EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Salt	**v**	**Department for Education**

At: **London Central Employment Tribunal** **On: 23, 24, 26, 27 September, 12, 13 & 15 November 2019**

Before: **Employment Judge Brown**

Members: **Mr J Carroll**
Ms B Leverton

Appearances

For the Claimant: **In Person**
For the Respondent: **Mr T Brown, Counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Respondent did not victimize the Claimant.

REASONS

1. The Claimant brings complaints of victimization against the Respondent, his employer.

2. The parties were asked to produce schedules of protected acts on which the Claimant relied in his claims, and of the detriments he contended he was subjected to, in Word format. These were not comprehensive statements of the claims, but were useful summaries.

3. The summarized detriments on which the Claimant relied were as follows:

1.	**25 January 2017** **SB** factoring in minor timekeeping issues into an attendance management process when it was not relevant or due process to do so (1)
2.	**Just before 16 February 2017** Just before the decision on 16 February 2017 not to dismiss C, **SB** and **LW** deciding to make C's post redundant because there was no funding available and create a new one at the same grade in parallel with very similar responsibilities with the same line management arrangements and a decision to keep me within the division until the attendance process concluded in mid April 2017. If C had one more day off sick between February and April 20187 he could have still been dismissed for attendance (1-3)
3.	**From 14 February 2017** **SB's** decision to administer so called "spot checks" on C's whereabouts resulting in C working in a hostile and offensive environment (1-4)
4.	***21 February 2018*** *LW and **SB** failing to inform C of all three HEO opportunities within the BIU, causing C to believe he would become surplus*
5.	**17 March 2017** **SB** and **LW's** decision to put C in the worst performance category "must improve" (two weeks before the end of the reporting year) before any prior indication and following an achieved rating at mid year review point. (1-5)
6.	**19 April 2017** **SB** and **LW's** decision to move C onto formal performance measures resulting in C not being able to apply for jobs for 15 months (1-6)
7.	**18 - 20 April 2017** The circumstances done or not done by **SB** around the complaint made to me by Ishaq Javed's line manager, Holly Mitchell and the circumstances of how **SB** informed C of this in a meeting with Rob Davenport on 20 April 2017 (1-8)
8.	**20 April 2017** **SB** and **LW's** decision to suddenly make funding available for my existing HEO post resulting in C having to stay in the same post at a point where he was unable to secure a post elsewhere for another 12 months because of the disciplinary procedures he was just put on (1-9)
9.	**19 May 2017** **SB** and **LW's** decision to issue C with a misconduct charge for swearing in the meeting on 20 April 2017, resulting in C feeling that he had to voluntarily downgrade to get away from SB (1-10)
10.	**31 May 2017** **SB's** decision and rationale to not allow C to work from home on an *ad hoc* basis as recommended by OH in the latest report resulting in C feeling further harassed (1-11)
11.	**15 June 2017** **SB** telling C his pay would be stopped if C didn't send in a sick note by 21 June 2017, resulting in C taking the decision to downgrade. It was C's only option is he had complained loads to LW about SB's behaviour and it just carried on and on. (1-12)
12.	**27 July 2017** **SB** and **LW's** decision to add a further allegation about two hours' worth of flexitime in Feb/Mar/April 2017 to strengthen a misconduct charge which would have resulted in C not being able to apply for jobs for 12 months (1-12)

13.	**August 2017** **LW's** decision to appoint a grievance manager within her own line management chain when she was part of the problem (1-10, 12, 13)
14.	**From 10 October 2017** **LW** leaving C without a line manager after Rob Davenport left on 10 October 2017, resulting in severe anxiety and uncertainty about what was going to happen (1-10, 12, 13)
15.	**14 November 2017** **LW's** decision to make herself C's line manager when she knew she was complicit in the unfair treatment I had received for months prior to this (and notwithstanding C's objections) (1-10, 12, 13, 14)
16.	**1 December 2017** **LW's** decision to only offer C a role with herself still as C's countersigning officer and her PA as C's line manager resulting in me either having to accept this post or be dismissed, it was effectively an ultimatum. Jennifer Clark offered to be C's line manager following a conversation with Barbara Davenport but LW did not agree to this (1-10, 12, 13, 14)
17.	**22 January 2018** **LW** and **AM** taking away flexitime upon C's return to work, resulting in C not being able to enjoy benefits that non-disabled staff get (1-10, 12-17)
18.	**29 January 2018** **AM's** decision to give C a first attendance warning meaning C couldn't apply for jobs on lateral transfer or promotion for 15 months (1-10, 12-17)
19.	**February 2018** **AM** giving C hardly any work to do and giving me a miniscule amount of work to do at AO grade. Claiming C being allowed to wear headphones and have a desk facing the wall was a fair reasonable adjustment (13-17)
20.	**9 May 2018** **LW** and **AM's** failure to address C's complaint that the attendance policy was being selectively applied.
21.	**10 May 2018** **LW** and **AM's** decision to issue me with a final attendance warning for going 1 day over the trigger point when it had become clear this SB and LW were not applying the policy to other staff that went over the trigger point (1—10, 12—20)
22.	**14 May 2018** **SB** vexatiously interrupting a meeting C was having with a member of her staff for no good reason causing C further anxiety knowing she could still cause me harm (1-12, 20)
23.	**14 May 2018** **AM's** failure to address a legitimate complaint made by C on 14 May 2017 about SB and instead **AM** telling LW that AM didn't want to line manage C anymore (13-17, 19-21)
24.	**15 May 2018** **LW** going to see C to say she would like to offer C a post in a division where C had a task manager from Jan-May-2018 that gave him 10 hours' worth of AO work in this time and who never met C. C was supposed to be doing 50% of his work for her during this time. This resulted in C having a new line manager when he was one day away from being dismissed for attendance until 10 August 2018. C was completely ostracised by this point (1-10, 12-22)
25.	**16 May 2018**

	LW failing to address a legitimate complaint about how the attendance management was being selectively applied to C and not to others. This was clear discrimination with proof that the policy was applied to C and not to one member of staff who was managed by SB and who had LW as a countersigning officer (1-10, 12-23)
26.	**26 June 2018—August 2018** Not being allowed to work from home one day per week. C's new line manager said his hands were tied following a handover meeting he had with **AM**. After complaining to HR, C was finally allowed to work from home one day a week from the first week in August 2018, just when the three- month attendance sanction finished (13-17, 19-25)
27.	**20 June 2018** **AM** spying on C's skype status and informing C's line manager when she believed I had left for the day, with the intent to cause problems between C and his new line manager (13-17, 19-25)
28.	**July 2018** **DS** and **ES's** decisions to narrow the scope of the grievance investigation by only looking into victimization and harassment from 29 January 2018 to May 2018. The detriment was ongoing following a series of protected acts so it should have looked into when the protected acts occurred in order to make a fair decision in line with the legal test. The grievance scope also stated that the discrimination aspects (not including victimization or harassment) would be looked into within the attendance management procedure which would only commence once the grievance appeal had finished (13, 25)
29.	**15 August 2018** **SB**, at a witness interview, claiming C's grievance was vexatious and malicious (which the accomplice at the witness meeting also asserted) and **SB** attempting to defame C's character by accusing C of tricking a friend and distressing him. C subsequently proved SB's version of events were verging on delusional. SB had a clear intention to unduly influence the grievance manager's perception of C by making false and malicious claims (1-12, 20, 24, 25)
30.	**16 August 2018** **LW**, at a witness interview, informing the grievance investigation manager of different facts surrounding why C was offered a move compared to what she had told C before he accepted the move which influenced the grievance manager's opinion of C (1-10, 12-25)
31.	**12 September 2018 (Grievance)** **22 February 2019 (Attendance Appeal)** **DS** and **ES** failing fully and properly to investigate by asking LW to respond to 1 allegation, SB 2 allegations and AM 1 allegation and then just taking their word for what went on as the correct version of events. In the attendance procedure, there was an agreement in place to look at allegation 2. After C provided clear evidence to back up allegation 2 (in this document) a decision was taken to decide this allegation out of scope, on the day the [attendance] appeal closed on 22 February 2019 where C remain 4 sick days away from being dismissed (13, 25)
32.	**12 September 2018 (Grievance)** **22 February 2019 (Attendance Appeal)** **DS** and **ES** failing to fully and properly investigate and doing so without unreasonable delay. The Appeal Manager was appointed one month after C's grievance finished and the same day the Department received C's ET1 (13, 25,

	27, 28, 29, 30, 31)
33.	**[?] November 2018** **SB** and **LW** claiming that C didn't now have a disability for mental health reasons when they had acknowledged in June 2018 that C was allowed to downgrade in their own words "as a reasonable adjustment in line with his disability" (1-12, 20, 25)
34.	**7 December 2018** **AWH** failing to take action with SB after it becomes clear that SB had attempted to deceive the investigation by attempting to cause me harm within the process. SB should have had a disciplinary case to answer for serious misconduct, instead she has just been allowed to go on secondment to work on Brexit. The grievance appeal did not consider all the evidence or relative legislation and did not once reference C's disability. (13, 25, 27, 28, 29, 30, 31, 32)
35.	**December 2018** It was decided that the discrimination aspect would be looked into via the attendance procedure with an appeal manager **ES** that had no authority to comment on my disability status therefore by definition could not make a judgement on whether discrimination occurred (13, 25, 29, 31, 32, 33)
36.	**22 February 2019** In the attendance procedure, there was an agreement in January 2019 to look at allegation 2. After C provided clear evidence to back up allegation 2, **ES** decided on 22 February 2019 that this allegation was out of scope, where C remained 4 sick days away from being dismissed and could not start applying for jobs until 10 August 2019 (13,25, 29, 31,32,33, 34)

4. The protected acts relied on, the relevant page references in the Bundle, the time of the relevant emails containing the protected acts, and whether the protected acts were admitted, were as follows:

9 January 2017	= 278g = 305	9:33	Admitted	(10A)
18 January 2017	233	12:07	Admitted	(10B)
31 January 2017	260	14:31	Not admitted	(10C)
2 February 2017	272	9:34	Denied	(10D)
10 February 2017	NS§34		Not admitted	(10E)
20 March 2017	354	9:42	Denied	(10F)
5 April 2017	433	9:26	Denied	(10G)
	440	9:14	Denied	(10H)
19 April 2017	507	13:03	Denied	(10I)
2 May 2017	571 = 574 = 581	10:17	Denied	(10J)
24 May 2017	633 = 638	20:12	Admitted	(10K)

	= 697			
1 June 2017	658	10:18	Denied	(10L)
31 July 2017	719	9:45	Denied	(10M)
13 November 2017	915	10:18	NS to BD Denied	(10N)
15 November 2017	936 = 948 = 951	9:11	NS to BD – suggests stress risk assessment Denied	(10O)
18 December 2017	982 = 986 = 999 = 1004 = 1012 = 1027 = 1037 = 1064	12:48	NS to AM Denied	(10P)
18 January 2018	?	?	Denied	(10Q)
n/a	n/a	n/a	Denied	(10R)
2 May 2018	1275 = 1278	13:56	Denied	(10S)
9 May 2018	1287—1288 = 1306 = 1310 = 1331 = 1350 = 1357 = 1365 = 1371	16:57	Denied	(10T)
10 May 2018	?	?	NPA	(10V)
14 May 2018	1340	14:33	Denied NS to LW	(10W)
16 May 2018	1342 = 1344 = 1346 = 1353	10:15	Denied	(10X)
20 May 2018	1513?	9:51	Admitted	(10Y)
29 May 2018	1521, 1522—1532	9:32	Grievance Admitted	(10Z)
26 June 2018	1578	11:51	Denied	(10ZA)
18 July 2018	1681	16:32	Admitted	(10ZB)
10 August 2018	1744	10:34	NS to EM Admitted	(10ZC)
20 August 2018	1788	9:36	NS to DS and ES Admitted	(10ZD)
21 August 2018	1806	12:26	NS to JW Denied	(10ZE)
13 September 2018	1924	10:30	NS to DS Admitted	(10ZF)

16 November 2018	2168	14:17	NS to OW Denied	(10ZG)
12 December 2018	2273	11:39	NS to ES and AWH Admitted	(10ZH)
23 January 2019	P104c1	n/a	Preliminary Hearing before EJ Wade Admitted	(10ZI)

5. The Tribunal heard evidence from the Claimant. For the Respondent, it heard evidence from Servet Bicer, the Claimant's line manager December 2016 – June 2017 and Business Manager in the Business Intelligence Unit at the relevant times; Louise Whitesman, Ms Bicer's line manager and Head of the Respondent's Legal and Transactions team; Anita McLoughlin, the Claimant's line manager December 2017 – May 2018 and Louise Whitesman's Personal Assistant; Daniel Simons, grievance investigator; Aleksandra Wasik-Hyde, grievance appeal manager; and Ed Schwitzer, independent appeal manager.

6. The Respondent sought, and was granted, permission to amend its Response, to admit that Occupational Health had recommended home working as an adjustment for the Claimant.

7. The Claimant sought permission to amend his claim to include an allegation of detriment that, on 21 February 2018, Louise Whitesman and Servet Bicer failed to inform the Claimant of 3 HEO opportunities within the Business Intelligence Unit and caused the Claimant to believe that he would become a surplus employee in the Unit.

8. The Respondent opposed the amendment, but proposed that the Tribunal proceed on the basis that the amendment had been granted, to hear the relevant evidence and decide, at the end of the hearing, whether to grant the amendment. The Tribunal adopted that course, as its decision on whether there was a continuing act of victimization in the case could be relevant to its decision on whether to allow the amendment.

9. The Tribunal refused a further application to amend made by the Claimant, in relation to the Respondent's conduct of the proceedings, for reasons the Tribunal gave orally at the time.

10. The Claimant presented a second witness statement to the Tribunal, to which the Respondent did not object. The Respondent presented second witness statements for Ed Schwitzer and Daniel Simons. The Claimant objected to these. The Tribunal decided to read the new witness statements and allow the Claimant to cross examine on the differences between the old and new statements. The Tribunal said that it would decide whether to accept the truth of the new witness statements, having heard all the evidence.

11. There was a Bundle of documents. Documents were added to it during the Hearing. Page references in these reasons are to pages in the Bundle. Both parties made written and oral submissions at the conclusion of the Hearing. The Tribunal reserved its decision.

Findings of Fact

12. The Claimant started permanent employment with the Respondent in January 2009, as an Executive Officer. He was promoted to Higher Executive Officer while working in the Respondents Free Schools Unit in 2012. His manager there was Andre Ellis. The Claimant then moved to the Respondent's Due Diligence and Counter Extremism Group ("DDCEG") in 2014. Initially at the DDCEG, the Claimant's manager was Gerard McAlea. The Claimant went off work, sick, with stress and anxiety from November 2014 - January 2015.

13. The Claimant had intermittent sickness absence during 2015 and then was off work on long term sickness absence from October 2015 - January 2016. The Claimant was issued with a final warning in respect of attendance in January 2016, which he did not appeal. His manager at this time was Sophie Young.

14. Pursuant to his final attendance warning, the Claimant was told that his attendance would be monitored for 12 months from April 2016 to April 2017. He was told that, if he had 8 days' absence during that period, the process would move to the next stage, which would mean that demotion or dismissal would be considered. The Claimant had 6 days absence after April 2016 while still in the DDCEG.

15. The Respondent has an Attendance Management Procedure, page 2674C. It provides the following, amongst other things: Managers' responsibilities include supporting employees to achieve satisfactory performance, by helping them continue to work when they experience ill-health. Their responsibilities also include holding a formal unsatisfactory attendance meeting with all employees who reach a trigger point and deciding on whether to take formal action, pages 2674E, J & K.

16. The procedure provides that, for sickness absences of 8 days or more, employees must provide a Fit Note. During longer absences, employees should send their manager the Fit Notes they receive. Failure to provide a Fit Note may result in disciplinary action and/or action to stop pay, page 2674H.

17. The procedure states that attendance is unsatisfactory if employees' sickness absence level reaches or exceeds 8 working days in a rolling 12-month period, page 2674J.

18. Formal action or unsatisfactory attendance attracts what the policy calls "decision points". These are: first written improvement warning; final written improvement warning (when the employee reaches or exceeds their trigger point following a first written improvement warning); consideration of dismissal or demotion (when the employee reaches or exceeds their trigger point following a final written improvement warning, or when a continuous sickness can no longer be supported), page 2674K.

19. A written improvement warning is followed by an "improvement period" of 3 months (which can be extended to 6 months), during which the employee should aim to meet their attendance standard. They are expected not to exceed 25% of the normal trigger point in the 3-month period, page 2674L.

20. After successful completion of the improvement period, the employee is subject to a 12 month "sustained improvement period", during which they are expected to maintain attendance below the trigger point, page 2674L.

21. Decisions on dismissal or demotion must be taken by senior managers at Deputy Director level or above, page 2674Q. There is a right of appeal at each decision point in the process, page 2674S.

22. The Respondent has an Improving Performance Policy, bundle 5, page 2519. It provides a number of things. The policy specifically states that poor performance does not include actions such as persistent lateness, inaccurate recording of flexitime and refusing to comply with a manager's reasonable requests. These are conduct matters, dealt with under the Respondent's Discipline Policy.

23. The Claimant complained about bullying and harassment by Sophie Young on 7 March 2016.

24. He received a performance warning on 25th May 2016, page 144.

25. The Claimant was seen in Occupational Health on 6 April 2016. In a Report dated 8 April 2016, an Occupational health doctor said that the Claimant felt that his current role did not suit him, that he was unhappy in his role and that the work situation had impacted on the Claimant's mental health. The Occupational Health doctor recommended that the Claimant managers discuss, with the Claimant, whether it would be possible for him to move to an alternative role.

26. The Claimant told the Tribunal that the Respondent informed him that, if the Claimant could broker his own move as a Higher Executive Officer, the Claimant would be allowed to leave the DDCEG.

27. The Claimant brokered a managed move with Rob Davenport, a manager in the Respondent's Legal and Transactions Division, in June 2016. The Claimant was told that funding for this new post would be available for 6 – 12 months. It was not in dispute that the Claimant knew, at the outset, that funding for his post was time-limited. This was, however, a permanent move to the new Division; there was no agreement that the Claimant should return to the DDCEG when funding for his new post ended.

28. The Claimant worked in the Business Intelligence Unit of the Legal and Transactions Division. In October 2016 Rob Davenport assessed Claimant's performance as strong and, in November 2016, Mr Davenport assessed his performance as good, page 354.

29. Servet Bicer became the Claimant's line manager in December 2016. At first, Ms Bicer and the Claimant had a good working relationship.

30. The Claimant went off work on sick leave for 5 days in December 2016. This triggered the attendance management process on the Respondent's computer systems. An alert was generated to take action to consider dismissal, page 166. This was because the Claimant had already taken 6 days' sick leave in the

DDCEG and had now gone over the 8 days' absence trigger point in the 1 year sustained improvement attendance monitoring period.

31. On 7 December 2016 Mr Davenport emailed Ms Bicer, saying that the Claimant's absences had triggered alerts and that Mr Davenport had assigned them to Ms Bicer to deal with, page 166. Ms Bicer responded, saying that she would encourage the Claimant to get some counselling through the Respondent's counselling provider, as she was concerned that the Claimant might be struggling with his emotions. She said that she had noticed a pattern of the Claimant being absent on Mondays, pages 165 -166.

32. On 5 January 2017 Ms Bicer invited the Claimant to a formal unsatisfactory attendance meeting, to be held on 13 January 2017.

33. On 9 January 2017, the Claimant responded, commenting on the appropriate course of action at the unsatisfactory attendance meeting. He said that he had a disability, anxiety and depression, and that he had been subjected to discrimination, bullying and harassment through micromanagement, by his previous manager, Sophie Young, during attendance review periods. He said that, since joining his present team, his mental health had improved and that he was enjoying work and valuing the new skills he had been learning. The Claimant said that his previous absences during the sustained improvement period, apart from the absence in December 2016, had been caused by bullying and harassment by Sophie Young. He said that, now that he was working within a supportive environment, the absences would not continue. He said, therefore, that neither dismissal nor demotion would be appropriate, pages 220 – 223.

34. It was not in dispute that the Claimant's email of 9 January 2017 was a protected act. It was not in dispute that the Claimant did numerous protected acts thereafter, including on 18 January 2017 (page 233), 24 May 2017 (page 633), 20 May 2018 (page 1513), 18 July 2018 (page 1681), 10 August 2018 (page 1744).

35. Ms Bicer held a formal unsatisfactory attendance meeting with the Claimant on 13 January 2017. In the meeting, Ms Bicer asked the Claimant about emails he had previously sent to Mr Davenport, saying that he would be unable to attend work on two occasions, when the Claimant had offered to make up the time for these absences by working flexitime. The absences had not been recorded on the Respondent's system. Ms Bicer asked to see the Claimant's flexitime sheets, to check whether the time being made up. She also asked to check the hours the Claimant had worked on Sunday 27 November 2016, when the Claimant had said that he had worked that day, instead of working on Monday 28 November 2016. The Claimant responded that he had not been recording flexitime until recently.

36. On 18 January 2017 the Claimant asked to reopen his formal grievance about bullying and harassment in the DDCEG. He said that he had stopped the grievance previously on the grounds of his mental health, page 233.

37. On 19 January 2017 Ms Bicer sent a spreadsheet showing the planned establishment for the Business Intelligence Unit of the Legal and Transactions team in the next financial year, April 2017 – April 2018. This included two Higher Executive Officers, page 227cc.

38. The Claimant was seen in Occupational Health on 25 January 2017. The resulting Occupational Health report dated 27 January 2017 said that the Claimant was much happier at work, that his line manager was very supportive, and that he found it helpful that there were clear expectations as to what was required of him. The report said that the Claimant was likely to be considered to be disabled. It advised that the Claimant was fit for his role, with adjustments. The report recommended that managers consider managing his sickness absence due to anxiety and depression separately and that managers permit him to attend disability-related medical appointments, such as talking therapy, if these fell within the working day. The report said that the Claimant suggested that an attendance management plan should be implemented, so that he could discuss staying well with his line manager. The report said, "Ad hoc homeworking is likely to be a helpful adjustment. I understand that Mr Salt has offered to be demoted so that he has less responsibility. Clearly it is for the employer to determine whether this appropriate or feasible." Page 252-254.

39. On 31 January 2017 the Claimant emailed Ms Whitesman and Ms Bicer, giving examples of what he said was subtle bullying by Sophie Young. He said that Ms Young had not supported him or made reasonable adjustments for him, page 260.

40. Also on 31 January 2017, Ms Bicer emailed the Claimant, saying that she was disappointed that he had been unable to provide her with an accurate record of his annual leave. She said that she had spoken to Andre Ellis, the Claimant's previous manager at the Free Schools Group, who had told Ms Bicer that the Claimant did have a record of annual leave and flexisheets. Ms Bicer said that the Claimant should, therefore, have known that he was required to keep an accurate record of these. She asked that the Claimant recover his leave record and share it with her. She said that, if he was unable to do so, she would seek advice about how to treat this. She further said that the matter would inform her final decision on the attendance management process, page 265.

41. On 1 February 2017, Louise Whitesman told the Claimant that HR advised that employees were required to raise complaints within three months of the relevant events, so that he could not continue with his old DDCEG grievance.

42. On 2 February 2017 the Claimant emailed Ms Bicer, saying that due process had not been followed. He said that he could not find his hard copy leave records. The Claimant also said that the attendance management process had been delayed and that this was causing him stress and further anxiety, page 272.

43. Ms Bicer replied, saying that, when the Claimant had joined the Legal and Transactions Division, he had told Mr Davenport that he didn't need any reasonable adjustments, so the Unit had not known about any underlying health issues. She said that this was why an Occupational Health report had been required. She said that she was concerned about the Claimant's lack of records of annual leave which was a slightly separate issue to the attendance process. Regarding flexitime, she said that she had not discovered that the Claimant was building up flexitime without using flexi sheets until the attendance meeting on 13th January, page 271. In the same email, Ms Bicer said that she had done her best to

support the Claimant, including allowing him to sit separately from the team, to alleviate any pressure he might feel.

44. Around this time, the Claimant sent Ms Bicer a number of emails, setting out and his annual leave from his records. It was not clear to the Tribunal, however, that the Claimant ever accurately accounted to Ms Bicer for his annual leave taken in 2016, or the flexitime he worked that year.

45. It was not in dispute between the parties at the Tribunal hearing that Ms Bicer was not a sufficiently senior manager to take decisions about whether the Claimant should be demoted or dismissed.

46. On 7 February 2017 Ms Bicer emailed Julian Wood information regarding the Claimant's attendance management process, so that Mr Wood could conduct the required attendance management meeting, page 278f. Mr Wood was sufficiently senior to conduct the meeting. She attached the Claimant's 9 January 2017 email, in which he had complained of harassment and bullying by Sophie Young and had said that he had a disability. She also attached an email the Claimant had sent to Mr Davenport saying that he did not need any adjustments put in place and that the stress of working in DDECG had led to his diagnosis of anxiety. The Claimant had said that he was confident that his attendance would improve now the stress was behind him. In her own email, Ms Bicer said, "This implies that he didn't have a disability and didn't need adjustments."

47. On 13 February 2017 Ms Bicer recommended that, in the event that the Claimant was dismissed, he should receive only 25% of possible compensation for employees who were dismissed because of sickness and non-attendance, page 281 on 15 February 2017.

48. Mr Wood wrote to the Claimant following an attendance meeting with him on 10 February 2017. Mr Wood said that he was satisfied that the Claimant had demonstrated an improvement in his attendance since his transfer to the Business Intelligence Unit. He said that the Claimant would not be dismissed nor demoted, but that his absence would be reviewed regularly, and that Mr Wood could reconsider his decision at any time within the sustained improvement period, up to 29 April 2017, pages 287-288.

49. Around 14 February 2017 Ms Bicer telephoned the Claimant at his desk, but found that he was not present for 35 - 40 minutes. The Claimant's flexitime sheets nevertheless indicated that he was at work during this time, page 296. Ms Bicer told the Tribunal that the two of the Claimant's colleagues, Mr Wynn and Ms Armstrong, had also informed her that the Claimant was not working the hours that he was recording on his flexi sheets.

50. The Claimant gave evidence to the Tribunal that around this time, Ms Bicer told him that she administered spot checks to check that employees were working. The Claimant considered that this was not true, because Ms Bicer did not keep records of such checks. The Claimant considered that Ms Bicer was specifically monitoring the Claimant, and not other people. It was not in dispute that Ms Bicer did not keep a record of spot checks she carried out. Ms Bicer told the Tribunal

that she only recorded instances where there were discrepancies with flexitime sheets.

51. On 13 February 2017 Ms Bicer emailed the Claimant, saying that she felt it was important that the Claimant sat together with the team, page 286. The Tribunal accepted Ms Bicer's evidence that she did this because she was concerned that she did not know what he was doing, or where he was, when he sat separately from the team. It also accepted her evidence that Ms Bicer wanted to make sure that, if the Claimant needed help, she would be able to give it to him.

52. The Tribunal further accepted Ms Bicer's evidence that the Claimant's colleagues had reported that he did not appear to be working the hours he recorded on flexitime. The Tribunal found that, on the evidence, the Claimant had not appropriately recorded, either, his flexi time or his annual leave, while in Ms Bicer's team.

53. Ms Bicer met the Claimant on 16 February 2017 at a Keeping In Touch meeting. There was a dispute between the parties about the nature of this meeting. The Claimant told the Tribunal that, at this meeting, Ms Bicer appeared to be angry that the Claimant had not been dismissed. He said that Ms Bicer told him that funding for this post would be running out and that a new Higher Executive Officer post would be created and advertised - and that the Claimant would be welcome to apply for it. He also told the Tribunal that, when the Claimant mentioned ad hoc home working at this meeting, Ms Bicer told him that there was no way he would be working from home. The Claimant told the Tribunal that Ms Bicer did not warn him, at this meeting, that his performance was unsatisfactory. He gave evidence that Ms Bicer said that he had betrayed her and had gone behind her back when he tried to arrange a job swap.

54. Ms Bicer produced brief handwritten notes of the meeting, which were not shared with the Claimant at the time. These state, "Leave sheet. Flexi. Relationship building. Move to Real Estate Team. More work to get to full capacity. Demotion to EO. Post – double check .. funding. George. .. Had a conversation with Rob about possibility of moving to RET… Disputes all accusation. Needs to rebuild himself wants to voluntarily regrade to EO. Must improve. Nick to consider whether he wants to voluntarily downgrade – a couple of weeks?", page 557I. The Claimant disputed that these notes were accurate, or made on 16 February 2017.

55. Ms Bicer told the Tribunal that the notes reflected the performance concerns she raised with the Claimant on 16 February 2017. She said that she had not raised them before 16 February because the Claimant had cancelled meetings in January 2017; he was dealing with the attendance management process at that time, she was sensitive to how he was feeling and did not want to add to his stress.

56. Ms Bicer drew the Tribunal's attention to an email she had sent to the Claimant on 19 April 2017, page 508. In it, Ms Bicer referred to her handwritten notes from 16 February. She also said, "We had a conversation about your performance at your performance management KIT on 16 February … you had cancelled our KIT the previous week because you were preparing for a decision meeting about your attendance, so I awaited the following week to give you this feedback …. You were concerned about the volume of concerns I had and you also disputed allegations

about brokering the move to the Real Estate Team via Rob and separately agreeing a job swap with George. I told you that you must improve. You told me that you were considering downgrading to EO and said that you had to rebuild yourself...”.

57. On 21 February 2017, the Regional Lead for the Real Estate team emailed Ms Bicer, saying that the Claimant had telephoned her to apologise about a discussion he had had with a colleague, George, about swapping jobs, page 300.

58. Ms Bicer also told the Tribunal that the Claimant informed her in the meeting on 16 February that he was considering downgrading to an Executive Officer post. She said that she explained to the Claimant that a new Higher Executive Officer post was being created in her team which would have significant duties supporting a Secretariat. Ms Bicer told the Tribunal that the Claimant responded that he would not want to do Secretariat work.

59. Ms Whitesman also gave evidence that a need for a new HEO post, to support a Secretariat, had been identified at this time. She said that the Secretariat was not functioning correctly and needed proper HEO support to operate effectively.

60. This HEO post was later advertised in April 2017, page 551a. The “key responsibilities” of the role were stated to include, “Secretariat for the Capital Commercial and Assurance Board, a strategic board comprising of Deputy Directors and Directors across ESFA Capital Group”, page 551c.

61. On 21 February 2017 the Claimant emailed Ms Bicer, referring to their discussion the previous week about his post. He said that he believed that the post was funded until the end of the financial year, but said that he was copying in Louise Whitesman and Rob Davenport for clarification, page 302. He said that Ms Bicer had told him that she would be advertising “the post” and asked for a timescale.

62. Ms Bicer replied the same day, saying that she had confirmed with John Corn that the funding for the Claimant’s post would continue until the end of May 2017. She said that Mr Wood would like the Claimant to remain in Ms Bicer’s team until the sustained improvement period ended on 29 April 2017. Ms Bicer stated that she would start the recruitment exercise to fill the HEO post by April 2017 and the process would take about seven weeks. Ms Bicer said that, if the Claimant did not apply for it, or was not appointed to it, he would not have to leave his own post until the end of May 2017. If, by the end of May, he had not secured alternative post, the Claimant would go into a surplus pool and would be prioritised for any vacancies before any Higher Executive Officer post was advertised, page 301. Ms Bicer also copied Ms Whitesman and Mr Davenport into her reply.

63. In his reply on 22 February 2017, the Claimant said that he knew that the funding for this current was running out, page 301.

64. The Claimant contended that, at this time, Ms Bicer and Louise Whitesman failed to tell the Claimant that there would be 3 Higher Executive Officer posts available within the Business Intelligence Unit in the following financial year. The Claimant drew the Tribunal’s attention to planning documents, which indicated the number of Higher Executive Officers which were anticipated to be needed in the Unit in

2017-2018. The Capital Group Resource Commission 2017 – 2019 showed the staff data for 31 October 2017 and stated that the agreed FTE HEO staff level for 2017 – 2018 was 7, page 1016y. The Claimant contended that 4 posts were already filled, meaning that 3 were vacant.

65. Ms Bicer told the Tribunal that the funding position for 2017 - 2018 was not known in February 2017.

66. Ms Whitesman corroborated Ms Bicer's evidence. She told the Tribunal that the Capital Group Resource Commission was an iterative document and that the version the Claimant was referring to was created in November 2017, page 1016za. She did not know, until then, that she had funding for 7 HEO posts. She said that the Unit's funding and staff contingent is never confirmed before the start of the financial year. Ms Whitesman said that she does not have a delegated budget for her Unit and, therefore, it is not within her gift to create or confirm posts.

67. The Claimant contended that Ms Whitesman must have known that she would have funding for additional posts because she retained some contingent workers at the start of the financial year in April 2017, when, on Ms Whitesman's account, funding for them was not confirmed. Ms Whitesman told the Tribunal that she could terminate the contingent workers on one week's notice, which was why she was able to retain them.

68. On all the evidence, the Tribunal found Ms Whitesman and Ms Bicer's evidence regarding funding for posts in the Unit to be more persuasive than the Claimant's. Ms Whitesman, in particular, had detailed knowledge of the funding process. She was able to explain the chronology and decision-making process in relation to available HEO posts in 2016 – 2017. The Tribunal decided that it was always known, including by the Claimant, that funding for the Claimant's HEO post was time limited and would expire in the first half of 2017. The Tribunal decided that, in February-March 2017 Ms Bicer and Ms Whitesman did not know that there would be 3 available HEO posts in the financial year 2017-2018. It decided that they knew that there would be one new HEO post, with Secretariat duties, available in 2017 – 2018 and that Ms Bicer told the Claimant about this post on 16 February 2017. The Tribunal found that this new post was different to his existing HEO post because it had significant Secretariat duties attached to it. The Claimant did not wish to apply for that post.

69. The Respondent has a Managing Surplus Staff Policy, page 2581. This provides, at paragraph 1, "A member of staff is considered to be surplus if they are a permanent member of staff, but no longer have a permanent post and are immediately available for redeployment." This definition never applied to the Claimant, so most of the duties under the policy were not relevant to him. Only paragraph 6 of the policy appeared to apply to the Claimant, "Where an individual is advised that they will be made surplus at a future date, the line manager should consider what appropriate support may be required for them during this transitional period."

70. Ms Bicer did not send the Claimant any written record of their 16 February 2017 meeting at the time. She did not tell him formally that his performance would be classed as "Must Improve". However, the Tribunal found that Ms Bicer did raise

significant performance concerns with the Claimant in the meeting. This apparently led to the Claimant apologising for an attempt to swap jobs with a colleague, George, page 300. The Tribunal accepted that Ms Bicer's handwritten notes were an accurate record of the topics discussed.

71. The Tribunal did not accept the Claimant's evidence that Ms Bicer was hostile towards him in the 16 February 2017 meeting. The Tribunal found that the Claimant's perception did not accord with the facts. In his list of detriments and written submissions, he complained that, on 16 February and 21 February 2017, Ms Bicer told him that funding for his post was running out. However, it was abundantly clear that the Claimant was always aware that funding for his post was time limited – there was no new decision in February 2017 in this regard. Ms Bicer was simply reminding the Claimant of something he already knew. The Claimant's contemporary emails confirm this. The Claimant took exception to something which was unexceptional.

72. On 17 March 2017 Ms Bicer met with the Claimant and told him that he would be graded "must improve" for performance in that year. The Claimant considered that he had not been warned at any time previously that his performance was not satisfactory. He was very concerned that this decision was sprung on him 2 weeks before the end of the relevant performance year.

73. Ms Bicer emailed the Claimant on 17 March 2017. She said that, in their meeting on 16 February, she had shared concerns about the Claimant's behaviour in three different instances, page 341. She said that the Claimant had tried to broker a move to the Real Estate team without Ms Bicer's knowledge and that the Claimant had told a colleague, George, that he would be able to do a job swap. She said that he had upset another member of staff, Harpal, by telling Harpal that Harpal had put Ms Bicer in her place. Ms Bicer also said that the Claimant and shown a lack of attention to detail and had not demonstrated the ability to work independently, pages 341 – 343.

74. The Claimant responded on 20 March 2017 saying that, in their last but one (January) meeting, he had been told that he had been "effective". He said that Ms Bicer had been drawing colleagues into the situation by continually asking about the Claimant's whereabouts, which he said was unprofessional, page 354.

75. The Claimant drew the Tribunal's attention to the Respondent's Record of Monthly Discussions April 2016 – March 2017. This showed that, in the February 2017 meeting, reviewing his January 2017 performance, the Claimant was rated "effective", but that, in his March 2017 meeting, reviewing his February 2017 performance, he was stated to be at risk of underperforming for the year and his performance was assessed as "inconsistent", page 420.

76. Ms Bicer told the Tribunal that she had raised conduct and performance issues with the Claimant informally from December 2016. The Tribunal accepted her evidence on this, given that she was able to set out her concerns in detail in her email on 17th March. The Tribunal accepted that this reflected the matters that she had raised before then.

77. Ms Bicer held a Keeping In Touch meeting with the Claimant on 23 March 2017 and sent the Claimant an email on 24 March 2017 summarising it, page 395. The Claimant responded, challenging some of the discussion and suggesting that they talk about it in the mediation, page 394.

78. Mr Davenport had attended the meeting and was copied into the correspondence. He said, in an email on 28 March 2017, "I did not take a note of the meeting but I was there as an observer. For what it is worth, from memory, Servet's note seems to be an accurate record of the meeting and is really quite uncontroversial". Page 393.

79. Ms Bicer met Claimant on 6 April 2017 to conduct an end of year performance review, page 498.

80. On 19 April 2017, Ms Bicer decided to start formal performance processes in respect of the Claimant. Ms Bicer told the Tribunal that she knew that the Claimant was already on a management process from 2016, but that she decided that the best way to proceed was to restart the process and give the Claimant more time to improve.

81. On 19 April 2017 she wrote to the Claimant, saying that he had received a warning on 5 May 2016 before joining the Legal and Transactions Team in June 2016. She said that the Claimant had been judged to be in the "Must Improve" performance category in February and March 2017. She confirmed that the Claimant had started working with a new manager during the performance management process, and he had not been issued with a letter to say that he would be in a sustained improvement period ending on 24 June 2017. Ms Bicer informed that the Claimant that he would, therefore, enter the managing poor performance process at stage 1. Ms Bicer invited the Claimant to a meeting on 27th of April 2017, to discuss supporting the Claimant to improve its performance to the required level. She said that the meeting could result in a first written warning, pages 498-499.

82. On 5 April 17, the Claimant emailed Ms Weitzman and Mr Davenport saying that Ms Bicer was victimizing him, page 433. He also complained to the Operations Team that Ms Bicer had failed, at an early stage, to put concerns about his performance in writing, or given him a fair chance to improve, page 440. Catherine McGruer responded on 5 April 2017, saying that she would expect to see email chains and written notes of meetings, to back up any issues raised about performance, if the Claimant had now been marked as "Must Improve", page 439.

83. The Tribunal found that Ms Bicer did have genuine and well- founded criticisms of the Claimant's performance. It was unfortunate that he was not told about these in detail until 16 February 2017 and was not formally told that he was in the "Must Improve" category until 17 March 2017. Nevertheless, circumstances dictated that timing to a large extent. Ms Bicer had only been managing the Claimant since December 2016. Almost immediately, the Claimant went off work, sick, triggering the attendance management process. This process - and the Claimant's failure properly to account for other annual leave - then dominated their interactions in January and early February 2017. There was, thereafter, little time before the end of the appraisal year, for Ms Bicer to address legitimate performance concerns.

84. In March 2017 the Claimant was part of a team organising interviews for a Senior Analyst post. On 24 March 2017 Mr Ishaq Javed emailed the Claimant about the interviews. The Claimant referred the matter to Ms Bicer, who asked him to confirm the timeline for the interview panel, including the times when the moderation of applications and interviews needed to be completed. The Claimant drafted a timetable and sent it to all members of the panel, page 490.

85. On 12 April 2017 one of those involved in the process emailed Ms Bicer, asking that the responsible member of her team confirm the interview slots, page 488. Ms Bicer set out proposed slots, page 487, copying in the Claimant.

86. It appears, however, that the interview panel was not then notified of the slots and some panel members were not present to conduct the scheduled interviews. On 18 April 2017, Ms Bicer emailed the Claimant, saying that Mr Ishaq Javed said the Claimant had cancelled the slots in the panelists' diaries, page 486.

87. The Tribunal was shown evidence that the Claimant had put "placeholders" in the panelists' diaries for the relevant day. Ms Bicer told the Tribunal that the Claimant was leading on the matter and that it was his responsibility to confirm interview times, rather than "place holding" a whole day, which would indicate something which was yet to be confirmed. The Claimant told the Tribunal that Ms Bicer should have told him, in detail, what was required of him. Ms Bicer told the Tribunal that this was a basic task.

88. The Tribunal found that the Claimant was the team member, from Ms Bicer's team, who had responsibility for these interviews. The fact that Ms Bicer copied him into the emails, specifying interview slots, demonstrated this. For some reason, the specific slots were not confirmed to the panelists, which resulted in confusion and inconvenience. The Tribunal decided that it was unsurprising that there would be an investigation into the matter. It was unsurprising that the Claimant, who had responsibility for the matter, would be questioned about his conduct. The Tribunal accepted Ms Bicer's evidence that the booking of interview slots was a basic task, which the Claimant ought to have known how to do properly, without detailed instruction.

89. On 7 April 2017 the Claimant emailed HR saying that his HEO post was being advertised and he did not intend to apply for it. He asked about redeployment, page 516. This resulted in Dave Fletcher from the redeployment telling the Claimant and Ms Bicer that there was no longer "priority consideration" for surplus staff and that it was line managers' responsibility to support staff in these circumstances, page 515. On 18 April, in response to an email from Ms Bicer, the Claimant accepted that the HEO post which was being advertised had a different remit to his HEO post, for which funding was running out, page 513.

90. On 20 April 2017, Ms Bicer emailed the Claimant saying that John Corn had confirmed that her Unit had received budgetary approval for the Claimant's post for the next financial year, so that the Claimant would not be redeployed, page 511. Mr Fletcher emailed further, saying that this was good news and that the Claimant would still be able to apply for other jobs through the civil service jobs portal.

91. The Claimant told the Tribunal that he was not able to broker his own managed moves, or to apply for other roles in the civil service, while he was on an attendance management process. This came to an end on 29 April 2017.

92. The Claimant had brokered his own move to Ms Whitesman's team in 2016, when he was both in a sustained improvement period for attendance and on a stage 1 performance warning.

93. Following the Claimant's complaint on 5 April 2017 that Ms Bicer was victimizing him, Ms Whitesman asked Mr Davenport to sit in on future meetings between the Claimant and Ms Bicer. Mr Davenport did this. Mr Davenport had also sat in on a meeting between the Claimant and Ms Bicer on 23 March 2017.

94. On 20 April 2017, Holly Mitchell, a team leader, emailed Ms Bicer, complaining about the unprofessional manner in which the Claimant had interacted with Mr Ishaq Javed. Ms Mitchell said that the Claimant had phoned Mr Javed three times and the way the Claimant had spoken to him had made him feel like he was being accused of having done something wrong. She said that the Claimant had told Mr Javed that he had said things which he had not, pages 517a-517b.

95. On 20 April 2017 Ms Bicer met with the Claimant. Mr Davenport was also present. At the end of the meeting, Ms Bicer told the Claimant about the complaint from Ms Mitchell and gave him a print-out of the complaint to read. The Claimant was very annoyed and swore, saying, "This is fucking ridiculous".

96. On 21 April 2017 Ms Bicer emailed the Claimant and Mr Davenport with a summary of the meeting on 20 April. At the conclusion of her email, she said that she had shared a hard copy of a complaint about how the Claimant had handled a conversation with a new Executive Officer apprentice, who had felt uncomfortable about the way the Claimant had spoken to him. Ms Bicer said that the Claimant had read the complaint and discarded it in anger and frustration. She said, "Nick became somewhat confrontational and at times unprofessional ….". In conclusion, Ms Bicer said she would seek advice in dealing with the complaint, pages 584-585.

97. On 9 May 2017 Ms Bicer emailed the Claimant, copied to Mr Davenport, querying the flexi time that he had recorded on 20 April that year. She said, "As you know, I do carry out spot checks and I noticed that you away from your desk from 12:40pm and returned at around 1:20pm that was a 40 minute break. Can you check your records please and let me know what happened …" pages 590-591. The Claimant emailed Mr Davenport on 10 May 2017 saying that, at the relevant time on 20 April, he was on the phone to ACAS, getting advice about constructive dismissal, page 590.

98. On 5 May 2017 Ms Bicer emailed the person who was covering for Ms Whitesman in the Legal and Transactions team, saying that she was formally requesting an investigation into the way that the Claimant responded to a complaint she had shared with him. She said that she believed that it should be treated as misconduct, pages 587-588. Ms Whitesman told the Tribunal that she appointed a manager to handle the complaint, to consider whether or not the matter was one which should be referred to disciplinary proceedings.

99. It was not in dispute that Ms Bicer did not permit the Claimant to work from home on an ad hoc basis as had been suggested by the Occupational Health report as being a potential adjustment in January 2017. Ms Bicer told the Tribunal that, in an Attendance Management Action Plan drafted in March 2017, she stated that the Claimant required extensive support from Ms Bicer and regular meetings to ensure that he was well, so that working from home might mean that Ms Bicer missed the Claimant's trigger points and opportunities to avoid the Claimant taking sickness absence for mental health reasons, pages 554-556. Ms Bicer told the Tribunal that the Claimant had initially agreed to this plan, but had then failed to sign up to the plan because of the breakdown in their relationship.

100. Ms Bicer also told the Tribunal that, previously, the Claimant had told her and Ms Young that he would not be able to work from home, as he had very poor phone reception where he lived. The Claimant disputed this in evidence at the Tribunal. He pointed out to the Tribunal that he had emailed work from his home email address, which proved that he had internet access at home.

101. The Tribunal accepted the Respondent's evidence that the Claimant had previously said that he was unable to work from home and that he did not have good telephone reception or internet access. The Tribunal noted that both Ms Bicer and Sophie Young had recorded that the Claimant said that he was unable to work from home. The Tribunal also noted that, on 22 May 2018, the Claimant told Anita McLoughlin and Louise Whitesman that he could not access the network at home, despite trying for ages, page 1443.

102. The Claimant was permitted to work from home two days a month from August 2018.

103. On 2 June 2017 the Claimant went off sick with stress and anxiety, page 662. On 6 June he emailed Ms Bicer saying that he had visited his GP the previous day. He said that his GP had advised him that he was suffering from depression and anxiety and that he would not be fit for work for 3 weeks. The Claimant said that he would send the doctor's note in due course, page 674. On 12 June 2017 Ms Bicer contacted the Claimant about a possible Occupational Health referral and also asked the Claimant to send in a copy of his sick note, pages 681-682. The Claimant replied, saying that he would chase the doctor for the sick note, page 681. Ms Bicer responded saying that the Claimant ought to have been given a Fit Note when he was signed off for 3 weeks, page 680. On 15 June 2017 Ms Bicer emailed the Claimant further, saying that she had telephoned him twice to have a conversation about the Fit Note, but had not received an answer. She said, "Please send me your Fit Note by Wednesday 21 June via recorded delivery (to prevent loss) otherwise your absence will be treated as unauthorised and your pay will be stopped … the attendance management guidance also states, "for sickness absences of 8 calendar days or more the employee must provide a Fit Note ….", page 678.

104. From the relevant correspondence, the Tribunal concluded that the Claimant had failed to provide a Fit Note in accordance with the Respondent's Attendance Management Policy, despite Ms Bicer having asked for it and having tried to contact the Claimant by telephone.

105. On 6 June 2017 the Claimant was invited to a formal meeting under the Respondent's Discipline Procedure, to consider an allegation that he had acted inappropriately towards his line manager at a Keeping In Touch meeting on 20 April 2017, page 676. The invitation told him that, at the end of the formal meeting, the decision manager would decide what further action to take. The Claimant did not attend the formal meeting.

106. Ms Bicer obtained advice from a HR case manager about the Claimant and his absence and conduct. On 19 June 2017, the HR case manager, Phil Huffer, wrote to Ms Bicer, saying that all concerns about the Claimant's behaviour should be investigated together. He said this was to avoid appearing to separate the issues in order to "stack up" warnings against the Claimant when the Respondent was aware of other conduct issues during on ongoing investigation, page 706.

107. Sarah Jane Pizzie produced an investigation report into the Claimant's alleged misconduct. She decided to add an allegation against the Claimant that there had been inaccuracies in his flexi time keeping, page 718. On 18 June 2017 Ms Pizzie wrote to the Claimant, clarifying that the additional allegation related to four specific dates: a lunch break on 14 February; a lunch break on 24 February; the Claimant's recorded start time on 10 March; and his recorded lunch break on 20 April 2017. She said that she had included the allegation in the misconduct investigation because, having taken advice from the case officer, it would be prudent to investigate the two allegations together, otherwise, if the first allegation resulted in a penalty, that penalty would need to be taken into account if the second allegation was proven, page 2875.

108. On 27 July 2017 Sarah-Jayne Pizzie sent the Claimant her investigation report into the Claimant's alleged misconduct. The same day, the Claimant asked Ms Pizzie whether she would like more evidence about Ms Bicer's behavior towards the Claimant. He asked that he be given time to put together a full case, page 721. On 31 July 2017 that Claimant emailed Ms Pizzie further, saying that he felt he had no option other than to raise a grievance against Ms Bicer for the way she had treated him since December 2016. Page 719. Ms Pizzie appointed Oliver Williams as investigation manager for the Claimant's grievance, page 719.

109. It appears that the Claimant met with Mr Williams on about 7 August 2017 and told him that he was going to collate his evidence and submit his grievance, but that the Claimant was also willing to consider mediation as an informal resolution of the grievance, page 731. On that day, the Claimant also emailed Mr Williams saying that, given that he had explained the impact that Ms Bicer's alleged behavior had had on him, he would like Ms Bicer to consider dropping the misconduct charge before the Claimant decided on the next steps, page 718.

110. On 4 September 2017, the Claimant told Mr Williams that he had sought advice about "the three month time limit". He also confirmed to Mr Williams that his grievance related to discrimination, including bullying and harassment, in relation to a protected characteristic of disability. He said that he would like the matter to be looked into and resolved, page 757. Mr Williams responded that he took the Claimant to mean that he would like to raise a formal grievance, page 757.

111. The disciplinary case against the Claimant was put on hold until the Claimant's grievance had been heard, page 812.

112. The Claimant was voluntarily demoted to the grade of Executive Officer in July 2017.

113. The Claimant remained signed off work, sick. He attended a 28 day formal attendance review meeting with Rob Davenport on 13 September 2017. Mr Davenport told him that the Respondent would support his sickness absence at that stage and that Mr Davenport would not recommend consideration of dismissal or demotion. He said that the Claimant's absence would be reviewed regularly and that he could reconsider that decision if it became unlikely that the Claimant would return to work in a reasonable period, page 806-807.

114. Mr Rob Davenport took over the Claimant's line management in mid 2017, but left the Respondent on 10 October 2017. Rob Davenport asked Barbara Davenport, Head of Real Estate to line manage the Claimant after Mr Davenport's departure. In Mr Davenport's file note for 22 September 2017 he recorded that he had had a catch-up call with the Claimant and told him that Barbara Davenport was to be his new line manager. Mr Davenport recorded that the Claimant was happy with that, page 878.

115. On 13 November 2017 the Claimant emailed Barbara Davenport, saying that he understood that either Barbara Davenport, or Ms Whitesman, was taking over from Mr Davenport as his line manager, page 915. The Claimant remained off work sick at this time.

116. On 14 November Barbara Davenport emailed the Claimant, saying that Louise Whitesman would be his line manager going forward, page 936. Barbara Davenport was also leaving the team and was therefore unable to manage the Claimant.

117. Ms Whitesman told the Tribunal that she was not aware, at that time, that the Claimant had any complaint about her.

118. Ms Whitesman told the Tribunal that she was not able to move the Claimant to another job within her department because there was none available. In evidence she said that Jennifer Clark had agreed to line manage the Claimant, but that Jennifer Clark was a home worker, whose nearest office was Manchester, and who was not often in the London office where the Claimant would be based. Ms Whitesman told the Tribunal that there was another Higher Executive Officer in London, but she was suffering from ill health and Ms Whitesman did not consider that it would be appropriate to require her to take on line management responsibility for the Claimant. The Tribunal accepted Ms Whitesman's evidence about the availability of managers in her department; she had detailed knowledge of the personnel and of their individual attributes and challenges.

119. On 13 December 2017 Anita McLoughlin wrote to the Claimant, saying that, in the last 6 months, the work of the Legal and Transactions team had grown, which had meant that Ms Whitesman's remit had also expanded. Ms McLoughlin said that Ms Whitesman therefore needed a Private Secretary and that Ms McLoughlin

had been appointed to that role. She said that this had created a role for an Executive Officer Assistant Private Secretary (APS) whom Ms McLoughlin would line manage. Ms McLoughlin said that the Unit was therefore facilitating a managed move for the Claimant to this new post as a reasonable adjustment. She said that it would involve providing support to both Ms Whitesman and Suky Atwal, the new Deputy Director for Commercial and Supplier Management. Ms McLoughlin told the Claimant that he would be responsible for diary management for both Deputy Directors, issuing consent letters and undertaking other administrative tasks, page 973.

120. The Claimant responded on 14 December 2017, saying that he was excited about the prospect of coming back to work and working with Ms McLoughlin. He said that he thought that she and he would make a good team to support Ms Whitesman and Suky Atwal, page 974.

121. The Claimant told the Tribunal that he had no choice but to accept this post, otherwise he would have been dismissed. Ms McLoughlin did not accept that proposition when it was put to her in cross examination.

122. In early January 2018, the Claimant contacted Mela Watts, Director of the Free Schools Group, to ask whether a managed move to her group might be possible. On 4 January 2018 Ms Watts emailed the Claimant saying that she could not agree a managed move; there were no Executive Officer vacancies and restructuring of the Group in the last 2 – 3 years meant that the roles envisaged by the Claimant no longer existed, page 1030.

123. On 11 January 2018, Anita McLoughlin confirmed to the Claimant that there were no alternative Executive Officer posts available, page 1061. She said that, because there had been no opportunity to monitor the Claimant's performance since his voluntary demotion, the Division would not support the Claimant going on a short-term move, under an "expression of interest", but that the Division would include some project work in the Claimant's objectives, page 1061.

124. The Claimant returned to work on 22 January 2018. Just before he did so, the Respondent took the decision not to proceed with the disciplinary proceedings against him, page 1079. The Claimant confirmed, on 29 January 2018, that he had decided to drop his grievance in the circumstances that the misconduct allegation against him had been dropped, page 1141.

125. The Claimant told the Tribunal that, on his return to work, he was required to sit in the same area as Ms Bicer and that he complained about this. He said that he was then required to sit at a desk facing a wall and that he wore headphones to drown out Ms Bicer's voice. Ms McLoughlin told the Tribunal that she felt that allowing the Claimant to face the wall, rather than Ms Bicer, would assist him, and that she had allowed him to wear headphones to help his concentration, as a reasonable adjustment. Ms McLoughlin also told the Tribunal that she sat with the Claimant, to provide him with support.

126. The Claimant complained that he had very little work to undertake while in the new role and that this was demoralizing and detrimental. Ms McLoughlin agreed, in evidence, that the Claimant was not provided with large amounts of work, but

said that he had done work for Tracey, who had given him positive feedback. Ms McLoughlin said that, perhaps, she was overly cautious; she did not want to overload the Claimant and wanted to support him over last-minute requests for leave. Ms McLoughlin gave evidence that she allowed the Claimant to take walks for an hour every day and made sure that he left work on time.

127. The Claimant contended that he was not allowed to work flexi time on his return to work. Ms McLoughlin agreed and said, in cross examination, that, as the Claimant was not working normal hours, he would have had to work longer hours in order to build up flexi time. She felt that this would overburden the Claimant. Ms McLoughlin said that the decision to not permit the Claimant to work flexi time was not final and would have been reviewed after a year.

128. The Claimant was invited to a formal unsatisfactory attendance meeting on 29 January 2018 because he had been absent for 198 days in a 12-month rolling period. At the meeting, Ms McLoughlin told him that she had decided to give him a first written warning, with a three-month improvement period, during which there would be a trigger point of two days' absence.

129. The Claimant contended that many other people in the Division were not given first attendance warnings when they exceeded the 8 day absence trigger point in a 12 month period. This was not in dispute. The Tribunal heard evidence that Ms Whitesman exceeded the 8 day trigger point and was not given a first attendance wearing. It also heard evidence that Mr Steve Wynn was absent for more than 8 days and was not called to a formal meeting, nor given a warning. Nevertheless, the Tribunal did not hear evidence that anyone else in the Division had anything like 198 days absence in a rolling 12-month period, nor did it hear evidence that anyone else in the Division had a pattern of repeated absences and previous warnings. On the evidence, there was no employee comparable to the Claimant in terms of, both, the number of absences and the length of absences.

130. On 23 April 2018 the Claimant emailed Ms McLoughlin, saying that he was up to date on the work front, that he had a good week the previous week and that Suky Atwal was coming directly to him for support, which was a pleasing sign, page 1268.

131. On 9 May 2018 the Claimant emailed Ms Whitesman, saying that he had become aware that there were people in the Division that had reached the 8-day absence trigger point in a 12-month period and had not been invited to a formal attendance meeting. He said that he was concerned that he might be the only person in the Division who had been invited to a formal attendance meeting as a result of reaching the 8-day trigger point.

132. The Claimant was asked for the names of individuals who had not been given first written warnings, having passed the trigger point. He was understandably reluctant to give individual names. On 11 May 2018 Rebecca Carney, HR Business Partner for the Division, wrote to Ms Whitesman, saying that the Claimant was not willing to provide any names to back up his allegation. She said that managers had flexibility to choose whether or not to give a warning, depending on individual circumstances. She said that the Claimant's real issue was whether people had not been invited to formal meetings, but that the Division

did not hold central data on this, only on the warnings given. Ms Carney said the matter was important and that managers needed to be reminded that they should invite people to formal meetings when they passed the trigger point. She said that she did not consider that an investigation was warranted, given that this would be time consuming and would not necessarily result in anything other than reminding managers to follow the policy. She said that sick absence was low in the Respondent's Capital Division, in any event.

133. On 16 May 2018 Ms Whitesman wrote to the Claimant, saying that she would send a message to all managers in the Division reminding them of the steps to be taken when an absence trigger point was reached. She said that, in absence of further details, she would not carry out a retrospective investigation. Ms Whitesman said that the important thing was that the process had been applied properly and fairly in the Claimant's case, page 1355. The Claimant replied, saying that he disagreed and that it was important that the policy was applied consistently; he said that others had not suffered the stress which the Claimant had suffered from going through the process and that they had been treated more favourably than the Claimant, who had a disability, page 1355.

134. Ms Whitesman told the Tribunal that she considered that the appropriate course was to send a reminder to managers about the need to apply the attendance policy properly. She said that she issued these reminders in a number of different ways.

135. The Claimant went off sick again during the improvement period following his first written improvement warning. Ms McLoughlin invited him to a formal unsatisfactory attendance meeting on 10 May 2018. Following this meeting she issued him with a final written improvement warning because of his absences on 19 February 2018, 6 March 2018 and 7 March 2018, page 1324. She said that the Department had made reasonable adjustments in the Claimant's case, including a phased return to work, establishing a fixed desk for the Claimant, moving Ms McLoughlin's desk so that they could sit together as a team and allowing him to wear headphones. She said that the background to the matter was the Claimant's extended sickness absence from 9 August 2017 to 20 January 2018.

136. The Claimant contended that Ms Whitesman took this decision, rather than Ms McLoughlin. He said that Phil Huffer, HR Case Worker who was present at the meeting, said words to the effect that it was not Ms McLoughlin who was giving the warning. The Claimant contended that he was only one day over the 2-day trigger point in the improvement period, so that the final warning was inappropriate.

137. Ms McLoughlin told the Tribunal that she recalled Mr Huffer saying only, "We all know that this is difficult decision for Anita to make". She said that Louise Whitesman attended the meeting to provide pastoral care for Ms McLoughlin, in response to Ms McLoughlin having told Ms Whitesman that Ms McLoughlin was experiencing a relapse of her own anxiety and had been referred to the local NHS service. Ms Whitesman corroborated Ms McLoughlin's evidence.

138. Ms McLoughlin said that it was her decision to award the final written warning. She believed it was a proportionate decision, because she looked at the evidence as a whole and, within the previous year, the Claimant had had 200 days absence.

Ms McLoughlin said that the Claimant had hit the trigger point and she believed the policy should be applied consistently.

139. Around the time of the formal unsatisfactory attendance meeting in May 2018 Ms McLoughlin told Ms Whitesman that she did not wish to manage the Claimant anymore, for health reasons. Ms McLoughlin told the Tribunal that she suffers from anxiety and found that the process of managing the Claimant exacerbated her own anxiety condition. The Tribunal accepted Ms McLoughlin's evidence regarding this.

140. As a result, Ms Whitesman was required to find another line manager for the Claimant. Ms Whitesman sought to arrange for the Claimant to be moved out of her Division. She told the Tribunal that she understood that that was what the Claimant wanted. She also told the Tribunal that she was able to broker a move to Suky Atwal's team, at this point, because the Claimant had, by then, been working with Suky Atwal, which he had not been doing when he returned to work in January 2018. The Tribunal accepted her evidence in this regard. It was consistent with the chronology of events.

141. On 16 May 2018 Ms Whitesman wrote to the Claimant, following a conversation with him. She said that she was aware that the Claimant wanted to move out of her Division entirely and was particularly interested in working in data-related areas. She said that she had spoken to Suky Atwal about moving the Claimant's role to his Division, carrying on the data work the Claimant was currently undertaking, line managed by Dapo Obatusin, page 1381. The Claimant agreed to this proposal, page 1433.

142. The Claimant was, thereafter, line managed by Dapo Obatusin. He did not allege that Dapo Obatusin had victimized him.

143. On 14 May 2018 the Claimant was in a room with a colleague, Steve Wynn, for some time. The Claimant told the Tribunal that Ms Bicer sent another colleague into the room to extract Mr Wynn from the room and that Ms Bicer then asked Mr Wynn what he had been talking about with the Claimant. On 14 May 2018 the Claimant emailed Ms McLoughlin, saying that Ms Bicer had sent a colleague into the room to tell Steve Wynn that Ms Bicer wanted to talk to Mr Wynn. The Claimant said in his email "I thought this was a wholly inappropriate and unprofessional thing to do unless something completely urgent cropped up at that minute that required SB to interrupt our chat". Page 1340.

144. Ms Bicer told the Tribunal that, in about February 2018, Mr Wynn had approached her, saying that he had had a conversation with the Claimant about Mr Wynn's absence from work and whether Mr Wynn had been invited to a formal attendance meeting as a result. Mr Wynn was concerned that he had been tricked into giving information to the Claimant which might lead to a complaint about Ms Bicer. Ms Bicer told the Tribunal that she had reassured Mr Wynn and had also asked Ms Whitesman to speak to Mr Wynn, to reassure him that he had not done anything wrong. Ms Whitesman told the Tribunal that she did speak to Mr Wynn about this.

145. Following Ms McLoughlin giving the Claimant the Final Written Improvement Warning, the Claimant emailed Ms Whitesman and Ms McLoughlin saying that he would not be appealing the Warning, but had initiated legal action. He said that he wanted the Warning to be rescinded and that he wanted to establish whether the Attendance Management Policy had been applied consistently in the Department, page 1346. Ms Whitesman replied, saying that any queries in relation to an appeal should be raised with the appeals manager, pursuant to the process, page 1344.

146. Ed Schwitzer, Head of Disadvantage and Strategic Delivery, was asked to be appeal manager in relation to the Claimant's potential appeal against his Final Written Improvement Warning. On 21 and 22 May 2018 the Claimant told Mr Schwitzer that he wanted to raise a grievance to establish that his long-term sickness absence was caused by bullying and harassment, page 1446. Mr Schwitzer sought HR advice on the correct procedure to adopt in these circumstances. An HR case manager told him that, if Mr Schwitzer believed that the outcome of the grievance could impact on the attendance management appeal, he should decide whether to wait for the grievance outcome before proceeding with his own appeal hearing, page 1445. As a result, on 24 May 2018, Mr Schwitzer wrote to the Claimant, saying that he would put the appeal on hold whilst the Claimant's grievance was investigated, page 1479. The Claimant agreed with this approach.

147. The Claimant confirmed his intention to bring a grievance, which was acknowledged by Julian Wood on 25 May 2018. Mr Wood appointed Daniel Simons, an Employer Services Strategy Manager, to hear the grievance. The Claimant had asked for a decision maker from outside the Capital Group, page 1512.

148. On 29 May 2018 the Claimant presented a detailed statement of grievance, alleging a campaign of bullying and harassment and willful neglect, which he said had caused a workplace injury and made his disability worse. He attached a chronology of events covering the period December 2016 to 25 May 2018, setting out actions taken by Servet Bicer and Louise Whitesman, page 1522 – 1532.

149. Mr Simons met the Claimant on 27 June 2018 to discuss the scope of the grievance investigation, page 1592. The Claimant outlined the events he was complaining about. He made clear that he considered that there ought not to be any temporal limitation on its scope; he said that he was complaining of a continuing act of discrimination, page 1621.

150. The Respondent's Grievance Policy provides that, when raising formal grievances, employees must do so without unreasonable delay and within three months of the event or issue taking place, page 2679.

151. Mr Simons wrote to the Claimant on 17 July 2018, page 1667. He said that the Claimant had submitted a grievance in August 2017, which he had withdrawn on 29 January 2018. Mr Simons said that the Respondent's Grievance Policy required complaints to be raised within 3 months, but that Mr Simons had agreed to extend the 3 months period in the Claimant's case to incidents going back to 29 January 2018 (the date on which the Claimant had withdrawn his previous grievance) because the Claimant was alleging a continuing act of discrimination.

152. Mr Simons said that he had considered the Claimant's statement to him that the reason the Claimant had withdrawn his August 2017 grievance was that he was concerned about impartiality and possible victimization. Mr Simons noted that that explanation differed from the reason the Claimant had given to Oliver Williams at the time, when the Claimant said, "I have decided to drop this grievance now that the misconduct ...allegation against me has been dropped. Many thanks for your help on this matter which was 100% helpful and professional." Mr Simons also said that he had taken into account the Claimant's statement that he had not previously known about continuing acts of discrimination and how they might apply to him. Mr Simons said, however, that there was no provision in the grievance process for revisiting a historical complaint when the complainant learns about new grounds on which he may be able to expand the scope of the complaint.

153. Mr Simons conducted the grievance investigation. He interviewed Servet Bicer, Louise Whitesman and Anita McLoughlin. He produced an investigation report, page 1865 – 1873. Mr Simons identified 4 allegations made by the Claimant within the relevant period. The Claimant had complained that in January 2018, Ms Bicer had said loudly in the office that she was very concerned about a member of staff who was on long term sickness and that she would like to fundraise to buy the person a hamper. The Claimant felt that this was done to provoke him. He also complained that, on 14 May 2018, the Claimant was having a private conversation with a colleague who worked for Ms Bicer in a glass walled meeting room. Ms Bicer had sent another member of staff in to interrupt the meeting. From January to June 2018, the Claimant said, he was given very little work. He said that this was harassment, by taking away responsibilities from a perfectly capable individual by exclusion. Lastly, the Claimant complained that, on 14 May 2018, Ms Whitesman had told him that she had agreed a move for him out of her Division. The Claimant said that he believed that this had been done because he had alleged that the Attendance Management Policy was not being applied fairly or consistently, pages 1866 – 1867.

154. Mr Simons did not find that any of the allegations were examples of bullying, harassment, victimization or discrimination. He noted that, regarding allegation 1, Ms Bicer had not been the Claimant's line manager when he had been off on long term sick leave. Mr Simons commented that showing concern for a colleague and discussing a collection for a them is common office behavior; it would be unreasonable to expect Ms Bicer to avoid taking part in such conversations. Regarding allegation 2, Mr Simons noted that Ms Bicer had told him that she had not entered the room herself, to avoid appearing confrontational. She said that the person to whom the Claimant had been taking was needed to attend a meeting and that the person, Mr Wynn, had previously told Ms Bicer that he had been distressed about a conversation he had had with the Claimant. Mr Simons said that it was normal managerial behavior to call a meeting and invite a colleague to join it, even if that involved interrupting another meeting they were in. He said that the manner of the interruption appeared to have been polite and that he did not find any evidence that it was inappropriate or unprofessional.

155. Regarding allegation 3, Mr Simons noted Ms McLoughlin's evidence that she had empathized with the Claimant's condition and felt that it was better not to overload him, but give him a solid platform from which to progress. Ms McLoughlin

had said that a new role had been created for the Claimant and that attempts were made to give the Claimant work within these constraints. She said that she had explained to the Claimant, before he returned to work, that the role would not be very challenging.

156. With regard to allegation 4, Mr Simons noted that the Claimant acknowledged that he had previously requested a move, and that he was therefore complaining about the timing and nature of the move offer. Mr Simons said that Ms Whitesman had explained that the immediate cause of the suggested move was Ms McLoughlin’s request to stop managing the Claimant because the stress was causing her anxiety. He said that Ms McLoughlin had corroborated this. Mr Simons also recorded that witnesses had explained that the move had not been offered earlier because roles had not been available earlier.

157. On 12 September 2018 Mr Simons sent his report to the Claimant and invited him to a meeting to discuss it, page 1925. The Claimant declined the meeting request and asked for details of the appeal manager. He asked that a paragraph be added to the report saying that he had declined the opportunity to discuss the report further because he did not agree with the scope of the investigation, which could not now be changed, page 1924.

158. On 11 October 2018 Mr Simons wrote to the Claimant formally, to confirm that his grievance had not been upheld, page 1992.

159. Ms Whitesman told the Tribunal that she had not previously informed the Claimant about Ms McLoughlin’s request to stop managing the Claimant on the grounds of ill health because that was a private matter. However, she was required to tell the investigation about Ms McLoughlin’s request, in the interests of transparency and fairness.

160. Ms Bicer told the Tribunal that she had tried hard to manage and support the Claimant and was shocked by the allegations against her, which had come a year after she had finished managing him.

161. The Claimant appealed against the grievance outcome on 15 October, page 1997. He said that he was attaching evidence, in the form of an email, that the attendance management process had been applied more favourably to a colleague who did not have a disability. He said that the email also proved that Ms Bicer had deliberately misled the investigation by saying she had never managed the Claimant while he was off sick – Ms Bicer had said that she would stop the Claimant’s sick pay if he did not supply a sick note. The Claimant said that Steve Wynn was a friend of his and should have been called as a witness to the investigation. The Claimant said that he did not believe that Mr Wynn had been distressed by any of the Claimant’s actions, page 1997.

162. The Claimant emailed Steve Wynn on 20 October 2018, asking him to answer some questions about his sick leave and subsequent conversations with the Claimant. Mr Wynn replied by email, saying that, in February 2018, he had told the Claimant that Mr Wynn had not received a first written warning when he returned to work after 4 weeks’ sick leave. He said that, on the recent occasion when Ms Bicer had sent a colleague into a room to ask Mr Wynn to attend a team meeting,

interrupting his conversation with the Claimant, Ms Bicer had not then held a team meeting, but had asked Mr Wynn what the Claimant and he had been talking about. Mr Wynn also said that, at no point, during the recent chat with the Claimant, did Mr Wynn feel distressed; that it was a normal conversation, and that there was no time when Mr Wynn felt that the Claimant was trying to trick him, page 2057.

163. On 28 October 2018 the Claimant emailed Mr Wynn further, asking whether Mr Wynn had felt distressed by the Claimant's actions at any time. In addition, he asked Mr Wynn whether he had approached Ms Bicer in February, privately expressing concern that his conversation with the Claimant might lead to a formal complaint against Ms Bicer. Mr Wynn replied, saying that he had not felt distressed during their conversation in February and "I never approached Servet about the conversation in the glass room, she asked to speak to me..", page 2103. It appears that Mr Wynn did not answer the question about whether he had approached Ms Bicer after the conversation in February.

164. The Claimant wrote once more to Mr Wynn on 31 October. He said that he had been asking about the conversation in February and whether Mr Wynn had approached Ms Bicer after that. He said that there were inconsistencies in Ms Bicer's evidence and said, "I seem to recall she saw us talking then too … and believe it was her who would have approached you.", page 2110. Mr Wynn responded again, saying, "At no point have I privately approached Servet so that I could say to her that I was concerned that anything we had spoken about may lead to a formal complaint being made against her." Page 2109.

165. The Claimant submitted his detailed appeal document on 31 October 2018, page 2115. He said that Ms Bicer had lied to the grievance investigation; he relied on Mr Wynn's emails as evidence in support.

166. Alexandra Wasik-Hyde conducted the Claimant's grievance appeal meeting on 1 November 2018, page 2125. The Claimant explained that he was appealing on a number of grounds. He said that the grievance investigation had only covered 3 months, but that the Claimant's complaints covered a 16-month period from December 2016 – May 2018. He said that he had not formally raised a grievance in August 2017. The Claimant also considered that a full investigation had not been carried out and pointed to his new evidence in support of the grievance.

167. Oliver Williams confirmed to Ms Wasik-Hyde that he had told Mr Simons that the Claimant had not submitted a formal grievance, page 2174.

168. On 21 November 2018 Ms Wasik-Hype provided the Claimant with a partial outcome to his grievance appeal, page 2187. She said that the Claimant had provided emails exchanged between him and Oliver Williams, who had been appointed as grievance investigation manager in 2017. She said that the emails showed that, in August 2017, the Claimant was considering raising a grievance and that, in August and September 2017, Mr Williams offered him advice on the process and encouraged the Claimant to raise his grievance on a number of occasions, reminding him that the grievance needed to be raised without unreasonable delay and within 3 months of the relevant incident. Ms Wasik-Hyde

said that the Claimant had not taken that opportunity up and, on 29 January 2018, had confirmed that he had decided to drop the grievance.

169. Ms Wasik-Hyde noted that the Claimant had explained that he had not continued with the grievance on his return from sick leave as the misconduct charge against him had been dropped and he wanted to make a fresh start in a new team.

170. In conclusion, on this matter, Ms Wasik-Hyde said that she had decided that Mr Simons' decision to investigate the period January 2018 – May 2018 was reasonable, as the Claimant had had sufficient opportunity to raise a formal grievance throughout the whole period, specifically as encouraged by Oliver Williams in August and September 2017, page 2188. Ms Wasik-Hyde also said that the grievance policy was clear that it should not be used to deal with complaints arising from the application of other policies, which included appeal mechanisms, including the Attendance Management Procedure. She said, however, that issues regarding attendance management would be dealt with by the attendance management appeal manager.

171. Ms Wasik-Hyde said that she did not uphold the Claimant's complaint that he was not given enough work to do. She said that the Claimant's line manager had said that the Claimant had not raised workload as an issue at the relevant time.

172. Nevertheless, Ms Wasik-Hyde also concluded that the Claimant's allegations regarding inconsistent application of the Attendance Management Procedure and Ms Bicer's interruption of the Claimant's meeting with Mr Wynn had not been reviewed and verified as they could have been. Ms Wasik-Hyde said that further investigation into those allegations would be undertaken, page 2190.

173. Ms Wasik-Hyde interviewed Mr Wynn on 29 November 2018, page 2234. He said that he had been having a normal conversation with the Claimant when Mr Wynn was asked by a colleague to attend a team meeting. Ms Bicer had then approached him and asked if everything was alright, page 2234. Mr Wynn also said that he had not approached Ms Bicer in February 2018 and could not remember talking to Ms Bicer about the Claimant bringing a formal complaint against her.

174. On 7 December 2019 Ms Wasik-Hyde wrote to the Claimant, giving a final outcome to his grievance appeal. She said that she had established that Ms Bicer line managed the Claimant between December 2016 and June 2017 and that the new evidence the Claimant had provided confirmed that Ms Bicer line managed the Claimant while he was off work, sick. She said however, that the new evidence did not provide evidence of differential treatment between the Claimant and other staff because Ms Bicer had not instigated the conversation about organising a hamper. Ms Wasik-Hyde said that, as a line manager and team member, Ms Bicer could not be expected not to take part in such conversations.

175. Regarding the interrupted meeting, Ms Wasik-Hyde said that, while there were discrepancies between Mr Wynn's and Ms Bicer's recollections, Ms Wasik-Hyde said that there was no evidence that any of the events put the Claimant at a disadvantage. She said that the passage of time may have contributed to difficulty

in establishing a clear record of events. Ms Wasik-Hyde concluded that the interrupted meeting was not a detriment to the Claimant.

176. Finally, Ms Wasik-Hyde said that management had considered all possible options to facilitate the Claimant's return to work. She said that Ms Whitesman and Ms McLoughlin had both confirmed that, later, the Claimant was offered a move when Ms McLoughlin had asked not to line manage him anymore, page 2263.

177. At the Tribunal, the Claimant contended that Ms Bicer had lied to the grievance investigation and grievance appeal hearing about Mr Wynn having raised concerns in February 2018 about being tricked by the Claimant into giving information into giving information which might lead to a complaint against Ms Bicer. He pointed to Mr Wynn's emails and his interview with Ms Wasik-Hyde, which contradicted Ms Bicer's version of events.

178. The Tribunal preferred Ms Bicer and Ms Whitesman's evidence on this. The Tribunal considered that it was likely that Mr Wynn had told Ms Bicer in February 2018 that he was worried that he had given information which might lead to a complaint against her, whatever Mr Wynn later said to the Claimant and Ms Wasik-Hyde. It is difficult to imagine how Ms Bicer would have known about Mr Wynn's private conversation with the Claimant about his absence, unless Mr Wynn had told Ms Bicer about it himself. The Tribunal considered that the Claimant had clearly spoken to Mr Wynn at some length about the matter and that Claimant's email correspondence with Mr Wynn included the Claimant asking leading questions and suggesting, to Mr Wynn, a version of events. While it was clear that Mr Wynn's reported recollection differed from that of Ms Bicer, the Tribunal considered there were many reasons why Mr Wynn might not have wanted to admit that he had privately expressed concerns about the Claimant's behaviour to Ms Bicer. Ms Whitesman corroborated Ms Bicer's evidence about Mr Wynn's concerns and the Tribunal considered that they were both credible witnesses on the matter. It therefore accepted Ms Bicer's evidence that the reason that she sent a colleague into the meeting on 14 May 2018 was to support Mr Wynn, who had previously expressed concerns about the way in which the Claimant was using information which he had extracted from him.

179. The Claimant contended that Ms Wasik-Hyde victimized him by failed to uphold his grievance appeal, despite Mr Wynn's evidence contradicting Ms Bicer's account. Ms Wasik-Hyde told the Tribunal that she did not find that Ms Bicer had attempted to deceive the investigation; Ms Wasik-Hyde found that none of the recollections was wholly reliable and it was very difficult to decide what had happened, many months after the event.

180. The Claimant had presented this claim, number 2205864/2018, to the Tribunal on 28 August 2018, following Early Conciliation through ACAS on 15 July – 15 August 2018.

181. On 7 November 2018 the Respondent presented its Response to the Claimant's claim. Its Grounds of Resistance paragraph 10, drafted by the Government Legal Department, said, "The Respondent does not admit that the Claimant was disabled within the meaning of the Equality Act 2010 at the time of the alleged discriminatory treatment or at all or that the Claimant is currently

disabled…". Ms Bicer and Ms Whitesman both told the Tribunal that they were not qualified to opine on whether the Claimant came within the definition of disability.

182. The Claimant's appeal against the Final Written Improvement Notice under the Attendance Management Process was heard by Ed Schwitzer on 27 November 2018, page 2226. The Claimant said that he had been harassed by Ms Bicer, who had threatened him with redundancy and applied the Attendance Management Process inconsistently with her treatment of other employees.

183. Having received Ms Wasik-Hyde's outcome, however, the Claimant then wrote to Ms Wasik-Hyde and Mr Schwitzer on 7 December, saying that he wanted to withdraw his attendance management appeal, page 2259. Mr Schwitzer replied, saying that he would still be willing to consider the Claimant's appeal if the Claimant confirmed that he wanted to proceed with it within 5 days, page 2270. The Claimant replied further, saying that, if Mr Schwitzer was willing to look into the Claimant's discrimination allegations going back to December 2016, the Claimant would be happy to proceed with his appeal, page 2269.

184. The Claimant then emailed Mr Schwitzer on 12 December, saying that he found it insulting that the Department had decided that he was not disabled. He said that he was not interested in his appeal anymore, page 2273. Mr Schwitzer responded on 11 January 2019, saying that it was not within his remit to consider whether the Department considered the Claimant to be disabled, page 2296.

185. On 22 January 2019 the Claimant decided to pursue his attendance management appeal and asked Mr Schwitzer to examine the circumstances in which it had been decided to make his post in Ms Bicer's team redundant, how relevant policies were applied, what advice was sought from HR and when Julian Wood was told about the decision to make the Claimant's post redundant, page 2336. He asked Mr Schwitzer to talk to Dave Fletcher about this, page 2348. Mr Schwitzer confirmed to the Claimant that he was only looking into the final attendance warning, not the first attendance warning, page 2378.

186. Mr Schwitzer interviewed Anita McLoughlin on 21 February 2019, page 2392.

187. On 22 February 2019 Mr Schwitzer wrote to the Claimant, rejecting his appeal against the Final Written Improvement Warning. He rejected the Claimant's contention that his absence was a result of harassment and discrimination in the workplace; Mr Schwitzer noted that the Claimant's grievance in this regard had not been upheld. He also rejected the Claimant's contention that the decision to issue the Claimant with a first written improvement warning on 2 February 2018 was discriminatory, as other staff who met the trigger point were not given a warning. Mr Schwitzer said that the first written improvement warning was not within the scope of his investigation, according to policy, because the Claimant had not appealed against that first warning at the time, page 2407.

188. Mr Schwitzer did not uphold the Claimant's contention that the Final Warning was discriminatory because the department had not made reasonable adjustments to support him in maintaining his attendance. The Claimant had said that he had been given a fixed desk facing the wall to minimize eye contact with Ms Bicer and allowed to wear headphones "as a reasonable adjustment" but said that this,

combined with no work and knowing that Ms Bicer was a few feet away, was not a supportive environment. He had acknowledged that the phased return to work was helpful. Mr Schwitzer said that he had found no evidence that Ms McLoughlin unreasonably refused requests for reasonable adjustments. He said that his interpretation of events was that Ms McLoughlin did attempt to support the Claimant's anxiety.

189. Mr Schwitzer said that the Claimant's complaints about being threatened with redundancy by Ms Bicer, being awarded a "must improve" performance grade, being put on a misconduct charge and being kept in Ms Bicer's team "as a hostage" were not within the scope of Mr Schwitzer's appeal. He declined to adjudicate upon Ms McLoughlin's first written improvement warning and matters which had predated it. He said that the Claimant had failed to appeal against the first written warning at the time, which was what the Respondent's policies required, page 2404 – 2408.

Relevant Law

190. By *s39(4) EqA 2010* an employer must not victimize their employee by subjecting the employee to a detriment.

191. The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010.

192. By *27 Eq A 2010*, " (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(*a*) B does a protected act, or
(*b*) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(*a*) bringing proceedings under this Act;
(*b*) giving evidence or information in connection with proceedings under this A
(*c*) doing any other thing for the purposes of or in connection with this Act;
(*d*) making an allegation (whether or not express) that A or another person has contravened this Act."

193. There is no requirement for comparison in the same or nor materially different circumstances in the victimization provisions of the EqA 2010.

194. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

195. The test for causation in the *Equality Act* is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the protected act. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or

unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified. Para [77].

196. If the Tribunal is satisfied that the prohibited act/s is one of the reasons for the treatment, that is sufficient to establish victimisation. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Discussion and Decision

197. The Tribunal has taken into account all its findings of fact and the relevant law before coming to its conclusions. For clarity, it has addressed each alleged detriment separately, but that does not indicate that the detriments were considered in isolation from each other.

Detriment 1. 25 January 2017: SB factoring minor timekeeping issues into attendance management when it was not relevant to do so

198. The Claimant had done a protected act on 9 January 2017, alleging to Ms Bicer that Sophie Young had bullied and harassed him in relation to his disability. He contended that this was the genesis of many detrimental acts which Ms Bicer subjected him to thereafter.

199. It is correct that, at one point, on about 31 January 2017, Ms Bicer emailed the Claimant, saying that she was disappointed that he had been unable to provide her with an accurate record of his annual leave. She asked that the Claimant recover his leave record and share it with her. She said that, if he was unable to do so, she would seek advice about how to treat this. She further said that the matter would inform her final decision on the attendance management process, page 265.

200. The Tribunal was satisfied, however, that the cause of Ms Bicer's examination of the Claimant's leave and flexitime records, at this time, was her discovery, in her meeting with the Claimant on 13 January 2017, that he had not been keeping accurate leave or flexitime records. It is normal and appropriate management behaviour to require employees to account for their leave and flexi hours. Ms Bicer was mistaken when she said that this matter could be taken into account in attendance management. The Respondent's policies require that failure to record flexi leave is a conduct matter. Nevertheless, the Claimant's failure to account for his time keeping was not, in the event, taken into account in the February 2017 attendance management decision. There was no detriment to the Claimant. Ms Bicer made a mistake, which was rectified, and her acts in attempting to manage the Claimant's flexi leave were nothing to do with his protected disclosure.

Detriments 2 & 4

201. **Ms Bicer and Ms Whitesman deciding to make the Claimant's post redundant but creating another one with very similar responsibilities; requiring the Claimant to say in the Division; Not telling the Claimant of 3 other available posts**

202. The Tribunal has found, on the facts, that it was always known, including by the Claimant, that funding for the Claimant's HEO post was time limited and would expire in the first half of 2017. This was not a decision which was made in February 2017.

203. In February-March 2017 Ms Bicer and Ms Whitesman did not know that there would be 3 available HEO posts in the financial year 2017-2018. The Tribunal decided that they knew that there would be one new HEO post, with Secretariat duties, available in 2017 – 2018, and that Ms Bicer told the Claimant about this post on 16 February 2017. The Tribunal found that this new post was different to his existing HEO post because it had significant Secretariat duties attached to it. The Claimant did not wish to apply for that post.

204. In the event, funding for the Claimant's post was extended for the whole financial year 2017 – 2018.

205. The Tribunal was satisfied that none of these decisions and events had anything to do with the Claimant's protected acts. They were the result of funding decisions being made on an ongoing basis in the Unit. Ms Bicer and Ms Whitesman did not have control over the relevant budgets.

206. The Claimant was required to stay in the Division until the end of his attendance improvement period – that was because the Respondent was legitimately attempting to manage the Claimant's absences. It was, again, nothing to do with his protected acts.

207. The Tribunal rejected the Claimant's amended detriment 4 on the facts, having heard evidence in relation to it. It would be otiose for it to make a separate decision on whether to allow the amendment.

Detriment 3: From 14 February 2017 Ms Bicer's spot checks resulting in a hostile and offensive environment

208. On the facts, around 14 February 2017, Ms Bicer telephoned the Claimant at his desk, but found that he was not present for 35 - 40 minutes. The Claimant's flexitime sheets nevertheless indicated that he was at work during this time, page 296. Two of the Claimant's colleagues, Mr Wynn and Ms Armstrong, had also informed Ms Bicer that the Claimant was not working the hours that he was recording on his flexi sheets.

209. The Claimant had not appropriately recorded his flexi time or his annual leave, while in Ms Bicer's team.

210. The Tribunal concluded that it was entirely unsurprising that Ms Bicer, as his manager, would wish to check on the Claimant's attendance and time keeping in those circumstances. Ms Bicer's checks on the Claimant were nothing to do with his protected acts.

Detriment 5: 17 March 2017; Decision to put Claimant into worst performance category without any prior indication and following achieved rating at mid-year

211. The Tribunal found that Ms Bicer did have genuine and well- founded criticisms of the Claimant's performance. She told him about these concerns on 16 February 2017. It was unfortunate that he was not told about these in detail until then. It was also unfortunate that the Claimant was not formally told that he was in the "Must Improve" category until 17 March 2017. Nevertheless, the Tribunal found circumstances dictated that timing to a large extent. Ms Bicer had only been managing the Claimant since December 2016. Almost immediately, the Claimant went off work, sick, triggering the attendance management process. This process - and the Claimant's failure properly to account for other annual leave - then dominated their interactions in January and early February 2017. There was, thereafter, little time before the end of the appraisal year, for Ms Bicer to address legitimate performance concerns.

212. The decision to put the Claimant in the "must improve" category was because of legitimate criticisms of the Claimant's performance. The timing of the decision was dictated by other events. Neither was caused in any way by the Claimant's protected acts.

Detriment 6: 19 April 2017 Decision to move the Claimant onto formal performance management measures. C unable to apply for jobs for 15 months

213. The Claimant's manager had well-founded criticisms of the Claimant's performance. Performance management measures were the natural result of that, and not caused by the Claimants' protected acts. Insofar as the Respondent's systems then prevented the Claimant from successfully applying for jobs, those systems applied to all employees, whether they had done protected acts or not.

Detriment 7: 18 – 20 April 2017 Ms Bicer's handling of a complaint made by Holly Mitchell; Ms Bicer telling the Claimant about it in a meeting

214. Holly Mitchell, a team leader, emailed Ms Bicer, complaining about the unprofessional manner in which the Claimant had interacted with Mr Ishaq Javed. Ms Mitchell said that the Claimant had phoned Mr Javed, an apprentice, three times and had made Mr Javed feel like he was being accused of having done something wrong. She said that the Claimant had told Mr Javed that he had said things which he had not, pages 517a-517b.

215. On 20 April 2017 Ms Bicer told the Claimant about the complaint from Ms Mitchell and gave him a print-out of the complaint to read.

216. The Claimant contended that Ms Bicer had encouraged Ms Mitchell to make this complaint – and that she had encouraged others to make complaints about the Claimant's behavior. The Tribunal did not accept that contention. The Tribunal considered that the Claimant was resistant to legitimate concerns about his work and conduct. On the facts, the Claimant quite vehemently denied any responsibility for failing to book slots of an interview panel. The Tribunal considered that it was likely that he did repeatedly telephone Mr Javed, an apprentice, about the matter, seeking to exculpate himself. It also considered that it was likely that Ms Mitchell would have complained about the Claimant's conduct. He was an HEO who was

putting pressure on an apprentice, which was inappropriate, rather than reflecting on his own performance and what he might learn.

217. The Tribunal found that the reason Ms Bicer raised Ms Mitchell's complaint with the Claimant was that she had a duty, as a manager, to address his conduct towards other more junior members of staff, where there had been complaints about it. This was nothing to do with the Claimant's protected acts.

Detriment 8. 20 April 2017. Suddenly making funding available for the Claimant's post when he had been put on disciplinary procedures and was unable to move posts

218. Funding was made available for the Claimant's post for the next financial year on about 20 April 2017. This was as a result of the Claimant enquiring about being made "surplus" and Dave Fletcher telling Ms Bicer that it was line managers' responsibility to help staff in these circumstances, page 515. As stated previously, the Tribunal accepted Ms Bicer and Ms Whitesman's evidence that they had no control over budgets and that they did not know, in advance of the financial year 2017-2018, what funding would be available for which HEO posts. The decision maker appeared to be John Corn, who confirmed in April that budgetary approval had been given for the Claimant's post for the next financial year, page 511.

219. The Tribunal was satisfied that funding was confirmed for the Claimant when it became clear that he would not be redeployed, but, rather, that his existing Unit had responsibility to assist him. This was nothing to do with his protected disclosures.

Detriment 9. 19 May 2017. SB and LW's decision to issue C with a misconduct charge for swearing in a meeting on 20 April 2017

220. At the end of a meeting on 20 April 2017 Ms Bicer told the Claimant about a complaint made about the Claimant by another manager and gave him a print-out of the complaint to read. The Claimant was very annoyed and swore, saying, "This is fucking ridiculous". On 5 May 2017 Ms Bicer requested an investigation into the way that the Claimant responded to the complaint, pages 587-588. Ms Whitesman told the Tribunal that she appointed a manager to handle the complaint, to consider whether the matter should be referred to disciplinary proceedings.

221. The Tribunal was satisfied, on the evidence, that Ms Bicer and Ms Whitesman had referred the Claimant's behaviour to another manager to decide whether to take disciplinary action. The Tribunal accepted that this was caused by the Claimant's conduct in swearing when his manager told him, as she had to, about a complaint against him. The Claimant's protected disclosures were nothing to do with this. The Claimant's reaction was inappropriate and rude and gave rise to the possibility of disciplinary proceedings.

Detriment 10. 31 May 2017. SB's decision not to allow the Claimant to work from home on an ad hoc basis

222. Ms Bicer did not permit the Claimant to work from home on an ad hoc basis, despite this having been suggested by Occupational Health as being a potential

adjustment in January 2017. The Tribunal accepted Ms Bicer's evidence that she had decided, in March 2017, that that working from home was not appropriate for the Claimant because he required support and regular meetings to ensure that he was well; working from home might mean that opportunities to avoid mental health-related absence were missed, pages 554-556. It also accepted the Respondent's evidence that the Claimant's managers believed that the Claimant had difficulties with phone and internet reception at home, so that working at home was not feasible. These reasons had nothing to do with the Claimant's protected acts.

Detriment 11. 15 June 2017. SB telling C his pay would be stopped if he did not send in a sick note by 21 June 2017

223. The Claimant was required, by the Respondent's Absence Management Policy, to provide a Fit Note/ sick note in relation to absences lasting 8 days or more. The Claimant told Ms Bicer that he had been "signed off" by his GP, which would normally mean that he had been given a Fit Note confirming this. He was asked to provide a Fit Note and failed to do so. The Absence Management Policy stated that failure to provide a Fit Note could result in pay being stopped. The Tribunal concluded that Ms Bicer was following normal management procedure in requesting a sick note and warning the Claimant of the sanction if he did not provide one. This was standard management procedure and nothing to do with the Claimant's protected acts.

Detriment 12. 27 July 2017 SB and LW's decision to add a further allegation about two hours' worth of flexitime in Feb/Mar/April 2017 to strengthen a misconduct charge

224. The Claimant had a history of not properly recording leave and flexitime. Employees are required, under their contracts of employment, to work the number of hours specified, to be entitled to be paid. The Tribunal considers that it is generally not detrimental treatment for an employee to be required to account for their working hours. The Claimant appeared to object to his working hours being checked on by Ms Bicer, who was his manager and had responsibility for doing so.

225. Ms Bicer had noticed further discrepancies in the Claimant's time keeping. In accordance with her responsibilities as a manager, she obtained advice from a HR case manager about the Claimant and his absence and conduct. On 19 June 2017 an HR case manager advised that all concerns about the Claimant's behaviour should be investigated together. He said this was to avoid appearing to separate the issues in order to "stack up" warnings against the Claimant when the Respondent was aware of other conduct issues during on ongoing investigation, page 706. Sarah Jane Pizzie, investigating manager, accepted this advice. She decided to add an allegation there had been inaccuracies in the Claimant's flexi time keeping, page 718, page 2875.

226. The decision to add flexitime discrepancies to the misconduct charges against the Claimant was taken by Ms Pizzie, not Ms Bicer. In any event, the decision was made because there were, in fact, discrepancies and HR advised that all misconduct matters should be dealt with together. There were valid, non-victimization, reasons for the decision.

Detriment 14. From 10 October 2017. LW leaving the C without a line manager after Rob Davenport left on 10 October

227. Ms Whitesman did not leave the Claimant without a line manager. Mr Rob Davenport took over the Claimant's line management in mid 2017, but left the Respondent on 10 October 2017. On 22 September 2017 Mr Davenport told the Claimant that Barbara Davenport was to be his new line manager. On 13 November 2017 the Claimant emailed Barbara Davenport, saying that he understood that either Barbara Davenport, or Ms Whitesman, was taking over from Mr Davenport as his line manager, page 915.

228. On 14 November Barbara Davenport emailed the Claimant, saying that Louise Whitesman would be his line manager going forward, page 936. Barbara Davenport was also leaving the team and was therefore unable to manage the Claimant.

229. On the Tribunal's findings, there was no hiatus in the Claimant's line management. Even if there was, the Tribunal concluded that this was due to the serial departure of managers and nothing to do with the Claimant's protected acts.

Detriment 15. 14 November 2017. LW's decision to make herself C's line manager when she knew that she was complicit in the unfair treatment C had received

230. The Tribunal accepted Ms Whitesman's evidence that she was not aware, in November 2017, that the Claimant had a complaint about her. The Claimant had made a number of complaints during 2017, but their primary focus was Ms Bicer. Ms Whitesman was unlikely to be familiar with the detail of all the Claimant's complaints.

231. In any event, the Tribunal was satisfied that Ms Whitesman becoming the Claimant's manager was caused by the fact that Mr Davenport, and then Ms Davenport, had left the Respondent in quick succession and there was a dearth of other suitable managers available to manage the Claimant.

Detriment 16. 1 December 2017. LW's decision to offer the C a role with LW as countersigning officer. Effectively giving the C an ultimatum to resign or be dismissed

232. The Tribunal accepted Ms Whitesman's evidence that there were no managers in London, other than Anita McLoughlin, available to line manage the Claimant on his return to work. This was nothing to do with the Claimant's protected acts – it was a matter of practicalities.

233. Insofar as the Claimant may have been dismissed if he had not returned to work to the only position which was available for him, this was, again, not related to his protected acts. The Claimant had been off work, sick, for many months. He had been told by Mr Davenport in September 2017 that his sickness absence would be reviewed and that he could be considered for dismissal if his absence could no longer be supported. The Respondent was not required to employ the Claimant indefinitely, irrespective of whether there was a likely return to work. If the

Claimant had not returned to work, he could well have been dismissed because of his extended sickness absence, not because of his protected acts.

Detriment 17. 22 January 2018. LW taking away flexitime on the C's return to work. Withdrawn against AM

234. The Tribunal found that Ms McLoughlin decided that the Claimant could not work flexitime. Given that the Claimant withdrew this complaint against Ms McLoughlin, the claim would fail. In any event, the Tribunal accepted that the reason flexitime was taken away was that the Claimant was not working normal hours, so he would have had to work longer hours in order to build up flexi time. Ms McLoughlin felt that that would overburden the Claimant. The Tribunal accepted that flexitime was inconsistent with the Claimant working reduced hours and gradually returning to work in a safe manner

Detriment 18. 29 January 2018 AM's decision to give C a first attendance warning

235. The Claimant was given a first attendance warning on 29 January 2018 after he had been absent for 198 days in a 12-month rolling period.

236. Other employees in the Division were not given first attendance warnings when they exceeded the 8-day absence trigger point in a 12-month period. This was not in dispute. Nevertheless, the Tribunal did not hear evidence that anyone else in the Division had anything like 198 days absence in a rolling 12-month period, nor did it hear evidence that anyone else in the Division had a pattern of repeated absences and previous warnings. There was no employee comparable to the Claimant in terms of, both, the number of absences and the length of absences.

237. The Tribunal was satisfied that Ms McLoughlin gave the Claimant first written warning because of his very extended absence and for no other reason. It is difficult to imagine how Ms McLoughlin could have acted differently in light of the length of the Claimant's absence.

Detriment 19. February 2018. AM giving C hardly any work to do; claiming C being allowed to wear headphones and have a desk facing the wall was a fair reasonable adjustment

238. Ms McLoughlin allowed the Claimant to face the wall, rather than Ms Bicer, and to wear headphones to help his concentration. These were adjustments which were designed to address his concerns about sitting near Ms Bicer. Ms McLoughlin also sat with the Claimant, to provide him with support. The Tribunal found that these were all done by Ms McLoughlin to reduce the Claimant's stress and anxiety and were appropriately described as adjustments.

239. Ms McLoughlin gave the Claimant little work because did not want to overload him. She allowed the Claimant to take walks for an hour every day and made sure that he left work on time.

240. The Tribunal concluded that all these were the actions of a supportive, sensitive manager. They were not detriments; they were advantageous to the Claimant, done to assist a successful return to work.

Detriments 20 and 25. 9 May 2018 and 16 May 2018. LW and AM's failure to address C's complaint that the attendance policy was being selectively applied

241. Ms Whitesman and Ms McLoughlin did not fail to address the Claimant's complaint. Ms Whitesman took advice and was told that the Division did not hold data on whether employees had been invited to formal meetings after an absence of more than 8 days. She was also told that an investigation was therefore unlikely to be fruitful and that sickness absence was low in the Respondent's Capital Division, in any event.

242. Ms Whitesman sent reminders to managers about the need to apply the attendance policy properly in future. The Tribunal considered that Ms Whitesman acted reasonably, having taken advice, and that nothing she did in this regard was because the Claimant had done protected acts.

243. Insofar as Ms Whitesman and Ms McLoughlin did not rescind the Claimant's first formal warning, there was no suggestion that other employees had comparable high levels of sickness to the Claimant, but had not been given warnings. There was no reason to remove the Claimant's warning simply because others, with much lower levels of sickness absence, had been treated more leniently.

Detriment 21. 10 May 2018. LW and AM's decision to issue C with final attendance warning for going 1 day over the trigger point when SB and LW were not applying the policy to others who had gone over the trigger point

244. The Tribunal accepted Ms Whitesman and Ms McLoughlin's evidence that Ms McLoughlin took the decision to give the Claimant a final attendance warning. It found that she did so because the Claimant had gone off sick, again, during the improvement period on 19 February 2018, 6 March 2018 and 7 March 2018, having had nearly 200 days' absence in the previous year. She looked at the absences as a whole and decided that a final warning was appropriate.

245. While other employees had not always been invited to formal meetings when they had had more than 8 days' absence in one year, none had comparable rates of absence to the Claimant. The Tribunal was satisfied that the Claimant's very high level of absence, followed by further absences, were the sole reason for the final attendance warning. Such high levels of absence would almost inevitably attract attendance warnings.

Detriment 23. AM's failure to address a legitimate complaint made by C on 14 May 2017 and instead telling LW that she did not want to line manage C anymore

246. On 10 May 2017 Ms Whitesman had attended the final attendance warning meeting, to support Ms McLoughlin, who was experiencing increased anxiety due

to her line management responsibilities for the Claimant. The Tribunal accepted Ms McLoughlin's evidence that she told Ms Whitesman that she did not wish to manage the Claimant anymore for health reasons. Ms Whitesman's attendance at the 10 May 2017 meeting corroborated this and predated the Claimant's complaint on 14 May 2018.

247. **Detriment 22. 14 May 2018 SB vexatiously interrupting a meeting C was having with a member of her staff for no good reason**

248. The Tribunal accepted Ms Bicer's evidence that she sent a colleague into the meeting on 14 May 2018 to support Mr Wynn, who had previously expressed concerns about the Claimant using information which he had extracted from Mr Wynn. Ms Bicer's action was not related to the Claimant's protected acts.

Detriment 24. 15 May 2018. LW offering C a post in a Division where a task manager had given him only 10 hours work in the previous year. C was completely ostracised

249. The Claimant was offered a new line manager because Ms McLoughlin had said that she did not wish to line manage him. As a result, Ms Whitesman was required to find another line manager. Ms Whitesman knew that the Claimant wanted to be moved out her Division. The Tribunal accepted her evidence that she was able to broker a move to Suky Atwal's team, at this point, because the Claimant had, by then, been working with Suky Atwal, which he had not been doing when he returned to work in January 2018. None of this was done because of the Claimant's protected acts, including his allegation that the Attendance Management Policy was not being applied fairly or consistently. The chronology of events dictated the Claimant's further move. More options were available to Ms Whitesman because the Claimant had worked across Divisions on his return to work.

Detriment 26. 26 June 2018 – August 2018. Not being allowed to work from home one day per week. C's new line manager saying his hands were tied following a meeting with AM. C allowed to work from home one day a week after 3 month attendance sanction had finished

250. The Claimant was line managed by Dapo Obatusin between 26 June 2018 and August 2018. As line manager, Mr Obatusin would have had responsibility for making decisions in relation to the Claimant's work. The Claimant did not allege that Dapo Obatusin had victimized him. The Tribunal concluded that Mr Obatusin did not victimize the Claimant in relation to decisions about working from home.

Detriment 27. Withdrawn by Claimant

Detriment 28. July 2018. DS and ES decision to narrow the scope of the grievance investigation to 29 January 2018 to May 2018, despite the Claimant relying on a series of acts

251. Mr Simons gave the Claimant detailed and considered reasons for his decision about the scope of the grievance investigation. He noted that the Claimant had submitted a grievance in August 2017, which he had withdrawn on 29 January

2018. Mr Simons referred to the Respondent's Grievance Policy, which requires complaints to be raised within 3 months. He took into account the Claimant's statements that the Claimant had withdrawn his August 2017 grievance because he was concerned about impartiality and possible victimization and that he had not previously known about continuing acts of discrimination and how they might apply to him. He extended the scope of the investigation to 29 January, to take account of the alleged continuing act.

252. The Tribunal found that Mr Simons carefully considered and justified his decision, on non-victimization grounds. It was not taken because the Claimant had done protected acts.

Detriment 29. 15 August 2018. SB claiming C's grievance was vexatious and attempting to defame C and unduly influence the grievance manager's perception of C

253. The Tribunal accepted Ms Bicer's evidence at the Tribunal about what Mr Wynn had said to her and why she had interrupted the Claimant's conversation with Mr Wynn. As such, it did not find that Ms Bicer had attempted to defame the Claimant's character when she gave the same evidence to the grievance investigation; it found that Ms Bicer gave an honest account to the investigation. On all the evidence it heard, the Tribunal did not find that Ms Bicer had misrepresented matters to the investigation. It decided that Ms Bicer genuinely attempted to manage the Claimant and believed that he had made unfounded complaints. This was not victimization; it was her honest belief based on her experience.

Detriment 30. 16 August 2018. LW informing the grievance investigation of different facts surrounding why C was offered a move

254. The Tribunal accepted Ms Whitesman's evidence that she had not previously informed the Claimant about Ms McLoughlin's request to stop managing the Claimant on the grounds of ill health, because that was a private matter. It accepted her explanation that she was required to tell the investigation about Ms McLoughlin's request, in the interests of transparency and fairness. This had nothing to do with the Claimant's protected acts.

Detriments 31 and 36. 12 September 2018 (Grievance) 22 February 2019 (Attendance Appeal) DS and ES failing fully and properly to investigate and taking managers at their word. Deciding allegation 2 was out of scope when C had provided clear evidence to back it up

255. The Tribunal did not find that Mr Simons and Mr Schwitzer failed properly to investigate the Claimant's grievance and attendance appeal. They sought relevant evidence and gave reasoned decisions. There was no evidence that they would have conducted their investigations any differently in the case of someone who had not done protected acts.

256. Mr Schwitzer explained why he had declined to review Ms McLoughlin's first written improvement warning. He said that the Claimant had failed to appeal against the first written warning at the time, which was what the Respondent's

policies required. The Tribunal found that this was Mr Schwitzer's genuine reason and that he did not victimize the Claimant in making his decision.

Detriment 33. November 2018. SB and LW claiming that C didn't now have a disability when they had acknowledged in June 2018 that C was allowed to downgrade "as a reasonable adjustment"

257. On 7 November 2018 the Respondent presented its Response to the Claimant's claim. Its Grounds of Resistance, paragraph 10, drafted by the Government Legal Department, said, "The Respondent does not admit that the Claimant was disabled within the meaning of the Equality Act 2010 at the time of the alleged discriminatory treatment or at all or that the Claimant is currently disabled…". The Tribunal considered that it was a standard Respondent approach in Tribunal cases to put a Claimant to proof of disability, by not admitting disability. Ms Bicer and Ms Whitesman were clearly not qualified to make a decision on whether the Claimant was a disabled person or not. There was no evidence that they were responsible for the wording of the Respondent's Grounds of Resistance in this regard. There was nothing to suggest that this was an act of victimization.

Detriment 34. 7 December 2018 AWH failing to take action against SB after it became clear that SB had attempted to deceive the investigation by attempting to cause C serious harm. The grievance appeal did not consider all the evidence and legislation and did not make reference to C's disability

258. The Tribunal decided that Ms Wasik-Hyde came to her conclusions on the evidence before her. It accepted her evidence that she did not find that Ms Bicer had attempted to deceive the investigation, but rather, that none of the recollections was wholly reliable and it was very difficult to decide what had happened, months after the event. The Tribunal itself did not find that Mr Wynn's accounts were reliable. He had apparently obfuscated in his account of what he had said to Ms Bicer in February 2018 until, after prompts from the Claimant, he made a definitive statement. He then told Ms Wasik-Hyde that he "could not remember" talking to Ms Bicer about a possible complaint against her by the Claimant in February 2018. The Tribunal considered that it was unsurprising that Ms Wasik-Hyde was unable to come to a clear conclusion on what had happened. In any event, the Tribunal decided that Ms Wasik-Hyde's central conclusion, that interrupting a meeting was not a detriment to the Claimant, was clearly correct. Ms Bicer had sent another colleague into the room, which was a sensitive approach. Managers are entitled to speak to their own staff. A reasonable employee, in those circumstances, would not feel disadvantaged.

259. Ms Wasik-Hyde undertook further investigations and interviewed Mr Wynn, as the Claimant sought. She took a careful approach to the appeal, attempting to improve the original investigation. There was no evidence that she would have acted any differently in respect of an appeal by a person who had not done protected acts. There was no victimization.

Detriment 35. December 2018. Decision that discrimination would be looked into via the attendance procedure appeal when the appeal manager ES had no authority to comment on C's disability status and so could not conclude whether discrimination occurred

260. As set out above, Mr Schwitzer explained why he had declined to consider Ms McLoughlin's first written improvement warning. He said that the Claimant had failed to appeal against the first written warning at the time, which was what the Respondent's policies required. The Tribunal found that this was Mr Schwitzer's genuine reason and that he did not victimize the Claimant in making his decision.

261. In summary, the Tribunal decided the Respondent had cogent, non-victimization reasons for every decision that it took. The Tribunal decided that victimization was not part of the reason that the Respondent acted as it did, at any point.

Employment Judge **Brown**

Date: 11 Dec 2019.

SENT to the PARTIES ON

17/12/2019

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FOR THE TRIBUNAL OFFICE