EMPLOYMENT TRIBUNALS

Claimant: **Mr. Madasar Ali**

Respondent: **Capita Customer Management Ltd**

Heard at: **Leeds (Hybrid hearing)** **On:** **14 December 2020 and 22 March 2021 and 23 March 2021 (deliberations)**

Before: **Employment Judge Rogerson**
Mr. J. Rhodes
Mr. R. Webb

Representation
Claimant: Mr. D. Panesar, Queens Counsel
Respondent: Mr. P. Wilson, Counsel

RESERVED JUDGMENT

The complaint of victimisation made pursuant to section 27 of the Equality Act 2010, that on 21 December 2016, the respondent subjected the claimant to a detriment by making an unjustified threat of applying a disciplinary process in relation to his Dependents Leave absence, succeeds.

REASONS

Background

1. This part of the claim was remitted for rehearing before this Employment Tribunal (ET) following the judgment of the Employment Appeal Tribunal (EAT), handed down on 11 April 2018. In that judgment Dame Justice Slade found that the ET had failed to provide sufficient reasons explaining why the victimisation complaint relating to the detriment of 21 December 2016 had succeeded. By way of background it might be helpful to set out the original findings of fact made by this ET and the relevant parts of the EAT's judgment.
2. The ET's original findings of fact in relation to that complaint are set out at paragraphs 6.33-6.37 of the ET judgment as follows:

> "*6.33 Miss Shillito was a relatively inexperienced manager who was on secondment for 12 months in this role. She said she had not been instructed to manage the Claimant differently to the way that she managed other people falling under her line management. She provided a number of documents of other meetings she had to support this. She accepts that she had misunderstood the dependent's leave policy and treated it as if it was sick leave and was applying triggers for disciplinary action when this was not the correct*

*procedure. She says she was instructed by her manager Helen Marriott to "**take it to the next stage and the next stage was disciplinary action**". We had no explanation from Helen Marriott why she would have told a more junior manager seeking advice to 'take it to the next stage' when that was not the procedure that should be followed. We did not know why it was necessary to have the meeting recorded in the formal way it was, when none of the examples produced for other employees were carried out in that way.*

6.34 All the other examples used a pro-forma document which Miss Shillito completed on her computer with the employee present. She would fill in the text, check it with the employee, would record what the employee said, what she said to the employee and the form would be printed off. Although there is a box for the line manager's signature and the employee's signature none of those were completed on any occasion for the Claimant and for others.

*6.35 What is unusual is that on 21 December 2016 Miss Shillito decided to hold a different type of meeting with the Claimant and did things differently for the Claimant. She did not use the proforma or the 'meeting note record' she used when she was the note taker in August 2016 with Ms. Stubbs. This time she uses a Capita 02 document headed "meeting" which states "this form should be used to capture all one to one discussions with a member of staff regarding their conduct, attendance, performance or any other issues which need documenting. The form must be signed by both a member of staff and their line manager". The explanation Miss Shillito gave for using this form was that Helen Marriott had told her to **take it to the next stage and the next stage was a disciplinary Stage 1 meeting**.*

6.36 If the purpose of the meeting was 'informal' as indicated to the Claimant, why not use the 'meeting notes' or pro-forma as she had done previously. To do it in the way that she did created suspicion. It supported the Claimant's perception of a 'sneaky' non-transparent process designed to manage him out of the business. It was accepted that this was not the appropriate or right procedure to use to manage the Claimant's dependents leave absences.

6.37 The Claimant was subjected to a detriment by Ms Shillito on 21st December 2016. The explanation of inexperience and 'consistency of treatment' with others was not accepted based on the evidence we saw. Ms Shillito knew about the tribunal claim and was being directed by her manager to take it to the next stage, in a way she was not doing for the other employees she managed. In the absence of an adequate explanation from her to explain her detrimental treatment of the Claimant we found the complaint is made out. (highlighted part our emphasis)

Employment Appeal Tribunal Judgment

4.The EAT's conclusions on the remitted part are set out at paragraphs 124-125:

"Paragraph 124: The alleged perpetrator of the detriment on 21 December 2016 of erroneously treating her meeting with the Claimant as a precursor to a disciplinary process was Ms. Shillito. The ET recorded at paragraph 6.33 that Ms. Shillito was a relatively inexperienced manager. She accepted that she had misunderstood the dependent leave policy and treated such leave as sick leave in applying triggers for disciplinary action. She said that she had been

instructed to take a meeting with the Claimant "to the next stage and the next stage was disciplinary action". That is why she used the form applicable to one-to-one discussions with the member of staff regarding their conduct, attendance, performance or any other issue which needs documenting.

Paragraph 125: The ET observed that by conducting the meeting with the Claimant in the way Ms. Shillito did created suspicion in his mind. The ET did not accept the explanation of inexperience and consistency given by Ms. Shillito, as a precursor to a disciplinary process. Unlike findings in relation to the complaints of the behavior of Ms. Tummons on 14, 27 and 28 July 2016, in my judgement the ET failed to give adequate reasons for disbelieving Ms. Shillito. They merely referred to "evidence we saw" as the basis for not accepting the reasons given by Ms. Shillito for the way in which she conducted meeting with the Claimant on 21 December 2016. In my judgment the decision of the ET to uphold the complaint of victimisation on 21 December 2016 was not ***Meek*** *compliant. The decision does not give reasons or adequate reasons to enable the respondent to know, why that complaint was upheld.*

The scope of the rehearing

5. The parties were not in agreement about the 'scope' of the rehearing. Mr. Panesar (who appeared for the Claimant before the EAT) had understood that it was a 'reasons only' referral and should be limited to both sides making representations on the undisturbed findings of fact made by the Tribunal. He viewed the Respondent's attempt to broaden the scope of the hearing as an attempt to have '*a second bite of the cherry*' which was unnecessary, unhelpful and would unreasonably delay the conclusion of these proceedings.
6. The Respondent wanted a full 'rehearing' of that part of the complaint. At the original hearing, the witness evidence was limited to the Claimant and Ms. Shillito and the Respondent wanted the opportunity to adduce the evidence of Ms. H Marriott (Operations Manager and Ms. Shillito's line manager). Given her involvement in the events of 21 December 2016 the Respondent felt it was important for the Tribunal to hear her evidence and have the best available evidence before making any findings of fact on the remitted part.
7. The EAT provided further clarification about the scope of the rehearing in January 2019, leaving it to the Tribunal's discretion. After considering the parties' representations the Tribunal agreed with the Respondent that the rehearing should allow the parties the opportunity to provide all the relevant evidence. Witness statements were exchanged in June 2019. A bundle of documents was prepared by the Respondent based upon the original hearing bundle to which further documents were added by the Respondent on the first day of the hearing.
8. The Tribunal reminded itself that the focus of the remitted issue was to decide and explain the motivation (conscious or subconscious) of Ms. Shillito in relation to the way in which she conducted the meeting on 21 December 2016 and her use of the document headed "**Capita 02**". Was she significantly influenced by the Claimant's protected acts? Given the relevance and significance of this contemporaneous document the Tribunal expected the Respondent's witnesses to provide clear and detailed evidence about the discussions that had taken place on 21 December 2016, the timing of those discussions, the content, why the Capita O2 form was used for the Claimant, how it was prepared, whether it was used for anyone else and if not why not?
9. The parties agreed the central facts in this case were largely undisputed. Mr. Panesar helpfully set out those facts in his skeleton argument. We heard

evidence from the Claimant, Ms. Shillito and then Ms. Marriott. Where there are any disputes of fact we will set out our findings on those disputed matters and how we resolved them. Mr. Wilson helpfully identified that the real difference between the parties is how the agreed facts should be interpreted and applied to decide if liability for victimisation is established.

The Applicable Law

10. The burden of proof provisions in section 136 Equality Act 2010 provide that:

 "(1) This section applies to any proceedings relating to the contravention of this Act.

 (2) If there are facts from which the court could decide in the absence of any other explanation, that a person(A) contravened the provision concerned, the court must hold that the contravention occurred".

 A 'contravention' of Section 27 Equality Act 2010 (victimisation) is when:

 "*A person (A) victimises another person (B) if A subjects B to a detriment because:*

 (a) B does a protected act."

11. It is not in dispute that the Claimant had done protected acts in this case. The Claimant raised a grievance on 5 April 2016 alleging sex discrimination and lodged a complaint to the Employment Tribunal on 22 June 2016 complaining of sex discrimination.

12. It is not in dispute that the respondent generally, and in relation to this particular complaint of victimisation, Ms. Shillito and Ms. Marriott had knowledge of the protected acts. At the time of alleged detriment on 21 December 2016, the hearing of the Claimant's ET claim was due to commence on 9 January 2017 and the Respondent was aware of that fact.

13. As to the meaning of 'detriment', Mr. Panesar directed the Tribunal to the guidance given in paragraph 9.8 of the Equality and Human Rights Code of Practice ("the Code of Practice") which states that "*a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage"*.

14. Paragraph 9.9 of the Code of Practice provides that "*a detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance would not be enough to establish detriment*".

15. Paragraph 9.10 states that "*detrimental treatment amounts to victimisation if a protected act is one of the reasons for the treatment but it need not be the only reason*".

16. To establish causation the reasoning in **Nagarajan-v- London Regional Transport (1999) IRLR 572 HL** applies and makes clear that there is no need for 'conscious' motivation. The alleged discriminator may 'subconsciously' be significantly influenced by the protected act in his/her treatment of the complainant. Mr. Wilson has also helpfully referred to paragraph 37 of the judgment of Peter Gibson LJ in the Court of Appeal in **Igen-v Wong 2005 IRLR 58 CA** which clarified that: "A "significant" influence is an influence which is more than trivial".

Findings of fact

17. It has been found (and upheld on appeal) that by December 2016 the Respondent had subjected the Claimant to the following detriments because of his protected acts of raising a grievance and bringing ET proceedings:

 a. On 14 July 2016 giving the Claimant an ultimatum that, if he did not return to work on the expiry sicknote he would not be able to return to his BRT (business retention) role.

   b. On 27 July 2016, removing the Claimant from his business retention role.
   c. On 28 July 2016, giving the Claimant a false reason for his removal from that role.

18. These acts of victimisation were committed by Ms. L. Tummons, who was the Claimant's Team Leader before Ms. Shillito took over that role. Both managers were reliant on their line manager Ms. Marriott for guidance and support in relation to management action.
19. Ms. Marriott was the common link between the detrimental treatment in July 2016 and the alleged treatment in December 2016. It is alleged that she was substantially involved in the decisions made about the Claimant. The Claimant relies on the previous history of 'animus' found to have been motivated by his protected acts to draw adverse inferences to support his complaint about his treatment on 21 December 2016.
20. Ms. Marriott has been employed by the Respondent as Operations Manager for over 11 years. She is an experienced senior manager. She managed Ms. Tummons from June 2016 to August 2016 and then managed Ms. Shillito. She was responsible for providing guidance, instruction and advice to her managers to help them perform their role. She was involved in advising both managers about management action in relation to the Claimant.
21. As an experienced senior manager Ms. Marriott was familiar with the Respondent's policies and procedures. In December 2016, Ms. Marriott relocated to the Leeds site, where the Claimant and Ms. Shillito worked which made it easier to provide 'hands on' management advice and support.
22. This was Ms. Shillito's first management role. She was an inexperienced manager. She had received no Equality and Diversity training and was unfamiliar with the Equality Act 2010. She was unaware that the Respondent provided "Guidance for managers on Dependent's Leave" (page 46). She relied upon Ms. Marriot to direct her to any relevant guidance before she took the next steps in managing non-medical absences for the Claimant and others in her team.
23. She understood that the policy permitted employees to take unpaid time off for dependent's leave. She could identify absences which were "Unpaid Time Off for Dependents" on the records she completed during return to work meetings. She had misunderstood the dependent's leave policy and treated dependent's leave as if it was sick leave and was applying triggers that would apply to sick leave leading to disciplinary action when this was not the correct procedure.
24. The Respondent has a Dependent Leave policy published on the intranet. It also publishes specific guidance for its managers on how they should apply the policy to colleagues. The guidance is available on the Intranet, is easily accessible to all managers and is drafted in clear terms. The guidance (page 46) provides as follows (all highlighted text is our emphasis):
    - Employees are entitled to take a reasonable amount of time off to deal with unexpected emergencies surrounding a dependent.
    - There is no specific time of which is reasonable and in most cases, employees will take 1 to 2 days to deal with any problems or emergencies.
    - The number of occasions which would be deemed to be unreasonable will depend on the circumstances outlined in the return to work and in **all cases always seek guidance from your group HR representative**.
    - The manager would need to consider **If this occurrence is the second occurrence of time off for the same reason clarify why an alternative was not put in place before and if alternatives had been**

explored (i.e. reduction in hours/parental leave/alternative arrangements etc. and this absence has continued consider applying the disciplinary procedure as it is a timekeeping issue.

- If it is **deemed** that the amount of time off is **excessive** then you will need to **instigate a formal procedure** with a view to establishing any underlying problem and discussing the impact of their absence on the business.
- The manager in question should **always** consult their group HR representative if the time off becomes excessive.

25. Ms. Shillito was not directed to the guidance by Ms. Marriott. Ms. Marriot was aware of the policy and she knew that managers were required to consult with HR before taking the next stage of the formal procedure of treating the non-medical absence as a disciplinary issue. She 'could not remember' her discussion with Ms. Shillito on 21 December 2016. While she accepted that she knew about that guidance, she had no explanation for not directing Ms. Shillito to that guidance or for referring her to HR.
26. Ms. Marriott could also not remember having any discussions with Ms. Tummons about the Claimant's grievance. Contemporaneous emails infer Ms. Tummons informed HR that she had discussed the grievance with Ms. Marriot. Despite that evidence Ms. Marriot was reluctant to accept that she had knowledge about the Claimant's grievance/its content, until she was taken to the emails. Ms. Marriot (and other managers more widely in the business) were being consulted about the issue raised by the Claimant in his grievance alleging sex discrimination in relation to parental leave. We found Ms. Marriott was not a straightforward witness, evasive in her answers on matters which were not in dispute.
27. She was more willing to accept that she had a close working relationship with Ms. Tummons who was someone who came to her '*for a point of direction generally*". It was reasonable to infer that inexperienced new managers like Ms. Tummons and Ms. Shillito would, given the potential consequences, rely on more experienced senior managers for 'points of direction' before taking 'management' action,
28. Ms. Shillito had direct knowledge of the Claimant's grievance and his ET claim. In August 2016, Vicky Stubbs (Operations Manager) met with the Claimant to request that he refrain from discussing his ET claim at work. Ms. Shillito was the note taker at that meeting and made contemporaneous hand-written notes of the meeting which were shown to the Claimant at the time they were taken and signed by Ms. Stubbs and the Claimant to confirm their accuracy. Ms. Shilleto knew how to use this method to record an important informal discussion to provide a record of that discussion.
29. Another record can be provided of a return to work meeting using a 'Closed Sickness and Absence Report' ('SAM'). This is a proforma form completed by the line manager on his/her computer while the return to work discussion takes place. The system allows the manager to access previous records and for the form to be printed off and signed by the manager and team member as a record of the discussion, if it is required. In practice the record was signed because the return to work discussion was treated as an informal discussion between the team member and his manager and not part of any formal absence management procedure.
30. It was agreed that as at the 21 December 2016 the Claimant had been absent on three occasions due to unforeseen emergencies surrounding a dependent. All dependents leave is unpaid leave which an employee can work back if that is possible for the business and the employee. If a 'work back' is not possible the absence is left on the record.

31. The background to each of the Claimant's absences was not in dispute and after each absence a manager conducted the return to work meeting and the reasons for the absence was recorded on the SAM. Although the Claimant was not provided a copy of the SAM record, he had no reason to believe that the explanations he had provided after each absence were not accepted by his managers who were aware that he was dealing with very difficult family circumstances (his wife suffering from postnatal depression and a newborn child under the age of one).
32. On 30 August 2016 (page 76) the Claimant's daughter had a fever, was not taking feed and was ill to the extent that she had to be taken to hospital in the first instance and then subsequently taken back to hospital by ambulance as her illness continued. The Claimant took two days leave to deal with those circumstances.
33. On 3 October 2016 (page 77) the Claimant and his wife heard that his father-in-law had developed cancer in his glands. The Claimant took a day's leave because his wife required support in those circumstances.
34. On 7 December 2016 (page 78) the Claimant's father was rushed to hospital and the Claimant took one days leave to support him in those circumstances.

<u>21 December 2016</u>

35. Before Ms. Shillito met with the Claimant to conduct the return to work meeting on 21 December, she met with Ms. Marriott for guidance about the next step to take to manage his non-medical absences identified as "Unpaid Time Off for Dependents". Given the importance of this discussion the Tribunal expected detailed evidence of the discussions that took place. Ms. Shillito (paragraph 7 WS) states that; "*I had recently got a new manager, Helen Marriott, and in reviewing my team performance with her including absence, she had told me that I needed to make clear to my team (having hit the triggers) when this escalation could happen. She'd told me that I needed to "document" the conversation. I recorded this conversation in a form that I understood was relevant for this purpose (page 79) – this is what* ***we use for documenting discussions which could progress to disciplinary warnings but are not yet at that stage****. It's known as a documented conversation*"
36. At the hearing in January 2017, closer in time to the discussion Ms. Shillito had recalled more details about the discussion. "*Helen Marriott had told her to* ***take it to the next stage and the next stage was a disciplinary Stage 1 meeting" and that was how she came to use the Capita O2 form.*** There was no evidence of any other member of her team (having hit triggers) being 'escalated' to the next stage in the same way as the Claimant. She could not provide any other example of the Capita O2 document used for anyone else in her team to support her explanation of 'consistency' of treatment.
37. The previous finding of fact made by the ET was that "*What is unusual is that on 21 December 2016 Miss Shillito decided to hold a different type of meeting with the Claimant and did things differently for the Claimant. She did not use the proforma or the 'meeting note record' she used when she was the note taker in August 2016 with Ms. Stubbs. This time she used a Capita 02 document headed "meeting" which states "this form should be used to capture all one to one discussions with a member of staff regarding their conduct, attendance, performance or any other issues which need documenting. The form must be signed by both a member of staff and their line manager".*
38. The Capita O2 document is used as a precursor to a formal disciplinary process. In closing submissions Mr. Wilson suggested that by using this form the Claimant was treated more advantageously than others in the team because he was provided with a 'record' of the return to work discussion. If the purpose was to

provide a record of the discussion, the SAM report was the simplest and most transparent way to do this in a way the Claimant was more familiar than to use the Capita O2 form which served a different purpose.

39. It was put to Ms. Shillito that her recollection in January 2017, closer in time to the event was more likely to be accurate. She did not agree her previous account was more reliable, but could not explain why she omitted the details of her discussion with Ms. Marriott. She agreed the reference to 'escalation' and Stage 1 is a reference to a 'verbal recorded warning' which is disciplinary action. The disciplinary procedure (page 46) describes *"Stage 1: Misconduct/ Unsatisfactory performance -Verbal recorded warning"*. Mr. Panesar also put to her, the alternative position advanced by the Respondent that it was about 'fact-finding' and was not a precursor to a disciplinary process, was implausible because the facts about the (3) absences were not in dispute. Ms. Shillito accepted that she had no reason to disbelieve what the Claimant had said about each of those absences. She was not suggesting he was untruthful or that he was taking an excessive or unreasonable amount of time off to deal with the emergency/unexpected situation. She accepted the Claimant was taking unpaid dependents leave to support/care for his dependents (his child his wife or a parent) as permitted by the policy. She agreed a 'fact find' served no purpose.
40. We found that Ms. Shillito's recollection of events at this hearing was less reliable than the evidence she gave in 2017. Although she accepted a 'fact find' served no purpose, both witnesses advanced that reason to explain their actions. We found that before the meeting took place with the Claimant on 21 December 2016, Ms. Shillito was given an instruction by Ms. Marriott to ***take it to the next stage and the next stage was a disciplinary Stage 1 meeting" and that was how she came to use the Capita O2 form.*** That finding of fact was consistent with the other findings of fact we made.
41. Ms. Shillito was asked about the Claimant's perception and understanding of the position when he was given the Capita O2 document to sign at his desk on 21 December 2016. She knew the Claimant was already on a Stage 2 Warning and that the threat of any further disciplinary action put him at greater risk of dismissal. Ms. Shillito accepted that by using that document in the way she did, the Claimant would be taken by surprise, would have been alarmed and stressed, in circumstances when it was '*not right to raise such a threat*'. She agreed that this left the Claimant in a vulnerable position knowing that if for any unforeseen reason any of his dependents needed his support in the next 12 months, and he took any unpaid leave he could face the threat of disciplinary action. She agreed that the Claimant was so alarmed that he refused to sign the document and insisted on speaking to his union representative to raise a complaint about it. All that evidence was consistent with the Claimant's understanding that the Capita O2 form was being used as precursor to a disciplinary process not a 'fact find'.
42. Ms. Marriott accepted she might have said "*if it continues take it to the next stage*". In her witness statement she also says she meant the next stage was 'fact find' and not a precursor to a disciplinary. However, in cross examination she not only conceded that there was no justification for a 'fact find' but it was 'wrong' to advance the case on that basis. In her answer she continued by suggesting that was the reason why an apology was offered at that time. In answer to a follow up question from the Tribunal, when she was asked to explain why her witness statement denied any wrongdoing and sought to justify the decision made she agreed that was how her statement read. It calls into question her credibility as a witness and whether the apology made was genuine.
43. We found that Ms. Shillito and Ms. Marriott have not used the opportunity this rehearing gave them to provide an accurate account of events. Instead they have

attempted to reconstruct events to fit in with the 'false' picture presented. We find further support for our view when we considered Ms. Shillito's evidence about how the 'Capita O2" document (page 79) was prepared. Again, detailed evidence was omitted and only came to light during cross examination. Ms. Shillito admitted that she typed up the Capita O2 document before the return to work meeting with the Claimant was conducted on the 21 December 2016. She checked it with Ms. Marriott and had not used the form for anyone else in her team. Just pausing there, to consider what that sequence of events means. The Capita O2 document had been prepared to record a discussion that had not yet taken place with the Claimant, for the sole purpose of 'escalating' matters to Stage1 of the disciplinary process for the Claimant.

44. Ms. Marriott's witness statement states that she was unaware that the Capita O2 document was going to be used, and as far as she was concerned the SAM record would have 'sufficed' as the record of the conversation. If that was true why did she not offer that guidance to Ms. Shillito. During cross examination she was evasive (when she was asked if she had seen the typed Capita O2 document when she had her discussion with Ms. Shillito she said: "*not going to answer yes or no")* After pressing, she did accept it was not appropriate to use it because *"it was not a recorded conversation as the conversation had not yet happened. It was not ideal and it was not normal*". She accepted the correct procedure for documenting important conversations with team members had not been followed. If the Capita O2 document was going to be used to document a conversation it should have been typed after the conversation had taken place. It would not be appropriate for a manager to type it up before the discussion had taken place.
45. She was also evasive in her answers about her discussion on 21 December 2016. She gave the impression that she had a general conversation with Ms. Shillito about a team member, not about the Claimant. We find it unlikely that on the day of the Claimant's return to work meeting, Ms. Marriott would advise a more junior inexperienced manager to 'escalate' it to the disciplinary process without any specific details about the team member concerned. Ms. Shillito sought specific advice about the Claimant because she was going to meet with him that day. Ms. Marriott not only instructed Ms. Shillito to take it 'Stage 1' she also sanctioned Ms. Shillito's use of the Capita O2 document, knowing that it was being used inappropriately.
46. Another credibility issue arose when Ms. Shillito contradicted herself and the evidence she gave earlier in cross examination (see paragraph 41). For the first time she suggested she gave the Claimant a first copy of the Capita O2 document at the return to work meeting and then a second copy at his desk after the meeting when she asked him to sign it. This new evidence was used to suggest the Claimant had already seen the document before he was asked to sign it. She accepted the Claimant refused to sign it at his desk. That new evidence was not included in the witness statement and it was not put to the Claimant in cross examination. The Claimant's unchallenged evidence (which we accepted) was that the first time he saw the Capita O2 document was when Ms. Shillito came to his desk after the return to work meeting. She gave him the document and asked him to sign it. He refused and immediately complained about it to his Union.
47. The Claimant's evidence was clear and straightforward. He believed the way in which the form was presented to him at his desk to sign was a 'sneaky'. His managers were not being open and transparent with him and were unjustifiably threatening him with a disciplinary process. He viewed this as another example of management singling him out for disadvantageous treatment. At the time he did not know that the Capita O2 document had been prepared in advance of his meeting and that its use had been sanctioned by Ms. Marriott.

48. We found the Capita O2 document was used preemptively to ensure the Claimant was escalated to Stage 1 of the disciplinary process putting him at greater risk of dismissal because he was already at Stage 2. No one else in the team had that same preemptive step taken to escalate their absences to the next stage.
49. The Claimant says that he was viewed as a trouble maker for raising a grievance and bringing an ET claim alleging sex discrimination. Mr. Panesar has quite fairly put to the Respondent's witnesses the evidence the Claimant relies upon to draw adverse inferences: a history of animus (the previous acts of victimisation because of his protected acts) and the skepticism expressed by managers about the timing of the Claimant's sickness absence coinciding with his grievance. He referred to paragraphs 8 and 9 of the ET3 response form which state as follows:

    Paragraph 8; "W*hilst the grievance was outstanding the Claimant became absent from work on 26 April 2016 due to reported work-related stress. It is understood that this period of absence which is ongoing has arisen during the same period of time when the Claimant had indicated that he would wish to take shared parental leave. He remains absent from work and his latest medical certificate is due to expire on 26 July 2016".*

    Paragraph 9*: "during an absence review meeting on 16 May 2016 the Claimant confirmed that he was spending time with his wife and supporting her with and looking after the baby on a day-to-day basis during his absence*".

50. Ms. Shillito and Ms. Marriott said they could not comment on the Respondent's ET3 because they were not involved with preparing it. Mr. Wilson invites the Tribunal to find that their 'frank' answers go to their credit showing that they are credible witnesses. We do not find their 'frankness' in answering this question persuades us that they are credible witnesses overall. While they could not explain those paragraphs of the ET3 they were the only witnesses available to comment on and rebut the inferences the Tribunal was invited to make. Both managers were directly/indirectly involved in managing the Claimant. It could reasonably be inferred that the pleaded case was prepared on the instructions of 'managers' involved in managing the Claimant absences/who would have access to the SAM records. We were left with no explanation for the 'scepticism' expressed in the pleadings about the timing of his sickness absences in April and May 2016 and the Claimant's grievance.
51. Ms. Marriott denies that she was motivated in any way in her treatment of the Claimant by his protected acts. She states "*in any event even if I knew of the grievance its subject and/or the ET claim links to the Claimant specifically (which I did not have recollection of at the relevant time) this would have been completely irrelevant to me in terms of decisions made to manage him and others on a day-to-day basis. My advice to Ms. Shillito* ***was exactly as it would have been for any other colleague***". The difficulty with that is that Ms. Marriott had been more substantially involved in the escalation and inappropriate use of the Capita O2 than she had admitted to. Ms. Marriott could not explain this or provide any other example where she had been involved in the same way for any other colleague.
52. Ms. Shillito relies on her inexperience and misunderstanding of the policy to assert that the Claimant was not being treated differently than other because she was having similar 'conversations' with others in her team. She cannot explain why only the Claimant was 'escalated' to the next stage of the disciplinary procedure by the inappropriate use of the Capita O2 document. If there was widespread misapplication/misunderstanding of the dependents leave policy and non-medical absences (or as Mr. Wilson refers to it "the mechanical operation of

monitoring non-medical absence and the application of triggers") we would have expected to see other examples. No other example was provided.

53. Ms. Shillito's witness statement was also misleading and incorrect in relation to a positive assertion she makes about her 'motivation' in her treatment of the claimant. At paragraph 10 of her witness statement she states "***At an earlier point, I'd met the Claimant <u>before he raised a grievance</u> following another period of non- medical absence.*** *At that time, he'd had a high level of non-medical absence and* ***I could have taken it further but didn't as it was clear that there were reasonable grounds for needing to take the leave due to his wife being ill and his baby having just been born. <u>This reflects however that before the grievance was brought</u> (the protected act) <u>I had similar conversations with him</u>***". (highlighted text our emphasis). That paragraph was put to the Claimant in cross examination to support an inference that because a 'similar conversation' had occurred about dependents leave absences before the protected act, Ms. Shillito was not influenced by the protected act. The Claimant could not recall this meeting. He was surprised by the suggested timing of the meeting (because Ms. Shillito was not his manager in April 2016) and he did not agree with the suggestion that Ms. Shillito's recollection was likely to be more 'reliable'.

54. The asserted facts were incorrect and Ms. Shillito recollection was not reliable. She corrected her statement when she gave her evidence, deleting the first and last sentence of paragraph 10, to withdraw the assertion made. She had already conceded that the Claimant was taking unpaid dependents leave to support/care for his dependents as permitted by the policy and it was not excessive or unreasonable. It was surprising that so little care was taken to check the accuracy of the asserted facts. While mistakes can be made, this mistake was part of a bigger picture demonstrating a general lack of credibility of the Respondent's witness evidence on the key issues. Key facts were omitted from witness statements, incorrect facts were asserted as true facts, inconsistent and contradictory evidence was given during the hearing to bolster the case presented.

<u>Conclusions</u>

55. The findings of fact made about the alleged detriment are set out at paragraphs 41-49. Before any return to work discussion had taken place with the Claimant on 21 December 2016, Ms. Shillito had already decided to escalate the Claimant's Dependents Leave absences to a disciplinary Stage 1 meeting. The inappropriate preemptive use of the Capita O2 form to escalate matters to that stage was sanctioned by Ms. Marriott. The Capita O2 form was not a 'documented record of a discussion'. It was not ideal or normal or the correct way to use the form. Contrary to the case presented it was wrong to try to justify using it for a 'fact find' when the real purpose was a precursor to a disciplinary procedure. Contrary to the case presented, it was also wrong to try to justify using it to provide a record of a return to work discussion before any discussion has taken place, especially when there were alternative and better ways of contemporaneously recording the meeting that could have been used (SAM and handwritten meeting record).

56. Was the treatment disadvantageous or advantageous treatment? Our findings of fact at paragraph 41 record the Claimant's perception and understanding at the time he was given the Capita O2 document to sign at his desk on 21 December 2016. Ms. Shillito knew the Claimant was already on a Stage 2 Warning and that the threat of any further disciplinary action put him at greater risk of dismissal. She knew that by using that document in the way she did, the Claimant would be taken by surprise, would have been alarmed and stressed, in circumstances

when it was '*not right to raise such a threat*'. She agreed that this left the Claimant in a vulnerable position knowing that if for any unforeseen reason any of his dependents needed his support in the next 12 months, and he took any unpaid leave he could face the threat of disciplinary action. She agreed that the Claimant was so alarmed that he refused to sign the document and insisted on speaking to his union representative to raise a complaint about it. All that evidence was consistent with the Claimant's understanding that the Capita O2 form was being used as precursor to a disciplinary process not a 'fact find'.

57. Mr. Wilson invites the Tribunal to find that the Claimant was not subjected to a 'detriment' by the use of the Capita O2 form because he was more advantageously treated than other employees in similar circumstances because he received a record of his return to work meeting. Mr. Panesar submits that to indicate that an employee may be subject to disciplinary proceedings where (a) it is not appropriate to do so and/or (b) other employees in similar/comparable circumstances have not been treated in the same way plainly amounts to a detriment. The findings of fact about the use of the Capita O2 document do not support the submission made by Mr. Wilson suggesting the Claimant was treated more advantageously (see paragraph 38). The sole purpose of the form was to achieve the desired escalation to the next stage of the disciplinary process.
58. Adopting the EHRC definition that a "*detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".* We find that the Claimant was subjected to an unjustified threat of a disciplinary process on 21 December 2016 and reasonably considered his position had changed for the worse. He reasonably viewed the detriment as a threat. He took that threat seriously at the time by immediately complaining to his Union. It was reasonable in all the circumstances for the Claimant to take the threat seriously.
59. It Is accepted that Ms. Shillito and Ms. Marriott had knowledge of the protected acts when the Claimant was subjected to the detrimental treatment. Did the fact that the Claimant had raised a grievance and/or presented the claim have a significant influence on Ms. Shillito's decision to subject the Claimant to the detriment on 21 December 2016*?* What was her conscious/subconscious motivation in subjecting the Claimant to the detriment on 21 December 2016 and what was Ms. Marriott's role in that decision? Were the protected acts a significant influence or one of the reasons for the detrimental treatment?
60. Before examining the mental processes of the alleged perpetrator to decide what motivated them to act as they did and whether we believe their explanations for the detrimental treatment, we considered our assessment of their credibility. Ms. Shillito and Ms. Marriott were not credible or reliable witnesses for the reasons set out in our findings of fact. There was a complete lack of transparency about the Capita O2 form, how it was created and why the Claimant was treated differently on 21 December 2016. Key facts were omitted from the witness statements incorrect facts were asserted as true facts, the evidence was inconsistent and changed during the hearing. Ms. Marriott admitted it was 'wrong' to advance the case on the basis that the Capita O2 form was used for a fact find, yet that was how the case was advanced. The Respondent's witnesses did not provide the best available evidence which was surprising given the Respondent position on the scope of the hearing. The Tribunal's findings of fact support the Claimant's suspicions that his managers were acting suspiciously and were 'singling' him out for detrimental treatment in a 'non-transparent' and inconsistent way. The Claimant invites the Tribunal to infer that the explanations and the denial that they were in any way motivated by his protected acts, should be disbelieved.

61. We agree with the Claimant that the denial and the explanations were not credible (see paragraphs 51-54). Ms. Shillito relies on her 'inexperience and misunderstanding' of the policy to infer the Claimant was not treated differently and that similar 'conversations' had taken place with others to suggest 'consistency' of treatment. There is no evidence to support 'consistency' of treatment. All the evidence supports 'inconsistency' of treatment because this inappropriate preemptive step was only taken for the Claimant. If there was a 'mechanical operation' of trigger points by managers or widespread misapplication/misunderstanding of the dependents leave policy, why were there no other examples of this type of escalation. If Ms. Marriott was giving the same advice to Ms. Shillito for others in the team who had also reached trigger points, it would be reasonable to expect to see other examples of the Capita O2 form being used. Ms. Marriott knew there was clear guidance in place for managers to use about the Dependent's Leave policy, which clearly urged caution before escalation to a formal disciplinary process. With that knowledge, she did not direct Ms. Shillito to the guidance and did not refer her to HR as a different 'point of direction'. Again, if the advice given was uniformly applied why was there no evidence of 'consistency' of treatment.
62. The Claimant invites the Tribunal to make adverse inferences that Ms. Shillito and Ms. Marriott (given her substantial involvement in the events of 21 December 2016) were subconsciously influenced in subjecting the Claimant to detrimental treatment by the protected acts because there was a history of animus (unlawful victimisation in July 2017) and skepticism expressed by managers about the Claimant's previous sickness absence coinciding with the timing of his grievance (see paragraph 49 of the findings of fact).
63. Mr. Panesar quite fairly put those matters to the Respondent's witnesses who denied they were influenced in any way by the protected acts. The common link between the 2 managers who 5 months apart subjected the Claimant to detrimental treatment, was the involvement of Ms. Marriott. She denied that she was motivated by the protected acts when she sanctioned the inappropriate use of the Capita O2 form and failed to direct her manager to the appropriate step to take (refer to the Guidance/ refer to HR) but could not explain why she did not take those steps. Her lack of credibility did not persuade us that her 'denial' of any previous animus/involvement was credible. Ms. Shillito was also aware of that history of animus. Both managers were given 'points of direction' in relation to the management action taken in relation to the Claimant. Ms. Shillito did not question the instruction she was given or why she was asked to do things differently for the Claimant. Her explanation, that she was treating the Claimant in the same way as others in the team, was not supported by our findings of fact. We concluded that it was reasonable to infer that subconsciously Ms. Marriott and Ms. Shillito were significantly influenced by the Claimant's protected acts in subjecting the Claimant to the detriment of an unjustified threat of a disciplinary process on 21 December 2016.
64. We did not consider it necessary or appropriate to draw the same adverse inference of subconscious motivation in relation to the scepticism expressed by 'managers' in the ET3 response, about the Claimant's sickness absence coinciding with the timing of his grievance in April 2016. It was not clear which managers were involved in drafting the response. The concessions made by Ms. Shillito and Ms. Marriott were that, the Claimant was taking unpaid dependents leave to support/care for his dependents as permitted by the policy and there was no factual dispute/concern about the timing of the Claimant's Dependent's Leave absences when the decision was made in December 2016.

65. Having not accepted the denial/explanations advanced by the Respondent's witness to explain their detrimental treatment of the Claimant we concluded "*there are facts from which the Tribunal can decide in the absence of any other explanation, that Ms. Shillito victimised the Claimant on 21 December 2016.*The complaint of victimisation therefore succeeds.
66. A telephone preliminary case management will be listed on the first date available, 14 days after this judgment is sent out to the parties to make case management orders for the remedy hearing with a time estimate of 2 hours. It would be helpful if the parties could cooperate with each other to provide some agreed draft case management orders in advance of that hearing to deal with matters like the use of expert evidence at the remedy hearing.

Employment Judge Rogerson
29 April 2021