R2 would have applied the stress management policy at this point which was before the claimant collapsed in court.
(3) As a manager R2 was required to arrange meetings with the claimant to address performance; there was nothing to suggest the meetings were not required.

(4-7) It was reasonable to initiate disciplinary proceedings because of the conduct. The claimant in cross-examination accepted that the second error was serious. We consider the claimant's conduct on 1 August 2016 in respect of the murder bail application was serious and it was perfectly reasonable to initiate disciplinary proceedings. In respect of the policy R2 did follow the respondent's policy as it was possible to investigate and then hold a disciplinary hearing oneself as a line manager.
Regarding her email to RA she was not cross examined on this and the claimant did not refer to it.
(8) R2 accepts she should have sent the evidence pack earlier. There was nothing to suggest it was more than that. The pack was sent later on, once it was requested. There was no detriment. The claimant could have asked for a postponement of the hearing if he felt he had received the package late. He was represented by his union; his union did not ask for a postponement either.

387. Claim (41): 8 September 2016 subjecting C to a disciplinary without assessing his fitness to attend. Factually this is not a detriment as there was no need to assess the claimant's fitness to attend as he had produced a fit note which indicted he was fit to return on 8 September. In the absence of an adjournment request there was no need to pursue the matter further. In his email of 4 September he said he was looking forward to returning to work.

388. *Claim (42):* 8 September 2016 R2 failed to remove herself from the disciplinary process despite:

(1) outstanding grievances against her,
(2) CPS policies, and
(3) her role as a key witness.

389. There were no outstanding grievances against R2 particularly as the letter of 25 April 2016 could not be read as a grievance. Neither was she a key witness. The fact she had originally intended to take this hearing when she thought no one was available does not make her a key witness. There was no contravention of policy suggested specifically by the claimant insofaras this refers to AH having undertaken the factfinding, this is allowed under the respondent's policy. There was no request that she remove herself from the disciplinary hearing. The claimant had a trade union representative who could easily have raised this matter. On the contrary they indicated they were ready and willing to proceed with the hearing. Factually this was not a detriment and there is nothing to suggest in any event any connection with the protected disclosure.

390. *Claim(44):* 15 2016 R2 issued the claimant with a written warning. It was perfectly reasonable to issue the claimant with a written warning in respect of the misconduct on 1 August and there was nothing to suggest this was connected with any alleged disclosures. Had it been completely disproportionate to the offence an ulterior motive might be suspected but it was not.

391. *Claim (45):* 19 September 2016 R2 pressurised C to return to work. We accept the respondent's submission that this is the same as allegation 23 and our findings in relation to that stand.

392. *Claim (53*): 7 February 2017 JD's grievance outcome ignored C's evidence and his disclosures. JD considered all the evidence and whilst his decision was succinct it was justified on the evidence in our view. Further, he sought to emphasise the fact that the claimant may wish to pursue his alleged disclosures and access the whistle-blowing policy and specifically raised that in his report. We rely on this to find that ithere was no connection on the balance of probabilities between the claimant raising protected disclosures and any failure to provide the claimant with a proper report (if he had so failed).

Summary

393.

1. The claimant was not disabled until November 2016
2. The respondent had no actual or constructive knowledge of the claimant's disability
3. The claimant's disability discrimination claims therefore fail.
4. The claimant made one protected disclosure on 25 April repeated on 14th October.
5. The claimant was not subjected to any detriments because of the protected disclosures.

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Employment Judge Feeney

Date: 5th December 2018

JUDGMENT SENT TO THE PARTIES ON

02 January 2019

FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.