EMPLOYMENT TRIBUNALS

Claimant: Mr M P Sutcliffe

Respondent: Crown Prosecution Service

HELD AT: Manchester **ON:** 14 June 2019 (reading day in chambers), 17-19 June 2019 and 20 June 2019 (in chambers)

BEFORE: Employment Judge Slater
Mr M C Smith
Mrs S J Ensell

REPRESENTATION:

Claimant: Mrs S Sutcliffe, claimant's wife
Respondent: Mr S Redpath, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of victimisation listed at 2(1) in the agreed list of issues is well founded.

2. The complaints of victimisation listed at 2(3), 2(5) and 2(6) in the agreed list of issues are dismissed on withdrawal by the claimant.

3. The complaints of victimisation listed at 2(2) and 2(4) in the agreed list of issues are not well founded.

4. The complaints of failure to make reasonable adjustments identified as FP1-3 in the agreed list of issues are not well founded.

5. The complaint of failure to make reasonable adjustments identified as FP4 in the agreed list of issues is well founded.

6. There will be a remedy hearing on 22 October 2019.

REASONS

Summary

1. The claimant was a caseworker with the respondent from 6 December 2001. His employment was terminated on grounds of incapacity in July 2018 after a lengthy period of sickness absence due to stress and depression. The claimant did not bring any complaints about his dismissal in these proceedings.

2. The claimant brought a grievance in June 2017 which included an allegation of unlawful discrimination. The respondent accepts this was a protected act. The outcome of the grievance was not in the claimant's favour. The investigating officer identified suspected anomalies in time sheets and a disciplinary investigation was held into the suspected anomalies. The claimant began his period of sick leave just after the outcome of the grievance, in December 2017, and continued on sick leave until his dismissal in July 2018. The claimant appealed unsuccessfully against the grievance outcome. The disciplinary investigation concluded there was no case to answer but the claimant was unhappy about comments made by the investigating officer in her report. The claimant complained about this and other matters to the Chief Crown Prosecutor and the Director of Public Prosecutions, but was unhappy with the response. Absence management meetings were held in June and July 2018, resulting in the termination of the claimant's employment. The claimant received an award of compensation under the Civil Service compensation scheme on termination of employment but believes the amount awarded was incorrectly calculated.

Claims and issues

3. The claimant brings complaints of victimisation and failure to make reasonable adjustments about various matters relating to the grievance, disciplinary and absence management processes.

4. The respondent conceded that the claimant was disabled at relevant times by reason of depression and anxiety.

5. The claims and issues were identified and recorded at a case management preliminary hearing on 6 March 2019. This agreed list of issues is reproduced in the Annex to this judgment.

6. At the start of the hearing, the respondent agreed that the claimant had done a protected act in that he had made an allegation in the grievance of 22 June 2017 that a person had contravened the Equality Act 2010. The respondent also accepted that there were no live time-limit issues.

7. Immediately prior to closing submissions, the claimant withdrew the complaints of victimisation identified at 2(3), 2(5), and 2(6) in the agreed list of issues. These complaints have, therefore, been dismissed on withdrawal by the claimant.

Procedural history

8. The claimant presented two claims. The first was presented in April 2018. The second was presented after the termination of the claimant's employment. There was a case management preliminary hearing in relation to the first claim on 3 July 2018. By an order dated 26 July 2018, Employment Judge Franey gave the claimant permission to amend her claim introduce the allegation which appeared as paragraph 2 (6) of Annex B to the case management orders made on 3 July 2018. This was the complaint which appears as paragraph 2 (6) in the agreed list of issues for this hearing. There was a case management preliminary hearing on 6 March 2019 in relation to the two claims. At this hearing, the agreed list of claims and issues was produced.

9. There was a further case management preliminary hearing on 7 June 2019 to discuss the contents of the hearing bundles and other matters relating to readiness for the final hearing. The claimant complained about irrelevant material being included by the respondent in the hearing bundles. The claimant complained that Mr Gough had failed to say what he knew about complaints, discipline and management action records about Julie Winstanley in his witness statement. At the case management preliminary hearing on 6 March 2019, the judge had not made an order in relation to the claimant's application for disclosure of complaints, discipline and management action records about Julie Winstanley on the basis that Mr Gough should look to explain in his witness statement what he knew such matters and why he found Ms Winstanley's evidence more credible than that of the claimant when he compiled his investigation report. For reasons given orally, Employment Judge Slater ordered that the hearing bundles would remain as prepared by the respondent. The judge ordered that the respondent must provide the claimant with a supplementary witness statement for Mr Gough explaining what he knew in the relevant period between 6 September 2017 and 6 December 2017 about complaints, discipline and management action records about Julie Winstanley. Applications made by the claimant for witness orders for the attendance of John Ellam and Martin Goldman were refused.

10. The day after Nicole Furzeland gave evidence for the respondent, the judge raised with the parties what the tribunal had realised, after Ms Furzeland completed her evidence, appeared to be an omission in her evidence. The judge noted that she had not given evidence as to whether or not she had knowledge of the claimant's protected act. The judge suggested, in the first instance, that the question be put to Ms Furzeland by email with the possibility of recalling her to give evidence if the claimant wished to challenge the answer she gave in writing. However, this was not done because the claimant agreed that we should proceed on the basis of there being an agreed fact that Ms Furzeland did not know about the protected act. Subsequently, the claimant withdrew the allegations of victimisation which concerned Ms Furzeland.

The evidence and cast list

11. At the final hearing, the hearing bundles contained a considerable number of documents which neither party referred us to. However, there were a number of documents which the respondent had not included in the hearing bundles which were added during the course of the hearing.

12. At the final hearing, the tribunal heard evidence from the claimant and, for the respondent, evidence from the following witnesses:

> Howard Gough, who was Head of the North West Complex Casework Unit at the relevant times and conducted the grievance investigation. Married to Caroline Staveley.
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> Sue Dziegel, an Operational Business Manager in the North West area who was the Grievance Commissioning Officer and Disciplinary Investigation Manager.
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> Nicole Furzeland, a Paralegal Business Manager, who conducted the disciplinary investigation.
>
> Martin Hill, Deputy Head of the North West Complex Casework Unit, who was the dismissing manager.
>
> Lauren Costello, a District Crown Prosecutor in the North West region, who was the Grievance appeal manager.
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> Chris Marr, who joined the respondent in January 2018 as an HR Business Partner (HRBP). He was involved in giving advice in relation to the Grievance appeal, the disciplinary investigation and Absence Management process which led to the claimant's dismissal.

13. Further people with a significant role in relevant events about whom we heard, but did not hear evidence from, were as follows:

> Suzanne Sutcliffe, the claimant's wife, who corresponded on the claimant's behalf during much of the internal proceedings, and who represented the claimant in these internal hearings (emails from her coming in the email address of Suzie Kirkham). Mrs Sutcliffe also represented her husband in these tribunal proceedings.
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> Julie Winstanley, the claimant's line manager against whom the claimant raised a grievance.
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> Kelly Woodman, the claimant's second line manager, against whom he raised a grievance.
>
> Andrew Wall, who became the claimant's temporary line manager after the claimant raised a grievance against Julie Winstanley.

Caroline Staveley, Business Manager, who was Acting Area Business Manager for the North West at relevant times. Some involvement in appointment of managers dealing with internal processes involving the claimant. Married to Howard Gough.

Caroline Cook, Human Resources Business Personnel from another area.

John Ellam, Human Resources, Business Personnel.

Martin Goldman, Chief Crown Prosecutor for the North West, recipient of the claimant's complaint of 21 May 2018 (along with the then Director of Public Prosecutions).

Martin Summerfield, Head of Human Resources.

Facts

14. We heard a great deal of evidence and read many documents, although, as noted above, we were not referred to all the documents in the hearing bundles. We refer in our findings of fact to those matters we consider most relevant to the issues we have to consider.

15. The claimant began employment with the respondent on 1 December 2001 as an A2 caseworker. In July 2014, he began working part-time, 3 days a week, having made a successful application for flexible working on the basis of looking after his 2 young children, one of whom was disabled. The application for flexible working was agreed by Kelly Woodman.

16. The claimant's line manager at relevant times, until a temporary change was made following the claimant's grievance, was Julie Winstanley. It is common ground that there was a good relationship between the claimant and Julie Winstanley prior to 22 February 2017 and that she had been supportive in facilitating his return to work after an absence for anxiety and depression.

17. The respondent has a practice under which employees may be rostered to work at home on certain days. This is referred to as "smart" working.

18. The catalyst for the events which led to the claimant's claims to this tribunal was a telephone call between the claimant and Julie Winstanley on 22 February 2017. The claimant was working at home that day. He had mentioned to Andrew Wall, that he may need to have a "smart" day on that day so that he could attend a medical appointment with his son. Andrew Wall was doing the roster and put the claimant down for a smart day on that day. The claimant had said that he would confirm with Julie Winstanley if he did need to attend an appointment but he forgot to do so, so Julie Winstanley was unaware of this. Julie Winstanley telephoned the claimant at home and was concerned to hear his child in the background. It appears from what followed, that Julie Winstanley was concerned that the claimant might be undertaking childcare at a time when he was supposed to be working.

19. It is common ground that some work, but not all work, will show up in audit trails on the respondent's CMS system.

20. Julie Winstanley spoke to the claimant about the telephone call on 22 February and an audit trail she had conducted of the claimant's work. She compared his trails with that of 3 other members of staff which she named. She restricted his duties when smart working to ones which would show up on the audit trail. The claimant was unhappy about this. He was, and remains adamant, that, at all times when he was working at home, he was engaged on duties for the respondent or permissible trade union duties. The claimant was also unhappy that he was told that he could not take Flexi credits for attending the appointment with his son. He was told that he could take special leave.

21. The relationship between the claimant and Julie Winstanley deteriorated. There were informal attempts to resolve matters which were not successful.

22. On 21 June 2017, the claimant submitted a grievance. This was primarily about Julie Winstanley who the claimant accused of bullying, harassment and discrimination against him as the carer of a disabled child. It also included a complaint that Kelly Woodman had victimised him as a result of his complaint about Julie Winstanley. He wrote that the main outcome he was seeking was the removal of Julie Winstanley as his line manager. The allegation of unlawful discrimination in the grievance is agreed to be a protected act and is the only protected act relied on in these proceedings. The grievance also contained allegations of breaches of confidence by Julie Winstanley in relation to the claimant and other employees. He wrote that he had an issue with her line management, a lack of confidentiality and trust and that it was paramount, after suffering from depressive illness and dealing with issues with his son, that he could trust his line manager with confidential information if difficulties arose again.

23. The claimant attempted to submit the formal grievance to Wray Ferguson but received an out of office reply. He then submitted it, the same day, to Caroline Staveley. She acknowledged receipt of the grievance in Wray's absence and replied that one of them would be in touch shortly to formally respond.

24. On 23 June 2017, Andrew Wall was appointed as the claimant's temporary line manager.

25. On 27 June 2017, Sue Dziegiel was appointed by Caroline Staveley as the grievance commissioning manager.

26. On 4 August 2017, at what was described as an informal meeting to discuss the grievance submission, Roz Atkinson, HRBP, told the claimant that a change in line management was not something which could be resolved informally.

27. Roz Atkinson suggested Howard Gough as the investigating officer. On 11 September 2017, Sue Dziegiel wrote to Caroline Staveley asking whether, in Roz's absence, she should contact Howard Gough. Caroline Staveley replied the same day, writing that she understood Howard Gough had been appointed as investigator and John Ellam would assist from an HR perspective. Sue Dziegiel wrote to the

claimant on 12 September 2017 informing him of Howard Gough's appointment as investigator. The claimant did not object to Howard Gough's appointment.

28. At some time in this period, the claimant made subject access requests. He informed Howard Gough, on 20 September 2017, that he was waiting for a response to his freedom of information request which had been made some weeks previously. He wrote that it was essential that he had sight of the material prior to their meeting. There was some correspondence in which Howard Gough asked for information about the disclosure and when it was expected. Howard Gough cancelled one meeting which had been scheduled for 28 September but refused to postpone a later scheduled meeting, writing that the meeting was the beginning of the investigation, not its conclusion, and the claimant could send in any further information up to the point the investigation was complete.

29. On 13 October 2017, the claimant sent in an addendum to his grievance. Howard Gough agreed to add a further complaint about Kelly Woodman agreeing to act as appeals manager. The claimant also wanted to add into the grievance that Julie Winstanley and Kelly Woodman had refused to disclose documents in relation to his freedom of information request. Howard Gough said this was outside the scope of his investigation.

30. Howard Gough interviewed the claimant, Julie Winstanley, Kelly Woodman and Andrew Wall in the course of the grievance investigation. The claimant and Kelly Woodman were interviewed on 18 October 2017. Julie Winstanley was interviewed on 26 October 2017 and Andrew Wall on 6 November 2017. Mr Gough wrote in his report that, following the interview with the three main parties (the claimant, Julie Winstanley and Kelly Woodman), he was satisfied that only Andrew Wall needed to be formally interviewed as a potential witness to the allegations.

31. Howard Gough found, as he explained later in his report and in evidence to this tribunal, that Julie Winstanley was an entirely credible witness. He accepted her explanations without further investigation. Although he said in oral evidence that no people had been identified with whom he could have spoken, there were, in relation to the breach of confidence allegations, some named individuals with whom he could have spoken and others who could been identified from the description i.e. people who had PDPs with Julie Winstanley.

32. In the course of the interview with Andrew Wall, Howard Gough asked if he had had any problems with the claimant. Andrew Wall said he had not; the only problems he had were usual; he could not get his Flexi form from him. Howard Gough asked whether he had audit trailed the claimant in the period he had been managing the claimant. Andrew Wall said he had and he had not had any serious concerns.

33. On 15 November 2017, Howard Gough wrote to Sue Dziegiel that he was looking to complete his report in the coming days, hopefully the next day. Shortly afterwards, on the same day, he asked Sue Dziegiel to let him have the claimant's Flexi forms for July to October inclusive. The request was passed on to Andrew Wall. He replied that he was still waiting for the sheets from the claimant. He wrote that he had asked for them numerous times now but still not had them.

34. Howard Gough's decision to look through the claimant's timesheets for the period July to October 2017 is the subject of a victimisation complaint. We need, therefore, to make findings as to Howard Gough's reasons for making this decision. Looking at time sheets for this period was not an obvious line of enquiry, given the scope of the grievance Mr Gough was investigating. The time sheets for July to October 2017 related to a period after Julie Winstanley had been managing the claimant. The sources available to us to help us understand Mr Gough's reasons and, in particular, whether the protected act played any material part in his decision, are: what is written in Mr Gough's report; Mr Gough's witness statement; Mr Gough's oral evidence at this tribunal hearing; and inferences we may draw from relevant matters. We will return, in our conclusions, to the evaluation of Mr Gough's evidence in relation to this crucial matter, and the drawing of inferences. In these findings of fact, we record the material to which we will return when carrying out this evaluation.

35. In his report, Mr Gough set out his conclusions in relation to the allegations he was investigating, without referring to the timesheets for the period July to October 2017 as forming any part of his reasoning in reaching his conclusions. However, in a section headed "Findings" which appears after his conclusions on the allegations, Mr Gough writes about considering these timesheets as follows:

> "6.2 I found it more than a little troubling that notwithstanding the serious nature of the allegations being made, that those allegations were significantly lacking in supportive evidence. The allegations are without doubt very serious indeed, and are some of the most serious that can be made within an organisation which has made it clear will not countenance any form of bullying, harassment, intimidation or discrimination in the workplace. Furthermore, that the consequence for those subject to the allegations would be significant if proven, indeed in this instance potentially career ending. It follows that such allegations should not be made without foundation and that any vexatious or indeed mischievous allegations should be considered very seriously indeed. I will make it clear at this point that I am not saying that these allegations are such, rather that I was unable to find evidence in support of the allegations made outside a subjective assessment of the person making those complaints.
>
> "6.3 This necessarily led me to consider the present position. Mark has sought a change of line management from managers who have sought, justifiably so in my opinion, to challenge his behaviours. Mark's request has been acceded to and he now has a temporary change of management. When interviewed his new line manager was asked whether he too undertook CMS audit trails on Mark. He said that he did. He was also asked whether he sought to challenge Mark in the same way that both Julie and Kelly had done, he said that he had not. This is perhaps significant. Particularly in light of my findings detailed below. (In addition, as detailed above, only upon my enquiry were Flexi forms submitted for the period in which Mark had a change of line management responsibility.)"

36. Mr Gough then set out issues he had identified as requiring further investigation arising from a provisional assessment he had conducted of the CMS data and Flexi forms relating to days upon which the claimant "Smarter Worked".

37. He wrote further:

> "6.4 I will make clear that I am not drawing any conclusions, I am merely seeking to identify opportunities where I would have anticipated Mark's manager to have challenged the above prima facie findings. That they have not been the subject of challenge is the issue which I feel needs to be considered by my commissioning manager. I have therefore concluded that Mark has gone from an environment whereby he has faced challenge to one where, on the evidence before me, he has not. One consequence of the lodging of the grievance appears to be that Mark no longer faces challenge. My commissioning manager may find that factor significant."

38. Mr Gough wrote at paragraph 37 of his witness statement:

> "I asked for the claimant's Flexi sheets for that period because I believed that it was important explanatory evidence linked to the original cause for concern. If Ms Winstanley was following policy and procedure on the basis of productivity then I would need to see if that was warranted. The only way I could do that was to see the Flexi sheets for that period. I do not accept and categorically deny that I took that decision because I was victimising the claimant in any way. I was attempting to get as full a picture as possible to enable me to come to a reasoned conclusion."

39. At the start of his evidence in this tribunal, having confirmed the truth of his two witness statements, Mr Gough added what he described as a rider to paragraph 37. He said that he was looking to establish Andrew Wall's part in the process so looking at the period of Andrew Wall's management. He said that, in the interview with Andrew Wall, Mr Wall had indicated that he had had difficulty getting Flexi sheets from the claimant.

40. In answer to questions from the judge, Mr Gough gave the following further evidence. He said what was concerning him was that he had a complaint making allegations. He could not find anything. He asked what was the motivation? Is it vexatious? The claimant wanted a change of manager. What was it about the change of manager which appealed to the claimant? With Andrew Wall, he had got mixed messages. He wanted to establish whether or not Andrew Wall should have done something he was not doing. It told him that someone went from an environment where he was attempted to be managed to an environment where he was not being managed. Each of the events would have led to a conversation. Mr Gough said he was left with a dilemma; the claimant had got himself into an environment which was more comfortable. Did that make the complaint vexatious? Mr Gough said he could not go that far. When asked why he needed to look into the claimant's motivation, if he had concluded that the allegations were not well founded, Mr Gough said he had not reached a conclusion at the time. He said he wanted to be comfortable that his conclusion was correct. He wanted to leave no stone unturned. He said it could be argued that he should not have done it, but he would have done the same with anyone. He said he did it to better understand what was happening. The claimant and Ms Winstanley went from a good working relationship to a complete breakdown. Mr Gough said he was looking at credibility and liability. Going

down that avenue made him more comfortable with the conclusion that the grievance was not substantiated.

41. On 24 November 2017, Sue Dziegiel asked Mr Gough for an update in relation to a timeline. He replied the same day, apologising and writing that the report was drafted the previous day and would be with her later that day.

42. The claimant's Flexi forms were sent to Howard Gough on 28 November 2017. He requested an extension of time to complete his investigation/report given the receipt of this additional evidence. Sue Dziegiel agreed an extension until 6 December 2017. On 29 November 2017, Howard Gough wrote to the claimant with an update on the investigation, informing him of the extension until 6 December 2017. He wrote that, the previous day, he had been presented with further evidence which he believed may be important to his investigation. The claimant replied, requesting the nature of the new evidence. Howard Gough did not reply to this email.

43. Howard Gough's report is dated 6 December 2017. He sent it to Sue Dziegiel late in the evening on that day.

44. In relation to the allegations about breach of confidentiality, Mr Gough found, based upon admissions made during Julie Winstanley's interview, that CMS data relating to others was shared with the claimant in contravention of the rules relating to confidentiality. He wrote that he did not believe that the breach warranted disciplinary action and recommended that Julie Winstanley be advised that the use of such data in that manner breaches the rules of confidentiality and should be avoided. In relation to the other alleged breaches of confidentiality, Mr Gough did not find the complaints well founded. In relation to the two allegations where specific details were given, he wrote that he did not find any evidence that the alleged conversations took place. Mr Gough reached his conclusion on the allegations about breach of confidentiality on the basis of interviews with the claimant and Julie Winstanley only. He did not interview any of the other people who might have been able to give information. Mr Gough described the evidence of Julie Winstanley, in his report, as "entirely credible and reliable." Mr Gough relied significantly on his assessment of Ms Winstanley as credible in reaching his conclusions. When asked in cross examination why he did not interview others, he said that no one was identified. However, the name of a person whose personal information was alleged to have been discussed in open office, was identified in one allegation. Another allegation related to conversations in PDRs with people Julie Winstanley line managed. There appears no reason why these people could not have been identified from that description.

45. In his witness statement, at paragraph 36, Mr Gough wrote:

> "I found Ms Winstanley to be a credible witness and found that she could provide contemporaneous notes taken at the time of her conversations. I had no reason to believe that she was deliberately trying to mislead me as to why she had taken the decisions that she had taken furthermore her decisions were backed up by policy. I certainly had no reason to believe that she took those decisions based on the fact that the claimant has a son with disabilities."

46. In oral evidence, Mr Gough said that he found Ms Winstanley's account entirely credible. He said he found her to be an entirely credible witness. He said that fundamentally, his assessment of her credibility was based on a lengthy interview with her. She came across as a very credible witness. When asked how he would say that Julie Winstanley followed the performance management policy paragraph 2.1, he said that his assessment of her was not based on compliance with that paragraph. It was based on his assessment of her as a witness of truth.

47. Mr Gough concluded in his report that the allegations about Ms Winstanley's conduct following the conversation on 22 February 2017 and the allegations about Ms Woodman were not well founded.

48. Mr Gough made recommendations in his report which included a recommendation for a disciplinary investigation into the timesheet anomalies he had identified.

49. On 12 December 2017, Mr Gough issued an addendum to his grievance report. He clarified that the further detailed investigation he had recommended should be done should be undertaken by an independent manager; not Julie Winstanley, Kelly Woodman or Andrew Wall.

50. Sue Dziegiel decided to commission a formal disciplinary investigation into timesheet anomalies. We accept her evidence as to the reasons for doing so. The recommendation of Howard Gough was a factor. She also received HR advice from Caroline Cook that, where an anomaly was identified, the business had a duty to look into it. She took the view that the work Howard Gough had done was an initial fact find and thought there were things which needed to be looked into by an investigator.

51. The respondent's disciplinary procedure states at paragraph 5.1:

> "Any investigation must be proportionate to the matter under investigation. In some cases a simple fact gathering exercise will establish the facts and in others the matter may be more complex and will require a greater level of enquiry in order to discover what actually occurred."

52. Paragraph 5.2 provides that, if a line manager has concerns that an employee's conduct has been unacceptable, they must make an initial enquiry into the matter. Paragraph 5.3 sets out the process for a full investigation.

53. Sue Dziegiel knew that the claimant had made an allegation of unlawful discrimination in the grievance. However, there is no evidence to suggest that her decision to commission a formal disciplinary investigation was motivated in any way, consciously or subconsciously, by the fact that the claimant had done a protected act.

54. The grievance report and outcome was sent to the claimant by Sue Dziegiel on 13 December 2017. The claimant was informed that he would be the subject of an investigation.

55. The claimant appealed against the grievance outcome. Lauren Costello was appointed to conduct the appeal. Caroline Staveley informed Sue Dziegiel that Lauren Costello would be the appeal manager. The claimant raised an issue about the grade of manager appointed to conduct the appeal. Lauren Costello was a higher grade than the commissioning manager, Sue Dziegiel, but a lower grade than Howard Gough. Sue Dziegiel queried this with Caroline Staveley, writing that Caroline Cook had advised that the appeal hearing manager should be of a higher grade than Howard Gough. Sue Dziegiel asked if Caroline Staveley could nominate an alternative appeal manager in line with the advice from Caroline Cook. Caroline Staveley sought advice from John Ellam, writing that, if the Appeal Manager were to be a higher grade than Howard Gough, who was a level E, this would mean someone at DCCP level, which would seem to be disproportionate. John Ellam advised that the appeal manager should be a grade higher than the commissioning manager as the decision maker. He wrote that the grade of the investigator should not matter.

56. On 19 December 2017, the claimant was signed off work with stress and depression. He continued on sick leave until his dismissal in July 2018.

57. Nicole Furzeland was appointed by Sue Dziegiel as investigation officer in relation to the disciplinary investigation into alleged timesheet anomalies. Nicole Furzeland was to be supported by HRBP Pam Smith. By February 2018, Chris Marr was also advising her.

58. In January 2018, Chris Marr joined the respondent. He was senior to the two HR advisers in the North West: Pam Smith and Sarah Sutherland. He quickly became involved with the grievance appeal, discussing this with Pam Smith and Sarah Sutherland. He also advised Nicole Furzeland in relation to the disciplinary investigation. He was not involved in attendance management by Andrew Wall of the claimant until around mid-May 2018.

59. A grievance appeal hearing took place in January 2018. There was a further appeal meeting on 5 March 2018. The grievance appeal outcome was sent to the claimant's wife on 12 March 2018.

60. The claimant was referred to occupational health and an appointment arranged for 31 January 2018.

61. The claimant objected to being contacted about a disciplinary hearing prior to the occupational health appointment and subsequent attendance management meeting with his line manager, in view of his mental health.

62. Dr Bell provided an occupational health report on 31 January 2018. He expressed the opinion that the claimant was not currently fit to work because of active symptoms of anxiety. He expected the claimant to recover fully and be able to return to work in due course. He wrote that a key brake on the claimant's recovery remained the outstanding matter of his grievance which the claimant felt had not been properly addressed and which remained unresolved. Dr Bell wrote that, without restoration of the normal employment relationship, the prospects for a sustained

return to work were guarded. He wrote that the claimant would struggle to engage in formal meetings with the organisation but, if these could be held at neutral venues and he could be accompanied or appoint a representative, he should be able to manage.

63. Chris Marr advised Nicole Furzeland on her response to the claimant. Nicole Furzeland wrote to the claimant at around 4.30 p.m. on Friday 2 February 2018 that she was willing to make reasonable adjustments to facilitate his attendance at the investigation meeting. She wrote that, in the absence of occupational health advice to state that the claimant was not able to participate in the investigation process, she would suggest that delaying this would not be in his interests and looked to convene the meeting already planned.

64. Mrs Sutcliffe replied on behalf of the claimant. She suggested that contacting the claimant before the occupational health report was available was to intimidate and deliberately exacerbate the claimant's condition. She wrote that the claimant's recovery was being severely impacted on an almost daily basis by the succession of emails generated by CPS employees. She wrote that he had received CPS emails in the last three Fridays at around that time of day. She wrote that a letter of authority allowing her to communicate on the claimant's behalf would follow. She asked that emails be sent to her at her email address in the hope that she could seek to "buffer" the claimant from further psychiatric injury. She asked Ms Furzeland to refrain from emailing or contacting the claimant directly given his current state of health. Mrs Sutcliffe provided the letter of consent to act on the claimant's behalf on 4 February 2018.

65. Nicole Furzeland replied on 5 February 2018, setting out reasons for the investigatory interview to take place and adjustments that would be made.

66. Mrs Sutcliffe wrote again to Nicole Furzeland on 5 February. She wrote that the content of Ms Furzeland's email clearly demonstrated the ongoing lack of communication between CPS employees. She wrote that she had copied in the ABM (Wray Ferguson) in the hope that somebody was able to fulfil an overarching role in respect of this. She complained that three CPS meetings were scheduled to take place in the same week: a grievance appeal meeting; the disciplinary investigation meeting and a managing attendance meeting. She questioned whether this was a proportionate or reasonable request given they were now in receipt of the claimant's occupational health (OH) report. She suggested that Ms Furzeland contact the claimant following the next OH report.

67. Ms Furzeland replied the same afternoon, in a way advised by Chris Marr. She suggested that what Mrs Sutcliffe saw as a lack of communication between CPS staff was, in fact, a reflection of the importance that they placed upon confidentiality and impartiality. She wrote that she would continue to maintain the strictest confidence while remaining open to rearranging meetings as necessary. She postponed the planned investigation meeting.

68. The claimant began ACAS early conciliation on 7 February 2018.

69. The investigatory interview was later rescheduled to 14 March 2018. Mrs Sutcliffe requested that the investigatory meeting be postponed again, until after the next occupational health appointment. On advice from Mr Marr, Nicole Furzeland wrote that she intended to proceed with the meeting as scheduled. Ms Furzeland asked Mrs Sutcliffe to confirm what adjustments the claimant required to enable the meeting to go ahead. Mrs Sutcliffe replied that the claimant would submit a written response to the initial fact-finding exercise. She did not state explicitly that the claimant would not attend the meeting.

70. On 9 March 2018, the claimant provided a written response to the disciplinary allegations. On 12 March 2018, Ms Furzeland confirmed by writing to the claimant's CPS email address receipt of the document and outlined that she was out of the office for a number of days and wanted to consider the claimant's written evidence fully, so she was postponing the meeting scheduled for 14 March. She asked for copies of the emails the claimant relied on in his written evidence. It appears that the claimant did not see this email since it was sent to his CPS email address. In response to an email from Mrs Sutcliffe on 14 March about not having acknowledged receipt of the claimant submission, Nicole Furzeland wrote on that day saying that she had responded to the claimant's CPS email address and copied the contents of that email.

71. In the meantime, on 12 March 2018 at 20.43, the grievance appeal outcome was sent to Mrs Sutcliffe. Mrs Sutcliffe replied later that evening to Ms Costello, complaining about the email being sent at a time when she had just managed to settle her son. She also wrote that it had been extremely stressful to receive more CPS emails at 10 pm the previous Thursday. She wrote that the claimant did not feel satisfied that his appeal had been properly considered. She wrote that they would continue with ACAS early conciliation.

72. Mrs Sutcliffe responded to Ms Furzeland's request to provide emails. She wrote that the CPS were failing to make the reasonable adjustment of dealing with this matter in writing. She requested that all future correspondence be sent to their home address and that Ms Furzeland should not email Mrs Sutcliffe's address or any other. In a further email sent a couple of hours later to Sue Dziegiel, Mrs Sutcliffe wrote that, in the previous seven days, three different CPS employees had sent emails to her personal email address at almost 9 pm, 10 pm, 11.15 pm and around 7 am that day. She wrote: "These intimidating measures are unacceptable. You are aware that Mark is signed off work unwell and are in possession of an OH report detailing his disability and fragile state of health. This was the very reason I was forced to act as a buffer between the CPS and Mark. Now I myself am scheduled to see the doctor at 10:55 am today as a consequence of the CPS's ongoing harassment." She asked Ms Dziegiel to ensure that no further emails were sent to that address and wrote that postal service would suffice.

73. The period of ACAS early conciliation ended on 20 March 2018.

74. On 26 March 2018, Nicole Furzeland sent the claimant by post an update on progress. The claimant accepted that he received this a few days after 26 March.

75. On 4 April 2018, Sarah Sutherland sought information from Mr Marr on timescales about meetings for the claimant. She wrote that decisions needed to be made about the claimant's absence but she was hesitant to advise Andrew Wall to refer the absence to a decision maker before the investigation had been concluded. Mr Marr agreed that referral to a decision maker should be delayed while the investigation was outstanding.

76. On 5 April 2018, there was a managing attendance conference. The claimant and his trade union representative were expected to dial in but did not do so. The claimant's evidence, which we accept, was that the invitation was only posted the day before and he had alerted the respondent that he could not participate because he did not have the dial in code.

77. On 12 April 2018, a further occupational health report was prepared by Dr Bell. This recorded that the claimant had told Dr Bell that his concerns about his grievances remained unresolved and he continued to feel that this had not been handled appropriately or in good faith and this was now being escalated to an employment tribunal. Dr Bell gave the opinion that the claimant was not fit to return to work currently because of active psychological symptoms. He wrote "I am concerned that the workplace dispute is becoming increasingly locked up and the differences of opinion between his views and yours appear increasingly irreconcilable. The prognosis for return to work is becoming increasingly guarded and the protracted, unresolved employment dispute remains a threat to his recovery and psychological health." He wrote that the claimant should be able to engage with the organisation to try and make progress in resolving the background workplace dispute. However, this might need to occur indirectly through his union representative or alternately through correspondence in the mail, because of anxiety symptoms. This would allow him time to consider any responses and deal with matters in a controlled fashion without provoking anxiety. Any meetings needed to be carefully prearranged, with sufficient notice, and at neutral venues, probably with someone there to support him, since his trust and confidence in his employer's processes was significantly damaged.

78. The claimant complains of excessive contact with him and his wife in the period 20 December 2017 and 14 April 2018 and of the times at which some of the email correspondence was sent. In the list of issues, the assertion is made of 42 occasions of contact in this period, including contact at 7.29 am and 11.29 pm. We were not shown evidence of all contact in this period or of all the alleged 42 pieces of correspondence. However, it is clear from what we have seen, that there was extensive correspondence in this period which related to the three internal processes of the grievance appeal, the disciplinary investigation and the attendance management process. We have seen that some of the email correspondence was sent outside normal office hours. It appears that the correspondence was sent when the relevant managers were working outside normal hours to keep on top of their workload. For example, Andrew Wall sent an email to Mrs Sutcliffe at 23.29 on 13 March 2018. Mr Wall apologised for missing a telephone appointment because he had been busy. He wrote "Unfortunately I am still receiving around 250 emails a week, hence still working at half past 11 at night, so if Mark has anything he urgently needs me to deal with please can you ask him to give me a call on my mobile." Another example is Lauren Costello writing to Mrs Sutcliffe at 20.43 on 12 March

2018. Mrs Sutcliffe wrote back the same night, complaining that it was stressful to receive emails at that time. Ms Costello apologised, writing that she had tried her hardest to comply with time limits set out in the policy rather than keep the claimant waiting because he had told her how much the process distressed him. She wrote that she had worked late to ensure this had been achieved and had not aimed to cause her distress; had she realised, she would have waited until the morning.

79. The claimant presented his first claim to the tribunal on 18 April 2018.

80. On 27 April 2018, Sue Dziegiel sent Nicole Furzeland's interim report to the claimant by DX with a letter informing the claimant that she had decided no formal action should be taken against the claimant. Unfortunately, due to a problem with the DX, this was not received by the claimant until 18 May, at the same time as he received the full investigation report. The full investigation report was completed on 16 May 2018. Although the report recommended that there was no case to answer, it included critical comments about the claimant. Ms Furzeland wrote that there was "lingering doubt remaining over the work conducted by Mark when smarter working and the hours he has recorded on his Flexi sheets." She wrote that there were gaps in his time and his explanations, although plausible on some accounts, on other dates did not feel credible. She wrote that the monitoring and management of the process had been inadequate and because of that it was difficult to determine whether this situation was due to poor performance, misconduct, both or none of them. She wrote that, if Flexi sheets had been submitted on time and checked in a timely manner by the manager and, if work conducted as smarter working was audited properly, then this situation may never have arisen. She wrote that she could not ascertain whether, because of this lack of proactive management, the claimant simply took advantage of the situation or not. She wrote: "some impressions remain but not enough evidence to definitely say misconduct and therefore considering all factors above and although there are issues identified I do not think that there is enough evidence to substantiate a disciplinary hearing in this case. I therefore recommend there is no case to answer."

81. On 16 May 2018, Chris Marr wrote to the HR complex casework team, which were dealing with the claimant's employment tribunal claim. He wrote:

> "Mr Sutcliffe is off work due to long-term sickness absence and his manager recently had a discussion with him that indicated that Mr Sutcliffe did not see a return to work being possible, on this basis we will be looking to obtain a compensation estimate from MyCSP and considering whether his absence can be sustained or dismissal is appropriate (following attendance process). Once we have the MyCSP estimate we will get this across to you. It would seem that Mr Sutcliffe just wants money from this claim based on his ET1 form and therefore the medical inefficiency process, including compensation, coupled with a COT3 may resolve this. We will make sure that absence process is managed with a view to the ET and won't make any decisions before ensuring that it ties in with GLD advice, however North West will be keen to progress at pace from here. Please let me know if you want to discuss."

82. In accordance with Ms Furzeland's recommendation, Sue Dziegiel decided that no further action should be taken. She sent the full investigation report together with a letter confirming that no formal action was to be taken to the claimant on 17 May 2018.

83. The claimant received the interim and final reports together on 18 May 2018 by DX.

84. Mrs Sutcliffe acknowledged by email on 18 May 2018 receipt of the interim and full reports. She noted that Mr Marr was advising in the disciplinary investigation and forthcoming formal managing attendance meeting. She made no explicit complaint in the email about Mr Marr's role and we do not consider that her email could reasonably be understood as making an implied criticism that Mr Marr was to be involved in the managing attendance meeting.

85. A third occupational health report was produced by Dr Bell on 21 May 2018. Although a subsequent occupational health report was produced, the third report was the last one which the dismissing manager saw before making the decision to dismiss. Dr Bell's opinion and recommendations were as follows:

> "This gentleman continues to report stress and anxiety symptoms which appear to have their roots in matters at work. Measures thus far have not been able to restore his trust and confidence to a degree where he is able to contemplate a return to work. Returning to work at this point would simply exacerbate anxiety symptoms and his function would likely be poor.
>
> "He will continue to engage with medical help and support. Hopefully the institution of psychological therapy will help him to better manage his symptoms. However the key to restoring this man's health and paving the way to a return to work remains the resolution of the outstanding workplace matters. This is something which lies between employer and employee."

86. By the time the third occupational health report was produced, there were no internal processes ongoing, other than the absence management process. Mr Marr interpreted the reference in this occupational health report to outstanding workplace matters to be those matters which were the subject of proceedings in the employment tribunal.

87. The claimant could not appeal against the outcome of the disciplinary investigation since this was in his favour, being a decision was that no action would be taken against the claimant. However, he was very unhappy about the comments made about him.

88. On 21 May 2018, the claimant and his wife sent a joint email to the then Director of Public Prosecutions and to Martin Goldman. The subject line of the email was "formal complaint". The email enclosed a two-page document with the title "complaint in relation to Nicole Furzeland's "investigation report"". The claimant stated that he was unwilling to accept the content, prejudicial comments or defamatory remarks contained within the report which he stated to be evidence of further victimisation by Nicole Furzeland and Sue Dziegiel. In relation to comments in the report, he

described these, in the face of a finding of no case to answer as absolutely outrageous and detrimental to him and his good character. He asked that the defamatory remarks be removed, that some details in relation to a day he was present with Sue Dziegiel should feature alongside details of the rota and for an apology for the way in which the matter had been handled from the outset and his personal information shared around at will. In the report and the covering email, Mr and Mrs Sutcliffe referred to the history and background to the matter being the subject of an application to the employment tribunal. In the covering email, they wrote that this was their written objection to the prejudicial, defamatory remarks contained in the report received on 18 May 2018. They wrote: "we have been forced to escalate it to yourselves as the DPP and CCP. This is due to the absolute breakdown in trust between Mark and the employer and the clear conflict in an Area Business Manager overseeing a matter which involves a complaint about her husband. The impact of this ongoing process on our private and family life and Mark's mental health cannot be overstated. We are in the process of writing to our MP to seek advice as to how to escalate this matter further be that via the CPS Inspectorate or the attorney general."

89. It appears that Martin Goldman sought advice from John Ellam after receiving this email. Mr Marr discussed the background to the complaint with John Ellam and offered Mr Ellam help with drafting a response or providing information. We have not seen any documents setting out the advice Mr Goldman was given. Neither Mr Ellam nor Mr Goldman gave evidence in these proceedings. We have had no evidence to explain why the respondent could not have appointed someone more senior to Sue Dziegiel who was independent, in the sense of not having been involved with the claimant up to that point, to look into the complaints.

90. By an email dated 25 May 2015, Mr Goldman acknowledged receipt of Mrs Sutcliffe's email and copied this to Mr Ellam and Mr Marr.

91. On 1 June 2018, Mr Goldman wrote to the claimant and Mrs Sutcliffe. He wrote that he was unclear as to whether their desire was for the email to be considered a grievance and dealt with as such. He wrote:

> "If you wish for the issues raised to be considered under the grievance policy and procedure then I would ask you to note the following from sections 2.2 and 3.1: the grievance policy and procedure places an obligation on employees to make all reasonable attempts to address and resolve any issues on an informal basis, prior to raising an issue as a formal grievance. In the 1st instance, employees should raise the issue with the employee(s) concerned in order to try and resolve matters with them directly, prior to escalating the matter, on an informal basis, by raising it with management (section 2.2). Employment issues should be dealt with promptly and at the lowest level possible (section 3.1).
>
> "If it is your desire to have the issues considered under the grievance policy and procedure this would firstly have to be done on an informal basis via Sue Dziegiel as the commissioning manager for the disciplinary investigation."

92. He asked them to confirm in writing to Chris Marr whether they wished to progress their concerns by way of informal grievance initially.

93. Mr and Mrs Sutcliffe replied shortly afterwards on the same day. They wrote "as specified this was a complaint, a request for intervention to you personally as CCP." They also wrote "you are aware that our complaint was about our exhaustion of the CPS internal procedures and the victimisation which continued throughout. Clearly the employment tribunal is the only route now available as even a CPS lawyer of your seniority, is unable/willing to put an end to this treatment of Mark. Your suggestion that we deal with Sue Dziegiel is frankly shocking given that you are aware she commissioned her "formal disciplinary investigation" into Mark while being in possession of most of the detail of his whereabouts. She then sanctioned the wording of the response which we complained of." They wrote that they would now correspond with their MP and take advice. They noted that Chris Marr had provided advice on this and had now appointed himself HR representative in respect of the claimant's sickness absence. They did not complain that Mr Marr was to be involved in the absence management process.

94. Chris Marr advised Martin Goldman that this email did not require a substantive response given that they accepted that internal procedures had been exhausted and they were not willing to engage with Sue Dziegiel or, seemingly, Mr Marr either and, instead, were to correspond with their MP.

95. On 12 June 2018, there was a long-term absence review meeting conducted by Andrew Wall. Mr Marr attended this. The claimant was accompanied by a trade union representative. During the meeting, Andrew Wall asked the claimant if he would consider the possibility of moving to another division, mentioning Serious Fraud, and whether this could be a possible way to move forward. The claimant asked if the managers would be the same. Mr Wall said that it would mean different managers, a different ABM and a different CCP. He asked that the claimant think about it. The claimant said he was not sure. The claimant said he was not capable of coming back to work, he was not in a fit mental state and at this stage could not speak about the future. The claimant said he had seen his GP again and would email a sick note which was for another two months. The claimant said he had no confidence in the employer, the bar was still the same if he came back he would be treated the same which would not help his recovery. Mr Wall again raised the possibility of maybe going to another department as an adjustment although he could not promise that this would happen. He asked the claimant to think about this option and let him know. He said they could adjourn for the claimant to think about it. He agreed that a decision did not need to be made that day. Mr Marr asked what would help the claimant get back to work. The claimant said this had taken a strain and he could not take any more and he could not see an end in sight; he was not ready to come back so could not predict what he could do. He could not look beyond now and, therefore, could not say what would be ideal at that stage. Mr Wall explained that they were to make a decision within 5 days whether they could continue to support the claimant's absence. Mr Wall told the claimant that there was a risk of redeployment or dismissal; the case could be referred to a decision maker who would hold another meeting. Mr Marr explained the compensation scheme and provided the claimant a copy of what that looked like in terms of figures specific to

the claimant calculated by MyCSP. Mr Marr gave the claimant some explanation of the calculation. He said that any questions could come back to Mr Marr or MyCSP.

96. It is agreed that, at some point, the claimant's wife asked Mr Marr to go back to MyCSP and check that they had worked out the figures correctly but Mr Marr refused and told them they needed to contact MyCSP themselves. The claimant did not, in his evidence, suggest that Mr Marr could bring any special knowledge to assisting in the calculation. They were just asking Mr Marr to ask MyCSP to clarify how the payment was calculated. It appears from the claimant's evidence that something they had read on a website made them question the figure. The claimant believes that the compensation payment he received after termination was lower than it should have been. We did not hear evidence as to why the claimant believes this to be the case, other than that something on a website led them to question this. The claimant said in evidence that he did not feel it appropriate for his wife to contact MyCSP and they would probably want to speak to the claimant. However, there is no evidence, other than this expressed belief, that this would have been the case.

97. On 14 June 2018, Andrew Wall wrote to the claimant with the outcome of the long-term absence review meeting. He wrote that this was to be referred to a decision maker to consider whether the claimant's sickness absence could continue to be supported or whether redeployment or dismissal was appropriate.

98. Martin Hill was informed by Chris Marr that he had been appointed as decision maker.

99. A fourth occupational health report was prepared by Dr Bell. Mr Hill did not see this before the meeting but the claimant had a copy. Mr Hill had seen the previous occupational health reports and the claimant told him in the meeting that the latest report was on similar lines. The claimant did not want to postpone the meeting to enable Mr Hill to receive the fourth report.

100. The formal long-term absence review meeting took place on 13 July 2018. Mr Marr had a pre-meeting with Mr Hill during which he went through the minutes of Andrew Wall's meeting with the claimant, which had included discussion about a possible move to another division. The claimant said in evidence that this meeting was the first time he knew Mr Marr was involved in the matter and that he found out through a freedom of information request later that Mr Marr had been advising earlier. However, Mr Marr had attended the absence management meeting with Mr Wall in June 2018. It is also apparent from Mrs Sutcliffe's emails, that she had been aware that Mr Marr had been advising in relation to other internal processes and was to be involved in the absence management. It appears, therefore, that the claimant was mistaken in his recollection on this point, unless Mrs Sutcliffe had not shared her knowledge of Mr Marr's involvement with the claimant.

101. In the course of the meeting, Mr Hill discussed with the claimant the possibility of redeployment e.g. to the Serious Fraud Office. The claimant responded that he had not received an offer so it was a hypothetical situation. He said that, at present, he was not fit to return to work, so this would not be a possibility. Later in the meeting, after a short break, Mr Hill again asked about redeployment. The claimant explained that a return to work was academic as he was not yet fit to return to work.

Mr Hill noted that the service could not sustain the absence and there was no possibility of redeployment. Adjustments were discussed and the fact that there was a barrier to recovery. Mr Hill said that, as the business could not support a continued absence, and there was no likely date of return that could be identified, dismissal was the only course of action as redeployment was not feasible. Mr Marr explained that the claimant had the right to appeal the decision. He said that the outcome letter would be followed by confirmation of compensation and right of appeal if this was less than 100%.

102. Mr Marr confirmed in evidence that redeployment was being considered only within the CPS. We accept his evidence about the size of the organisation and various divisions. The example given, the Serious Fraud Division, has 9 levels of management before there is common management between that division and the department within which the claimant worked. We accept Mr Marr's evidence that there is little movement of people between the claimant's department and the Serious Fraud Division. A move to the serious fraud division normally requires a successful application for a particular job, which involves an interview. The CPS and other government organisations are separate employers.

103. The claimant referred us to a policy entitled "organisational change/redeployment policy" which he said he had obtained from the trade union after his dismissal. The claimant relied on this as evidence that redeployment was possible outside the CPS into the wider civil service. We can understand how the claimant, by reading parts of this policy, could come to the view that it could be applicable to his situation. However, we accept that Mr Marr's understanding was and is that this policy does not have any application outside the situation of organisational change and that it is not applicable where a person is unable to do their current job, which continues to exist, because of ill-health. We accept that his understanding was and is that redeployment in the claimant's situation came under the attendance management policy and that references to redeployment in the attendance management policy were to redeployment within the CPS.

104. Neither the claimant, who was a trade union representative himself, nor the trade union representative who accompanied him in the absence management meetings, suggested that the claimant would be able to return to work if he could be redeployed outside the CPS in the wider civil service.

105. By a letter which is undated in the bundle of documents but which appears to have been sent on 19 July 2018, the claimant's dismissal with effect from 19 July 2018 was confirmed. The dismissal was with pay in lieu of notice. The letter noted that the claimant may be entitled to compensation under the Civil Service compensation scheme and that details of the level of compensation would be sent to him within 10 working days from the letter.

106. The claimant was paid compensation under the Civil Service compensation scheme although, as noted above, the claimant believes this has been incorrectly calculated, to his detriment.

107. The claimant presented his second claim to the employment tribunal on 12 October 2018.

Submissions

108. The parties both made oral submissions.

109. Mr Redpath, for the respondent, referred to the legal cases of *Derbyshire and others v St Helens Metropolitan Borough Council [2007] ICR 841* and *Environment Agency v Rowan [2008] ICR 218.* In the *St Helens* case, Mr Redpath referred us to parts at page 863 of the ICR report: that an unjustified sense of grievance cannot amount to "detriment"; and that an alleged victim cannot establish "detriment" merely by showing that she had suffered mental distress; it had to be objectively reasonable in the circumstances; distress and worry which may be induced by the employer's honest and reasonable conduct in the course of his defence, or in the conduct of any settlement negotiations cannot (save possibly in the most unusual circumstances) constitute detriment. He referred to the *Rowan* case for the importance of a structured approach to a failure to make reasonable adjustments claim.

110. The respondent conceded that the claimant had done a protected act, by alleging a breach of the Equality Act 2010 in his grievance.

111. In relation to victimisation complaint 2(1), Mr Redpath submitted that there was insufficient evidence to be satisfied that the steps Mr Gough took were anything but appropriate in the circumstances; he was doing no more than carrying out his function as an investigator.

112. In relation to victimisation complaint 2(2), Mr Redpath submitted that Ms Dziegiel reached her conclusion that someone would need to look at this on the basis of the information before her.

113. In relation to victimisation complaint 2(4), Mr Redpath submitted that contact was required because of the three processes.

114. Mr Redpath submitted that there was no evidence to suggest that what motivated the conduct of those complained of was because the claimant had raised a grievance.

115. In relation to the reasonable adjustment complaint FP1, Mr Redpath accepted that the PCP was applied. He submitted that substantial disadvantage was not made out.

116. In relation to the reasonable adjustment complaint FP2, Mr Redpath accepted that the PCP was applied. He submitted that substantial disadvantage was not made out.

117. In relation to the reasonable adjustment complaint FP3, Mr Redpath accepted that the PCP was applied. He submitted that the respondent asked the right questions and the claimant's answers led them to conclude that redeployment was not an option.

118. In relation to the reasonable adjustment complaint FP4, Mr Redpath submitted that the claimant was not put at a substantial disadvantage by being given the advice in Mr Goldman's letter. Mr Goldman was not saying how it should be dealt with.

119. Mrs Sutcliffe made submissions on behalf of the claimant.

120. In relation to victimisation complaint 2(1), she submitted that the decision was made by Mr Gough to request the timesheets because the claimant had made potentially career ending complaints of discrimination.

121. In relation to victimisation complaint 2(2), Mrs Sutcliffe submitted that the decision to order a formal investigation without a fact find was because of the complaint of discrimination by association. The decision of Ms Dziegiel was a continuation of victimisation by Mr Gough.

122. In relation to victimisation complaint 2(4), Mrs Sutcliffe submitted that excessive contact with the claimant and his appointed representative at anti-social hours was a deliberate collusion between senior members of the respondent to victimise the claimant as a consequence of his complaint. She submitted that Howard Gough and Caroline Staveley were the senior people orchestrating what happened; they allowed it to continue deliberately.

123. In relation to reasonable adjustments complaint FP1, Mrs Sutcliffe said she thought they had drawn to the respondent's attention that they did not consider Mr Marr's role to be appropriate. The respondent should have made the reasonable adjustment of offering separate HR partners to deal with the different processes. They could have engaged HRBPs from outside the area.

124. In relation to reasonable adjustments complaint FP2, Mrs Sutcliffe submitted that the claimant was at a disadvantage because he was ill and Mrs Sutcliffe had no knowledge in this area and was unable to support the claimant given the complex calculations. She submitted that the claimant got the wrong amount in the end.

125. In relation to reasonable adjustments complaint FP3, Mrs Sutcliffe submitted that the claimant was at a disadvantage because he was not externally redeployed and lost employment.

126. In relation to reasonable adjustments complaint FP4, Mrs Sutcliffe submitted that a reasonable adjustment would have been to allow the complaint to be dealt with at a higher level, outside the grievance process. Mr Goldman should have dealt with a formal complaint; not directed them to the grievance process. The claimant was put at a disadvantage by being directed to a manager about whom he was complaining.

The Law

127. The relevant law is contained in the Equality Act 2010.

128. Section 27 defines victimisation as follows:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act."

129. Subsection (2) sets out the definition of a protected act which includes making an allegation (whether or not express) that A or another person has contravened the Equality Act.

130. Section 39(2)(4) makes it unlawful for an employer to victimise an employee by subjecting them to a detriment.

131. The tribunal must ask what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment? The protected act does not need to be the sole or even main reason for the detrimental treatment. Victimisation will be established if the protected act had a 'significant influence' on the employer's decision making.

132. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

133. Section 20 and Schedule 8 contain the relevant provisions relating to the duty to make adjustments. Schedule 8 imposes the duty on employers in relation to employees.

134. Section 20(3) imposes a duty comprising "a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

135. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

136. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the EAT in *Environment Agency v Rowan [2008] ICR 218*. The tribunal must identify the provision, criterion or practice (PCP) applied by or on behalf of the employer, the identity of the non-disabled comparators (where appropriate) and the nature and extent of the substantial disadvantage suffered by the claimant.

Conclusions

The victimisation complaints

2(1) In the decision of the grievance investigating officer, Howard Gough, to start a trawl through the claimant's timesheets to find anomalies and to reject the claimant's grievance in December 2017

137. The respondent objected to the use of the term "trawl". However, even if that term is not used, the essence of the complaint is about Howard Gough's decision to call for and examine the claimant's time sheets for the period July to October 2017. As noted in paragraph 34, looking at time sheets for this period was not an obvious line of enquiry, given the scope of the grievance Mr Gough was investigating. The complaints about Julie Winstanley related to a period when she was still managing the claimant, after the telephone call on 22 February 2017. The time sheets for July to October 2017 related to a period after Julie Winstanley had been managing the claimant.

138. We conclude that the claimant was subjected to a detriment by Mr Gough carrying out this enquiry. A formal investigation resulted from the enquiry and Mr Gough's recommendation. This was unusual; a more normal investigation would be questions from the line manager nearer the relevant time. The claimant suffered anxiety from having to face a formal disciplinary investigation. The claimant was at a disadvantage in this investigation, compared to the position had he been questioned by a line manager at an earlier stage, in having to account for all his time at a much later date.

139. We deal in paragraphs 35 to 40 with the evidence available to us which is relevant to Mr Gough's decision to make this line of enquiry. Paragraph 37 of Mr Gough's witness statement suggested, incorrectly, that he was examining time sheets for the period in relation to which Julie Winstanley was managing the claimant. The report suggests that the examination was undertaken because Mr Gough was looking to see whether the claimant was making vexatious claims. His oral evidence to this tribunal was that he was looking into the motivation of the claimant, to see whether his complaints were vexatious. He said he wanted to be comfortable that his conclusion was correct. He wanted to leave no stone unturned.

140. The thoroughness with which Mr Gough investigated the time sheets for the period July to October 2017 is in marked contrast to his approach to the allegations made by the claimant, particularly about breach of confidentiality by Julie Winstanley, where there were obvious lines of enquiry which Mr Gough chose not to follow. Where he stated in his report that he could not find any evidence to support the claimant's allegations of breach of confidentiality (other than the one admitted by Julie Winstanley), those statements were not made on the basis of having done a thorough enquiry. Mr Gough relied heavily on his impression of Julie Winstanley as an entirely credible witness without testing her evidence against independent evidence which might have had relevance to the assessment of her credibility. We do not know what the outcome might have been of a more thorough investigation, but there is, at the least, a possibility that the material might have shed light on whether Julie Winstanley was entirely credible in all she said. We know from judicial

experience, and would be surprised if Mr Gough, given his position, did not know, that the impression given by a witness may be misleading and the truth of evidence given is best tested against other evidential material that is available. It appears to us that Mr Gough had made his decision on the grievances and was looking for information which would reinforce his decision by embarking on the examination of the time sheets for a period after the claimant had been managed by Julie Winstanley.

141. We accept that Mr Gough could legitimately conclude that the telephone call on 22 February 2017, where the claimant's child was heard in the background, and the audit trail which, whilst accepted by everyone not capable of identifying all work done, was a good catalyst for a conversation about the work being done at home, gave good reason for Julie Winstanley to question the claimant about his smart working and to restrict his duties for a period. Given this, and the previous good relationship between the claimant and Julie Winstanley, we accept that Mr Gough was left with a question as to why the claimant would be making allegations of harassment about Julie Winstanley's management of him following the call. We accept this was a reason for Mr Gough to look further into the issue of motivation of the claimant by looking at what had happened subsequently with a new manager.

142. Even if looking at the claimant's motivation was the principal reason for embarking on the examination of time sheets for the period July to October 2017, we are left with the question of whether the protected act had a significant influence on Mr Gough's decision to look at those time sheets. If it did, the complaint of victimisation will be well founded. There is rarely direct evidence of victimisation, as with other forms of discrimination, and conclusions may need to be reached based on inferences from relevant facts.

143. There are a number of matters from which we consider we can draw inferences which suggest that the protected act had a significant influence on Mr Gough's decision to embark on that enquiry, whether Mr Gough was consciously aware of this or subconsciously motivated by knowledge of the protected act:

143.1. From the references in his report to the serious nature of the allegations against Julie Winstanley, described as "some of the most serious that can be made within an organisation which has made it clear will not countenance any form of bullying, harassment, intimidation or discrimination in the workplace" and the reference to the consequence for those subject to the allegations being "potentially career ending," it is clear that Mr Gough had very much in mind the nature of the protected act i.e. the allegation of unlawful discrimination.

143.2. The very different way Mr Gough treated the evidence of the claimant and Julie Winstanley, failing to follow up leads which potentially could assist the claimant.

143.3. The very thorough approach to examining time sheets for July to October 2017, in seeking reinforcement for his conclusions, wanting, in Mr Gough's words, to leave no stone unturned, compared with Mr Gough's approach in relation to the breach of confidentiality complaints where he did not follow up obvious lines of enquiry.

143.4. Mr Gough's witness statement at paragraph 37, suggesting, incorrectly, that he was examining time sheets for the period in relation to which Julie Winstanley was managing the claimant and being inconsistent with his oral evidence as to why he had embarked on the investigation of time sheets for the later period of July to October 2017.

143.5. The comments Mr Gough made in his report about vexatious claims, although writing that he was not saying the claimant's complaints were vexatious; if there was not clear evidence that the claimant was making vexatious complaints, there seems no good reason to include this section.

144. Having regard to all these matters, we conclude that the protected act did have a significant influence on Mr Gough's reasons for embarking on the examination of time sheets for the period July to October 2017, albeit that this may have been unconscious. This was to the claimant's detriment. We conclude that this complaint of victimisation is well founded.

2(2) In the decision of the Commissioning Manager, Sue Dziegiel, to order a formal disciplinary investigation of the claimant in relation to timekeeping.

145. As set out in paragraph 50, we accepted the evidence of Sue Dziegiel as to her reasons for ordering the formal disciplinary investigation. The recommendation of Howard Gough was a factor. She also received HR advice from Caroline Cook that, where an anomaly was identified, the business had a duty to look into it.

146. The claimant took issue with the formal investigation being commenced without, in his view, a fact find having been carried out first. This was an unusual situation, where the information leading to the disciplinary investigation was obtained in the course of dealing with a grievance, rather than arising as a concern on the part of a line manager. Sue Dziegiel took the view that the work Howard Gough had done was an initial fact find and thought there were things which needed to be looked into by an investigator.

147. As we note in paragraph 53, Sue Dziegiel knew that the claimant had made an allegation of unlawful discrimination in the grievance. However, there is no evidence to suggest that her decision to commission a formal disciplinary investigation was motivated in any way, consciously or subconsciously, by the fact that the claimant had done a protected act. We conclude, therefore, that this complaint of victimisation is not well founded.

2(3), 2(5) and 2(6) were withdrawn by the claimant

2(4) In the excessive contact with the claimant and his wife amounting to 42 occasions between 20 December 2017 and 14 April 2018 including contact at 7.29 am and 11.29 pm whilst the claimant was signed unfit for work due to a mental health disability caused by his working environment

148. The claimant was signed off work in the period from 19 December 2017 until his dismissal with stress and depression. The essence of this complaint is about the contact with the claimant in the period between 20 December 2017 and 14 April 2018, which the claimant asserts to be excessive and to amount to subjecting him to a detriment. It is not necessary for us to make a finding at this stage as to whether the mental health disability was caused by the claimant's working environment and we do not do so.

149. Mrs Sutcliffe said in closing submissions that the claimant believed that excessive contact with the claimant and his appointed representative at anti-social hours was a deliberate collusion between senior members of the respondent to victimise the claimant in consequence of his complaint. Mrs Sutcliffe alleged that Howard Gough and Caroline Staveley orchestrated what happened. This allegation of orchestration was not put to Mr Gough in cross examination. We find no evidence to support the allegation that Mr Gough and Ms Staveley orchestrated the amount of contact and timing of that contact with the claimant and his wife during this period.

150. We have not been shown evidence of all the contact between the respondent and the claimant and his wife in this period so we are unable to make a finding as to whether there were, as asserted, 42 occasions of contact. Whether or not there were exactly 42 instances, it is clear that there was extensive correspondence during that period. Some of that correspondence was sent by email out of normal office hours. There were three internal processes taking place during this period: the grievance appeal, the disciplinary investigation into the alleged timesheet anomalies and the absence management process. All these processes required contact with the claimant or his appointed representative. Mrs Sutcliffe submitted that the respondent kept pushing for meetings to take place that were not necessary and, therefore, much of the correspondence was unnecessary. We are not satisfied by the evidence that much or any of the correspondence in this period was unnecessary. We note that the claimant took the view that meetings about the disciplinary matter should not proceed at the time; he was objecting to being contacted about a disciplinary hearing prior to an occupational health appointment and subsequent attendance management meeting with his line manager, in view of his mental health. However, the respondent took the view, as we consider it was entitled to, that the meetings could go ahead if reasonable adjustments e.g. as to venue, were made.

151. We conclude that the correspondence was sent because it was a necessary part of the internal processes which were underway, rather than because of the claimant having done a protected act.

152. In relation to the timing of some of the email correspondence, we conclude that this was because the people sending the correspondence were working out of normal office hours to try to do what needed to be done in a timely fashion. We gave examples in paragraph 78.

153. We conclude that the protected act was not a material factor in the number or timing of the contact with the claimant and his wife in the period 20 December 2017 to 14 April 2018. We conclude this complaint is not well founded.

The complaints of failure to make reasonable adjustments

FP1 – PCP of allocating a Human Resources Business Partner (HRBP) to deal with a dismissal process despite that HRBP having previously been involved with that employee

154. This relates to the HRBP Chris Marr. He was involved, from shortly after he joined the respondent in January 2018, with advising in relation to the grievance appeal and the disciplinary investigation. He advised less experienced HR advisers and also advised Nicole Furzeland, the disciplinary investigator, directly. Chris Marr advised in relation to the absence management process from around mid-May 2018.

155. We conclude that the respondent did "allocate" Chris Marr to deal with the absence management process, which led to the claimant's dismissal. We conclude that the PCP was applied.

156. We conclude that the evidence does not support the assertion that this PCP put the claimant at a substantial disadvantage between May and July 2018 compared to a person without his disability. The argument put on behalf of the claimant was that the claimant's anxiety and depression meant that concerns about the impartiality of the HRBP had an adverse effect on his health and impaired his ability to engage in the process. Although the claimant, in paragraph 25 of his witness statement, referred to Mr Marr advising in relation to the grievance appeal and disciplinary investigation and then providing advice in relation to attendance management, the claimant did not give any evidence that the involvement of Chris Marr in all these processes adversely affected his health and impaired his ability to engage in the process. There is no contemporaneous evidence which suggests that the claimant had a concern about Chris Marr's involvement in all the processes at the time. Mrs Sutcliffe's email of 18 May 2018 notes that Chris Marr, the HRBP responsible for advising in the formal disciplinary investigation is now also involved in the forthcoming managing attendance meeting, but does not express any concern about this being the case. (Paragraph 83). There is a further reference to Mr Marr's role in correspondence on 1 June 2018 (paragraph 91). The claimant and Mrs Sutcliffe did not complain that Mr Marr was to be involved in the absence management process. Indeed, on 5 February 2018, Mrs Sutcliffe expressed a wish that someone at the respondent fulfil an overarching role, when three meeting relating to the different internal processes had been scheduled for the same week (see paragraph 66).

157. The claimant has not satisfied us that he had a concern about Mr Marr's involvement at the time which adversely affected his health and his ability to engage with the process. It appears to us that the claimant's concern about the role of Mr Marr may have developed in hindsight, having seen material, not available to the claimant at the time, which he obtained by his SAR requests or disclosure in these proceedings e.g. Mr Marr's email to the complex casework team of 16 May 2018 (see paragraph 81).

158. This complaint of failure to make reasonable adjustments fails on the basis that the element of the test, that the PCP must put the claimant at a substantial disadvantage (in the sense of more than minor or trivial), compared to persons without his disability, is not satisfied.

159. Even if we had concluded that Mr Marr's involvement put the claimant at a substantial disadvantage in the way argued, we would have concluded that this complaint failed because there was nothing which should have alerted the respondent to the claimant being put at a disadvantage of Mr Marr's involvement causing the claimant more anxiety and adversely affecting the claimant's ability to engage with the process. We would have concluded, therefore, that the respondent did not have the requisite knowledge of disadvantage and the complaint would have failed for this reason.

160. For these reasons, we consider that the duty to make reasonable adjustments did not arise and we conclude that complaint FP1 of failure to make reasonable adjustments is not well founded.

FP2 – PCP of expecting employees and former employees to deal with MyCSP themselves

161. Mr Marr obtained an initial quote from MyCSP. It is agreed that, at some point, the claimant's wife asked Mr Marr to go back to MyCSP and check that they had worked out the figures correctly but Mr Marr refused and told them they needed to contact MyCSP themselves. The claimant did not, in his evidence, suggest that Mr Marr could bring any special knowledge to assisting in the calculation. They were just asking Mr Marr to ask MyCSP to clarify how the payment was calculated. It appears from the claimant's evidence that something they had read on a website made them question the figure. The claimant believes that the compensation payment he received after termination was lower than it should have been. We did not hear evidence as to why the claimant believes this to be the case, other than that something on a website led them to question this.

162. We conclude that the respondent did apply a PCP of expecting employees and former employees to deal with MyCSP themselves. We conclude, on a balance of probabilities, that the PCP did not put the claimant at a substantial disadvantage compared to a person without his disability. The claimant argued that he was at such a disadvantage because his depression and anxiety meant that he could not deal effectively with MyCSP himself. As noted above, the claimant did not suggest Mr Marr could bring any special knowledge to assisting in the calculation. If he had assisted, he would have acted solely as a go-between. We are not satisfied, on the evidence, that the claimant would have been incapable of writing to MyCSP to clarify the calculation. If the claimant did not feel up to contacting MyCSP himself, he could have given authority for his wife or someone else e.g. a trade union representative, to contact MyCSP on his behalf. The claimant said in evidence that he did not feel it appropriate for his wife to contact MyCSP and they would probably want to speak to the claimant. However, there is no evidence, other than this expressed belief, that this would have been the case. There is no evidence to suggest that the claimant's wife or someone else contacting MyCSP on the claimant's behalf would have been any less effective than Mr Marr seeking clarification on the claimant's behalf.

163. We also conclude that the respondent could not reasonably have been expected to know that the claimant would be at a disadvantage by being required to deal with MyCSP himself (or by an appointed representative, such as his wife).

There was no reason for the respondent to know that the claimant would not have been able, in writing, to contact MyCSP himself or that he could not get his wife or someone else to do so on his behalf.

164. For these reasons, we conclude that the duty to make reasonable adjustments did not arise and the complaint is not well founded.

FP3 – PCP of the respondent applying a PCP of only considering redeployment within its own organisation

165. As clarified in Mr Marr's evidence, the respondent only considered redeployment in this context within the respondent organisation; it did not consider redeployment within the wider Civil Service. We conclude that the respondent did apply this PCP.

166. The claimant argued the PCP put him at a substantial disadvantage from 3 May 2018 because his depression and anxiety made it much more difficult to work with the respondent's own managers. The respondent was suggesting, in the meetings of 12 June and 13 July 2018, the possibility of a move to another part of the respondent organisation with different managers. Since the claimant would have been working under a different management team, save for a convergence of management at a very high level, we conclude he would not have been put at a substantial disadvantage by the PCP which considered redeployment only within the organisation, since this allowed for redeployment in a role away from the managers about whom the claimant complained. In any event, during this period, the claimant was saying that he was not fit to return in any capacity; he was not saying that he could return to work if it was a job elsewhere in the Civil Service. The position of the claimant as stated in the meeting on 12 June 2018 was that he was not fit to return in any capacity. As noted in paragraph 94, the claimant said at that meeting that he was not capable of coming back to work, he was not in a fit mental state and at this stage could not speak about the future. In the meeting on 13 July 2018, (paragraph 100), the claimant said that a return to work was academic as he was not yet fit to return to work. We conclude that this PCP did not put the claimant at a substantial disadvantage from 3 May 2018 compared to a person without his disability.

167. We conclude that the respondent did not know, and could not reasonably be expected to know, that the PCP was likely to put the claimant at the alleged disadvantage. They could not be expected to know that the claimant would suffer disadvantage by working for a completely different management team (save at the very highest level) from the team which he alleged had caused him problems.

168. For these reasons, we conclude that the duty to make reasonable adjustments did not arise and the complaint is not well founded.

FP4 – PCP of the respondent treating a complaint about an employee's own manager as being a grievance which had to be discussed with that manager first.

169. This relates to the response to the claimant's complaint sent to the DPP and Mr Goldman. Mr Goldman replied to this on 1 June 2018, after taking advice from HR. He wrote that he was unclear as to whether their desire was for the email to be

considered a grievance. He then went on to provide information about how to proceed if they did wish to pursue a grievance; writing (paragraph 90) that

> "If it is your desire to have the issues considered under the grievance policy and procedure this would firstly have to be done on an informal basis via Sue Dziegiel as the commissioning manager for the disciplinary investigation."

170. Although Sue Dziegiel was not the claimant's own manager, we interpret this complaint widely as being that the claimant was told that he had to raise the matter first with Sue Dziegiel since the complaint is clearly about who the claimant was told he had to raise the matter with first. We conclude that this PCP was applied by the respondent.

171. Being required to discuss a complaint with the manager about whom the complaint is made will be an uncomfortable situation for any employee. However, this will be even more difficult for someone suffering from anxiety and depression. We conclude that the claimant was placed at a substantial disadvantage by the application of this PCP.

172. The respondent was aware that the claimant was suffering from anxiety and depression. We conclude that the respondent ought to have known that it would be more difficult for someone with this condition than others to be required to raise the issues set out in the letter of 21 May 2018 with Sue Dziegiel, whom the claimant had named in that letter as a person he accused of victimisation. We conclude that the respondent could reasonably be expected to have known that the claimant was likely to be at a substantial disadvantage by application of this PCP. We conclude, therefore, that the duty to make reasonable adjustments arose.

173. The claimant was asking that Mr Goldman or the DPP deal with the complaint. He was asking for someone at a higher level than Sue Dziegiel to deal with his complaint. We consider that the appointment of an independent person at a higher level than the people to be investigated had the potential to resolve the issues. The respondent gave no evidence as to why this could not reasonably have been done. We conclude that this would have been a reasonable adjustment. We conclude that this complaint of failure to make reasonable adjustments is well founded.

Employment Judge Slater

Date: 10 July 2019

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

18 July 2019

FOR THE TRIBUNAL OFFICE

ANNEX
Agreed List of Issues

Victimisation – section 27 Equality Act 2010

1. Was the claimant's grievance of 22 June 2017 a protected act under section 27(2)(d) in that it made an allegation (whether or not express) that a person had contravened the Equality Act 2010?

2. If so, are the facts such that the Tribunal could conclude that the respondent subjected the claimant to a detriment because of that protected act in any or all of the following alleged respects:

(1) In the decision of the grievance investigating officer, Howard Gough, to start a trawl through the claimant's timesheets to find anomalies and to reject the claimant's grievance in December 2017;

(2) In the decision of the Commissioning Manager, Sue Dziegiel, to order a formal disciplinary investigation of the claimant in relation to timekeeping;

(3) In the delay between 9 March and 23 April 2018 in the disciplinary investigating officer, Nicole Furzeland, considering the claimant's response to the disciplinary investigation, despite the claimant's illness;

(4) In the excessive contact with the claimant and his wife amounting to 42 occasions between 20 December 2017 and 14 April 2018 including contact at 7.29am and 11.29pm whilst the claimant was signed unfit for work due to a mental health disability caused by his working environment;

(5) In the failure on three occasions to honour a prearranged telephone appointment for a discussion about managing attendance; and

(6) In the inclusion of comments critical of the claimant in the report of Nicole Furzeland sent to the claimant on 17 May 2018?

3. If so, can the respondent nevertheless show that it did not contravene section 27?

4. If any of the above complaints of victimisation succeed, what is the appropriate remedy? Issues likely to arise include the award for injury to feelings, an award for injury to health, and an award in respect of financial losses.

Breach of duty to make reasonable adjustments – sections 20 and 21 Equality Act 2010

*NOTE: References in this section to paragraphs from the further particulars of claim dated 13 January 2019 are "**FP1**" etc.*

FP1

5. Did the respondent apply a provision, criterion or practice ("PCP") of allocating a Human Resources Business Partner ("HRBP") to deal with a dismissal process despite that HRBP having previously been involved with that employee?

6. If so, did that PCP place the claimant at a substantial disadvantage between May and July 2018 compared to a person without his disability in that his anxiety and depression meant that concerns about the impartiality of the HRBP had an adverse effect on his health and impaired his ability to engage in the process?

7. If so, can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?

8. If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage? The adjustment for which the claimant contends was to have allocated an HRBP with no previous involvement with him.

FP2

9. Did the respondent apply a PCP of expecting employees and former employees to deal with MyCSP themselves?

10. If so, did that PCP place the claimant at a substantial disadvantage from 13 June 2018 onwards compared to a person without his disability because his depression and anxiety meant that he could not deal effectively with MyCSP himself?

11. If so, can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?

12. If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage? The adjustment for which the claimant contends was for an HRBP to have liaised with MyCSP on his behalf.

FP3

13. Did the respondent apply a PCP of only considering redeployment within its own organisation?

14. If so, did that PCP place the claimant at a substantial disadvantage from 3 May 2018 compared to a person without his disability because his depression and

anxiety made it much more difficult for him to work with the respondent's own managers?

15. If so, can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?

16. If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage? The adjustment for which the claimant contends was to have looked for redeployment opportunities in the Civil Service beyond the Crown Prosecution Service itself.

FP4

17. Did the respondent apply a PCP of treating a complaint about an employee's own manager as being a grievance which had to be discussed with that manager first?

18. If so, did that PCP place the claimant at a substantial disadvantage when the respondent addressed his complaint of 21 May 2018 compared to a person without his disability because his anxiety and depression made it much more difficult for him to deal with the manager about whom he was complaining?

19. If so, can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?

20. If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage? The adjustment for which the claimant contends was to have allowed his grievance to be dealt with at a higher level.

Time Limits

21. If any of the matters for which the claimant seeks a remedy for a breach of the Equality Act occurred more than three months prior to the presentation of his claim, allowing for the effect of early conciliation, can the claimant show that it formed part of conduct extending over a period which ended within three months of presentation?

Remedy

22. If any of the above complaints of a breach of the duty to make reasonable adjustments succeed, what is the appropriate remedy?