RESERVED **CASE NO: 2601500/18**

EMPLOYMENT TRIBUNALS

Claimant: Mrs N Hepburn

Respondent: Crown Prosecution Service

Heard at: Nottingham

On: **Reading in day:** 6 September 2019
Hearing days: 9, 11, 12, 13, 16, 17, 18, 19, 20 September 2019
Reserved: 29 and 30 October 2019

Before: Employment Judge P Britton
Members: Mr R N Loynes
Mr C Goldson

Representation
Claimant: In person, assisted by Mr K Hepburn
Respondent: Mr A Lyons of Counsel

RESERVED JUDGMENT

The claims are dismissed in their entirety.

RESERVED REASONS

Procedural history and first observations

1. The Claimant, having been employed by the CPS from 30 November 2005 as a Qualified Solicitor holding by the time of material events the rank of a Senior Crown Prosecutor in what is RASSO Team North based in Nottingham, presented her claim (ET1) to the tribunal on 28 June 2018.

2. By that stage, she had presented a grievance to the Respondent (the CPS). The grievance outcome had yet to be given. This occurred on 3 October 2018. The ET1 is to be found in the extensive bundles of documentation which was

before the tribunal in volume 1 commencing at Bp 16 [1]. The claim was not labelled as such in terms of the provisions of the Equality Act 2010 but was stated to be one of bullying, discrimination and victimisation.

3. The protected characteristic relied upon in relation to discrimination was disability. The condition that was being relied upon was migraine. There is a second disabling condition which comes into the facts of this case relating to her right knee which, by the time of the hearing in this matter, had also been accepted by the Respondent to be a disability for the purposes of the Equality Act 2010. For reasons we shall come to, it is of secondary importance to the core issues.

4. What the claim was about essentially as per Bp 14 was "*… continuous victimisation and discrimination …*" in essence relating to the raising of alleged poor performance her having raised protected acts her being inter alia circa as at 15 August 2017 "*expressly warned me off ...*" and that being an "*affront to her integrity …*" and continuing unjustified attacks upon her performance. In the second period commencing with the knee injury, which she stated to be on 14 September 2017 and that thereafter "*… once again began to attack my performance …*".

5. We will return to that in due course because that is factually wrong in terms of events in the latter half of 2017.

6. Then what the Claimant says is that commencing in early 2018, there were renewed unjustified attacks on her performance, including "… *threatened to dismiss and/or remove me from my team and clearly linked … to the previous protected act(s) …*". She then goes on to set out acts which essentially would therefore be victimisation including relating to the grievance procedure (to which we shall come) and in particular on 19 June 2018.

7. It is to be noted that the ET1 did not raise issues relating to unfavourable treatment apropos section 15 of the Equality Act 2010 (EA 2010) and it did not make any reference to a failure to make reasonable adjustments pursuant to sections 20-22.

8. On 15 August 2018, the Respondent filed a detailed Response (ET3) (Bp 19 – 34) making plain that it refuted the allegations and setting out in detail as to why. At that stage, this presiding Judge held a case management discussion on 15 November 2018 (Bp 35 – 37).

9. By now, as is clear from the case management summary, the Claimant's grievance had been rejected following an extensive investigation. This was on 3 October 2018. She appealed the same on 18 October 2018.

10. The Respondent accepted that the migraine was a disability. At that stage as to the knee injury, it reserved its position. As it is, an occupational health report

[1] Bp = Bundle page

(it was one of several) certainly at the latest by 8 October 2018 had opined, given the knee problem had become acute and it seems now that the Claimant may have to have a knee replacement, that she should be seen as being disabled in relation to it. As we have already said, this was in due course accepted by the Respondent. It was clear that the current time estimate for the trial of only three days was going to be inadequate and that at that stage, this Judge extended it by two days.

11. As to this presiding Judge's orders (as to which see Bp 36), he made clear that there would need to be detailed particularisation by the Claimant of all the specific allegations and in so doing engaging the concept of continuing act, apropos ***Hendricks***[2], and she would need to label all sections of the EA 2010 that were engaged and give particulars in relation to why any given section was so engaged. In due course, further and better particulars were supplied, commencing at Bp 38. She repeated that as to the first disability "*suffers from chronic migraine which affects her motor and cognitive abilities*". She pleaded that the Respondent had only accepted that this was a disability in June 2017 viz a Dr Dar (as to which see his occupational health report at Bp 179 – 19 June 2017).

12. Stopping there, it is wrong as a matter of fact to say that the Respondent only then accepted she was disabled because of migraine. This is clear from the preceding occupational health reports (as to which see at Bp 102-104 -21 February 2014). It could not be plainer. During that period, there were reasonable adjustments made for her work in relation thereto. So, it is wrong for the Claimant to opine that there was only this late concession that she was disabled by reason of her migraines, viz Dr Dar – 19 June 2017.

13. As to the claims she was bringing, first made plain was that she was indeed bringing a claim based upon unfavourable treatment pursuant to section 15. She cited the relevant section. She gave further history about matters. She confused the words "less favourable" (which of course refers to section 13) with "unfavourable" and this was to be repeated in the skeleton argument put in at the start of the trial of this matter. That perhaps matters not as it was always accepted this was an unfavourable treatment claim pursuant to section 15.

14. Inter alia, she stated:

"*The Respondent* has a*lways been dismissive of the Claimant's disability status; putting her to onerous and "strict" standards of proof, claiming that she was just a "poor performer" and rejecting third party expert opinions and reports*".

15. Again, as an opening in this case, that is wrong. There was a clear sympathy for the Claimant, as to which see the period in 2010 when she was under the wing (so to speak) of Angela Clark in a division of the CPS in Nottingham known as Charging. There were a lot of personal issues relating to difficult circumstances at home, which are referred to in particular June 2010. This is in

[2] ***Hendricks v Commissioner of Police for the Metropolis (2005) IRLR 96 CA.***

some of the additional documentation which was before the tribunal during the hearing and has been placed by the tribunal at the start of the blue tab section in the first bundle.

16. Stopping there, during that period there were difficulties because there was an issue that was raised as to whether the Claimant was potentially guilty of a conduct offence in terms of her flexi working time for which she was claiming. This led to her being informed that there would be a disciplinary investigation on 8 July 2010 and led in turn to the Claimant submitting a grievance on 18 August 2010 alleging inter alia harassment and bullying.

17. As to what happened to all of that, it seems clear that she received what is known as "an attendance improvement notice" but as to the outcome of the grievance, all we know from when she was asked by Mr Lyons during his cross-examination is that it seems it may have gone to mediation but the Claimant cannot remember the outcome.

18. Suffice it to say that there is a theme that can be gleaned from that chapter which is that the Claimant made very critical comments about Ms Clark which all in effect seemed to stem from what prima facie may have been legitimate concerns viz flexi claims. The significance is that as Mr Lyons put it in his submissions, is this perhaps indicative of the Claimant's stance when prima facie legitimate concerns are raised with her by line management?

19. That then leads us to 2015 on a similar theme and when she was being managed by Peter Shergill. In early 2016, she actually stated that Mr Shergill was not telling the truth on this particular topic. Again, we are not going to go into the topic other than to observe that the evidence is that the Claimant makes very serious allegations about people using such words as "dishonest" without stopping to think as to the impact that it may have on the recipient and in circumstances where, for reasons we shall come to, there is by and large no objective justification for making such allegations. This is particularly critical when we deal with the issues at the heart of this case commencing in 2017, the Claimant having by now joined the RASSO North team based in Nottingham in circa December 2015 and there having been a change in management during the first year but then a new manager having been appointed to the RASSO North team, namely Charlotte Caulton-Scott (CCS) in circa October 2016. She is very much at the heart of the Claimant's case as a victimiser.

20. Going back to the further and better particulars, there is reference to her caseload and how her doctor had written in on 24 February 2017 "explaining how her work was adversely impacting on her chronic migraines and suggesting more homeworking". We do not have that GP letter in the bundle.

21. Cross-reference to that period, and there was an occupational health referral raised on 8 March 2017 by Angela Whitt (AW), a senior HR person within the CPS. She gave evidence before us. The theme of the referral was that "*Nicole considers her working environment may have an impact on her migraine …*". The issue was could homeworking be accommodated to the extent that the

Claimant wanted? Inter alia AW wanted: "*advise of nature of migraine and causes and expected that there could be a report obtained from the consultant and thence it was about adjustments particularly in the CPS office because it would be very difficult to sustain the level of homeworking that the Claimant required.*"

22. What is critical to this case is that apropos the subsequent occupational health reports and in particular that of 19 July 2017 by Dr Dar (Bp 179), a core issue that arises is as to whether stress was part of the migraine condition. What he did opine was that "*her stress has been compounded by her being advised of issues with her performance whilst at work*". He never said that the Claimant's propensity to migraine attacks had intensified as a consequence. She was not taking any medication for her stress and had not been referred to counselling but coped by undertaking yoga. We have no evidence that stress is part of her migraine condition. This becomes relevant to the section 15 issue. It finally needs to be said that the Claimant had for a long time been asking for homeworking on more than one day a week, which the CPS was allowing under what is called the START policy, albeit the day allocated was ad hoc to suit performance needs.

23. So, when we come to the section 15 issue, which we shall in due course address, the core issue becomes in that respect what is the "something arising" and is it "in consequence of" the disability. In other words, the migraine.

24. Therefore, going back again to the further and better particulars, it is again plain wrong, apropos Bp 42, for her to say that in letters dated 28 April 2017 and 19 May 2019 the CPS "*suggested the sick leave was simply an example of poor performance*". We will return to those letters but in terms of overarching themes, they are supportive in terms of the management for attendance process. Despite the absence history, for which there had been a previous increase in the triggering threshold to adjust for migraine absences and which had nevertheless been exceeded, the Claimant was never taken down the formal management for attendance (MAP) route and that includes in relation to the lengthy absences in relation to the knee and indeed even as of now. Furthermore, she has never been the subject of formal performance management such as the issuing of a PIP (Personal Improvement Plan); or any disciplinary process. To turn it around another way, the Claimant has in her particularisation and allegations unfortunately distorted the reality. Conversely, not referred to in those further and better particulars was that the raising of the performance issue in the letter which the Respondent issued via CCS but actually written by AW and dated 28 April 2017 (Bp 166 – 167) was unfavourable treatment because of something arising in consequence of her disability apropos section 15.

25. The core point being that inter alia that letter stated:

"*Both immediately before and since you have been sick there have been some performance related issues which I will also need to discuss with you at the point of your return to work*".

That is a fundamental in this case because it has become the issue in relation to section 15.

26. Stopping there, that is because this is made plain in the written closing submission for the Claimant dated 14 October 2019 and at page 8:

> "*38. Having regard for the full evidence, we believe the key issues for the employment tribunal are*
>
> *a) Did R wrongly instigate a disciplinary procedure against C, OR*
>
> *b) Did R accuse C of a false and/or irrelevant performance issue, AND*
>
> *c) Did R, in raising these issues against C whilst she was on sick leave cause C to be treated unfavourably. AND*
>
> *d) Can R show that informing C of the performance issues whilst she was on sick leave was a proportionate means of achieving a legitimate aim.*"

27. But as a matter of fact and as so obvious from all the documentation before this tribunal and which is contemporaneous and gives an accurate record of events throughout the period and under review before this tribunal, there was never a disciplinary procedure against the Claimant. We can eliminate that at this stage.

28. As to d) and the accusation of false or irrelevant performance issues, we will deal with that in due course. However, in summary at this stage we can say that this tribunal is of no doubt that there were performance issues; that they were not therefore false accusations. And we repeat; they never led to any form of formal disciplinary procedure; they were dealt with informally on the basis of providing the Claimant with additional training and a mentor.

29. Thus, there cannot be unfavourable treatment particularly as the occupational health reports (and particularly that of Dr Dar) made plain, having been specifically asked in the referral, that the performance issues were not related to the disability, which was of course at that stage the migraine.

30. In terms of the knee issue, the Claimant was never accused of falling down in terms of performance because of her knee problems. Indeed, the CPS was very sympathetic. We can close that down in that respect at this stage by reference to that the Claimant, in terms of the first period relating to her knee, thanked CCS for being so "*understanding*". Thus, Bp 219A (7 November 2017): "*… I really appreciate your support*".

31. Again, reverting to the further and better particulars, no specific reference was made to any failure to make reasonable adjustments pursuant to sections 20 –

22 of the ERA. It could perhaps be deduced that she was raising an issue of whether she should have had a formal cap on her workload following her return to work, ie August 2017.

32. The second clear limb of her case was the victimisation issue and starting with "*falsefully accused of poor performance*".

33. There was in due course a response to those further and better particulars. It is a full rebuttal of what was now being raised. There was no specific pleading of any failure to make reasonable adjustments because understandably it was not actually specifically pleaded by the Claimant. This led to a further case management discussion before this presiding Judge, which was on 8 February 2019 (Bp 65). A core focus there was that the Claimant wished to widen out her claim to deal with events in effect up to that date. For reasons which are made clear, this was permitted. What is fundamental is that this presiding judge was not allowing an open-ended pleading but only that the Claimant could plead events up to then. As to the detailed particularisation, it was decided this would be dealt with by way of her witness statement.

The hearing

34. It had been intended that there having been a reading in day on 6 September 2019, the attended hearing would start on Monday 9 September 2019. Suffice it to say that the Respondent's solicitors had misread the letter that went out; and for reasons which are made plain in the adjudication that we made and published on 9 September **(attached hereto)**, we accepted that explanation. However, there were applications that had to be dealt with by the Claimant, inter alia dealing with discovery and the confusion in relation thereto as per the opening skeleton argument that had been put together by Mr and Mrs Hepburn because of its references to less favourable treatment and was this therefore in fact the introducing of a section 13 direct discrimination claim. It was clarified that that was not engaged. There was then an issue as to who was the Respondent calling by way of witnesses. The Claimant seemed to think that it was required to call all witnesses that she wanted to question rather than those that it considered were relevant to its defence.

35. That was resolved first by the Respondent eventually deciding it would additionally call AW. Second by the tribunal agreeing to issue very late in the day witness summonses for the Claimant in relation to three persons, Rebecca Edwards, Sarah Humphreys and Liam Bushen. These issues in fact engaged the tribunal for the whole of that first day 9th September.

36. The final point is that we refute the suggestion made in the Claimant's closing written submissions that we favoured Mr Lyons in terms of our treatment of him on the 9th. Mr Lyons came to the tribunal at very short notice to explain the Respondent not being ready to start, having of course not been briefed to attend that day as the Respondent's solicitors mistakenly thought the attended hearing was starting on the 10th. His wife had given birth overnight by way of caesarean. As it is he had to remain of course for the whole of the hearing day rather than

go and see his wife and he would need the next day therefore to make arrangements for the care of his two young sons. In any event we could not proceed until the witness summonses had been served. That is why we actually resumed this case on Wednesday 12 September but we added on an extra day.

37. At the onset therefore, the tribunal was now of course obliged to make plain with the parties' agreement what the issues were. We have now already dealt what we were engaged with in determining the section 15 issue.

38. The victimisation claim was wide-ranging but that we could deal with.

39. But the third issue was what was the claim based upon reasonable adjustment? Suffice it to say that the tribunal was able to discern that it appeared to relate to failing to make reasonable adjustments in terms of the conditions in the office where the Claimant worked at King Edward Court (KEC) in Nottingham, which we shall refer to as the lighting and noise issues.

40. A further issue, was whether there had been a failure to cap the case load of the claimant on her return to work in August 2017.

41. But the Claimant wanted to widen it out and this required the tribunal to make an adjudication, which it did on the afternoon of the 11th. We rehearsed how there was little or nothing particularised by the Claimant on the failure to make adjustment issues. We were taking a very lenient approach in allowing the issues as already identified to be adjudicated upon, although on the face of it and from our reading in the previous Friday the core issues were really relating to victimisation. We referred to how the Claimant was obliged to make plain what her claims were; to focus upon the issues and inter alia referred to the dicta of Lord Justice Mummery in that respect in ***Hendricks***. We made it plain that we were not prepared to now see a widening out of a claim for failure to make reasonable adjustments to include the homeworking issue now being raised by the claimant. Thus made plain was the reasonable adjustment issue would be confined to the office reasonable adjustments issue and the cap. Finally on this point, we should make plain that by cross-referencing to the Claimant's witness statement, it could be seen that these were the core reasonable adjustments issues she was then raising.

42. What can therein be readily seen is that the homeworking issue is not engaged for the purposes of the section 15 and sections 20 – 22 claims.

Evidence received and further observations

The witnesses under summons

43. These were Rebecca Edwards and Sarah Humphreys as Liam Bushen was too ill to attend. The reason why the Claimant had wanted them called was because it was her contention that CCS was a deeply unpopular manager as a result of which an already stressed RASSO North team's circumstances were aggravated and there was resultant high turnover of staff under CCS's watch.

44. In passing, RASSO North is a department which deals with serious sexual offences. The very nature of the work is therefore stressful and can be upsetting; even to the most resilient of Crown Prosecutors and their paralegal support staff.

45. RASSO North had been in some disarray. It had come into being it seems under the management of Sally French. She went long-term sick in March 2016. Incidentally, it is to be noticed that she herself had at one stage felt upset by the way in which the Claimant had addressed her, as to which see the email exchange on 17 December 2015 in the additional documentation received.

46. In and out of the picture came Peter Shergill who had managed the Claimant previously for a period it seems and now may have taken over the reins at RASSO North. We have already referred to an accusation the Claimant made in relation to him. Then, management of the Claimant was taken over by Lawrence English who prepared the PDR[3] in October 2016.

47. The Claimant was in many respects doing well but there were performance concerns and they are flagged up in that PDR. One focus was on the Claimant needing to observe such as a rape trial. Her experience in the past had been more in the Magistrates Court whereas the kind of cases that RASSO dealt with were self-evidently in the Crown Court and many of them very serious indeed.

48. It is significant to point out that the urging that the Claimant should attend a such as a rape trial as set out by Mr English was something the Claimant still had not done when there were performance discussions between her and CCS in August 2017.

49. Reverting back against that background of comings and goings of management in RASSO North, coupled with that the caseload was overloaded because of at that stage not enough prosecutors (and which incidentally started to change for the better post the arrival of CCS), we come back to the evidence of Rebecca Edwards. She was a deeply impressive and credible witness. She has cerebral palsy. This manifests itself not only in physical disability but in problems with her speech. She is quite remarkable in the way she has persevered with those disabilities, becoming a Senior Crown Prosecutor, although not engaged in direct work in the courts. She is primarily office based. And it simply was not correct for the Claimant to suggest that she was allowed to from home work per se in contrast to herself. What does happen is that when her disability is getting her down, she is of course allowed to work from home. Before us she was so clear as to why she wants to come into the office; it is an essential part of the job: for instance the conferences with Counsel or the seeing of such as a complainant; the dialogue with the rest of the team because of course in this kind of work there is a collegiate element. All of this was essential to the modus operandii of RASSO, certainly prior to the bedding in of the extensive digitalisation.

[3] Performance development review.

50. Her evidence doubtless disappointed the Claimant who had required her to come under witness summons. As it is she was wholly unsupportive of the Claimant's stance. The picture that Miss Edwards portrayed was of a very supportive manager in CCS; that although the Department was stressful, that was not the fault at all of that manager.

51. She also refuted any suggestion that another alleged perpetrator of the victimisation of the Claimant was James Allen (JA) and in the period particularly 2018 onwards. Her evidence was that he is a very good manager.

52. When it came to Sarah Humphreys (another senior Crown Prosecutor in the RASSO North team) and again her explaining that the department was stressful but that workloads have now reduced, she did not support the Claimant. As to it being alleged that the CCS micromanages in the way that might be seen as bullying, she made the point that when CCS joined the team it was her first management role. She was new to the RASSO North and feeling her way and so to start with she did email all of them a great deal and in that sense could be said to be micromanaging, but in no way did she see this as bullying and harassment. As CCS became more confident, so that intensity of management levelled off.

53. What it means is that the picture which the Claimant sought to portray of CCS was not supported by these two very impressive witnesses.

54. The next witness who was called for the Respondent (and there was interposing going on because of the timetable in between the continuance of the evidence of the Claimant who of course had started first) was Denise Meldrum who provided a very detailed witness statement by way of her evidence-in-chief. A resume of her evidence and the criticisms made of her by the Claimant in relation to the case, takes us forward to after the Claimant had raised her grievance, which the reader of this judgment would doubtless appreciate was primarily focussed on CCS. Denise Meldrum had been brought in to be the investigating officer on that grievance by JA, who had been given the task of overseeing the investigation. The person initially selected to be the investigating officer (Wendy Wyeth) found herself unable to do it, hence the appointment of Ms Meldrum.

55. So, Ms Meldrum was appointed on 31 May 2018. She has extensive experience in the CPS over many years and has undertaken grievance investigations. She is based in Southampton. She was a witness of utmost integrity. What is crucial is this. Having been appointed on 31 May, she arranged as the first stage of the grievance investigation to interview the Claimant and the subject of the grievance, CCS, and that this would take place on 19 June 2018.

56. By now, on 13 March, CCS had produced a detailed document with attachments entitled "Chronology of events" rebutting the grievance of the Claimant. This is at Bp 301 onwards. On an aside, the Claimant argues that CCS should not have been allowed to submit said document at that stage. We do not agree. The grievance procedure does not preclude her from doing so, and we are with Mr

Lyons that it would be a breach of natural justice given the very serious nature of the grievance (which could be career threatening) if CCS was not at the earliest opportunity able to put in a rebuttal. It is to be expected that a recipient of such a serious grievance, particularly an experienced lawyer such as CCS (as indeed is the Claimant), would be expected to submit her defence and any documents in support at the earliest opportunity.

57. When Miss Meldrum arrived in Nottingham to undertake these interviews on 19 June 2018, she was asked if she might see CCS first. This in fact was because the latter was dealing with a very difficult circumstance in that her mother was at that stage needing to see a consultant on that day we gather to find out the results of tests as to whether she was suffering from cancer. CCS is very close to her mother and therefore wanted to go with her by way of support to see the consultant. Therefore, Ms Meldrum agreed that she would see her first. Then she saw the Claimant and immediately appreciated that the Claimant had not seen CCS's defence at Bp 301 onwards. Furthermore, the Claimant protested that it was wrong that she had not been seen first. She therefore raised a complaint in that respect and suffice it to say that Ms Meldrum withdrew. We do not find that there was actually anything untoward in the approach of Ms Meldrum. It did not prejudice the Claimant, albeit she contends that it would. Ms Meldrum was a very experienced grievance investigator who had never met either the Claimant or CCS before.

58. This brings in something that deeply troubled this tribunal. In dealing with the arrangements for the hearing in interposing etc, it became plain that we would need to make allowances for CCS because her mother was now very ill indeed and thus she would need to see her. We therefore made arrangements to that effect. At a particular stage of the cross-examination of her which was then being undertaken by Mr Hepburn (Mrs Hepburn it seems was finding it difficult to undertake the task albeit we had make significant adjustments for her disability such as lighting being turned down), he appeared to be going towards a line of questioning which the tribunal was very uneasy about in terms of the relevance given what we had established as to why CCS was seen first on 19 June.

59. Mr Hepburn was urged to consider carefully what the questions might be. We have no doubt that he was being closely instructed by Mrs Hepburn; it was so obvious. He nevertheless then began to ask a series of questions, the inference of which was that in some way or another CCS had manipulated the position on 19 June 2018 by using her mother. This had the inevitable result of causing an emotional breakdown by CCS. This meant that we halted and had an adjournment whilst CCS recovered her composure. On our return Mr Hepburn apologised but of course the damage had been done. Suffice it to say that the tribunal was deeply concerned at this line of questioning. It was unnecessary and aggravating. The tribunal is driven to the conclusion that this was deliberate in terms of causing upset to CCS and regrettably it goes to the over-arching theme of this case, to which we shall return, which is that the Claimant is not entitled to the shield of protection in terms of her victimisation claim because so much of what she is about in this case is an unjustified sense of grievance and

an indifference to the impact she has upon others in terms of such as strident language or hurtful and in the main unjustified accusations.

60. As to the significance of that in terms of the reliance upon the protection from victimisation apropos section 27, the tribunal reminds the reader and the parties, as it did during the proceeding, of the seminal judgment to that effect of their Lordships, and their recitation of preceding authorities, in the case of ***St Helen's Borough Council v Derbyshire & others [2007] UKHL 16:*** and in particular Lord Bingham and paragraph 27[4] of his speech. Mr Hepburn in the written submissions he has placed before this tribunal has sought to rely on other elements of that case. However, the facts are starkly different and they do not give him that support for that very reason. So, this is an undermining of the credibility of the Claimant and is just one factor in that respect.

61. In passing, another one that we can deal with at this stage and which goes to in effect paranoia in the non-mental dictionary sense of that word is the Dr Scott issue. Suffice it to say that apropos the second occupational health report in terms of material events, ie that of Dr Dar of 19 June 2017, the Claimant had attended at the surgery of OH Assist in Birmingham. At that premises, one of the senior occupational health medical consultants is Dr Scott. He is the father of CCS. On taking up her job at RASSO North, CCS had declared that relationship and it had been agreed that Dr Scott would undertake no occupational health consultations and reports in relation to members of the RASSO North team.

62. In the referral that AW had submitted for the purposes of that report at Bp 173, it was made plain that the OH consultation and ensuing report should not be by Dr Scott. The Claimant in her third protected act (POA) that she relies upon in this case, namely her detailed e-mail on 28 June 2017, inter alia made the following accusation:

"*I was also confused as to why I was sent to your father's place of work for this OH report and I understand he sits in the office next door to Doctor Sumra Dar. The neutrality and bias of the OH report is therefore questioned and concerns are raised for unprofessional conduct.*"

63. This is a theme also in the grievance. It was alleged that Dr Scott smirked at the Claimant. The inference was that he had then improperly influenced the report of Dr Dar. Incidentally, the latter report is clearly objective and not in any way biased.

64. Of course, this is a very serious accusation but it is wholly without foundation. The Claimant was deeply unimpressive on the subject of whether it was a smirk. Under cross-examination, she changed this to it was a smile; then that it was a small smile. Furthermore in the findings of the final investigator into the grievance (Sheila Khilay), the latter inter alia observed as to how did the Claimant even know it was Dr Scott as the individual concerned never

[4] In particular his emphasis that an unjustified sense of grievance will not sustain a claim of victimisation.

introduced himself.

65. Put at its simplest, the following is what happened on this particular issue. The Claimant went into what we assume was the waiting room. Whilst waiting to see Dr Dar, another man came out of a side room (which we will assume was a consulting room although we cannot be sure) and in passing smiled at the Claimant. Mr Lyons put it to the Claimant as to how on earth is that to be interpreted as sinister. Is it not a normal thing that might happen? The Claimant was unable to disagree with him.

66. A side issue in that respect is that, as Mr Lyons put it in his written closing submissions, the Claimant in this case when being questioned regularly did not answer questions and they had to be repeated to her and her then asked to please answer said questions.

67. This accusation viz Dr Scott was clearly deeply hurtful to CCS. Suffice it to say that it is a hopeless accusation. There is nothing in it. Again, it goes to the credibility of the Claimant. These are but illustrations.

68. So, in any event turning back to the witnesses and of course we are dealing with material observations here, we come away from the Denise Meldrum episode finding that there was no improper or prejudicial behaviour by her. It cannot possibly be linked to the alleged victimisation because Denise Meldrum was not acting in a way which was objectively detrimental and in any event there is no causal link to the protected act, ie ending with the grievance because Denise Meldrum was simply doing her professional best.

69. On this topic, we also bring in the Claimant in her use of strident terminology and which is a hallmark of this case. In dealing with this issue, apropos 19 June 2018, at Bp 402 – 403 she used the words "… *ambushed … completely biased and prejudicial to me …*".

70. This was not an ambush. The Claimant may because of her state of mind have perceived it to be such but that is not capable of standing up to scrutiny as being reasonable. It is worthy of note that the Claimant and Mr Hepburn never put to Ms Meldrum that there was any such motivating link if that were the case.

71. The next witness we heard from was Sheila Khilay[5] (SK) who undertook the grievance investigation following the withdrawal of Denise Meldrum. She was appointed in June and undertook a first meeting with the Claimant on 13 July 2018 (Bp 439). She was also a very impressive witness. Her final report is to be found in the bundle commencing at Bp 570 and dated 19 September 2018. She is not an employee of the CPS; she has her own consultancy– Blue Tulip Consultancy. She has very extensive experience in undertaking grievances; she is fully conversant with the Equality Act and its predecessors.

72. The Claimant accused her in effect of being inappropriately influenced by JA to

[5] Evidence in chief of all witnesses other than those appearing by witness summons was by written statement.

provide a distorted and untruthful report. The Claimant raised the same accusations when cross examining JA. It simply does not pass muster. We are with Mr Lyons in his submissions. Again, it is a gratuitous accusation and a very serious one supported by no evidence whatsoever.

73. The quality of SK's investigation speaks for itself. It is thorough. She interviewed all material witnesses and considered closely the documentation. Her conclusions in dismissing the grievance are sustainable backed as they are by the documentation and the weight of the evidence. To suggest as the Claimant did that a person of the experience and professional reputation of SK would skew a report, and on the face of it with no reasons being put forward as to why she should other than improper influence JA, was wholly refuted by SK. There is no evidence to undermine her position. In passing, the same applies to JA.

74. Inter alia, the accusation against her (ie 19 July 2018) and cross-referencing to JA , is "grooming". This is also an accusation raised against CCS. Of course it is an unfortunate term of phrase for the Claimant to use given the work of RASSO North and the connotations of the word "grooming". Again, the tribunal is driven to conclude it is because the Claimant is indifferent as to the impact it may have upon those who are the recipients. The same applies to her use of the word "witch-hunt"; and we have already referred to such as the use of the words "ambush" and "dishonest".

75. In passing as is usual in grievance investigations, the Claimant was asked to sign the record of the interview that JK had undertaken with her. In that sense, she was treated no differently from such as CCS and the other witnesses. The Claimant's stance was to refuse to so as it was not "a statement". Be that as it may.

76. The next witness which we heard from was Tracey Easton. She is a very senior Crown Prosecuting lawyer based in London. She heard the Claimant's appeal against the grievance outcome. The appeal hearing took place on 14 November 2018. The appeal was not upheld, as to which see Bp 684 – 686.

77. In passing, the Claimant says that Tracey Easton found that CCS had acted wrongly in terms of performance concerns as mentioned in the letter of 28 April 2017 (Bp 161). This is distortion of Tracey Easton's evidence. In passing, she was again an impressive witness; as with the others bar the Claimant consistent and answering the questions clearly and concisely. She did not say that. What she said was that she as an experienced manager would not have signed off the letter as in fact written by AW. It was in that sense perhaps clumsy to make reference to the need to discuss the performance issues once the Claimant was back at work. On the other hand, that was the policy of AW and HR at the time. As a robust independent senior official in the CPS, Ms Easton would just ignore in that sense advice and do it her own way. The same applies when Mr Allen gave his evidence. But both made absolutely plain that CCS was a very new manager dealing with a very difficult situation in terms of the Claimant and which is so obvious even by April 2017 let alone in terms of what was then to occur in

terms of the "protected acts" from the Claimant and the stridency of their tone, and matters up to in terms of the second chapter of events ending in August 2017; let alone what then happened in February/March 2018 after what we would describe as the honeymoon period.

78. It follows that they were not critical of CCS. Furthermore, in terms of the Claimant saying that there were no performance concerns against her, that is not what they said. Tracey Easton, in dealing with the issues which emerged in early 2017 (and to which we shall return) and thence in terms of the Elliott Mather letter in April 2017, or the issues following the complaint of His Honour Judge Coupland at the beginning of 2018, made plain the concerns were not wholly to be laid at the door of the Claimant and would not warrant disciplinary action but they did flag up issues that needed addressing. That was their evidence. The Claimant's take on it is actually a distortion of their evidence taken overall on said topic.

79. That as is perhaps self-evident then leads us to James Allen (JA). We have already dealt with the issue of whether he sought to improperly influence the SK investigation. We have dealt with his observations on the April 2017 letter and the performance issues. Suffice it to say that he took over the management of the Claimant post the raising of the grievance against CCS on 2 March 2018.

80. The tribunal has no hesitation in saying that subsequently he has done his upmost to deal with the issues relating to the Claimant. He has been supportive on the issue of the right leg. The Claimant had been reassured that she can work from home insofar as the leg renders her unable to get into the office. The problem has been as to how to deal with the Claimant in terms of where to put her. As the Claimant made so abundantly clear in her evidence before the tribunal, she will not work with CCS. It goes further than that, she requires the removal of CCS from her role as the head of RASSO North and that she be subjected to disciplinary action; and she will not work in RASSO North while CCS remains there.

81. The Respondent's position, as is perhaps now self-evident, is that CCS has done nothing wrong in very difficult circumstances and has become a very good manager indeed. So, the Respondent is not prepared to act as the Claimant requires. It has endeavoured to place the Claimant in the RASSO South team, which is based in Leicester and which has been going through various changes in terms of the region and its management. It is prepared to accommodate the Claimant's leg problem in that insofar as she might need to attend conferences in Leicester, it will provide her with taxi transport. This the Claimant has rejected out of hand. This impasse is not for this tribunal to any further address as we cut off issues at February 2019. The tribunal can however say at this stage that it is so obvious that the Claimant has not been victimised in the way in which the Respondent, via JA, another very impressive witness, has endeavoured to address a very difficult situation. There have been regular updates from occupational health and the Respondent has not for instance taken any steps against the Claimant even though it might be justified given the now length of the absence, and for instance by utilising on a formal basis its management for

attendance policy (MAP). This flies in the face of this being a continuing chain of victimisation stemming from the original protected acts going all the way back to the performance issues, which we shall now be addressing and commencing with the first protected act on 8 June 2017.

82. Those are our preliminary observations. This therefore leads us back to our core findings of fact.

Chapter 1 – January 2017 to the return to work 17 July 2017

83. We have already sketched out the background. Suffice it to say and keeping it short, that CCS was endeavouring to be supportive of the Claimant and in terms of undoubted stresses on the latter, including in relation to her being upset at the handling of the sick leave/annual leave issue by Peter Shergill, and that she was finding RASSO a "living hell".

84. Her GP had suggested that she might benefit from more home working but the problem which the RASSO North team faced given the high workloads and the very nature of the job was how to accommodate this in terms of say a reasonable adjustment.

85. So, around this time, an occupational health referral was made by AW. Inter alia this specifically raised the difficulties of accommodating the home working to the extent that the Claimant required and wanted to know if this was actually really needed in relation to accommodating the migraine disability and in particular in the context of the difficulties of allowing it to the extent the Claimant wanted; and of course we bear in mind that the Claimant's desire for increased home work was long-standing, going back as it did to at least 2010.

86. Suffice it to say that the occupational health report that was received did not address the referral, as to which see Bp 141 – 142. It did not address the core issues as required by the Respondent. It had been written by an occupational health nurse, Wilfred Vanerp and is at Bp 153 – 155.

87. What it did first flag up is the issue of whether reasonable adjustments could be made in terms of the office:

"… since she has moved to her current open plan busy office, her migraines have got worse. She finds the noise, lighting, business and lack of quiet to compound her problems, she is on medication to take when a migraine occurs. …"

88. Reference was made to the fact that there was already a workstation assessment in hand. Second, it was made plain that she was medically fit for work but then there was the supporting of the Claimant in a desire to work from home 2 to 3 days a week. It did not address as to what, if that was not available, other adjustments might if necessary be made. This was a shortcoming in that report.

89. Suffice it to say that it led to the Respondent complaining to OH Assist against the background where there had been poor reports on other occasions and it was agreed that there would be a further report commissioned, as to which we get back of course to the report of Dr Dar of 19 June 2017.

90. In terms of the referral that was made by AW[6] in relation thereto commencing at Bp 171 – 174, it is very detailed in what is required. It also addressed an issue, to which we now come to. That what might be described as performance issues had by now been raised is clear. First on more than one occasion Margaret Martin, who seems to have managed the paralegals (POs), raised concerns that the Claimant's approach to them was disrespectful particularly her use of the words "*instructions to admin*". The tribunal is aware from this case, and indeed others, of the need to tread carefully so as to not ruffle feathers so to speak in dealing with different levels of professional workers.

91. The second issue was that the Claimant was getting the POs to do jobs that she should be doing herself. The most important issue however which emerged during this period related to a rape complainant who had been allowed to sit in the Crown Prosecutors' room unsupervised with the obvious concerns that she would thereby be potentially able to access highly confidential files. This was raised by Nat Hartley in the CPS team to CCS by at the latest 15 March 2017. As to the concerns that CCS therefore set out for the Claimant to answer they are clear at Bp 150. That the Claimant knew of these concerns is obvious from her reply the following day. It therefore flies in the face of the Claimant's contention as set out certainly in the protected acts starting in June that she was unaware of any performance issues.

92. As it is, the Claimant went off sick on 16 March. The sicknote referred to "*Migraine disorder caused by work related stress*". So, this brings us back to the second OH referral and in which inter alia AW was asking for an opinion as to whether the performance issues that were emerging could be due to disability issues. That the Respondent was dissatisfied with the first occupational health report is clear. That the Claimant was made aware that there was going to be a second occupational health report is obvious because of the reference thereto in the letter of 28 April 2017 (Bp 166 - 167).

93. This now brings us to the section 15 issue; and we are back to the paragraph in that letter on the second page (Bp 167):

> "*Both immediately before and since you have been sick there have been some performance related issues which I will also need to discuss with you at the point of your return to work.*"

94. An added problem is that by now on 5 April 2016 a prominent firm of solicitors in the Nottingham region had written to the Chief Crown Prosecutor (Janine Smith) for the Nottingham region. This complaint is at Bp 163 – 164. It is about not having received significant pieces of evidence in terms of them acting for a

[6] Also a very impressive witness with many years of experience with the CPS and by now a senior HR.

defendant in a case involving "serious allegations of sexual abuse against children". It set out, to summarise, a catalogue of delays; problems therefore with Nottingham Crown Court; that they had still been unable to see crucial digital recordings; that they had sent letters "in desperation" and still had no reply.

95. Taking it at its simplest, we will address two points. The first is that the raising of the need to address the performances related issues as set out in the letter of 28 April 2018 is before any protected act by the Claimant. But, she says, that is not fatal to a claim of victimisation based upon that letter pursuant to section 27.

96. If we stop there, we will now factor in the relevant definition apropos the sections. Thus, section 27 of the EqA starts with:

> **"*27 Victimisation***
>
> *(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."*

97. Faced with the obvious dilemma for the purposes of the Claimant's case that there was no protected act before the raising of the performance concerns on 15 March or the letter of 28 April, Mr Hepburn relied upon the contention that CCS acted because she believed that the Claimant "*may do*" a protected act. Where is the evidence? Also, it is to be noted that despite the tribunal doing its upmost to assist and make sure in a neutral way that Mr Hepburn (or for that matter the Claimant[7]) were focussing on the issues and covering them by way of questioning, and of course the tribunal cannot make a case for the Claimant, the fact is that neither she nor Mr Hepburn, despite the most extensive of cross-examination lasting well over a day never questioned CCS on this particular point. The same applies to AW, if it related to her which is not at all clear.

98. The most that Mr Hepburn can submit is that as CCS would have known of the previous history, ie the grievance raised by the Claimant against AC in 2010, thus she could assume that the Claimant was likely to now raise a complaint. By now there had been an issue between the two of them over car parking. Taking that briefly, RASSO North had restricted car parking at KEC, at most two spaces. This was because of the impact of the parking levy in Nottingham in relation to therefore the allocation of parking spaces by CPS at KEC. There were other divisions of CPS based there and so there was competition for parking spaces. Therefore, they should not be used for other than parking on a strictly business basis. Complaints had been made that the Claimant was in fact abusing that protocol and she had been strident in her repost to CCS when

[7] From time to time they interchanged the questioning of witnesses.

the former raised the issue. The Claimant had this stage inferred that CCS abused the car parking. In fact the latter, who was working very long hours, shared a car with her husband who had dropped her off with a box of files which CCS had been working on, on the way to taking the children to school.

99. But that has got nothing otherwise to do with the core issues other than to denote the possibly worsening relationship between CCS and the Claimant. Otherwise, the evidence is that on handover by it seems Mr English, CCS had been given some background information; but she had no knowledge of the details of the past in terms of any complaints that the Claimant might have raised against such as AC. A second problem is that she did not make up the performance issue viz the unattended complainant; it had in fact not emanated from her. Second, when it comes to the Elliott Mather issue, as we have already said this was in fact a complaint made to the Senior Crown Prosecutor, a superior of CCS and who required that CCS deal with this matter, taking the view that she did when she read what Elliott Mather had to say, that this was a very serious issue. In fact Janine Smith went so far as to say in her instructions to CCS dated 17 April 2017 (Bp 161):

"… *I am sure you agree that Nicole handled this very badly and thankfully Anne has now gripped it. …*
When Nicole returns Charlotte will need to raise this as a performance issue with her. It doesn't seem to have been gripped at all never mind as a priority with a CTL running.
I am very keen to support Charlotte with any performance management issues so please just ask if anything is needed.

…"

This email was copied to Lawrence English.

100. So, the assertion for the Claimant that this was incepted by CCS by way of victimisation because she foresaw that the Claimant might be about making a protected act is untenable.

101. Going back to the definition of victimisation and in terms of where it engages post the protected acts, suffice it to say that we have already dealt with where the shield is lost, ie if there is an unjustified sense of grievance. Mr Lyons has also raised an issue relating to bad faith. This relates to section 27(3):

> *"(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith. "*

102. Leaving that to one side, we now engage section 15 confined as it is to the passage in the letter, to which we have referred at Bp 167. Thus, we now bring in the definition:

"15 Discrimination arising from disability

> *(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

103. Self-evidently, 15(2) is not engaged because the Respondent had the knowledge.

104. So, the focus is on s.15(1). In this respect, the tribunal has considered the relevant legal authorities and in particular in terms of the approach, the helpful dicta of Mr Justice Langstaff (as he then was) in ***Basildon and Thurrock NHS Foundation Trust v Mr S G Arjuna Weerasinghe [UKEAT/0397/14/RN]***. This judgment was handed down in July 2015. Inter alia, it most helpfully recites the preceding jurisprudence. The crucial point is at paragraph 26:

> *"26. The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" - and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B …* "

105. So, what is the "*something*"? The Claimant says that it is the additional worry and thus stress caused by the reference in the letter to that there will need to be addressed performance issues on her return to work, and thus its impact upon her recovery. Is that "*something arising in consequence of B's disability*"? What is the medical evidence? The second occupational health report of Dr Dar (to which we have already referred and which of course also engages the Dr Scott issue) is dated 19 June 2017. It is at Bp 179 – 181. It sets out that the Claimant of course suffers from chronic persistent migraines; and the various medications she has taken. He then moved on to the environmental issues in the office, ie the lighting and how the Claimant says this was "*triggering her migraines*". He then set out how since moving to RASSO she noted "*an increase in the frequency of her migraines*" likely to be due to a combination of factors.

106. Having dealt with the first of those "*other significant triggers are levels of lighting,*

noise and also stress". He then dealt with the high workload and back to the current location "*noisy and bright*". Then "*that a request for additional home working was not supported prior to being signed off work*".

107. And inter alia then he writes:

"*Mrs Hepburn has not been started on any medication for her stress nor has she been referred for formal counselling support although she is aware of the EAP. She has been undertaking some Yoga as a form of relaxation whilst off work.*"

He said how she said that she has not been made aware of the specifics of concerns about performance issues. This is actually not correct for the reasons we have gone to. She did know about the concerns relating inter alia the rape victim being left unattended. On the other hand, she had not yet been informed about the Elliott Mather allegations. So, it could not in that sense be a stressor. If that is engaged, all she knew was that there were additional performance issues that would be discussed upon her return.

108. He then referred in terms of her current situation to:

"… *Mrs Hepburn is still experiencing migraines but she is nevertheless managing with her day to day activities.*"

He referred to how she was bored *"at home*" and indicated that her stress has been compounded by her being advised of issues with the performance whilst off work – "*This is adding to her anxiety and needs to be addressed at an early stage of her return to work*".

109. He then went on to deal with another condition (that need not engage us). Thereafter he repeated what had been said in preceding reports that the chronic migraines are likely to be covered by the Equality Act 2010. However, he then went on to say that she was managing reasonably well at home; re-stated the issues about the need for adjustments at work, to which we have of course now referred; could not see why she would not be able to return to work; repeated the issues as we have referred to them and suggested that there should be a stress risk assessment when she returned; and then:

"T*he issues that have been highlighted to her in terms of any performance matters will also need to be explored and although this can often be quite anxiety provoking, delaying these discussions is not going to be helpful either*".

110. He then recommended a phased return and in conclusion opined inter alia:

"*Unfortunately because of her medical history, the hormonal triggers for migraine are limited in terms of treatment available but the environmental and stress related triggers should be able to be better controlled. …*"

111. He then said as follows:

> "*Although migraines, when they occur, can impact on concentration and focus; it is unclear whether in Mrs Hepburn's case her migraines have significantly contributed to any performance issues as I am not clear on the detailed nature of the concerns that have been raised*."

112. So, what we are back to is the "something" (ie increased stress) arising in consequence of the migraine. Stress of course is with us all to varying degrees. In itself is not a disability. It becomes one if it develops into something more serious, such as acute anxiety or depression. That is not the case here.

113. So, there is a question mark about whether there is a causal link in that respect. The second point is was this in any event unfavourable treatment? Given the nature of the Claimant, the Respondent would be in a position where it would be damned if it did not tell her that there were issues because she would inevitably raise a complaint if she was suddenly confronted with such issues on her return to work. After all, she is clearly capable of using the word "ambushed" as we have already rehearsed.

114. Furthermore, the then policy (as we have already referred to it) was that any such issues ought to be as a matter of best practice referred to in any management for attendance sickness absence letter on the basis that even though they would not be addressed until the person was recovered sufficiently, nevertheless it would be wrong to not let the individual at least know that there was an issue. The converse of course of that is that in so doing, it could for instance for somebody already suffering from acute anxiety have the effect of exacerbating the condition and thus postponing the recovery. That of course is why there was the discussion before us as to whether it was "*clumsy*" and in terms of the evidence of TE and JA.

115. In that sense, it is something of a difficult issue. But it is really answered by what then occurred. Before we get there, we remind ourselves that the burden of proof is on the Claimant in the first instance to establish that there is a prima facie case on the evidence that there has been unfavourable treatment within the definition that we have now gone to.

116. The Claimant's response to the letter of 28 April 2017 is protected act no 1 (POA), so to speak. First she brings up that she now knows that the first occupational health report has been rejected and she wants more reasons as to why. She also requested how to go about making a subject access request. She raises:

> "*I am concerned that you have alleged that there were some performance related issues immediately before and since I have been sick. I am unaware of any such performance issues*."

We have already commented on that.

117. This chronologically brings us to the next subtopic. An accusation flagged up in the POA[8] (Bp 169-9)and hardened up in such as the Claimant's witness statement is that CCS by implication queried the genuineness of the continued absence and its link to migraine. This was in the keep in touch telephone call on 23 April. She says:

"… w*herein you expressed surprise and questioned how "a migraine" could last so long and enquired about the medication I am taking and queried why it was not working.*

It appears you are alleging that I am not sick at all, that I have performed poorly whilst off sick, and you are now accusing me of performance related issues because of my disability.

Furthermore, I am concerned it is your intent to "ambush" me on return to work with these alleged issues. If there any serious or formal performance issues you wish to pursue, I would remind you that you are required to document those issues in writing as part of the formal procedure."

…

In the circumstances, I am concerned that any formal long term sickness absence review meeting is likely to degenerate into an formal performance and/or grievance hearing for which I am wholly unprepared at this time.

…"

118. Of course, first of all the fluency and combative tone of this protected act, in style not dissimilar to communications in the past which we have touched upon, is not indicative of somebody who has been impacted upon because of the reference to performance issues and in terms of an adverse effect on recovery in terms of the disability, it is the opposite.

119. Second, there is distortion because we are wholly satisfied on the evidence and faced as we are with a somewhat discredited Claimant in terms of the cross-examination and for the reasons we have gone it as opposed to CCS[9], that what happened is as follows. When they were discussing matters on the telephone, CCS sympathetically expressed concern as to why it should be that the migraine episode was going on for so long knowing as she did that normally speaking, migraine episodes are of short duration. She therefore queried in a kindly way as to whether or not perhaps it might be that the Claimant's medication was not assisting her. She did not suggest that the Claimant was not being truthful about her condition or that she was not actually genuinely ill. We bear in mind the limit of the extent of the conversation as set out in the protected act. What has happened is that the Claimant has read into CCS's enquiry and constructed an interpretation. She makes no reference to it in the detailed conversation as set

[8] Note as with those following headed Equality Act 2010.

[9] Evidence in chief by witness statement and for reasons we will elaborate upon a compelling witness.

out in the OH report by Dr Dar which of course reflects an attended consultation on 19 June. So well after the telephone call.

120. There is also the detailed reply of CCS to the Claimant on 19 May 2017 (Bp 175-6). She made absolutely plain that she had no intention of going down the performance route:

"*Prior to your sickness absence starting we agreed to meet to discuss an issue that had arisen, but this meeting did not take place due to you reporting sick on the day it was arranged. I can assure you that there is no attempt to ambush and I am disappointed you would think this; when these issues are discussed we will consider what training or support may be required*" (our emphasis).

121. She then went on to explain why they had made the second occupational health referral and also addressed the performance issue as follows:

"*… how has your health had an impact on your ability to carry out your duties, what has led to the work related stress migraines and because there are performance issues it is also important that you have the support of myself and colleagues when reviewing cases upon your return; the OH advisor will hopefully be able to offer positive advice on how best to support you with this.*"

Therefore, she expressed concern at the comments in the Claimant's letter.

122. CCS's letter is therefore nothing but supportive and absolutely reassuring of the Claimant that there is going to be no performance management of her and explaining why there had been reference to the performance issues.

123. The response by the Claimant of 8 June 2017 (which is POA[10] No. 2 headed again Equality Act 2010) was:

"*I unequivocally dismiss your assertion that "performance issues" have been previously discussed. …*"

124. In sense of there had been meetings, she dismisses these as being "*about inept and impractical management and workload strategies …*"

125. Then referring clearly to the Dr Dar: "*I am further alarmed that you now to seek to "groom" a third party …*". She then repeats her stance over the telephone call and "*My doctor advises that you are impeding my recovery with your inexperienced and insensitive approach …".*

126. Then of course we get occupational health report number 2, to which we have now referred and then we get a reply to the Claimant from CCS on 26 June (Bp 181A - 181B). Again, this explained in a supportive way the management for attendance policy (MAP). There was no suggestion they were going to go down a formal route. There was now the offer that they meet on 3 July in terms of a

[10] Protected act as per s27.

formal long-term sickness absence review meeting and this was on the basis of course that the occupational health specialist opined that the Claimant was fit to return to work if there were workplace adjustments. It repeated there would be the need to discuss the performance issues; this was a cut and paste of the letter of 26 April. Again, there was no reference to any formal procedure being in contemplation.

127. The reply is POA no3 – 28 June 2017 again headed "Equality Act 2010". The Claimant again was really refusing to accept that there were performance issues and "… *you seem intent on ambushing me …*". Again, referenced to the occupational health report was also raised the issue of improper influencing of Dr Dar via Mr Scott. That of course then brings us to the meeting, held on 3 July between the Claimant; CCS and AW (Bp 185-192).

128. Out of that meeting came the phased return to work programme; the putting in place of the reasonable adjustments; and all of which starts with CCS's letter to the Claimant of 14 July 2017 at Bp 199A and is then followed through with a return to work meeting on 18 July 2017(Bp 201). In the context of what was thought by CCS to be hopefully a productive meeting there is however recorded how at the meeting on 3 July, the Claimant had said that CCS "*had it in for her*" and how CCS had found that quite hurtful.

129. Stopping there, what is hopefully self-evident from the recitation of that chapter in the documentation is that it flies in the face of there being a "*something"* which has been adversely impacted upon because of the letter at Bp 161, even if it is something arising in consequence of the disability, which is debatable.

130. The tribunal is also driven to conclude that it is not unfavourable treatment in the context and because the Claimant needs to know. If we had to fall back on it, self-evident now is that engaged would become section 15(1)(b), which is: "*A cannot show that the treatment is a proportionate means of achieving a legitimate aim*". But It is proportionate in terms of a legitimate aim, which is to make the Claimant aware that there are performance issues in order that they can in due course be addressed upon a return to work.

131. Overall, it follows from the findings that we have made that we therefore do not find that the Claimant establishes discrimination under section 15 of the EA 2010 and that element of the claim is accordingly dismissed.

The reasonable adjustment claim

132. Suffice it to say that arising out of the return to work meeting, and following on as it did from occupational health report number 2, very swiftly indeed workplace adjustments were made. There was a workplace assessment (as to which see Bp 221C onwards). As to the Claimant's workstation, she was moved to a quieter place; the overhead lighting was taken out above her desk in order that the trigger for a migraine was ameliorated.

133. Throughout the period until the Claimant was to go off on sick leave primarily

because of the worsening leg in January 2018, the Claimant never raised any unhappiness in this respect. We have already referred to her expressing her gratitude for CCS's support toward the end of 2017. The Claimant has subsequently raised that she was isolated but the evidence before us is clear. That is to say the placing of her in the quieter area was a matter of feet away from her colleagues so that she could still be a member of the tea club and interact with them. This being an open plan office, the alternative of course would have been to remove her from it thus making her even more.

134. It follows that the claim of failure to make reasonable adjustments on both those fronts fail.

135. That leaves us with the issue of the cap. By way of a reasonable adjustment, some of the staff (for which read Rebecca Edwards) did have a cap so to speak on their number of cases that they undertook. Looking back, in relation to Ms Edwards her caseload, and we bear in mind she was not working five days a week unlike the Claimant, was capped at 36 cases at the time the Claimant went of sick circa 16 March 2017. But when the Claimant returned to work at the beginning of August, as is self-evident from the records of the meetings she had no caseload at all. It had been worked out by others as with the increasing number of staff and the changes viz RASSO South, the caseload allocation was dropping. So, there was nothing to cap. In the short-term, the plan was that they would bring the Claimant up to working on a caseload of two. Then they would review it. So, the point is made by the Respondent's witnesses who are engaged on this point (ie CCS, AW and JA), that there was no need for a cap at the time; and there was no need for the Claimant to feel stressed that there might be one, because it was made abundantly clear that the matter would be kept under review. The Claimant never reached anything remotely like the number of cases that she had undertaken before she had gone sick on 16 March 2017.

136. It follows that there was no need to make a reasonable adjustment because at that stage, the provision, criterion and practice engaged (and which was far from clear in terms of its articulation by the Claimant but which we will take as being the need to be able to sustain a sufficient level of working so as to meet caseload targets) was not putting the Claimant at a particular disadvantage because her workload was so far below anything remotely needing a cap.

137. It follows that that is an end of the reasonable adjustment claim and it is dismissed.

Chapter two: return to work 17 July 2017 to final absence re leg issue 1 January 2018

138. A big problem that the CPS was facing throughout this period and before, and which was well publicised and in particular in relation to the prosecution of serious sexual offences cases such as rape, was the failure to comply with the unused material requirements. This of course is that the prosecution must ensure that they obtain all the evidence on a particular case, ie from the police

force, including such things as full records taken from mobile 'phones obtained in the course of the investigation, and for instance of a complainant, in order that they can be assessed as to whether there is material that might assist the defence. As we are all well aware, during this period there were spectacular collapses of trials for that very reason; and this led to significant criticism of the CPS and indeed it would appear the departure of the then Director of Public Prosecutions.

139. Furthermore, this was causing major concerns to Judges presiding in these type of cases starting of course with what is known as the plea and directions hearing when the defence is supposed to be in full possession of the evidence, including any unused material that might assist it, in order to be able to advise a defendant as to plea and in order that such things as the time estimate of the trial and the issues can be discussed.

140. A debate before us was to whether or not the responsibility for the unused material aspect of the case management for the prosecution was the responsibility of the Crown Prosecutor with conduct of the case. To turn it around another way, was it something that could be delegated to a paralegal. The answer to that question was so obvious from the evidence before us; it is something that has to be the responsibility of the Crown Prosecutor with conduct of the case because of course it requires an evaluation of the evidence in terms of the unused material test.

141. Second, ultimately the person with conduct of the case of course is responsible for ensuring that evidence has been properly obtained. So, in this type of work interviews by the police with such as a complainant by way of video link subsequently require an authorised transcript which must be served upon the defence. This is part of the protocol. Finally, of course, it is self-evident that there must be preservation of the relevant exhibits and scrutiny of what was taken by the police in order to ensure that for instance if there was more than one 'phone, that all have been analysed, if they are able to be. If such as a mobile phone obtained as part of the investigation has gone missing, it is a priority to ensure that it is found and if it is not, the matter is flagged up. The final point to make of course is the importance of the CPS retaining the goodwill and confidence of the of the presiding Judges in the region and to also not expose the CPS to the risk of adverse and sometimes high profile criticism.

142. We have no doubt whatsoever on the evidence that these functions are the responsibility in the first instance of the Crown Prosecutor with conduct of said case.

143. Thus, reverting to the Elliott Mather complaint, it did raise justifiable concerns. But, as we have already rehearsed, the decision was taken to take the Claimant down an additional training needs route rather than such as formal performance management. Therefore, we can see, both at the 18 July return to work meeting and thence on 25 July, that CCS was explaining what the training would encompass in the context of an agreed training plan for the Claimant. This would include going on a disclosure course; attending a rape trial (which she had still

yet to do); having a mentor; and reviewing the induction process so the Claimant reminded herself of it which of course is not the same thing as having to undertake a further induction.

144. The Claimant's response to this was that she did not need a mentor (as to which see Bp 207). CCS's response was that she did and they would deal with the performance issues in the way she described, not formally but by addressing them in "*bite sized chunks*". She was also anxious that the Claimant be careful of her style in terms of not making hurtful remarks. We have already been to some of those and the impact that they had had on inter alia CCS; and that it was essential to "*treat others in a kind and respectful way"*.

145. The response of the Claimant at this time as per 18 August 2017 (Bp 211) was un-cooperative. So, CCS made it plain that as the manager she required the Claimant to cooperate. We are with Mr Lyons, and it is something he put to the Claimant early on in cross-examination of her, that management has a right to manage. There were clear performance issues, and the way in which they were being managed was proportionate and, with a difficult member of staff, they were being handled as sensitively as possible. CCS clearly felt very unhappy with the way that she had been criticised by the Claimant on such as the Scott issue and the use of language such as "ambush". But she clearly wanted them to move forward albeit in the context that the Claimant should remember that CCS had the right to also be treated with dignity at work and that the vitriolic accusative style[11] in correspondence needed to stop. This is all clear from the meeting on 7 August 2017 which in many respects could be described as a clear the air meeting (Bp 209-210).

146. The response was POA no 4 dated 18 August 2017 (Bp 211) again headed "Equality Act 2010". Apart from challenging the above note of the meeting and not accepting: "… *my letters or emails have contravened the Dignity at Work policy*", she rather distorted matters again insofar as in the sense that CCS had said that she needed to stop communicating in the way she had because of its impact upon her and that if the Claimant was not going to do so, and if there was a continued contravention of the Dignity at Work Policy (and she gave the Claimant a copy), then that might lead to having to take further steps. The Claimant interpreted that as a threat of "*formal action*".

147. Suffice it to say that this was not victimisation by CCS. She was responding as she was not because the Claimant had made protected acts but because of the manner in which the Claimant persisted with them including the false accusations and the language that she used.

148. Stopping there, the allegation relating to Dr Scott for instance was false as was that there had been no performance issues raised with the Claimant. As to CCS having "*it in for me*", looked at in the context of matters, the latter's attempts to deal with these t issues was wholly reasonable and in the context of support on such as making reasonable adjustments and getting the Claimant back into

[11] This the tribunal's summarisation of what is so obvious.

work and addressing undoubted training needs in relation to performance.

149. It follows that we do not find that during this period, there was victimisation pursuant to section 27.

Chapter 3: The honeymoon period – end of August 2017 to 1 January 2018

150. During this period, in fact things went well. Training started as did the placing of the mentor.

151. On 19 September, the Claimant injured her right knee at home. The email chain thereafter is nothing but supportive by CCS. As the Claimant still wanted to get into work when she could, CCS arranged she should have one of the highly prized car parking spaces when she was coming in. She withstood flak from other members of the team who were unhappy at this preferential treatment. She made plain that the Claimant would have the parking space. Of course, again that flies in the face of her being victimiser of the Claimant.

152. An occupational health report was obtained from Mr Tait on 19 October. It was primarily confined to the issue of the leg injury, albeit reiterating the Claimant's long standing desire for home working. The estimated recovery time for return to work was about 8 weeks.

153. As a temporary measure, the Claimant was allowed to home work during this period, other than when she needed to come in: hence the provision of the car parking space. On 7 November in this context the Claimant sent an e-mail to CCS: The first line was:

"*Thank you so much Charlotte I really appreciate your support*".

154. It follows that there is no ongoing victimisation during this period.

Chapter 4 – January 2018 to grievance 2 March 2018

155. Further performance concerns emerged. First, those of a paralegal (Claire Harvey) starting on Bp 220. This we will refer to as the His Honour Judge Coupland issue. Claire Harvey was flagging up concerns of the Claimant not attending to core issues on a particular case in the Crown Court. She was raising them with CCS because the Claimant with conduct of the case was not dealing with matters such as Counsel's advice; and she set out why.

156. At this stage, the Claimant had clearly endeavoured on the 27 December 2017 (Bp 220A) to answer criticisms raised in terms of a case management hearing. This had to do with 'phone downloads, as to which we have already referred. Suffice it to say HHJ Judge Coupland was not satisfied with the reply and via his clerk on the 2 January (Bp 220B) made a series of somewhat stinging criticisms to the CPS, which again was directed to senior level. He referred to a long delay in providing the video interviews, to which we have already referred, not uploading the summaries, no provision of unused material, in

particular on the issue of the telephone and:

"*This is not the first case in which such material has been missing - the regular failure to obtain transcripts at an early stage has been directly raised with the head of RASSO on a previous occasion.*"

157. So, the matter was delegated to CCS to urgently deal with. She then had to answer the Judge (Bp 221A). Also wholly understandable was that she also wanted to discuss these matters with the Claimant. Thus on 4th January she e-mailed her and Ms H Littlewood, who is a paralegal in the crown court team[12], to that effect inter alia observing that the case was "an absolute mess" It also now turned out that the Claimant had not had the requisite VCR telephone, which is an essential tool of her job, for some six months and had not informed CCS about this.

158. Against that background, the Claimant went off sick circa 8 January because of an exacerbation of the knee problems, and notified CCS on 9 January.

159. The tone of the emails changed. The Claimant was back to being acerbic and this was upsetting CCS, inter alia "*not justification for bad behaviour towards me*" (Bp 232). There was also an issue on 12 February or thereabouts over a disagreement about whether a case should be proceeded with on the basis of it having a realistic prospect of conviction. Previously it had been observed of the Claimant that she tended to get emotionally too close to cases and needed to be more detached. Suffice it to say that she felt strongly that this case should proceed. CCS, for reasons which are clear and are based upon an evaluation of the evidence and the prosecution witnesses, was clear that the case should be dropped (Bp 260). The Claimant disagreed with her. That of course could just be put down to being a perfectly acceptable professional disagreement. But the Claimant was very strident in the way that she addressed the matter (Bp 259) and which bridled CCS who was obviously by now really at the end of her tether.

160. This came to a head on 13 February when CCS stated to CC in one of this series of e-mails between them (Bp 262):

"… *I have asked you numerous times to stop levelling allegations against me; … I have done nothing but support you and I am insulted and offended to be told that I am perpetuating a negative approach. I am now going to seek HR advice about our continuing relationship and whether I can continue to manage you in these circumstances. I find your approach towards me intolerable…*"

161. CCS asked AW if she might herself raise a grievance against the Claimant, but was advised that that would not be the best thing to do but to soldier on. We note that SK in her grievance conclusions makes the point that she does not feel that CCS was supported as well as she should have been in what was an increasingly difficult situation.

[12] So at the coal face so to speak of such as criticism from a judge at court.

162. The Claimant's reply to CCS (Bp 262) inter alia was: *"I perceive this as a threat of dismissal … a significant escalation of an ongoing campaign. …*"

163. About this time, there was a further occupational health report on 26 February about the worsening knee condition and the uncertain prognosis and the awaiting of a scan; there was no mention in there of stress and any interface to migraines.

164. So, against that background, by now CCS and AW were discussing whether they should go down the performance management route and also that there be a management attendance meeting with the Claimant but not on a formal basis; just to discuss the latest occupational health report. As is it the Claimant raised her grievance on 2 March (Bp 273-283), to which we have referred. This of course as made plain before us by the Claimant is POA no 5.

Chapter 5 – from the grievance to end of February 2019

165. We can take this short. We have already dealt with it in the main. JA now took over the management of the Claimant for obvious reasons. The Claimant remained off sick. We have dealt with the grievance investigation and that the conclusions are supported by the evidence and that the procedure was a fair one; there was no undue influence upon the investigating officer and the decision of Miss Easton to not uphold the Claimant's appeal is procedurally and forensically justifiable.

166. That finally leaves us with the third stage appeal to Sarah Hammond, Deputy Chief Crown Prosecutor. A second stage appeal hearing is one at which the parties are not present and essentially is a review. Therefore, not surprisingly Miss Hammond upheld the preceding decisions. Importantly, she observed (Bp 708):

"I have reminded myself of the CPS Respect policy and in particular paragraph 3.13: 'Unacceptable behaviour excludes legitimate actions by a manager to support and encourage an employee to perform against key objectives and to manage performance appropriately.' This appears to be all that CCS was doing in the e-mails I have seen."

167. That observation exactly sums up the position.

Conclusion on victimisation

168. There has been no victimisation of the Claimant. As is now self-evident from our findings of fact, the Claimant was not subjected to a detriment because either she had done a protected act or CCS (or for that matter any of the other alleged conspirators such as JA) believed that she may do so. Detriment of course means something which is to an individual's disadvantage. Of course, there is an element of subjectivity about it as the jurisprudence makes plain. The context also cannot be ignored. As to whether the Claimant was acting in

bad faith we leave on one side and prefer to take the view that the Claimant was unreasonably obsessional and unable to act in a detached way whereby she stood back and tried to look at matters in a more rational way. It is clear from the facts in this matter that there were issues with the Claimant and that they did need addressing and that the Claimant reacted unreasonably when there were attempts to do so. Her responses and her protected acts were driven by an unjustified sense of grievance. The treatment of her by CCS, particularly in the honeymoon period, flies in the face of a victimising approach. Put at its simplest, CCS was driven beyond endurance by the unreasonable behaviour of the Claimant. That is why she reacted as she did in August 2017 and February 2018. Perhaps a more robust manager with many years of experience would not have risen to the bait in that respect so to speak although that does not make her a victimiser.

169. Finally, we remind ourselves that when the Claimant refers to trust and confidence, that is irrelevant to the issues before us. We are not dealing with a claim of constructive unfair dismissal.

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Employment Judge P Britton

Date: 20 November 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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